Questions taken on Notice for the House of Representatives Inquiry

Information provided by WWF and the Nature Conservation Council of NSW;
Responses to Questions taken on Notice at the Public Hearing of Friday, 15 August 2003.

1 Environment Protection and Biodiversity Conservation Act:

Question taken on Notice: Why did we have concerns with implementation of the EPBC Act and what problems did we have with nomination processes under the Act?

WWF, the Humane Society International and the Tasmanian Conservation Trust have produced a Performance Audit of Environment Australia's Administration of the Referral, Assessment and Approval Process Under the *Environment Protection and Biodiversity Conservation Act 1999*. This was provided as a Submission to the Australian National Audit Office in August 2002 and is provided as an attachment for your information.

1.1 Nominations:

a) WWF and NCC consider the reliance on small groups to provide nominations needs to recognise resource limitations.

EA or DEH is expecting the general public to police the EPBC compliance, from actually making the nominations for referrals through to ensuring compliance with conditions of approval. Usually this is undertaken by small groups such as conservation groups, residents groups and the "friends of" groups and the local conservation groups looking after specific areas such as parklands. This is a problem because frequently groups of this size and nature are insufficiently resourced (time and money). Often these nominations will fail because the groups do not have a holistic understanding of the Act, which leads them to feel disillusioned by the process, feel their concerns have not been listened to, and leaves them unlikely to want to participate in the future. For a current example of this, consider the referral by Yarra Valley Golf Course Pty Ltd (reference number: 2003/928).

b) WWF and NCC consider there are difficulties in having key threatening processes nominated and accepted under the EPBC.

Key threatening processes are not being listed under the Act, as the TSSC appears to be interpreting the Act in a way that makes the threshold for listings too high. An example of this currently is the rejection of the "Introduction of Marine Pests to the Australian Environment via Shipping Nomination". In relation to rural water, WWF has seen the rejection of nominations for key threatening processes of:

- The alteration to natural flow regimes on rivers and streams;
- The removal of large woody debris from rivers and streams;
- The alteration to the natural temperature regime in rivers and streams;

- The prevention of passage of aquatic biota as a result of the presence of instream structures;
- The increased sediment input to rivers and streams due to human activities
- The introduction of live fish to waters outside their natural regimes within a river catchment after 1770.

These nominations were rejected because the TSSC did not consider there was sufficient information in the nominations to justify listing. However, these same nominations were accepted under NSW and Victorian legislation. Our interpretation is that there is too high an expectation for the public to provide the necessary scientific support for the nominations, when in many cases the science is not available or is costly to generate. WWF considers this is not a sufficient reason to reject a nomination, given what is there appears adequate for State level processes. A precautionary approach by the Commonwealth is urgently required.

The same issue occurred with the listing of the Lowland Riverine Fish Community for the Southern Murray Darling Basin as a Threatened Ecological Community. This has been accepted under NSW legislation but was also rejected at the Federal level.

c) WWF and NCC consider there are undue difficulties in adding to the critical habitat register

Section 207A of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) requires the Minister to keep a register of habitat "critical to the survival of a listed threatened species or listed ecological community". In terms of water, this is usually most important where a river system, lake or wetland has either been specifically identified as critical habitat or as areas of vital importance re the life cycle requirements of listed threatened species.

At present, there is no formal nomination process for the listing of habitat on the Register, and it appears to WWF that this issue has received a low priority. Once a recovery plan has been approved by the Threatened Species Scientific Committee (TSSC) and adopted under the EPBC Act, the critical habitat identified in that recovery plan should be automatically added to the register of critical habitat. This would be cost and time effective, however it is currently not happening.

1.2 Additional issues:

a) WWF and NCC consider the cumulative effects of actions need to be given more attention.

Another issue is the failure to adequately take into account cumulative effects. One person grazing in, or taking water from, a wetland may not have a "significant effect" on the wetland, but realistically that is one of 1000 people who will do it for 10 years. Permits issued, and referrals approved, under the EPBC Act need to look more holistically at overall impacts. If there is clear evidence that the action will have a

significant impact on a matter of national environmental significance then it should be possible to reject the application now, rather than wait until damage has actually occurred. WWF acknowledges that in some cases it would not be possible to reasonably project the consequences of an action five or 10 years into the future, however in cases where the cumulative impact of past actions are being acknowledged today the Minister should have the power to consider that evidence in the review process.

b) Costs of native vegetation and biodiversity regulations: the Productivity Commission Inquiry.

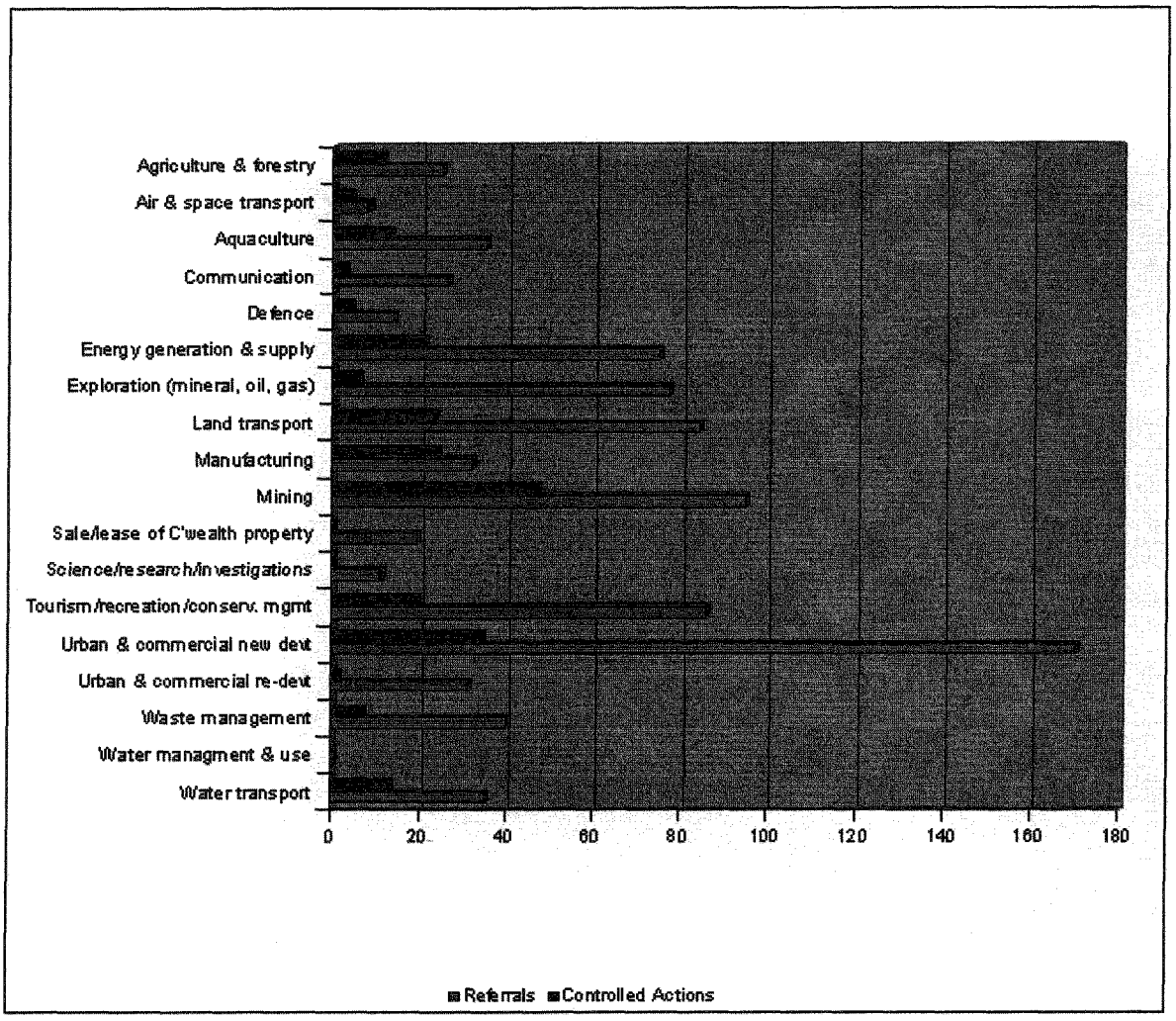
For the Committee's interest, WWF provides an extract from our submission to the Productivity Commission in relation to their inquiry into the costs of native vegetation and biodiversity regulations.

"The [Productivity] Commission proposes to review the impact the EPBC Act and Regulations on native vegetation has had or is likely to have on landholders. Given the Act only came into force on 16 July 2000, WWF considers that this limited period (about 3 years) is insufficient to rigorously determine either the costs or the benefits of the Act.

However, the evidence indicates that the EPBC Act has had little or no impact on landholder decisions in relation to clearing native vegetation, and consequently is likely to have had minimal economic effect on landholders despite claims to the contrary:

To date, the evidence strongly suggests that the EPBC Act has had no or very little impact on rural landholders, with **only seven referrals** having been submitted on land clearing proposals since inception of the Act. In 2001-2, a mere 9 of a total of 309 referrals related to the agricultural and forestry sector (see graph below)

Referrals Received and Controlled Actions By Category



2 Climate Change:

Why was a period of 50 years used in the report "Global Warming Contributes to Australia's Worst Drought". Isn't a period of 200 years or more required to come up with some sort of average or difference in global warming.

Given the report was tabled on the day of the hearing, it was of course impossible for the Committee to be aware of the detail in the report. The report explains issues around the use of the 50 year period, and WWF is happy to take specific questions on any matter arising from that report.

In short, there are several points to make at this time:

The report considers rainfall over a 100 year period, and temperature over 50 years. The data used are data released by the Bureau of Meteorology to the public domain. Quality controlled rainfall data was available for a longer period than the temperature data.

Temperature data for longer periods is held by the Bureau but not available to the general public given it has not yet been quality controlled. Taking the rainfall data it can be seen the recent drought was among the "worst" over the century, without even considering the temperature data.

The next question is as to the adequacy of these periods. The answer is that the longer the period the better in determining trends. Climatologically speaking, the rule of thumb is that 30 years would be a lower bound, given the need to smooth out year-to-year and decade-to-decade variations. In that sense, 40 is better than 30, and 50 is better again than 40. Fifty years is toward the lower end of what we would like, but it has the potential to have removed significant variation.

With respect to the need for 200 years of data, in the case of Temperature there are no direct measurements longer than about 150 years, given the availability and widespread use of thermometers. Data prior to about 1880 are generally discarded given insufficient spatial coverage. Temperature data for longer periods therefore requires proxy records. The existing instrumental temperature record has been extensively examined by the IPCC, and they have determined on the basis of a hundred years of record that there is a significant warming trend globally, and that it is likely in substantial part due to increases of greenhouse gases. Studies of the proxy temperature record going back over longer periods have increased confidence in the unusual nature of the twentieth century warming. Studies of temperature trends in continental regions such as Australia are consistent with those for the global region assessed by the IPCC in finding likely substantial contributions by greenhouse gases. These studies are based on fifty to a hundred years of instrumental data, which is well accepted within the community as sufficiently long to make assessment of trends worthwhile. One would always like to have longer periods of data, but two hundred year records of instrumental temperature observations simply don't exist.

Should you have any further questions on this issue, WWF will be happy to provide a response.

3 Process of conducting Future Water

What is the consultation process to be contributed by the University of New England (Centre for Ecological Economics and Water Policy Research) to the FutureWater initiative?

I have requested this supporting information from the CEEWPR and it will be forthcoming. Unfortunately the person responsible was unavailable by this date. I request more time to be able to provide you with supplementary material.

Performance Audit of Environment Australia's Administration of the Referral, Assessment and Approval Process Under the *Environment Protection and Biodiversity Conservation Act 1999*

SUBMISSION OF WWF AUSTRALIA, HUMANE SOCIETY INTERNATIONAL AND THE TASMANIAN CONSERVATION TRUST

AUGUST 2002

HUMANE SOCIETY INTERNATIONAL

WWF AUSTRALIA

Tasmanian Conservation Trust Inc.

INDEX

1. INTRODUCTION

World Wide Fund for Nature Australia, Humane Society International and the Tasmanian Conservation Trust

The following submission contains the opinions of the World Wide Fund for Nature Australia ('**WWF Australia**'), Humane Society International ('**HSI**') and the Tasmanian Conservation Trust ('**TCT**') on Environment Australia's administration of the referral, assessment and approval process under the EPBC Act.

WWF Australia, HSI and TCT supported the introduction of the *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) ('**EPBC Act**') on the grounds that it was a significant improvement on previous Commonwealth environmental legislation. In particular, we consider that the structure of the EPBC Act is a vast improvement on the processes and administrative procedures that applied under the *Environment Protection (Impact of Proposals) Act 1974* (Cwlth), which was the primary Commonwealth legislative instrument for environmental impact assessment prior to the commencement of the EPBC Act.

Having supported the introduction of the EPBC Act, we are concerned to see that it is applied appropriately and that its objects are realised. To enable us to assist in the administration of the Act, with the support of Environment Australia, we established the EPBC Unit. Since mid-2000, the EPBC Unit has sought to raise community awareness and understanding of the EPBC Act through the publication of various information products and the provision of advice to a range of organisations and individuals. The operation of the EPBC Unit has enabled us to gather a large amount of information on Environment Australia's administration of the EPBC Act and community perceptions as to the effectiveness of the Act's referral, assessment and approval process.

Scope of the performance audit

On 15 July 2002, the Australian National Audit Office ('**ANAO**') issued a notice calling for public submissions in relation to the Commonwealth Auditor-General's performance audit of Environment Australia's administration of the referral, assessment and approval process under the EPBC Act.

The letter we received from the ANAO stated that:

"The objective of the audit is to examine and report on the quality, timeliness and cost of administrative practices applying to environmental referrals, assessments and approvals. The assessment of quality will address the consistency, rigour and transparency of the decision-making process. The audit will also consider monitoring by Environment Australia of compliance by proponents with the requirements of the Act."

The letter also indicated that the Auditor-General would particularly like information in relation to the following matters.

- Examples of good practice and/or lessons learned.
- Technical, institutional or administrative impediments and constraints.
- Administrative arrangements between levels of government, that is, between local government, the States/Territories and the Commonwealth.

- Actual experiences with the operation of the Act. For example, were you dealt with fairly? Was there reasonable access to relevant officers? Did you receive helpful advice? Was it accurate? Was it timely?

We have interpreted the phrase "*referrals, assessments and approvals*" to mean the processes contained in Chapters 2, 3 and 4 of the EPBC Act. Please contact us if our interpretation of the scope of the audit is incorrect.

We do not require this submission to be confidential.

2. GENERAL COMMENTS

On the whole, we consider that Environment Australia has done a reasonable job in administering the referral, assessment and approval process under the EPBC Act since its introduction in July, 2000. The EPBC Act brought about sweeping changes to Commonwealth environmental law, none more significant than those contained in Chapters 2, 3 and 4 of the Act. The task of facilitating and administrating these changes was enormous and we commend Environment Australia for its efforts to date.

Having said this, we have a number of concerns about the manner in which certain aspects of the Act have been administered. Areas of particular concern include the following.

(a) Despite clear evidence that relevant provisions of the Act have been breached on a number of occasions, Environment Australia has failed to take any substantial enforcement action. While we agree that cooperative compliance has a legitimate place in any enforcement regime, Environment Australia must be prepared to take action to prosecute persons who commit clear and intentional breaches of the Act. The failure to take enforcement proceedings in these circumstances seriously erodes the Act's ability to provide a regulatory incentive to change behaviour. We are concerned that there is a growing awareness of Environment Australia's reluctance to take enforcement action and that this is creating a culture of non-compliance in certain industries and geographic regions. If this continues, the EPBC Act will be unable to contribute to attempts to address environmental issues.

(b) On a number of occasions, decisions have been made under Part 7 concerning whether proposed actions require approval under Part 9 of the Act (what are called '**controlled action decisions**') without adequate information. Environment Australia's willingness to make decisions in these circumstances jeopardises the integrity of the assessment and approvals process.

(c) Environment Australia has been prepared on a number of occasions to treat stages of a single development as distinct actions and make controlled action decisions on this basis. This practice can result in developments not being assessed and approved under the Act (or being assessed in a less onerous manner than they otherwise would be), despite the fact that they will have a significant adverse impact on matters protected under Part 3. It also creates a method by which devious proponents can manipulate the assessment process.

(d) There has been a preference within Environment Australia to undertake assessments via preliminary documentation. This is clearly illustrated in the referral statistics. Assessments by way of preliminary documentation cannot ensure that all relevant impacts of proposed actions are thoroughly evaluated. While justified in certain instances, we believe Environment Australia has used this assessment approach too often and in inappropriate circumstances.

(e) A large number of assessments have been carried out by way of accredited assessment approaches. A small number of assessments have also been carried out under the processes that are accredited under the Tasmanian Bilateral Agreement. We are concerned that Environment Australia is not providing sufficient oversight of these processes. Further, public notices concerning these assessments are not being published on Environment Australia's website, which is adversely affecting the public's ability to participate in the assessment process.

(f) There is no evidence that Environment Australia has established sufficient processes to monitor compliance with conditions attached to referral and approval decisions. The effectiveness of the referral and approval processes are dependent upon Environment Australia's ability and willingness to ensure compliance with these conditions.

(g) On a number of occasions, Environment Australia has failed to publish notices on the internet in a timely manner. Many stakeholders (including ourselves) rely on Environment Australia's website as the definitive source of information on public notices that have been published in relation to the Act. Failure to ensure that all notices are published in a timely manner diminishes the ability of the public to participate in the referral, assessment and approval processes.

We believe that Environment Australia currently suffers from a lack of resources and that its ability to administer the Act would be substantially improved if its budget was increased significantly. Australia's ability to address current environmental issues is dependent upon the Commonwealth's active involvement in the regulation of matters of national environmental significance. If additional resources are not made available for Environment Australia to perform its regulatory functions effectively and efficiency, the Commonwealth will not be able to fulfill its environmental responsibilities. This failure will be at great cost to the environment and future generations of Australians.

3. COMPLIANCE AND ENFORCEMENT

Two of the primary purposes of the statutory penalties in Chapters 2, 3 and 4 of the EPBC Act are to protect the public interest and to influence public behaviour (ie. to deter persons from engaging in harmful behaviour). The importance of a number of these provisions in protecting the public interest is re-enforced by the fact that they give effect to international environmental agreements that are intended to provide protection for matters of international environmental significance[1].

The ability of these provisions to serve these purposes and to assist in furthering the objects of the Act is contingent upon their enforcement in appropriate circumstances. The failure to adequately enforce these provisions has the potential to reduce the Act to a decorative instrument which has little or no effect upon public behaviour and fails to provide appropriate protection for matters of national and international environmental significance. The Australian environment cannot afford such an outcome. Further, as the flagship of Commonwealth environmental law, the way in which the EPBC Act is enforced has the potential to set the tone for the design and application of State and Territory environmental regimes.

As of 31 July 2002, Environment Australia had not commenced any substantial enforcement action in relation to breaches of the requirements in Chapters 2, 3 and 4 of the EPBC Act. The only formal enforcement action that has been taken to our knowledge was the issuance of a

[1] See, for example, ss.12 and 15A, which provide protection for world heritage values of places included on the World Heritage List under the World Heritage Convention, or ss. 16 and 17B, which provide protection for the ecological character of wetlands listed under the Ramsar Convention.

lapsed proposal declaration under s.155 on 13 June 2002, in relation to a proposed development in Queensland (Reference Number 2001/250).

The reluctance to commence enforcement proceedings against persons who contravene the Act was understandable in the first year of the Act's operation. There is a growing body of Commonwealth, State and Territory environmental and planning legislation and members of the public should, generally, be given time to adjust to new processes. Obviously, leniency should not be displayed where there has been a clear and deliberate contravention of the Act. However, Environment Australia has failed to take any formal action in relation to a number of clear breaches of the provisions of Chapters 2, 3 and 4 of the Act that have occurred in the last 12 months. These breaches have involved land clearing activities in western Victoria, northern NSW, and southern and central Queensland and the provision of false and misleading information in relation to proposed actions. This has been particularly distressing given that the perpetrators of the relevant actions appear to have been aware of the operative provisions of the Act. Further, a review of the data concerning referrals made under Part 7 of the Act suggests strongly that there are a number of geographic regions and industries where people are failing to comply with the Act. Of particular concern in this regard are the low number of referrals from the agricultural sector, especially in Queensland.

The EPBC Act has provided Environment Australia with a wide range of compliance and enforcement mechanisms (some of which are available to the Commonwealth under environmental law for the first time)[2]. These include civil and criminal penalties, environmental audits, conservation orders, injunctions, infringement notices, the power to publicise contraventions, and the power to take action to remedy environmental damage and to recover the costs of these actions from perpetrators. The provision of such a broad range of enforcement tools indicates clearly the legislature's intention for the Act to be enforced rigorously and that the regulator should have a variety of methods to do so. To date, this has not occurred. Rather, Environment Australia has preferred leniency and a cooperative approach to enforcement. This has been done without a clear expression of intention in relation to enforcement or guidelines as to the nature of its leniency policy.

We are concerned that there is a growing awareness of Environment Australia's reluctance to take enforcement action and that this is creating a culture of non-compliance in certain industries and geographic regions. We submit that this partly explains the small number of referrals that have been received from Queensland's agricultural sector. If this continues, the EPBC Act will be unable to contribute to attempts to address environmental issues.

As recent Commonwealth reports have indicated, the Australian environment is suffering dreadfully as a result of poor natural resource management practices[3]. Drastic and immediate action is required to ensure our natural heritage and productive resources are preserved for the present and future generations. The EPBC Act is intended to constitute one of the main Commonwealth mechanisms for addressing these issues. However, if it is not enforced, it will fail to realise its objectives.

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[2] Australian Law Reform Commission, *Securing Compliance: Civil and Administrative Penalties in Australian Federal Regulation*, Discussion Paper No.65, April 2002, p. 169.

[3] See, for example: Morton S., Bourne G., Cristofani P., Cullen P., Possingham H. and Young M. (2002), Sustaining our Natural Systems and Biodiversity: An Independent Report to the Prime Minister's Science, Engineering and Innovation Council. CSIRO and Environment Australia, Canberra; and Morgan G. (2001), Landscape Health in Australia: A Rapid Assessment of the Relative Condition of Australia's Bioregions and Subregions. Environment Australia and the National Land and Water Resources Audit, Canberra; and Australian State of the Environment Committee (2001), Australia State of the Environment 2001, Independent Report to the Commonwealth Minister for the Environment and Heritage. CSIRO Publishing on behalf of Environment Australia, Canberra.

4. REFERRALS

Generally, we believe that Environment Australia processes referrals in a timely and effective manner. However, there are several areas where we have concerns.

Making controlled action decisions – the criteria

The latest publicly available information suggests that of 571 controlled action decisions, 357 had been held not to be controlled actions and 47 have been held not to be controlled actions on the basis the action would be carried out in a specified manner. That is, in excess of 70% of referrals are held to not require approval under the Act.

We concede that these statistics are not a reliable guide to the veracity of the decision making process. However, from cases we have observed, we are concerned that Environment Australia is applying too high a standard in making controlled action decisions.

When making controlled action decisions, the decision-maker is required to take account of the precautionary principle[4]. In addition, Branson J's decision in *Booth v Bosworth* (2000) suggests that the preferred meaning of "*likely*" in relevant provisions of Part 3 is a "*real chance or possibility*" (rather than probability). This interpretation is supported by relevant decisions concerning the interpretation of similar statutory requirements in Parts 4 and 5 of the *Environment Planning and Assessment Act 1979* (NSW)[5]. Branson J also held that the phrase "*significant impact*" when used in relevant provisions of Part 3 should be interpreted as "*important, notable or of consequence*".

The combined effect of these provisions and decisions is that where there is evidence that there is a real possibility that a proposed action will have an important or notable adverse affect on a matter protected under Part 3, the Minister should declare that the action is a controlled action. The only exception to this principle is where the proponent is able to produce persuasive evidence that supports the conclusion that, on the balance of probabilities, there is not a real possibility that the action could have a notable impact on a relevant matter.

We are concerned that this standard is not being applied and that, as a result, proposals that should be assessed and approved under the Act are being declared not to be controlled actions.

The "existing use" exemption (s.43B)

Section 43B (previously s.523(2)) of the Act provides an exemption from the provisions of Part 3 for those actions that are, "*a lawful continuation of a use of land, sea or seabed that was occurring immediately before the commencement of this Act*". However, an "*enlargement, expansion or intensification of use*" is not regarded as a continuation of a use for the purposes of the exemption.

This exemption follows the terminology of the existing use exemption that applies under s.109 of the *Environmental Planning and Assessment Act 1979* (NSW). The scope of the exemption under s.109 of the *Environmental Planning and Assessment Act 1979* (NSW) has been considered on a number of occasions[6]. The accepted view is that it is limited to[7]:

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[4] See s.391(1).

[5] *Jarasius v Forestry Commission of N.S.W.* (1990) 71 LGRA 79; *Bailey v Forestry Commission of N.S.W.* (1989) 67 LGRA 200; *Drummoyne Municipal Council v Maritime Services Board* (1991) 72 LGRA 186; *Bentham v Kiama Municipal Council* (1986) 59 LGRA 94 and *Leichhardt Municipal Council v Maritime Services Board* (1985) 57 LGRA 169.

[6] For exemple, see *Vaughan-Taylor v. David Mitchell-Melcann Pty Ltd* (1991) 73 LGRA 366 and *South Sydney City Council v. Houlakis* (1996) 92 LGERA 401.

"...the actual use of the land on the day when the planning laws otherwise would have affected it, that actual use being confined to the land actually (as opposed to potentially) physically being used, and the extent of the use of that land likewise being limited to its extent on that day".

That is, it effectively freezes the permissible land use to that occurring on the date of the commencement of the relevant exemption provision and any enlargement, expansion or intensification of use will require approval, irrespective of how small that enlargement, expansion or intensification may appear.

There is nothing in the EPBC Act to suggest that s.43B will be interpreted differently to the manner in which courts have interpreted s.109 of the *Environmental Planning and Assessment Act 1979* (NSW). Despite the existence of this clear authority on the interpretation of this exemption, we understand that Environment Australia has been interpreting the exemption more broadly and suggesting that certain changes or intensifications of land uses fall within its scope. This may be contributing to the low levels of referrals from the agricultural sector.

Environment Australia should apply this exemption in the accordance with the existing authority on its interpretation. Further, Environment Australia should clarify with appropriate stakeholders that if a person changes or intensifies a previous use, the use (or action) will require approval if it is likely to have a significant impact on a matter protected under Part 3. That is, the relevant impact for the purposes of the EPBC Act is not the incremental effect of the change or intensification on the matter protected under Part 3. Rather, it is the total impact of the use or action.

Lack of accurate information

In several instances, we believe that controlled action decisions have been made on the basis of inadequate information. The timelines for making decisions in relation to referrals are onerous and must restrict Environment Australia's ability to apply rigorous standards to its decision-making processes concerning controlled action decisions. Further, as noted above, Environment Australia suffers from under-funding. However, Environment Australia has a duty to administer the Act and must ensure that this duty is discharged in an appropriate manner.

In this regard, s.75(2) specifically requires the decision-maker to "*consider all adverse impacts*" the relevant action is likely to have on matters protected under Part 3. This provision imposes a positive duty on Environment Australia to ensure that, when making controlled action decisions, it has before it all relevant information concerning the potential adverse impacts of proposed actions. We are concerned that this duty is not being discharged.

Obviously, not having access to details on what Environment Australia does to verify information provided in referral forms restricts our ability to provide concrete examples of where decisions have been made on the basis of inaccurate or incomplete information. However, referral forms provided in relation to the following proposals provide an indication of our concerns.

(a) Reference Number 2002/705;

(b) Reference Number 2002/721;

(c) Reference Number 2002/656;

(d) Reference Number 2002/725.

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[7] *Vaughan-Taylor v. David Mitchell-Melcann Pty Ltd* (1991) 73 LGRA 366, per Priestley JA at 373.

Copies of these referral forms can be downloaded from Environment Australia's website.

We stress that we are not alleging that the proponents in these cases have provided false or misleading information or that they have deliberately sought to manipulate the statutory process. However, as an objective fact, the referral forms contain very little verifiable information on the potential impacts of the relevant actions.

We are also concerned that the failure to properly investigate proposed actions may allow proponents to manipulate the referral process. Of particular concern have been instances where proponents have submitted referral forms at a point in their project development where all information on the potential impacts of the proposed action on matters protected under Part 3 have not been available.

A referral form that was recently submitted by Suntay Aquaculture Pty Ltd in relation to a proposed aquaculture farm in the Northern Territory (Reference No. 2002/737) illustrates the potential for this to occur. We emphasise that we are not alleging that Suntay Aquaculture Pty Ltd has sought to manipulate the statutory process, included false or misleading information in its referral form, or in any way acted in an inappropriate manner. The referral form for the project merely provides an example where the proponent has indicated that further studies on the environmental impacts of the proposed action would be carried out after the referral process was completed. Obviously, a proponent who was deliberately attempting to manipulate the process would not disclose this fact.

The referral form for the project states in Part 5 that:

"We will conduct further studies as part of our application for Environmental Permit and Aquaculture License to be submitted to the Northern Territory Government."

If further studies will be carried out on the potential environmental impacts of the proposed action, then a decision in relation to the proposal under Part 7 of the EPBC Act should be delayed until those studies have been completed. This would be consistent with the statutory requirement for the decision-maker to consider "*all adverse impacts*" and to apply the precautionary principle. If Environment Australia is making controlled action decisions in the knowledge that additional environmental studies will be carried out, disreputable proponents will submit referral forms prior to the completion of all necessary environmental studies so as to eliminate the risk of these studies finding that the proposed actions will have an important impact upon matters protected under Part 3 of the Act.

Section 76 enables Environment Australia to request more information from a proponent about the potential impacts of the proposed action on matters protected under Part 3. If further information is requested, the statutory timeline for making controlled action decisions is delayed until the information is provided. Environment Australia should be more willing to use these powers where it appears that the information provided is inadequate, more information on the impacts of the proposal is being or will be prepared, or the process is being manipulated.

False and misleading information in referral forms

Closely related to the issues discussed above is the deliberate provision of false and misleading information in referral forms. Concerns have been expressed on a number of occasions about the veracity of information contained in referral forms and the proponents intentions in providing this information. If false or misleading information is provided in referral forms, the relevant proponents should be prosecuted under s.489. Environment Australia must demonstrate that such behaviour will not be tolerated and this can only be achieved through a formal and public prosecution.

Not a controlled action – manner specified

As noted above, 47 actions have been held not to be controlled actions on the grounds the action will be carried out in a specified manner that will mitigate or minimise the risk of harm to relevant matters protected under Part 3.

We have two main concerns with the manner in which this provision is being applied. Firstly, we are concerned that this provision has been used to ensure that controversial projects have not been required to undergo a thorough and comprehensive environmental assessment process. A prime example of this was provided in the Minister's recent decision concerning Basin Mineral Holdings NL's proposed Douglas Mineral Sands Project (Stage 1) (Reference Number 2001/228).

The Minister initially held that the project was not a controlled action. However, after receiving additional information from Birds Australia, the Minister revoked the initial decision and substituted a decision that the proposed action was not a controlled action because it will be carried out in a specified manner. Birds Australia is concerned that the mining proposal will have a significant adverse impact upon Red-tailed Black Cockatoos (which are listed as endangered under the Act). There is also concern that the proposal will adversely affect Buloke Woodlands of the Riverina and Murray-Darling Depression Bioregions (which is an ecological community that is listed as endangered under the Act). The manner that was specified by the Minister covers two pages of surrogate conditions. These conditions include an effective "trade-off", whereby the proponent is required to plant new trees for those that are destroyed.

This is a controversial project that clearly has the potential to have an important adverse impact upon matters of national environmental significance. The use of the "manner specified" process in this instance was inappropriate and denied the public the opportunity to participate in a thorough assessment of the relevant impacts of the proposed mine. It was also contrary to the objects of the Act, most relevantly the object of the Act (s.3(d)):

"...to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples."

The use of a process that denies the opportunity for the public to participate in the assessment and approval process in relation to controversial and significant projects is clearly contrary to the object of the Act to promote a co-operative approach to protection and management of the environment.

Our second main concern with the use of the "manner specified" process is the willingness and ability for Environment Australia to monitor compliance with the identified process. As noted above, we believe Environment Australia is under-funded. Owing to the lack of resources, Environment Australia does not have sufficient staff in the field (or the necessary linkages with State and Territory agencies) to adequately monitor compliance with the terms of the identified process. This is of considerable concern where the relevant actions have not been assessed under the Act and there has been limited opportunity for the public to be involved in an evaluation of the impacts of the action on matters of national environmental significance.

Environment Australia is well aware of its resource constraints and the burden that is associated with monitoring compliance with a specified process. Consequently, it should be extremely cautious in its use of the manner specified process and limit it to those instances where it is highly unlikely the action will have a serious adverse impact on a matter protected under Part 3, there is limited public interest in the action, and it has the necessary resources to ensure the proponent will comply with the specified process. Unfortunately, to date, Environment Australia has not demonstrated the necessary restraint in the use of these powers.

Splitting projects – staged development

Another practice we are concerned about in relation to controlled action decisions is splitting projects. This involves the division of projects into stages. The proponent then refers each stage separately to the Minister under Part 7 for a decision on whether approval is required for the activities involved with each stage under the Act.

This practice could be done for legitimate reasons. For example, a proponent may only have approval under relevant State planning and environment legislation for the commencement of certain stages of a multi-stage project. Indeed, in many instances, State authorities that are responsible for granting planning approvals will refuse to grant blanket approvals for large developments that lack precision. Consequently, developers are forced to split projects into separate stages and then seek approval for each stage when sufficient information and financing is available to produce concrete plans for each stage.

However, splitting projects into stages undermines the effectiveness of the EPBC Act referral, assessment and approval process and could be used as a means of manipulating the approval process. By dividing a project that will have a significant impact on a matter protected under Part 3 into separate components, the proponent also splits the relevant environmental impacts of the project into smaller, less "significant" elements. In doing so, this reduces the probability that any one stage of a development will require assessment and approval under the Act and, if a stage does require approval, it will limit the scope of the assessment and approval process, increase the chance the stage will be assessed in a less onerous manner than the entire project otherwise would be, and increase the chance that any approval that is granted will be subject to less onerous conditions than would otherwise be imposed on the entire development.

Irrespective of the intention of the proponent, the splitting of projects into separate stages for the purposes of the referral, assessment and approval process is contrary to the objects of the Act and should not be tolerated. In this regard, the objects of the Act include to provide for the protection of the environment and the promotion of the conservation of biodiversity[8]. These objects are intended to be achieved through the adoption of an environmental assessment and approval process that "*will ensure activities that are likely to have significant impacts on the environment are properly assessed*"[9].

The relevant provisions in Part 7 of the Act also demand that the assessment and approval process focuses upon the relevant environmental impacts of entire projects, not separate stages of projects. s.75(1) states that the Minister must determine:

"*...whether the action that is the subject of a proposal referred to the Minister is a controlled action;...*"

Section 523 defines "*action*" as including a "*project*", "*development*", "*undertaking*", and "*an activity or series of activities*". Having regard to the objects of the Act and relevant extrinsic material, there is little doubt that the legislative intent was for the definition of "action" to be interpreted broadly to capture any collection of related activities that are proposed by a person. Unfortunately, Environment Australia has, at the behest of proponents, adopted a narrow definition of action. In doing so, it has undermined the effectiveness of the Act and created a means by which the assessment and approval process can be manipulated.

There is a possibility that Environment Australia's approach to this issue has been influenced by State and Territory planning processes. However, there are significant differences between State and Territory planning processes and the assessment and approval processes under the EPBC Act. In particular, the requirement to obtain approvals and carry out an environmental

[8] See ss.3(1)(a) and (b).
[9] See s.3(2)(d).

assessment under State and Territory planning laws is unusually determined on the basis of types of activities and land uses. In contrast, the application of the assessment and approval processes under the EPBC Act are dependent upon the impact of the development on certain aspects of the environment. This difference makes the application of State and Territory processes towards staged development inappropriate in the context of the EPBC Act.

Examples of developments that have been split into separate components and Environment Australia has made controlled action decisions on the basis of these components are set out below. We emphasise that we are not alleging that any of the proponents below have sought to manipulate the process, have provided false or misleading information, or have in any way acted in an inappropriate manner. The examples are used merely to illustrate Environment Australia's failure to treat staged or split developments as single actions for the purposes of the referral, assessment and approval provisions of the Act.

(a) The Douglas Mineral Sands Project (Reference Number 2001/228).

As discussed above, this project is a staged sand mining development. However, the referral that has been made only relates to Stage 1 of the development. Despite being fully aware of the nature of the entire development, Environment Australia has treated Stage 1 as a distinct action and made its controlled action decision on this basis.

(b) Peregian Springs Residential Development Project (Reference Numbers 2001/164 and 2001/165).

This project is a staged residential development on the Sunshine Coast in Queensland that requires clearing and disturbance of vegetation that contains, and is known to support, a number of listed threatened species (including the Wallum Sedge Frog (*Litoria olongburensis*), *Allocasuarina emuina*, *Phaius australis*, *Phaius tankervilleae* and *Prasophyllum wallum*). The development was divided into a number of components and separate referrals were made in respect of two of these components. Despite the fact that the two referrals related to parts of the same development, Environment Australia treated the referrals separately, deciding that both were controlled actions and that they would both be assessed by way of preliminary documentation.

(c) Laguna Quays Resort Redevelopment Project (Reference Numbers 2000/58, 2001/246, 2001/248 and 2002/706).

The controversial Laguna Quays Resort redevelopment is another example where a single development proposal has been divided into separate components and controlled action decisions have been made by Environment Australia on the basis of the components, rather than treating the proposal as a single development.

Laguna Quays Resort is located near Proserpine on the Queensland coast (adjacent to the Great Barrier Reef World Heritage Area). In October 2000, Staged Developments Australia Pty Ltd referred a proposal to construct a private resort airport at the resort (Reference Number 2000/58). The referral form states (in Part 2.6):

"...the airport proposal is an initial step in a major expansion and improvement programme. Later phases will be separately referred for preliminary consideration under the Act, as necessary."

Despite this clear indication that the proposed action was part of a larger development proposal, Environment Australia made its controlled action decision solely on the basis of the likely impacts of the airport development on the matters protected under Part 3, holding that the action was a controlled action and that the controlling provisions for the proposal

were ss.12 and 15A (world heritage values of the Great Barrier Reef World Heritage Area), ss.18 and 18A (listed threatened species) and ss.20 and 20A (listed migratory species). The proposal was subsequently assessed on the basis of preliminary documentation and approved in August 2001[10].

In April 2001, Staged Developments Australia Pty Ltd referred two other components of the redevelopment to Environment Australia (Reference Numbers 2001/246 and 2001/248). Reference Number 2001/246 related to the construction of a golf course (known as Jagabara Golf Course), club house and driving range and Reference Number 2001/248 related to the construction of 41 golf course estate units that will be adjacent to the golf course. The referral form relating to 2001/246 states (in Part 2.1):

"The proposed golf course will be associated with the future development of approximately 300 golf course estate units, which will provide tourist accommodation for the resort."

Despite the clear link between these two elements of the redevelopment project (and the reference to the larger development), Environment Australia again treated the components as separate and distinct actions and, in May 2001, held that neither action was a controlled action.

Only recently, the Great Barrier Reef Marine Park Authority ('**GBRMPA**') referred the remaining elements of the development proposal (which includes a hotel with 120 hotel suites, 160 bungalow units, a marina with 900 berths, a 900 lot residential estate, a third resort comprising 220 hotel rooms and 100 units, a commercial precinct, convention centre, a third golf course and 720 golf course condominiums) to Environment Australia for a decision on whether these elements of the project require approval under the Act (Reference Number 2002/706)[11]. Clearly, the entire development proposal should have been assessed as a single action early in 2001.

As the above cases illustrate, the failure to treat the components of staged developments as single actions undermines the effectiveness of the Act and the efficiency of the assessment process. Further, it provides a means of manipulating the assessment and approval process.

All staged or split projects should be assessed as a single action. If Environment Australia receives a referral for part of staged development, it should request information in relation to the entire development proposal and make the controlled action decision on the basis that the relevant action includes all stages of the development. If the proponent is unable to supply information on later stages of the development proposal, the controlled action decision should be delayed until such time as this information is available.

The Act demands that staged developments be treated as single proposals, yet, to date, Environment Australia has been prepared to treat their components separately. In doing so, it has undermined the effectiveness of the Act and the efficiency of its administration. This issue requires urgent attention. If Environment Australia believes there are legislative impediments to the assessment of staged developments as single proposals, amends should be made to the Act to remove these impediments.

Administrative Guidelines on Significance

The Administrative Guidelines on Significance are inconsistent with the Act.

Section 67 states that:

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[10] It appears the conditions of the approval were amended by agreement in July 2002.

[11] Note, the proponent identified in the referral form is Australian Super Developments Pty Ltd (ACN 058 626 761), which was formerly Staged Developments Australia Pty Ltd (ACN 058 626 761).

"An action that a person proposes to take is a controlled action *if the taking of the action by the person without approval under Part 9 for the purposes of a provision of Part 3 would be prohibited by the provision. The provision is a* controlling provision *for the action."*

As you would be aware, the prohibitions contained in Part 3 of the Act prohibit a person from taking an action that "*has, will have, or is likely to have*" a significant impact on a matter protected under Division 1 or Division 2 of Part 3.

Section 68 states:

"A person proposing to take an action that the person thinks ***may*** *be or is a controlled action must refer the proposal to the Minister for the Minister's decision whether or not the action is a controlled action."*

The term "*may*" has a different meaning from "*likely*". As discussed, there is a strong argument that the term "*likely*", when used in this content, means "*real possibility*". With that in mind, we submit that the preferred interpretation of "*may*" is simply "*a possibility*". That is, where a person subjectively believes there is a possibility a proposed action will have, or is likely to have, a significant impact on a matter protected under Part 3, the person is required to refer the proposal to the Minister.

This interpretation is logical and consistent with the structure of the decision-making process under the Act. Whether a proposed action is a controlled action (ie. where it requires approval) is not an objective fact (or what is known as a "jurisdictional fact"). It is subjectively determined by the Minister and his/her decision is only reviewable on the grounds of abuse of power (eg. he/she had regard to irrelevant considerations, failed to have regard to relevant considerations, or the decision was manifestly unreasonable). To account for this, the test for referrals was deliberately made lower (ie. "a possibility") than the test that applies to controlled action decisions (ie. a "real possibility"). If this was not the case, proponents would effectively be performing the statutory duty that rests with the Minister.

The Administrative Guidelines on Significance state its purpose as:

"... to assist in determining whether an action should be referred to the Environment Minister for a decision on whether approval is required."

It proceeds:

"In particular, they are intended to provide guidance on whether a proposed action is ***likely to have*** *a significant impact on any of the matters of national environmental significance."*

And again:

"If a proposed action is not covered by one of the exceptions identified below, a person proposing to take an action that he or she thinks ***will have****, or* ***is likely to have****, a significant impact on a matter of national environmental significance must refer that action to the Minister for the Environment."*

These statements are incorrect. The Administrative Guidelines on Significance should be corrected and clearly convey to proponents and members of the public that persons have an obligation to refer proposed actions to the Minister if they believe there is a possibility the action may be a controlled action.

5. ASSESSMENTS UNDER PART 8

We have the following concerns about the way in which the assessment provisions are currently being administered.

Preference for preliminary documentation

As at 16 July 2002, 47% of all assessments that had been, or were being, carried out under the Act were by way of preliminary documentation. We do not deny that assessment by way of preliminary documentation has a legitimate place in the statutory scheme. However, it should be used sparingly. Assessments on preliminary documentation provide only a cursory examination of the potential environmental risks associated with a project. They also provide interested stakeholders with less of an opportunity to obtain an understanding of the details of the project and to participate in the assessment process. Further, the Government has a reduced capacity to review and test the veracity of the assessment material.

We submit that preliminary documentation assessments should only be used in circumstances where:

(a) it is unlikely that the project will have a serious detrimental impact on any matter protected under Part 3;

(b) there is limited public interest in the development; and

(c) there is verifiable evidence that the preliminary documentation provided under s.86 is thorough, accurate and complete.

To date, the statistics suggest strongly that this assessment approach option is being used in inappropriate circumstances. We are also aware of a number of instances where preliminary documentation assessments have been used in circumstances that we consider to be inappropriate. These include the following.

(a) Falls Creek Ski Lift Installation (Reference Number 2001/129). The project involved the installation of ski lifts and the preparation of a ski run in an area that is known habitat for a number of listed threatened species. The project has attracted considerable public attention and political interest.

(b) Griffin Coal Mining Company Pty Ltd coal mine expansion (Reference Number 2001/376). The project involved the expansion of an existing coal mining operation, which required the clearing of bushland that was known to support Chuditch *(Dasyurus geoffroii),* Baudin's Cockatoo *(Calyptorhynchus baudinii)* and Carnaby's Cockatoo *(Calyptorhynchus latirostris).* All three of these species are listed as threatened under the EPBC Act.

(c) Peregian Springs Residential Developments (Reference Number 2001/164 and 165). As discussed above, the project is a staged residential development that is likely to adversely affect several threatened species. The project attracted considerable public opposition and clearly is going to have an important impact upon threatened species, yet both referrals were assessed by way of preliminary documentation.

(d) Laguna Quays Resort Redevelopment Project (Reference Number 2000/58). Again, the details of this project are discussed above. The construction and operation of the resort airport was assessed on the basis of a preliminary documentation, despite the potential threat the airport (and the associated development) poses to the world heritage values of the Great Barrier Reef World Heritage Area and numerous threatened and migratory species.

(e) Melville Island Hardwood Plantation Extension (Reference Number 2001/229). The proposal involved the establishment of 25,000 ha of hardwood plantations (mainly *Acacia manglum*) on western Melville Island in the Tiwi Island group by the Tiwi Land Council and The Australian Plantation Group Pty Ltd. The proposal required the destruction of habitat of four listed threatened species, Butler's dunnart, Red goshawk, Partridge pigeon (eastern subspecies) and the Masked owl (Melville Is subspecies). Despite the size of the proposal and the clear threat to these listed species, the assessment was carried out by way of preliminary documentation.

This bias may be brought about by the reduced cost and expediency of the preliminary documentation process. However, we are strongly of the opinion that this method of assessment should be used sparely and only in the exceptional circumstances described above.

Preference for accredited assessment approach

The second most popular assessment approach has been accredited assessments (approximately 30% of all assessments to 16 July 2002). We are concerned that the Commonwealth is not providing sufficient oversight of the assessments carried out under these accredited processes to ensure that all relevant impacts are thoroughly evaluated. Further, we are also concerned that Environment Australia may have used accredited assessments as a means of avoiding its assessment responsibilities.

Our concerns in relation to the use of accredited assessment approaches are exacerbated by the fact that public notices concerning these assessments are not published on Environment Australia's website. We acknowledge that there is no statutory requirement for Environment Australia to publish this information on the internet. However, by their very nature, these assessments concern matters of national (and potentially international) environmental significance. Accordingly, equivalent notices as those required in relation to assessments under Divisions 4, 5 and 6 of Part 8 should be published on Environment Australia's website in relation to assessments carried out by way of accredited assessment approaches.

Assessments under the Tasmanian Bilateral Agreement

Similar to the situation with accredited assessments, we are concerned that the Commonwealth is not providing sufficient oversight of assessments being carried out under the Tasmanian Bilateral Agreement. In addition, as with assessments carried out under accredited assessment approaches, public notices concerning assessments carried out under the *State Policies and Projects Act 1993* (Tas) and *Environmental Management and Pollution Control Act 1994* (Tas) are not published on Environment Australia's website. Again, we acknowledge that there is no statutory requirement for Environment Australia to publish this information on the internet. However, given the national environmental significance of the subject of the assessments, we believe that public notices calling for comments on assessment documents and notifying of the completion of the assessment process should be published on Environment Australia's website.

Determination of assessment approach – guidelines needed

At present, there are no guidelines to assist Environment Australia to make assessment approach decisions. This is despite the express power to do so in s.87(6). We believe this is a significant failing on behalf of Environment Australia and it is likely that the absence of guidelines has contributed to the bias towards the use of preliminary documentation and accredited assessment approaches.

6. APPROVALS

We have two main concerns regarding Environment Australia's administration of the approvals process under Part 9.

Conditions attached to approvals.

While we acknowledge that the person responsible for making approval decisions is required to have regard to a diverse range of issues, the overriding objectives of the Act are paramount and approval decisions must be designed to ensure adequate protection is provided for the matters protected under Part 3. Further, approval decisions should reflect the fact that the decision-maker is required to have regard to the precautionary principle. Unfortunately, in a number of instances, the conditions attached to approvals have not reflected the Acts objectives and are incapable of providing adequate protection for the matters they are intended to safeguard. Examples include the following.

(a) Kooragang Island Protech Cold Mill Facility (Reference Number 2001/274).

The development involved the construction and operation of a cold mill facility on Kooragang Island in New South Wales, near the Kooragang Wetlands (which are listed under the Ramsar convention). The mill will have a production capacity of up to 520,000 ton of steel products per annum and could adversely affect a number of listed threatened and migratory species (including the Green and Golden Bell Frog (*Litoria aurea*), Curlew Sandpiper (*Calidris fermginea*), Lesser Sand Plover (*Charadrius mongolus*), Latham's Snipe (*Gallinago hardwickii*), and Black-tailed Godwit (*Limosa limosa*)). Of particular importance is a pond located approximately 400m from the site boundary, which provides a night roosting habitat for migratory species. Despite the potential for the construction and operation of the mill to adversely affect the ecological character of the wetlands and relevant listed threatened and migratory species, the only condition that was attached to the approval provides:

"Protech Steel must submit for the Minister's approval a plan for managing the impacts of the action on the Green and Golden Bell Frog. The action must be taken in accordance with the approved plan. Ground-disturbing works must not commence until the plan has been approved, except with the written agreement of the Minister."

Despite the limited reach of this condition, the approval applies in respect of ss.16 and 17B (declared Ramsar wetlands), ss.18 and 18A (listed threatened species) and ss.20 and 20A (listed migratory species). Where an approval provides the proponent with an exemption from a provision of Part 3, the conditions should reflect the nature of the exemption and ensure the relevant action does not have a significant adverse impact upon the relevant matters.

(b) Eidsvold Weir (Reference Number 2001/385).

The Eidsvold Weir project involved the construction of a weir for agricultural, commercial and domestic purposes on the Burnett River in Queensland. The proponent indicated on the referral form that it considered the action was a controlled action. The action was held to be a controlled action on the basis of its potential impacts on listed threatened species and listed migratory species and an approval was subsequently granted in relation to ss.18, 18A, 20 and 20A. Despite the potential impacts on matters of national environmental significance, no conditions were attached to the approval. Again, where an approval provides the proponent with an exemption from a provision of Part 3, the conditions should

reflect the nature of the exemption and ensure the relevant action does not have a significant adverse impact upon the relevant matters[12].

(c) Peregian Springs Residential Development – Emu Mountain (Reference Number 2001/165).

This development is discussed above. Condition 2 of the approval that was granted in relation to Reference Number 2001/165 states:

"Forrester Kurts Properties must submit an Environmental Management Plan for managing the impacts of the action on the Wallum Sedge Frog to the Minister within two months of the date of this approval. The Environmental Management Plan must address water quality within the Emu Mountains site, management of acid sulfate soils during construction of artificial wetlands, management of the artificial wetlands, and monitoring the health of the wet heathland within the conservation area. The Environmental Management Plan must be implemented."

Similar conditions have been included in other approvals. The drafting of this condition is flawed in several respects. Firstly, it does not explicitly state that the Minister is required to approve the environmental management plan. Secondly, it does not prevent the commencement of the development until the environmental management plan has been approved. Thirdly, the condition uses the phrase "*must be implemented*", rather than a more enforceable alternative such as "*must be taken in accordance with*".

Compliance with conditions

As only 34 approvals have been granted thus far (6 without conditions), it is difficult to draw conclusions about Environment Australia's willingness and ability to ensure that proponents comply with conditions that are attached to approvals. We are concerned that Environment Australia does not have the necessary resources or will to ensure that all proponents abide by the conditions of the approvals. We would like to see additional resources directed toward compliance.

7. PUBLIC NOTICES AND THE INTERNET

The inclusion of the internet publication requirements in s.170A and Part 16 of the Regulations was an important initiative and Environment Australia has done a commendable job in ensuring that most notices are published on the site in a timely manner. Environment Australia has also taken it upon itself to publish several notices on the internet that are not required under the Act, for which it should be praised.

However, there have been a number of instances where important notices have not been published on the internet or have been published on the internet well after the notice was issued. Recent examples of late notices being published on the internet include the notices that were published in relation to the release of preliminary documentation for public comment concerning Reference Numbers 2002/547, 2002/644 and 2002/337. The notices concerning 2002/547 and 2002/644 should have been published on the internet in June 2002. However, they did not appear until late July 2002. Similarly, the notice concerning 2002/337 should have been published on the internet in May 2002. However, it did not appear until late July 2002.

As the internet has become one of the (if not the) primary mechanism by which Environment Australia disseminates information on opportunities for public participation, the failure to ensure

[12] Five other approvals have been granted without conditions.

that all relevant notices are published in a timely manner can severely impede the public's ability to contribute to the decision making process. We hope that Environment Australia can keep working towards ensuring that all notices are published on the website in a timely manner.

8. CONCLUSION

In conclusion, we emphasise again that we believe Environment Australia has done a reasonable job thus far in administering the referral, assessment and approval process. We recognise that the administration of a new Act of this nature is a difficult task and that Environment Australia suffers from a lack of resources. However, there have been a number of significant failings and there are several areas where Environment Australia's performance must be improved.

We hope that the issues raised above are addressed and that initiatives are taken to ensure the EPBC Act is effectively utilised to assist in changing community behaviour and bringing about improvements in the state of the Australian environment.