

The Auditor-General
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Performance Audit

**Referrals, Assessments and Approvals under
the *Environment Protection and Biodiversity
Conservation Act 1999***

Australian National Audit Office

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Canberra ACT
10 April 2003

Dear Mr President
Dear Mr Speaker

The Australian National Audit Office has undertaken a performance audit across agencies in accordance with the authority contained in the *Auditor-General Act 1997*. Pursuant to Senate Standing Order 166 relating to the presentation of documents when the Senate is not sitting, I present the report of this audit and the accompanying brochure. The report is titled *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999*.

Following its presentation and receipt, the report will be placed on the Australian National Audit Office's Homepage—<http://www.anao.gov.au>.

Yours sincerely

A handwritten signature in black ink, appearing to read 'P. J. Barrett'.

P. J. Barrett
Auditor-General

The Honourable the President of the Senate
The Honourable the Speaker of the House of Representatives
Parliament House
Canberra ACT

AUDITING FOR AUSTRALIA

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Abbreviations/Glossary

Accredited assessment process	An environmental assessment process carried out under a State or Territory, which the Minister accredits for the purposes of environmental assessment under the Act.
the Act	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
Action	A project, development, undertaking, activity or series of activities (as defined in section 523 of the Act).
AMSA	Australian Maritime Safety Authority
ANAO	Australian National Audit Office
Approved action	An action that has undergone the environmental assessment process and has been approved by the Minister under section 130 of the Act.
Bilateral agreement	An agreement between the Commonwealth and a State or Territory that allows the Commonwealth to delegate responsibility for conducting environmental assessments under the Act, and in more limited circumstances, the responsibility for granting environmental approvals under the Act.
Controlled action	An action that the Minister has decided, under section 75 of the Act, needs to undergo the environmental assessment process.
EA	Environment Australia
ESD	Ecologically Sustainable Development
EPBC Act	<i>Environment Protection and Biodiversity Conservation Act 1999</i>
Finance	Department of Finance and Administration
GBRMPA	Great Barrier Reef Marine Park Authority
DIMIA	Department of Immigration and Multicultural and Indigenous Affairs
IRPC	Immigration reception and processing centre
The Minister	The Minister for the Environment and Heritage
Not controlled action (NCA)	An action that the Minister has decided, under section 75 of the Act, does not need to undergo the environmental assessment process.

Particular manner not controlled action)	An action that the Minister has decided, under section 75 of the Act, does not need to undergo the environmental assessment process provided it is carried out in a particular manner.
Precautionary principle	The precautionary principle is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.
PM&C	Department of the Prime Minister & Cabinet
Proponent	If an action requires approval under section 75 of the Act, the Minister must designate a person as the proponent of the action. The proponent is responsible for preparing the assessment documentation for the assessment process. The proponent may not necessarily be the person undertaking the action, but for the purposes of this report, the terms are used interchangeably.
Referral	An action that has been referred to the Minister for a decision on whether it is a controlled action.
Strategic assessment	Under section 146 of the Act, the Minister may assess the impacts of all actions taken under a policy, plan or program.
DOTARS	Department of Transport and Regional Services
Wetlands of international importance	A declared wetland of international importance is an area that has been designated under Article 2 of the 1971 Convention on Wetlands of International Importance (Ramsar, 1971). (The Minister may also declare a wetland in accordance with section 16 the Act.).

Summary and Recommendations

Summary

Background

1. The *Environment Protection and Biodiversity Conservation Act 1999* (the Act) came into force in July 2000. The Act is recognised as a major development in the Commonwealth's role in environmental regulation. It gives the Commonwealth greater legislative power to regulate activities that affect the environment at the national level. The objects of the Act are broad and include the protection of matters of national environmental significance, the promotion of ecologically sustainable development, the conservation of biodiversity and co-operative approaches to the protection and management of the environment.¹

2. The Act has been promoted as the 'first comprehensive attempt to define the environmental responsibilities of the Commonwealth.' It aims to provide a national scheme of environmental protection and biodiversity conservation, recognising not only responsibility to this generation, but also to future generations. The Act aims to deliver important benefits for the Australian community including stronger protection of the environment, a more efficient and timely environmental assessment and approval process and a reduction in intergovernmental duplication.² The Act provides for the referral, assessment and approval of actions that are likely to have a significant impact on six matters of national environmental significance:

- World Heritage properties;
- wetlands of international significance;
- listed threatened species and ecological communities;
- listed migratory species;
- the environment in Commonwealth marine areas; and
- the environment in relation to nuclear actions (including uranium mining).

3. If an action is likely to have a significant impact, it must be referred to the Minister for the Environment and Heritage (the Minister) for a decision on whether it will require approval under the Act. If the Minister decides that an action will require approval, an environmental assessment of the action must be carried out. After this step the Minister will decide whether to approve the action, and what conditions if any, to impose.

¹ The objects of the Environment Protection and Biodiversity Conservation Act are set out in subsection 3(1).

² *An Overview of the EPBC Act 1999* (See Environment Australia Web-site).

4. The Act similarly applies to actions by the Commonwealth, as well as actions in relation to Commonwealth land. However, the Act imposes greater environmental stewardship obligations on Commonwealth agencies in relation to these matters. An action should be referred if it has any significant impact on the 'environment,' which includes social, economic and cultural impacts.

5. In an effort to streamline the assessment process, there are mechanisms in the Act that give the States and Territories a greater role in both the assessment and approval of actions.

6. The nature of actions referred under the Act can vary greatly. Projects that have been referred include urban land developments, aquaculture projects, renewable energy generating wind farms and mining projects. The value of referrals also varies. Smaller projects can be valued at less than \$100 000 while larger scale industrial projects have been valued at hundreds of millions of dollars.

Audit objective and scope

7. The objective of the audit was to examine and report on the quality and timeliness of environmental assessments and approvals under the Act, as well as on Environment Australia's activities to ensure compliance with the Act.

8. The scope of the audit was focussed on the role of the Department of Environment and Heritage in administering the Act. For completeness, the ANAO also examined compliance with the Act by the Commonwealth, in terms of whether agencies were aware of the Act's requirements and were referring relevant actions to the Minister for a decision.

Overall conclusions

9. The ANAO concluded that the referral, assessment and approval processes under the Act are generally thorough and well documented. They are also improving as more experience is gained with the operation of the legislation. Environment Australia has established and implemented rigorous processes that provide an assurance that the matters required to be considered under the Act are taken into account in a comprehensive manner.

10. The ANAO was satisfied that in the overwhelming majority of cases examined, the reasons for decisions by the Minister or delegate were documented and were consistent with the Prime Minister's *Guide on Key Elements of Ministerial Responsibility* and the principles of administrative law. In those 22 cases on referrals where the former Minister took a different view from his Department as to whether the Act was triggered, the majority of examples were well

documented and provided an explanation as to the reasons for decisions. However, in four cases, the reasons for decision did not clearly show how the specific provisions of the Act were taken into account. Better documentation in these cases would have provided greater transparency and placed the Department in a better position to consider the issues raised in future cases.

11. Staff in Environment Australia have been active in assisting organisations undertaking an action to determine whether their action is likely to have a 'significant impact', and would need approval under the Act. However, over the first two years of the Act's operation the vast majority of referrals (some 71 per cent) were determined not to be 'controlled actions'.³ At the same time, relatively few referrals have been made from some industries such as agriculture, as well as from Commonwealth agencies. More specific guidance and promotion of the Act in relation to what constitutes a 'significant impact'—especially within industry sectors or regions—would assist in encouraging relevant referrals from key industry groups. This is important in terms of protecting those environmental matters of national significance, as well as providing a higher degree of certainty and lower costs for industry. Drawing attention to specific responsibilities of Commonwealth agencies under the Act would also assist in this area.

12. The timeliness of decision-making is generally in accordance with the time frames specified in the Act. The timeliness of decision-making in 2001–02 was an improvement on that of the previous year with more than 90 per cent of the statutory decisions made on time. Timeliness compares favourably with similar processes at the State and Territory level but there are opportunities for further improvement. Where required time frames have not been met, the reasons are documented and reported to Parliament as required by the Act. However, while the reports to Parliament are accurate, there have been difficulties associated with generating accurate timeliness statistics from the Department's management information system. Improvements to the system would enable the Department to generate statistics more cost effectively than is currently the case.

13. Monitoring and enforcing compliance with the provisions of the Act is crucial to the effective operation of the Act. As part of its compliance strategy, Environment Australia has been building awareness of the requirements of the Act by informing stakeholders of their obligations.

14. While plans have been put in place for monitoring actions approved under the Act and, in particular, for auditing any conditions attached to approvals,

³ A controlled action is a referral where the Minister must decide whether to approve the action under the EPBC Act.

implementation is still at an early stage. Inadequate monitoring was also an issue identified as a shortcoming with the implementation of the previous legislation.⁴ Finalising compliance and enforcement guidelines and strengthening compliance networks with other levels of government and non-government organisations, together with a more timely and effective approach to potential breaches of the Act, would assist in enhancing compliance and enforcement action.

15. Greater attention to publicly reporting emerging trends and changes over time would strengthen the quality of reporting and provide a better overall picture of achievements and outstanding challenges in relation to protecting the environment and conserving biodiversity on a national scale.

Agency Responses

16. Environment Australia considered that the report provides a valuable review of the way it undertakes its responsibilities in administering the Act, and makes a significant contribution to work EA has been undertaking to improve its performance. EA also welcomed the ANAO's overall conclusions. While the primary focus of the audit was on Environment Australia, a total of six agencies were involved to various degrees. Other agencies included, Defence, Immigration and Multicultural and Indigenous Affairs (DIMIA), AusAID, Transport and Regional Services and AirServices Australia. All agencies generally agreed with the findings. All recommendations were directed to Environment Australia. Environment Australia has agreed with all recommendations.

⁴ *Environment Protection (Impact of Proposals) Act 1974.*

Key Findings

Managing referrals (Chapter 2)

17. A referral is an action that has been referred to the Minister for consideration as to whether it should be ‘controlled’ under the Act. It is the first major step in the process of decision-making. Some degree of judgement is required to balance the tensions between stakeholders seeking certainty and Environment Australia having to fully consider the details of each individual action on its merits. Since the introduction of the Act, 603 referrals had been received by Environment Australia as at 30 June 2002. While 167 referrals were classified as controlled actions, the majority (71 per cent) have been designated as not being controlled actions. The ANAO examined 70 referrals from all categories for rigour and transparency in terms of processing and decision-making.

18. Environment Australia has made serious efforts to promote awareness of the Act. In addition to internet-based information, Environment Australia has published administrative guidelines for determining whether an action has, will have, or is likely to have, a significant impact on a matter of national environmental significance. A number of stakeholders commented positively on the assistance provided by Environment Australia when proponents were considering a referral. At the same time, relatively few referrals have been made from some industries such as agriculture.

19. Reflecting the large number of referrals found not to be controlled actions, stakeholders have also commented that the guidelines are not specific enough to industry sectors or particular environmental risks to allow an initial decision by a proponent on whether an action is likely to have a ‘significant impact’ and should be referred to the Commonwealth for a formal determination. A review of the guidelines is planned by the Department to address these concerns.

20. From the sample of referrals examined, Environment Australia has established a rigorous process of checks and balances that provides an assurance that the matters required to be considered under the Act are considered for decisions on whether an action is controlled or otherwise. Compliance with the requirements of the Act is apparent through the identification of adverse impacts, the public consultation process, and the application of the precautionary principle.⁵ However, improved consistency and documentation of the

⁵ The precautionary principle is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.

precautionary principle, and how it applies in particular cases, would also assist in the process.

21. Another issue of concern is the practice of referring actions to Environment Australia in stages. In doing so, the objects of the Act may be circumvented as assessing actions in stages means the cumulative impact of a project may not be recognised. This is a difficult issue. Environment Australia is alert to the administrative challenges in managing 'staged referrals.' However, the ANAO considers that the management of staged referrals could be strengthened by making the disclosure of staged referrals more explicit in referral applications. It would also be useful to emphasise to proponents the requirement under Schedule 2 of the regulations to disclose 'any related actions' in a referral and the consequences of providing misleading or false statements.

22. A further area for improvement in consideration of referrals includes the provision of accurate and complete information. This has been a particular issue in fauna surveys used to establish the existence (or otherwise) of threatened or listed migratory species at development sites. Fauna surveys have not always been conducted thoroughly enough by proponents for a clear decision to be made on the proposed action. While not necessarily false or misleading, the information provided to Environment Australia can require additional time and resources to determine whether or not there is likely to be a significant impact on a matter of national environmental significance. More specific guidelines on the standards required for information, such as fauna surveys, and the introduction of an accreditation scheme for environmental consultants, could improve the accuracy of the information available and consequently the quality of the referral process.⁶ These actions could also reduce costs for all concerned.

23. In reviewing the decision-making process, the ANAO considers that overall, there was sufficient documentation of the referral process and reasons for decisions to ensure that the transparency of the process was satisfactory. Environment Australia had a documented record of all recommendations and decisions relevant to each of the cases examined. The decisions by the Minister were within the scope of the legislation and the decision-making process met the standards required by the Prime Minister's *Guide on Key Elements of Ministerial Responsibility* and the principles of administrative law. Nevertheless, as could be expected from the introduction of a new Act of Parliament, there have been examples where the Department and the Minister had different views on some referrals. In four of the 22 cases examined, documentation of the reasons behind the Minister's disagreement did not clearly show how the provisions of the Act were taken into account. In particular it was not clear to what extent 'all adverse

⁶ This could also improve the timeliness of the process. Further discussion of timeliness is outlined in chapter 4.

impacts' had been considered and how the 'precautionary principle' had been taken into account. Consistent with the principles of administrative law, it would also have been preferable for a more detailed explanation of the reasons for the decision to be given so that the Department would have been better placed to consider the issues raised in future cases.

Managing assessments and approvals (Chapter 3)

24. Statutory and administrative processes for managing assessments and approvals apply to all actions that have been determined to be 'controlled actions'. Of the 167 actions designated as controlled actions, 34 had been approved as at 30 June 2002. All the approved actions were tested by the ANAO in terms of compliance with the provisions of the Act as well as in terms of the rigour and transparency of the surrounding processes.

25. Key compliance issues tested through the audit were the choice of assessment method, the evaluation of the impacts of the actions and mitigation measures in the assessment report, consideration of economic and social matters, State and Territory comments, and the cost effectiveness of any conditions attached to the approvals. From an examination of the records of the 34 actions approved, the ANAO considers that the implementation of the assessment and approval processes under the Act is sound and there is adequate compliance with the provisions of the Act. Environment Australia has a standard approach for considering the relevant matters for assessments and approvals. The assessment process for all actions was thorough and comprehensive. In some cases it involved independent reports by consultants commissioned by Environment Australia.

26. Environment groups indicated some concern about the heavy reliance on preliminary documentation in making an assessment. However, in the cases examined, the assessment reports were objective and well researched with no evidence of relevant matters being ignored.

27. While Environment Australia has consulted with the States and Territories on the requirements of section 130 notices⁷ (and provided advice from the Australian Government Solicitor to the States and Territories regarding the application of this section of the Act), the matter remains contentious and has contributed to delays in approvals in some instances. The difficulties concern the interpretation of the provisions and the contingent liability that might apply to the States and Territories in providing the advice. One State has issued

⁷ Section 130 notices require the Commonwealth to obtain an assurance from a relevant State or Territory that certain and likely impacts of the action on things other than matters protected by the controlling provisions for the action have been assessed to the greatest extent practicable and explaining how they have been assessed.

qualifications on the certificates to minimise their risk of legal exposure. Nevertheless, this is a matter that can be addressed through the consultation process prior to the introduction of bilateral agreements between the Commonwealth and the States/Territories.

28. The assessment and approval process was also well documented and met the high standard required for statutory decision-making. In relation to key aspects of the Prime Minister's *Guide on Key Elements of Ministerial Responsibility* such as the documentation of reasons for decisions, a clear consideration of the merits of the case taking into account relevant (and not irrelevant) considerations was apparent.

Timeliness (Chapter 4)

29. Managing the timeliness of environmental assessments and approvals is important, both in terms of meeting the statutory requirements of the Act and in minimising unnecessary delays and costs for proponents. Generally, the timeliness of decision-making under the Act is in accordance with the statutory requirements. Furthermore, the timeliness of decision-making has improved over the two years of the Act's operation, with more than 90 per cent of the decisions made on time in 2001–02. Where the timeframes have not been met, the reasons are documented and reported accurately to Parliament, as required by the Act.

30. Generally, the overall time that elapses during the decision-making process compares favourably with similar processes at the State and Territory level, but there are opportunities for improvement. These may be realised through the provision of more effective 'pre-lodgement' assistance and the increased use of bilateral agreements and through the accreditation of State and Territory assessment processes. At present there is little evidence that bilateral agreements and accredited assessments improve timeliness, as there are so few bilateral agreements in place. As well, Commonwealth/State and Territory tensions need to be resolved before accreditation can work efficiently. For example, tensions need to be resolved in relation to the range of State or Territory processes that can be accredited under the Act. Further consideration also needs to be given as to whether conditions can be attached by the Commonwealth to a decision made by a State or Territory during an accredited process and whether accreditation can still proceed for a project already under consideration by a State or Territory agency. Nevertheless, while the accreditation of State and Territory assessment processes are increasingly in use, bilateral agreements are more likely to become the main means of improving the efficiency of the assessment process as more agreements come into force from 2003.

31. The EPBC Database is the primary tool by which compliance with statutory time frames is managed. This is facilitated by a number of different reports that are regularly generated from the database. However, in the first two years' operation of the Act, there have been significant inaccuracies in the timeliness statistics generated from the database. Inaccuracies in these statistics have the potential to significantly distort statistical reports, and have led to some officers keeping shadow information systems. The first Annual Report on the Act's operation was largely accurate because the database figures were adjusted using the figures from the 'shadow systems'. However this has been a time-consuming and inefficient exercise.

32. Inaccuracies in the database figures are primarily due to user error. Environment Australia has implemented a number of different strategies to improve user behaviour. A review of the database is also likely to lead to outcomes that will improve the accuracy and effectiveness of the database. The slow response of the system has been identified as an issue. Possible improvements to the system to make it easier to operate have also been considered.

Referrals by the Commonwealth (Chapter 5)

33. The Act places a greater onus of responsibility on the Commonwealth than on the private sector. The Commonwealth, or a Commonwealth agency, must not take an action that is likely to have a significant impact on the environment, whether inside or outside Australia. The definition of 'environment' for the purposes of these requirements is wide. It is not limited to the matters of national environmental significance but includes significant social, economic and cultural impacts. A referral must be made where it is considered such impacts are likely. Furthermore, Commonwealth agencies are required to seek the Minister's advice with respect to certain actions involving foreign aid, airspace management and airports.

34. Overall, the number of Commonwealth referrals under the Act has not been high when the scale and diversity of Commonwealth business activities is considered along with the higher standard of compliance required of Commonwealth agencies. Nevertheless, the number of referrals has increased from 21 to 33 over the first two years of the Act's operation. Commonwealth agencies have commented that it can be an inherently difficult decision to determine whether an action will have, or is likely to have, a significant impact on the environment. In an effort to assist agencies, Environment Australia has developed draft guidelines but these have not yet been finalised or promulgated. The lack of formal guidelines after more than two years' operation of the Act

reflects the initial focus by the Department on the private sector and identifying impacts on matters of national environmental significance. The Department recognises this problem and, as part of its current review of the administrative guidelines, intends to formalise the draft Commonwealth guidelines.

35. The ANAO examined a sample of different Commonwealth agencies in order to assess the level of awareness of the Act and the controls that are in place to manage compliance with the Act. In agencies such as Defence, AusAID and Airservices Australia, the ANAO found good practice examples of environmental risk management that could be considered by other agencies. Defence has agency-wide instructions to personnel and is introducing an environmental management system. AusAID has formal Ministerial Protocols on how the Act will be implemented. Airservices Australia has a comprehensive data management system to better identify risks and provide timely reports on how those risks are being managed. In agencies such as these, where environmental management is regarded as a significant business risk, there is a high level of awareness of the requirements for compliance with the Act in terms of referrals and section 160 requests for advice.⁸

36. Nevertheless, clearer information should be made available to all Commonwealth departments and agencies on whether an action is likely to have a significant impact on the environment as a matter of priority. The lack of awareness is an issue in agencies where environmental risks are not normally important business considerations. This is exemplified by the establishment of the offshore processing centres on Nauru and Manus Island in Papua New Guinea, where it was unclear whether the Commonwealth agencies were aware of the requirements of the Act at the time.

Compliance and enforcement (Chapter 6)

37. Monitoring and enforcing compliance with the requirements of the Act is crucial to its effective operation. The Act provides for considerably stronger provisions for dealing with breaches of the legislation than existed under previous environment legislation. In 2001–02, the Department received 122 reports of activities that could breach the Act. To date, there have been no prosecutions brought by the Commonwealth under the Act. However, in three cases, third parties have commenced proceedings in relation to matters dealt with under the Act.

⁸ Section 160 advice relates to the requirements under the EPBC Act for a Commonwealth agency or employee to consider advice from the Minister for the Environment and Heritage before authorising certain actions with a significant impact on the environment. Actions covered by this provision include providing foreign aid, managing aircraft operations in airspace, adopting or implementing a major development plan for an airport or an action prescribed by regulations.

38. The three elements examined by the audit were:

- education and awareness raising to ensure that all relevant referrals that should be made are, in fact, made;
- monitoring the progress of relevant actions and compliance with any conditions attached to such actions; and
- timely follow-up to potential breaches of the Act.

39. Education and awareness raising have been priority measures for Environment Australia in the lead up to the commencement of the Act and over the first two years of its operation. The objective has been to facilitate a cooperative approach that encourages potential proponents into making referrals where appropriate. Stakeholder submissions, as well as consultations during the audit, indicate that there is a reasonable degree of awareness of the EPBC legislation in both the private and public sectors where the environment is a major business focus. However, specific matters such as what particular actions are likely to have a significant impact (thereby requiring a referral), are not well understood. There could be benefit in having the results, trends and lessons learned from the awareness raising, monitoring and follow-up activity reported on the EPBC web-site to assist in greater compliance. Building stronger compliance networks with the State and local governments, as well as with non-government organizations, would also assist in enhancing compliance and enforcement action.

40. Inadequate monitoring of compliance with approval conditions was identified as a shortcoming in the implementation of the previous Act and similar legislation overseas.⁹ Monitoring the progress of all actions that are subject to the Act is important to ensure that there are no unintended consequences and that the objectives of the Act have been met. A study of environmental impact assessment in the USA¹⁰ found that of the impacts foreshadowed in environmental impact statements, only 30 per cent were unambiguously similar to the ultimate outcomes.¹¹ While departmental planning for the monitoring of actions is well underway, implementation is at an early stage. Environment Australia does not have information on the number of approved actions that have commenced or that have been completed. Particular manner actions (i.e.

⁹ Audit Report No.10 1992–93 Living with our Decisions, Commonwealth Environmental Impact Assessment Processes and Commissioner of the Environment and Sustainable Development (1998) *Environment Assessment—A Critical Tool for Sustainable Development*.

¹⁰ PJ Culhane 'The Precision and Accuracy of US Environmental Impact Assessment' in *Environmental Monitoring and Assessment* (1987).

¹¹ While in 13 per cent of cases the impact was less than forecast, the vagueness about the impacts' significance and the likelihood of occurrence precluded conclusive judgements about predictive accuracy in over a quarter of the forecast sample. Consequently a referral that is either unquantifiable or quantifiably wrong is not helpful for making decisions on how to prevent or mitigate environmental damage.

those that are not controlled actions if conducted in a particular manner, thereby avoiding the environmental assessment process) are not currently subject to any formal monitoring or audit. Environment Australia can strengthen its current monitoring arrangements to provide assurance as to compliance with any conditions of approval.

41. Timely follow-up action on complaints, or on potential breaches of the Act, is critical to ensuring the integrity of the Act. Environment Australia has conducted a small number of investigations following the reports of possible breaches. The Department estimates that around five per cent of development proposals referred to Environment Australia were submitted following compliance effort. However, responses to potential breaches of the Act have, to date, focussed on the less robust options. As noted earlier, no legal action has been taken by the Commonwealth. Clearly this is not an option to be taken lightly given the costs involved and the important precedent that would be set. Nevertheless, a timely and effective approach is particularly important, as some cases have illustrated that irreversible damage may have occurred. Even a legal remedy may not be available as evidence may have been destroyed. Compliance by the Commonwealth itself has been uneven with indications that there has sometimes been a lack of awareness of the obligations under the Act. Finalising compliance and enforcement procedures and guidelines and stronger disclosure of legal compliance requirements across the Commonwealth would also assist in this area. The compliance framework planned by the Department, together with processing improvements recommended by the ANAO, should enhance the integrity of the compliance and enforcement system.

Reporting on results (Chapter 7)

42. Public reporting of results is a key element of accountability. A good annual report is one that demonstrates progress over the preceding year, as well as discussing risks and defining challenges and priorities for the years ahead. The report should be focussed on outcomes and outputs achieved, as well as the cost-effective use of inputs so as to allow Parliament and other stakeholders to make an informed assessment of performance over time.

43. In accordance with the legislation, Environment Australia has produced two annual reports specifically on the operation of the Act. They include a detailed annual report on the operations of the Act and are summarised in the departmental Annual Report. The annual EPBC reports cover information on protecting the environment and conserving biodiversity, monitoring and compliance, and ongoing and future developments. They include a broad range of statistics on the operation of the Act, with information on the number of

referrals received and processed, the number of times each controlling provision was triggered, and analysis of proponents by industry category, amongst other relevant issues. Statistics in the EPBC Annual Report are derived primarily from the EPBC database. The range of statistics provided in the annual report on the operation of the Act address the quality and quantity measures outlined in the Department's Portfolio Budget Statement.

44. The first EPBC Annual Report in 2000–01 was primarily focussed on activities and discussions of outputs. The second EPBC Annual Report in 2001–02 has been improved with some reporting at a strategic level on how the Department is progressing in terms of protecting and conserving individual species and communities. The second EPBC Annual Report has also been improved through the addition of short, illustrative case studies. However, there is a need for a more structured analysis of these results for the information of Parliament and other stakeholders. Reporting on successes, as well as remaining challenges, in various priority regions may also assist in forming a national picture of achievements under the Act over time.

45. Aggregated data on progress with implementing conditions may also give greater depth to the annual report. It would also be useful for the Department to enhance its reporting on compliance and enforcement matters in the next annual report. Stakeholders raised the desirability of the Department taking, and being seen to take, a greater role in this regard. Public reporting of achievements, risks and priorities for the future may help to redress perceptions that the Department is passive in this regard. While the ANAO recognises that it is still early days for the Department in terms of being able to report on outcomes, it is nevertheless timely to give consideration to enhancing the quality of the report over time. Greater discussion of emerging trends and changes over time would strengthen the quality of reporting and provide a better overall picture of achievements and outstanding challenges in relation to protecting the environment and conserving biodiversity on a national scale.

Recommendations

The ANAO's recommendations are set out below. Priority should be given to recommendations 1, 4 and 5. Details of the agency response to each recommendation is included in the body of the report.

Recommendation No. 1
Para. 2.34 In order to improve the consistency and quality of referrals made under the Act, the ANAO *recommends* that Environment Australia:

- a) finalises as soon as practicable, the industry sectoral guidance on the Act;
- b) further encourages proponents to seek advice from the Department before lodging referrals and investigate measures by which this could be achieved;
- c) considers the introduction of an accreditation scheme for consultants submitting applications under the Act; and
- d) considers providing guidance on what would be an acceptable standard of information required, for example in fauna or flora surveys, as part of a referral under the Act.

Agency Response: Agree.

Recommendation No. 2
Para. 2.43 In order to address the risks from referrals of staged developments that may circumvent the objectives of the Act, the ANAO *recommends* that Environment Australia revise the application form and guidelines to make more explicit:

- a) the requirements for proponents to disclose staged developments; and
- b) the assessment criteria that will apply in these circumstances.

Agency Response: Agree.

Recommendation No. 3
Para. 6.16 In order to improve awareness of the requirements of the Act, the ANAO *recommends* that Environment Australia establishes appropriate mechanisms for enhanced communication and knowledge sharing through:

- a) public reporting on the results of investigations, trends, lessons learned and compliance activity in progress, via the EPBC website; and
- b) the establishment of networks with Commonwealth, State and local government agencies to ensure that information on projects that should be referred is received early enough for compliance and enforcement action to be considered.

Agency Response: Agree.

Recommendation No. 4
Para. 6.32 The ANAO *recommends* that, to strengthen monitoring and review arrangements and provide assurance as to compliance with any conditions of approval, Environment Australia:

- a) introduces a formal notification and reporting system as part of the approval, which requires proponents to advise Environment Australia of the progress of relevant actions;
- b) considers an accreditation scheme and/or delegations for Commonwealth agencies, such as the Great Barrier Reef Marine Park Authority, to enable third parties to sign-off that conditions have been complied with by proponents;
- c) modifies the EPBC database to allow for consistent tracking of activities post approval for the purposes of compliance and enforcement; and
- d) provides advice to proponents subject to the 'particular manner' provisions of the *Environment Protection and Biodiversity Conservation Act 1999*, on their continuing obligations to ensure that they manage their actions so that there is no impact of national environmental significance or alternatively, if this becomes unavoidable, a further referral is made to the Commonwealth.

Agency Response: Agree.

Recommendation No. 5
Para. 6.43

The ANAO *recommends* that, in order to enforce the provisions of the Act, Environment Australia:

- a) finalises as soon as practical, compliance and enforcement procedures and guidelines;
- b) ensures that there are timely and effective responses to all potential breaches of the Act; and
- c) includes, in the guidance to Commonwealth agencies, appropriate advice in regard to contractors and their obligations to comply with the provisions of the Act.

Agency Response: Agree.

Recommendation No. 6
Para. 7.13

In order to enhance the quality of public reporting on the administration of the Act, the ANAO *recommends* that Environment Australia should:

- a) include analysis of challenges, risks and priorities for the future in its annual reports; and
- b) enhance information on progress being made towards the achievement of the Act's objectives.

Agency Response: Agree.

Audit Findings and Conclusions

1. Background

Legislation

1.1 The *Environment Protection and Biodiversity Conservation Act 1999* (the Act) came into force in July 2000. The Act is recognised as a major development in the Commonwealth's role in environmental regulation.¹² It gives the Commonwealth greater legislative power to regulate activities that affect the environment at the national level, providing the Commonwealth with an expanded assessment and approval role in this regard. The objects of the Act are broad and include the protection of matters of national environmental significance, the promotion of ecologically sustainable development, the conservation of biodiversity and co-operative approaches to the protection and management of the environment.¹³

1.2 The Act provides for the referral, assessment and approval of actions that are likely to have a significant impact on the six matters of national environmental significance:

- World Heritage properties;
- wetlands of international significance;
- listed threatened species and ecological communities;
- listed migratory species;
- the environment in Commonwealth marine areas; and
- the environment in relation to nuclear actions (including uranium mining).

1.3 If a proposed action is not specifically exempted under the Act, it should be referred to the Minister for the Environment and Heritage (the Minister) if it has, will have, or is likely to have a significant impact on any of the environmental matters referred to above.

1.4 If the Minister decides that the action is not likely to have a significant impact, then the action does not require approval under the Act. On the other hand, if the Minister decides the action is likely to have a significant impact then it will require approval under the Act. If the Minister decides that the action will require approval, then an environmental assessment of the action must be carried out, after which the Minister will decide whether to approve the action, and what conditions, if any, to impose. In an effort to streamline the process, there are mechanisms in the Act that give the States and Territories a greater

¹² *Department of the Environment & Heritage Annual Report 2000–01* p. 104.

¹³ The objects of the Act are set out in subsection 3(1) of the EPBC Act.

role in both the assessment and approval of actions. Bilateral agreements may be signed between the Commonwealth and the States/Territories under which responsibility for the assessment and/or approval of the action is transferred to the States/Territories. At present, only Tasmania, the Northern Territory and Western Australia have signed bilateral agreements with the Commonwealth. This is only in relation to assessment processes. A number of other assessment bilateral agreements are close to finalisation. Another means by which the Commonwealth may delegate responsibility to the States/Territories is through the accreditation of State/Territory assessment processes on a case-by-case basis.

1.5 Also covered by the Act are actions by the Commonwealth that are likely to have a significant impact on the environment in Australia or elsewhere in the world, and actions involving Commonwealth land. The Act places greater environmental obligations on these actions as the impacts of the actions are not restricted to the matters of national environmental significance, but are considered with respect to the 'environment' as defined in section 528 which includes social, economic and cultural aspects.

1.6 The nature of actions referred under the Act can vary greatly. For example projects that have been referred include urban land developments, aquaculture projects, electricity generating wind farms and mining projects. There is also a broad range in the monetary value of projects. However, there is no agreed measure by which the value of a project can be ascertained, eg a value may be ascribed based on the cost to the proponent, or in the case of urban land developments, based on the value of the land. Some smaller scale projects have been valued at less than \$100 000, while some larger scale industrial projects have been valued at hundreds of millions of dollars.

1.7 Table 1 outlines actual and estimated expenditure as well as staffing levels for the division with prime responsibility for administering the Act in Environment Australia—the Approvals and Legislation Division.

Table 1
Salaries and expenses for the Approvals & Legislation Division

	Salaries (\$m)	Admin expenses (\$m)	Program expenses (\$m)	Total (\$m)	Average staffing levels
2000–01	4.41	0.25	0.72	\$5.38	66.9
2001–02	4.60	0.55	0.46	\$5.61	63.1
2002–03 (est)	4.76	0.81	0.89	\$6.46	63.2

Source: Environment Australia

What actions need to be assessed?

1.8 An action will require approval from the Minister under the Act if the action has, will have, or is likely to have, a significant impact on:

- a matter of national environmental significance (as outlined above);
- the environment on Commonwealth land; and
- the environment anywhere in the world (in relation to actions taken by the Commonwealth, or for actions taken on Commonwealth land).

1.9 This requirement is clearly articulated in Chapter 2 of the Act, which provides for civil and criminal penalties where an action is taken without an approval. There are some exceptions, and approval is not needed if, for example, the action is a lawful continuation of an action that was occurring immediately before the Act's commencement or the action is covered by a Regional Forest Agreement. The onus is on the person taking the action to decide whether it is likely to have a significant impact on one of the matters protected. If the action is likely to have a significant impact, then the person must refer the action to the Minister for a decision.

1.10 A summary outline of the operations of the Act in 2000–01 and 2001–02 is set out in Table 2. The number of referrals has increased slightly over the two years, along with a significant increase in the number of referrals designated as controlled actions. The increase in the number of controlled actions and the relatively low number of approval decisions may be a challenge in terms of work flow management in the future, as there are increasing numbers of actions designated as controlled actions yet to be finalised.

Table 2

Key EPBC Act Statistics Referrals & Controlled actions

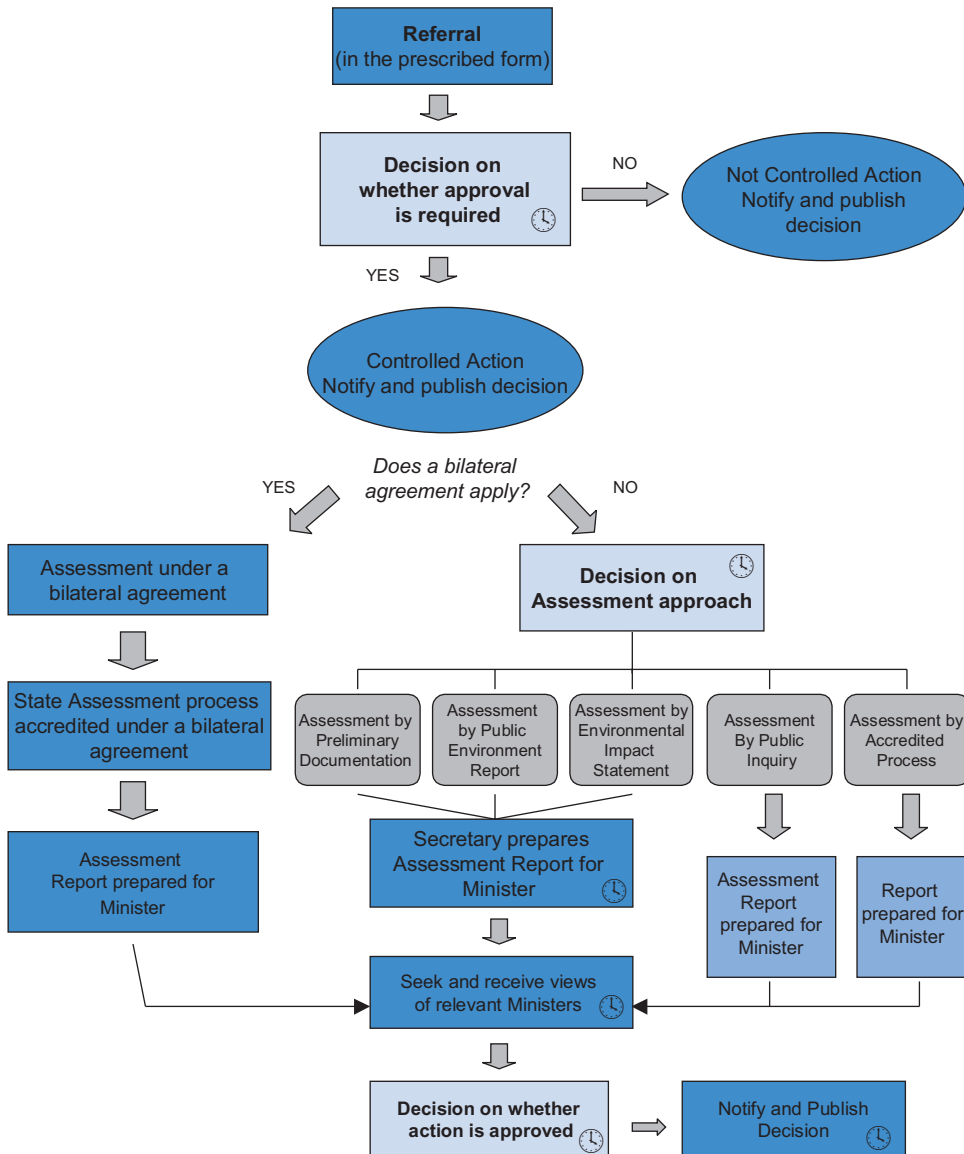
	2000–01	2001–02	Total
Total referrals received	294	309 ¹⁴	603
Referrals withdrawn or lapsed before decision	2	10	12
Approval not required—if action taken in a particular manner	30	17	47
Approval not required—no conditions	161	196	357
Approval required—controlled actions	72	95	167
Being processed as at end June	29	20	20
Approval not granted	0	0	0

Source: EPBC Act Annual Report 2001–02

¹⁴ Note: An additional 29 applications were carried over from 2000–01.

1.11 The number of referrals in 2001–02 was approximately the same as for the last full year of the *Environment Protection (Impact of Proposals) Act 1974*, when 314 projects were referred to Environment Australia. An outline of the overall process is shown in Figure 1.

Figure 1
EPBC Act: Referral, Assessment and Approval process



⌚ Indicates a statutory time limit

Note: The EPBC Act has requirements for public comment at various stages throughout the process
Source: ANAO

Previous reviews and lessons learned

1.12 Environmental assessment is a recognised process for evaluating natural systems and for anticipating and managing the adverse effects and consequences of proposed developments.¹⁵ The Commonwealth has had a long-standing involvement with environmental assessment through the *Environment Protection (Impact of Proposals) Act 1974* which preceded the current Act. In 1992–93, the ANAO conducted an efficiency audit of Commonwealth Environmental Impact Assessment Processes (Audit Report No.10). The audit concluded that:

- opportunities existed to manipulate the environment impact assessment (EIA) process and possibly to circumvent the legislation under which it operated;
- lack of monitoring of the effects of EIA decisions could result in harm to the Australian environment going unnoticed;
- there were inefficiencies that added to the length and complexity of the process; and
- education of action officers was not adequate given the importance placed on the environment.¹⁶

The then Commonwealth Environment Protection Agency accepted the validity of the recommendations.

1.13 Recent audits or reviews of State environmental assessment processes in New South Wales and Western Australia have highlighted the scope for improvement at the State level.¹⁷ In New South Wales, the NSW Auditor-General highlighted that, while the basis for environmental impact assessment of major projects was sound, improvements were needed in documentation and disclosure of assessment reports consistent with the principles of transparency and accountability.¹⁸ In Western Australia, an Independent Review Committee recommended, amongst other things, a better integration of approvals processes between the Commonwealth and State agencies.¹⁹ A more seamless system was proposed to deliver the necessary approvals within a reasonable timeframe at reasonable cost, and offering greater certainty to the proponent, while properly

¹⁵ Barry Sadler (June 1996), *International Study of the Effectiveness of Environmental Assessment—Final Report of Environmental Assessment in a Changing World: Evaluating Practice to Improve Performance*.

¹⁶ ANAO Audit Report No.10 1992–93 *Living with our Decisions*, Commonwealth Environmental Impact Assessment Processes; p. ix.

¹⁷ Victoria currently has a major review in progress of its environmental assessment processes.

¹⁸ Audit Office of NSW, Performance Audit Report, *Environmental Impact Assessment of Major Projects in NSW* (Department of Urban Affairs and Planning) November 2001.

¹⁹ 'Review of the Project Development Approvals System', Independent Review Committee chaired by Dr Michael Keating, April 2002.

taking into account the public interest. Improvements were also identified in areas such as outcome-based conditions and the availability of information on the approvals process.

1.14 Internationally, there have been numerous individual country reviews of environmental assessment processes. A number of areas where common shortcomings have been identified across over 100 countries or agencies practising environmental impact assessment included:

- initiating the assessment so that the proposal is reviewed early enough for the development of reasonable alternatives;
- clear, specific directions in the form of terms of reference or guidelines covering priority issues, timelines, and opportunities for information and input at key decision-making stages;
- quality information and processes fostered by compliance with procedural guidelines and use of good practices; and
- receptivity of decision makers and proponents to the results of environmental assessment, founded on good communication and accountability.²⁰

1.15 A 1998 report of the Canadian Commissioner of the Environment and Sustainable Development found shortcomings in relation to Canadian Environmental Assessment. In particular, environmental information was incomplete and difficult to use, there was insufficient information to determine if all significant environmental effects had been considered, there was insufficient monitoring of approval conditions and follow-up of environmental results and the quality of reporting was inadequate in terms of whether or not environmental assessment was achieving expected results.²¹

Audit objectives and scope

1.16 The objective of the audit was to examine and report on the quality and timeliness of environmental assessments and approvals under the Act, as well as on Environment Australia's activities to ensure compliance with the Act.

1.17 The audit primarily encompassed the Approvals and Legislation Division within Environment Australia, which has administrative responsibility for environmental assessments and approvals. The assessment of quality and timeliness considered the consistency of administrative processes against the

²⁰ Barry Sadler, (June 1996); International Study of the Effectiveness of Environmental Assessment; Environmental Assessment in a Changing World: Evaluating Practice to Improve Performance.

²¹ Commissioner of the Environment and Sustainable Development (1998) Environment Assessment—A Critical Tool for Sustainable Development, p. 1.

objects and provisions of the Act, as well as taking into account better practice as appropriate.

1.18 The scope of the audit also covered compliance with the Act by the Department of Defence, the Department of Transport and Regional Services, the Department of Immigration and Multicultural Affairs, Airservices Australia and AusAID.

Methodology

1.19 The ANAO interviewed Environment Australia staff and examined files and records relevant to referrals, assessments and approvals covered by chapters three and four of the Act. Of the 603 referrals made between the Act being introduced and 30 June 2002, the ANAO examined 70 actions (11.6 per cent) that included:

- 34 controlled actions that have been approved;
- 28 referrals determined to be 'not a controlled action' (i.e. 7.8 per cent of the 357 referrals in this category);
- eight referrals determined to be 'not a controlled action if done in a particular manner' (17 per cent of the 47 referrals in this category); and
- two referrals that were reconsidered (these are included in the above categories).

1.20 The ANAO also invited submissions from relevant stakeholders. Thirty-one submissions were received from a range of stakeholders such as environment groups, industry and government. Consultations were also conducted directly with stakeholders including relevant Commonwealth agencies as well as environment groups, industry, local and State government officials.

2. Managing Referrals

Introduction

2.1 The decision on referrals is the first important decision point in the EPBC process because it determines whether the proposed action triggers the Act and consequently whether or not the Commonwealth has the power to regulate the action. If the action requires approval, then it will be designated a ‘controlled action’—that is, the Minister must decide whether to approve the action. Section 75 of the Act sets out the requirements for the Minister’s decision, and the factors that must be considered. These requirements are further elaborated in the published departmental guidelines; *The EPBC Act, Administrative Guidelines on Significance*.

2.2 In making a decision in relation to section 75, the Act states that the Minister or delegate must consider all adverse impacts (if any) the action has, will have or is likely to have on the matters protected in Part 3 of the Act.²² Consideration must also be given to any public comments that were received and the precautionary principle.²³ However, in making the decision on the referral, the Minister must not consider any beneficial impacts the action has, or is likely to have.

2.3 In addition to these compliance requirements, the ANAO was seeking assurance that the process was rigorous and transparent in accordance with better administrative practice. Rigour relates to the thoroughness and quality of the process used by an agency. It relates to the commitment of the agency to the substance or intent of the legislation, not just the form. Within the context of administrative law and good practice, the ANAO also considered the transparency of the process. This included an examination of record-keeping practices, documentation of reasons for decisions and whether the procedures for reaching the decisions met the standards required by the Prime Minister’s *Guide on Key Elements of Ministerial Responsibility*.

The number of referrals

2.4 Since the introduction of the Act in July 2000, 603 referrals had been received by Environment Australia as at 30 June 2002. Five hundred and seventy-one decisions on whether the action is controlled had been made. One hundred and sixty-seven (29.2 per cent) were designated as controlled actions (that is,

²² Part 3 of the EPBC Act provides for protection of the six matters of national environmental significance, actions involving Commonwealth land and actions involving the Commonwealth.

²³ The precautionary principle is required to be considered under section 391 of the Act.

actions requiring consideration under the Act). By far the majority of referrals, 357 (62.5 per cent), had been designated as 'not a controlled action'. Forty-seven (8.2 per cent) were classified as not being controlled actions only if carried out in a particular manner. Twelve referrals had lapsed or been withdrawn. Twenty referrals had not received a decision.

Administrative guidelines

2.5 Environment Australia has published non-binding administrative guidelines for determining whether an action has, will have, or is likely to have, a significant impact on a matter of national environmental significance. The Guidelines are important as they are the primary means used by proponents to assist them in determining the 'significance' of an action's impact, and their decision whether or not to refer an action to the Minister. The ANAO notes that this is a challenging concept to administer, because of the inherent complexities in assessing the impacts of actions on the environment. Additionally, neither the Act nor the regulations define what constitutes a 'significant impact'. On the other hand, the guidelines set out criteria for each matter of national environmental significance.

2.6 The ANAO notes that these guidelines provide general guidance on the types of actions that will require approval and the types of actions that will not, although they are not intended to be exhaustive or definitive. The Guidelines note that 'the particular facts and circumstances of the proposed action will need to be taken into account'. It is particularly challenging for a proponent of a small to medium-sized venture to assess whether or not their action will pass the threshold test for these matters. For example, at what threshold is there a significant impact on a threatened ecological community or species? Over what period of time should one determine whether there is a long term adverse effect on an ecological community?

2.7 Another challenge is assessing the impacts of new and emerging industries, such as wind farms and aquaculture facilities. This is illustrated in the case study below.

Case study 1

Assessing the impacts of new industries

Referrals have been received from a range of industrial sectors, including new and emerging industries such as wind farms and aquaculture. A challenge for proponents, and for Environment Australia, is assessing the impact that these new industries may have on matters of national environmental significance given that very little baseline data exists worldwide.

Wind farms

The Australian wind farm industry is currently expanding rapidly, and analysts predict that it may generate up to \$10 billion worth of investment and 10 000 jobs in rural and regional Australia within the next decade. A particular challenge is the fact that the optimal sites for wind farms in Victoria and Tasmania align with the preferred migratory routes of a number of threatened bird species.

For example, one stakeholder raised concerns over the impact of wind farms in Victoria on the Orange-bellied Parrot (OBP), and other listed threatened bird species. There are only 200 OBPs left in the wild, and it is very difficult to assess the actual impact that wind farms will have on the remaining population—even the death of one parrot may have a significant impact on the gene pool for the species. The use of surrogate species for survey work may be an option, and it may also be possible to consider better practice design options for wind farms that would minimise impacts on bird populations. Without comprehensive baseline data, however, assessing impacts is a challenge. To date, 29 wind farms have been referred under the Act.

Aquaculture

Similarly, the aquaculture industry is growing rapidly, particularly in coastal Queensland. Over the past four years, jobs growth in the industry has been reported to be at 260 per cent, with 7 000 people now employed. The industry is aiming to achieve \$2.5 billion in exports by 2010. Aquaculture production in Australia has risen in value by an average 13 per cent each year since 1990. There have been concerns raised, however, about the impact of effluent from aquaculture facilities on matters of national environmental significance. Mitigating these impacts is extremely important. In Queensland, the Great Barrier Reef Marine Park Authority has worked closely with Environment Australia to regulate the environmental impacts of aquaculture facilities. Twenty-nine aquaculture proposals have been referred under the Act to date.

While government and community stakeholders have been largely satisfied with the regulation of aquaculture facilities, industry itself is less so. In

particular, the difficulty of assessing effluent charges against 'background levels' of already polluted rivers has been contentious. This creates real challenges in assessing whether or not an aquaculture action is likely to have a significant impact in terms of the discharge of nutrient rich waste water into polluted rivers that may then in turn flow into a world heritage or wetland of international importance. It also highlights the importance of sectoral guidelines to cover industries such as aquaculture and their cumulative impacts.

2.8 Environment Australia staff actively assist those seeking further guidance. Positive comments were made by stakeholders consulted throughout the audit regardless of whether they were from industry, environment groups or government agencies. As one State agency involved in referrals commented:

Staff of Environment Australia have been very helpful in explaining the requirements of the Act in relation to the preparation of referrals. They freely offered advice on the requirements and issues they would be looking for in the preparation of referrals. They have a strong business focus and a desire not to be bureaucratic. At the same time, they recognise the overarching objective of protection of the environment in relation to the Commonwealth's interest, and this is respected. This positive assessment reflects comments provided by a number of different administrative units within the [State agency].

2.9 The publication of the guidelines assists organisations undertaking actions that may have a significant impact on a matter of national environmental significance. Their publication on the Environment Australia web-site facilitates this ease of access.

2.10 Environment Australia considers that, notwithstanding the general nature of the guidelines, the Act may encourage persons to be cautious when undertaking an action and lead them to make a referral when in doubt. However, a number of stakeholders have expressed a degree of confusion as to the concept of 'significance' and have commented that the guidelines are not specific enough to industry sectors or particular circumstances to allow a decision to be made on whether an action is likely to have a 'significant impact'. For example, a State agency while commenting positively on the helpful approach of staff within Environment Australia also observed:

It is not clear when a project has to be referred—there are different interpretations based on the same available information. For example, my interpretation is that a development only needs to be referred if there is the potential for it to have a significant impact on a listed species/community. Other people I have been working with have recommended referring all developments that involve consideration of any listed species/community regardless of whether or not the impact is considered significant.

2.11 The large number of actions (62.5 per cent) designated as ‘not a controlled action,’ combined with the concerns of stakeholders, suggests that more specific guidance is needed. A formal review of the guidelines is planned by the Department. As part of this review, the Department will conduct a three-month public consultation phase, with consideration also being given to finalising industry ‘sectoral guidelines’ on what aspects are significant for particular industries. This derives from feedback given in response to targeted awareness raising within certain industries and groups. Sectors and industries, such as landowners/farmers, aquaculture and wind farms, are likely to be covered under these industry ‘sectoral guidelines’. These guidelines will result in the better targeting of information to encourage referrals from higher-risk areas. However, Environment Australia should also continue to encourage proponents to consult their staff prior to lodging referrals.

Compliance with the Act

2.12 The ANAO examined 70 referrals to ensure decisions complied with the requirements of the Act. Section 75 provides that the Minister must consider all adverse impacts of the action (but no beneficial impacts at the referral stage of the process) and any public comments that were received. Section 391 of the Act also requires that the Minister take into account the precautionary principle when making his/her decision.

Identifying all adverse impacts

2.13 When making a decision on a referral, the Minister or delegate must consider all adverse impacts that the action is likely to have. The Department aims to ensure this important aspect is met through a number of mechanisms. Information from the proponent, advice from line areas within the Department, and comments from other Commonwealth, State/Territory Ministers and the general public, demonstrate that reasonable efforts are made to identify all adverse impacts.

2.14 Advice from departmental line areas is a primary source of information used in making recommendations. To support this, the Approvals and Legislation Division has service level agreements in place with other divisions in the Department for the supply of high quality, specialist information. Consequently, detailed advice in areas such as marine ecology, endangered species or ecological communities, is available to assist in the decision-making process. There was no evidence to suggest that beneficial impacts were considered at the referral stage, which would have been contrary to the Act.

2.15 Furthermore, in some instances involving particularly sensitive actions or where there are higher levels of uncertainty over impacts, Environment Australia has commissioned consultants to provide additional information or to test the assertions made in the referral documentation. This demonstrates Environment Australia's readiness to ensure compliance with this part of the Act. While recognising the challenges of identifying all adverse impacts, the ANAO was satisfied that Environment Australia had a reasonable process in place to ensure this requirement is met.

Public consultation

2.16 Public consultation is facilitated by a link between Environment Australia's management information system (the EPBC Database) and the Public Notifications page of the web-site. Once a valid referral is entered into the EPBC database it will automatically be posted onto the web-site for public comment (unless the proponent believes that it is a controlled action).

2.17 Of the 70 referrals examined by the ANAO, 63 were made available for public comment²⁴ and comments were received on 26 of these. These comments were clearly considered by the Minister in making the decision on whether the action was a controlled action. This is an important aspect of the decision-making process as interested parties with local or additional information on the action can advise of any significant impacts that it may have. It gives stakeholders an avenue for involvement in the decision-making process, and promotes its quality. A significant number of stakeholder submissions indicated that this was one of the most positive aspects of the Act and an example of good practice management by Environment Australia.

2.18 Although some stakeholders advised of specific occasions where there was a delay in the posting of the notice on the web-site, the ANAO considers that overall, the public consultation phases of the process are well managed by Environment Australia and are generally effective in meeting the requirements of the Act in this area. Some stakeholders raised concerns about access and equity issues for rural and remote communities or for those without internet access. However, the ANAO notes that the Act specifies the internet as the medium for public notices.

The precautionary principle

2.19 The broad requirements of the precautionary principle are outlined in the Act, however its application can be difficult. The precautionary principle is an

²⁴ Seven were considered to be controlled actions by the proponent, and were not made available for public comment.

important safeguard of the Act, especially with respect to new and emerging industries such as wind farms and aquaculture, or where there is a lack of scientific knowledge about specific species. As a matter of course, there is a general clause in the decision brief to the decision-maker that states; 'In making your decision, you are required to take account of the precautionary principle (s391). The Department has taken this principle into account in providing its advice'. While this information is included in every decision brief, it is not always clear as to how the precautionary principle was applied in the decision-making process.

2.20 On the one hand, in some referrals it was readily apparent that the precautionary principle was considered in the decision-making process. For example, in certain referrals, the Department specifically noted that it was taking a precautionary approach in determining that an action was likely to have a significant impact on a matter of national environmental significance. However, in the majority of referrals, the application of the precautionary principle was not specified. Apart from the standard wording outlined above, there was little evidence of the latter's consideration in the decision-making process. In four cases from the sample examined during the audit, the former Minister disagreed with the Department on the application of the precautionary principle. In three instances, the Minister decided that the referral was not a controlled action. In the other case, the Minister decided it was a controlled action.

2.21 This reflects the challenges in the practical application of the precautionary principle. The ANAO recognises that it is not a simple concept in practice and some judgement is required. However, the process would be assisted by a better documentation of the application of the precautionary principle in procedural documents and manuals. Furthermore, a more extensive explanation of how the precautionary principle was specifically applied in the decision-making process should be outlined in the decision brief. This could also assist to build a stronger consensus in future on its application.

Rigour of the decision-making process

2.22 From the sample of referrals examined, the ANAO tested that the decision-making process was thorough and of a quality appropriate to a statutory decision-making process. In the course of the audit, the ANAO identified two challenges to the rigour of the decision-making process: the potential for gaps and shortcomings in the information on which decisions are based, and the practice of making referrals in stages with the potential to circumvent the requirements of the legislation.

2.23 All referrals have separate files and the decision briefs prepared by Environment Australia for the Minister (or their delegate) followed a standard

format, incorporating the key elements and statutory requirements of the Act. For example, they generally include:

- a copy of the referral;
- a summary of public comments;
- comments from relevant Commonwealth or State/Territory Ministers;
- the date a decision is required by;
- the relevant controlling provisions (if applicable);
- designation of the proponent;
- a statement that the precautionary principle has been taken into account by the Department in providing its advice;
- an analysis of likely adverse impacts (if any) and any additional checks or information obtained by the Department on the facts of the case; and
- a recommendation based on the evidence as to whether the action is a controlled action or not.

2.24 The above framework provides a sound control mechanism to address the rigorous standards required of statutory decision-making.

Gaps and shortcomings in referral information

2.25 Because the referral process is largely driven by information supplied by proponents, it is critical that there is sufficient accurate information available to the Minister, or the Minister's delegate, to make a decision on whether the action should be controlled. As mentioned previously, this is the threshold decision under the Act that determines whether the proposed action needs to undergo an environmental assessment and approval process.

2.26 During the audit, the ANAO noted the challenges for Environment Australia in ensuring adequate information at the referral stage. For example, fauna surveys were not always conducted thoroughly enough by proponents to enable a clear decision to be made on the proposed action. While not necessarily false or misleading, the information provided to Environment Australia on these occasions may be inadequate to make a judgement as to whether there is, or is likely to be, a significant impact on a matter of national environmental significance.

2.27 The adequacy of information in referrals was a key concern raised by stakeholders. Complaints range from generally inadequate information in referral documents, inadequate/incomplete fauna survey information in referrals, and the use of generic, unspecific information that has been duplicated

in a series of referrals. There have also been assertions that some referrals have been deliberately false and misleading. However, the evidence to support such assertions is not conclusive. The following case study illustrates the importance of having adequate information for decision-making purposes.

Case study 2

Mining and protection of a listed threatened and migratory species

A particular referral concerned a large mining project, and specifically its impact on a listed threatened and migratory species. The proponent stated in the referral form that no sightings of the species had been made and that breeding sites were not recorded in the area. On the basis of information supplied by the proponent, the Department decided that remaining vegetation on the site was scattered, and unlikely to provide an important habitat for the species. Importantly, the environmental assessment indicated that the site was not a breeding site for the species. This was based on survey work conducted outside the species' breeding season. Consequently, it was considered that the proposal was unlikely to significantly impact on the species as it was not known to forage or breed in the area. The action was determined not to be a controlled action.

A reconsideration of the decision by the Minister was triggered by concerns about the adequacy of the initial survey work and additional information about the use of the area by the species. The Minister substituted the initial decision with a decision that the action was not a controlled action if undertaken in a 'particular manner'.

In making the second decision, the Minister recognised that significant new information had become apparent. Specifically, it was acknowledged that the habitat at the site was a critical habitat for the species, and that the species had been observed feeding at the site. Furthermore, there was a significant amount of uncertainty as to the likely impact of the proponent's plans to remove the vegetation in the area, and the effect that this would have on the species. Ultimately, the Department acknowledged that, due to the very small population of the species, any loss of critical feeding habitat was likely to be significant. The 'particular manner' conditions provided a mechanism to enable some protection of the critical habitat.

The experience of this referral demonstrates the importance of having adequate information at the referral stage.

2.28 The ANAO notes that proponents may have insufficient resources to provide detailed information in their referral. There may be no baseline fauna or flora data or it might be very expensive to collect, such as in relation to the

benthic zone in the marine environment.²⁵ Alternatively, it is recognised that there is an incentive for proponents to provide a minimum amount of information in the referral as a possible means to circumvent the assessment and approval process. One stakeholder made the following observation:

Currently the provision of a good quality referral could be potentially detrimental to proponents. For example, a carefully researched referral might indicate the presence of a threatened species that might not be discovered in the preparation of a poorer quality referral.

2.29 Accurate information is critical for the decision on whether the action is a controlled action. A referral that is designated as a non-controlled action on the basis of inadequate information is clearly a poor outcome. As one stakeholder noted, a decision in these circumstances jeopardises the integrity of the assessment and approvals process.

2.30 Environment Australia has put measures in place to mitigate against inadequate information in referrals. A screening process takes place before a referral is treated as valid and starts the formal decision-making process. This screening phase identifies those referrals that lack information, with only valid referrals being entered into the EPBC Database. What constitutes a valid referral is outlined in Environment Australia's internal procedures, and is derived from the Regulations to the Act. Under section 76 of the Act, if the Minister believes on reasonable grounds that the information provided in the referral is inadequate, further information may be requested.

2.31 Environment Australia estimates that 20–30 per cent of referrals undergoing the screening phase have inadequate information in some form or another. About 10 per cent will warrant a formal letter from Environment Australia advising that the referral is invalid and requesting a new referral. About half of all persons receiving this letter will resubmit a valid referral.

2.32 From the cases examined in the audit, it is apparent that the problem of inadequate information is generally picked up by Environment Australia and/or is addressed through the public consultation phase of the process. The capacity of the public and environmental groups to comment on the referral documents is clearly an important process whereby the veracity of referral information is assessed. Furthermore, on occasions Environment Australia has requested additional fauna surveys to verify the proponent's information. In at least one instance, Environment Australia met the cost of an additional survey rather than the proponent. However, this is clearly not an ideal solution as it introduces issues of equity in terms of why one proponent would receive assistance while others were willing to pay for a comprehensive referral in the first place. The

²⁵ The benthic zone is associated with the sea floor. (State of the Environment Report 1996; A-23).

ANAO notes that a small number of consultancy firms are tending to specialise in referrals and have made a number of referrals on behalf of clients.

2.33 Given the relatively high number of inadequate referrals in the first instance, it would be preferable for Environment Australia to encourage better quality information from proponents. This could also assist in speeding up the assessment process. For example, the accreditation of environmental consultants is one measure by which quality referral information can be encouraged. Another possible measure is the publication of a minimum set of criteria that fauna and flora surveys are to comply with for the information to be considered valid and reliable.

Recommendation No.1

2.34 In order to improve the consistency and quality of referrals made under the Act, the ANAO *recommends* that Environment Australia:

- a) finalises as soon as practicable, the industry sectoral guidance on the Act;
- b) further encourages proponents to seek advice from the Department before lodging referrals and investigate measures by which this could be achieved;
- c) considers the introduction of an accreditation scheme for consultants submitting applications under the Act; and
- d) considers providing guidance on what would be an acceptable standard of information required, for example in fauna or flora surveys, as part of a referral under the Act.

2.35 **Agency Response:** Agree. EA is conscious of the need to continue to improve the quality of referrals and to this end has instituted a program to review guidelines and enhance the clarity of our advice to stakeholders. The detail of the recommendation will be incorporated in this work.

‘Testing the water’ through staged referrals

2.36 A related issue within the context of referrals is the issue of staged referrals, which involves making a referral in stages with an initial referral covering the first stage only. Known staged referrals represented less than 10 per cent of the total sample of referrals examined. However, they frequently represented the more complex referrals. For example, a significant number of aquaculture projects, residential and resort developments were referred in stages.

2.37 A number of stakeholders have raised concerns about the increased prevalence of staged referrals. The Great Barrier Reef Marine Park Authority has indicated that this is a significant issue in coastal areas of North Queensland

given the volume of infrastructure, resort and residential developments in the region.

2.38 Splitting projects into stages has the capacity to undermine the effectiveness of the assessment and approval process as it reduces the probability that any one stage of a development will require assessment and approval under the Act. As one of a number of stakeholders who expressed concern commented:

We consider that Environment Australia's treatment of single developments as separate components risks diminishing of the effectiveness of the referral, assessment and approval provisions of the Act. This is because the presentation of the proposed developments in separate, smaller components is prone to giving the incorrect impression that the environmental impact is less significant than if the proposed development is treated as a whole.

2.39 It is accepted that staged referrals can be made for legitimate reasons. For example, when making the first referral, the person may not have any plans with respect to further stages. Alternatively, the person may be unwilling to refer all the stages of the project due to the absence of guaranteed finance for later stages or the unwillingness of State and Territory planning authorities to approve further developments. However, the ANAO notes the requirement of Schedule 2 of the *Environment Protection and Biodiversity Conservation Regulations 2000*. Schedule 2 prescribes the information that must be provided to the Department for a valid referral and requires 'a description of the proposed action' including *inter alia* 'whether the action is related to other actions or proposals in the region'.

2.40 The ANAO also recognises that there is a legal obligation on Environment Australia to assess a referral only on the extent of the action proposed. If the action is capable of standing alone as a separate development, it is also capable of assessment. It would be unreasonable to reject a referral that is valid, in accordance with the Regulations.

2.41 Environment Australia is alert to this issue and exercises a certain degree of flexibility in its approach to staged referrals. Generally, it will seek to commence a dialogue with the proponent, in an effort to gauge what is likely to be the full effect of the action. The ANAO recognises the benefits of this approach, but considers that a more formal approach to staged referrals should be implemented. Environment Australia has advised that on a number of occasions an action has been designated as not controlled, with the understanding that, although it was part of a larger development, the other actions were not to proceed for a significant period of time. In these situations, the action was capable of being assessed as a 'stand-alone' action. However, Environment Australia notes that in some cases it has been surprised when a referral for a related action is made a short period of time later.

2.42 To guard against such future occurrences, the ANAO considers that the Referral Form should be amended to include specific questions on whether any other related actions are planned, now or in the future and when these actions are likely to occur. This should draw more specifically on Schedule 2 to the Regulations, as discussed earlier. A related referral that is subsequently made, contrary to the advice provided in the initial referral form, would imply that false or misleading information has been provided to the Department. Under section 489, the provision of false or misleading information to obtain an approval or permit is an offence.

Recommendation No.2

2.43 In order to address the risks from referrals of staged developments that may circumvent the objectives of the Act, the ANAO *recommends* that Environment Australia revise the application form and guidelines to make more explicit:

- a) the requirements for proponents to disclose staged developments; and
- b) the assessment criteria that will apply in these circumstances.

2.44 **Agency response:** Agree. The referrals application form and associated guidelines will be amended as soon as practicable. As part of this process, clearer guidance will be produced regarding the assessment of staged developments.

Transparency of the referral process

Principles of transparency

2.45 In reviewing the sample of files, the ANAO examined the transparency of the decision-making process. In doing so, the ANAO was seeking an assurance that better practice principles had been followed in terms of good record-keeping practices, documentation of reasons for decisions and whether the procedures for reaching decisions met the standards required by the Prime Minister's *Guide on Key Elements of Ministerial Responsibility*.²⁶

2.46 The files examined by the ANAO indicated that overall, the transparency of the process was satisfactory. The file record is supported by web-based

²⁶ These guidelines (based on the *Administrative Decisions (Judicial Review) Act 1977*) include the principles that each decision needs to be within the scope of the power provided by the legislation; the procedure for reaching the decision needs to meet basic standards of fairness, allowing all sides to present their cases, and must also comply with any special requirements set by the legislation; each decision needs to be made on the merits of the case, with the decision-maker unbiased and acting in good faith; and conclusions must be soundly based in reason, in particular they must reflect a proper understanding of the law, draw on reasonable evidence for findings of fact, take account of all relevant considerations and not take account of irrelevant considerations.

information. Both sources provide documented evidence of the steps in the decision-making process for each decision and the rationale behind decisions. This latter point is covered in more detail in the file record rather than the website. The decisions were clearly within the scope of the legislation and the decision-making process met the standards required by the Prime Minister's Guide. Nevertheless, as would be expected, especially with the introduction of a new Act, there have been examples where the Department and the Minister had different views on some referrals. All these decisions related to the former Minister. As part of its file review, the ANAO examined 22 referrals where the former Minister did not agree with the Department's recommendation on whether the action was a controlled action. In 17 of the referrals, the former Minister determined that the action was not a controlled action. In the other five referrals, the former Minister determined that the action was a controlled action.

2.47 It should be noted that a Minister is entitled to disagree with the Department and not accept its recommendation. In doing so, a Minister can rely upon information from other sources or information that had since come to light. Where the Minister disagreed with the Department's advice, the ANAO sought assurance that the principles of transparency were given effect and that there was adequate documentation of the reasons for the decision including an explanation of any differences of opinion.

Documentation of reasons for decisions

2.48 Given the difficulties surrounding the interpretation of 'significance' in the Act, as outlined earlier, it is understandable that there are real challenges in determining whether or not an action triggers the Act. In these referrals where the former Minister disagreed with the departmental recommendation there was a difference of view on matters such as the extent to which the action would impact on matters of national environmental significance, what scale of action triggered the Act and whether the assertions made in the referral were totally accurate.

2.49 Some of the difficult considerations as to whether or not there was an impact on a matter of national environmental significance were documented. Consideration included whether or not road upgrades would significantly impact on listed threatened species, whether or not listed marine migratory species would be impacted by seismic surveys and the importance of having data on estimated effluent loads for actions involving discharge into sensitive environments.

2.50 The scale of the action was also a factor in the decision in some cases. While clearly linked to significance, scale is not itself a criterion in the guidelines. Nevertheless, it was considered particularly relevant to two aquaculture projects.

In these projects the documented reasons for these decisions were limited to the small size of the proposals.

2.51 Given the detailed facts and consideration in the Department's decision briefs that reflected the prescribed requirements of the Act, the reasons for the Minister's disagreement in a small number of referrals, (four cases), did not clearly show how matters, such as to what extent all adverse impacts had been considered and how the precautionary principle had been taken into account.

2.52 In these circumstances it would have been desirable for the Department to seek further clarification of the Minister's views to assist the Department in better understanding the Minister's position and the weighting he placed on various factors. This assists to ensure that full accountability forms part of the statutory decision-making process. In particular, if the Minister was giving different weighting to the criteria it is essential that the Department is fully aware of this and adjusts the guidelines accordingly so that the guidelines can evolve as new issues are dealt with. This was also an issue in an earlier audit on the Natural Heritage Trust.²⁷

2.53 In two cases examined during the audit the Department did in fact seek clarification of the Ministers reasons, largely in response to third party requests. In one case involving mining in Queensland, the Minister recognised that it was a difficult decision but considered that the link between the action and its impact on a listed threatened species was not sufficiently established to warrant a controlled action decision. In this and one other case involving mining near a sensitive wetland, the Department was concerned about either the process or the adequacy of the reasons for the Minister's decision. The Department sought legal advice. Subsequently, in both cases the reasons for decisions were appropriately clarified and fully addressed the requirements of the Act.

Conclusions

2.54 Administrative guidelines to assist proponents are widely available on the Environment Australia web-site as well as in a published form. Environment Australia has developed a good client focus and a high level of goodwill across all stakeholder groups in terms of assisting clients to interpret the guidelines. However, more specific guidance in relation to matters of national environmental significance—particularly within industry sectors or regions—would assist in reducing the number of unnecessary referrals and improving the quality of the information of those that are made.

2.55 Environment Australia has a good system of checks and balances that provides an assurance that the matters required to be considered under the Act

²⁷ *Preliminary inquiries into the Natural Heritage Trust* ANAO Audit Report No.42 1997–98.

are considered for decisions on whether an action is controlled or not. Compliance with the requirements of the Act is apparent through the identification of adverse impacts, the public consultation process and the application of the precautionary principle. However, improved consistency and documentation of the precautionary principle and how they apply in particular cases would also assist the process.

2.56 The rigour of the decision-making process for referrals under the Act is generally sound and is improving as more experience is gained with the administration of the Act. The shortcomings in some of the information provided by proponents needs particular attention to ensure quality information is available on which to make decisions. The introduction of an accreditation system for consultants would assist in this regard. Likewise, the issue of staged referrals has the potential to undermine the objectives of the Act. Enforcing greater disclosure through the administrative guidelines and Referral Form would assist in improving this matter.

2.57 Overall, the ANAO was satisfied that there was sufficient documentation of the referral process and reasons for decisions to ensure the transparency of the process. Nevertheless, the ANAO notes that in 22 cases the former Minister did not agree with the recommendation of Environment Australia as to whether a referral was a controlled action or not. The Minister as delegate would at times be expected to have a different view and in the overwhelming majority of cases where this occurred the reasons were clear and concerned differing opinions on the interpretation of the Act. However, a more detailed explanation of the reason in all cases would have been beneficial for better practice and would lead to improvements in the Department's processes. As noted in an earlier ANAO audit report, greater attention to reasons for decision in all cases would engender greater confidence in a system of open and transparent decision-making, as part of a sound framework of public accountability.²⁸

²⁸ Examination of the Federation Cultural and Heritage Projects Program 1999–2000; p. 14.

3. Managing Assessments and Approvals

Introduction

3.1 Processes for managing assessments and approvals apply to all actions that have been determined to be 'controlled actions'. Section 87 of the Act outlines the options for assessing the relevant impacts of an action (i.e. an accredited assessment process²⁹, an assessment on preliminary documentation, a public environment report, an environmental impact statement or a public inquiry). Part 9 of the Act specifies the requirements for approval of actions. The Minister must consider information in the referral, information about impacts of the action that the Minister considers relevant, the matters (if any) prescribed by the regulations and any gazetted guidelines.³⁰ As with referrals, the ANAO examined the level of compliance with the provisions of the Act as well as the rigour of this process and the degree of transparency of the assessment and approvals process within the context of administrative law and good practice. This included an examination of the documentation of reasons for decisions and whether the procedures for reaching the decisions met the standards required by the Prime Minister's *Guide on Key Elements of Ministerial Responsibility*.

The number of controlled actions

3.2 Of the 167 referrals designated as controlled actions, 34 (20 per cent) had been approved as at 30 June 2002. Table 3 outlines the key decision points that had been reached for all controlled actions, as at 30 June 2002.

Table 3
Controlled actions

	2000-01	2001-02	Total
Total controlled actions	72	95	167
Assessments completed	17	27	44
Assessment reports completed	12	25	37
Approval decisions	8	26	34
<i>Approval with conditions</i>	6	22	28
<i>Approval without conditions</i>	2	4	6
<i>Approval not granted</i>	0	0	0

Source: EPBC Act Annual Report 2001-02

²⁹ An accredited assessment process may be established as part of a bilateral agreement between the Commonwealth and the States/Territories, or may be approved on a case-by-case basis.

³⁰ See subsection 87(3) of the EPBC Act.

Compliance with the Act

3.3 The first decision in the assessment and approval process involves consideration of which assessment method is to be used. Section 87 outlines the options that must be considered. Assessment by preliminary documentation or an accredited process is likely to result in lower costs for proponents. Assessment by a public environment report, environmental impact statement or by public inquiry are higher cost and more lengthy processes and are likely to be used for those actions with the highest risks and/or uncertainty concerning the environmental impacts.

3.4 Of the 34 actions approved at 30 June 2002, two had been assessed through bilateral agreements, three through accredited processes and 29 through preliminary documentation. There had been no public environment reports, environmental impact statements or public inquiries.³¹ In all cases examined, the assessment requirements of the Act were met. Consultation with the States and Territories was an integral part of the assessment process for the 34 approvals examined. Guidelines for choosing the assessment approach (as required under section 87(6)) are available on the web-site. The assessment process involves a brief to the Minister that outlines relevant considerations pertinent to the action being considered.

3.5 The approval decision is the last key step in the decision-making process under the Act. Key factors to be taken into account when making the decision include:

- the assessment report relating to the action,
- economic and social matters, and
- any comments received from other Commonwealth, State or Territory Ministers.

3.6 The Minister can also impose conditions on the approval, where they are considered necessary, for repairing or mitigating potential environmental damage. In making the decision, the Minister may also take into account the proponent's environmental record.

The assessment report

3.7 The assessment report prepared by the Department is particularly important to the decision-making process as it provides the factual material upon which the recommendation and/or decision is made. From the assessment

³¹ There are some 37 controlled actions being assessed through accredited assessment processes as at 30 June 2002. However only three actions had been approved by accredited assessment process at the time of the audit.

reports examined for the 34 approved actions, the reports are comprehensive and objective. Reports tend to follow a common format including relevant matters such as a factual description of the proposed action, a description of the existing environment, an analysis of direct and indirect impacts, possible mitigation measures and draft conditions of approval.

3.8 In all the cases examined, the precautionary principle had at least been implicitly taken into account in the process. In some cases it is explicitly referred to in the report. For example, one report noted that the fauna survey was inadequate for determining the presence of listed threatened species. In this case the report commented that ‘in keeping with the precautionary principle, it should be assumed that the species concerned is located in the vicinity of the proposed works’. In some cases independent consultants are used to prepare reports while others are conducted ‘in-house’ within Environment Australia. However, in all cases examined, the reports addressed the criteria required under the Act.

Consideration of economic and social matters

3.9 Under section 136 of the Act the Minister must consider economic and social matters when making a decision on whether to approve an action. However, the Act does not stipulate how this is to be done or what standard is expected. From the 34 approvals examined by the audit, it was clear that economic and social matters were considered, as required by the Act. All decision briefs addressed this issue. Where the economic and social benefits were not necessarily quantifiable, the Department considered factors such as investment, construction costs or job creation.

3.10 In some cases the Department, in its advice to the Minister, noted uncertainty over the monetary value of economic benefits. However, where economic and social benefits were quantified, the benefits were relatively significant. For example, one natural gas project was valued at \$650 million with 900 permanent jobs and 400 temporary jobs. A rail link project was valued at over \$440 million. For a small number of approvals, the economic benefits were minor or too difficult to determine (such as in relation to a landfill site, an airport relocation and a residential subdivision).

3.11 The ANAO considers that Environment Australia has adequately met the requirements of the Act in this regard. The importance of economic and social matters in the decision-making process is illustrated in Case Study 3, where these considerations were a critical factor in the Minister’s decision.

Case study 3

Balancing environmental matters with social and economic considerations

This project was a joint venture involving the establishment of a large hardwood plantation on indigenous land in Northern Australia. The project involved the clearing of 25 000 ha of native vegetation dominated by dense open eucalypt forest. The Minister determined that the action was a controlled action and identified issues dealing with six listed threatened species and communities. The proposed action was assessed on preliminary documentation.

In making the decision on whether to approve the proposed action, the social and economic importance of the project to the local indigenous people was recognised. It was noted that the local economy is primarily characterised by welfare dependency and small ‘cottage’ industries. In undertaking the project, one of the joint venture partners was aiming to diversify available economic opportunities for indigenous residents. The Department sought comments from the relevant Commonwealth Ministers. The Ministers provided comments in support of the project and articulated possible amendments to the conditions attached to the project, in order to safeguard the economic and social viability of the project.

The Minister approved the action with conditions. One of the conditions required the proponents to submit plans for the management of such things as weeds, fertiliser application, pests and diseases. Another condition prohibited the clearing of vegetation close to watercourses and known sites of the listed threatened species.

Environment Australia’s consideration of all relevant factors was thorough in a project that exemplified the challenges associated with making a decision on an action that has competing environmental, social and economic benefits and costs.

Section 130 notices—Comments from the States and Territories

3.12 Section 130 of the Act requires the Minister not to grant an approval for a proposed action until he or she has received a notice from a State or Territory regarding the impacts of the action on matters other than those subject to the Act. The notice provides assurance that all impacts of the matter are considered. According to the Department’s ‘Approval Manual’, ‘the notice need only contain a statement that the certain and likely impacts of the action on things other than matters protected by the controlling provisions for the action have been assessed to the greatest extent practicable, and how they have been assessed.’

3.13 While Environment Australia has consulted with the States and Territories on the requirements of section 130 notices (and provided advice from the Australian Government Solicitor to the States and Territories on the application of this section of the Act), the matter remains contentious and has contributed to delays in approvals in some instances. The difficulties concern the interpretation of the provisions and the contingent liability that might apply to the States and Territories in providing the advice. While the provision of section 130 notices is complied with for those cases examined, one State agency has issued qualifications on the certificates to minimise the risk of legal exposure.

3.14 Difficulties in the requirements of section 130 also arise when trying to align State and Territory processes with the Commonwealth's Act processes. Differences in terminology and the processes involved make concurrent approval between the Commonwealth and the States more difficult. Environment Australia has recently adjusted its information to proponents to make more explicit to proponents that a section 130 notice is required from the States or Territories before an action can be approved. This gives the proponent the opportunity to approach the relevant State or Territory authority and facilitates concurrent process of approvals at the Commonwealth and State/Territory level. The ANAO also considers that many of the challenges relating to the application of section 130 notices can be addressed through consultations associated with the bilateral agreements being negotiated with the larger States—particularly as familiarity with the Act improves over time.

Conditions attached to approvals

3.15 Section 134 of the Act gives the Minister the authority to impose conditions on approvals. Of the 34 controlled actions approved as at 30 June 2002, six were approved with no conditions and 28 were approved with conditions. In attaching conditions to the approvals, the Minister must consider any relevant conditions imposed by other State, Territory or Commonwealth agencies and information provided by the proponent. The Minister must ensure, as far as practicable, that the conditions imposed are cost effective in terms of meeting their objective. Where no conditions were imposed, this was often because conditions that had been imposed by State and Territory processes were regarded as sufficient to achieve the Act objectives or that there were no actual impacts on protected matters.³² In all cases, the decision brief was clear and the reasons for attaching conditions were well documented and relevant to the requirements of section 134 of the Act.

³² Three of the cases involved referrals that were specified as controlled actions. After the assessment process it was confirmed that there were no actual impacts likely on matters of national environmental significance. The other three cases involved clearing of protected ecological communities and the State process provided adequate protection.

3.16 Conditions typically related to matters such as:

- the proponent ensuring that an action does not adversely affect listed threatened species or listed migratory species;
- a requirement for a plan to be approved by the Minister that covers management of any construction activity affecting listed threatened species or listed migratory species;
- a requirement that activity be restricted to particular times or periods;
- a requirement for an audit of compliance with a specified plan; and
- a requirement for notification to the Minister if any significantly adverse event occurs (such as an oil spill).

3.17 From the approvals examined through the audit, the ANAO considers that Environment Australia has met the requirements of the Act when imposing conditions on developments. Full consideration has been given to ensuring that the conditions are reasonable in terms of alignment with State or Territory regulations and are cost effective. While some stakeholders were concerned that the conditions were sometimes too prescriptive and insufficiently focussed on outcomes, the ANAO considers that the current process is sufficient to adequately achieve the requirements of the Act.

Rigour of the assessment and approval process

3.18 As in the examination of referrals, the rigour of the assessment and approvals process involved consideration of the thoroughness and the quality of the process. Because the decision making process involves a statutory process subject to judicial review, the process needs to have a high degree of rigour. Rigour also has a statutory dimension in that section 87 of the Act allows the Minister to decide on an assessment on preliminary documentation only if the Minister is satisfied that that approach will allow the Minister to make an informed decision.³³

Assessments

3.19 In regard to assessments, Environment groups have indicated some concern about the heavy reliance on preliminary documentation and whether this provided sufficient assurance and rigour that all relevant matters had been considered. However, in the cases examined through the audit, the assessment process for all actions was thorough and comprehensive and in some cases involved independent reports by consultants commissioned by Environment

³³ See section 87 (5) of the EPBC Act.

Australia as well as further detailed documentation by the proponent and submissions from a range of stakeholders. The ANAO was satisfied that the reports were objective and well researched with no evidence of relevant matters being ignored.

3.20 The former Minister tended to favour assessment by preliminary documentation. In two referrals where the Department recommended assessment by public environment report, the Minister did not agree and instead chose assessment by preliminary documentation. His reasons were documented and related to alternatives that he considered more cost effective.

3.21 Two stakeholders commented in submissions to the ANAO that they had concerns about the technical capacity of Environment Australia in specialist areas of assessments. However, the ANAO considers that, on the basis of the 34 decisions examined, Environment Australia generally consults expert groups or engages expert consultants where the technical expertise does not reside within the Department. The consultation process with the States and Territories is also very important in managing the risks during the assessment process. Quality assurance and consistency is also maintained through the Approvals and Audit Section within the Approvals and Legislation Division. This section coordinates and balances the assessments from the different line areas and other sources throughout the Department and provides the final recommendation and conditions (if any) to the Minister or delegate.

Approvals

3.22 Decisions on approvals were considered through a decision brief that was provided to the Minister or the delegate. All decision briefs followed a format that comprehensively addressed the considerations for the approval decision, as outlined in section 136. The decision brief also included an assessment report that analysed the action and its likely impact on the matters protected. From the approvals examined, there was no case where the Minister rejected the final recommendation contained in the decision brief. The decision briefs to the Minister, recommending proposed actions be approved followed a standard format covering the key considerations outlined under the Act. The decision briefs also include administrative requirements, such as the approval instrument, the proposed letter to the proponent, and the date a decision is required by.

3.23 The assessment report and the conditions attached to the approval provide the details and rationale for approvals that have the capacity to protect the environment and mitigate any damage arising from the actions being considered. The rigour of the process is underpinned by the quality of the public consultation process and the engagement of State and Territory agencies and expert

consultants as required. It is important in striking the right balance between environmental protection and the social and economic benefits that may result from the action. The ANAO was satisfied that, from the cases examined, the rigour of the decision-making was thorough and consistent with the high standards that would be expected from a statutory decision-making process.

3.24 In recommending attaching conditions to approvals, the Department seeks to balance environment protection priorities with the practicalities of implementing the condition(s). The conditions attached to approvals were tailored to the risks in each case and the documentation demonstrated that a thorough process had been undertaken in reaching the final set of conditions to be implemented. The Department seeks to agree conditions as far as possible with the proponent before they are finalised and checks the consistency of the conditions with those imposed by the State or Territory. In some cases the conditions are very prescriptive where there is a higher risk to a listed threatened species. For example, in one case the proponent was required to use the 'horizontal directional drilling construction method' at a particular watercourse crossing to avoid impacting on sensitive species. In cases where there may be unavoidable impacts on listed threatened species, a translocation plan has been required to preserve that population.

Transparency of assessments and approvals

3.25 In reviewing the transparency of the process, the ANAO examined the documentation for assessments and approvals in terms of whether it met the standard required for statutory decision-making. In particular, the Department's record keeping practices, the level of documentation of reasons for decisions and whether the procedures for reaching decisions met the standards required by the Prime Minister's *Guide on Key Elements of Ministerial Responsibility* were examined. As noted earlier, in the 34 controlled action approvals, there was no example where the Minister or the delegate rejected the Department's recommendation to approve the action.

3.26 Documentation was sound with each assessment and approval having a complete file record that carried over from the referral stage. The file record for the cases examined included the decision brief for the assessment and the approval stages of the process for each controlled action. The decision brief documented the key decisions points and their relevance to the requirements of each case.

3.27 Environment groups were concerned about the absence of public information on assessments conducted through bilateral agreements. In particular, the absence of public notices on the Environment Australia web-site

restricted comments on the assessment process. Environment Australia has indicated that it is currently working to improve the web-site so that assessments conducted under bilateral agreements are notified on the web-site alongside assessments conducted by Environment Australia. The ANAO considers that this is an important initiative to further enhance transparency and provide a measure of quality assurance on the assessment process.

Conclusions

3.28 Compliance with the Act requires consideration of the impacts of the proposed action and any mitigation measures in an assessment report, as well as economic and social matters, comments from the States or Territories and the cost-effectiveness of any conditions attached to the approvals. From the records of the 34 approvals made, the ANAO considers that there is full compliance with the requirements of the Act. Environment Australia has a standard approach to considering relevant matters such as economic and social matters, public comments and attaching conditions on approvals. There are some challenges in addressing section 130 requirements in relation to matters other than those being controlled through the Act and this has resulted in some delays. However, these can be addressed in the context of bilateral agreements.

3.29 The quality of the assessment and approval process under the Act is sound. From the 34 actions examined, the assessment process was thorough and comprehensive. In some cases, it was supported by independent reports by consultants commissioned by Environment Australia. While some stakeholders were concerned about the heavy reliance on preliminary documentation as the assessment method, in the cases examined, all of the decision briefs were objective and thorough, with no evidence of relevant matters being ignored.

3.30 The primary concern from stakeholders was in relation to the impact of bilateral agreements and accredited assessment processes, and the level of public information that would be available on matters of national environmental significance. Accredited assessment processes, facilitated by bilateral agreements, are one of the five options for assessment under the Act and the one option that is likely to become more common in the future as more agreements are signed. Environment Australia is currently improving the level of public information available on assessments conducted under bilateral agreements on its web-site. This will have the added benefit of providing a measure of quality assurance on the assessment process.

3.31 In terms of the transparency of the assessment and approval process, reasons for decisions were well documented. Approval decisions were also well documented and generally met the high standards required for statutory

decisions. Considerations were generally focussed on relevant matters pertinent to the merits of the case being examined, as required by administrative law and the Prime Minister's *Guide on Key Elements of Ministerial Responsibility*.

4. Timeliness

Introduction

4.1 Managing the timeliness of environmental assessments and approvals is important, both in terms of meeting the statutory requirements of the Act and minimising unnecessary delays and costs for proponents. Statutory timeframes are provided at the referral, assessment and approval stages.

4.2 At the referral stage, the Minister must make a decision as to whether a referral is a controlled action within twenty business days of receiving the referral, or within 10 business days if the proponent stated in the referral that they thought it was a controlled action.³⁴ At the assessment stage the Minister must decide on an assessment approach for the controlled action within twenty business days of a decision that the action is a controlled action.³⁵ At the approval stage, the Minister must decide whether or not to approve a controlled action within 30 business days of receiving the assessment report if the action is the subject of an assessment report or 40 business days if an inquiry is commissioned in relation to the action.³⁶

Timeliness of decisions

4.3 In an effort to ensure that the timeframes are met, the Department has put in place administrative arrangements to promote timely and efficient processing of referrals, assessments and approvals.

4.4 The ANAO examined the accuracy of the timeliness figures in the Annual Reports to Parliament on the operation of the Act. The ANAO checked the accuracy of the figures for the most significant decisions—whether the action is a controlled action and whether a controlled action is approved. From the sample examined the ANAO considers that the overall timeliness figures reported are accurate, generally meet the statutory timeframes, and have improved over time.

³⁴ Subsection 75 (5) of the EPBC Act.

³⁵ Subsection 88 (1) of the EPBC Act.

³⁶ Section 130 of the EPBC Act allows a longer period for a decision if specified in writing.

Table 4
Time frames reported under the Act

Process decision	Timing requirement	Percentage of decisions on time 2000–01	Percentage of decisions on time 2001–02
Referrals	10 or 20 days	82	94
Assessment approach	20 days	82	92
Approvals	30 or 40 days	75 (6 out of 8)	96 (25 out of 26)

Source: EPBC Act Annual Report 2001–02

4.5 In relation to referrals, the Department's Annual Report indicates that there were 19 late decisions in 2001–02 on whether an action is controlled (6 per cent of the totals for that year). This compares positively with the 45 late decisions in 2000–01 (17 per cent of the totals for that year). The average number of days late was less than three business days. The reported figures are accurate within a one per cent tolerance.³⁷

4.6 In terms of approval decisions, 25 of the 26 approval decisions in 2001–02 were made on time. The Department indicated that the one late decision was due to the complexity of the issues under consideration.³⁸ The 2001–02 figures compare favourably with the 2000–01 figures, which indicated that two of the eight approval decisions were late.

4.7 A further consideration in timeliness, is the requirement under subsection 77(4) of the Act for the Minister to respond to proponents within 28 days, with the reasons that a proposal was designated a controlled action. The 2000–01 Annual Report indicated that 11 requests were handled during that year and that the timeframe for meeting the requests was 'often not met.' The Department indicated that this was because of the need to seek legal advice and the need to meet other statutory timeframes associated with referrals. Further, the Department indicated that 'systems were being reviewed to improve performance in this regard'.³⁹ The 2001–02 report indicates that 13 requests were handled. Six did not meet the statutory timeframe. The same reasons were given for not meeting the timeframe, although the Department suggests that 'performance in meeting this timeframe has, however, improved since 2000–01 and continued to improve throughout 2001–02.' The ANAO appreciates the tensions between timeliness and the quality of responses in this area. However,

³⁷ The figures for the number of late decisions on referrals in the 2000–01 Annual Report is 18 per cent, but 17 per cent for the same year in the 2001–02 annual report. The error was largely due to difficulties in ensuring that accurate information was recorded in the database for the first year of the Act's operations.

³⁸ *Annual Report on the Operation of the Environment Protection and Biodiversity Conservation Act 1999, 2001–02.*

³⁹ *Annual Report on the Operation of the Environment Protection and Biodiversity Conservation Act 1999, 2000–01.*

there would appear to be considerable scope for improvement when it is considered that the Department only meets the required timeframe in just over 50 per cent of cases.

Reasons for delays

4.8 Where the timeframes are not met, the reasons must be included in the annual report to Parliament. Some of the reasons that timeframes have not been met were:

- the need to seek legal advice on issues related to the decision;
- the need to seek further advice on complex or difficult proposals;
- delays caused by travel or absence of decision makers; and/or
- (in the case of approval decisions) prolonged consultation with proponents to ensure conditions were achievable.

4.9 The ANAO considers that the reported reasons generally reflect the situation identified in individual decision briefs and circumstances of the cases examined. They comply with the requirements of the Act.

Actual time taken to approve an action

4.10 Given the importance of timely decision-making in the referrals, assessment and approvals process, the ANAO also examined the actual time that elapsed from when the 34 referrals were received to when they were approved. In doing so, the ANAO recognises that the Department does not have complete control over the timing of the decision-making process. For example, the Department may be waiting on some information from the proponent, or may be waiting for a section 130 notice from a State or Territory. On these occasions, the Department may 'stop-the-clock' so that no time elapses for the purposes of the statutory timeframe. Nevertheless, the overall elapsed time taken for the 34 approved controlled actions is set out in Table 5.

Table 5
Elapsed Time

Elapsed Time from referral to Approval	Number of assessments in each category	Percentage of assessments in each category
3–6 months	11	32
6–8 months	9	26
8–10 months	6	18
10–12 months	5	15
Over 12 months	3	9
Total	34	100

Source: ANAO analysis of referral data

4.11 The overall time taken to approve controlled actions, from its receipt by the Department to the approval decision, compares favourably to similar State and Territory processes. For example in Western Australia, the Review of the Project Approvals System indicated that:

On average, the assessment and conditions setting process takes about 63 weeks [almost 16 months] to complete, and, where comprehensive timelines were available, the average increase in time over that expected at the start is nearly 21 weeks [more than 5 months], with the delay apparently mostly with the proponent.⁴⁰

4.12 In NSW the Audit of Environmental Impact Assessment of Major Projects indicated that:

For major transport projects, the environmental impact assessment process from issuing of Director-General's requirements through to the Minister's determination takes about 26 months on average.⁴¹

4.13 In addition, stakeholder submissions indicated general satisfaction with the timeliness of the environmental assessment and approval process. Nevertheless, the ANAO considers that, given the expectations of Parliament, there are further opportunities to improve the overall elapsed time figure. In taking this view, the ANAO recognises that much of the assessment process is driven by the proponent and depends on how quickly and efficiently the proponent can produce necessary documentation for the Department's consideration. Furthermore, the overall elapsed time figure may be extended due to difficulties associated with the State or Territory notice required under section 130 (as outlined in Chapter 3). However, given the specific, relatively tight timeframes specified in the Act, it is reasonable for the Department to consider opportunities to improve processes to reduce the time frames outlined in Table 5. Improving the time taken for decisions below the current median of six–eight months could provide better client service and strengthen performance outcomes consistent with the objectives of the Act.

4.14 Providing more 'pre-lodgement' assistance such as better guidance on the standard of information expected at the referral stage or the accreditation of consultants, as recommended earlier in this report should help to speed up the process.

4.15 It should also be possible to improve the timeliness of assessments conducted through accredited processes. The use of accredited assessments increased from 18 per cent of assessments in the first year of the Act to 38 per cent in the second year. However, in evidence provided by one State agency, the

⁴⁰ Western Australian Government Review of Environmental Approvals (2002).

⁴¹ NSW Audit Office Report, p. 58.

accredited assessment process contributed to additional delays rather than speeding up the process. In particular concerns were raised in regard to:

- what range of State processes could be accredited under the Act;
- whether conditions can be attached by the Commonwealth to a decision made by the State through an accredited process; and
- whether accreditation can still proceed for a project already under consideration by the State.

4.16 These types of problems are more apparent where there are no bilateral agreement in place. This highlights the importance of these agreements. There is the potential for these matters to be addressed through reviews of State legislation prior to the signing of bilateral agreements. Environment Australia's performance information should focus on measuring/assessing this improvement over time.

EPBC Database—Management Information System

4.17 The EPBC database is the primary workflow management tool by which Environment Australia tries to ensure that statutory timeframes are met. The database cost \$1.29 million to develop. Designed by a contractor according to Environment Australia's specifications, it was installed and ready for use at the commencement of the Act in July 2000. An important feature of the database is that it generates the Public Notifications page on the departmental web-site. Once information about a referral is entered into the database, the requisite public notice is automatically published on the web-site.

4.18 The main priority of the system is to support the statutory and administrative processes and help staff meet the timeframes specified in the legislation. Uncertainty as to the amount of work the Act would generate meant that the system was designed to provide workload management capabilities that would enable Environment Australia to cope with increased volumes and new functions.⁴² These capabilities include the ability to monitor the Approvals and Legislation Division's processing load, and the ability to report on tasks that are due or overdue, and, where possible, highlight to users the next task.

4.19 Responsibility for meeting the statutory timeframes is with the individual officer involved in the assessment or approval of the referral. The design of the database facilitates this by breaking up the assessment and approval process into various stages. These stages facilitate compliance with the statutory timeframes. For each stage, the responsible officer is required to enter into the

⁴² As compared to the previous Commonwealth Act, the *Environment Protection (Impact of Proposals) Act 1974*.

system the date by which the decision is to be made, calculated in business days. This gives the officer sufficient flexibility to take into account local public holidays occurring in the State or Territory in which the proposed action is to take place. When the relevant decision is made, the stage is completed and it is the officer's responsibility to update the system and effectively 'close off' that stage of the decision-making process.

4.20 As noted earlier, 'stopping-the-clock', effectively stalling the process, is an option available where there is inadequate information to make a decision. In practice, it is only used where key information is absent, and without that information it is not possible to make a decision.

Problems with the accuracy of information within the database

4.21 Environment Australia acknowledges that there have been significant problems with the accuracy of the timeliness statistics in the database and the Timeframes Reports generated by the system. These reports form the basis of reporting to Parliament. For example, a Timeframes Report generated for the 2001–02 financial year indicates that 67 decisions on the assessment approach were made, with 75 per cent of the decisions made on time. However, the correct figures as reported to Parliament in the Annual Report, indicate that 63 decisions were made, with 92 per cent on time.⁴³

4.22 User error is the primary reason as to why there are errors in the database and the timeliness statistics are inaccurate. It is the officers' responsibility to update the system when milestones are achieved, such as when key decisions have been made. Although a decision or task may be completed on time and the proponent duly notified, the stage in the database must be 'closed off' accordingly. If this is not done, or there are delays in entering the data into the system, there will be an inaccurate record for that particular referral.

4.23 Another problem has also been identified with the use of the 'stop the clock' option when further information is requested. In the early days of the database's operation there was misunderstanding amongst users as to the requirements of 'stopping the clock'. When the clock was restarted, it was widely unrecognised that the stage completion date also needed updating. Consequently, although decisions were made within the timeframe, the system did not recognise this and reported differently.

4.24 Inaccuracies such as this have the potential to significantly distort the statistics in the Timeframes Report. The uncertainty and lack of confidence in the statistics from the database and its slowness have led to some officers keeping shadow information systems in conjunction with the EPBC database,

⁴³ EPBC Act Annual Report 2001–02.

in order to maintain a true record of actual timeframes for their own purposes. The first report to Parliament was largely accurate as a result of manual adjustments using the shadow systems. However, this was a time consuming and inefficient exercise.

Measures to improve database accuracy

4.25 A review of the database was underway during the course of the audit. As part of the review the initial expectations of the database are being examined and reconciled with the lessons learnt from its first two years of operation. Environment Australia is attempting to improve the accuracy of the database by making database maintenance a key priority in section business plans and individual performance agreements.

Conclusions

4.26 The timeliness of decision-making under the Act is generally in accordance with the timeframes required under the Act. Where the timeframes have not been met, the reasons are documented and reported accurately. Generally, the actual total time that elapses during the decision-making process compares favourably with similar processes at the State and Territory level, but there is a real opportunity for improvement.

4.27 The ANAO considers that making available more effective 'pre-lodgement' assistance and the increased use of bilateral agreements and accredited assessment processes provide the capacity to reduce the overall time taken for an environmental assessment. However, there is insufficient evidence of this occurring at present. Greater alignment of Commonwealth and State and Territory processes is necessary before this can occur.

4.28 The EPBC Database is the primary management tool by which compliance with statutory timeframes is promoted. This is facilitated by a number of different reports that are regularly generated from the database. However, in the first two years' operation of the Act, there have been significant inaccuracies in the timeliness statistics from the database. Primarily due to user error, these statistics have led to inefficiencies due to the need to manually verify and update statistics generated from the database. Environment Australia has implemented a number of different strategies to improve user behaviour in this respect. A review of the database, currently underway is designed to lead to outcomes that will improve the accuracy and effectiveness of the database.

5. Referrals by the Commonwealth

Introduction

5.1 The Act places a greater onus of responsibility on Commonwealth agencies compared with the private sector. Section 28 of the Act provides that the Commonwealth, or a Commonwealth agency, must not take an action that has, will have, or is likely to have, a significant impact on the environment, whether inside or outside the Australian jurisdiction.⁴⁴ Additionally, some agencies are also required under section 160 of the Act to obtain and consider advice from the Minister for the Environment and Heritage before authorising certain actions that are likely to have a significant impact on the environment.⁴⁵ For the purpose of these sections, the Act includes in the definition of ‘environment’: ecosystems...including people and communities; natural and physical resources; the qualities and characteristics of locations, places and areas; and the social, economic and cultural aspects of any of the abovementioned things.⁴⁶ Consequently, there is a greater onus of responsibility on the Commonwealth, as its actions are not limited to impacts on matters of national environmental significance but include social, economic and cultural considerations.

5.2 The ANAO examined the Environment Australia database on referrals and requests for advice from Commonwealth agencies as required under the Act. Consultations were also conducted with a sample of different Commonwealth agencies in order to assess the level of awareness of the Act and the controls that are in place to manage compliance with the requirements of the Act. The Act also allows some exemptions in the national interest. This is discussed below.

Exemptions

5.3 There is provision in the Act for exempting certain actions that are in the national interest.⁴⁷ In determining the national interest, the Minister may consider Australia’s defence, or security, or a national emergency (although this does not limit the matters the Minister may consider). To date, Commonwealth related

⁴⁴ A related provision, section 26, applies to actions taken on Commonwealth land or actions affecting Commonwealth land, but its application is not limited to the Commonwealth or Commonwealth agencies.

⁴⁵ A Commonwealth agency or employee must consider advice from the Minister before authorising one of the following actions with a significant impact on the environment: a) providing foreign aid; b) managing aircraft operations in airspace; c) adopting or implementing a major development plan for an airport; d) an action prescribed by the regulations. s160 EPBC Act.

⁴⁶ Section 528 of the EPBC Act.

⁴⁷ Sections 158 and 303A of the EPBC Act.

activities have dominated the exemptions, with Commonwealth agencies accounting for three of the four exemptions. These were in relation to the:

- National Plan to Combat Pollution of the Sea by Oil and Other Noxious and Hazardous Substances administered by the Australian Maritime Safety Authority (AMSA);
- Australian Defence Force activities in Central Asia—an exemption for Defence operations in Central Asia as part of the military campaign in Afghanistan; and
- establishment and ongoing operation of the Immigration Reception Processing Centre, together with associated services and infrastructure, on Christmas Island by the Commonwealth, in particular the Departments of Immigration and Multicultural and Indigenous Affairs (DIMIA) and Transport and Regional Services (DOTARS).⁴⁸

5.4 Given the broad criteria for exemptions under section 158 of the Act, the above matters comply with the requirements.

Section 28 Referrals

5.5 In 2001–02, 33 proposals relating to Commonwealth or Commonwealth agency activity were referred for consideration under the Act. This was an increase on the 21 referrals made in the first year of the Act's operation. Commonwealth referrals accounted for over seven per cent of all referrals in 2000–01, and over 10 per cent of all referrals in 2001–02. The following table sets out the number of referrals by agency.

⁴⁸ The fourth exemption was granted for the South Australian government's plague locust control programme for Spring/Summer 2000–01.

Table 6
Referrals by Commonwealth agencies 2000–01 & 2001–02.

Agency	2000–01	2001–02
ABC	2	
AGSO		2
Albury-Wodonga Development Corporation	3	1
AMSA		1
ANSTO		2
Australia Post		4
CSIRO		2
Defence Portfolio ⁴⁹	6	10
DFAT	1	
DITR	1	
DOTARS		3
DOFA		4
Environment Australia ⁵⁰	1	1
National Gallery of Australia	1	
Shire of Christmas Island	1	2
Snowy Mountain Hydro-Electric Authority	1	
Sydney Harbour Federation Trust		1
Telstra Corporation	4	
Total	21	33

Source: EPBC Act Annual Report 2001–02

5.6 Referrals have been received for such diverse actions as the Christmas Island airport expansion by DOTARS, the laying of fibre optic cable by DFAT, and marine sonar and acoustic trials by Defence.

5.7 To assist Commonwealth agencies, Environment Australia has draft examples of factors to be taken into account in determining the environmental significance of actions involving the Commonwealth or Commonwealth land. These cover:

- the characteristics and sensitivity of the receiving environment (this may include physical, natural, cultural or other human attributes);
- the nature and extent of impacts (this may include consideration of direct, indirect, short term, long term, temporary and permanent impacts, and the frequency and duration of impacts); and

⁴⁹ Includes referrals from Defence Estate Organisation, Defence Housing Authority and Defence Science and Technology Organisation.

⁵⁰ Includes referrals from Parks Australia.

- the extent to which impacts can be predicted and managed (this may include the degree of confidence with which the impacts of the action are known and understood).⁵¹

5.8 Nevertheless, Commonwealth agencies have commented on the difficulty of determining whether an action is likely to have a significant impact on the environment. This may be partly attributable to the fact that only some departments and agencies have had access to the draft Commonwealth guidelines. The lack of formalised Commonwealth guidelines after more than two years' operation of the Act reflects the initial focus by the Department on the matters of national environmental significance. The Department recognises this and intends to formalise the Commonwealth guidelines as part of its review of the general *Administrative Guidelines on Significance*.

Department of Defence

5.9 The Department of Defence has the potential to have major impact on the environment because of its landholdings that are integral to its core operations. Defence has 25 000 facilities, 760 properties and 3 million hectares of land under its direct control. Numerous properties are large scale and many have significant environmental conservation value. The ANAO was seeking assurance that Defence, as an agency with a higher environmental risk, would have the necessary systems in place to ensure compliance with the Act.

5.10 The Department of Defence made eight referrals in 2001–02.⁵² The majority of activities referred have been infrastructure projects including laying fibre optic cable through wetlands, remediation of depots, and general construction. Environment Australia has worked closely with Defence to build awareness of the requirements of the Act and of Defence's obligations under it. In this respect, communication between the two agencies has been sound. Defence has also undertaken an agency-wide awareness raising campaign to enhance understanding of obligations under the Act.

5.11 Defence has also taken environmental stewardship a stage further than required under the Act. In addition to Defence Environmental Instructions (which specifically address the requirements of the Act) the Department also issues environmental clearance certificates.⁵³ Where an activity is unlikely to trigger the Act, and the activity is not covered by environmental conditions in standard operating procedures, the certificates provide an assurance that environmental

⁵¹ Environment Australia, 'Examples of factors to be taken into account in determining the environmental significance of actions involving Commonwealth land or Commonwealth actions' (Draft).

⁵² *Department of Defence Annual Report*, pp. 228–229. The Portfolio had 10 referrals as outlined in table 6.

⁵³ See Defence Environmental Instructions No. 16/2002.

matters have been considered and work can proceed. More than 300 new certificates were issued during 2001–02.

5.12 Defence commented that it is not always clear whether overseas activities, (such as peace-keeping activities in East Timor and Bougainville, and engineering works in Fiji), would be considered significant for the purposes of the Act. An additional challenge in this regard is the lack of baseline data on environmental sensitivities at overseas sites. The need to assess economic, social and environmental impacts at the approval stage, is also regarded as a challenge by Defence.

5.13 However, there is potential for referrals from Defence to be managed more strategically. This may be achieved through the Defence Environmental Management System (EMS). The Defence EMS is currently under development, and individual Defence sites aim to comply with ISO 14001 by the end of 2003. Within this framework, there should be opportunities for Defence and Environment Australia to work collaboratively, to further improve environmental performance. This is currently constrained by the absence of an agency-wide management information system that would allow Defence to monitor activities that may trigger the Act. A high degree of reliance is placed on the regional environmental officers in the field. A more systematic approach could assist Defence in better managing its risks and statutory obligations in this area.

Offshore Asylum Seeker Processing Centres

5.14 The ANAO examined the application of the Act with respect to the offshore asylum seeker processing centres on Nauru and Manus Island (Papua New Guinea) as well as Christmas Island. As mentioned earlier, an exemption was granted for the permanent Immigration Reception and Processing Centre (IRPC) on Christmas Island.

5.15 The centres on Nauru and Manus Island involved a rapid response from a number of Commonwealth agencies coordinated through a senior level interdepartmental committee. This included the Department of Prime Minister and Cabinet (PM&C), the Department of Foreign Affairs and Trade and DIMIA. Agencies were required to work to tight time frames in meeting the expectations of Ministers and accommodating the relatively high numbers of asylum seekers endeavouring to enter Australia at the time.

Nauru

5.16 Following an agreement with the Nauruan government, a processing centre was established in September 2001. The centre was built on cleared or degraded land that was previously a football field and a disused housing site.

Approximately 1100 asylum seekers were to be held in the two separate sites, although the Nauruan government agreed to allow up to 1200 people. They were originally housed in a temporary camp constructed by Defence in 2001. The use of the centre is ongoing with an agreement being signed for the facilities to continue in 2003.

5.17 To meet the physical needs of the asylum seekers, fresh water, food and supplies were transported from Australia. DIMIA has indicated that there was an understanding that the facilities should benefit the local communities and the work undertaken has improved the water supply. A waste management consultant was commissioned and the consultant's recommendations were implemented to improve the treatment of waste. There was no referral made or exemption sought under the Act.

Manus Island—Papua New Guinea

5.18 Approximately 400 asylum seekers were at one stage detained in a processing centre on Manus Island in Papua New Guinea (PNG), although the PNG government had agreed to take up to 1000 people. The processing centre was based on an existing Naval base, but some extra construction work was necessary. There was no referral made or exemption sought under the Act.

ANAO comment

5.19 The ANAO recognises that, as the particular site on Nauru was already cleared and Manus Island was an existing naval base, there was unlikely to be any significant site-specific natural environmental impact. The Act puts the onus on the proponent of an action to consider whether or not that action will have or is likely to have a significant environmental impact. However, the broad definition of environment in the Act (that is, 'people and communities; natural and physical resources; the qualities and characteristics of locations, places and areas; and the social, economic and cultural aspects of any of the abovementioned things') would suggest that the impacts of the actions envisaged would merit adequate consideration and documentation even if the decision was that there was likely to be no significant impact. The ANAO considers that this would be good practice for agencies to follow as a matter of course.

5.20 The level of significance is clearly an important consideration. In these cases, while a site-specific consideration of the physical environment would be unlikely to require a referral or exemption, the establishment of the processing centres had the potential to impact significantly on the broader social, economic and cultural aspects of the environment as prescribed in the Act. On Nauru, an island of 21 square kilometres, the number of asylum seekers resulted in an increase of almost 10 per cent to the island's population of 12 000, (this does not

include the processing officials, health and medical staff and guards brought in to work at the centre). The size of the population increase and the likely social, economic and cultural impacts would suggest that environmental considerations should have been documented as part of the decision-making process.

5.21 In the absence of documentation, it is not clear whether the Commonwealth agencies involved were fully aware of the provisions of section 28 of the Act at the time. The Act was relatively new and the definition of the environment and the provisions of section 28 were unlikely to be widely understood across Commonwealth agencies. If agencies were aware, the documentation was inadequate to demonstrate that full consideration had been given to environmental matters. This highlights the importance of Environment Australia being more proactive in ensuring all Commonwealth agencies are aware of their obligations under the Act and the importance of documenting the consideration that has occurred—especially the broader requirements applicable to Commonwealth agencies under section 28.

5.22 It is also not clear which agency would be responsible for making any referral or seeking an exemption. PM&C chaired the interdepartmental committee, the Department of Defence undertook the initial construction work and the Department of Foreign Affairs and Trade led the negotiation process with respective foreign governments. DIMIA participated in the negotiations, established arrangements with other third parties as well as carrying out some of the refugee assessments. This situation, where a number of agencies were involved in achieving the government's objective, also illustrates the importance of one agency being designated as the lead agency responsible for making a referral or seeking an exemption. This is particularly important as networked service delivery becomes a more prominent feature of public administration.

Christmas Island

5.23 In March 2002, the Government decided that a permanent IRPC should be constructed on Christmas Island by 2002. Exemptions under sections 158 and 303A were issued for its establishment and ongoing operation in April 2002 to the Minister for Immigration & Multicultural & Indigenous Affairs and the Minister for Territories, Regional Services and Local Government. The IRPC was designed to house approximately 1200 people. The exemptions apply only to Parts 3 and 13 of the Act, which relate to the requirements for environmental approvals and permits for actions impacting on threatened species. The requirements of the Act relating to the National Park, and to the protection of biodiversity as provided for in Part 9 of the Regulations, still applied. This is important for the protection of the National Park and threatened flora and fauna including the Abbott's Booby and the red crab.

5.24 The exemption was issued on the condition that the Commonwealth agencies committed to best practice environmental management in relation to the establishment and operation of the IRPC. This included: the development of an environmental management plan for the construction and operation of the IRPC and associated infrastructure; the appointment of a suitably qualified environmental manager; monitoring for protected species and the application of any necessary mitigation measures to protect the environment. An Inter-Departmental Committee (Chaired by DIMIA) involving representatives from Environment Australia, DOTARS, Finance, PM&C, Industry, Tourism and Resources and Employment and Workplace Relations addresses, amongst other things, key issues relating to the implementation of best practice environmental measures. This represents sound practice in relation to the management of significant environmental risks.⁵⁴ Environment Australia's involvement will continue given the environmental sensitivity of the project, and the nature of the commitments made by the Government.

Section 160 Requests for Advice

5.25 Three requests for advice under section 160 were received in 2001–02 and all related to airport development plans. Requests for section 160 advice were steady over the two years of the Act's operation.

Table 7

Section 160 Requests for Advice by Commonwealth agencies 2000–01 - 2001–02.

Agency	2000–01	2001–02
AusAID	1	0
DOTARS	2	3
Total	3	3

Source: EPBC Act Annual Report 2001–02

5.26 As part of the audit the ANAO reviewed requests made by AusAID and Airservices Australia, two agencies that should have regard to section 160.

AusAID

5.27 AusAID, within the Foreign Affairs and Trade Portfolio is directly affected by the foreign aid requirement of section 160. In 2002–03, AusAID will allocate \$1.8 billion in official development assistance for approximately 1500 projects ranging from health and education to agriculture and infrastructure

⁵⁴ Prior to the establishment of current monitoring mechanisms there was a potential breach of the EPBC Act with possible impacts on a listed threatened species. This issue is further discussed in Chapter 6.

development. The majority of activities that are relevant to the Act relate to infrastructure, water supply and sanitation, reforestation, renewable energy and some health activities.

5.28 To date, AusAID has made one formal request for section 160 advice and no referrals. However, informal advice was sought in relation to one solid waste management facility project in Tonga. During 2001–02, 373 new AusAID funded projects commenced and, of these, 36 were considered to have a direct environmental impact on an environmentally sensitive location or sector. These projects included a community water supply and sanitation project in East Timor, coastal trunk road maintenance in Bougainville, community forestry in Vietnam, and an eco-tourism project on Atauro Island. For the purposes of environmental significance⁵⁵, all of these activities were assessed by AusAID as low environmental risk and were not referred to Environment Australia. The reasons for decisions were documented in contrast to the situation regarding the detention centres on Nauru and Manus Island.

5.29 AusAID has an environmental adviser to assist with technical evaluations, as well as a proponent self-reporting mechanism to evaluate project outcomes. Environmental screening is undertaken for all aid activities, and potential impacts are assessed and managed early in the decision-making process. AusAID considers that its relationship with Environment Australia has been strengthened through a protocol signed between the respective Ministers in October 2000. The ANAO considers that the protocol represents good practice in terms of clearly agreeing mechanisms for the making of requests for advice and forms of appropriate consultation between the two agencies. However, it would have been preferable for AusAID's obligations under section 28 of the Act to be outlined in this document.

Airservices Australia

5.30 Airservices Australia is directly affected by the aviation airspace management component of section 160. To this end, the agency has worked collaboratively with Environment Australia on matters relevant to the Act. For example, Airservices Australia has established appropriate principles and procedures for minimising the impact of aircraft noise. In 2001–02, Airservices Australia assessed 82 air traffic proposals for business risk and environmental impact. None was found to be environmentally 'significant' as defined by the Act. Airservices Australia had experience with the *Environment Protection (Impact of Proposals) Act 1974* and worked with Environment Australia in assessing the impact of the new legislation for its sphere of operation. The ANAO considers

⁵⁵ Environmental significance is relevant to section 28 and section 68, as well as section 160 advice.

that Airservices Australia has a sound environmental risk management framework, which is illustrated in the case study below.

Case study 4

Risk management database

Airservices Australia has developed a project management database that facilitates the identification, assessment and management of both business and environmental risks. It is a comprehensive system that ensures that officers in the field submit consistent information on project risks, and that information on these risks is instantaneously disseminated to officers with a need to know. The database assists Airservices Australia in meeting the requirements of its own legislation, as well as of the Act. It also allows the agency's Executive to be regularly briefed on current and emerging business risks Australia-wide.

Where a project is identified as high risk, the Environment Services Branch in Canberra undertakes an environmental assessment. This allows Airservices Australia to identify projects that should be referred under the Act. To date, while 82 activities have been reviewed, none have been determined to have a significant impact on the environment for the purposes of the Act. Airservices Australia maintains records of reasons for these decisions, and has a policy of informing Environment Australia when a significant business risk is identified, even if it considers there is no associated environmental risk.

The system is user-friendly and guides staff through the risk identification and management process. It automatically sends email notices to all staff identified as having an interest in a matter entered into the database, and provides clear management trails for the purposes of monitoring and review. The system is compliant with the Australian/New Zealand Risk Management Standard AS/NZ 4360.

It is a very powerful risk management tool and represents better practice in terms of the systems supporting the Act reviewed by the ANAO. Other Commonwealth agencies with systemic environmental risks may benefit from considering a similar approach.

Conclusions

5.31 Overall, the number of Commonwealth referrals under the Act has not been high when the scale and diversity of business activities is considered, along with the broader onus of responsibility placed on Commonwealth agencies compared with that on the private sector. Nevertheless, the number of referrals has increased from 21 to 33 over the first two years since the Act came into effect. However, like other stakeholders, Commonwealth agencies have also

commented on the difficulty of determining whether an action is likely to have a significant impact on the environment. This may be partly attributable to the fact that only some departments and agencies have had access to the draft Commonwealth guidelines. The lack of formalised Commonwealth guidelines after more than two years' operation of the Act reflects the initial focus by the Department on the matters of national environmental significance. The Department recognises this and intends to formalise the Commonwealth guidelines as part of its current review.

5.32 In considering the experience of agencies such as Defence, AusAID and Airservices Australia the ANAO found good practice examples of environmental risk management that could be considered by other agencies. Defence has agency-wide instructions and is introducing an environmental management system. AusAID has formal Ministerial Protocols on how the Act will be implemented. Airservices Australia has a comprehensive data management system to better identify risks and provide timely reports on how the risks are being managed. In agencies, such as these, where environmental management is regarded as a significant business risk, there is a high level of awareness of the requirements for compliance with the Act in terms of referrals and section 160 requests for advice.

5.33 Nevertheless, clearer information should be made available to Commonwealth departments and agencies on the application of section 28 of the Act, and in particular the requirement for consideration of significant environmental impacts (including social, economic and cultural matters) whether inside or outside Australia. This is a particular issue in agencies where environmental risks are not normally important business considerations such as in the case of the offshore processing centres for asylum seekers.

6. Compliance and Enforcement

Introduction

6.1 Monitoring and enforcing compliance with the requirements of the Act is crucial to its effective operation. Compliance and enforcement activity should encompass a range of actions from information dissemination and education programs through to monitoring and auditing activity and ultimately legal action, if necessary, to ensure that the principles of the legislation are upheld. Clearly, the nature of the response should be contingent on the significance of the breach and the circumstances surrounding the action.

6.2 Public reporting of compliance activity assists in demonstrating how the legislation is being effectively implemented and how well risks are being managed, as well as informing stakeholders as to the Commonwealth's commitment to the spirit, as well as the practice, of the Act. This is important as the Act provides for considerably stronger provisions for dealing with breaches of the legislation than existed under previous Commonwealth environment legislation. These include civil penalties of up to \$550 000 for individuals and \$5.5 million for bodies corporate.⁵⁶

The nature of the challenge

6.3 Given the new role for the Commonwealth under the Act, the nature of compliance and enforcement introduces particular risks. These are:

- a lack of awareness by stakeholders of the requirement for a referral where there is the likelihood of a significant impact on a matter of national environmental significance or involving Commonwealth land or Commonwealth actions;
- a lack of compliance with conditions imposed as a requirement of approval or where an action is designated as 'not a controlled action' if carried out in a particular manner; and
- the ineffectiveness of responses to potential breaches because of a lack of resources or the absence of effective and timely interventions.

6.4 In 2001–02, the Department received 122 reports of activities that could breach the Act. Seventy-one of these incidents (or 58 per cent of all incidents reported) were assessed as requiring a low level response, that is, a standard

⁵⁶ There are also provisions in the Act directly relevant to Commonwealth agencies. section 28(1) EPBC Act is linked to s4AA(1) of the *Crimes Act 1914* and imposes strict compliance requirements and potential penalties on Commonwealth agencies as defined under s528 of the Act.

educative letter was sent to address the lack of awareness of the Act. Forty-five incidents (or 37 per cent) were considered to be of mid-level sensitivity, and follow-up letters were sent. Six incidents (five per cent) were considered to be worthy of detailed examination. Overall, 12 site visits were undertaken. Fourteen activities were referred to the Department for consideration as a result of compliance action.

6.5 As at the beginning of March 2003, there have been no prosecutions brought by the Commonwealth under the referrals, assessments and or approvals provisions of the Act. However, in three cases, third parties have commenced proceedings in relation to matters dealt with under the Act⁵⁷.

The requirement for projects to be referred to Environment Australia

6.6 Education and awareness raising have been priority measures for Environment Australia in the lead up to the commencement of the Act and over the first two years of the operation of the Act. The objective has been to facilitate a cooperative approach that encourages, rather than coerces, potential proponents into making referrals. Awareness raising activities have included the development and distribution of booklets and fact sheets about the Act, the placement of articles in newspapers and journals, presentations and workshops and intensive training sessions to a wide range of stakeholders including State, Territory and local government and industry and non-government bodies. Over 50 presentations on the Act were given in 2001–02 to an estimated 1000 people. Supplements to the administrative guidelines on significance for a range of nationally endangered species or ecological communities were also finalised or released for public comment.⁵⁸

6.7 The Department has also established a comprehensive website that allows for direct, 'real time' dissemination of information. During 2001–02, the EPBC web-site received 75 710 visits, with the homepage visited 50 894 times and the public notification page visited 16 729 times.⁵⁹ The EPBC web-site lists information on all referrals and, as noted earlier, is used to seek public comment on assessments in progress. It provides access to application forms and decision support tools including an interactive map that allows proponents to search for species and ecological communities that could be affected by their proposed

⁵⁷ The three cases to date are *Booth v Bosworth* [2001] 1453 (or the 'Flying Fox case'), *Schneiders v State of Queensland* [2001] FCA 553 (or 'Culling of dingoes on Fraser Island') and the Scoresby Freeway case involving VicRoads. EA have also advised that three cases are currently being considered for possible prosecution.

⁵⁸ *EPBC Annual Report, 2001–02* p. 17.

⁵⁹ *ibid.*

activities. These online decision support tools have received a number of awards and the web-site is generally well regarded by stakeholders. The Department also provides financial assistance to non-government organisations to provide information on, and promote involvement with, the Act.⁶⁰ The distribution of referrals by sector is shown in Table 8.

Table 8
Referrals by Categories

Category	2000–01	2001–02
Agriculture & Forestry	4	9
Air & Space transport	5	1
Aquaculture	10	15
Communication	6	4
Defence	1 ⁶¹	8
Energy generation & supply	19	27
Exploration (mineral, oil, gas)	34	17
Land transport	29	34
Manufacturing	15	12
Mining	36	30
Sale or lease of Commonwealth property	4	4
Science research & investigations	0	7
Tourism, recreation & conservation	22	34
Urban & commercial new development	53	45
Urban & commercial redevelopment	11	17
Waste management	12	17
Water management & use	14	19
Water transport	19	9
Total	294	309

Source: EPBC Act Annual Report 2001–02

6.8 Table 8 highlights the minimal change in the number of referrals over the first two years as well as the relatively higher level of referrals from urban and commercial development, mining, mineral oil and gas exploration and land transport. 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.⁶² 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.

⁶⁰ Environment Australia provides joint funding to the World Wildlife Fund for Nature, the Humane Society International and the Tasmanian Conservation Trust for an electronic information service about the EPBC Act and funding to the Environmental Defender's Office to assist in producing a publication on the EPBC Act. In addition, Environment Australia has seconded one of their officers to the National Farmers' Federation to assist in awareness-raising and implementation of the Act.

⁶¹ These figures are from the EA data base and do not necessarily reconcile with the figures in table 6.

⁶² The State of the Environment Report noted that clearance of native vegetation remains the single most significant threat to terrestrial biodiversity. SOE, 2001 p. 73.

A further consideration is the small scale of much land clearing activity, which, by definition is unlikely to trigger the Act because each individual action is unlikely to have a significant impact, by itself, on any matter of national environmental significance.

6.9 Nevertheless there have been considerable tensions between the Department and agricultural interests in the implementation of the Act. This was particularly apparent since land clearance was designated by the former Minister as a key threatening process and the grasslands of the Brigalow Belt bioregions were designated as endangered ecological communities.⁶³ These concerns were reflected in a submission to the ANAO from this sector and are discussed in a recent overview of the Act by environment groups.⁶⁴ The recent secondment of an Environment Australia officer to the National Farmers Federation has the potential to assist in reducing tensions and enhancing compliance processes in this sector over time.

6.10 Community awareness of the Act is particularly important in enhancing compliance. In April 2002, a concerned citizen wrote to Environment Australia to report that permits were being sought to clear land of a significant number of trees that were the preferred feeding trees of a listed threatened species of cockatoo. Approximately 650 to 1000 individuals of these species are thought to remain in the wild. No referrals had been made to Environment Australia. In July 2002, Environment Australia inspected the area and prepared detailed advice to assist landholders in determining whether or not to make a referral. One landholder agreed to make a referral, and letters were sent to a further three landholders recommending that they consider referring their activities. At the time of the audit this matter had not been concluded.⁶⁵ In another case in a different community, community concerns about the likely environmental impact of a proposed residential facility caused the Minister to request a referral under section 70 of the Act (one of only two occasions when this power has been used). In this case, the concern was that the construction and operation of the facility would destroy the feeding habitat of a particular species of parrot as well as having a number of other negative impacts on this endangered species. A wide range of stakeholders, including school children and other members of the

⁶³ The Brigalow Belt extends from inland New South Wales into vast tracts of central Queensland. It is predominantly acacia woodland much of which has been cleared for grazing and other agricultural purposes. There are some 328 species of birds in the Southern Queensland Brigalow Belt bioregion. Three of these are listed as endangered and a further 21 species are listed as vulnerable or rare. (Sparshott, P September 2000; Queensland Parks and Wildlife Service)

⁶⁴ WWF, Humane Society and Tasmanian Conservation Trust (2002) 'Environment Protection and Biodiversity Conservation Act 1999: An Overview of the First Two Years'.

⁶⁵ Environment Australia has advised that a total of six letters were sent to landholders and contact has been made with all of them. Two referrals have since been received, one has been promised but not yet received and in the remaining three cases referrals are not considered necessary. Since then EA has been advised of an additional two incidents and contact has been made in both cases.

community, raised their concerns with the Minister. In July 2001, the Minister wrote to the developer requesting a referral within 15 business days. When this referral was not received, Environment Australia engaged a consultant to provide independent scientific advice on the potential impact of the proposed action, and undertook a site visit. The developer subsequently suspended the plans to build on that particular site.

6.11 Even though specific matters, such as what particular actions are likely to have a significant impact (thereby requiring a referral), are not well understood, stakeholder submissions to the ANAO as well as consultations with peak industry, environment and government bodies indicate that there is a wide degree of awareness of the EPBC legislation in general terms. Consequently, third parties can, and do, play an important role in helping to enforce compliance with the provisions of the Act. This complements the information seminars and workshops conducted by Environment Australia. However, there would be merit in Environment Australia broadening its networks and sources of intelligence—particularly in regard to local government.

6.12 The increase in the number of bilateral agreements between the Commonwealth and the States/Territories can also help to broaden the opportunities for involving the States/Territories as well as local government in encouraging referrals where appropriate. Some local councils have already been proactive in terms of informing proponents at the works approval or planning permit stage that the Act should be considered alongside relevant State/Territory legislation. As the State and local government arenas are the key entry points for many developers, this is an approach that could be promoted further in the future.

6.13 Environment Australia could also do more to advise complainants of the outcomes of investigative activity. In a number of cases reviewed, while complainants were thanked for bringing information on alleged breaches to the attention of the Department, they were rarely informed of the results of the investigations. Informing complainants of the results of the investigations would demonstrate that complaints were valued, and would provide feedback about the relevance of those complaints to the provisions of the Act.

6.14 While Environment Australia does provide a summary of compliance activity in the Act Annual Report, there could also be benefit in having the results and lessons learned from compliance activity reported on the EPBC website. This would need to take account of legal constraints on identifying those involved but may assist in addressing the perception that little compliance and enforcement activity is underway. A recent audit report from the Tasmanian

Audit Office recommended a similar approach for the Tasmanian Department of Primary Industries, Water and Environment.⁶⁶

6.15 Overall, the ANAO considers that, while Environment Australia has made significant efforts to ensure that stakeholders are informed about the Act, there are further opportunities to ensure that actions that should be referred are, in fact, referred.

Recommendation No.3

6.16 In order to enhance awareness of the requirements of the Act, the ANAO recommends that Environment Australia establishes appropriate mechanisms for enhanced communication and knowledge sharing through:

- a) public reporting on the results of investigations, trends, lessons learned and compliance activity in progress, via the EPBC website; and
- b) the establishment of networks with Commonwealth, State and local government agencies to ensure that information on projects that should be referred is received early enough for compliance and enforcement action to be considered.

6.17 Agency response: Agree. These mechanisms will be pursued as part of the EA Compliance and Enforcement Strategy.

Monitoring and verification that conditions have been met by proponents

Monitoring approved actions

6.18 As noted earlier, of the 34 approved referrals, 28 were approved with conditions. Only six referrals were approved without conditions. Monitoring the progress of all actions that are subject to the Act is important to ensure that there are no unintended consequences and that the objectives of the Act have been met. As noted in Chapter 1, lack of monitoring was a shortcoming identified in the ANAO efficiency audit of environmental impact assessment in 1992–93. This highlights the substantial risks involved and why monitoring is essential to the management of actions under the Act. For example, a study of environmental impact assessment in the USA found that, of the impacts

⁶⁶ Tasmanian Audit Office 2002, Environmental Management and Pollution Control, Special Report No.40, June, p. 45.

foreshadowed in environmental impact statements, only 30 per cent were similar to the ultimate outcomes.⁶⁷

6.19 While planning by Environment Australia for the monitoring of approved actions is well underway, implementation is at an early stage. Environment Australia does not have information on the number of approved actions that have commenced or that have been completed. In addition, while proponents are asked to nominate timeframes for project commencement and completion in the referral form, currently this information is not effectively used. There would be value in this information being collated and entered into the EPBC database to assist with compliance planning and risk assessment. The EPBC database does not currently support the monitoring and compliance function, as data ceases at the approval phase. There would be benefit in enhancing the system's capacity to allow for the monitoring of activities beyond the decision-making phase.

6.20 The ANAO recognises that the above issues largely reflect the priority given by Environment Australia to critical administrative implementation matters and raising awareness of the Act in the wider community. This is understandable at this stage of the Act's implementation. However, the need for monitoring and auditing systems will become more important as more referrals are approved in the future.⁶⁸ Given the nature of conditions for approval outlined earlier in this report (such as the requirement for management plans to be approved by the Minister or where restrictions are placed on the timing of activity in others), the function is very important to ensure that the conditions of approval are complied with and, consequently, the objectives of the Act are met.

6.21 In many cases, the approval has been given after a careful balance between socio-economic and environmental considerations. A failure by a proponent to meet the required conditions could well tip the balance against the development. At the same time the Department needs to know that the conditions that have been applied have been appropriate and cost effective in practice so that the lessons learned can be applied in the future. The following case study illustrates the balancing of environmental, social and economic interests through conditions and why monitoring is so important.

⁶⁷ Harding R (ed) 1998, *Environmental Decision-Making: The Roles of Scientists, Engineers and the Public.* & Culhane P J et al (1986) *The Precision and Accuracy of US Environmental Impact Statements.* While in thirteen per cent of cases the impact was less than forecast, the vagueness about the impacts' significance and the likelihood of occurrence precluded conclusive judgements about predictive accuracy in over a quarter of the forecast sample.

⁶⁸ 133 referrals designated as controlled actions were being assessed as at 30 June 2002 compared to the 34 that were approved at that date.

Case study 5

Monitoring approved actions

One particular action examined by the ANAO involved a major residential development that included the clearing of several hundred hectares of urban-zoned land. The development was referred in stages to Environment Australia. Several threatened flora and fauna species were found in the vicinity. The development was found to be a controlled action and Environment Australia consulted with a range of stakeholders in order to advise the Minister. The decision was challenging, as the development was to impinge on largely undisturbed habitat, with likely significant impacts on four listed species. The Department advised the Minister that the impacts could be mitigated provided that the proponent complied with certain conditions. For example, in relation to one threatened species, the proponent undertook to establish an equivalent population elsewhere as well as to develop a recovery plan. In relation to another, the proponent agreed to undertake surveys and to develop a management plan. The development was approved with conditions in July 2002. Monitoring compliance with these conditions will be important as the project progresses, and the full impact of a major residential development on threatened species becomes apparent. A monitoring plan for this project has not yet been developed by Environment Australia.

Auditing compliance with conditions

6.22 Currently, Environment Australia is preparing audit plans for all actions that have been approved subject to conditions—that is 28 actions as at 30 June 2002. Ten audit plans have been approved and three are in draft form. Audit plans include State contacts and details of co-operative arrangements, criteria, timing triggers, verification requirements and acceptable levels of evidence. No approved action has yet been audited by Environment Australia. There is no requirement for proponents to advise Environment Australia on the progress of actions approved with conditions under the Act.

6.23 The ANAO notes that during the course of the audit, the staffing levels for this function were limited. However, Environment Australia has advised that sufficient funds have been allocated in the forward estimates to enable an adequate resourcing level to be reached in the near future.

6.24 To date, only one breach of a condition of approval has been identified by Environment Australia. This was a minor breach associated with delayed documentation and was managed in partnership with the proponent. As noted earlier, the 133 controlled actions currently being assessed necessitates this function being given a higher priority to provide an assurance that the conditions

placed on approved actions are being met and to assess the cost-effectiveness of the imposed conditions. Currently there is no mechanism in place to evaluate whether or not the conditions are cost-effective in practice.

6.25 At present most States/Territories have no formal role in monitoring compliance with approved conditions. On the other hand, Tasmania, Western Australia and the Northern Territory have bilateral agreements that outline a formal role for the States and Territory in this regard. Where an action approved under the Act is taken in these jurisdictions, the States/Territories and the Commonwealth have agreed to cooperate in monitoring compliance with conditions to reduce duplication. Similar undertakings have been made in relation to enforcing conditions on approvals. While Queensland did not have a formal bilateral agreement in place during the course of the audit, a State agency has agreed to monitor compliance with the conditions of approval for the Dalrymple Bay Coal Terminal. In this case, the proponent's actions were approved on the condition that dredging is undertaken only at specified times to minimise the impact on turtles in the World Heritage Area, among other things.

6.26 There is scope for the Department to consider whether the States/Territories could take a greater role in this regard in the future. This could be achieved, for example, through either the bilateral agreement process, or through an accreditation scheme. There would be advantages for the Commonwealth in terms of managing the monitoring and compliance process more effectively, and advantages for the proponent in terms of dealing with only one agency post-approval. Delegations could also be considered for other Commonwealth agencies with analogous compliance auditing functions. For example, GBRMPA has already established an audit function pertaining to its legislation but this does not extend to matters under the Act. There could be benefit in Environment Australia taking advantage of GBRMPA's experience in this regard, whether by delegation or some other acceptable mechanism.⁶⁹

Actions that are not controlled actions if carried out in a particular manner

6.27 A further area relevant to monitoring and verification relates to referrals classified as 'not a controlled action' if undertaken in a particular manner. The advantage of particular manner decisions is that they provide a cost effective mechanism for proponents who have demonstrated their capacity to manage potential impacts on matters of national environmental significance. The Department's draft practice note on the use of particular manner provisions

⁶⁹ For example, Environment Australia has advised that consideration is being given to accrediting Queensland State processes by the Commonwealth under the Great Barrier Reef Marine Park (Aquaculture) Regulations 2000 in relation to aquaculture matters that fall outside the EPBC Act.

states that it 'can only be used in a limited set of circumstances and does not substitute for legally enforceable conditions'. Forty-seven referrals (7.8 per cent) were designated within this category as at 30 June 2002.

6.28 Legal advice to Environment Australia indicated that particular manner actions are only enforceable insofar as a breach of a particular manner condition can be shown to have a significant impact on a matter of national environmental significance. Unlike approved controlled actions, non-compliance with particular manner conditions does not, of itself, breach the Act. In this regard, particular manner assessments are no different to actions that are not controlled actions, or indeed than of activities that do not enter the referral process at all.

6.29 However, given that conditions have been formally provided to the proponent in line with identified risks to matters of national environmental significance, the ANAO considers that there is an obligation to at least verify that the risks have been adequately managed. At the same time, feedback could, as in the case with monitoring of conditions on controlled actions, provide guidance to the Department as to how cost-effective the particular manner conditions have been in practice.

6.30 During the course of the audit, particular manner actions were not subject to any formal monitoring or audit. Of the 47 referrals involving a particular manner, the Department has no information on the number of activities that have commenced or have been completed. The Department is reliant on the proponent or the wider public to advise of changes or circumstances affecting the implementation of the particular manner conditions. However, to date, no breaches of particular manner conditions have been brought to the Department's attention. Environment Australia has advised that four companies have now been approached to participate in audit activity.

6.31 While noting that the risks in this area are likely to be lower than for controlled actions, the ANAO considers that a cost-effective mechanism would assist in better managing risks. For example, Environment Australia could consider introducing a self-reporting requirement on proponents as part of compliance with particular manner conditions. A certification that the conditions have been met fully, in part, or not at all, would be particularly useful. If the latter approach were to be adopted, the reasons why, and what measures were taken to manage the environmental risks, would assist Environment Australia to better manage its risks. Alternatively, a survey of proponents after the event could also assist in achieving the same result.

Recommendation No.4

6.32 The ANAO *recommends* that, to strengthen monitoring and review arrangements and provide assurance as to compliance with conditions of approval, Environment Australia:

- a) introduces a formal notification and reporting system as part of the approval, which requires proponents to advise Environment Australia of the progress of relevant actions;
- b) considers an accreditation scheme and/or delegations for Commonwealth agencies, such as the Great Barrier Reef Marine Park Authority, to enable third parties to sign-off that conditions have been complied with by proponents;
- c) modifies the EPBC database to allow for consistent tracking of activities post approval for the purposes of compliance and enforcement; and
- d) provides advice to proponents subject to the 'particular manner' provisions of the Act, on their continuing obligations to ensure that they manage their actions so that there is no impact of national environmental significance or alternatively, if this becomes unavoidable, a further referral is made to the Commonwealth.

6.33 **Agency response:** Agree. A formal notification and reporting system would complement the existing system for auditing compliance with approval conditions. Additional resources will be devoted to implementing such a system in accordance with the availability of funding. Modification of the EPBC Database to allow for tracking of post approval activity is planned to be undertaken as resources allow. In future, letters to proponents of actions subject to specified manner authorisations will be advised of their obligations under the Act.

Responses to potential breaches of the Act

6.34 Having sufficient resources for a timely response to complaints or to potential breaches of the Act are critical to ensuring the integrity of the Act. Currently, there are eight staff dedicated to compliance and enforcement follow-up actions. Four of these are fully trained and designated as inspectors for the purposes of the Act. The section has an overall compliance role for the Department as a whole, as well as being responsible for compliance with the referral, assessment and approval process. The section has an annual work plan with objectives, strategies and targets. It is also working towards implementation of a department-wide compliance and enforcement strategy that was agreed by the departmental Executive in May 2002. The new compliance and enforcement strategy is discussed at the end of this Chapter, in 'Future developments'.

6.35 A range of compliance and enforcement options are available to Environment Australia from warning letters and telephone calls, through to civil and criminal penalties. The Department can seek injunctions from the Federal Court, can order an environmental audit to be prepared, require the remediation of environmental damage, hold executive officers or bodies corporate as well as individuals liable, and publicise contraventions of the Act.

6.36 The Australian Federal Police (AFP) reviewed Environment Australia's investigation capacity and structure in April 2000, prior to the implementation of the Act. The AFP found a number of significant constraints including a lack of policies and procedures, the absence of a case management system capable of managing an investigation, and an absence of training for personnel. It also found that many existing investigative practices had been 'inherited' or developed 'ad hoc', and that no information or intelligence was shared between relevant areas of Environment Australia. The need for an integrated approach was clear. A second independent evaluation of the Department's compliance and enforcement strategy was undertaken in June 2000.⁷⁰ The evaluation found that the Department's strategy was too narrowly focussed to support the requirements of the new legislation.

6.37 Since that time Environment Australia has conducted a small number of investigations following the 122 reports of possible breaches. The Department estimates that around five per cent of development proposals submitted to Environment Australia as a referral were submitted following compliance effort. A small number of cases are discussed as follows.

Case study A

In 2001, Environment Australia was informed that an area of 500 hectares of land adjacent to a national park had been cleared without approval. Advice from line areas within the Department identified seven listed threatened flora and fauna species as being potentially present on the land that was cleared. They also suggested that the cleared area could have been an important nesting or foraging site for an endangered species of Cockatoo. Environment Australia proposed that compliance action would be desirable in this case and informed the then Minister that it intended to investigate the matter further. The Minister sought the cooperation of the relevant State authorities in investigating a possible breach of the Act. The State responded that because the cleared vegetation had been disposed of, there was virtually no likelihood of proving a case that threatened species had been affected. While no progress was made in terms of establishing a breach of the Act, the developer was fined under

⁷⁰ Surgam Management Group 2000, Environment Australia Legislation Reform Process, *Independent Audit of Implementation Action against the Strategic Risk Identification Report*, June 2000.

relevant State soil conservation legislation. This case demonstrates the challenges for regulatory agencies if perpetrators destroy evidence prior to the incident being discovered.

Case study B

In July 2002, an allegation was made that 60 hectares of rainforest had been cleared. The land in question was considered to be potential habitat for an endangered bird species, an endangered marsupial, four endangered species of frog and several other species listed as endangered or vulnerable. Environment Australia worked closely with the relevant State authority, as well as other Commonwealth law enforcement bodies, to assess the significance of the clearance for the purposes of the Act. Environment Australia engaged a scientific expert to provide advice, and conducted a site visit in August 2002. Draft advice from Environment Australia's consultant suggests that further investigations may be warranted. At this stage the investigation remains open. The case illustrates the importance of Commonwealth and State/Territory cooperation in enforcing the Act and the important role that quality scientific information plays in the process.

Case study C

In March 2002, the Department was advised that land clearing was underway near a wetland of international importance. At the time of the incident report, 500 hectares were alleged to have been cleared. Environment Australia wrote to the landholders informing them of their obligations under the Act. The Department also liaised with relevant State authorities and other stakeholders. A month after the incident was reported, there was some evidence that approximately 1500 hectares had been cleared. Two months later, Environment Australia was informed that 4000 hectares, or a habitat corridor 12 kilometres in length, had been cleared without relevant approvals. In June, a third party raised the issue of a possible injunction, and in July alleged that the land clearing activity would have adversely impacted on the ecological character of the wetland. The Department's records supported the view that the clearing could have had an adverse impact on migratory bird species, as well as on listed flora and fauna. Environment Australia is continuing to investigate the action as a potential contravention of the Act. At the time of the audit, a site visit with an expert consultant was planned. This case illustrates the importance of the need for prompt action by the Department in response to the alert provided by third party stakeholders.

Commonwealth actions

6.38 As noted in the previous chapter, Commonwealth awareness in regard to the provisions of the Act is variable. As with private sector developers, third parties can play an important role in ensuring that the Act is complied with when Commonwealth activity is undertaken. This is illustrated below in a case study that illustrates a timely response from Environment Australia.

Case study 6

Survey work on Christmas Island

The Department of Transport and Regional Services (DOTARS) had responsibility for infrastructure development for the permanent Immigration Reception and Processing Centre (IRPC) on Christmas Island. A contractor engaged by DOTARS began survey work on the proposed site in March 2002. The site involved a rehabilitated mine site adjacent to a forest where the endangered Abbott's Booby is known to nest. The survey work commenced prior to DOTARS/DIMIA seeking an exemption from the Minister for the Environment and Heritage under the Act.

On 20 March 2002 Parks Australia found that the contractor for DOTARS had bulldozed a track through the rehabilitated land, effectively cutting the rehabilitated area of approximately 2.4 hectares in half and adversely impacting on its integrity. There were no erosion control measures taken nor any consultation with Parks Australia North who undertook the rehabilitation of the site. The incident is significant as the Abbott's Booby Recovery Plan provided for the rehabilitation of mined areas adjacent to the Abbott's Booby habitat and Section 268 of the Act requires Commonwealth agencies not to take action that contravenes a recovery plan. Environment Australia contacted DOTARS and DIMIA to request that work cease immediately. Work was stopped pending the outcome of the subsequent exemption application. DOTARS advised the ANAO that they did not realise at the time that the survey work would involve bulldozing a track through the rehabilitated land.

At the time Environment Australia considered that it was 'highly likely' that there had been a breach of the Act and/or Regulations as the contractor did not have authorisation under the Act to carry out the work.

The Minister for the Environment and Heritage wrote to the Minister for Immigration and Multicultural and Indigenous Affairs, and the Minister for Regional Services, Territories and Local Government and noted that he was 'disappointed' that development activity had taken place in relation to the IRPC proposal in advance of his consideration. While of a preliminary nature, the Minister noted that the damage was 'not insubstantial'. He reminded his

Ministerial colleagues of their commitments to 'best practice environmental management in relation to the establishment and ongoing operation of the IRPC'.

Environment Australia then monitored the situation to ensure that there were no further breaches. It was felt that there would be no benefit in pursuing a prosecution in this case. DOTARS has advised that following this incident, at the personal direction of the Departmental Secretary, DOTARS raised awareness in both the Christmas Island Administration and the Perth Office in charge of capital works of the importance of meeting Act requirements before any works commence.

This case study highlights the importance of all Commonwealth agencies being aware of the requirements of the Act and ensuring that they appropriately advise contractors of their obligations in carrying out work that may have a significant impact on the environment which includes social, economic or cultural aspects. It would also be desirable for Commonwealth agencies to understand the full extent and scale of work to be carried out by contractors engaged by them and follow up to ensure compliance. DOTARS has advised that as well as ensuring that information is available to contractors; they will include a provision in new contracts that requires contractors to comply with relevant provisions in the Act.



Close up view of bulldozer track through the rehabilitated area on Christmas Island.
Source: Parks Australia



Aerial view of the site. The arrows indicate the bulldozer track. This action has essentially cut the block of rehabilitated land in half. The area of primary forest is immediately behind the site.
Source: Parks Australia

6.39 The case studies demonstrate the importance of timely and effective action by Environment Australia as well as collaboration with the States and other local authorities to ensure that referrals are made where appropriate and prompt action is taken to minimise damage to the environment. In some cases, an injunction may be the only reasonable mechanism to stop a development that may impact on a matter of national environmental significance. Case study A highlights that even a legal remedy may not be available after serious damage to the environment.

6.40 The Christmas Island case study also highlights the importance of providing essential information on the Act throughout the 'supply chain' so that contractors are well aware of their obligations and responsibilities in regard to best practice environmental management. There may be merit in agencies ensuring that a clause on EPBC obligations is inserted as a standard clause in Commonwealth contracts where there is a risk of environmental damage.

6.41 Stakeholders have expressed some concern over the current level of enforcement activity. For example, one commented that:

We are concerned that there is a growing awareness of Environment Australia's unwillingness to take enforcement action and that this is creating a culture of non compliance in certain industries and geographic regions. If this continues, the EPBC Act will be unable to contribute to attempts to address environmental issues.

6.42 The ANAO recognises that the introduction of the Act represented a major shift towards a regulatory role for Environment Australia. The Department has taken significant steps in terms of developing a compliance and enforcement framework for the future, implementing investigation training for some staff, and defining a number of priority regions and groups for ongoing awareness raising activity during 2002–03. However, to date, investigation procedures and guidelines remain in draft form, and a compliance and enforcement policy for the Division is yet to be designed and implemented. This has made investigations challenging, and difficult to resolve—especially given the challenge of determining 'significance' for the purposes of the Act. The decision-makers' checklist, currently under development, should help to clarify the key decision-making points, and enhance effectiveness in this regard. However, there are currently no performance standards that would allow the Department to review the effectiveness of its compliance and enforcement activities.

Recommendation No.5

6.43 The ANAO *recommends* that, in order to enforce the provisions of the Act, Environment Australia:

- a) finalises as soon as practical, compliance and enforcement procedures and guidelines;
- b) ensures that there are timely and effective responses to all potential breaches of the *Environment Protection and Biodiversity Conservation Act 1999*; and
- c) includes, in the guidance to Commonwealth agencies, appropriate advice in regard to contractors and their obligations to comply with the provisions of the *Environment Protection and Biodiversity Conservation Act 1999*.

6.44 **Agency response:** Agree. Under the 2002–04 EA Compliance and Enforcement Strategy all relevant areas of the Department are required to develop and document compliance procedures as a matter of priority. The EA Compliance and Enforcement policy will ensure timely and effective responses to particular Act breaches. Advice will be provided to Commonwealth agencies regarding their responsibilities to ensure their contractors comply with the provisions of the Act.

Future developments

6.45 The Department has acknowledged the challenges facing its compliance and enforcement function. The quality of its compliance plans is variable, and the compliance, enforcement and auditing functions have been under-resourced. The compliance and enforcement functions have also been reactive rather than proactive.

6.46 In response, the Department is currently developing a better compliance framework that reflects the high priority set by Parliament. Clearly the Department has limited resources, which, understandably were allocated to critical administrative functions such as awareness raising in the wider community and negotiating bilateral agreements and accreditation processes with the States and Territories. As noted earlier, additional resources have been allocated in the forward estimates towards the compliance and enforcement functions. The aim is to design and plan the best mix of compliance strategies, which will involve both persuasive (awareness raising) and coercive (civil and criminal penalties) components. Environment Australia aims to implement a training strategy by 2003, and to re-activate a formal Department-wide compliance network at both operational and senior management level.⁷¹ It is

⁷¹ There have been earlier departmental compliance networks that had met a number of times, although these have not been active in the last 12 months.

envisaged that the compliance network will provide an accountability report to the departmental Executive on a six monthly basis. This report is to include statistics on compliance and enforcement activity, risk analyses and an assessment of performance against objectives.

6.47 The ANAO considers that the implementation of a comprehensive compliance and enforcement strategy should be a high priority to enhance the integrity of the referrals, assessments and approvals process and provide a much greater level of assurance than currently exists. It should also allow the effectiveness of the assessment and approvals process to be evaluated, and facilitate its continuous improvement. As one study has noted:

Limiting the EIA process to assessed, as opposed to actual impacts, imposes a fundamental constraint on achieving its basic objective, namely environmental protection. All project decisions are made in the face of uncertainty, contingent upon the forecasts and predictions made in EIA. Yet all predictions of future events are inexact, at best, and uncertainty increases in relation to our lack of knowledge concerning project impacts and/or particular environmental systems. Lack of adequate monitoring and follow-up perpetuates this situation.⁷²

6.48 The ANAO acknowledges that the compliance and enforcement strategy outlined above is a high priority for Environment Australia. It is well designed but equally needs to be effectively implemented and monitored to ensure that the environment, especially those aspects that are matters of national environmental significance, is protected and conserved.⁷³ Effective and timely responses to matters of national priority are essential if the integrity of the Act is to be maintained.

Conclusions

6.49 Compliance and enforcement are critical to the effective operation of the Act. In 2001–02, the Department received 122 reports of possible breaches of the Act. Key risks that need to be managed are:

- stakeholders are aware of their obligations;
- conditions imposed are complied with; and
- responses to potential breaches should be timely and effective.

6.50 There have been no prosecutions under the EBPC Act by Environment Australia to date. Some stakeholders were concerned about the lack of enforcement action by Environment Australia in certain industries and regions.

⁷² Sadler, B 1996, *International Study of the Effectiveness of Environmental Assessment: Final Report*, p. 15.

⁷³ Outcome 1, *Portfolio Budget Statements 2002–03*, Environment and Heritage Portfolio, p. 36.

Instead, Environment Australia has had a focus on building awareness of the requirements of the Act and informing Commonwealth agencies, community and industry stakeholders of their obligations. The 75 710 visits to the website indicate the level of interest in this area. However, while there is a reasonable level of general awareness of the intent of the Act, there is still much that can be done to alert stakeholders to their legal obligations and to ensure that referrals that should be made are in fact made. Stronger public reporting on the results of investigations and the development of effective compliance networks across all levels of government could assist in this regard. This is also important given the heavy reliance by Environment Australia on third parties for information on potential breaches of the Act.

6.51 Monitoring of approved actions and verification that there are no unintended consequences is important to provide assurance that the objectives of the Act are being met. While planning for the monitoring of actions is well underway in Environment Australia, implementation is at an early stage. Environment Australia has no information on what actions have commenced or that have been completed. The EPBC database does not currently provide a post-approval monitoring function. While plans have been put in place for audits of conditions, this has yet to be implemented. The ANAO considers that a formal notification and reporting system would at least assist in obtaining information on the progress of relevant approved actions. An accreditation scheme and/or delegations could expedite implementation in this area. Modifying the EPBC database to allow for consistent tracking of activities after they have been assessed would also assist this process.

6.52 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 action such as land clearing has taken place. Compliance by the Commonwealth has also been variable with evidence that agencies and/or contractors working for agencies are generally unaware of their obligations under the Act. Finalising compliance and enforcement procedures and guidelines, a more effective and timely approach to potential breaches of the Act and stronger disclosure of legal compliance requirements across the Commonwealth would assist in this area. The responsive compliance framework planned by the Department, together with processing improvements recommended by the ANAO, should enhance the integrity of the compliance and enforcement system.

7. Reporting on Results

Introduction

7.1 Public reporting of results is a key element of accountability. Effective reporting should provide Parliament and other stakeholders with a clear understanding of achievements, as well as of challenges remaining for the future. A good annual report is one that demonstrates progress over the preceding year, as well as discussing risks and defining challenges and priorities for the years ahead. The report should be focussed on outcomes and outputs achieved as well as the cost effective use of inputs so as to allow Parliament and other stakeholders to make an informed assessment of performance over time.

7.2 Environment Australia publicly reports on the administration of the Act through the Annual Report on the operation of the Act and through the departmental Annual Report.

EPBC Annual Report

7.3 Each year, under section 516 of the Act, the Secretary of the Department of Environment and Heritage is required to prepare and give to the Minister a report on the operation of the Act for the previous 12 months. This report must be tabled in Parliament annually, and must include a discussion of compliance with statutory timeframes. As such, it is one of the most comprehensive reports prepared by the Department on the Act.

7.4 To date, Environment Australia has produced two EPBC annual reports on the operation of the Act. These reports cover information on protecting the environment and conserving biodiversity, monitoring and compliance, and ongoing and future developments. They include a broad range of statistics on the operation of the Act, with information on the number of referrals received and processed, the number of times each controlling provision was triggered, and analysis of proponents by category, among other things. Statistics in the EPBC Annual Report are derived primarily from the EPBC database. As discussed earlier in the section on the EPBC database in Chapter 4, there are some concerns about the accuracy of these statistics. Consequently, it was necessary for Environment Australia to manually adjust the statistics before they were included in the foregoing report.

7.5 The range of statistics provided in the EPBC Annual Report on the operation of the Act address the quality and quantity measures outlined in the Department's Portfolio Budget Statement. Quality measures include the

percentage of statutory timeframes met, and the provision of useful and timely information that increases stakeholder and public awareness about environmental assessment and approval requirements. Quantity measures include the number of referrals and decisions, and the number of recommendations made in relation to other relevant legislation. Other quantity measures are the number of training sessions and presentations conducted, and the level of usage of information prepared by the Department, including the EPBC website.⁷⁴

7.6 The first EPBC Annual Report for 2000–01 was primarily focussed on activities and discussions of outputs. The second EPBC Annual Report for 2001–02 has been improved with some reporting at the strategic level on how the Department is progressing in terms of protecting and conserving individual species and communities. The second EPBC report has also been improved through the addition of short, illustrative case studies. However, there is a need for a more structured analysis of these results for the information of Parliament and other stakeholders. Reporting on successes, as well as remaining challenges, in various priority regions may also assist in forming a national picture of achievements under the Act over time.

7.7 Proponent self-reporting, as recommended in the section on compliance and enforcement in Chapter 6, may give greater depth to the EPBC Annual Report. It would also be useful for the Department to enhance its reporting on compliance and enforcement matters as a matter of priority. Stakeholders raised the desirability of the Department taking, and being seen to take, a greater role in this regard. Public reporting of achievements, risks and priorities for the future may help to redress perceptions that the Department is passive in this regard. While the ANAO recognises that it is still early days for the Department in terms of being able to report on outcomes, it is nevertheless timely to give consideration to enhancing the quality of the report over time.

Departmental Annual Report

7.8 Assessments and approvals under the Act are included in the departmental Annual Report. The Annual Report sets out results against the relevant departmental objective, namely:

to meet requirements under the [Act] by administering referrals, assessments and approvals in an effective, timely and professional manner.

⁷⁴ *Portfolio Budget Statements 2002–03: Environment and Heritage Portfolio*, Budget related paper no. 1.7, p. 47.

7.9 In line with this objective, the department reports annually on the following categories:

- operation of the Act;
- referrals, assessments and approvals;
- compliance and enforcement programme; and
- *Environment Protection (Impact of Proposals Act) 1974 (EPIP Act)*.⁷⁵

7.10 The departmental Annual Report is, to a large extent, a summary of matters raised in the Annual Report on the operation of the Act. While there is a broad range of activities and statistics listed, it is difficult to come to any conclusion about the effectiveness of the assessment and approval system overall.

7.11 Greater discussion of emerging trends and changes over time would strengthen the quality of reporting. The departmental Annual Report is the key agency level public report. It is currently difficult to gain an overall picture of achievements and outstanding challenges in relation to protecting the environment and conserving biodiversity at the national scale.

Conclusions

7.12 Environment Australia regularly reports a broad range of statistics associated with the operation of the Act. The key reports produced by Environment Australia provide detailed information on activities undertaken and processing decisions made. They also include specific information required under the Act, for example on compliance with statutory timeframes. However, currently reporting is predominantly activity-focussed, rather than outcome-focussed. While the 2001–02 EPBC Annual Report to Parliament includes illustrative examples of some results, there is only limited information on trends, risks and challenges for the future. Reporting on compliance and enforcement matters in particular should be enhanced, to increase the confidence of all stakeholders in the referrals, assessments and approvals process. Finally, it would be useful for Parliament and other stakeholders to be able to assess the achievement of the Act's objectives. This is partly a timing issue given that the Act has only been in force for two years. However, it would be desirable, over time, for the report to form a progress report on the Act's achievements, preferably on a national scale.

⁷⁵ A number of projects were still being assessed under the repealed EPIP Act at the time of the audit. The transitional provisions for the EPBC Act provide that assessments begun under the EPIP Act may continue, provided they were completed by 16 July 2002.

Recommendation No.6

7.13 In order to enhance the quality of public reporting on the administration of the Act, the ANAO *recommends* that Environment Australia should:

- a) include analysis of challenges, risks and priorities for the future in its EPBC annual reports; and
- b) enhance information on progress being made towards the achievement of the Act's objectives.

7.14 **Agency response:** Agree. Analysis of challenges, risks and priorities for the future will be incorporated into future EPBC Annual Reports. Performance indicators against the Act objectives will be further developed to ensure a more comprehensive approach to determine achievement of the objectives of the Act, and relevant linkages to overall EA objectives.

Canberra ACT
10 April 2003



P. J. Barrett
Auditor-General

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