The Senate

Standing Committee on Environment, Communications and the Arts

The operation of the *Environment Protection and Biodiversity Conservation Act 1999*

First report

March 2009

ISBN 978-1-74229-080-5

This document was printed by the Senate Printing Unit, Parliament House, Canberra

Committee membership

Members to 30 June 2008
Senator Anne McEwen (ALP, SA) (Chair)
Senator Andrew Bartlett (AD, QLD) (Deputy Chair)
Senator Simon Birmingham (LP, SA)
Senator the Hon. Rod Kemp (LP, VIC)
Senator Kate Lundy (ALP, ACT)
Senator Stephen Parry (LP, TAS)
Senator Ruth Webber (ALP, WA)
Senator Dana Wortley (ALP, SA)

Members from 1 July 2008
Senator Anne McEwen (ALP, SA) (Chair)
Senator Simon Birmingham (LP, SA) (Deputy Chair from 6 August 2008)
Senator the Hon. Ron Boswell (NATS, QLD) (from 15 October 2008)
Senator Scott Ludlam (AG, WA)
Senator Kate Lundy (ALP, ACT)
Senator Stephen Parry (LP, TAS) (to 25 November 2008)
Senator Louise Pratt (ALP, WA)
Senator the Hon. Judith Troeth (LP, VIC) (from 25 November 2008)
Senator John Williams (NP, NSW) (to 15 October 2008)
Senator Dana Wortley (ALP, SA)

Substitute members for this inquiry
Senator Fiona Nash (NATS, NSW) replaced Senator the Hon. Ron Boswell (NATS, QLD) (from 2 December 2008)

Participating Members participating in this inquiry
Senator the Hon. Ian Macdonald (LP, QLD)
Senator Rachel Siewert (AG, WA)

Committee secretariat

Dr Ian Holland, Secretary
Mr Derek Abbott, Acting Secretary
Mr Andrew Bray, Principal Research Officer (WISE Participant)
Mr Ivan Powell, Senior Research Officer
Ms Sophie Dunstone, Senior Research Officer
Ms Jacquie Hawkins, Research Officer
Mrs Dianne Warhurst, Executive Assistant

Committee address

PO Box 6100
Parliament House
Canberra ACT 2600
Tel: 02 6277 3526
Fax: 02 6277 5818
Email: eca.sen@aph.gov.au
Internet: http://www.aph.gov.au/senate/committee/eca_ctte/index.htm

TABLE OF CONTENTS

Recommendations

Recommendation 1

2.10 The committee recommends that the objects of the Act be amended to remove the words 'to provide for' from section 3(1)(a) and 3(1)(ca).

Recommendation 2

2.57 The committee recommends that the appropriateness of a greenhouse trigger under the Act and the nature of any such trigger, should it be required, be carefully considered in light of the findings of the independent review and in the context of the government's overall response to climate change, in particular the CPRS.

Recommendation 3

2.58 The committee recommends that, having regard to the conclusions of the review of the *National Framework for the Management and Monitoring of Australia's Native Vegetation* currently underway, and in light of advice from the Threatened Species Scientific Committee, the government should consider including a land clearing trigger in the Act.

Recommendation 4

3.34 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.

Recommendation 5

3.37 The committee recommends that the department undertake regular evaluation of the long-term environmental outcomes of decisions made under the Act, and that the government ensure agency resources are adequate to undertake this new activity.

Recommendation 6

4.19 The committee recommends that the Independent Review of the EPBC Act and / or the ANAO examine the effect of existing bilateral agreements on the quality of environmental assessments of matters of national environmental significance. The committee suggests that particular regard be given to the transparency of, public engagement in, and appeal rights in relation to assessments performed under a bilateral agreement, compared to the conditions that would have existed had the assessment been performed under the EPBC Act.

Recommendation 7

4.33 The committee recommends that the government review the interaction between the EPBC Act and the Fisheries Management Act in relation to the conservation of fish species and relevant assessment processes.

Recommendation 8

5.34 The committee recommends that the process for nomination and listing of threatened species or ecological communities be amended to improve transparency, rigour and timeliness. Changes that should be considered include:

- **Either requiring publication of the Scientific Committee's proposed priority assessment list or reducing ministerial discretion to revise the priority list under section 194K; and**
- **Reducing the maximum period allowed for an assessment under section 194P(3).**

Recommendation 9

5.66 The committee recommends that government policy regarding the use of 'offsets' for habitat conservation state that the use of offsets:

- **is a last resort;**
- **must deliver a net environmental gain; and**
- **should not be accepted as a mitigating mechanism in instances where other policies or legislation (such as state vegetation protection laws) are already protecting the habitat proposed for use as an offset.**

Recommendation 10

6.76 The committee recommends that consideration be given to expanding the scope for merits review in relation to ministerial decisions under the Act, particularly in relation to:

- **whether an action is a controlled action,**
- **assessment decisions; and**
- **decisions on whether a species or ecological community is to be listed under the Act.**

The committee recommends that the independent review examine this possibility in the first instance, and that the process of consideration should include consultation with the Administrative Appeals Tribunal.

Abbreviations

A&A	Assessment and approvals
AAT	Administrative Appeals Tribunal
ACF	Australian Conservation Foundation
ADJR Act	*Administrative Decisions (Judicial Review) Act 1977*
AFMA	Australian Fisheries Management Authority
ANAO	Australian National Audit Office
ANEDO	Australian Network of Environmental Defender's Offices
ARC	Administrative Review Council
BOCA	Bird Observation and Conservation Australia
CAMBA	China-Australia Migratory Bird Agreement
CAR	Comprehensive, adequate and representative
CCACT	Conservation Council (ACT Region)
CCSA	Conservation Council of South Australia
CEEC	Critically endangered ecological community
CFA	Commonwealth Fisheries Association
CPRS	Carbon Pollution Reduction Scheme
DAFF	Department of Agriculture, Fisheries and Forestry
DEWHA	Department of the Environment, Water, Heritage and the Arts
EIA	Environment impact assessment
EIANZ	Environment Institute of Australia and New Zealand
EIS	Environment impact statement
EPBC Act	*Environment Protection and Biodiversity Conservation Act 1999*
ESFM	Ecologically sustainable forest management
ETS	Emissions trading scheme

FMA	*Fisheries Management Act 1991*
GHG	Greenhouse gas
HSI	Humane Society International
IFAW	The International Fund for Animal Welfare
IMB	Independent multidisciplinary body
JAMBA	Japan-Australia Migratory Bird Agreement
KTP	Key threatening process
MCA	Minerals Council of Australia
MNES	Matter of national environmental significance
NAFI	National Association of Forest Industries
NCC	Nature Conservation Council
NES	National environmental significance
NFF	National Farmers' Federation
NGOs	Non-government organisations
NPAC	National Parks Australia Council
NRM	Natural resource management
PER	Public environment report
RFA	Regional Forest Agreement
RNE	Register of the National Estate
SEPPs	State Environment Planning Policies
TAP	Threat abatement plan
TWS	The Wilderness Society
VCAT	Victorian Civil and Administrative Tribunal
WWF-Australia	World Wide Fund for Nature Australia

Chapter 1

1.1 On 18 June 2008, the Senate referred the following matter to the committee for inquiry and report by 27 November 2008:

> The operation of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) and other natural resource protection programmes, with particular reference to:
>
> (a) the findings of the National Audit Office Audit 38 Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999;
>
> (b) lessons learnt from the first 10 years of operation of the EPBC Act in relation to the protection of critical habitats of threatened species and ecological communities, and potential for measures to improve their recovery;
>
> (c) the cumulative impacts of EPBC Act approvals on threatened species and ecological communities, for example on Cumberland Plain Woodland, Cassowary habitat, Grassy White Box Woodlands and the Paradise Dam;
>
> (d) the effectiveness of responses to key threats identified within the EPBC Act, including land-clearing, climate change and invasive species, and potential for future measures to build environmental resilience and facilitate adaptation within a changing climate;
>
> (e) the effectiveness of Regional Forest Agreements, in protecting forest species and forest habitats where the EPBC Act does not directly apply;
>
> (f) the impacts of other environmental programmes, eg EnviroFund, GreenCorps, Caring for our Country, Environmental Stewardship Programme and Landcare in dealing with the decline and extinction of certain flora and fauna; and
>
> (g) the impact of programme changes and cuts in funding on the decline or extinction of flora and fauna.

1.2 On 14 October 2008, the Senate agreed to an extension of time to report on this inquiry to the last sitting day of February 2009. On 11 February 2009, the Senate granted a further extension of time to report, requiring the committee to deliver this, its first report, by 11 March 2009, and a final report on 24 April 2009. A further extension for the first report was later granted, to allow tabling on 18 March 2009.

1.3 In accordance with its usual practice, the committee advertised details of the inquiry in *The Australian.* The committee also contacted a range of organisations and individuals, inviting submissions. The committee received submissions from 113 individuals and organisations, listed at Appendix 1.

1.4 The committee held four public hearings in Melbourne, Canberra and Sydney. Details of these hearings are shown at Appendix 2. A list of tabled documents and additional information is at Appendix 3.

1.5 The committee found that the breadth of the terms of reference led to a lack of a clear focus in submissions, and made it difficult for the committee to gather high quality evidence targeting key issues. Despite these problems, the committee has attempted to address the main concerns expressed by stakeholders.

1.6 This Inquiry did not address the cultural heritage aspects of the Act as the terms of reference were focused on lessons to be learned in protecting Australia's unique plants, animals, threatened species and ecological communities. However, as providing for the protection and conservation of heritage is one of the objects of the Act, the effectiveness of the Act and the performance of the advisory bodies and departments overseeing heritage should be similarly evaluated in the future. The injection of $60 million to the heritage sector through the recent economic stimulus package made some headway in responding to the substantial decline in federal funding for historic heritage conservation. The committee did not however receive evidence on the extent to which initiatives such as this will meet the current and future demand or provide the needed distribution of heritage conservation skills and knowledge.

Design and operation of the EPBC Act

1.7 The *Environment Protection and Biodiversity Conservation Act 1999* (the Act) is a major piece of environmental legislation that passed parliament in June 1999 and came into effect on 16 July 2000.

1.8 The Act replaced the *Environment Protection (Impact of Proposals) Act 1974* and a number of environment-related Acts,[1] and was designed to address perceived problems with Australia's approach to environment protection.

1.9 The objects of the Act are:

- to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance;
- to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources;
- to promote the conservation of biodiversity;
- to provide for the protection and conservation of heritage;

1 The *National Parks and Wildlife Conservation Act 1975*; the *Whale Protection Act 1980*; the *World Heritage (Properties Conservation) Act 1983*; and the *Endangered Species Protection Act 1992*.

- to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples;
- to assist in the co-operative implementation of Australia's international environmental responsibilities;
- to recognise the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and
- to promote the use of Indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.[2]

Commonwealth environmental responsibilities

1.10 The Act gives the Commonwealth responsibility for the following matters of national environmental significance:

- world heritage properties;
- national heritage properties;
- Ramsar wetlands of international importance;
- listed nationally threatened species and communities;
- listed migratory species protected under international agreements;
- nuclear actions (including uranium mining); and
- the Commonwealth marine environment.

1.11 Actions[3] that are likely to have a significant impact on a matter of national environmental significance are prohibited unless approved by the Minster for the Environment.

1.12 The Act also gives the Commonwealth responsibility for actions undertaken on Commonwealth land or by the Commonwealth or a Commonwealth agency. Actions that are likely to have a significant impact on the environment of Commonwealth land, or are undertaken by the Commonwealth and are likely to have a significant impact on the environment anywhere in the world, are prohibited unless approved by the minister.[4]

---

2 EPBC Act, s. 3(1).

3 An action includes a project, development, undertaking, activity or series of activities, or an alteration of any of these.

4 There are a number of exceptions: actions taken in accordance with a bilateral agreement or accredited Commonwealth approval process, the *Great Barrier Reef Marine Park Act 1975* or a regional forest agreement; authorised by a government decision on advice from the minister; or exempted by the minister on the basis of national interest.

1.13 Environmental matters outside those prescribed for the Commonwealth are the responsibility of the states.

Referrals, assessments and approvals

1.14 Actions that may have a significant impact on a matter of national environmental significance (MNES) and relevant Commonwealth actions must be referred to the minister. The minister may decide that an action:

- is a controlled action because it is likely to have a significant impact;
- is not a controlled action if undertaken in a manner specified; or
- is not a controlled action and therefore does not require approval.

1.15 The minister must choose one of six methods of assessment for a controlled action: ranging from a full public inquiry, to assessment based on the referral documentation. Alternatively, a controlled action may be assessed by a state or territory process designated in a bilateral agreement or by an accredited Commonwealth process.[5]

1.16 The proponent of the action is usually responsible for the preparation of assessment documentation.

1.17 At the completion of an assessment, the minister must decide whether to approve the action. The minister must consider a number of relevant matters, including environmental values relevant to the assessment undertaken, principles of ecologically sustainable development, relevant assessments and reports and related economic and social matters. The minister may approve an action subject to conditions. The process of referral, assessment and approval is discussed in detail in chapter three.

2006 Amendments to the EPBC Act

1.18 The Environment and Heritage Legislation Amendment Bill (No 1.) 2006 amended the Act. These changes included:

Approvals process

- Enabled examination of preliminary proposals.
- Delegated responsibility to the states where management plans are in place.

Heritage listings

- Streamlined process for transfers to the National Heritage list.
- Removal of places outside Australian jurisdiction.

5 Bilateral agreements currently exist with Queensland, Western Australia, Tasmania, New South Wales and the Northern Territory. There are currently no accredited Commonwealth processes.

- Installed an annual cycle for the listing process and simplified the process for emergency listing.
- Disestablished the Register of the National Estate (RNE).

Enforcement

- Eliminated prohibition on the Federal court imposing sureties for damages for parties seeking injunctions.
- Expanded the range of enforcement powers and penalties.

Threatened species

- Amended the process for listing threatened species to an annual thematic process.
- Gave the minister the power to determine conservation themes.
- Removed the requirement for the Scientific committee to assess species on state and territory lists.

Criticisms of the Act

1.19 There have been a number of areas of ongoing criticism or concern relating to the Act. This section outlines some of the claims made about the Act's deficiencies which are discussed more fully in later chapters of this report.

Matters of environmental significance

1.20 A persistent criticism of the Act is that important environmental matters or actions are not included as MNES, and are therefore unable to trigger the assessment and approval mechanisms. There have been numerous suggestions for additional 'triggers', including:

- climate change/greenhouse gas emissions; [6] and
- cumulative impacts.[7]

Threatened species and the EPBC Act

1.21 The Act's regime relies on the maintenance of lists of threatened species and ecological communities. A 2006–07 Australian National Audit Office (ANAO) report, taking into account the 2006 amendments, cast doubt on the ability of the current

---

6 Chris Smyth (Australian Conservation Foundation), *Marine environment left unprotected by weak laws*, 1 Feb 2008, http://www.acfonline.org.au/articles/news.asp?news_id=1622&c=113435 (accessed March 2009); ANEDO, *EPBC Act: recommendations for reform*, 5 March 2008, pp 6–7, http://www.edo.org.au/policy/epbc_amendment_package080305.pdf (accessed March 2009).

7 ANEDO, *EPBC Act: recommendations for reform*, 5 March 2008, pp 6–7, http://www.edo.org.au/policy/epbc_amendment_package080305.pdf (accessed March 2009).

listing processes to produce accurate and comprehensive lists in appropriate timeframes.[8]

1.22 Recovery plans for listed threatened species and ecological communities set out management actions necessary to maximise the long-term survival of affected species and ecological communities. They also provide a basis for allocation of funding for biodiversity protection and conservation. Despite the 2006 amendments to the Act, progress on completion and monitoring of recovery plans remains slow.[9]

Public participation

1.23 The Act allows community involvement in decision-making processes; it also envisages broad rights of appeal of decisions made under the Act. This is reflected in the standing granted in some circumstances to interest groups by the Act, allowing them to pursue merits review of certain decisions.[10] Nevertheless, there is scope to re-examine the Act's standing provisions (particularly third-party enforcement), as well as the influence of costs and undertakings as to damages on public participation.[11]

Referrals

1.24 The scheme of the Act relies predominantly on self-referral by action proponents. Schemes dependent on self-regulation can pose significant challenges for compliance. There is evidence that better information and education strategies could improve the Act's referrals system.[12] In addition, the low number of outright refusals to allow a controlled action has been cited as evidence that the Act's self-referral system may not be capturing all relevant actions.[13]

Compliance and enforcement

1.25 An effective compliance and enforcement strategy is required to ensure the integrity of the Act, particularly so that the requirements of conditional approvals are observed. Currently, it appears that implementation of compliance monitoring has

---

8 ANAO, Audit Report No.31 2006–07, *The conservation and protection of national threatened species and ecological communities*, pp 17–19.

9 ANAO, Audit Report No.31 2006–07, *The conservation and protection of national threatened species and ecological communities*, pp 21–22.

10 ANEDO, *EPBC Act: recommendations for reform*, 5 March 2008, p. 8, http://www.edo.org.au/policy/epbc_amendment_package080305.pdf (accessed March 2009).

11 ANEDO, *EPBC Act: recommendations for reform*, 5 March 2008, pp 9–16, http://www.edo.org.au/policy/epbc_amendment_package080305.pdf (accessed March 2009).

12 ANAO, Audit Report No.31 2006–07, *The conservation and protection of national threatened species and ecological communities*, pp 22–24.

13 Andrew Macintosh and Debra Wilkinson, 'EPBC Act: the case for reform', *Australasian Journal of Natural Resources Law and Policy*, vol. 10, no. 1, 2005, p. 155.

been insufficient, such that the department 'has not been well positioned to know whether or not the conditions…being placed on actions are efficient or effective'.[14]

Independent review

1.26 While the committee's inquiry was underway, a separate independent review of the Act commenced. That review is based on section 522A of the Act, which requires that a review of the Act take place. It states:

> (1) The Minister must cause independent reviews to be undertaken by a person or body of:
>
> (a) the operation of this Act; and
>
> (b) the extent to which the objects of this Act have been achieved.
>
> (2) The first review must be undertaken within 10 years of the commencement of this Act. Later reviews must be undertaken at intervals of not more than 10 years.
>
> (3) The person or body undertaking a review must give a report of the review to the Minister.
>
> (4) The Minister must cause a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House after the Minister receives it.

1.27 On 31 October 2008 the minister, The Hon Peter Garrett AM MP, announced the commencement of the independent review. The head of the review is Dr Allan Hawke, and the review is being supported by a panel of experts, comprising:

- The Honourable Paul Stein AM
- Professor Mark Burgman
- Professor Tim Bonyhady
- Ms Rosemary Warnock

1.28 The committee notes that the review issued a discussion paper to support the review, and called for public submissions by 19 December 2008. It is now considering the 195 submissions it received. It is due to report by 31 October 2009.

1.29 The committee was advised that the minister has written to Dr Hawke asking that the independent review take account of this committee's work. The committee is pleased that the independent review will have the opportunity to take account of the discussion, conclusions and recommendations contained in this report.

---

14 ANAO, Audit Report No.31 2006–07, *The conservation and protection of national threatened species and ecological communities*, p. 25.

This report

1.30 This report concentrates on several key issues raised by submitters to the present inquiry, and foreshadowed above. These are:

- The scope of the Act (chapter two);
- The referral, assessment and approval process (chapter three);
- Agreements and coordination between governments and agencies (chapter four);
- Threatened species and ecological communities (chapter five); and
- Community and stakeholder engagement (chapter six).

1.31 The committee received considerable evidence in relation to the interaction between the Act and environmental impacts in areas covered by Regional Forests Agreements (RFAs). This particular topic will be the subject of the separate report to be provided to the Senate in April.

Chapter 2

The scope of the EPBC Act

The objects of the Act

2.1 Currently, the objects of the Act are:

> (a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and
>
> (b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and
>
> (c) to promote the conservation of biodiversity; and
>
> (ca) to provide for the protection and conservation of heritage; and
>
> (d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and
>
> (e) to assist in the co-operative implementation of Australia's international environmental responsibilities; and
>
> (f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and
>
> (g) to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.[1]

2.2 The committee received evidence that one particular aspect of the wording of these objects presented both a legal flaw and a problem with regard to Australia's international commitments. The clauses within the objects that specifically refer to protecting the environment and heritage state that the Act must 'provide for' that protection. The committee heard evidence that these words substantially weaken the effect of the legislation.

2.3 Governance expert Mr Tom Baxter began by drawing attention to consideration by the courts of the use of the phrase 'provide for' in the context of a dispute regarding another aspect of the EPBC Act's operation: RFAs. During *Brown v Forestry Tasmania*,[2] the trial judge considered the implication of a section of the

---

1 EPBC Act, s. 3(1).

2 *Brown v Forestry Tasmania* (No 4) [2006] FCA 1729.

Regional Forest Agreements Act 2002 which describes an RFA as an agreement that, amongst other things, 'provides for a comprehensive, adequate and representative reserve system…' and also 'provides for the ecologically sustainable management and use of forested areas in the region or regions' (emphasis added).

2.4 Baxter noted the judge's interpretation of the phrase 'provides for', which was accepted by the full court in the subsequent appeal.[3] His Honour said:

> The Commonwealth submits the phrase 'provides for' in the definition of RFA in the RFA Act does not mean 'requires' or 'establishes' in a legally enforceable manner. All that is relevantly required, according to the Commonwealth, is that the RFA establishes a structure or policy framework which facilitates or enables the creation or maintenance of a CAR Reserve System and the implementation of ESFM practices.
>
> The Commonwealth notes the use of 'provides for' instead of 'provide' and refers to dictionary definitions of 'provides for' which emphasise the making of arrangements for, rather than the actual provision of, something.
>
> The Commonwealth and Forestry Tasmania refer to the judgment of the Full Court of the Supreme Court of New South Wales in *Stocks and Parkes Investments Pty Ltd v The Minister* [1971] 1 NSWLR 932 ('*Stocks and Parkes Investments*') at 940, where the Court said: 'There is a great difference between the verb "provide" and the verb "provide for" or "make provision for" and it is this difference which gives a clue to the construction of cl. 16. The difference between "provide" and "provide for" is that the former means to give or to make available in fact, while the latter looks to the planning stage alone. You provide for a school site by "looking forward" and planning accordingly. You provide a school site by actually making it available.'
>
> **Consideration**
>
> I accept the submissions of the Commonwealth and Forestry Tasmania concerning the meaning of 'provides for'. I see no reason to doubt the analysis of the Full Court of the Supreme Court of New South Wales in *Stocks and Parkes Investments*.[4]

2.5 Baxter then pointed out that these words are used in the Act's objects (set out above). He argued that the Act ought to 'aim higher than to merely 'provide for'… the protection of the environment and heritage'.[5] The Wilderness Society was likewise scathing of how the objects of the Act are constructed:

> the EPBC promotes, provides for, assists, recognises, strengthens, adopts, enhances and includes various things, but does not actually protect or require protection of anything.[6]

---

3 *Forestry Tasmania v Brown* [2007] FCAFC 186, at paragraphs 71–73.

4 *Brown v Forestry Tasmania* (No 4) [2006] FCA 1729, at paragraphs 195–198.

5 Mr Tom Baxter, *Submission 65*, p. 4.

6 The Wilderness Society, *Submission 51*, p. 5.

2.6 Other submitters agreed.[7]

2.7 It was also argued that the current objects of the Act fall short of Australia's international commitments. Australia is a signatory to the World Heritage Convention, which states that each signatory:

> … recognizes that the duty of ensuring the identification, protection, conservation, presentation and transmission to future generations of the cultural and natural heritage situated on its territory, belongs primarily to that State. It will do all it can to this end, to the utmost of its own resources and, where appropriate, with any international assistance and co-operation, in particular, financial, artistic, scientific and technical, which it may be able to obtain.
>
> To ensure that effective and active measures are taken for the protection, conservation and preservation of the cultural and natural heritage situated on its territory, each State Party to this Convention shall endeavour, in so far as possible, and as appropriate for each country … to take appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage…[8]

2.8 Mr Baxter suggested that agreeing to the convention requires Australia 'to "ensure" protection, conservation, etc, not merely "provide for" them'.[9]

2.9 The committee also notes that the Productivity Commission, in its 2004 inquiry on native vegetation and biodiversity regulation, recommended that the goals of environmental legislation 'should be clearly specified in terms of desired environmental outcomes'.[10] If the goal of the Act is to achieve environmental protection outcomes with regard to MNES, the committee can see merit in modifying the objects of the Act to state that directly.

Recommendation 1

2.10 The committee recommends that the objects of the Act be amended to remove the words 'to provide for' from section 3(1)(a) and 3(1)(ca).

---

7 Green Institute, *Submission 78*; WWF-Australia, *Submission 81*; Western Australian Forest Alliance, *Submission 88*; Professor Lee Godden, *Submission 92*; NPAC, *Submission 93*; CCACT, *Submission 94*.

8 Convention Concerning the Protection of the World Cultural and Natural Heritage. Adopted by the General Conference of UNESCO, 17th Session. Done at Paris, 16 November 1972. 1037 UNTS 151, 11 ILM 1367 (entered into force 17 December 1975). http://whc.unesco.org/archive/convention-en.pdf (accessed February 2009).

9 *Submission 65*, p. 6.

10 Productivity Commission, 2004, *Impacts of Native Vegetation and Biodiversity Regulations*, Report no. 29, Melbourne, p. xxxv.

Matters of national environmental significance

2.11 Chapter 4 of the Act establishes procedures for determining whether a proposed action requires environment impact assessment (EIA) and approval under the Act. It also establishes assessment process and procedures for approving proposed actions.[11]

2.12 Approval under the EPBC Act is required:

> for actions that have, will have or are likely to have a significant impact on a matter of NES [national environmental significance]; and for Australian Government actions that are likely to have a significant impact on the environment or the environment on Commonwealth land and actions on Commonwealth land that are likely to have a significant impact on the environment anywhere.[12]

2.13 A significant impact is:

> an impact which is important, notable, or of consequence, having regard to its context or intensity. Whether or not an action is like to have a significant impact depends upon the sensitivity, value, and quality of the environment which is impacted, and upon the intensity, duration, magnitude and geographic extent of the impacts.[13]

2.14 There are seven MNES protected under the Act:

- World Heritage properties;
- National Heritage places;
- wetlands of internationals importance;
- listed threatened species and ecological communities;
- migratory species protected under international agreements;
- Commonwealth marine areas; and
- nuclear actions (including uranium mines).[14]

2.15 MNES are also referred to as 'protected matters' or 'triggers'.

---

11 *Submission 85*, p. 16.

12 *Submission 85*, p. 16.

13 DEWHA, *About the EPBC Act, Glossary*, www.environment.gov.au/epbc/about/glossary.html (accessed 10 December 2008).

14 DEWHA, *What is protected under the EPBC Act*, www.environment.gov.au/epbc/protect/index.html (accessed 10 December 2008).

World Heritage properties and National Heritage places

2.16 The Act provides for the listing of natural, historic or Indigenous places that are of outstanding national heritage value as well as heritage places on Commonwealth lands and waters or under Australian Government control.[15]

2.17 A declared World Heritage property is an area that has been included in the World Heritage List or declared by the Minister to be a World Heritage property. The National Heritage List includes natural, historic and Indigenous places of outstanding heritage value.

2.18 Once a heritage place is listed under the Act, special requirements come into force to ensure that the values of the place will be protected and conserved. The Act provides for the preparation of management plans which set out the significant heritage aspects of the place and how the values of the site will be managed.

2.19 To date there are 17 places on the World Heritage List and some 79 National Heritage places listed.[16]

Wetlands of international importance

2.20 A declared Ramsar wetland is an area that has been designated under Article 2 of the Ramsar Convention[17] or declared by the Minister to be a declared Ramsar wetland under the Act. The broad aims of the Ramsar Convention are to halt the worldwide loss of wetlands and to conserve those that remain through wise use and management. The Convention provides for international cooperation, policy making, capacity building and technology transfer.[18]

2.21 Under the Ramsar Convention a wide variety of natural and human-made habitat types, ranging from rivers to coral reefs, can be classified as wetlands. Wetlands include swamps, marshes, billabongs, lakes, salt marshes, mudflats, mangroves, coral reefs, fens, peat bogs, or bodies of water - whether natural or artificial, permanent or temporary. Water within these areas can be static or flowing;

---

15 DEWHA, *World Heritage properties and National Heritage places*, www.enviroment.gov.au/epbc/protect/heritage.html (accessed 27 January 2009).

16 DEWHA, *The National and Commonwealth Heritage Lists*, 1 Jan 2004 – 30 June 2008, Commonwealth of Australia, 2008, p. 7; DEWHA, *World Heritage properties and National heritage places*, www.enviroment.gov.au/epbc/protect/heritage.html (accessed 27 January 2009).

17 *The Convention on Wetlands of International Importance especially as Waterfowl Habitat*, an intergovernmental treaty adopted on 2 February 1972 in Ramsar, Iran; commonly referred to as the Convention on Wetlands or the Ramsar Convention.

18 DEWHA, *Ramsar Convention on Wetlands*, www.environment.gov.au/water/environmental/wetlands/ramsar/index.html (accessed 27 January 2009).

fresh, brackish or saline; and can include inland rivers and coastal or marine water to a depth of six metres at low tide. There are even underground wetlands.[19]

2.22 The Act establishes a process for identifying Ramsar wetlands and best practice management through nationally consistent management principles.[20] These principles have been set out in regulations and cover matters relevant to the preparation of management plans, environment assessment of actions that may affect the site, and the community consultation process. A management plan for a Ramsar wetland cannot be accredited unless it is in accordance with these principles. The principles may also be used for the management of any wetland throughout Australia.[21]

Listed threatened species and ecological communities

2.23 The Act provides for the listing of nationally threatened native species and ecological communities, native migratory species and marine special and protects.

2.24 The Act protects Australia's native species and ecological communities by providing for:

- identification and listing of species and ecological communities as threatened;
- development of conservation advice and recovery plans for listed species and ecological communities;
- development of a register of critical habitat;
- recognition of key threatening processes; and
- where appropriate, reducing the impacts of these processes through threat abatement plans.[22]

2.25 Any person may nominate a native species, ecological community or threatening process for listing under any of the categories specified.

Migratory species protected under international agreements

2.26 Migratory species are those animals that migrate to Australia and its external territories, or pass through or over Australian waters during their annual migrations,

---

19 DEWHA, *Ramsar Convention on Wetlands*, www.environment.gov.au/water/environmental/wetlands/ramsar/index.html (accessed 27 January 2009).

20 DEWHA, *Wetlands of international importance (Ramsar wetlands)*, www.environmentlgov.au/epbc/protect/wetlands.html (accessed 27 January 2009).

21 DEWHA, *Australian Ramsar management principles*, www.environment.gov.au/water/environmental/wetlands/ramsar/management.html (accessed 27 January 2009).

22 DEWHA, *Listed threatened species and ecological communities*, www.environment.gov.au/epbc/protect/species-communities.html (accessed 27 January 2009).

and include mammals, birds, fish, reptiles and insects. Listed migratory species also include any native species identified in an international agreement approved by the Minister.

2.27 The national list of migratory species consists of species listed under the following International Conventions:

- Convention on the Conservation of Migratory Species of Wild Animals - (Bonn Convention)
- Japan-Australia Migratory Bird Agreement (JAMBA)
- China-Australia Migratory Bird Agreement (CAMBA). [23]

Commonwealth marine areas

2.28 The Commonwealth marine area is any part of the sea, including the waters, seabed, and airspace, within Australia's exclusive economic zone and/or over the continental shelf of Australia, that is not state or Northern Territory waters. They stretch from 3 to 200 nautical miles from the coast and are areas which are recognised to have high conservation value.[24]

Nuclear actions

2.29 Nuclear actions are:

- establishing or significantly modifying a nuclear installation;
- transporting spent nuclear fuel or radioactive waste products arising from reprocessing;
- establishing or significantly modifying a facility for storing radioactive waste products arising from reprocessing;
- mining or milling uranium ores, excluding operations for recovering mineral sands or rare earths;
- establishing or significantly modifying a large-scale disposal facility for radioactive waste. A decision about whether a disposal facility is large scale will depend on factors including:
    - the activity of the radioisotopes to be disposed of
    - the half-life of the material
    - the form of the radioisotopes
    - the quantity of isotopes handled;

---

23 DEWHA, *Listed migratory species*, www.environment.gov.au/epbc/protect/migratory.html (accessed 27 January 2009).

24 DEWHA, *Commonwealth marine areas*, www.environment.gov.au/epbc/;protect/marine.html (accessed 27 January 2009).

- decommissioning or rehabilitating any facility or area in which an activity described above has been undertaken; or
- any other type of action set out in the EPBC Regulations.[25]

Option for additional triggers

2.30 Section 25 of the Act provides a framework for recognising additional MNES through Regulations after consultation with the states and territories. There has been one new MNES established since the commencement of the Act: the environment of the Great Barrier Reef Marine Park.[26]

Matters involving the Commonwealth

2.31 The Act also regulates actions, undertaken on Commonwealth land or outside of Commonwealth land, that are likely to have a significant impact on the environment of Commonwealth land, or are undertaken by the Commonwealth or a Commonwealth agency and are likely to have a significant impact on the environment anywhere in the world.[27]

Are the 'triggers' in the Act adequate?

2.32 Since its enactment, concerns have been raised about the scope of the Act. For example, a number of submitters to the 2006 inquiry into the provisions of the Environment & Heritage Legislation Amendment Bill (No. 1) 2006, noted the need for additional triggers, in particular the impacts of greenhouse gas pollution, climate change, land clearing and water extraction. [28]

2.33 A number of submitters to the current inquiry also raised concerns about the 'trigger' process in the Act.

2.34 ANEDO expressed its view that the Act gives the Commonwealth a limited and narrow role to intervene in decisions affecting a MNES.[29] It advocated the addition of new triggers as well as amendments to improve current matters of national

---

25 DEWHA, *Nuclear actions*, www.environment.gov.au/epbc/protect/nuclear.html (accessed 27 January 2009).

26 Schedule 4, *Great Barrier Reef Marine Park and Other Legislation Amendment Act 2008*, Act No. 125, 2008.

27 There are a number of exceptions: actions taken in accordance with a bilateral agreement or accredited Commonwealth approval process, the *Great Barrier Reef Marine Park Act 1975* or a regional forest agreement; authorised by a government decision on advice from the minister; or exempted by the minister on the basis of national interest.

28 See Report on the provisions of the Environment & Heritage Legislation Amendment Bill (No. 1) 2006, Environment, Communications, Information Technology and the Arts Committee, 2006, pp 57–58.

29 ANEDO, *Submission 90*, p. 5.

significance.[30] The Australian Conservation Foundation (ACF) likewise considered that new triggers for the application of the assessment and approval regime and improvements to existing triggers are required if the Act is to achieve its stated objectives and meet community expectations about an appropriate role for the Commonwealth in protecting our natural environment.[31]

2.35 While there were various proposals put forward to broaden the scope of the triggers in the Act, two were most prominent during the committee's current inquiry: greenhouse gas; and land clearing.[32]

New 'triggers'

Climate change

2.36 In its submission, the National Parks Australia Council (NPAC) noted that the role of climate change and a greenhouse gas 'trigger' in the EPBC Act has been debated since the first EPBC Bill. NPAC suggested that the design and implementation of the current Act makes it difficult for the Act to address climate change:

> Specifically the 'significant impact' test has proved a real obstacle given that even very large amounts of greenhouse emitted as a result of any single action in Australia will be 'a drop in the ocean' on the world stage. However that is not to say that the EPBC Act does not have the potential to make an impact on Australia's emissions.[33]

2.37 NPAC offered two options for inserting a greenhouse gas trigger into the Act. The first was:

> Listing climate as a Matter of National Environmental Significance. A direct trigger for the operation of the Act meaning that once a project will emit or cause to be emitted, a prescribed amount of Green House Gas (GHG) it is a controlled action. … [34]

2.38 Its second option was:

> to insert a consideration requirement that at each stage of the decision making process the Minister consider the climate change impacts of the Action and its contribution to Australia's greenhouse gas emissions. This measure should allow for a more comprehensive range of conditions to be

---

30 ANEDO, *Submission 90*, p. 41.

31 ACF, *Submission 52*, p. 22

32 See IFAW, *Submission 28;*ACF, *Submission 52,* Lawyers for Forests Inc, *Submission 68;*NPAC, *Submission 93;* Government of South Australia, *Submission 105.*

33 NPAC, *Submission 93*, p. 36.

34 NPAC, *Submission 93*, p. 37.

> attached to approvals … and if combined with a prescribed threshold may lead to better outcomes. [35]

2.39 NPAC concluded that the combination of these two measures and the requirement that projects only be assessed for their contribution to Australia's greenhouse gas emissions would increase the scope of the Act to address action previously excluded and hopefully reduce the number of highly carbon intensive actions undertaken.[36]

2.40 The Department of Defence indicated concern that the Act does not currently provide for direct responses to climate change, particularly where there is a need to balance competing priorities. For example, the increasing need to implement more energy efficient design and upgrades to facilities in response to the climate change agenda may have the potential to conflict with the priorities to conserve heritage or environmental values.[37]

2.41 The ACF considered the lack of an explicit mechanism to regulate emissions of greenhouse gases (together referred to as 'carbon emissions') has been a widely acknowledged shortcoming of the Act since inception and welcomed current work in progress to develop a national emissions trading scheme ('ETS'), the Carbon Pollution Reduction Scheme ('CPRS').[38]

2.42 The ACF acknowledged the current Government's policy platform that the inclusion of a 'climate change trigger' in the Act is an appropriate approach to planning processes and decisions.[39]

2.43 The Wilderness Society also noted that the lack of a greenhouse gas trigger is a fundamental problem with the Act. However, it stated:

> [a]ny climate change trigger which only works in the current framework of individual projects will be limited in its effectiveness, and should be altered to take account of the cumulative impacts of greenhouse gas emissions.[40]

2.44 ANEDO recommended that the Act be amended to include a greenhouse gas trigger that any actions resulting in emissions over a specified level per year be recognised as a MNES and that all projects on a designated development list trigger approval provisions.[41] Friends of the Earth were one of several other groups to recommend triggers based on specific emission values for proposed projects. They

---

35 NPAC, *Submission 93*, p. 37.

36 NPAC, *Submission 93*, p. 37.

37 Department of Defence, *Submission 67*, p. 10.

38 ACF, *Submission 52*, p. 23.

39 ACF, *Submission 52*, p. 24.

40 The Wilderness Society, *Submission 51*, p. 13.

41 ANEDO, *Submission 90*, p. 35.

recommended the Act be triggered for proposals that would produce over 100 000 tonnes of CO_2 equivalent per annum.[42] WWF supported a trigger on the same basis.[43]

2.45 The International Fund for Animal Welfare (IFAW) also suggested a greenhouse trigger. They proposed that such a trigger could not only examine greenhouse emissions impacts but also address impacts (both negative and positive) or carbon sinks.[44] The Conservation Council of South Australia (CCSA) argued that the trigger would need to take account of the cumulative impact of greenhouse gas emission increases.[45] Professor Godden agreed there should be such a trigger, as did the Planning Institute Australia.[46]

2.46 The committee recognises that introducing a greenhouse gas trigger may have implications in the context of the CPRS, and that these must be carefully considered.

2.47 With respect to the need for a greenhouse gas trigger and the CPRS, Mr Andrew Walker suggested that the proposed opt-in scheme for forest industries under the CPRS, as detailed in the CPRS green paper, meant there was a need for a greenhouse trigger 'so that the actual impacts are assessed under the EPBC Act'.[47] However, Mr Walker also acknowledged that it was difficult to say exactly how a greenhouse gas trigger and the CPRS would interact on the basis that 'we do not know what the outcome of the green paper will be or what form the Carbon Pollution Reduction Scheme will take at this stage, so it is a bit premature to comment'.[48]

2.48 The National Association of Forest Industries (NAFI) indicated that a CPRS scheme would suffice and that a greenhouse gas trigger under the Act was not necessary:

> Already the government's objectives in relation to its obligations under the Kyoto protocol and its eventual successor are being manifested in the CPRS legislation. To have a trigger under the EPBC Act for yet another layer of examination, assessment and approval between Minister Garrett and Minister Wong is not necessarily a healthy situation in terms of efficient regulation.[49]

---

42 Friends of the Earth Melbourne, *Submission 48*, p. 4.

43 WWF-Australia, *Submission 81*, p. 18.

44 IFAW, *Submission 28*, p. 6.

45 CCSA, *Submission 89*, p. 9.

46 Professor Lee Godden, *Submission 92*, p. 6; Planning Institute Australia, *Submission 104*.

47 Mr Andrew Walker, Lawyers for Forests Inc., *Committee Hansard*, 8 December 2008, p. 27.

48 Mr Andrew Walker, Lawyers for Forests Inc., *Committee Hansard*, 8 December 2008, p. 30.

49 Mr Shane Gilbert, Strategic Advisor, National Association of Forest Industries, *Committee Hansard*, 18 February 2009, p. 10.

Land clearing

2.49 Land clearing is already recognised by the Commonwealth as a key threatening process. Given the consequences of land clearing, which ANEDO noted include the destruction of biodiversity habitat, degradation of soil, degradation of water quality, increased salinity, release of greenhouse gas emissions, ANEDO recommended that a comprehensive land clearing trigger be included in the Act. While some States have legislation regulating land clearing, ANEDO considered the Commonwealth should have a role in assessing impacts of significant clearing proposals.[50]

2.50 The ACF considered that existing triggers under the Act do not adequately capture land clearing activities which, in recent years, have had devastating impact upon biodiversity and salinity and are a significant contributor to Australia's carbon emissions.[51]

2.51 ACF considered that a proposal put forward by ANEDO offered a sound basis for approaching this issue:

> … an approach to land clearance/native vegetation triggers based on three elements: (i) a generally applicable area threshold for clearance of native vegetation; (ii) a trigger for clearance of vegetation that provides habitat for listed threatened species or ecological communities or listed critical habitat; and (iii) a schedule of activities involving general land clearance (eg. major coastal developments) that would trigger the A&A regime.[52]

Conclusion

2.52 The committee notes the longstanding preference of many stakeholders for increasing the scope of the Act through the inclusion of additional MNES. These views have been expressed repeatedly over the years, including to the inquiry into the 2006 amendments to the Act conducted by the predecessor to this committee. There are at least two distinct ways in which new triggers could be included in the Act: by an additional regulation under section 25; or through inserting new sections under Part 3, Division 1 of the Act.

2.53 At all stages, greenhouse gas emissions and land clearing have been the dominant issues of concern. The committee is in principle supportive of the objective of broadening the scope of operation of the Act in these areas. There are some issues that must be dealt with in seeking the most appropriate way in which to proceed.

2.54 As will be noted in chapter three, currently both greenhouse gas emissions and land clearing are registered under the Act as key threatening processes. They have

---

50 ANEDO, *Submission 90*, pp 38–39.

51 ACF, *Submission 52*, p. 25.

52 ACF, *Submission 52*, p. 25, and see ANEDO, *Submission 90*, p. 39.

been on the books since 2001, yet in neither case has a threat abatement plan been developed. As a result, neither issue is being actively considered under EPBC Act processes. The committee suggests that the minister seek the advice of the Threatened Species Scientific Committee about the introduction of a threat abatement plan for land clearance.

2.55 The committee is aware that there are other policy processes underway that are intended to have a direct bearing on both problems. With regard to land clearing, the committee is aware that all Australian governments are currently participating in a review of the *National Framework for the Management and Monitoring of Australia's Native Vegetation*. This review is scheduled to report at the end of 2009.[53] With regard to greenhouse gas emissions, the Commonwealth is currently planning for the implementation of an emissions trading system, as well as presiding over other policies as part of its CPRS. None of the submitters addressed the issue of how a greenhouse gas trigger would mesh with an emissions trading scheme.

2.56 The committee notes that the proposed CPRS will define the government's primary framework for action on climate change and accordingly, the role, scope and operation of a greenhouse gas trigger in the Act would need to be considered in light of the final design of that scheme. This will ensure that Australia's climate change response is coherent, as well as economically and environmentally sound.

2.57 The independent review of the Act has sought submissions on whether the Act provides an appropriate legislative framework for addressing climate change in the context of environmental protection and biodiversity conservation. The report of that review is to be provided to the minister by 31 October 2009.

Recommendation 2

2.58 The committee recommends that the appropriateness of a greenhouse trigger under the Act and the nature of any such trigger, should it be required, be carefully considered in light of the findings of the independent review and in the context of the government's overall response to climate change, in particular the CPRS.

Recommendation 3

2.59 The committee recommends that, having regard to the conclusions of the review of the *National Framework for the Management and Monitoring of Australia's Native Vegetation* currently underway, and in light of advice from the Threatened Species Scientific Committee, the government should consider including a land clearing trigger in the Act.

---

53 DAFF, *Submission 86*, p. 4.

Chapter 3

The environmental assessment and approval process

3.1 The Commonwealth's role in environmental impact assessment has a long history, and was a function set out under the old *Environmental Protection (Impact of Proposals) Act 1974* legislation that preceded the current Act.[1] The current legislation has more detailed criteria for determining whether the Commonwealth has an assessment role in relation to development proposals (the MNES, or so-called 'triggers'), as well as specifying the assessment process in more detail.

3.2 Part 3 of the Act establishes the scope of activities to which environmental assessment and approvals processes apply. As outlined in the previous chapter, these include matters of national environmental significance (Division 1) and development proposals involving the Commonwealth itself (Division 2). The committee has already discussed one of they key concerns of stakeholders; namely, that the MNES currently set out under the Act do not adequately describe the range of environmental impacts that are of national concern and that require a Commonwealth role.

3.3 Beyond the question of the appropriate scope of triggers under the Act, a range of other issues about the operation of Commonwealth impact assessment have been raised with the committee. This chapter is concerned with the nature of the impact assessment approach used by the Commonwealth and whether reform might result in better environmental protection outcomes. The issues and suggestions discussed here are:

- The use of strategic impact assessments and planning instruments;
- The assessment of cumulative environmental impacts;
- The appropriateness of the assessment and approval process; and
- Ministerial discretion under the Act, and the possible role of a statutory assessment body.

3.4 A further issue raised by submitters was the relationship between the Act and operations conducted under RFAs. This matter will be the subject of a later report by the committee.

The Commonwealth's role

3.5 Commonwealth environmental assessments occur under the Act for anything that is determined to be a 'controlled action'. A person (including a company,

---

1 See *Environment Protection (Impact of Proposals) Act 1974*, http://www.austlii.edu.au/au/legis/cth/num_act/epopa1974481/ (accessed January 2009).

government or agency) who is considering taking an action that might impact on a MNES is responsible for notifying the department prior to undertaking that action.[2] The minister then determines whether the action is:

- Not a controlled action;
- Not a controlled action, provided it is conducted in a particular manner;
- A controlled action; or
- Clearly unacceptable.[3]

3.6 A controlled action is one 'that is likely to have a significant impact on a protected matter' (meaning a matter of national environmental significance under Part 3 of the Act). Between July 2000 (when the Act commenced) and 30 June 2008, 2567 proposed actions were submitted to the department and subject to a decision under the Act. Of these, it was determined that:

- 1517 were not controlled actions;
- 446 were not controlled actions, provided they were conducted in a particular manner;
- 604 were controlled actions;[4] and
- 1 was clearly unacceptable.[5]

3.7 Thus just under a quarter of actions referred to the Commonwealth have been administered under the Act as controlled actions.

3.8 Once an activity is determined to be a controlled action, the Commonwealth then decides the level of assessment that is required in order to adequately scrutinise the proposal. The range of assessment options is designed:

> to account for differences in the nature of proposed actions, the quality of available information available, the level of public interest in a particular proposal and the nature and scale of the likely impacts from the action.[6]

3.9 The diverse types of environmental assessment allow different levels of scrutiny of projects and create mechanisms that support cooperation between levels of government, or between Commonwealth agencies, in undertaking an environmental assessment. The assessment approach options include:

---

2 DEWHA, *Submission 85*, p. 16.

3 DEWHA, *Submission 85*, pp 17–18.

4 DEWHA, Correspondence to the committee, 9 February 2009. Note that, owing to the revision of this figure by the department, the four categories now add up to one more than the total of 2567 provided in the original submission.

5 DEWHA, *Submission 85*, p. 18.

6 DEWHA, *Submission 85*, p. 19.

- assessment based on information provided in the referral (a category recently introduced by the 2006 amendments to the Act);
- assessment based on preliminary documentation;
- assessment by public environment report (PER);
- assessment by environmental impact statement (EIS);
- assessment by public inquiry;
- assessment under an accredited process (by agreement with a Commonwealth agency, or state or territory government); and
- assessment under a bilateral agreement with a state or territory.[7]

3.10 Of the 604 actions that were determined to be controlled actions, the breakdown of assessment approaches was:

- five based on information provided in the referral;
- 241 based on preliminary documentation;
- 31 by PER;
- 29 by EIS;
- none by public inquiry;
- 83 under an accredited process (other than a bilateral agreement); and
- 108 under a bilateral agreement.[8]

3.11 Of the remaining 107 cases, 79 were either withdrawn or lapsed before the assessment approach decision was made. The department indicated to the committee that:

> The remaining 26% have either stalled or not yet had an assessment approach determined. This is most likely due to DEWHA waiting on further information before being able to make the decision.[9]

3.12 The proportion of actions being assessed under bilateral agreements is rising, as more such agreements are put in place.[10]

3.13 Once it has been determined what kind of assessment process should be followed, the proponent, the department and public submissions may all play a role in generating further information about the impacts of the proposed action, and about steps to be taken to mitigate those impacts. This information forms the basis of the decision on whether the action should be approved; approved but with conditions

---

7 DEWHA, *Submission 85*, p. 20.

8 DEWHA, *Submission 85*, p. 20.

9 DEWHA, Correspondence to the committee, 9 February 2009.

10 DEWHA, *Submission 85*, p. 20.

placed upon it; or refused. Of the 604 actions that were determined to be controlled actions:

- 231 actions were approved with conditions;
- 11 actions were approved without conditions;
- seven actions were refused;
- 147 actions were withdrawn or lapsed after it was decided that the action was a 'controlled action';[11] and
- 97 are being assessed as an accredited assessment or under a bilateral agreement (and are therefore yet to be subject to a Commonwealth approval decision).[12]

In addition, 26 are subject to reconsideration under sections 78, 78A or 79 of the Act. The remaining 85 are currently under active consideration.[13]

3.14 The committee received evidence critical of the operation of the approvals process in three main areas:

- The effectiveness of Commonwealth assessment actions under the existing legislation;
- Problems with the assessment of cumulative impacts, and uncertainty over the merits of strategic impact assessments; and
- The high degree of ministerial discretion allowed by the Act (a criticism that was applied to other areas of the Act as well).

Evaluations of the Commonwealth's environmental assessment actions

3.15 How effective the Act has been, and how effectively it is enforced, are difficult to determine. Certainly, since the Act's inception, a large number of proposed developments and activities have been assessed by the department, and many conditions have been placed on particular projects. Others may not have proceeded at all because of the impacts they would have had on the environment. On the other hand, very few projects have been refused approval, and almost no prosecutions have been undertaken.

3.16 The ANAO, in its 2002–03 audit, noted that there had been no prosecutions for breaches of the Act at that time. It commented:

> Responses to potential breaches of the Act have been patchy in terms of timeliness and effectiveness. A timely and effective approach is particularly important, as even a legal remedy may not be available after an irreversible

11 DEWHA, *Submission 85*, p. 22.

12 DEWHA, Correspondence to the committee, 9 February 2009.

13 DEWHA, Correspondence to the committee, 9 February 2009.

> action such as land clearing has taken place…Finalising compliance and enforcement procedures and guidelines [and] a more effective and timely approach to potential breaches of the Act… would assist in this area.[14]

3.17 In a second audit four years later, the ANAO reported some progress, but also flagged serious issues with the effectiveness of assessments and with enforcement. It noted that, since its last audit, the department had been involved in legal actions under the Act, including at least one successful prosecution of a breach of the legislation.[15]

3.18 In relation to actions that were declared to not be controlled actions, provided they were conducted in a particular manner, the ANAO observed:

> the department does not have sufficient information to know whether particular manner decisions are generally met or not. There is no follow up on the requirements and no effective management of information coming in from proponents.[16]

3.19 The ANAO was even more critical of the treatment of controlled actions:

> there has been no comprehensive examination as to whether or not terms and conditions are being met. Consequently the department is not well positioned to know how effective the Act has been in meeting its objectives and whether or not the conditions that are being placed on approvals are efficient and effective. This gives an unfair advantage to proponents who breach conditions. It also creates the perception that the department is not seriously enforcing its own legislation. This is particularly important as the Act contains 86 criminal and 17 civil penalty provisions and is the Commonwealth's primary means of protecting matters of national environmental significance.[17]

3.20 The ANAO noted that the department had conducted a small audit of some controlled actions and of actions that were not controlled provided they were conducted in a particular manner. The audit found that 12 per cent of actions were non-compliant, a further 30 per cent were only partly compliant, and that compliance was worse for the controlled actions than for those that were not controlled actions provided they were conducted in a particular manner.[18]

---

14 ANAO, *Referrals, Assessment and Approvals under the Environment Protection and Biodiversity Conservation Act 1999*, Performance Audit No. 38 of 2002–03, p. 99.

15 ANAO, *The Conservation and Protection of National Threatened Species and Ecological Communities*, Performance Audit No. 31 of 2006–07, p. 146.

16 ANAO, *The Conservation and Protection of National Threatened Species and Ecological Communities*, Performance Audit No. 31 of 2006–07, p. 142.

17 ANAO, *The Conservation and Protection of National Threatened Species and Ecological Communities*, Performance Audit No. 31 of 2006–07, p. 142.

18 ANAO, *The Conservation and Protection of National Threatened Species and Ecological Communities*, Performance Audit No. 31 of 2006–07, pp 142–3.

3.21 The ANAO noted that the department had sought increased budget funding to undertake compliance and enforcement activities, but that the government had not agreed with the request, leaving the department without sufficient budget funding in this area.[19]

3.22 The 2006 *State of the Environment* report briefly examined the operation of the Act. The report indicated that the Act had made a positive contribution to environmental protection 'beyond what would otherwise be achieved under state and territory laws', describing the results of assessments under the Act as 'good, though mixed'.[20] Both the *State of the Environment* report and analyst Chris McGrath have highlighted two individual legal cases under the Act as delivering important environmental benefits.[21] The *State of the Environment* report also was positive about the Act's role in fisheries, describing the 'comprehensive assessment of fishery operations and management, including the effects of fishery operations on non-target species and ecosystems'.[22]

3.23 A wide range of submitters, from the Minerals Council of Australia (MCA) to the ACF, expressed concern at the difficulty in determining whether the Act was in fact delivering environmental protection outcomes.[23] The Wilderness Society and others were particularly critical of changes made in 2006 to the processes for listing threatened species. They argued that this was a case of the legislation being amended to reflect resource constraints:

> Since its inception, the processes mandated under the EPBC have been chronically under-resourced resulting in backlogs in processing and assessing threatened species listings, and there have been only a couple of successful prosecutions under the Act. The resourcing problem is most clearly evident in the 2006 amendments to the Act. The original Act required the Minister to keep threatened species lists up to date, but with lack of resources this proved impossible so instead of the government finding more resources, the Act was changed to 'relieve' the obligation to keep the lists up to date.[24]

---

19 ANAO, *The Conservation and Protection of National Threatened Species and Ecological Communities*, Performance Audit No. 31 of 2006–07, p. 148.

20 2006 Australian State of the Environment Committee, Australia State of the Environment 2006, p. 99, http://www.environment.gov.au/soe/2006/publications/report/index.html, (accessed January 2009).

21 2006 Australian State of the Environment Committee, Australia State of the Environment 2006, p. 100, http://www.environment.gov.au/soe/2006/publications/report/index.html, (accessed January 2009); Chris McGrath, 'Swirls in the stream of Australian environmental law: Debate on the EPBC Act', *Environmental and Planning Law Journal*, Vol. 23, 2006, pp 170–173.

22 2006 Australian State of the Environment Committee, Australia State of the Environment 2006, p. 99, http://www.environment.gov.au/soe/2006/publications/report/index.html, (accessed January 2009).

23 MCA, *Submission 30*, p. 8; ACF, *Submission 52*, p. 8.

24 The Wilderness Society, *Submission 51*, p. 11.

The committee examines this in more detail in chapter five.

3.24 The committee received evidence arguing that the Act was ineffective in securing environmental protection, and evidence that compliance with assessments and approvals was not adequate. It has been argued that the very small number of actions that have been found to be clearly unacceptable or have failed to receive approval suggests that the Act is not cost-effective in controlling adverse environmental impacts.[25] Some stakeholders have suggested that the performance of the Act is so poor that, unless it is radically reformed, it may as well be scrapped.[26]

3.25 The National Farmers' Federation (NFF) expressed concern at the limits to the expertise and engagement of departmental staff when considering individual projects under the Act. The NFF commented that, while progress was being made, 'there is still a level of uncertainty and a lack of information or communication about the act down at the farm level'.[27] Case studies were provided to the committee that suggested deficiencies in project assessments under the Act.

3.26 It was argued that enforcement action has been poor, delayed and ineffective.[28] A range of submitters endorsed the findings of the ANAO audits and expressed concern that these suggested the Act was not operating effectively.[29] Some felt that a lack of staff in compliance and enforcement was an issue,[30] with an over-reliance on information supplied by proponents.[31] Others noted a 'growing need to bolster efforts and resources for training and education programs and for the development of other supporting tools' to deal with emerging needs under the Act.[32]

---

25 Andrew Macintosh, *Environment Protection and Biodiversity Conservation Act: An Ongoing Failure*, The Australia Institute, July 2006, p. 4. See also Andrew Macintosh and Deb Wilkinson, 'Evaluating the success or failure of the EPBC Act; A response to McGrath', *Environmental and Planning Law Journal*, Vol. 24, 2007, pp 81–89.

26 Wildlife Protection Association of Australia, *Submission* 27; Andrew Macintosh, *Environment Protection and Biodiversity Conservation Act: An Ongoing Failure*, The Australia Institute, July 2006.

27 Mr Ben Fargher, CEO, National Farmers Federation, *Proof Committee Hansard*, 9 December 2008, p. 16.

28 Land & Environment Planning, *Submission 18*.

29 NCC(NSW), *Submission 35*, p. 5; ACF, *Submission 52*; HSI, *Submission 58*; Office of the Secretary and Chief of the Defence Force, *Submission 67*; ANEDO, *Submission 90*; Professor Lee Godden, *Submission 92*.

30 For example, Ms Vanessa Richardson, *Submission 32*.

31 BOCA, *Submission 72*, p. 3; Mr Ivan Jeray, *Submission 79*.

32 South Australian Government, *Submission 105*, p. 8.

3.27 Both the MCA and the department rejected a link between the low number of actions refused and a lack of effectiveness of the Act.[33] The department pointed out, firstly, that:

> the formal number of rejections is not an accurate reflection of the number of proposals that have not proceeded as a result of the legislation. Secondly, even if it were, the argument does not take account of the substantial environmental improvements made to proposals through the assessment process even if they ultimately receive approval under the Act.[34]

3.28 The department explained that many proposals were withdrawn by proponents, or allowed to lapse, once they were declared to be controlled actions. Some of these did not proceed, it said, 'because of the difficulty foreseen with environmental approval, either following initial discussions with the department or when the assessment approach is decided'.[35]

3.29 Legal expert Chris McGrath also critiqued claims that the low rate of refusals under the Act is an indication of failure. In a paper in 2006 he pointed out that, at that time, most projects being considered under the Act had to receive a section 130(1B) notice before they proceeded to consideration by the Commonwealth.[36] Such notices were issued by state and territory governments, confirming that they had assessed 'the certain and likely impacts of the action on things other than matters protected by' the Commonwealth's legislation.[37] Thus, in most cases, a project was not even considered by the Commonwealth until aspects of its environmental impact had been examined by the relevant state or territory government, and had secured that government's approval on that basis. This might be expected to have played a part in already minimising any adverse environmental impacts of projects being considered for approval under the Act.

3.30 The committee notes that, in its submission to this inquiry, the department stated that it is currently preparing a formal response to the 2006–07 ANAO Performance Audit. That audit commenced in February 2006 and was finalised in March 2007.[38] Given that this was the second ANAO audit relating to the administration of the Act and that in both cases significant concerns were raised by ANAO, the committee is concerned that it is taking a long time for the department to fully respond to the audit recommendations. However, it also notes that the

---

33 MCA, *Submission 30*.

34 Correspondence from DEWHA, 14 November 2008, p. 4.

35 Correspondence from DEWHA, 14 November 2008, pp 4–5.

36 Chris McGrath, 'Swirls in the stream of Australian environmental law: Debate on the EPBC Act', *Environmental and Planning Law Journal*, Vol. 23, 2006, p. 169.

37 EPBC Act, s. 130(1B)(b)(i) – *prior* to the 2006 Act amendments, which modified this provision.

38 ANAO, *The Conservation and Protection of National Threatened Species and Ecological Communities*, Performance Audit No. 31 of 2006–07, p. 43.

department has significantly expanded its compliance and enforcement staff,[39] is receiving significantly more complaints about possible incidents,[40] and that there has been a significant increase in resources allocated by the government in the wake of the 2006–07 audit.[41]

3.31 Calls for greater resourcing for government functions are regularly heard by committees. In this case however, the calls are particularly widespread, and the evidence base for them appears compelling. A number of experts such as Professor Godden were cognisant of the 2006 reforms and the improvements made in the administration of the Act, but were nevertheless adamant that the resourcing of a range of functions, particularly compliance and enforcement, needs to increase.[42] Similarly the Australian Freshwater Turtle Conservation & Research Association advocated increased use of compliance auditing, particularly following the conclusion of projects approved under the Act.[43]

3.32 This need for greater compliance and monitoring resources is consistent with submissions by many other groups, and with the tenor of the two ANAO reports. Furthermore, the department itself has noted that demands on the assessment process are increasing. The increase in resources has allowed it to make more site visits, but it is still not reaching all proposals, particularly not if the matter is determined not to be a controlled action:

> With the increase in resources, one of the practice changes we made was to have people visit sites more regularly. I think it is probably much more up in the high percentages—70 or 80 per cent—for projects that are controlled actions. It is still a bit lower for the first part of the process, the decision on whether or not a project is a controlled action.[44]

3.33 The committee is strongly supportive of more resources being allocated to ensure compliance with the Act. At present, the Commonwealth incurs significant costs in ensuring that matters of national environmental significance are protected and impacts of actions are effectively mitigated. The committee did not have the opportunity to explore the question of whether the right balance exists between government and proponents in bearing the costs of protecting the national environment. It notes that at present those costs incurred by the Commonwealth in the environmental assessment process are not recovered from proponents. The committee

---

39 DEWHA, *Submission 85*, pp 70–71.

40 DEWHA, *Submission 85*, p. 74.

41 Mr Peter Burnett, First Assistant Secretary, Strategic Approvals and Legislation Branch, DEWHA, *Proof Committee Hansard*, 9 December 2008, p. 64.

42 Professor Lee Godden, *Submission 92*.

43 Australian Freshwater Turtle Conservation & Research Association, *Submission 46*.

44 Mr Mark Flanigan, Assistant Secretary, Strategic Approvals and Legislation Branch, DEWHA, *Committee Hansard*, 9 December 2008, p. 67.

proposes that either the government and/or the independent review of the act consider such mechanisms.

Recommendation 4

3.34 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.

3.35 The committee notes the broader concern, expressed by diverse stakeholders participating in this inquiry, that the government is not always able to determine what effect decision-making under the Act is having on the environment in the longer term. This applies to decisions in relation to environmental assessment, but is a concern about decisions made under the Act in general, including threatened species and ecological community listing decisions.

3.36 The committee believes that long-term evaluation of the impact of decisions under the Act is desirable. It believes that the department should initiate action to examine the longer-term environmental outcomes from decisions. It recognises that this may represent a new activity, and should be properly resourced as such.

Recommendation 5

3.37 The committee recommends that the department undertake regular evaluation of the long-term environmental outcomes of decisions made under the Act, and that the government ensure agency resources are adequate to undertake this new activity.

Cumulative impacts and strategic impact assessment

3.38 The committee received numerous submissions arguing that the cumulative environmental effects of many different developments are not being addressed adequately under the legislation as it currently stands. They were concerned that a 'death of a thousand cuts' was the fate that awaited many species and ecosystems, mainly because of habitat destruction caused by many unrelated development activities.

3.39 Some submitters were concerned that, in the case of projects where several components were known from the outset to make up a larger planned development, environmental assessments were nevertheless being separately conducted for each of the constituent elements.[45] This was unnecessarily exacerbating the problems of assessing cumulative impacts. They argued that such projects should not be broken up, but be assessed in a holistic manner.

45 E.g. Mr Steve Burgess & Ms Elaine Bradley, *Submission 44*; Australian Freshwater Turtle Conservation & Research Association, *Submission 46*.

3.40 The Nature Conservation Council of NSW (NCC(NSW)) argued:

> Unrelated developments that may impact one critical habitat are assessed separately without consideration of their combined threat to local or national biodiversity and matters of national significance. While each individual development may not be considered a "significant impact", holistic examination reveals their cumulative significance to be very pronounced.[46]

3.41 Others have likewise argued that cumulative impacts need to be assessed. The Possum Centre at Busselton discussed the case of developments at Dalyellup:

> Development and therefore referral of a proposal in stages might sometimes soften the impact; however it also leads to impact assessments of small areas in isolation and does not consider the cumulative effect…If the whole picture is not taken into account, no benefit will come from 'controlled actions' regarding a few scattered developments…All are assessed individually and some not at all because of zoning issues or non-referral. Zoning seems to be a more powerful instrument than the EPBC act.[47]

3.42 Cumulative impacts are a challenging problem for environmental management and regulation. One of the approaches designed to deal with cumulative impacts is to conduct strategic impact assessments, instead of relying solely on assessments of individual projects. Strategic impact assessments are allowed for under Commonwealth legislation, and their features were outlined by the department:

> A strategic assessment may examine the potential impacts of actions, including cumulative impacts, which are to be taken in accordance with one or more policy, program or plan. It is, by its nature, a collaborative assessment process undertaken by the Australian Government in conjunction with the person responsible for the adoption or implementation of the policy, program or plan. By way of example, such persons can include state and local governments, developers or resource and mining companies.
>
> A strategic assessment can also consider impacts on the full range of matters of NES within a particular area or associated with a particular policy, plan or program including world heritage and national heritage values, threatened species, threatened ecological communities, the ecological character of wetlands of international importance, listed migratory species and Commonwealth marine areas.[48]

3.43 Part 10 of the Act is designed specifically to facilitate strategic assessment processes. It contains two Divisions: Division 1 provides a framework for the conduct of strategic assessments. Division 2 establishes a process for strategic assessments of Commonwealth-managed fisheries.

---

46 NCC(NSW), *Submission 35*, section 1.1.

47 Possum Centre Busselton, *Submission 49*, pp 3–4.

48 DEWHA, *Submission 85*, pp 25–26.

3.44 Strategic assessments have always been possible under the Act, however, the limited benefits that they offered meant that little use was made of the provisions. As originally legislated, the outcomes of strategic assessments 'could effectively only be taken into account in deciding the [subsequent] appropriate assessment approach for a particular action'.[49] Thus a proponent would have to go through two assessments – a strategic one, and a project-specific one, potentially significantly increasing the amounts of time and effort involved. Two strategic assessments commenced under the Act were never completed for this reason.[50] Prior to 2006, strategic assessments were only undertaken in the area of fisheries, as these were mandatory under the legislation.[51]

3.45 The limited adoption of strategic approaches to impact assessment is evident from the fact that, even with the 2006 amendments in place, to date only one strategic assessment has commenced under Division 1 of the Part 10 provisions. This began in February 2008, with an agreement between the Commonwealth and the Western Australian government to undertake 'a joint strategic assessment of the site selection and management of a common-user liquefied natural gas hub to service the Browse Basin gas reserves'.[52]

3.46 Despite their use being limited to date, the department strongly endorsed the use for strategic assessments, particularly in dealing with the cumulative impact of gradual habitat destruction. They described strategic assessment as desirable:

> to try to get ahead of the game through strategic assessments, because otherwise we are always trying to catch up with the cumulative impacts and, no matter how many resources you have got, you can never do it if you are doing it case by case. The idea with strategic assessments is to get ahead of the game, get in and work with the states, look at the entire area—taking the Carnaby's black cockatoo example, look at the entire habitat of the bird around metropolitan Perth—and ask, 'Where are the key bits of habitat? How can we preserve these?' That is in advance of anybody actually proposing the next tranche of development. That is the sort of discussion that we are having with the WA government and with others. These provisions for strategic assessment are still relatively new and only a couple of them are formally underway. There are a number of others that are under

49 Gerard Early, 'Australia's National Environmental Legislation and Human/Wildlife Interactions', *Journal of International Wildlife Law and Policy*, Vol. 11, No. 2, 2008, p. 115.

50 Gerard Early, 'Australia's National Environmental Legislation and Human/Wildlife Interactions', *Journal of International Wildlife Law and Policy*, Vol. 11, No. 2, 2008, p. 127.

51 The committee notes that there are other cases where the department has taken a strategic approach in fulfilling its goals, such as in contributing to the Queensland government's planning exercise for Far North Queensland: DEWHA, *Annual Report 2007–08*, Volume 2, p. 17; Gerard Early, 'Australia's National Environmental Legislation and Human/Wildlife Interactions', *Journal of International Wildlife Law and Policy*, Vol. 11, No. 2, 2008, p. 127.

52 DEWHA, *Annual Report 2007–08*, Volume 2, pp 17, 107.

> discussion. That is the sort of thing that we would like to do. That is the long-term solution.[53]

3.47 There was in-principle support for the use of strategic assessments.[54] Professor Godden thought that its application to fisheries had shown how the process can be useful:

> I think strategic environmental assessment tends to be a crisis response and, in the fisheries area, it was implemented in the knowledge that a lot of the scientific data was pointing to very serious declines in fisheries. So the strategic environmental assessment has been useful there and its application more widely in other environmental protection and natural resource management areas would be useful, particularly because it allows adaptive governance.[55]

3.48 NPAC likewise thought the process had potential, though they were also cautious about the risks of allowing particular types of development to be exempted by the strategic assessment from needing further approvals.[56]

3.49 The ACF saw scope for an increasing emphasis on strategic assessment in protecting biological diversity, but linked this to broadening the scope of the Act:

> …what you would need to do is to broaden the trigger significantly so that it does encompass all projects that will have an adverse effect on biological diversity. Obviously there would be a piece of work to identify—how do you go about determining that and what do you mean by 'biological diversity' as such?—and you would talk about populations as well as threatened species, for instance.
>
> But ultimately, you would then have to have a heightened focus on the strategic assessment and forward planning and adaptive management processes in order to actually make that approach workable—in other words, you could not simply say, 'All projects that impact biological diversity have to be referred.' … you would have to have strategic assessments covering particular types of activities and particular regions.[57]

3.50 The Commonwealth Fisheries Association (CFA) argued that strategic assessments would be of benefit provided other processes then did not apply:

> We actually support the EPBC Act and the strategic assessment process generally—we do believe that it has improved fisheries management—but what we do not agree with is that, if your fishery is strategically assessed,

---

53 Mr Peter Burnett, First Assistant Secretary, Approvals and Wildlife Division, DEWHA, *Committee Hansard*, 8 December 2008, p. 72.

54 Eg. Professor Lee Godden, *Proof Committee Hansard*, 8 December 2008, p. 1.

55 Professor Lee Godden, *Proof Committee Hansard*, 8 December 2008, p. 3.

56 Ms Christine Goonrey, President, and Mr Tom Warne-Smith, Researcher, NPAC, *Proof Committee Hansard*, 9 December 2008, pp 31–32.

57 Mr Charles Berger, ACF, *Proof Committee Hansard*, 8 December 2008, p. 10.

> then different sections of the EPBC Act can come in, such as protected species legislation, and create export problems or even impose conditions on a fishery which has previously been assessed as sustainable.[58]

3.51 The Australian Fisheries Management Authority (AFMA) was also concerned about duplication and inconsistency between assessment processes under different parts of the Act, describing their operation as 'less than optimal', and expressing concern at 'the failure to fully integrate the various sections of the EPBC Act'.[59] Their frustration with processes to date suggested to the committee that the potential for strategic assessments under the Act is still not being realised.

3.52 The committee notes that, while strategic assessment has some support, in the one area in which it has been regularly applied under the Act – ocean fisheries – the committee received submissions indicating that not all stakeholders are happy with the processes and their results.[60] Likewise, the committee is aware that New South Wales strategic planning instruments – the State Environmental Planning Policies, or SEPPs – have had a mixed record in the eyes of stakeholders when it comes to facilitating environmental protection.[61] The committee also notes that RFAs represent a type of strategic assessment process and, as the committee's second report will show, they do not have widespread acceptance amongst community groups, environmental NGOs, and independent researchers.

3.53 While strategic impact assessments appear to be supported in theory, the evidence suggests they may be controversial in practice. The committee is aware that there are other ways of attempting to tackle cumulative environmental impacts, including by direct regulation. For example, many states have remnant vegetation protection laws, designed to address the pressures caused by land clearing. There is also the option of using the 'key threatening process' provisions under the current Act.

Alternatives to strategic impact assessment

3.54 Strategic impact assessments are not the only option for assisting the management of cumulative impacts. The Act provides for the listing of threatened species or ecological communities, and the preparation of recovery plans for them. This is addressed further in chapter five.

---

58 Mr Jeff Moore, Executive Member, CFA, *Proof Committee Hansard*, 9 December 2008, p. 41.

59 AFMA, *Submission 59*, pp 1–2.

60 HSI, *Submission 58*, pp 6–7; AFMA, *Submission 59*.

61 Compare, for example, *Hastings Point Progress Association Inc v Tweed Shire Council and Anor*; *Hastings Point Progress Association Inc v Tweed Shire Council and Ors* [2008] NSWLEC 180 (6 June 2008), http://www.austlii.edu.au/au/cases/nsw/NSWLEC/2008/180.html (accessed January 2009) with *Evans and Anor. v Maclean Shire Council and Anor.* [2004] NSWLEC 512 (9 September 2004), http://www.austlii.edu.au/au/cases/nsw/NSWLEC/2004/512.html (accessed January 2009).

3.55 In addition, the Act makes provision for the identification of key threatening processes,[62] and the preparation of threat abatement plans to address these.[63] A process can be listed as a key threatening process if it could:

- cause a native species or ecological community to become eligible for inclusion in a threatened list (other than the conservation dependent category); or
- cause an already listed threatened species or threatened ecological community to become more endangered; or
- adversely affect two or more listed threatened species or threatened ecological communities.[64]

3.56 As of February 2009, there were 17 listed key threatening processes, most of them relating to the introduction of exotic pests. Two listed key threatening processes are particularly relevant to concerns raised with the committee about cumulative impacts: 'loss of terrestrial climatic habitat caused by anthropogenic emissions of greenhouse gases'; and land clearance.[65] Both were listed in 2001.

3.57 The committee noted that, while land clearance and climate change have been listed for over eight years, and are widely regarded as crucial threatening processes affecting threatened species and ecological communities nationwide, no threat abatement plan is in place, or in draft, in either case.[66] Submitters were highly critical of what they saw as a failure to pursue such high priority issues.[67]

3.58 The committee notes that there are limits to the effectiveness of threat abatement plans,[68] as many activities to which they apply may be the responsibility of state and territory governments and agencies. However the minister, in making approval decisions under the Act, cannot act inconsistently with a threat abatement plan[69] and this provision could have potential to play a role in dealing with cumulative impacts. The Humane Society International (HSI) was highly critical of a failure to make use of this provision in regard to one of the most endangered types of ecological community, Cumberland Plain Woodland:

---

62 EPBC Act, ss. 183, 188.

63 EPBC Act, ss. 270A-284.

64 DEWHA, Key threatening processes under the Environment Protection Biodiversity Conservation Act, http://www.environment.gov.au/biodiversity/threatened/ktp.html (accessed February 2009), based on the EPBC Act, s. 188.

65 DEWHA, Listed key threatening processes, http://www.environment.gov.au/cgi-bin/sprat/public/publicgetkeythreats.pl (accessed February 2009).

66 The committee notes that, under s. 279 of the Act, the decision on whether to have a threat abatement plan for these two processes is currently under review.

67 HSI, *Submission 58*, pp 18–20; WWF-Australia, *Submission 81*, p. 3

68 EPBC Act, ss. 268, 269.

69 EPBC Act, s.139(1).

> HSI submissions for critical habitat remnants of Cumberland Plain Woodland to be listed on the Register have been ignored and remnants on Commonwealth land, such as the former ADI site at St Mary's, have been sold without covenants to the detriment of their conservation.[70]

3.59 As in other areas of the implementation of the Act, there was disappointment expressed at the resources applied to dealing with key threatening processes:

> The identification of KTPs and the development of TAPs is an appropriate way to manage the threats of established high-threat invasive species. However, the plans are generally poorly funded and therefore not effective…[71]

3.60 Submitters were concerned that there was too much ministerial discretion when it came to the application of the threat abatement plan provisions, and other similar parts of the Act. IFAW noted that, under section 267 of the Act, the minister only has to arrange for preparation of a threat abatement plan if the minister thinks that it will be a 'feasible, effective and efficient way of abating the [threatening] process'.[72] It suggested this kind of provision was 'far too broad and open to abuse'.[73] The CCSA described the discretion available regarding preparation of threat abatement plans as 'an opportunity lost'.[74]

3.61 The Act also provides for the maintenance of a register of critical habitat. However, it only has practical effect within Commonwealth areas.[75] There are only five critical habitat listings, only two on either mainland Australia or Tasmania, and only one appears to apply to land that is not under direct Commonwealth control.[76] However, the register does have one other function of note: Commonwealth land that includes listed critical habitat must, should it be leased or sold, have a covenant protecting the critical habitat included in the contract.[77]

Ministerial discretion under the EPBC Act

3.62 Criticism of the ministerial discretion around the preparation of threat abatement plans was just one example of the broad rejection by many stakeholders of the scope of ministerial discretion in the Act. Currently the Act contains a very large

---

70 HSI, *Submission 58*, p. 12.

71 Invasive Species Council, *Submission 55*, p. 29; see also ANEDO, *Submission 90*, p. 30; South Australian Government, *Submission 105*, p. 15.

72 EPBC Act, s.267. IFAW, *Submission 28*, p. 3.

73 IFAW, *Submission 28*, p. 3.

74 CCSA, *Submission 89*, p. 11.

75 EPBC Act, s.207B(1)(c).

76 DEWHA, Register of critical habitat, http://www.environment.gov.au/cgi-bin/sprat/public/publicregisterofcriticalhabitat.pl (accessed February 2009).

77 EPBC Act, s.207C.

number of provisions that allow ministerial discretion in decision-making processes. These include (and the list is by no means complete):

- A range of decisions on whether to list something under the Act to afford that thing some type of protection;[78]
- Declarations that actions do not need approval under the Act, provided the minister believes they are consistent with the Act and are covered by accredited assessment processes or authorisation processes;[79]
- Choices as to what type of environmental assessment process will be followed;
- Decisions under assessment processes, within certain constraints;[80]
- Determinations of conservation themes for assessments of threatened species, ecological communities[81] and national heritage places;[82]
- Determinations of whether to list a species or an ecological community as threatened,[83] or to list a national heritage place;[84]
- Extensions (potentially indefinite) in the time allowed for a decision to be made about a threatened species or ecological community listing,[85] or about a national heritage place;[86]
- Decisions on whether to list habitat as critical habitat for a listed species;[87]
- Decisions on whether or not to initiate preparation of a threat abatement plan;[88] and
- Decisions on whether or not to initiate preparation of a recovery plan.[89]

3.63 The committee received a number of submissions that were critical of the effects of ministerial discretion. These criticisms were both general, and in relation to particular powers under the Act. A local Landcare group were concerned that the Act:

---

78 For example, EPBC Act, ss. 14 (World Heritage Areas), 17A (Ramsar wetlands), 249 (listing marine species).

79 EPBC Act, ss. 33–34F.

80 EPBC Act, ss. 136–140A.

81 EPBC Act, s. 194D.

82 EPBC Act, s. 324H.

83 EPBC Act, s. 194Q(1).

84 EPBC Act, s. 324JJ.

85 EPBC Act, s. 194Q(4).

86 EPBC Act, s. 324JJ(3).

87 EPBC Act, s. 207A.

88 EPBC Act, s. 270A.

89 EPBC Act, s. 269AA.

> has been rendered irrelevant because it gives too much discretionary power to the Minister, allowing politics to dominate over science.[90]

3.64 The Environment Institute of Australia and New Zealand (EIANZ) submitted that:

> The listing process is slow and the Minister has discretion over whether to list a species or not, irrespective of whether Australia has an international obligation to conserve it.[91]

3.65 IFAW made similar remarks:

> The 2006 amendments to the Act not only removed the obligation on the Commonwealth Environment Minister to ensure lists are kept up-to-date, but initiated a new listing process that relies heavily upon ministerial discretion. The move towards priority listing of threatened species is contentious, as it risks species that do not fall within annual 'conservation themes' or those that are of low socio-economic and cultural importance being overlooked, despite their ecological importance or conservation status.[92]

3.66 The Wilderness Society went further, characterising the Act's scheme for environmental protection as one in which 'the Minister has absolute discretion to *not* act to protect the environment or conserve biodiversity'.[93]

3.67 Friends of the Earth Australia believed that the range of ministerial discretion granted by the Act should be reduced, in particular in relation to endangered species.[94] Birds Australia made the same argument, stating that '[t]he circumstances under which exemption via ministerial discretion apply need to be tightly defined to provide more certainty and confidence in the operation of the Act'.[95]

3.68 Although there was much criticism of the discretionary provisions in the Act, it was not always clear what alternatives were being proposed, nor was it clear whether any alternative arrangements would better meet the objectives of the legislation. Decision-making under the Act can involve complex balancing of a wide range of information and factors. It can require environmental protection goals to be weighed against their social and economic implications. It is clear from submissions that stakeholders are sometimes dissatisfied with individual decisions. Sometimes this is because they believe those decisions give insufficient weight to environmental

---

90 Aldgate Valley Landcare Group, *Submission 4*, p. 1.

91 EIANZ, *Submission 14*, p. 12.

92 IFAW, *Submission 28*, p. 3.

93 The Wilderness Society, *Submission 51*, p. 5.

94 Friends of the Earth Australia, *Submission 48*, pp 10–11.

95 Birds Australia, *Submission 39*.

protection. In other cases, there are stakeholders dissatisfied because they believe economic or social benefits were not given sufficient emphasis.

3.69 The complexity of the task was described in correspondence from the department:

> This requires judgements to be made about the likely impacts of the action in relation to the timing, duration and frequency both of the action and its impacts; on-site and off-site impacts; direct and indirect impacts; the geographic area affected; existing levels of impact from other sources; and the degree of confidence with which the impacts of the action are known and understood. In the case of decisions about whether or not to approve a proposal, relevant economic and social matters must also be taken into account. There is often room for differences of opinion about the weight to be given to all of these factors, and their likely effect, in any particular case.
>
> Against such a background, it is not surprising that such differences of opinion are, from time to time, expressed about the merits of decisions made under the EPBC Act.[96]

3.70 The committee is aware of a range of options that could change the transparency of decision making and the role of ministerial discretion in the Act. These could include:

- Reducing discretion in ministerial actions;
- Increasing the transparency of ministerial actions;
- Enhancing the capacity for independent review; or
- Transferring some decision-making responsibilities to a statutory body.

3.71 Ensuring transparency and appropriate ministerial discretion in relation to threatened species and ecological community listings is discussed in chapter five. The third option is considered further in chapter six. Remaining aspects of these options are discussed below.

3.72 Given the extensive role of the minister under the Act, there may be opportunities to reduce the minister's discretion. However ministerial discretion is in many cases not able to be simply removed. For example, the Act contains numerous points at which a minister is allowed to make a decision. The need for such a decision itself cannot be eliminated. Thus ministerial discretion could only be reduced by legislating to place more constraints on the decision.

3.73 In other cases, removing the discretion may simply create regular administrative breaches of the Act without achieving greater transparency. For example, it would be possible to remove the minister's discretion to extend the time available for certain documents to be prepared. If departmental and ministerial promptness did not improve, the effect might be to put the department or a scientific

96 DEWHA, Correspondence to the committee, 14 November 2008.

committee in breach of the Act, but not to have achieved any improved environmental outcomes. It is also possible that these sorts of reforms would take the department's attention away from addressing high priority issues in favour of ensuring compliance with timeframes. This indeed was a factor in the (controversial) decision to reform the threatened species and ecological communities listing process in 2006:

> The 2006 amendments to the EPBC Act have assisted in this regard by establishing a new process for listing threatened species, ecological communities and key threatening processes. This new process has improved the effectiveness of listing with a more strategic approach, focussing on those species and ecological communities in greatest need of protection, and has streamlined the process through an annual cycle of nominations from the community.[97]

3.74 Furthermore, the committee received evidence about an example where the *removal* of ministerial discretion by an amendment to the Act in 2006 was, in the submitter's view, bad policy. Mr Tom Baxter, like a range of submitters, was critical of the way the Act restricts the minister's role in addressing any negative environmental impacts of logging and related activities in some circumstances. He argued that section 75(2B) of the Act removes the minister's discretion to consider adverse impacts of forestry operations under RFAs.[98] This removal of discretion from the minister, it was argued, inhibits his or her ability to fulfil the Act's objectives.

3.75 A second option for addressing ministerial discretion is to increase transparency of processes under the Act. There are limited opportunities however for this to take place. The Act already provides for the production of statements of reasons for most decisions. There may be scope for further decision documentation to be automatically made public, however this did not in itself appear to be an issue of major concern amongst submitters. A specific option for increased transparency, relating to the work of the Scientific Committee, is discussed further in chapter five.

3.76 One submission suggested an alternative approach based on establishing 'a new independent multidisciplinary body ("IMB") charged with implementation of key processes and decisions under the EPBC Act'.[99] It suggested certain types of decision would be transferred to such a body, including most decisions relating to environmental assessments. The ACF did suggest that the minister should have discretion 'allowing the minister to make the final decision in defined circumstances' (ie. call-in powers), or alternatively that the IMB public release recommendations for a decision by the minister, with the minister still taking final approvals decisions. The ACF saw the IMB as an opportunity to shift the minister's role from being a day-to-day decision maker to 'strategic oversight of the portfolio'.[100]

---

97 DEWHA, Correspondence to the committee, 14 November 2008.

98 Mr Tom Baxter, *Submission 65*, p. 8.

99 ACF, *Submission 52*, p. 29.

100 ACF, *Submission 52*, p. 31.

3.77 The committee received limited evidence about this proposal, and notes that the ACF itself commented that it intended 'to provide more detail in relation to the potential operation and role of such a body in the course of submissions made to the statutory review of the EPBC Act'.[101] The committee has some concerns that such a proposal, as well as not having widespread support, would increase administrative complexity without necessarily resolving stakeholder dissatisfaction over key decisions. Committee members are aware, for example, that call-in powers of planning ministers in many jurisdictions are themselves controversial. Unresolved questions about the scope of such an independent body's powers highlight the fact that ultimately there must be a decision-maker who must weigh up diverse factors in making approval decisions. This cannot be avoided – and neither can the fact that some stakeholders will be disappointed with individual outcomes.

3.78 The committee believes that some discretion in administrative decision making can be important when complex decisions must be taken, and when these decisions involve weighing up diverse factors and types of evidence. For example, in determining whether to approve a proposed action, the minister must consider economic and social matters in addition to the need to protect matters of national environmental significance.[102] At the same time the committee recognises that the fact that a decision is complex can be a reason to *reduce* discretion, not to increase it, so that there is more guidance for the decision maker, and so that those seeking decisions under the Act operate in a more predictable decision environment, increasing certainty. The committee also notes that complexity can be an argument for greater access to legal review mechanisms, since more complexity may mean more scope for error.

3.79 The dissatisfaction expressed by stakeholders relates to a minority of decisions, typically regarding proposals that are already controversial before the Act comes into play. The committee formed the impression that in some of these cases, dissatisfaction with ministerial decisions was not clearly related to evidence regarding matters of national environmental significance. Nevertheless, the committee believes that ensuring that high quality information and advice is available to the minister is important, as is guaranteeing a high quality of ministerial decision-making. The committee believes that increased resources, and improved scrutiny of the decision-making process, are two key factors that will ensure effective outcomes under Act processes.

3.80 Through an increase in resources for monitoring and compliance as recommended earlier in this chapter, and through the other recommendations made in chapters five and six, the committee believes that the Act can be strengthened, addressing concerns that were raised about ministerial discretion under the current Act.

---

101 ACF, *Submission 52*, p. 29.

102 EPBC Act, s. 136(1).

Chapter 4

Effectiveness of agreements

4.1 The Act provides for agreements to be established between the Commonwealth and state or territory governments. These agreements put in place mechanisms whereby the states or territories are delegated responsibility for some environment protection processes which would otherwise be undertaken by the Commonwealth.

4.2 Submitters to the inquiry provided comments on bilateral agreements and RFAs. Given the substantive information provided to the committee on RFAs and the complexity of the issues raised, the committee will discuss RFAs in a separate, subsequent report.

Bilateral agreements

4.3 Bilateral agreements between the Commonwealth and state and territory governments are provided for under the Act. Bilateral agreements are written agreements that provide for one or more of the following:

(i) Protecting the environment;

(ii) Promoting the conservation and ecologically sustainable use of natural resources;

(iii) Ensuring an efficient, timely and effective process for environmental assessment and approval of actions;

(iv) Minimising duplication in the environmental assessment and approval process through Commonwealth accreditation of the processes of the State or Territory (or vice versa).[1]

4.4 Section 50 of the Act requires that the minister may only enter into a bilateral agreement if the minister is satisfied that the agreement:

(a) Accords with the objects of the Act; and

(b) Meets the requirements (if any) prescribed by the regulations to the Act.[2]

4.5 Bilateral agreements can be used to reduce duplication of environmental assessments or approvals processes. However, agreements on assessment are far more widespread than for approvals.

4.6 To date, bilateral agreements for environmental impact assessment exist between the Commonwealth and South Australia, New South Wales, the Northern

---

1 EPBC Act, s. 45.

2 EPBC Act, s. 50.

Territory, Queensland, Tasmania and Western Australia.[3] Draft bilateral agreements for assessment processes are currently under negotiation between the Commonwealth and the Australian Capital Territory and Victoria.[4]

4.7 In contrast, there is currently only one very limited bilateral agreement that applies to approvals. This agreement, between the Commonwealth and New South Wales governments, accredits approvals granted in accordance with the Sydney Opera House management plan.[5]

4.8 While bilateral agreements are intended to minimise duplication in the environmental assessment and approval process, the committee heard evidence that proponents continue to experience duplication and overlap of Commonwealth and state and territory processes. The NFF stated:

> [W]hat we are pointing to is a streamlining of not just the EPBC Act but how you might incorporate the requirements at local and state levels in terms of assessment. What we are after is a one-stop shop that farmers can go to if they are looking to do a particular activity on their farm—for example, implement an infrastructure development. They get one assessment; they do not need to get one off local government, one off the state government and one off the federal government.

4.9 The committee heard evidence that the Commonwealth's role should be to provide strategic oversight through a legislative framework for use by the states and territories, and that assessment and approval of actions should not be the responsibility of the Commonwealth:

> Ms Stutsel – We certainly think the Commonwealth should have primary responsibility for the framing of the legislation, identifying matters of national environmental significance and ensuring there are appropriate bilateral assessment and approval processes in place with the states to remove the duplication that is occurring between those jurisdictional layers. We as an industry strongly support the existence of regulation. We consider that that provides a minimum for underperformance, but we are always looking to go beyond that in terms of continuous improvement to better align with societal expectations.
>
> CHAIR – Who do you think should have the call on whether or not something goes ahead?

---

3 DEWHA, 2008, *Bilateral agreements*, http://www.environment.gov.au/epbc/assessments/bilateral/index.html (accessed 15 December 2008).

4 DEWHA, 2008, *Bilateral agreements*, http://www.environment.gov.au/epbc/assessments/bilateral/index.html (accessed 15 December 2008).

5 DEWHA, 2008, *Bilateral agreements*, http://www.environment.gov.au/epbc/assessments/bilateral/index.html (accessed 15 December 2008).

> Ms Stutsel – If the Commonwealth actually sets the regulatory framework, which is the decision-making process, then the states should be able to use that framework to make a determination about whether a project is in compliance with it.[6]

4.10 Concern was also raised about the operation of bilateral agreements in situations where the proponent had close links with the state or territory government, for example a wholly government-owned corporation, and the possibility of 'a clear and undeniable conflict of interest in the State Government operating in the simultaneous roles of proponent and assessor under a bilateral agreement'.[7] For example, Mr Ian Matthews was concerned about the RFA in Tasmania. He was concerned that state government entities with an economic interest in development approvals may have an inappropriate say in assessment or decision processes under agreements between the Commonwealth and states or territories.[8]

4.11 The bilateral agreement between the Commonwealth and the NSW government was criticised for a lack of 'rigorous processes to protect matters of national environmental significance'.[9] This criticism was also made about the agreements generally.[10]

4.12 The NSW bilateral agreement delegates development assessments required under Part 8 of the EPBC Act to Part 3A of the NSW *Environmental Planning and Assessment Act 1979*.[11] The agreement states that 'this assessment approach corresponds to assessment by Environmental Impact Statement and meets the requirements of a Public Environment Report under the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999*'.[12]

---

6 Ms Melanie Stutsel, Director, Environment and Social Policy, Minerals Council of Australia, *Committee Hansard*, 9 December 2008, p. 4.

7 Mr Steve Burgess and Ms Elaine Bradley, *Submission 44*, p. 4.

8 Mr Ian Matthews, *Submission 34*, p. 2.

9 Central West Environment Council Inc of NSW, *Submission 43*, pp 3–4.

10 Lawyers for Forests, *Submission 68*, pp 12–13.

11 Commonwealth of Australia and the State of New South Wales, *An agreement between the Commonwealth of Australia and the State of New South Wales, Under Section 45 of the Environment Protection and Biodiversity Conservation Act 1999, Relating to environmental impact assessment*, 18 January 2007, http://www.environment.gov.au/epbc/assessments/bilateral/pubs/nsw-agreement-signed.pdf (accessed 17 February 2009).

12 Commonwealth of Australia and the State of New South Wales, *An agreement between the Commonwealth of Australia and the State of New South Wales, Under Section 45 of the Environment Protection and Biodiversity Conservation Act 1999, Relating to environmental impact assessment*, 18 January 2007, http://www.environment.gov.au/epbc/assessments/bilateral/pubs/nsw-agreement-signed.pdf (accessed 17 February 2009).

4.13 Under section 75F of Part 3A of the NSW *Environmental Planning and Assessment Act 1979*, the NSW Director-General has discretion to decide on the environmental assessment requirements for a project seeking approval.[13] Further, major developments and critical infrastructure approved under Part 3A are exempt from a number of other state approvals.[14]

4.14 The committee heard claims that this 'largely unfettered discretion with respect to preparing environmental impacts assessment requirements, and determining the adequacy of environmental assessments undertaken',[15] coupled with exemptions from other state approval processes, has meant that some actions in NSW may have avoided rigorous environmental impact assessment. The Central West Environment Council Inc of NSW stated:

> There is therefore no guarantee of adequate assessment of, for example, threatened species and native vegetation, local heritage, aboriginal cultural heritage, greenhouse gas emissions. It is inappropriate to accredit a process that potentially excludes comprehensive assessment of such matters.[16]

The Inland Rivers Network agreed.[17]

4.15 The application of Part 3A of the NSW *Environmental Planning and Assessment Act 1979* has been legally challenged on a number of occasions.[18] Critics have argued that the general failure of these challenges has demonstrated the lack of procedural rigour in Part 3A,[19] and in the NSW bilateral agreement more broadly.[20]

4.16 Some submitters wanted to see a reduction in the use of bilateral and other agreements under the Act. NPAC and the Conservation Council (ACT Region) (CCACT) argued that there should be limited or no use of declarations under section 84 of the Act (referred to as 'accredited assessment processes'), and that other exemptions (such as for bilateral agreements) should be removed from the Act.[21]

---

13 *Environmental Planning and Assessment Act 1979 (NSW)*, s. 75F.

14 Central West Environment Council Inc of NSW, *Submission 43*, p. 4; NSW Environmental Defender's Office, 18 October 2006. *Fact sheet*, http://www.edo.org.au/edonsw/site/factsh/fs02_1_2.php, (accessed 6 February 2009).

15 Central West Environment Council Inc of NSW, *Submission 43*, p. 4.

16 Central West Environment Council Inc of NSW, *Submission 43*, p. 4.

17 Inland Rivers Network, *Submission 69*, section 6.

18 For examples, see NSW Environmental Defender's Office, 18 October 2006. *Fact sheet*, http://www.edo.org.au/edonsw/site/factsh/fs02_1_2.php, (accessed 6 February 2009).

19 ANEDO (NSW), Submission to the NSW Premier Re: Environmental Planning and Assessment (Infrastructure and Other Planning Reform) Bill 2005, June 2005, http://www.edo.org.au/edonsw/site/policy/epandarefrombill050713.php (accessed 17 February 2009)

20 ANEDO, *Submission 90*, p. 18.

21 NPAC, *Submission 93*, pp 13, 18; CCACT, *Submission 94*, pp 13, 18.

4.17 The committee did not have an opportunity to test these concerns with governments because some state governments (NSW and Victoria) did not provide submissions to the inquiry. However, the committee notes that the high levels of ministerial discretion in the EPBC Act are a concern for many stakeholders, as outlined in the previous chapter. It appears that Part 3A of the NSW legislation creates higher levels of discretion again, particularly in regard to public consultation processes. The committee understands the concern that this causes stakeholders in some jurisdictions.

4.18 At the same time, the committee notes that the bilateral agreements in general cover only assessment; they do not extend to the actual decision on approval, which remains with the Commonwealth. That decision, under sections 136 to 140A of the Act, must be guided by principles, agreements and plans designed to ensure protection of matters of national environmental significance. The bilateral agreements do not alter those obligations.

Recommendation 6

4.19 The committee recommends that the Independent Review of the EPBC Act and / or the ANAO examine the effect of existing bilateral agreements on the quality of environmental assessments of matters of national environmental significance. The committee suggests that particular regard be given to the transparency of, public engagement in, and appeal rights in relation to assessments performed under a bilateral agreement, compared to the conditions that would have existed had the assessment been performed under the EPBC Act.

Activities undertaken by Commonwealth agencies

4.20 Under the Act, the Commonwealth is responsible for actions undertaken by Commonwealth agencies. Furthermore, actions which are likely to have a significant impact on the environment of Commonwealth land, or are undertaken by the Commonwealth and are likely to have a significant impact on the environment anywhere in the world, are prohibited unless approved by the minister. As a result, there are regular requirements for a wide range of Commonwealth agencies to deal with the Act and to seek decisions under it. Two of the most directly affected agencies, Defence and AFMA, made submissions to the inquiry.

Defence activities

4.21 As a Commonwealth agency, the Department of Defence is required to apply the principles of environmental management as outlined in the Act. Given that the Department of Defence is responsible for some 2.8 million hectares of land, the department's use and experience of the Act is considerable. [22]

22 Mr Colin Trinder, Director, Environmental Impact Management, Department of Defence, *Committee Hansard*, 9 December 2008, p. 56.

4.22 The Department of Defence discussed the issue of being required 'to seek additional approval for implementation of decisions by the Government or for the ongoing use of existing training areas for routine military activities, since that land has been set aside by the Government precisely for that purpose'.[23] Defence argued that the requirement to submit for additional approval for activities undertaken on Defence land was not an optimal use of resources, nor an efficient application of the Act.

4.23 The Department of Defence believed that the efficiency and effectiveness of the Act, as it applies to Commonwealth agencies and in particular the Department of Defence, could be improved by exempting certain of their activities from the formal assessment and approval processes under the Act:

> Defence considers a better approach might be to shift the centre of gravity in the legislation pertaining to Commonwealth agencies away from a traditional regulation / enforcement model to one that delivers more proactive guidance and advice, including benchmarking and auditing environmental practice. Defence considers sharing this information within other government agencies managing similar issues would enhance environmental performance. This approach could help drive continuous improvement, minimise impacts and reduce the resources needed to address the strict regulation and compliance enforcement processes that currently exist in the Act.[24]

4.24 The committee acknowledges the Department of Defence's desire to reduce repetition with regard to seeking approval for ongoing Defence activities.

Fisheries management

4.25 The CFA and AFMA were critical of the duplication and lack of integration between the Act, the *Fisheries Management Act 1991* (FMA) and the Commonwealth Fisheries Harvest Strategy Policy. The CFA and AFMA also discussed a lack of clarity regarding the roles of DEWHA, the Department of Agriculture, Fisheries and Forestry (DAFF) and AFMA in the management of fisheries.[25]

4.26 The CFA described what they believed to be a 'double jeopardy' whereby Commonwealth fisheries must be assessed under both the EPBC Act and the FMA:

> …despite meeting the sustainability objectives of the *FMA 1991*, the fishing industry is being further assessed under the *EPBC Act*, which is effectively creating a "double jeopardy" situation.
>
> It is important for the Government to determine clearly defined legislative responsibility for management of Australian fisheries resources and currently the duplication between DEWHA, DAFF and AFMA is significant.

---

23 Office of the Secretary and Chief of the Defence Force, *Submission 67*, p. 10.

24 Office of the Secretary and Chief of the Defence Force, *Submission 67*, p. 5.

25 CFA, *Submission 57*; AFMA, *Submission 59*.

> For example, the Commonwealth fishing industry is exposed to the risk of being excluded from export markets by an unfavourable DEWHA strategic assessment, which can occur even if an industry is meeting all the requirements of the *FMA 1991*. Worse still, despite fulfilling all the requirements of the *FMA 1991*, industry is exposed to the risk of having fisheries closed through the listing of a key target or by-catch species under the provisions of the *EPBC Act*, which over-ride the *FMA 1991*.

4.27 DAFF acknowledged the intersection between the EPBC Act and the FMA:

> While Commonwealth fisheries are managed through the application of the FM Act, the management of Australia's domestic fishing activity including the management of internationally-shared and straddling fish stocks cannot be meaningfully separated from the EPBC Act. The EPBC Act, which looks at species from a biological conservation point of view, intersects with fisheries management in a number of ways, principally through Part 10 (*Strategic Assessments*), Part 13 (*Species and Communities listings*) and Part 13A (*International Movement of Wildlife Specimens*).

4.28 DAFF went on to explain that the Commonwealth Harvest Strategy Policy was intended to clarify 'the relationship between fisheries management and the EPBC Act in relation to the application of threatened species listing for fished stocks above a limit biomass reference point'.[26] However, clear guidance is not provided on threatened species listings for stocks below the limit biomass reference point and '[a]ction under both fisheries and environmental legislation may be considered when the limit reference point is exceeded'.[27]

4.29 DEWHA also provided an explanation of the Harvest Strategy Policy and remarked that:

> …it was developed jointly between the Department of Agriculture, Fisheries and Forestry and ourselves, because we recognised that there was some kind of confusion, sometimes, between how people perceived the different parts of the act. The policy really elaborated ways of thinking about fisheries and the interaction with the EPBC Act versus fisheries management. It set up ways of thinking about target catch levels and catch levels for fisheries at a point when the EPBC Act would become interested in them because of the relative overall reduction in the species…The harvest strategy is directed towards looking at the listings exercise.[28]

4.30 It was recommended to the committee that the 'double jeopardy' facing the fisheries industry be addressed through rationalisation of duplicated legislative requirements under the EPBC Act and the FMA. The CFA suggested:

---

26 DAFF, *Submission 86*, p. 5.

27 DAFF, *Submission 86*, p. 5.

28 Mr Andrew McNee, Assistant Secretary, Marine Initiatives Branch, DEWHA, *Committee Hansard*, 9 December 2008, p. 78.

> That the Government initiate a comprehensive and transparent review of the interaction of the EPBC Act and the FMA 1991 with the objective of eliminating areas of duplication in preference for a more complementary legislative framework.[29]

4.31 In addition, and similarly to the Department of Defence, the CFA believed that a more pragmatic and collaborative arrangement between different Commonwealth agencies would improve both the operation of the Act and the environmental standards it seeks to achieve:

> In addition to legislative changes, the CFA strongly recommends the establishment of a government / industry consultative committee comprising representatives from DEWHA, DAFF, AFMA and CFA to encourage and promote a more functional and collaborative administrative arrangement on environmental issues and standards.[30]

4.32 The committee notes that there appears to be ongoing concern amongst fisheries managers regarding conflict and overlap between the EPBC Act and the FMA. The issues appear complex, and the committee was not in a position to assess whether the matters raised by stakeholders represent undesirable duplication, or parallel assessment processes necessary to ensure all aspects of fisheries conservation are properly considered and addressed.

Recommendation 7

4.33 The committee recommends that the government review the interaction between the EPBC Act and the Fisheries Management Act in relation to the conservation of fish species and relevant assessment processes.

29 CFA, *Submission 57*, p. 6.

30 CFA, *Submission 57*, p. 6.

Chapter 5

Threatened species and ecological communities

Pressure on species and ecological communities

5.1 All major scientific studies of Australia's flora, fauna and ecosystems indicate that there is significant ecosystem degradation taking place across Australia, and that numerous species are in decline, with some of them facing extinction. Three species have been declared extinct since 2000:

- *Galaxias pedderensis* (Pedder Galaxias) (a fish) listed as "extinct in the wild", on 6 June 2005.
- *Nyctophilus howensis* (Lord Howe Long-eared Bat) listed as "extinct in the wild", on 4 April 2001.
- *Vanvoorstia bennettiana* (Bennett's Seaweed) listed as "extinct", on 16 October 2001.[1]

5.2 In addition, there have been no reported sightings for many years for several other species, including:

- *Cinclosoma punctatum anachoreta* (Spotted Quail – thrush (Mount Lofty Ranges)) last recorded in 1984.
- *Litoria nyakelensis* (Mountain Mistfrog) last recorded in 1990.
- *Litoria lorica* (Armoured Mistfrog) last recorded in 1991.[2]

5.3 The 2002 Australian Terrestrial Biodiversity Assessment concluded:

> The extent of landscape modification in Australia means that 2891 ecosystems and other ecological communities are now threatened. These assemblages are a priority for conservation to protect the immense species diversity associated with them and for the protection of ecological processes… The high number of threatened ecosystems identified in this assessment indicates how extensive the repair task will be unless comprehensive action is taken.[3]

---

1 DEWHA, answer to question on notice, 9 December 2008 (received 10 February 2009).

2 DEWHA, Species Profile and Threats Database, http://www.environment.gov.au/cgi-bin/sprat/public/publicthreatenedlist.pl?wanted=fauna#MAMMALS_CRITICALLY%20ENDANGERED, (accessed 10 March 2009).

3 Paul Sattler and Colin Creighton, *Australian Terrestrial Biodiversity Assessment 2002*, National Land and Water Resources Audit, 2002, chapter 4, http://www.anra.gov.au/topics/vegetation/pubs/biodiversity/bio_assess_threat.html (accessed January 2009).

5.4 It stated in respect of mammals that:

> [t]here has been a significant contraction in the geographical ranges and species composition of Australia's indigenous mammal fauna… [and that] [e]vidence suggests that the wave of mammal extinctions in Australia is continuing.[4]

5.5 Similarly, the 2006 *State of the Environment* report stated:

> Australia's most vulnerable ecosystems have been the first to suffer massive biodiversity decline but this does not mean that other systems will not follow. It is only a question of how long it will be before pressures will overwhelm the resilience of the remaining ecosystems. This issue of decline is now recognised by Australian farmers and others in the community, and it is increasingly being incorporated into the evolving natural resource management response.[5]

5.6 Noting significant limitations on available data, the *State of the Environment* report nevertheless concluded that fish species numbers have declined, as have waterbird numbers and aquatic indicator species.[6]

5.7 Prominent ecologist Professor David Lindenmayer, surveying the state of Australian biodiversity, described Australia as 'a leader in environmental degradation', with many species on an 'extinction trajectory'.[7] The committee notes that, of the issues raised in submissions it has received, concerns over the protection of endangered species and ecological communities have been most prevalent.

5.8 The committee heard of:

- concern about the effects of amendments made to the legislation in 2006;
- doubt whether the Act was effective in affording protection even when species were listed;
- questions over the effectiveness of recovery plans; and
- criticism of the use of offsets in development approvals.

---

4 Paul Sattler and Colin Creighton, *Australian Terrestrial Biodiversity Assessment 2002*, National Land and Water Resources Audit, 2002, chapter 6, http://www.anra.gov.au/topics/vegetation/pubs/biodiversity/bio_assess_mammals.html (accessed January 2009).

5 State of the Environment 2006, section 5.1, http://www.environment.gov.au/soe/2006/publications/report/biodiversity-1.html (accessed January 2009).

6 State of the Environment 2006, section 5.1, http://www.environment.gov.au/soe/2006/publications/report/biodiversity-1.html (accessed January 2009).

7 David Lindenmayer, *On Borrowed Time: Australia's Environmental Crisis*, Penguin Books & CSIRO Publishing, 2007.

How the Act works: listing threatened species and ecological communities

5.9 The Act requires the responsible minister to establish a list of threatened species divided into the following categories:

(a) Extinct;

(b) Extinct in the wild;

(c) Critically endangered;

(d) Endangered;

(e) Vulnerable;

(f) Conservation dependent.[8]

5.10 In addition, the Act also requires the establishment of a list of threatened ecological communities, which must be assigned to one of the following categories:

(a) Critically endangered;

(b) Endangered;

(c) Vulnerable.[9]

5.11 Nominations for listing may be made during each assessment period, usually an annual cycle. The process for nomination and listing normally followed during an assessment period involves a number of steps:

(a) The minister may determine conservation themes (optional).

(b) The minister invites people to make nominations for inclusion on the lists for threatened species, threatened ecological communities or key threatening processes. These nominations are given to the Scientific Committee.

(c) The Scientific Committee prepares and provides to the minister a proposed priority assessment list. The proposed priority assessment list developed by the committee must include an assessment completion time for each item.

(d) The minister finalises the list of items that are to be assessed ('finalised priority assessment list'). In finalising the priority assessment list, the minister may add or omit any item, or make any other change(s) in accordance with the regulations to the Act.

(e) The Scientific Committee invites people to provide comments about the items in the finalised list.

8 EPBC Act, s. 178.

9 EPBC Act, s. 181.

(f) The Scientific Committee assess the items in the finalised list and gives the assessments to the Minister. The Scientific Committee must assess the items in the finalised priority assessment list by the time specified in that list or by that time as extended under section 194P of the Act. In total, the Minister may grant extensions of time up to but not beyond five years.

(g) The Minister decides whether an assessed item should be included in the relevant list. The Minister must decide whether or not to include an assessed item on a list under the Act within 90 days of receiving the assessment. This period can, however, be extended indefinitely.[10]

5.12 Nominations for listing of native species, ecological communities and threatening processes can be made by the public. Nominations require supporting evidence such as information on the taxonomy, legal status and ecology of the nominated item.[11] Listing provides for:

- Identification of species and ecological communities as threatened;
- Development of conservation advice and recovery plans for listed species and ecological communities;
- Development of a register of critical habitat;
- Recognition of key threatening processes; and
- Where appropriate, reducing the impacts of these processes through threat abatement plans.[12]

5.13 A species or ecological community listed as threatened under the Act becomes a MNES.[13] In addition, listed threatened species are eligible for funding via the Threatened Species Network Community Grant Program, a collaboration between the Australian government and WWF-Australia. The Threatened Species Network Grant Program provides funding to on-ground, community-based conservation projects, including habitat restoration, feral predator control, and monitoring and surveying species populations.[14]

---

10 EPBC Act, ss 194A and 194Q.

11 DEWHA, 2008, *Threatened Species Nomination Form*, http://www.environment.gov.au/biodiversity/threatened/pubs/nominations-form-species.doc (accessed 18 December 2008).

12 DEWHA, 2008, *Listed threatened species and ecological communities*, http://www.environment.gov.au/epbc/protect/species-communities.html (accessed 5 January 2009).

13 DEWHA, 2008, *What is protected under the EPBC Act?* http://www.environment.gov.au/epbc/protect/index.html (accessed 5 January 2009).

14 WWF-Australia, 2008, *Threatened Species Network*, http://wwf.org.au/ourwork/species/tsn/ (accessed 6 January 2009).

5.14 Species or ecological communities that are not listed as threatened under the Act do not benefit from the protection mechanisms afforded by it, regardless of their conservation status.

5.15 There are significant differences between the scope of endangered species listings under Commonwealth and state legislation. For example, in the Cumberland Plain in 2002, there were 85 species listed under the NSW legislation, the *Threatened Species Conservation Act 1995*, as endangered or vulnerable. However, at that time the Commonwealth had only 35 species listed as endangered or vulnerable under the EPBC Act.[15]

Comments about the listing process

5.16 Prior to the amendments enacted by the *Environment and Heritage Legislation Amendment Act (No. 1) 2006*, section 185 of the Act required that the minister maintain the lists in 'up-to-date condition' by taking 'all reasonably practical steps to amend as necessary'.[16] It was also a requirement that nominations be considered within one year of receipt.[17] The repeal of section 185 removed the obligation on the minister to update or amend lists for threatened species or ecological communities in a timely manner.

5.17 Concerns have for some time been expressed by stakeholders about delays in the listing process, and about whether some nominations have been inappropriately rejected. These delays in the listing process were an issue before enactment of the 2006 amendments. The Wilderness Society claimed that these delays were due to inadequate resources devoted to the task and that keeping the lists up to date, as required, 'proved impossible so instead of the government finding more resources, the Act was changed to "relieve" the obligation to keep the lists up to date'.[18]

5.18 The removal of the section that had required the minister to maintain lists under the Act in up-to-date condition appears to have endorsed delays already apparent in the listing process. ANEDO described the repeal as 'a serious flaw in the Act'.[19]

---

15 Paul Sattler and Colin Creighton, *Australian Terrestrial Biodiversity Assessment 2002*, National Land and Water Resources Audit, 2002, chapter 10 case studies, http://www.anra.gov.au/topics/vegetation/pubs/biodiversity/bio_assess_cumberland.html (accessed January 2009)

16 EPBC Act, s. 185 (repealed by *Environment and Heritage Legislation Amendment Act (No. 1) 2006*).

17 Mr Peter Burnett, First Assistant Secretary, Approvals and Wildlife Division, Department of the Environment, Water, Heritage and the Arts, *Committee Hansard*, 9 December 2008, p. 64.

18 The Wilderness Society, *Submission 51*, p. 11.

19 ANEDO, *Submission 90*, p. 27.

5.19 EIANZ considered that the listing process is slow and noted that the minister has discretion whether to list a species or not, 'irrespective of whether Australia has an international obligation to conserve it'.[20] The Institute stated:

> Getting species listed is difficult and because of a lack of integrated biodiversity monitoring at the national level, the process of reconsidering the status of species is even slower.[21]

5.20 Further, EIANZ argued that the listing process is inadequate, as the Act limited its scope to species that are considered 'vulnerable' or above, noting that:

> All species are threatened to an extent and the challenge we face is not to focus [on] just those species that are heavily threatened, but to make sure those more commonly occurring do not become increasingly uncommon.[22]

5.21 There has been criticism of the lack of transparency and certainty that the Act currently creates in the nominations process. These uncertainties relate to many aspects of the process, including the timeframes for decisions; the criteria considered by the minister in determining priorities for assessment; and the lack of transparency in decision-making under this part of the Act.[23]

5.22 ANEDO was critical of the very long extensions of time for assessment that were possible under the Act, and of the wide range of factors that could affect priority assessment lists, rather than priorities for assessment being based solely on conservation status and threats.[24]

5.23 HSI contrasted their experience under federal legislation with that at the state level:

> We also note in regard to both the technological challenges and the resourcing issues, that other jurisdictions have been able to process HSI's nominations within their statutory deadlines. While HSI doesn't always agree with their decisions, processes to list threatened ecological communities and threatened species under the NSW *Threatened Species Conservation Act 1995* and the Victorian *Flora and Fauna Guarantee Act 1998*, run comparatively smoothly and efficiently.[25]

5.24 The use of conservation themes is intended to prioritise the consideration of relevant listing nominations, perhaps because their protection is deemed more urgent. However, the use of conservation themes for each annual cycle appears to be unpopular. It also appears there may have been an unintended consequence resulting

---

20 EIANZ, *Submission 14*, p. 12.

21 EIANZ, *Submission 14*, p. 12.

22 EIANZ, *Submission 14*, p. 8.

23 HSI, *Submission 58*, pp 5–6.

24 ANEDO, *Submission 90*, p. 27.

25 HSI, *Submission 58*, p. 6.

in all listing nominations outside of the conservation themes being excluded from consideration:

> In deciding upon a theme, the Minister has broad discretion which may relate to a particular group of species, a particular species or a particular region of Australia. This is not a definitive list of criteria and so in practical terms, this means that a range of considerations may come into play, not just the conservation status of the species. It is likely that the more controversial species (such as those currently commercially exploited) are unlikely to qualify thematically.[26]

5.25 IFAW held a similar view about the effect of themes,[27] while Birds Australia described it as 'inappropriate. The listing process needs to be timely, rigorous and comprehensive, and it needs to clear a large backlog of neglected taxa. The only way to do this is to resource it adequately'.[28]

5.26 The committee sought details from the department of how many nominations made it on to priority assessment lists, and how many had failed to be listed twice and thus were no longer eligible for consideration. The department advised the committee that sixty outstanding nominations for listing made prior to the 2006 amendments had been considered for inclusion in the 2007 and 2008 finalised priority assessment lists. Of these nominations, 21 were not placed on the finalised priority list for either of the two assessment periods and were therefore no longer eligible for consideration.[29]

5.27 Further, the committee was informed that since the commencement of the 2006 amendments, 101 nominations for listing (including the 60 nominations described above) had been considered and 71 of these had been placed on a finalised priority assessment list. Of the 71 included on a finalised priority list, 32 had been the subject of a decision by the minister whilst 39 are currently under assessment.[30]

5.28 The committee notes the important role members of the public and conservation groups play in making submissions to the threatened species and ecological communities lists. Further, the committee recognises the resources that some conservation groups devote to making nominations to the lists under the Act.

5.29 The amendments to the Act in 2006 and the application of a system of prioritisation appear to have had a limited impact on delays in the listing of threatened species and ecological communities. The evidence presented to the committee suggests that in some instances, the 2006 amendments and the use of priority areas have exacerbated existing problems. These delays and the need to repeatedly re-

---

26 ANEDO, *Submission 90*, p. 27.

27 IFAW, *Submission 28*, p. 3.

28 Birds Australia, *Submission 39*.

29 DEWHA, answer to question on notice, 9 December 2008 (received 10 February 2009).

30 DEWHA, answer to question on notice, 9 December 2008 (received 10 February 2009).

submit nominations falling outside of annual priority areas has caused frustration for conservation groups.

5.30 The committee acknowledges that the volume of nominations for listing received by the department appears currently to necessitate some form of prioritisation. It is otherwise difficult to choose between nominations which may be equally worthy of consideration, in a situation where it is not possible to consider them all in a timely manner. The committee is aware that the department has had recent increases in resources, some of which are being used to deal with threatened species and ecological community nominations. The department stated that it has:

- increased resources to the listing of threatened species and ecological communities
- increased resources dedicated to the development of recovery plans and recovery actions, which has included accelerating the preparation of conservation advices for listed threatened species under the Act.[31]

5.31 The committee also notes the work capacity of the Scientific Committee is identified in the legislation as a potential constraint on conducting assessment of nominations.[32] The committee did not take evidence from members of the Scientific Committee; however it would be concerned if a lack of resources to this committee was resulting in a bottleneck in the assessment process. The committee hopes that this possibility was addressed in the allocation of the increased resources received by the department generally, and the Approvals and Wildlife Division in particular, in 2007.

5.32 The committee notes that, whereas the Scientific Committee is restricted in the matters it can consider when preparing advice on a listing, the minister is not. The Scientific Committee's assessment is based on whether an item is eligible for inclusion on a list, and 'the effect that including the item in that List could have on the survival of the native species or ecological community concerned'.[33] No equivalent clause guides the minister's decision.

5.33 This appears to reduce the transparency and policy consistency of the decision process. The decision to list does not in itself have direct consequences for development proposals that will be assessed pursuant to Part 3. The Act gives the minister scope to consider matters other than just impacts on matters of national environmental significance at that later point. It is not clear why such broad, and unspecified, discretion operates at the point of a decision on whether a species or ecological community deserves listing.

5.34 The committee is concerned that the ministerial discretion and indefinite extensions of time provided for under section 194 of the Act are undermining the

31 DEWHA, *Submission 85*, p. 2.

32 EPBC Act, s. 194G.

33 EPBC Act, s. 194N(4).

credibility of the nomination and listing process. The committee believes all stakeholders benefit from greater certainty under the Act regarding how listings will occur, how long the process will take, and what information will be taken into account during the consideration of proposed listings.

Recommendation 8

5.35 The committee recommends that the process for nomination and listing of threatened species or ecological communities be amended to improve transparency, rigour and timeliness. Changes that should be considered include:

- **<u>Either</u> requiring publication of the Scientific Committee's proposed priority assessment list <u>or</u> reducing ministerial discretion to revise the priority list under section 194K; and**
- **Reducing the maximum period allowed for an assessment under section 194P(3).**

Effectiveness of listings under the Act

5.36 Clearly, ensuring the effectiveness of listing processes was a major concern for many submitters. However, perhaps paradoxically, the committee received similar numbers of submissions expressing dissatisfaction with events *after* listing had taken place.

5.37 The committee was given numerous examples by submitters of particular species or communities where they felt that recognition of conservation value under the Act had not led to improvements in environmental management, or had not prevented continuing decline. These cases included abalone fisheries,[34] Southern Brown Bandicoot (*Isoodon obesulus*),[35] Short-tailed Shearwater (*Ardenna tenuirostris*),[36] Golden Sunmoth (*Synemon plana*) and Leadbeater's Possum (*Gymnobelideus leadbeateri*),[37] Lungfish (*Neoceratodus forsteri*),[38] Baw Baw Frog (*Philoria frosti*),[39] South-eastern Red-tailed Black Cockatoo (*Calyptorynchus banksii graptogyne*),[40] Grassy Box woodland,[41] White Box woodland,[42] and the Western

34 Dr S.A. Shepherd AO, *Submission 1*.

35 Aldgate Valley Landcare Group, *Submission 4*.

36 Mr Barry Hebbard, *Submission 5*; Mrs Mavis Rowlands, *Submission 23*; Mrs Mary C Clemons, *Submission 37*.

37 Ms Ann Jelinek, *Submission 15*; Dr. Ralph Ballard, *Submission 24*; Ms Melissa Gunner, *Submission 33*.

38 Mr Dave Milligan, *Submission 20*; Ms Carolyn Robins, *Submission 40*.

39 Ms Joanne Goossens, *Submission 26*.

40 Birds Australia, *Submission 39*.

41 Central West Environment Council, *Submission 43*.

42 The Wilderness Society, *Submission 51*, p. 12.

Ringtail Possum (*Pseudocheirus occidentalis*).[43] In addition, numerous submissions made reference to species in Tasmanian forests that have been discussed in the context of the Regional Forest Agreement and the Wielangta case (to be discussed in the committee's second report), including the Swift Parrot (*Lathamus discolour*), the Tasmanian Wedge-tailed Eagle (*Aquila audax fleayi*), stag beetles and the endangered orchids *Corunastylis nuda* (Tiny Midge Orchid) and *Pterostylis atriola* (Snug Greenhood).[44]

5.38 In all these cases, the species or community nominally has some form of protection under the Act. Submitters were particularly concerned that listing of a species did not appear to consistently result in protection of its habitat from damage or from clearing. The MCA and The Wilderness Society alike voiced concerns that the Act may not always be delivering improved environmental outcomes.

5.39 The committee does not wish to debate the details of individual cases, and it recognises that some of the circumstances in any particular example may be beyond any party's control. The committee believes that there are a range of positive developments which will go some way toward addressing these concerns. These include:

- The increased resources of the Approvals and Wildlife Division, which appear to be facilitating progress both with listings of species and communities, and with raising the quality and reliability of assessments of proposed actions;
- Increased enforcement action taken by the department, also underpinned by additional resources;
- The department's decision to prepare and implement a communications plan,[45] and to make use of outplaced staff and field officers; and
- Ministerial leadership being used to raise the benchmark for developments with regard to protecting endangered species, such as in the case of Carnaby's black cockatoo.[46]

5.40 The committee also believes that several of its recommendations, if adopted, will also address this situation, particularly in relation to:

- Continuing to increase the resources of the Approvals and Wildlife Division for their activities (chapter three);
- Review of provisions governing discretion in ministerial action (this chapter);

---

43 Possum Centre Busselton, *Submission 49*; Western Australian Forest Alliance, *Submission 88*.

44 Dr Chris James, *Submission 10*; Ms Vivienne Ortega, *Submission 17*; Mr Ian Matthews, *Submission 34*.

45 Mr Peter Burnett, First Assistant Secretary, Approvals and Wildlife Division, DEWHA, *Committee Hansard*, 8 December 2008, p. 66.

46 Mr Peter Burnett, First Assistant Secretary, Approvals and Wildlife Division, DEWHA, *Committee Hansard*, 8 December 2008, p. 72.

- Carefully limiting the use of offsets in habitat conservation (this chapter); and
- Expanding the scope of judicial review of certain actions under the Act (chapter six).

Recovery plans

5.41 Under the Act, the minister may make or adopt and implement a recovery plan for a listed species of threatened fauna or flora[47] or a listed threatened ecological community.[48] Recovery plans are intended to stop the decline, and support the recovery, of listed threatened species or threatened ecological communities.

5.42 Recovery plans are binding for the Australian government and government agencies must act in accordance with a recovery plan once it is made or adopted.[49] This includes ministerial decisions under the Act itself.

5.43 The regulations to the Act require that a recovery plan describe:

to the extent practicable, with spatial information

(a) The location of species or ecological communities for which it is made; and

(b) Areas of habitat critical to the survival of the species or ecological communities; and

(c) Important populations of the species or ecological communities that are necessary for their long-term survival and recovery; and

(d) Any areas that are affected by a key threatening process.

A recovery plan should state:

(a) What must be done to stop the decline of, and support the recovery and survival of, the species or ecological community, including action:

(i) To protect important populations; and

(ii) To protect and restore habitat; and

(iii) To manage and reduce threatening processes; and

(b) To the extent possible, what management practices are necessary to avoid significant adverse impact on the species or ecological community.

5.44 The committee notes that there are currently 354 recovery plans covering 456 species and 15 ecological communities.[50] There are another 244 recovery plans currently under preparation.[51]

---

47 Other than 'conservation dependent' species.

48 DEWHA, 2008, *Recovery plans*, http://www.environment.gov.au/biodiversity/threatened/recovery.html (accessed 22 December 2008).

49 DEWHA, 2009, *Recovery plans made or adopted - Common name order*, http://www.environment.gov.au/biodiversity/threatened/recovery-list-common.html (accessed 2 February 2009).

5.45 The department advised that, following the 2006 amendments to the Act, conservation advices had been developed and used preferentially in some instances over recovery plans. This change was in recognition that recovery plans 'were not necessarily effective and efficient in terms of driving recovery action'.[52] Conservation advices are prepared by the department in consultation with the Threatened Species Scientific Committee and focus on known threats to the relevant species.[53]

5.46 An approved conservation advice has a number of legislative implications. Once a conservation advice has been approved for a threatened species or ecological community, the Act requires that the minister must have regard for the conservation advice when:

- Making a declaration that actions do not need approval under Part 9 of the Act (section 33);
- Entering into a bilateral agreement (section 53);
- Deciding whether to approve an action which will have or is likely to have a significant impact on a listed threatened species or ecological community (section 139);
- Approving an action (section 146K); and
- Issuing permits under the Act (sections 202 and 238).[54]

5.47 The department explained what they perceived to be the benefits of conservation advices over recovery plans:

> We think those are a much more useful document. They are more rapid to prepare, they target what the real risks are to the species and they get information out to people quickly.
>
> Frankly, we found the old process of doing recovery plans sclerotic. It was slow. It tended to pull together established interests, if you like. And it tended to identify research questions and open-ended things rather than really focussing on management requirements. So we have been trying to free the system up, while still focussing on identifying the risks to species

50 Department of Environment, Water, Heritage and the Arts, answer to question on notice, 9 December 2008 (received 10 February 2009).

51 Mr Mark Flanigan, Assistant Secretary, Strategic Approvals and Legislation Branch, Approvals and Wildlife Division, DEWHA, *Committee Hansard*, 9 December 2008, p. 80.

52 Mr Mark Flanigan, Assistant Secretary, Strategic Approvals and Legislation Branch, Approvals and Wildlife Division, DEWHA, *Committee Hansard*, 9 December 2008, p. 80.

53 Mr Mark Flanigan, Assistant Secretary, Strategic Approvals and Legislation Branch, Approvals and Wildlife Division, DEWHA, *Committee Hansard*, 9 December 2008, p. 80.

54 EPBC Act, ss 33, 53, 139, 146K, 202 and 238.

> and finding ways to deal with that. So we tend now not to focus on recovery plans per se. We look at the whole package.[55]

5.48 The committee also heard evidence in support of the use of conservation advice but in addition to recovery plans rather than as an alternative:

> I think it is an improvement that they do the conservation advice on listing so that, as soon as the species or community or heritage place is listed, there is advice going across to the people who do the environmental impact assessments, rather than waiting for a recovery plan, which would take three to five years or would not happen at all. So I think it is good that that conservation advice is developed at the point of listing. However, that does not take away the need to do a more detailed recovery plan, so I do not think it should be either / or. Not that all species warrant a recovery plan, but most would.[56]

5.49 Both recovery plans and conservation advices play key roles in determining steps to be taken in conserving and protecting threatened species and ecological communities. In addition, the publication of proposed recovery plans on the department's website and the opportunity for public comment is vital to ensuring public engagement and providing assurances that recovery plans are appropriate and likely to be effective.

5.50 The committee notes, however, that recovery plans for some threatened species and ecological communities are never developed, or are developed and not implemented.

5.51 It was suggested to the committee that recovery plans could be an effective means of implementing and enforcing requirements from strategic assessments. The ACF explained:

> Senator BIRMINGHAM – Are there any provisions at present for that type of very sweeping strategic assessment to be undertaken and for its findings to be enforced in some way, either at a state level or through the Commonwealth?
>
> Mr Berger – I think the species recovery plans are one possible mechanism for advancing that. The recovery planning generally has been of the form of, say, targeted land acquisitions, additional research plans, reintroduction and relocation programs. That tends to be the bread and butter of these recovery plans, but there is no reason that they could not be somewhat more ambitious in terms of containing broader guidance for private landholders in terms of what is likely to be allowable and what is not and for mobilising much greater resources than typically we have seen go into the recovery planning. So there is a tool there and, again, I think the strategic

55 Mr Mark Flanigan, Assistant Secretary, Strategic Approvals and Legislation Branch, Approvals and Wildlife Division, DEWHA, *Committee Hansard*, 9 December 2008, p. 81.

56 Ms Nicola Beynon, Senior Program Manager, Humane Society International, *Committee Hansard*, 10 December 2008, pp 19–20.

> assessments, if used robustly and with the goals of the act squarely in mind, are another possible tool that can be used.[57]

5.52 The committee believes that recovery plans play an important role in detailing steps to be taken to prevent the continued decline, and assist in the recovery, of listed threatened species and ecological communities.

The use of offsets in habitat conservation and species protection

5.53 According to the department's 2007 'Draft Policy Statement: Use of environmental offsets under the *Environment Protection and Biodiversity Conservation Act 1999*':

> The Australian Government defines environmental offsets as 'actions taken ***outside a development site*** that compensate for the impacts of that development – including direct, indirect or consequential impacts'…Environmental offsets provide compensation for those impacts which cannot be adequately reduced through avoidance and mitigation. They should be distinguished from 'mitigation', which refers to the range of actions that can be undertaken to reduce the level of impacts of a development (usually undertaken on-site).[58]

5.54 Environmental offsets fall into two categories: direct offsets and indirect offsets. Direct offsets are aimed at on-ground maintenance and improvement of habitat or landscape values. Indirect offsets cover the range of actions that improve knowledge, understanding and management resulting in improved conservation outcomes.[59]

5.55 The Australian Government's draft policy statement describes eight principles which should be applied to the use of environmental offsets:

(i) Offsets should be targeted to the matter protected under the Act that is going to be impacted.

(ii) A flexible approach should be taken to the design and use of environmental offsets in order to achieve long-term and certain outcomes which are cost-effective for proponents.

(iii) Offsets should deliver a real conservation outcome.

(iv) Offsets should be developed as a package of actions, which may include both direct and indirect offsets.

---

57 Mr Charles Berger, Director of Strategic Ideas, ACF, *Committee Hansard*, 8 December 2008, p. 13.

58 DEWHA, *Draft Policy Statement: Use of environmental offsets under the* Environment Protection and Biodiversity Conservation Act 1999, August 2007, p. 2.

59 DEWHA, *Draft Policy Statement: Use of environmental offsets under the* Environment Protection and Biodiversity Conservation Act 1999, August 2007, p. 3.

(v) Offsets should, at a minimum, be commensurate with the magnitude of the impacts of the development and ideally deliver outcomes that are 'like for like'.

(vi) Offsets should be located within the same general area as the proposed action.

(vii) Offsets should be delivered in a timely manner and be long lasting.

(viii) Offsets should be enforceable, monitored and audited.[60]

5.56 Offsets may be seen as a measure of 'last resort',[61] when no other approach to impact mitigation is feasible. In a recent paper, DEWHA Deputy Secretary Gerard Early wrote:

> Sometimes there are simply no mechanisms available to avoid impacts of developments on habitat which, although not of critical importance, may nevertheless have value for wildlife either now or in the future. The value of such habitat may not be sufficient to deny approval to the development. On such occasions, the use of offsets may be appropriate. In such cases, offsets are not sought simply on a one-for-one basis; the aim is to secure a positive environmental outcome.[62]

5.57 The committee heard a degree of disquiet amongst submitters about offsets. The committee heard evidence in favour of the use of offsets as well as concern that offsets were inadequate and / or being used inappropriately.

5.58 The Central West Environment Council discussed the approval of offsets in association with clearing of Grassy Box Woodland in the central west of NSW:

> In 2007 Moolarben Coal Project Stage 1, adjacent to Wilpinjong Coal Project received approval to clear 65 ha of mature, good condition Grassy Box Woodland. This approval was granted by a member of the EPBC Unit.
>
> These approvals were given with a condition that a 2:1 offset be purchased on private land to be transferred to the NSW Minister for the Environment and Climate Change. However, the [critically endangered ecological community] on private land is already protected under the NSW Native Vegetation Act 2004. Clearing of CEEC under the state legislation would not be approved or with much larger offsets of up to 50:1.[63]

---

60 DEWHA, *Draft Policy Statement: Use of environmental offsets under the* Environment Protection and Biodiversity Conservation Act 1999, August 2007, p. 4, http://www.environment.gov.au/epbc/publications/pubs/draft-environmental-offsets.pdf (accessed 23 January 2009).

61 See, eg, MCA, *Submission 30*.

62 Gerard Early, 'Australia's National Environmental Legislation and Human/Wildlife Interactions', *Journal of International Wildlife Law and Policy*, Vol. 11, No. 2, 2008, p. 141.

63 Central West Environment Council Inc. of NSW, *Submission 43*, p. 2.

5.59 The government has released only a draft policy statement on the use of offsets and is yet to develop a final policy.[64] However, the committee would be concerned that the approval of offsets as allegedly occurred in the example above may not have been consistent with the government's intention that 'offsets should be real'[65] and 'should not rely on securing habitat that is already protected for conservation purposes'.[66]

5.60 A claim was put to the committee that the minister 'improperly took an offset into consideration when making the decision' to approve the clearing of wetland on the Fleurieu Peninsula in South Australia.[67] Further, it was suggested to the committee that the private landholder in question had failed to comply with the offset requirement and had been given more than one extension of time to do so.[68]

5.61 The committee notes that the decision on the referral in question (2005/2060) did not involve an offset. The decision determined that the area of 2ha to be cleared contained 0.8ha of swamp which was degraded and of low biodiversity value, and that the loss of this area would not significantly impact on the listed 'Swamps of the Fleurieu Peninsula' ecological community.[69] Notwithstanding that the proposed action would not have a significant impact on the swamp ecological community, the landholder had proposed that 19.7ha of remnant vegetation, comprising the listed ecological community and open woodland, be fenced and rehabilitated.[70] The department had approved a number of extensions to complete the fencing, as the requests were made on the grounds of delays in council approval processes, legal proceedings and inclement weather.[71]

5.62 The Possum Centre Busselton succinctly summarised the concerns of a number of submitters on the use of offsets:

---

64 As at 23 January 2009. DEWHA, *Draft Policy Statement: Use of environmental offsets under the* Environment Protection and Biodiversity Conservation Act 1999, August 2007, http://www.environment.gov.au/epbc/publications/pubs/draft-environmental-offsets.pdf (accessed 23 January 2009).

65 DEWHA, *Draft Policy Statement: Use of environmental offsets under the* Environment Protection and Biodiversity Conservation Act 1999, August 2007, p. 5.

66 DEWHA, *Use of Environmental Offsets Under the Environment Protection and Biodiversity Conservation Act 1999 Discussion Paper*, August 2007, p. 5.

67 NPAC, *Submission 93*, p. 20.

68 Mr Tom Warne-Smith, Researcher, National Parks Australia Council, *Committee Hansard*, 9 December 2008, p. 34.

69 DEWHA, answer to question on notice, 9 December 2008 (received 10 February 2009).

70 DEWHA, answer to question on notice, 9 December 2008 (received 10 February 2009).

71 DEWHA, answer to question on notice, 9 December 2008 (received 10 February 2009).

> Offsets are often insufficient, not providing like for like, and in some instances the same offset is used by the proponent for several stages of the development in order to 'get away cheaply'.[72]

5.63 The committee also heard evidence from proponents regarding the use of offsets. The NFF commented on what they felt was the inconsistent application of offset conditions:

> It is not the offsets that are the concern for the NFF but the inconsistency by which they are implemented. NFF stresses that each application should be assessed on its merits but individual farmers should have some faith that there is an equal and consistent approach to how their application is assessed.[73]

5.64 The MCA recommended the development of an offsets policy under the Act. The MCA supported the use of offsets but had been unhappy about the application of offset conditions to date.[74] The MCA was not alone in questioning the scientific basis for offsets. Conservation groups were also critical of the absence of scientific evidence supporting the use of offsets, albeit for different reasons:

> An emphasis on offsetting is inconsistent with the first listed object of the EPBC Act which is "to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance". The idea that impacts on such unique matters of national environmental significance can simply be offset, is deeply concerning. In many cases it will not be possible to offset impacts on specific unique places and species…There is no standard scientific methodology for assessing quantity, quality or location of offsets, and there is little evidence of success of offsets…[75]

5.65 The evidence did not make clear the current status of any offset policy. The policy appears still to be a draft, though a departmental official did remark that he thought that 'offsets are used a bit more these days than they have been in the past… perhaps partly because there is now a properly developed policy dealing with offsets, so the rules are a bit clearer'.[76] The submission of the MCA also appeared to indicate the policy was still under preparation, and expressed concerns about the consultation process.[77]

---

72 Possum Centre Busselton Inc., *Submission 49*, p. 3.

73 National Farmers Federation, answer to question on notice, 16 January 2009, p. 4.

74 MCA, *Submission 30*, p. 13.

75 ANEDO, *Submission 90*, p. 20.

76 Mr Peter Burnett, First Assistant Secretary, Approvals and Wildlife Division, DEWHA, *Committee Hansard*, 8 December 2008, p. 83.

77 MCA, *Submission 30*.

5.66 The committee recognises that the use of offsets must only be applied as an adjunct to avoidance and mitigation. Offsets must not be used as a tool to get projects, which would otherwise be unacceptable, 'over the line'. Whilst government statements on the use of offsets are clear that they should not be used in this way, the evidence provided to the committee suggests that at least in some circumstances, offsets may not be improving the 'net effect of a proposal on the environment because of the reparation or "environmental gain" achieved through those actions'.[78]

Recommendation 9

5.67 The committee recommends that government policy regarding the use of 'offsets' for habitat conservation state that the use of offsets:

- **is a last resort;**
- **must deliver a net environmental gain; and**
- **should not be accepted as a mitigating mechanism in instances where other policies or legislation (such as state vegetation protection laws) are already protecting the habitat proposed for use as an offset.**

78 DEWHA, *Use of Environmental Offsets Under the Environment Protection and Biodiversity Conservation Act 1999 Discussion Paper*, August 2007, p. 4.

Chapter 6

Engaging stakeholders

6.1 Stakeholders in the community – including project proponents, landholders, community associations or environmental non-government organisations – are vital players in the operation of the legislation. Maintaining good relationships and effective communication is an important part of the department's task in ensuring the Act operates well – a task to which they have recently committed further resources.[1]

6.2 The committee heard evidence on a range of issues regarding the roles of stakeholders in the operation of the Act, particularly in relation to:

- Whether proponents are referring all actions that should be being assessed under the Act;
- Whether proponents should be able to withdraw and re-submit a proposal, and under what conditions;
- The effects of assessment time frames under the Act on ensuring effective public participation;
- The costs to community groups of litigation; and
- The need to ensure parties affected by decisions under the Act can access independent reviews of decisions.

Are all projects that need to be referred getting referred?

6.3 Proponents intending to undertake an action which will have or is likely to have a significant impact on a matter of national environmental significance are required to seek approval for that action under the Act. This includes activities undertaken by landholders on privately owned land.

6.4 The committee heard that some proponents remain unclear about when and for which actions they must seek approval under the Act. This lack of understanding may have resulted in some actions that require approval not being referred and vice versa. Land & Environment Planning stated:

> Development proponents common lack an understanding of the responsibilities under the Act. It appears that in many cases there are actions which would have a significant effect on matters of national

1 Mr Peter Burnett, First Assistant Secretary, Approvals and Wildlife Division, Department of Environment, Water, Heritage and the Arts, *Committee Hansard*, 9 December 2008, p. 66.

> environmental significance which are not referred to the Commonwealth, particularly in relation to land development and smaller projects.[2]

6.5 The agricultural sector was specifically cited as one where there continues to be significant confusion about the application of the Act and the need for referral:

> As the Productivity Commission has stated in relation to the agricultural sector, "In terms of preventing activities, or of requiring activities to undergo the assessment and approval process, the EPBC Act to date has had little direct impact on the agricultural sector." [Productivity Commission, *Impacts of Native Vegetation and Biodiversity Regulations*, Report No 29 (2004)]. The referral figures support this view in 06-07 the department received 3 referrals for the agriculture and forestry category, all of which were found to be not controlled actions.[3]

6.6 Routine activities undertaken on farms may require referral under the Act, depending on their impact on matters of national environmental significance. However, sections 43A and 43B of the Act exempt certain actions from requiring assessment and approval. Section 43A exempts actions with prior authorisation under a law of the Australian Government, a state or self-governing territory (granted before 16 July 2000) from assessment and approval under the Act.[4] For example, 'an activity that could be exempted under the prior authorisation provision is cattle grazing in accordance with a crown land licence issued under the Victorian *Land Act 1958*'.[5] Section 43B provides for 'actions that are lawful continuations of use of land' to be exempt from assessment and approval, so long as the action commenced prior to 16 July 2000, the land use is lawful and the action has continued in the same location without enlargement, expansion or intensification.[6] An example of an action exempt under section 43B is 'continuing cropping and crop rotation'.[7]

6.7 Confusion regarding these provisions appears to have arisen specifically around the enlargement, expansion or intensification of farming practices. The NFF stated:

---

2 Land & Environment Planning, *Submission* 18.

3 NPAC, *Submission* 93, p. 24.

4 EPBC Act, s. 43A; DEWHA, 2008, *Prior authorisation and continuing use exemptions - Sections 43A and 43B*, http://www.environment.gov.au/epbc/publications/exemptions.html (accessed 25 February 2009).

5 EPBC Act, s. 43B; DEWHA, 2008, *Prior authorisation and continuing use exemptions - Sections 43A and 43B*, http://www.environment.gov.au/epbc/publications/exemptions.html (accessed 25 February 2009).

6 DEWHA, 2008, *Prior authorisation and continuing use exemptions - Sections 43A and 43B*, http://www.environment.gov.au/epbc/publications/exemptions.html (accessed 25 February 2009).

7 DEWHA, 2008, *Prior authorisation and continuing use exemptions - Sections 43A and 43B*, http://www.environment.gov.au/epbc/publications/exemptions.html (accessed 25 February 2009).

> As NFF understands it, the continuing use provisions state that when a farmer continues to use his land as it has been historically managed then there is no requirement for an assessment process. However, this provision does not cover intensification or expansion of the historic farming practice, e.g. increasing the number of livestock being grazed or expansion of the area traditionally cropped.[8]

6.8 The NFF went on to explain:

> Where a farmer has significant biodiversity on his or her place and those species, for example, are listed under the act or the area is within an ecological community that is threatened under the act, the farmer has to consider how increasing cropping or increasing stocking rates of livestock may impact on those species and needs to seek approval under the act from the department. It is that simple. First they have to acknowledge that the act is in existence and the understanding within our farming community is quite low, so there is a communication issue. They also have to understand what threatened species and what ecological communities of value are on their place. Where there are none of value, they do not need to seek approval. But where their property is an area that, for example, has threatened species then they need to seek approval under the act. It is not clear to farmers where those continuous use provisions kick in and where they do not.[9]

6.9 The committee is aware that ensuring effective regulation of the impacts of agriculture and land clearing under the Act is a long-standing issue for both the department and stakeholders. The ANAO in its 2002-03 audit, examining this issue, remarked:

> The most surprising figure is the low level of referrals from agriculture and forestry. Given the impact of land clearing on listed threatened species it could be expected that there would be a higher number of referrals in this area. The exemptions relating to existing activities prior to the Act's introduction and where Regional Forest Agreements are in place might explain this to some extent.[10]

6.10 In recognition of the impact of the Act on farmers in particular, the department has an out-placed Resource Liaison Officer based with the NFF to provide advice to the agricultural sector on the application of the Act.[11] This arrangement was

---

8 NFF, *Submission 87*, p. 12.

9 Ms Deborah Kerr, Natural Resource Manager, National Farmers Federation, *Committee Hansard*, 9 December 2008,

10 ANAO, *Referrals, Assessment and Approvals under the Environment Protection and Biodiversity Conservation Act 1999*, Performance Audit No. 38 of 2002–03, p. 82.

11 NFF, *Submission 87*, p. 6.

in place at the time of the 2002–03 ANAO audit,[12] and is continuing. The NFF commented on the need for and usefulness of this support:

> NFF is grateful to DEWHA for the provision of this service for Australian farmers. With the recent cut back in funding for on-ground regional based NRM facilitators (Landcare in particular), the role of the out posted Officer will be increasingly important to ensure that farmers are aware of their responsibilities under the EPBC Act.[13]

6.11 ANAO, however, in 2006–07 noted that referrals from the agricultural sector have not increased, despite land clearing (including illegal clearing) being known to be a significant environmental problem:

> Since 2002–03, referrals from the rural sector have continued to be low. Referrals from the agriculture sector were 2.8 per cent of total referrals, or 46 out of 1 630 referrals to June 2006.[14]

6.12 The committee also notes that the ANAO was critical of the department's capacity to address the substantive underlying problems with referrals in relation to agriculture and land clearing:

> At the national level, the department has provided an out-posted officer on secondment to the National Farmers Federation since 2002–03. The out-posted officer provides a range of services such as advice on aspects of the Act, assistance with referrals, guides facts sheets, information and training to relevant stakeholders. This is an important initiative to promote the Act to potential proponents. Some 92 presentations (involving 1,380 farmers from 920 farm businesses) have been conducted since 2002. This represents contact with approximately one per cent of the target audience. Despite the considerable efforts being made, the current resource allocation is insufficient to fully engage all relevant rural and regional stakeholders throughout Australia – especially in the absence of the EPBC Unit which previously undertook much of the work in this area.[15]

6.13 It was suggested to the committee that the out-placement of departmental officers would be useful to other sectors. The MCA recommended that a seconded officer be provided, based on the NFF model, 'to those industry's [sic] that intersect significantly with the Act's implementation, to facilitate better advice on whether a referral is really required and where impact assessment efforts should be targeted'.[16]

---

12 ANAO, *Referrals, Assessment and Approvals under the Environment Protection and Biodiversity Conservation Act 1999*, Performance Audit No. 38 of 2002–03, p. 82 (footnote).

13 NFF, *Submission 87*, p. 6.

14 ANAO, *The Conservation and Protection of National Threatened Species and Ecological Communities*, Performance Audit No. 31 of 2006–07, p. 132.

15 ANAO, *The Conservation and Protection of National Threatened Species and Ecological Communities*, Performance Audit No. 31 of 2006–07, p. 134.

16 MCA, *Submission 30*, p. 15.

6.14 The department advised the committee that field officers are also located in Perth and Hobart.[17] These field officers have been placed on-ground to assist with specific matters – in Perth, the field officer assists with applications associated with Perth's urban growth; in Hobart, the field officer assists with work associated with the proposed Gunns pulp mill development.[18]

6.15 The committee recognises the assistance provided by the department out-placed officer to the agricultural sector, and the value the sector places on this service. The committee also notes the placement of field officers in Perth and Hobart to provide assistance with identified areas of increased workload under the Act. The committee accepts the concerns expressed through both ANAO audits regarding the adequacy of referrals in the area of agriculture and land clearing. The committee hopes that the increase in resources already received by the department; the department's plan to implement a communications strategy; and the additional funding recommended in chapter three of this report, will collectively ensure improvements in this area.

Withdrawal and re-submission of proposals

6.16 As it currently stands, the Act does not prevent a proponent who has withdrawn a referral from subsequently re-submitting that same proposal:

> (1) Subject to subsection (2), a person who:
>
> (a) has referred a proposal to take an action to the Minister under section 68; or
>
> (b) is named as the person proposing to take an action in a proposal that is referred to the Minister under section 69 or 71;
>
> may withdraw the referral, by written notice to the Minister.
>
> (2) The referral cannot be withdrawn after the Minister has decided, under Part 9, whether or not to approve the taking of the action.
>
> (3) If the Minister receives a notice withdrawing the referral, the Minister must publish a notice of the withdrawal of the referral in accordance with the regulations.
>
> (4) If the referral is withdrawn, the provisions of this Chapter that would, apart from this subsection, have applied to the action cease to apply to the action.[19]

6.17 Mr Michael Stokes described the withdrawal and subsequent re-submission of the pulp mill proposal by Gunns and raised the question of whether 'a proponent who has withdrawn from the selected assessment [should] have the right to withdraw the

17 Mr Peter Burnett, First Assistant Secretary, Approvals and Wildlife Division,DEWHA, *Committee Hansard*, 9 December 2008, p. 66.

18 Mr Peter Burnett, First Assistant Secretary, Approvals and Wildlife Division, DEWHA, *Committee Hansard*, 9 December 2008, pp. 66–67.

19 EPBC Act, s. 170C.

referral and restart the process, effectively requiring the minister to reconsider the original choice of assessment process'.[20] Mr Stokes stated:

> Common sense suggests that if the Act permits such strategic withdrawals, the appropriate decision for the minister would be to require that the proposal be re-submitted to the original assessment, which would then continue from where it left off. But it is not clear that such a decision would be valid. The Act is silent on the issue of how the re-referral of a withdrawn referral is to be dealt with.[21]

6.18 In light of the Full Court's decision in the *Wilderness Society Case* that there were no restrictions to prevent Gunns from re-submitting the proposed pulp mill after having withdrawn the same referral, Mr Stokes suggested that proponents should not have an unlimited right to withdraw and re-refer a proposal. It was recommended to the committee that:

> …it is likely that the EPBCA intended that the proponent should not be able to withdraw and re-refer a proposal for no other reason than to avoid the limits on the minister's powers to reconsider an earlier decision that the proposal was a controlled action or that it was to be assessed in one way rather than another…Therefore, s 170C, which permits a proponent of a referral of an action for assessment and approval to withdraw the referral, should make it clear that a proponent who withdraws a referral does not have an unqualified right to re-refer the proposal. There are a number of ways in which this could be done. One is to impose a time limit, for example of two years in which a proponent who withdrew a referral would not be able to re-refer substantially the same proposal. Such time limits are common in development control legislation. Another would be to prevent the Minister from considering a re-referral of a withdrawn proposal where a major reason for the withdrawal and re-referral was to force the Minister to reconsider whether the proposal was a controlled action or the proposed method of assessment.[22]

6.19 The committee notes that the efficacy of restrictions such as those suggested by Mr Stokes would rely in part on the definition of 'substantially the same'. In other jurisdictions this has been determined in the courts:

> I took those ideas out of state planning legislation, where quite often you cannot resubmit substantially the same proposal. You are quite right, there has been quite a lot of litigation about when a proposal is 'substantially the same'. I do not know that we can define 'substantially'. The important thing from the EPBC Act is that what is being proposed is fairly similar, and the impacts are likely to be similar – nothing has really changed with respect to

20 Mr Michael Stokes, *Submission 54*, p. 6.

21 Mr Michael Stokes, *Submission 54*, p. 6.

22 Mr Michael Stokes, *Submission 54*, p. 7.

> those impacts on the environment, because that is what we are concerned about here.[23]

6.20 Whilst acknowledging that the extent to which proposals are determined to be 'substantially the same' may in part be determined by the courts, the committee believes that limiting proponents' ability to withdraw and re-refer the same proposal warrants consideration. Appropriate limitations on a proponent's right to withdraw and re-refer a proposal would prevent the proponent from seeking a strategic advantage whereby their proposal can avoid rigorous scrutiny under the Act.

Public participation: assessment timeframes; providing information

6.21 The Act provides for interested members of the public to provide comment on matters such as referrals, assessments, nominations for listing, recovery plans and threat abatement plans. Typically, a notification and relevant documents are made available via the DEWHA website. The period for public comment is usually 10 or 30 business days.[24]

6.22 The committee heard from numerous submitters that the current timeframes provided for public comment prohibit meaningful public engagement and that extension of these periods would be appropriate:

> Experience shows that the lack of time available for public comment on referrals has hindered effective community engagement in the administrative processes of the EPBC Act. It is suggested that 3 - 4 weeks for comment is more reasonable than the present arrangement.[25]

6.23 The ACF commented:

> Minimum public consultation periods mandated by the EPBC Act can often be too short to enable meaningful public engagement in EIA processes conducted under the EPBC Act. This is particularly the case where the action under assessment is large-scale and impacts upon communities that are socially marginalised and / or dispersed over large geographical areas…ACF considers that statutory minimum time frames mandated for key steps in EIA processes conducted under the EPBC Act should be extended to enable meaningful public participation in these processes. In ACF's view, a legislatively mandated minimum period of 90 days for more complex processes is required, with the ability for longer periods to be prescribed where necessary.[26]

---

23 Mr Michael Stokes, Senior Lecturer, Law School, University of Tasmania, *Committee Hansard*, 18 February 2009, p. 5.

24 For example, see EPBC Act, ss 74(3) and 194M(3).

25 Land & Environment Planning, *Submission 18*.

26 ACF, *Submission 52*, p. 35.

6.24 Submitters were particularly critical of the 10 days provided for public comment on referrals, recommending that the time frame be extended:

> The process of notification of referrals and the 10 day turn around for response is inadequate for public participation in commenting on the impacts of projects submitted for referral. This period needs to be extended to 28 days.[27]

6.25 Bird Observation and Conservation Australia (BOCA) made a similar request. As well as favouring a longer comment period, BOCA also noted that it can take time for an organisation simply to establish whether a referral is of interest to them: 'Matters listed on the DEWHA website provide little clue as to the major concerns or issues that have triggered the referral'.[28] BOCA was also critical of the effects of the time frame on the reliability of available information:

> In many instances BOCA must rely on local knowledge and records to support or refute the claims of proponents and their representatives. The collation and analysis of relevant information (both published and local) is time consuming, often requiring much longer than the relevant 10 day period for adequate analysis and submission preparation.[29]

6.26 Submitters suggested various extended periods for public comment. These ranged from approximately 28 through to 90 days 'for more complex processes'.[30]

6.27 There were other complaints about documentation of the assessment process. When a decision is made that the manner of assessment will be by accredited assessment process, it is not always clear from the published notice of decision what that assessment process actually involves. NPAC commented:

> There is no requirement to publish the details of the assessment process. The decision notification documents for referrals 2008/3948, 2007/3809 and 2008/3960 do not state what the accredited assessment process is. The public is left with no idea as to how these referrals are to be assessed.[31]

6.28 The committee notes that section 91 of the Act does appear to require details to be published; it states in part:

> If the Minister decided that the relevant impacts of the action are to be assessed by an accredited assessment process, the written notice and the published notice must specify the process.[32]

---

27 Central West Environment Council, *Submission 43*.

28 BOCA, *Submission 72*.

29 BOCA, *Submission 72*.

30 See Land & Environment Planning, *Submission 18* and Australian Conservation Foundation, *Submission 52*, p. 35.

31 NPAC, *Submission 93*, p. 13.

32 EPBC Act, s. 91(2).

6.29 The committee examined the three examples and agreed that there did appear to be limited information accessible regarding the assessment approach through the department's online database.

6.30 It remains unclear to the committee to what extent the department is able to take into consideration information provided to it by members of the public. Public comment both engages stakeholders in EPBC processes and provides an opportunity for the department to be presented with information, relevant to a referral or other public notice, of which it may have been unaware. For example, the committee notes that the department may be unfamiliar with a specific location(s) and public comment provides a mechanism by which potentially valuable 'local knowledge' can be obtained.

6.31 The ANAO noted examples where information provided to the department by members of the public had been significant in detecting and addressing possible impacts on matters of national environmental significance.[33] In light of earlier discussion, the committee believes it is significant that both cases involved habitat destruction.

6.32 Public input may also be important in identifying incorrect information that might be provided by proponents. The committee notes that section 489 of the Act makes it an offence to provide false or misleading information in order to obtain approval or a permit under the Act.[34]

6.33 The Act thus places responsibility on the proponent to provide accurate information. However, where this is contested by comments provided by a member of the public (an individual or organisation), and is deemed to be neither frivolous nor vexatious, this should be a source for concern. The committee understands there is a role for the department to investigate the accuracy of information provided to it where there is discrepancy between that provided by the proponent and that received during public comment. Given the limited resources with which the department operates, the committee was unsure of the extent to which this takes place.

The costs of litigation

6.34 Public interest litigation represents a means by which third parties, usually conservation groups or other non-government organisations, can bring alleged breaches of the Act before the courts. Public interest litigation is considered by some experts to play an important role as 'surrogate regulation' in protecting the environment.[35]

---

33 ANAO, *Referrals, Assessment and Approvals under the Environment Protection and Biodiversity Conservation Act 1999*, Performance Audit No. 38 of 2002–03, pp 83–84.

34 EPBC Act, s. 489.

35 See Dr Chris McGrath, *Submission 38*, p. 2.

6.35 The committee heard evidence that the costs associated with litigation, most notably the threat of adverse costs orders, orders for security for costs and undertakings for damages, are a prohibitive barrier to those wishing to challenge or seeking to enforce decisions made under the Act:

> Under current rules, costs generally "follow the event" i.e. at the conclusion of the court proceedings, an award can be made that the unsuccessful party bear both its own legal costs plus the costs of the other parties to the litigation. Furthermore, a party to litigation may apply to the court, and be granted, an order requiring the application to provide security for that party's costs or (in the case of an application of an interlocutory injunction) an undertaking for damages.
>
> The threat of these orders operates as a powerful disincentive to individuals and organisations wishing to challenge decisions made under the EPBC Act or apply for an injunction to enforce it. Individuals or community organisations face financially ruinous orders for costs in the event that they lose expensive proceedings conducted in the Federal Court of Australia.[36]

6.36 Lawyers for Forests went further, stating:

> The right to challenge decisions made under the Act is being significantly undermined by matters relating to costs, for example the threat of security for costs against applicants and costs being ordered on an unsuccessful application.[37]

6.37 NPAC was unhappy about the apparent inconsistency in determinations awarding costs, citing a number of cases brought before the Federal Court:

> Theses cases illustrate that there is no clear rule about when cost will follow or the quantum of those costs. Yet all the judgements recognise that these cases are brought in the public interest on issues that a significant proportion of the community supports, have an important role in defining the application of the Act and merited judicial consideration. Reform of the EPBC Act is needed to address the costs issue…[38]

6.38 Numerous submitters recommended changes to the Act to limit the extent to which applicants are exposed to costs associated with litigation. ANEDO's recommendations were representative of these:

- The insertion of a provision into the Act that allows the court to consider granting an order that each party to a proceeding bear their own costs.
- The insertion of a provision into the Act that allows the court to consider granting a protective costs order to a party to the proceeding (or include public interest costs orders in the *Federal Court Rules*).

---

36 ACF, *Submission 52*, p. 33.

37 Lawyers for Forests, *Submission 68*, p. 3.

38 NPAC, *Submission 93*, pp 34–35.

- The insertion of a provision into the Act allowing public interest parties to apply for a maximum costs order.
- The insertion of a provision into the Act that prevents a party from making an application for security costs against a public interest applicant.
- Reinstate the repealed section 478 into the Act in its original form.[39]

6.39 The 2006 amendments to the Act repealed section 478 'No undertakings as to damages'. Section 478 provided:

> The Federal Court is not to require an applicant for an injunction to give an undertaking as to damages as a condition of granting an interim injunction.[40]

6.40 The repeal of section 478 has exposed applicants to the possibility of having to undertake to pay costs for potential damages as a requirement of the injunction sought being granted.

6.41 The committee heard that amending the Act to protect applicants from the costs associated with litigation was unlikely to open the 'floodgate' on environmental litigation:

> There is no evidence of that vexatious nature of proceedings, and there is no evidence that, if you open up court systems, it is the floodgates opening, and people will start running through them. We have had open standing in New South Wales since 1979, nearly 30 years, and there have been only a handful of matters brought by third parties – by 'third parties' I mean any person who does not have a direct material or financial interest – because one simply does not go to court lightly. We are in the business of going to court, and we do not go to court lightly.[41]

6.42 Dr Chris McGrath agreed with this position:

> I fully support a costs provision being there in appropriate cases where a respondent has incurred costs because some mad person has run a case, but that is rare. If we want third parties involved – and, as I have argued in my article, I think there is a really important role for third parties in enforcing the act – we really need to support them and indicate to the Federal Court that costs should not be awarded against them and that if there is a valid case and if it is well run they should be allowed to not risk bankruptcy.[42]

---

39 ANEDO, *Submission 90*, p. 16.

40 EPBC Act, s. 478 (repealed by *Environment and Heritage Legislation Amendment Act (No. 1) 2006*).

41 Mr Jeff Smith, Director, Australian Network of Environmental Defenders' Offices, *Committee Hansard*, 10 December 2008, p. 27.

42 Dr Chris McGrath, *Committee Hansard*, 10 December 2008, p. 50.

6.43 Evidence provided by the department certainly suggests that there is little litigation initiated under the Act – either by third parties, proponents of actions, or permit applicants. In the approximately eight years since the Act commenced, there have been just eight applications to courts for injunctions, 21 applications for judicial review of decisions, and 12 applications for merits reviews of decisions.[43] When it is considered that this is Australia's main national environmental legislation, containing 86 criminal and 17 civil penalty provisions[44] as well as third party standing provisions, this appears to be an extremely low level of litigation.

6.44 In addition to reinstating section 478 and inserting other provisions in the Act to protect applicants from the costs of litigation, some submitters recommended to the committee that legal aid be established to assist public interest litigants in running their cases.

Administrative review of decisions

6.45 According the Commonwealth Administrative Review Council (ARC),[45] 'the community is entitled to expect that public administrators will act lawfully, rationally, openly and efficiently in their dealings with the community'.[46] Indeed, 'public acceptance of Government and the roles of officials depend upon trust and confidence founded upon the administration being held accountable for its actions'.[47]

6.46 In basic terms, 'administrative review' refers to processes by which a party whose interests are affected by a government administrative decision can challenge that decision (or the failure to make a decision) via internal review mechanisms or in a court or tribunal. According to the ARC,

> Expressed in its simplest form, administrative review has a dual purpose:
>
> - to improve the quality, efficiency and effectiveness of government decision-making generally; and
> - to enable people to test the legality and the merits of decisions that affect them.[48]

---

43 DEWHA, *Submission 85*, pp 78–79.

44 At the time of the 2006–07 Audit: ANAO, *The Conservation and Protection of National Threatened Species and Ecological Communities*, Performance Audit No. 31 of 2006–07, p. 142.

45 The Commonwealth Administrative Review Council is a statutory body established under the *Administrative Appeals Tribunal Act 1975*, and is tasked with monitoring the system of administrative review and to provide the government with recommendations for reform.

46 ARC, *The Contracting Out of Government Services*, Issues Paper, 1997.

47 ARC, *The Contracting Out of Government Services*, Report No 42, 1998, Chapter 2, p. 5.

48 ARC, 'Overview of the Commonwealth System of Administrative Review', http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Overview_Overview_of_the_Commonwealth_System_of_Admin_Review (accessed 24 February 2009), paragraph 1.

6.47 Key elements of the Commonwealth administrative review system designed to safeguard the rights and interests of people and corporations in their dealings with government agencies include:

- Judicial review under the *Administrative Decisions (Judicial Review) Act 1977* ('the ADJR Act') of the lawfulness of most statutory decisions;
- Merits review of statutory decisions by independent tribunals such as the Administrative Appeals Tribunal (AAT), or internal merits view by the agency responsible for the decision;
- Investigation by the Ombudsman of complaints of maladministration; and
- Access to information via the *Freedom of Information Act 1982*, and the regulation of the use the use and storage of information about individuals through the *Privacy Act 1988* and *Archives Act 1983*.[49]

6.48 Stakeholders provided the committee with a number of views in relation to the current system of administrative review of decisions under the EPBC Act, particularly judicial and merits review provisions. Some of the issues raised are discussed below.

Judicial Review and the EPBC Act

6.49 Along with most other Commonwealth legislation, the EPBC Act is subject to judicial review provisions. Thus, an "interested person" may apply to the Federal Court for judicial review of an administrative decision made under the Act. As the ARC notes, the scope of judicial review is limited to whether or not a decision is correct in law. Thus, it does not involve re-visiting the merits of a case. Rather, the purpose of judicial review is to ensure that the decision maker acted lawfully by not exceeding their authority and followed the correct legal procedures (including considering all relevant considerations).

6.50 Where a decision is found to have been affected by legal error, the power of the court is generally limited to setting the decision aside and referring the matter back to the decision maker for reconsideration according to the law. The ADJR Act sets out the procedure by which a 'person aggrieved by a decision', or the imposing of a condition or requirement, may apply to the Federal Court for an order for review, the grounds for a review, the relief that the court can provide, and the procedure by which a person can obtain a written statement of reasons for a decision prior to commencing action.

6.51 Section 487 of the EPBC Act extends the meaning of 'persons aggrieved' under the ADJR Act to include persons or organisations which are engaged in activities in Australia for protection, conservation or research into the environment during the previous two years. In other words, the EPBC Act extends the right to seek

49 ARC website, http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Overview (accessed on 20 February 2009).

judicial review (also known as *standing*) to include third parties, including some community organisations.

6.52 The department stated that 'since the commencement of the EPBC Act there have been 21 applications for judicial review of decisions made under the EPBC Act (not including cases on appeal)… in the majority of those cases, the decision making process employed under the EPBC Act has been upheld'.[50] While judicial review has the potential to play a more significant role environmental law, its cost may account for the lack of public interest litigation.

6.53 In 2007–08, ten court actions were commenced seeking judicial review of decisions made by the Minister under the Act.[51] At least two of these court actions led to decisions being set aside. In the case of *Phosphate Resources Ltd v Minister for the Environment, Heritage, Water and the Arts (no. 2)* [2008] (FCA 1521), the decision by the then Minister, the Hon Malcolm Turnbull MP, to refuse approval for the expansion of phosphate mining operations on Christmas Island was set aside due to two errors contained in the departmental briefing provided prior to the Minister's decision (in particular, the briefing did not sufficiently call the Minister's attention to the mandatory requirement to consider the proponent's Environmental Impact Statement).[52]

6.54 In the case of *Lansen v Minister for Environment and Heritage* [2008] (FCAFC 189), the decision of the then Minister, the Hon Ian Campbell, to approve the change from underground to pit mining at McArthur River in the Northern Territory (requiring the diversion of the river) was set aside by the Federal Court. The reason for the decision was the perceived failure to consider any conditions imposed by the Northern Territory Government when deciding to impose conditions on approval for the action.[53]

6.55 It should be emphasised that, because these are examples of judicial review, the decisions were set aside on legal grounds, and made no judgement as to whether the decision was the 'preferable' one. As one analysis of the Phosphate Resources case put it, 'any "replacement" decision on the expansion project may turn out to be no

---

50 DEWHA, *Submission 85*, p. 79.

51 DEWHA, *Annual Report 2007-2008*, Vol. 2, pp. 67–69.

52 Buchanan J, Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2) [2008] FCA 1521, http://www.lexisnexis.com/au/legal/search/runRemoteLink.do?service=citation&langcountry=AU&risb=21_T5862629342&A=0.7143174628039017&linkInfo=F%23AU%23FCA%23year%252008%25page%251521%25sel1%252008%25&bct=A (accessed 26 February 2009).

53 Moore, Tamberlin and Lander JJ, Lansen v Minister for the Environment and Heritage [2008], FCAFC 189, http://www.lexisnexis.com/au/legal/auth/checkbrowser.do?ipcounter=1&cookieState=0&rand=0.43577769203106753&bhcp=1 (accessed 26 February 2009).

different from the original April 2007 decision'.[54] In this light, it is worth noting that the current Minister for the Environment, Heritage and the Arts, Hon Peter Garrett AM MP, has re-approved the proposed action at McArthur River on 20 February 2009, albeit with additional conditions.[55]

6.56 One potential avenue for judicial review is to consider the 'reasonableness' of administrative decisions. Mr Andrew Walker noted:

> The Minister's decision is not really reviewable, except on administrative law grounds, including the main ground, that the decision was unreasonable. The test for ascertaining whether this is the case is the so-called Wednesbury unreasonableness test. Under the Wednesbury unreasonableness test, an applicant for review must establish that, in summary, no reasonable Minister could make such a decision in the circumstances. That is pretty hard to establish, given the Minister's discretionary powers under the EPBC Act.[56]

6.57 However, this ground for appeal would have to be justified on the basis of the particularities of the case. Even if a court held that the decision was 'unreasonable', it does not necessarily follow that remitting the case to the decision maker for re-consideration, would yield a 'superior' result. Given the difficulties indicated by Mr Walker with this approach, several stakeholders have claimed there is a need for specific merits review procedures to be adopted. This possibility is discussed further in the section below.

Merits review of decisions

6.58 According to the ARC, 'the purpose of a merits review action is to decide whether the decision which is being challenged was the 'correct and preferable' decision. If not, a new decision can ordinarily be substituted'.[57] Merits review is generally undertaken by administrative tribunals, the principal of which is the AAT Unlike judicial review, merits review rights must be specifically assigned by legislation (usually by the legislation under which the decision is made).

---

54 Briggs, John, 'Federal Court overturns Minister's decisions to refuse approval for expansion of mining operations on Christmas Island,' 1 December 2008, http://www.blakedawson.com/Templates/Publications/x_article_content_page.aspx?id=53701, (accessed 24 February 2009).

55 The Hon Peter Garrett AM MP, Minister for the Environment, Heritage and the Arts, 'McArthur River Mine Decision Remade with Extra Conditions', Press Release PG/216, 20 February 2009.

56 Andrew Walker, *The EPBC Act: An Overview*, Biodiversity Summit, September 2006, http://www.biodiversitysummit.org.au/walker.html (accessed 19 February 2009).

57 Administrative Review Council 'Overview of the Commonwealth System of Administrative Review', http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Overview_Overview_of_the_Commonwealth_System_of_Admin_Review (accessed 20 February 2009).

6.59 The Act allows for merits review by the AAT in certain specific instances, including of decisions relating to:

- Permits for activities affecting listed threatened species or ecological communities, listed migratory species, listed marine species and citations under Part 13;
- Permits under Part 13A; and
- Advice on whether an action would contravene a conservation order under Part 17.[58]

6.60 In addition, the Act provides stakeholders with mechanisms for internal review of some decisions. For example, section 78 of the Act allows a Minister to revoke and substitute decisions relating to approvals of controlled actions on numerous grounds, including the availability of new information or changed circumstances.

6.61 The department noted in its submission that there had been 12 applications for merits review of decisions under the Act.[59] The AAT website lists 11 cases since 1 January 2006, dealing with 7 separate decisions made under the Act. All cases listed since 2006 relate to decisions made under Part 13A of the Act, including appeals against decisions to approve wildlife trade management plans or operations (under sections 303FO or 303FN), to withhold 'exceptional circumstances' permits for export of living Australian wildlife specimens (under section 303GB) or to grant permits for import of species from overseas (under section 303CG).[60] All except two of the cases since January 2006 were brought by third parties (environmental NGOs).

6.62 Some of these cases involved decisions made by the Minister personally (e.g. the decision of the AAT to vary permit conditions for the import of live elephants from Thailand for Australian zoos in December 2005). As a result of amendments to the Act in 2006, AAT review of decisions made by the Minister personally was removed. The power is now confined to review of decisions made by a delegate of the minister (meaning a senior official in the Department of Environment, Water, Heritage and the Arts). This removal was criticised by NPAC, which argued:

> While decisions of the Delegate of the Minister remain reviewable, it is reasonable that the Minister's decision (as he/she is exercising discretion) can be tested on appeal to the AAT. Improving public rights to review leads to better public participation and the NPAC strongly believes that any limitations on that review should be removed.[61]

---

58 DEWHA, *Submission 85*, p. 79.

59 DEWHA, *Submission 85*, p. 79.

60 Administrative Appeals Tribunal decisions can be found at http://www.austlii.edu.au/au/cases/cth/aat/.

61 NPAC, *Submission 93*, p. 30.

6.63 At the time the amendments were being considered, the then Minister justified the removal of merits review of decisions made personally by the Minister on the grounds that 'where decisions are sufficiently important to be taken by the Minister as an elected representative, those judgements should not be overturned by an unelected tribunal such as the AAT'.[62] Despite this explanation, the Senate Scrutiny of Bills committee expressed concern, remarking that it 'finds the explanation that such important and complex decisions "should not be able to be overturned by an unelected tribunal such as the AAT" obscure'.[63]

6.64 In 1999, the ARC released a report outlining principles that should determine what decisions should be subject to merits review.[64] That report stated:

> As a matter of principle, the Council believes that an administrative decision that will, or is likely to, affect the interests of a person should be subject to merits review. That view is limited only by the small category of decisions that are, by their nature, unsuitable for merits review, and by particular factors that may justify excluding the merits review of a decision that otherwise meets the Council's test.
>
> The Council's approach reflects the requirements for standing to appear before the AAT. Section 27 of the Administrative Appeals Tribunal Act 1975 ('AAT Act') provides that persons whose interests are affected by a decision may apply to the AAT for review of the decision.[65]

6.65 Adopting the reasoning under the ARC's approach, it seems that administrative decisions made under Parts 7 and 8 of the Act (relating to environmental assessment decisions) would be suitable for merits review, for both applicants and third parties.[66] The logic underpinning this conclusion also appears relevant to administrative decisions made under section 184 of the Act. Section 184 of the Act deals with the Minister's power to amend lists of threatened species, threatened ecological communities and key threatening processes.

6.66 There has been concern among some stakeholders that the existing scope for merits review in the EPBC Act is too narrow:

---

62 Scrutiny of Bills Committee, *Alert Digest No. 4 of 2006*, p. 38, cited in Scrutiny of Bills Committee, *Work of the Committee in the 41st Parliament: Nov 2004 – Oct 2007*, p. 62.

63 The Hon Ian Campbell, cited in Scrutiny of Bills Committee, *Eleventh Report of 2006*, p. 223.

64 Administrative Review Council, *What Decisions should be Subject to Merit Review*? AGPS, 1999, http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_What_decisions_should_be_subject_to_merit_review (accessed January 2009).

65 Administrative Review Council, *What Decisions should be Subject to Merit Review*? AGPS, 1999, Chapter 2.

66 Part 7 of the Act deals with deciding whether approval of actions is needed. Part 8 of the Act deals with assessing the impacts of controlled actions.

> The EPBC Act has no merits review system [for listings decisions], unlike for example Victoria's planning system where the Victorian Civil and Administrative Tribunal ('VCAT') is able to review, on their merits, decisions made by Councils to issue (or not to issue, or failing to issue) planning permits. Instead, the Minister decides whether to make a listing and the avenues of review are limited. Perhaps they have not been tested to their full extent yet, because the EPBC Act does have strong objectives, so there may be scope to argue that the Minister's decision was unreasonable in the circumstances, and to challenge the Minister's decision on other administrative law grounds.[67]

6.67 Other parties arguing that scope for merits review should be expanded included Lawyers for Forests[68] and the NPAC.[69]

6.68 Dr Chris McGrath argued that the application of the principles provided by the ARC would mean that decisions under sections 75 and 133 of the Act should be subject to merits review.[70] Section 75 decisions are those determining whether an action is a controlled action. Section 133 decisions are those determining whether an action will be approved and under what conditions.

6.69 The Wilderness Society recommended that there be merits review of:

- whether an action is a controlled action (i.e. subject to the EPBC);
- approvals of actions;
- listing of threatened species and communities;
- heritage listings.[71]

6.70 The ACF's position was similar, supporting merits review for 'key decisions under the EPBC Act – including key controlled action and "listing" decisions under Parts 7 to 9 and 13'.[72]

6.71 Since the Act was changed in 2006 there does appear to have been a reduction in the number of merits review cases brought before the AAT, though the number of cases was never high. There appear to have been about seven distinct AAT decisions from July 2004 until amended Act took effect on 19 February 2007, and only two since that time. At the same time, there appears to have been an increase in third parties seeking administrative review in the Federal Court or High Court (though,

---

67 Andrew Walker, *The EPBC Act: An Overview*, Biodiversity Summit, September 2006, http://www.biodiversitysummit.org.au/walker.html (accessed 19 February 2009).

68 Lawyers For Forests, *Submission 68*, p. 9.

69 NPAC, *Submission 93*, pp 30–31.

70 Dr Chris McGrath, *Submission 38*, p. 3.

71 The Wilderness Society, *Submission 51*, p. 10.

72 ACF, *Submission 52*, p. 33.

again, the total number of cases involved is very small). The figures suggest that there is little scope for any form of judicial review at present.

6.72 Dr McGrath has noted that creating increased scope for merits review could lead to an increase in costs and the length of time involved in gaining approvals under the Act. Dr McGrath also noted increased scope for merits review could lead to an increase in appeals from proponents who are dissatisfied with decisions under the Act, noting that 'developer appeals far outnumber public interest litigation under State planning laws that allow merits review.' He argued in relation to these costs that 'if good decision-making is the main objective rather than merely cheap and speedy decisions then merits review is attractive'.[73]

6.73 There appeared to be an expectation amongst some stakeholders that increased opportunity for merits review would result in decisions that favoured the position of environmental organisations. However one of the recent administrative review cases highlights the possibility that expanded access to merits review could lead to more cases being brought by proponents seeking favourable decisions on their development approvals. In *Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts*, the proponent had in fact tried unsuccessfully to argue the case on merits grounds. Buchanan J noted 'the arguments advanced suggesting there was no evidence to support a range of findings really sought to invoke an impermissible review of the merit of those findings'.[74] If merits review had been available, the outcome could have been different. Given that proponents are likely to be better resourced than community groups and NGOs, the committee is not sure why some groups think that merits review will result in fewer approvals of developments, or tighter development conditions.

6.74 The committee notes the view expressed by the then Minister in 2006 that some decisions are appropriately the responsibility of elected officials and should not be overturned by unelected officials. The committee recognises that there are decisions of national significance and which are effectively policy decisions are appropriately the realm of government. The committee agrees with the approach of the ARC, however, and notes that decisions of the type made under the EPBC Act are not all necessarily of this character. It is not unusual for Ministerial decisions (and not just those of delegates) to be subject to merits review. The committee is of the opinion that greater access to merits review for decisions taken under the Act may be

---

73 Chris McGrath, 'Flying Foxes, dams and whales: Using federal environmental laws in the public interest,' (2008), 25 EPLJ 324 – *Submission 38 (Attachment 1)*, p. 354.

74 Buchanan J, Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2) [2008] FCA 1521, http://www.lexisnexis.com/au/legal/search/runRemoteLink.do?service=citation&langcountry=AU&risb=21_T5862629342&A=0.7143174628039017&linkInfo=F%23AU%23FCA%23year%252008%25page%251521%25sel1%252008%25&bct=A (accessed 26 February 2009), paragraph 58.

appropriate in certain cases, as it could have the overall impact of improving the quality of decision making under the Act.

6.75 The committee recognises that increasing the number of decisions under the Act that are subject to merits review could have resource implications both for the department and the AAT. The committee notes that the AAT already employs a range of specialists, including those with environmental qualifications or experience. It also notes that the Tribunal organises its work into Divisions that both reflect areas of significant workload and which allow the Tribunal members to develop specialist expertise.[75]

Recommendation 10

6.76 The committee recommends that consideration be given to expanding the scope for merits review in relation to ministerial decisions under the Act, particularly in relation to:

- **whether an action is a controlled action,**
- **assessment decisions; and**
- **decisions on whether a species or ecological community is to be listed under the Act.**

The committee recommends that the independent review examine this possibility in the first instance, and that the process of consideration should include consultation with the Administrative Appeals Tribunal.

Senator Anne McEwen
Chair

75 Administrative Appeals Tribunal, Introduction to the AAT, http://www.aat.gov.au/AboutTheAAT/IntroductionToTheAAT.htm (accessed 27 February 2009).

Coalition Senators' Additional Comments

For a major piece of legislation that has sought to establish a significant presence for the Australian Government in issues of environmental protection and conservation the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) remains relatively new. This is especially so when compared with the majority of similarly significant taxation, finance or legal measures, though not unusual in the environment field.

Coalition Senators make this observation because we accept it is important to review the ongoing effectiveness and efficacy of this legislation. That occurred in 2006, when amendments to the Act were made to address numerous areas of concern, and is happening again at this point in time through an independent review of the Act (required at regular intervals under section 552A of the Act) that was commissioned by the Minister for the Environment, Heritage and the Arts, the Hon Peter Garrett AM MP, on 31 October 2008 and is due to report by 31 October 2009.

However, Coalition Senators are firmly of the opinion that such reviews – particularly when conducted after just the first ten years of operation and less than four years after significant amendments – and any subsequent changes to either the Act or its implementation by the Government must firstly focus on improving the operation of the Act to meet its objectives, rather than significantly widening its scope or application. We are strongly of the view that the more recent changes of 2006 should not be overturned without clear evidence of their failure.

We also note a bias of viewpoint in the direction of this report. While we recognise this is a critically important piece of environmental legislation – indeed it was introduced by the former Coalition Government – statements made in isolation about "whether reform might result in better environmental protection outcomes" (paragraph 3.3 of the majority report) without any mention of the potential to improve the operation of the Act for applicants or proponents demonstrate a one-track focus. To operate successfully in Australia's national interest this Act must be balanced.

Coalition Senators are supportive of some of the practical recommendations made in the majority report of this Committee and welcome the passionate contributions of the many witnesses who gave evidence to this inquiry, but we believe that some other recommendations proposed would increase the costs and complexity of the scheme whilst placing undue impediments on development and economic investment within Australia. Accordingly, we have addressed a number of the issues and recommendations contained in the majority report below.

Objects of the Act

The majority report recommends that the words 'to provide for' be deleted from sections 3(1)(a) and 3(1)(ca) of the Act. We note that the majority of discussion on this matter centres on the case of *Brown v Forestry Tasmania* and the interaction of the verb 'provides for' in both the EPBC Act and the *Regional Forest Agreements Act 2002* (RFA Act).

However, the committee decided to address the particular issues of interaction between the EPBC Act and RFA Act in a separate report to be provided to the Senate in April; a point that is detailed at 1.30 of the majority report. Coalition Senators believe this recommendation pre-empts the findings of this second report and reserve our position on this matter until more fulsome consideration to this issue has been given.

In particular, Coalition Senators are concerned that the issues that arise from *Brown v Forestry Tasmania* may relate more to the effective enforcement of Regional Forest Agreements than any objects of the EPBC Act. We would be especially reticent to see a situation where a duplication of assessments, requirements or enforcements could apply to the forestry industry across both the EPBC Act and RFA Act. These matters require closer examination to avoid potentially costly consequences and deliver the most effective environment outcome before the objects of the EPBC Act are amended in the recommended way.

New 'triggers'

Recommendations 2 and 3 of the majority report propose further consideration of new 'triggers' – impacts that would be considered as matters of national environmental significance and therefore require assessment and approval under the Act. Specifically, a greenhouse trigger and a land clearing trigger are canvassed.

Coalition Senators are firmly against the imposition of a 'greenhouse trigger'. While we believe that every effort should be made to reduce Australia's greenhouse emissions as rapidly as economically, technologically and socially feasible, we do not believe that this is an appropriate mechanism by which do so.

Considering the greenhouse emissions of just one project in isolation is no way to manage or shape Australia's overall emissions management and would be of less than negligible impact on global emissions, as identified by the National Parks Australia Council:

> even very large amounts of greenhouse emitted as a result of any single action in Australia will be ‘a drop in the ocean’ on the world stage.[1]

---

1 National Parks Australia Council Inc, *Submission* 93, p. 36.

Worse than this, Coalition Senators believe that the inclusion of greenhouse emissions as a potential trigger for assessment under the EPBC Act could prove to be a driving force in carbon leakage to other countries. It is precisely at this stage of investment planning and approval that projects will be most likely to consider development offshore, potentially in countries where other policy parameters and business processes could lead to higher levels of emissions than would have occurred in Australia.

The National Association of Forest Industries (NAFI) indicated that such a proposal would result in undue complexity, when the Government's primary greenhouse emissions reduction policies are being pursued through totally different mechanisms:

> Already the government's objectives in relation to its obligations under the Kyoto protocol and its eventual successor are being manifested in the CPRS legislation. To have a trigger under the EPBC Act for yet another layer of examination, assessment and approval between Minister Garrett and Minister Wong is not necessarily a healthy situation in terms of efficient regulation.[2]

Coalition Senators are more open to the arguments surrounding a 'land clearing trigger'. However, we would need to be convinced that the inclusion of any such trigger would result in greater certainty for proponents or applicants and not result in a reduction of access to existing prime agricultural land. Any further consideration of this recommendation by the Government must include appropriate consultation with all relevant stakeholders, especially representatives of land users.

Compliance and Outcomes

Coalition Senators support Recommendations 4 and 5, especially as they relate to investigation, compliance, auditing and enforcement measures. To be relevant and apply equally across the community laws need to be effectively policed and enforced. There is no point applying all manner of conditions to an approval or accepting a range of undertakings if those conditions or undertakings are never monitored.

For example, Coalition Senators themselves have been highly critical of the proposed North-South or Sugarloaf Pipeline to convey water from the Goulburn River to Melbourne, which itself was the subject of a conditional approval by Minister Garrett last year. The water savings upon which the Government assures us the operation of this pipeline are contingent, along with other conditions imposed, must be properly audited and assessed to maintain even the slightest modicum of community acceptance for this project.

---

2 Mr Shane Gilbert, Strategic Advisor, National Association of Forest Industries, *Committee Hansard*, 18 February 2009, p. 10.

Some improvements in this area of enforcement have been noted at 3.30 of the majority report. However, more does need to be done to ensure the expensive processes employed by all stakeholders to obtain approvals are not wasted for lack of enforcement.

We also note the concerns highlighted in 3.23 of the majority report from diverse stakeholders like the Australian Conservation Foundation and the Minerals Council of Australia (MCA) that it is difficult to determine whether the Act is "in fact delivering environmental protection outcomes". Confidence in the long term benefits of the Act is important and further assessments that provide more detail than that contained in the 2006 *State of the Environment Report* would be welcome to improving confidence in the merits of the Act.

The range of powers and tools

The Act provides for a range of tools and mechanisms that can be employed by government to achieve its objects, such as strategic impact assessments, listing of threatened species and the preparation of recovery plans, in addition to those aspects that specifically relate to the assessment of individual projects. The majority report highlights a number of witnesses who sought increased use of these measures, especially as they can be used to address cumulative impacts, or criticised what they saw as the limited use of them to date.

Coalition Senators hope that the independent review will give more fulsome consideration to the merits of these measures, the impediments to their effective deployment by the department, their impact on environmental, economic and social outcomes and the proposals made by the majority report in Recommendation 8.

The diverse concerns of organisations such as the MCA, Australian Network of Environmental Defender's Offices and National Farmers Federation about the application of 'offsets' policies for habitat conservation make the development of a clear policy in this area essential. Such an outcome should improve the certainty for all stakeholders and, in doing so, minimise costs and delays. However, Coalition Senators are unwilling to be as prescriptive about the content of such a policy as the majority report is at Recommendation 9 and would urge wide consultation with relevant parties prior to its finalisation.

Bilateral agreements

Coalition Senators welcome Recommendation 6. The risk of State Governments operating in "the simultaneous roles of proponent and assessor" as outlined in 4.10 of the majority report does have the potential to undermine public confidence in the system established by this Act.

Currently the South Australian Government is undertaking Environmental Impact Statements in regards to the construction of a weir near Wellington towards the end of the River Murray and the possible admission of seawater into the Ramsar wetlands of Lake Alexandrina and Lake Albert. The South Australian Government is the applicant or proponent of these highly controversial proposals and its suitability to assess their environmental impact has already been called into question.

Commonwealth agencies and duplication

Coalition Senators also welcome Recommendation 7, which seeks to address duplication concerns raised by the Commonwealth Fisheries Association and the Australasian Fisheries Management Authority regarding the duplication and lack of integration between the EPBC Act and the *Fisheries Management Act 1991*. This is similar to the potential duplication that Coalition Senators wish to avoid in relation to the EPBC Act and RFA's or other matters.

Coalition Senators also recognise the specific concerns of the Department of Defence in regard to adherence to the Act as a Commonwealth agency. The repetition described by defence and the impact of "prescriptive rather than performance based"[3] conditions on approvals warrant further inspection by both the independent review and the Government.

Merits review

Though not opposing consideration by the independent review, Coalition Senators are concerned about the impact of expanding the scope for merits review as suggested in recommendation 10 of the majority report.

It is clear from the majority report itself that decisions made under the Act are often contentious and can infrequently, if ever, make all parties happy:

> It is clear from submissions that stakeholders are sometimes dissatisfied with individual decisions. Sometimes this is because they believe those decisions give insufficient weight to environmental protection. In other cases, there are stakeholders dissatisfied because they believe economic or social benefits were not given sufficient emphasis.[4]

---

3 Office of the Secretary and Chief of the Defence Force, *Submission 67*, p. 67.

4 Majority Report, paragraph 3.68

This does make this area a potentially litigious one. Yet it is also an area of policy that requires levels of certainty and timeliness. Coalition Senators would encourage moves towards greater transparency in decision making rather than avenues that could increase the potential for appeal and therefore the delays that may be experienced.

Senator Simon Birmingham
Senator for South Australia

Senator the Hon Judith Troeth
Senator for Victoria

Senator Fiona Nash
Senator for New South Wales

Additional Comments from the Australian Greens

Introduction

The Environmental Protection and Biodiversity Conservation Act was intended to be Australia's key environmental legislation, enacting our commitments under the Convention for the Conservation of Biological Diversity to *"achieve by 2010 a significant reduction of the current rate of biodiversity loss"*[1] as well as other international commitments ratified by the Commonwealth – including World Heritage, Ramsar wetlands, and migratory birds. Crucially, the EPBC Act "…represents the only comprehensive attempt in the history of our federation to define the environmental responsibilities of the Commonwealth".[2]

While the majority committee report and our additional comments can and should consider the framing, implementation and relative effectiveness of particular provisions within the EPBC Act, the ultimate test of this legislation as a whole must be the measure of its success in actually conserving biodiversity and protecting our environment.

Unfortunately to date it has not achieved this outcome. Biodiversity loss is continuing at an alarming rate across Australia, and the rate of loss of species and ecological communities shows no sign of slowing. As the State of the Environment report states: *"…biodiversity continues to be in serious decline in many parts of Australia"*.[3] On this key measure of the broader success of the EPBC Act it is clear that it has not delivered on its promise *"to provide for the protection of the environment"*.[4] Native vegetation continues to be cleared at an alarming rate, the interception and over-extraction of surface and groundwater is creating an environmental and social disaster in the Murray Darling Basin and elsewhere, invasive plants and animals continue to devastate natural systems, over-fishing threatens the health of our oceans and the ongoing viability of our fisheries, and climate change presents an unprecedented threat to biodiversity – yet the EPBC Act seems apparently incapable of assisting the government or empowering the community to act to prevent this tragic loss of diversity.

The context of the EPBC Act

In considering the relative success or failure of the EPBC Act, it is clear that the Act does not operate in isolation, and its effectiveness will be limited to an extent by the nature and adequacy of the institutional arrangements that support its implementation. Many of the concerns and criticisms aired by witnesses to the committee inquiry were

---

[1] UN CCBD www.cbd.int/2010-target/

[2] Second Reading speech on the introduction of the EPBC Act 1995.

[3] Australia State of the Environment report 2006.

[4] Objects of the EPBC Act, Part 1 Chapter 1 Section 3(1)(a).

focused on the inadequacy of the administrative arrangements and resources that support the Act's implementation – particularly in relation to environmental research, monitoring and assessment; compliance and enforcement; and public participation.[5]

There is a high level of community concern about the manner in which the structure and implementation of the EPBC Act has effectively bureaucratised the protection of the environment and the conservation of biodiversity – producing a moribund box-ticking approach that fails to protect the environment or deliver a timely assessment regime.[6] Ultimately this results in an Act that purports to cover a comprehensive range of conservation issues and commitments, but which in practice *"… largely divests the Commonwealth of actual responsibility for environmental protection"*.[7]

When considered in these broad terms the EPBC Act fails to enact our international conservation commitments. It limits Commonwealth responsibility for biodiversity to listed threatened species and communities and migratory species. It limits Commonwealth assessment of developments and threatening processes to a narrow focus on their direct impacts on relevant matters of national environmental significance, rather than enabling comprehensive assessments and consideration of cumulative impacts. It reduces the Commonwealth's commitment to protecting World Heritage, National Heritage and Ramsar Wetlands to protecting the identified 'values' of these places while failing to protect the places themselves.[8]

The Australian Greens support the general direction of the majority committee report, but believe that its analysis of the limitations of the EPBC Act and the inadequacy of its implementation does not go far enough in considering the manifest failure of the EPBC Act to actually protect and conserve biodiversity and our environment – nor do its recommendations.

The recommendations of the majority committee report identify and address some serious shortcomings with the EPBC Act (for instance, in relation to a greenhouse trigger; resourcing assessment, monitoring and compliance; merits review of ministerial decisions; and nomination and listing of threatened species). We are concerned however that a number of the recommendations are neither strong enough nor sufficiently targeted to solve the problems discussed in the report. In addition, we are also concerned that there are a number of significant shortcomings of the EPBC Act that are not addressed in the recommendations, which are listed in the last section on this report.

The Greens also remain concerned that many of the opportunities to be proactive on environmental protection and biodiversity conservation offered by the EPBC Act have

[5] Submissions by HSI, ACF, WWF, TWS, WPAA, IFAW, ISCI EIANZ among others. Also the combined environment groups submission to the EPBC Act review.

[6] op.cit.

[7] Dr Marg Blakers, Green Institute submission to the EPBC Act review, p 2.

[8] Dr Marg Blakers, Green Institute submission to the EPBC Act review.

failed to be realised – due to a combination of sustained chronic under-funding and insufficient political will.

Climate Change

Climate change in particular presents an unprecedented challenge to environmental protection and biodiversity conservation that it would seem the Commonwealth is not legislatively prepared to tackle. While the Rudd Government is introducing an emissions trading framework to tackle industry carbon emissions, the proposed framework does not include any mechanism to arrest emissions from vegetation clearing, logging of native forests or degradation of remnant ecosystems.[9] Perversely this system allows for the voluntary inclusion of carbon sequestration in plantation forestry, but fails to account at all for the significantly higher levels of green carbon sequestered in native forests and woodlands, or the emissions resulting from the logging or clearing of these forests or woodlands.

Any simple cost-benefit analysis of the economics of emission abatement must clearly show that preventing land clearing is one of the most cost-effective means of reducing carbon emissions, and that the cost of replacing or offsetting the green carbon sequestered in native ecosystems is such that it makes it effectively irreplaceable over relevant timeframes. The EPBC Act, however, fails to provide a mechanism to tackle the problem of land clearing (except where it impacts directly on threatened species or ecological communities) and is incapable of playing a role in contributing to the pressing issue of climate change by protecting green carbon stores. If anything, the approach taken by the EPBC Act implicitly assumes that clearing, logging and land degradation will continue to take place and is acceptable provided that listed threatened species and ecological communities are protected.

The impacts of climate change on native ecosystems necessitate an urgent reappraisal of our approach to biodiversity and ecosystem conservation. The threat of climactic shifts means that landscape connectivity is critically important. This is particularly important for highly biodiverse native remnants in a fragmented landscape, as we see for instance in the wheat belt landscape of the biodiversity hotspot of south-western WA. Increasing climactic variability and extreme climate events also mean that managing for ecosystem and species resilience, diversity and function need to be paramount. We need a new paradigm in environmental management.

Given the high costs of reducing carbon emissions and the irreplaceable nature of the green carbon sequestered in native ecosystems it is clear that we need to prioritise the protection of existing ecosystems and that developed countries such as Australia should be looking to stop clearing, seeking to effectively conserve their remaining native ecosystems, and looking at ways to measure and manage green carbon. The EPBC Act is not capable of taking on this task and it is arguable that we in fact require a paradigm shift in our approach to biodiversity conservation to do so. While the Greens advocate the inclusion of a climate change trigger for MNES within the

[9] Estimated to have accounted for over 90 million tonnes of CO2-e in 2006, Blakers, M 2008, *A framework for carbon accounting and emissions reductions*, Green Institute.

existing EPBC Act and the proactive use of its planning powers to more effectively address the threats posed by climate change to biodiversity and native ecosystems, we also believe that ultimately a more effective outcome would be to replace the EPBC Act with a much more effective and robust framework.

Improving the EPBC Act

It is difficult to do justice to the depth and range of analysis provided to the committee inquiry and also the submissions to the Independent Review of the EPBC Act[10] by community conservation groups and non-government organisations. These organisations and individuals have raised a number of issues of particular concern that are listed below. Given the short time frame available for writing these additional comments it is not possible at this stage to discuss these problems in detail, so we have confined ourselves to listing the issues of particular concern and making some key recommendations to address them.

We note that this is in effect an interim report on this inquiry, with the second part of this inquiry with a specific focus on Regional Forest Agreements reporting on 24th April 2009. To this end we will refrain from discussing the issues associated with RFAs in these additional comments and also hope to address the key concerns listed below in more detail.

The Australian Greens believe that the volume and detail represented in this wide range of submissions provides a good indication of the extent of community engagement and concern with issues of biodiversity conservation and environmental protection. Many of these groups have actively engaged in the public processes for the listing of threatened species and ecological communities over the years, and to this end we are both disappointed and concerned by the amendments to the EPBC Act under the Howard Government that reduced the scope for public participation.

We are particularly concerned by:

- The broad ministerial discretion allowed in the direction of and decision making within the Act.
- Exemptions to the protections offered under matters of national environmental significance.
- The devolution of commonwealth responsibility and decision-making through approved bilateral agreements with states and territories (without a requirement of similar levels of assessment or protection).
- The removal of the right to challenge ministerial decisions on their merits in 2006.
- The 2006 changes to the Act that undermined the listing of threatened species, threatened ecological communities, key threatening processes and heritage places.

[10] Independent Review of the EPBC Act 1999, DEWHA. http://www.environment.gov.au/epbc/review/index.html

- The lack of a statutory timeline to ensure the prompt assessment and listing of threatened species, ecological communities, key threatening processes and heritage places.
- The lack of any requirement that the Minister ensures lists are kept up to date.
- The lack of consideration of climate change, water extraction and interception, land clearing, migratory fish and vulnerable ecological communities as matters of national environmental significance.
- The lack of a mechanism to recognise cumulative impacts under MNES.
- Failure to effectively use the Strategic Assessments provisions under the Act to proactively undertake bioregional planning and pre-emptively address the problem of cumulative impacts.
- Lack of requirement for public consultation in regional strategic assessment processes.
- Lack of a requirement that the minister comply with a bioregional plan (rather than simply *'…have regard for…*').
- A lack of guidelines to ensure where strategic assessment takes place there is no diminution of or exemption from environmental impact assessment processes.
- The lack of effective protection of species and ecological communities listed as threatened under EPBC.
- The under-resourcing of threat abatement and recovery plans.
- Inappropriate use and over-use of environmental 'offsets' in MNES approval processes under EPBC (threatened species or communities and critical habitats are not 'replaceable').
- The focus of limited resources and effort on assessment and approval processes.
- Lack of utilisation and resourcing of the EPBC provisions for:
    - conservation agreements
    - covenants
    - critical habitat protection
    - bioregional plans
    - recovery plans
    - wildlife conservation plans
    - threat abatement plans.
- The lack of threat abatement plans for land clearing or climate change.
- The absence of any effort to systematically develop bioregional plans for all of Australia's IBRA bioregions.
- The restrictions on public participation including the length of public consultation periods and the lack of a legislative timeline for a response from the Minister.
- The limitations of 'priority assessment' on public nominations of threatened species and ecological communities, heritage places and key threatening processes.

- The disincentive to public participation in EPBC Act interpretation posed by the risk of orders for security costs and the threat of costs following a court action.
- The need to reinstate and expand the right to appeal the merits of key ministerial decisions.
- The move away from mandatory recovery planning for threatened species or communities in the 2006 amendments.
- The need to require that recovery plans are sufficiently resourced, implemented, monitored and enforced to ensure that species or communities actually recover.
- The failure to list critical habitats on the EPBC Register of Critical Habitats despite their being identified as critical to the survival or recovery of threatened species or communities in recovery plans.

Recommendations

Objects

- **Strengthen the Objects of the Act to require the conservation of biodiversity and the protection of the environment … by replacing the words 'to promote the conservation of biodiversity' with 'to conserve biodiversity' in section 3(1)(c) … and removing the words 'to provide for' from sections 3(1)(a) and 3(1)(ca)**

Triggers

- **Add a Greenhouse Trigger for Matters of National Environmental Significance for major new greenhouse gas emitting projects AND require all decision making under the EPBC Act to explicitly consider climate change**
- **Add a Water Extraction, Interception and Use trigger for MNES for activities involving ground water and surface water interception and/or extraction**
- **Add a Broadscale Land Clearing trigger for MNES for major new vegetation clearance proposals**
- **Add a Migratory Fish trigger for MNES for species listed under Annex 1 of the UN Convention for the Law of the Sea**
- **Add a Vulnerable Ecological Community trigger under MNES[11]**

Cumulative Impacts

- **Amend the Act to require assessments of environmental harm take into account cumulative and indirect impacts**
- **Publish administrative guidelines outlining how the government will take into account cumulative impacts in referral, assessment and approval processes**

Strategic Assessments

- **Publish guidelines for Strategic Assessments**
- **Require public consultation**

Ministerial Discretion

- **Amend the EPBC Act to limit ministerial discretion so that approvals cannot be given to activities which cause significant impact to threaten species or ecological communities, to National, Commonwealth and World Heritage or Ramsar sites**
- **Prevent the use of environmental 'offsets' in relation to MNES**

[11] Detailed discussion of trigger thresholds is contained in the HSI, WWF, TCT, ACNT 2005 submission to the Commonwealth Government.

Planning and Proactive Use

- **Better utilise and provide greater resources for the use of proactive measures under the EPBC Act including recovery plans, threat abatement plans, wildlife conservation plans, bioregional plans, conservation zoning, covenants and conservation agreements**
- **Develop a threat abatement plan for climate change**
- **Develop a threat abatement plan for vegetation clearance**
- **Strengthen bioregional planning provisions to require public consultation**
- **Amend the EPBC Act to require the Minister to comply with bioregional plans (rather than simply 'have regard for')**

Public Participation

- **Increase public consultation periods**
- **Reinstate and expand the right to appeal the merits of key Ministerial decisions**
- **Remove the threat of orders for security for costs and for costs following court action**
- **Include a statutory timeline for response to all public nominations of threatened species and ecological communities, heritage places and key threatening processes**

Regional Forestry Agreements

- **Repeal the exemption for RFAs so that they are required to ensure the conservation of threatened species, ecological communities and critical habitats**
  Note that issues with RFAs will be covered in more detail in the subsequent part of this inquiry and we expect to include additional recommendations on these issues in our subsequent report.

Senator Rachel Siewert
Australian Greens Whip

Senator Scott Ludlam
Australian Greens

Appendix 1

Submissions

1	Dr Anna Shepherd
2	Hon. Dr Bob Such MP, Member for Fisher
3	Dr Victor Wilk
4	Aldgate Valley Landcare Group Inc
5	Mr Barry Hebbard
6	Mr Rob Hales
7	Timber Communities Australia
8	Mr Colin Smith
9	Mr Sue Gould
10	Ms Jo Murray
11	Friends of Bass Valley Bush Inc Landcare Group
12	Dr Chris James
13	Mr Keith Sarah
14	Environment Institute of Australia and New Zealand
15	Ms Ann Jelinek
16	Bendigo and District Environment Council Inc
17	Ms Vivienne Ortega
18	Land & Environment Planning
19	Ms Sylvia Cooper
20	Mr Dave Milligan
21	Ms Maureen Cooper
22	Sunshine Coast Environment Council
23	Mrs Mavis Rowlands
24	Dr Ralph Ballard
25	Mr Julian and Ms Deborah Guess
26	Ms Joanne Goossens
27	Wildlife Protection Association of Australia Inc
28	IFAW Asia Pacific (The International Fund for Animal Welfare)
29	Mr Peter Wadham
30	Minerals Council of Australia
30A	Minerals Council of Australia (Supplementary Submission)
31	Port of Melbourne Corporation
32	Ms Vanessa Richardson
33	Ms Melissa Gunner
34	Mr Ian Matthews
35	Nature Conservation Council of NSW
36	Mr George Villaflor
37	Mrs Mary C Clemons
38	Dr Chris McGrath
39	Birds Australia

40 Ms Carolyn Robins
41 Ms Katherine Webb
42 Ciro De Luca
43 Central West Environment Council Inc of NSW
44 Mr Steve Burgess & Ms Elaine Bradley
45 Mr Graeme Armstrong
46 Mr Craig and Ms Gabrielle Latta - Australian Freshwater Turtle Conservation and Research Association
47 Mr Michael Noble
48 Friends of the Earth Melbourne
49 Possum Centre Busselton Inc
50 Ms Kellie Gee
51 The Wilderness Society
52 Australian Conservation Foundation
53 Bat Advocacy NSW
54 Mr Michael Stokes
55 Invasive Species Council Inc
56 National Association of Forest Industries
57 Commonwealth Fisheries Association
58 Humane Society International
59 Australian Fisheries Management Authority
60 Ms Diana Palmer
61 Limestone Plains Group
62 Hume City Council
63 South West Environment Centre
64 Mary River Catchment Coordinating Committee
65 Mr Tom Baxter
66 Greater Mary Association Inc
67 Office of the Secretary and Chief of the Defence Force
68 Lawyers for Forests Inc
69 Inland Rivers Network
70 Professor Jon Altman & Mr Sean Kerins
71 Mr Jim Walker
72 Bird Observation & Conservation Australia
73 Mr Brad Jessup
74 Mr Justin Tutty
75 Confidential
76 Mr Peter Robinson
77 Confidential
78 Green Institute
79 Mr Ivan Jeray
80 Save the Mary River Coordinating Group
81 WWF-Australia
82 Confidential
83 Dr Mark Drummond
84 Colong Foundation for Wilderness

84A	Colong Foundation for Wilderness (Supplementary Submission)
85	Department of the Environment, Water, Heritage and the Arts
86	Department of Agriculture, Fisheries and Forestry
87	National Farmers' Federation
88	Western Australian Forest Alliance
89	Conservation Council of SA Inc
90	Australian Network of Environmental Defender's Offices
91	Clarence Environment Centre
92	Professor Lee Godden
93	National Parks Australia Council Inc
94	The Conservation Council, ACT Region
95	Magnetic Island Community Development Association
96	Conservation Council of Western Australia
97	North East Forest Alliance and Northern Inland Environment Council
98	North Coast Environment Council
99	Government of Tasmania
100	Mr Steve Meacher
101	Myenvironment Inc
102	Ms Mary Chandler
103	Ms Maria Riedl
104	Planning Institute Australia
105	Government of South Australia
106	Ms Bree Jashin
107	Confidential
107A	Confidential
108	Save the Mary River Brisbane Group
109	Sustainable Environment Group of the Mornington Peninsula Shire
110	North East Bioregional Network Inc
111	Ms Julie Wellington
112	Wentworth Group of Concerned Scientists
113	Australian Hydroponic & Greenhouse Association

Appendix 2

Public hearings

Monday, 8 December 2008 – Melbourne

Centre for Resources, Energy and Environmental Law, Melbourne Law School, The University of Melbourne

Professor Lee Godden, Director

Australian Conservation Foundation

Mr Charles Berger, Director of Strategic Ideas

Ms Amy Hankinson, National Liaison Officer

Invasive Species Council

Dr Carol Booth, Policy Officer

Mr Tim Low, Policy Officer

Lawyers for Forests Inc.

Mr Andrew Walker

Department for Environment and Heritage, South Australia

Mr Brenton Grear, Deputy Director, Science and Conservation, and Head of Nature Conservation

Ms Jody Gates, Officer

Tuesday, 9 December 2008 – Canberra

Minerals Council of Australia

Ms Melanie Stutsel, Director, Environment and Social Policy

Dr Jason Cummings, Assistant Director, Environmental Policy

National Farmers Federation

Mr Ben Fargher, Chief Executive Officer

Ms Deborah Kerr, Manager, Natural Resource Management

National Parks Australia Council

Ms Christine Goonrey, President

Mr Tom Warne-Smith, Researcher

Commonwealth Fisheries Association

Mr Christopher Melham, Chief Executive Officer

Mr Jeff Moore, Executive Member

Environment Institute of Australia and New Zealand

Mr John Ashe, Fellow

Department of Defence

Mr Colin Trinder, Director, Environmental Impact Management

Department of the Environment, Water, Heritage and the Arts

Mr Peter Burnett, First Assistant Secretary, Approvals and Wildlife Division

Ms Alex Rankin, First Assistant Secretary, Land and Coast Division

Mr Terry Bailey, Assistant Secretary, Natural and Indigenous Heritage Branch

Mr Andrew McNee, Assistant Secretary, Marine Initiatives Branch

Mr Mark Flanigan, Assistant Secretary, Strategic Approvals and Legislation Branch, Approvals and Wildlife Division

Ms Claire Howlett, Acting Assistant Secretary, Marine Biodiversity Policy Branch

Mr Derek White, Acting Assistant Secretary, Environmental Water and Natural Resources Branch

Wednesday, 10 December 2008 – Sydney

Colong Foundation for Wilderness Ltd

Mr Keith Muir, Director

Humane Society International

Ms Nicola Beynon, Senior Program Manager

Australian Network of Environmental Defenders Offices

Mr Jeff Smith, Director

Mr Richard Howarth, Policy Officer

Ms Kristy Graham, Scientific Officer

The Wilderness Society

Ms Felicity Wade, Campaigner

Dr Greg Ogle, Legal Coordinator

Dr Christopher McGrath (Private capacity)

Wednesday, 18 February 2009 – Canberra

Mr Michael Stokes (Private capacity)

National Association of Forest Industries

Mr Allan Hansard, Chief Executive Officer

Mr Shane Gilbert, Strategic Adviser

Mr Tom Baxter (Private capacity)

Mr Ian Matthews (Private capacity)

Appendix 3

Tabled documents, additional information and answers to questions taken on notice

Tabled documents

Letter to the Minister for the Environment, Heritage and the Arts from the Victorian National Parks Association regarding Illegal and proposed clearing of Natural Temperate Grassland of the Victorian Volcanic Plain – urgent action required, tabled by National Parks Australia Council, 9 December 2008

Letter from the Minister for the Environment, Heritage and the Arts to the Colong Foundation for Wilderness, tabled by Mr Keith Muir of the Colong Foundation for Wilderness, 10 December 2008

Analysis of submissions to Senate Environment committee EPBC Inquiry, tabled by The Wilderness Society, 10 December 2008

Paper on Legislative mechanisms for the protection of tropical forests in developing countries by the Environmental Defender's Office New South Wales, tabled by Humane Society International, 10 December 2008

Playing a Greater Role in Australia's Future: A strategy for the development of Australia's sustainable forest industries, tabled by National Association of Forest Industries, 18 February 2009

Newspaper article, Burnoffs following Victoria bushfires a 'threat to biodiversity', *The Australian*, 12 February 2009, tabled by National Association of Forest Industries, 18 February 2009

Additional information

The Australia Institute: Environment Protection and Biodiversity Conservation Act – An Ongoing Failure, July 2006

The Australia Institute, Environment Protection and Biodiversity Conservation Act: A Five Year Assessment, July 2005

Australian Society for Kangaroos: Report on Decimation of an Icon

Letter from the Independent Trawlers Association Inc, dated 21 September 2008

Answers to questions taken on notice

Environmental Defender's Office (NSW) Ltd (from public hearing, Sydney, 10 December 2008)

National Farmers' Federation (from public hearing, Canberra, 9 December 2008)

Department of Environment, Water, Heritage and the Arts (from public hearing, Canberra, 9 December 2008)