5 September 2008

The Secretary
Senate Standing Committee on Environment
Communications and the Arts
PO Box 6100
Parliament House
Canberra ACT 2600

RE: Submission to the Senate Inquiry into the operation of the *Environment Protection and Biodiversity Conservation Act 1999*

Dear Sir/Madam,

The International Fund for Animal Welfare (IFAW) welcomes the opportunity to provide a submission in regards to the Senate Inquiry into the operation of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

IFAW works to improve the welfare of wild and domestic animals in more than 40 countries around the world by reducing commercial exploitation of animals, protecting wildlife habitats, and assisting animals in distress. IFAW seeks to motivate the public to prevent cruelty to animals and to promote animal welfare and conservation policies that advance the well-being of both animals and people.

In introducing the EPBC Act, Australia established a strong and welcome legislative framework for protecting our unique and important natural heritage. However, legislation is only as good as the ability for it to be effectively implemented and enforced. Consequently, having considered the terms of reference of the Senate Inquiry, there are a number of concerns that IFAW wishes to raise about the operation of the EPBC Act. Most seriously, a biased focus on the legislation's timely and efficient administration has greatly compromised its effectiveness as a biodiversity conservation tool. It is submitted that in order for the EPBC Act to effectively achieve its stated objectives, significant reforms must be made to Government administration, implementation and enforcement of the Act in order to promote more systematic and strategic biodiversity conservation in Australia. A number of key recommendations for reform are made in our submission in this regard.

IFAW wishes to thank the Senate again for the opportunity to provide our comments on the operation of the EPBC Act and would welcome the chance to discuss any of this submission in greater detail if required.

Yours sincerely,

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Submission to the Senate Inquiry into the operation of the *Environment Protection and Biodiversity Conservation Act* 1999

This submission is on behalf of the International Fund for Animal Welfare (IFAW).

Submitted to:

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Executive Summary

Australia has an unenviable record of native habitat destruction and species extinction. In just two centuries since Europeans arrived, Australia has lost at least 28 species and subspecies of mammals, the highest rate of extinction for any country or continent over the same period, with 17 being marsupials.[1] The rate of species decline has been exacerbated by large-scale land clearing of native vegetation, resulting in degraded ecosystems and ecological communities, such as temperate woodlands and grasslands, dwindling to near extinction.[2] There are critical signs that many living species are on borrowed time and may vanish if we lower our guard.

The conservation and protection of Australia's unique, and often rare, species of flora and fauna should be considered by the Federal Government to be in the national interest for ecological, educational, recreational, humanitarian, scientific and economic reasons. However, it is submitted that the government should have a clearer and broader vision of what are national environmental issues.[3] In addition, where issues involve potentially significant impacts on matters of national environmental significance, it is crucial that resources are available for comprehensive, transparent and accountable environmental impact assessment to be undertaken.

Notwithstanding, a recent independent review of the implementation and environmental achievements of the EPBC Act by the Australian Institute is scathing, describing the administration of the act as an "ongoing failure".[4] In addition, the 2006 Senate inquiry held to consider amendments to the EPBC Act found that chronic under-resourcing was a major hindrance to effective administration of the environmental impact assessment process.[5] Without sufficient Federal Government commitment, resources and political will to implement and enforce the Act's provisions, biodiversity conservation in Australia is without foundation and will certainly fail to achieve its objectives and international obligations under the 1992 Convention on Biological Diversity (CBD).

It is with due consideration that IFAW thus submits that there is a significant need to instil a more holistic approach to the assessment of the environmental impacts of projects under the EPBC Act. Moreover, if the Act is to be considered to be operating effectively, real achievements must be made in stabilising and restoring threatened species populations, ecological communities and their habitats upon which they depend.

It is imperative that implementation of the Act must be improved if these challenges are to be met and the Federal Government is to be in step with international trends in effective

[1] Dickman, C. (2007) *A Fragile Balance: The extraordinary story of Australian marsupials,* Craftsman House, Sydney at 164. The remainder comprises nine species of native rodents and two species of bats.
[2] Mapping of the vegetation of the Cumberland Plain in 2000 estimated that only 9% of the original Cumberland Plain Woodland community remains, with an additional 13% present as degraded patches of varying sizes within the landscape. See NPWS (2000) Interpretation Guidelines for the Native Vegetation Maps of Cumberland Plain, Western Sydney. NSW National Parks and Wildlife Service, Hurtsville.
[3] See Gumley (2005) 'Calls for New Matters of National Environmental Significance', *National Environmental Law Review*, p 45.
[4] See Macintosh, A. '*Environment Protection and Biodiversity Conservation Act:* An Ongoing Failure'. The Australia Institute (2006) <http://www.tai.org.au/documents/downloads/WP91.pdf.>
[5] *Senate Report*: Standing Committee on Environment, Communications, Information Technology and the Arts, Parliament of Australia, *Environment and Heritage Legislation Amendment Bill [No 1] 2006* (2006) [6.12]-[6.14].

environmental regulation. To this end, IFAW's submission to this timely inquiry addresses the following seven key issues:

1. Threatened Species Nominations and Listing;
2. Consideration of Cumulative Impacts;
3. Additional Matters of National Environmental Significance;
4. Integrating bio-regional marine plans into Part 9 of the Act;
5. The ad-hoc application of environmental offsets in the referral and assessment process;
6. Effectiveness of the Regional Forest Agreement (RFA) Exemption; and
7. Compliance and Enforcement.

Further discussion on each of these key issues is provided below.

1. Threatened Species Nominations and Listing

Currently, some 800 species of plants and 111 species of animals are considered endangered or vulnerable in Australia. However, there is a magnitude of disparity between the two levels of government in Australia, with the Federal Government listing 30% of Australia's species of marsupials as extinct or threatened, compared with 19% (Qld) to 62% (NSW) for the individual states.[6] IFAW is of the opinion that the process which underlies the movement from national threatened species lists to the relevant EPBC schedules is based upon ministerial whim as much as independent scientific review.

The 2006 amendments to the Act not only removed the obligation on the Commonwealth Environment Minister to ensure lists are kept up-to-date,[7] but initiated a new listing process that relies heavily upon ministerial discretion.[8] The move towards priority listing of threatened species is contentious, as it risks species that do not fall within annual 'conservation themes' or those that are of low socio-economic and cultural importance being overlooked, despite their ecological importance or conservation status.[9]

Furthermore, under section 267 the Minister must ensure a threat abatement plan is in force for a key threatening process "only if the Minister decides that a plan is a feasible, effective and efficient way of abating the process." It is submitted that the current discretionary power bestowed on the Environment Minister under Part 13 of the Act is far too broad and open to abuse. Recovery plans and threat abatement plans are necessary prerequisites in order to maximise the long term survival of affected species and ecological communities. Resources, not

[6] [6] Dickman, C. (2007) *A Fragile Balance: The extraordinary story of Australian marsupials*, Craftsman House, Sydney at 165.
[7] This was effected by the repeal of the former s 185.
[8] *EPBC* Act s 194.
[9] 2006 amendments repealed section 185 of the EPBC Act and introduced priority listing. The priority assessment list scheduled to commence on 1 October 2008 includes iconic species such as the Tasmanian Devil and the Koala, and included the endangered ecological communities of the Cumberland Plain Woodlands and the Lower Murray River and associated wetlands.

ministerial discretion, must be made available for the Department of Environment, Water, Heritage and the Arts (DEWHA) to adequately monitor the implementation of recovery plans. Current funding levels are notably insufficient to reverse the decline in biodiversity.

Recommendations

- The repeal of the amendments made to the following sections as a result of the *Environment and Heritage Legislation Bill (No.1) 2006*: s 267 and 269AA, and for sections 185 and 189(4) (5) (6) to be reinstated.
- That recovery plans (not 'actions') should be reinstated and be made mandatory requirements for the conservation of threatened species. Recovery plans provided an invaluable basis on which funds should be prioritised and directed for biodiversity protection and conservation.
- The Commonwealth Government must ensure that the Department of Environment, Water, Heritage and the Arts (DEWHA) is adequately resourced to review nominations for threatened species listing and to implement recovery plans in a timely manner.
- That ecological communities that are in the categories of 'vulnerable, 'near threatened' and 'conservation dependent' and also 'near threatened species' should be provided due consideration under EPBC Act listing and project approval provisions.

2. Consideration of Cumulative Impacts

It is submitted that the EPBC Act lacks a comprehensive planning system and fails to adequately deal with cumulative impacts.[10] The referral and assessment process does not address the cumulative impacts of development and no assessment is currently provided for the overall impact of a series of unrelated developments on critical habitat for certain species or for World Heritage values.

The widespread destruction of natural habitat areas and the spread of urbanization have radically increased the likelihood that even relatively small projects may involve direct, indirect or cumulative impacts on species and ecological communities listed as threatened under the EPBC Act. As a result, it is inadequate to consider the environmental impacts of human activities for one project in isolation from others to which it is linked.[11] Notably, the Full Federal Court on appeal in the *Nathan Dam Case* held that the notion of 'impact' under the EPBC Act "can readily include the "indirect" consequences of an action and may include the results of acts done by persons other than the principal actor".[12]

In this regard, greater guidance for regional and local councils is required to ensure matters of national environmental significance are given acceptable consideration in the initial stages of the approval process. In addition, the Commonwealth Government may need to work with key local councils where zoning and planning laws can reasonably be expected to affect World Heritage values, RAMSAR wetlands, river catchments or coastal waterways. It has also been suggested

[10] Cumulative impacts may be described as environmental effects arising either from persistent additions from one process or development or compounding effects involving two or more processes or developments.
[11] *Nathan Dam Case* (2004) 139 FCR 24, 40 (Black CJ, Ryan and Finn JJ). See also *Mees v Roads Corporation* (2003) 128 FCR 418, 456 (Gary J).
[12] *Nathan Dam Case* (2004) 139 FCR 24, 38 (Black CJ, Ryan and Finn JJ).

that integrating NRM planning and regional marine planning into decision-making in Part 9 of the EPBC Act would allow for the consideration of cumulative impacts and improve the legislative framework of the Act.[13]

Recommendations

- That provisions be introduced in Part 9 of the EPBC Act that provide for a more comprehensive planning framework and adequate consideration of cumulative impacts.
- Specific provisions be made for considering local government plans, NRM plans, bio-regional plans, regional marine plans and other policy documents for projects that are likely to impact biodiversity 'hot-spots' and listed endangered ecological communities.

3. Additional Matters of National Environmental Significance

The identification of 'matters of national environmental significance', which themselves must fall within the ambit of the Commonwealth's constitutional heads of power[14], sets the jurisdictional scope of the EPBC Act by determining which types of development project with an environmental impact will require approval by the Commonwealth Environment Minister.[15] Currently, the EPBC Act specifies seven 'matters of national environmental significance', including one protected matter which was added by way of amendment after the legislation's enactment.

An important decision by the Federal Court highlights the way in which the application of the EPBC Act may be hindered by the narrow focus of its specified 'matters of national environmental significance. The case of *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* ('*Wildlife Whitsunday*')[16] concerned a challenge by an environmental NGO to decisions of the Department of the Environment and Water Resources that two new Queensland coal mines could not be designated 'controlled actions' on the basis of the potential for resulting greenhouse gas emissions to adversely affect 'matters of national environmental significance' like the Great Barrier Reef World Heritage Area. The absence of an effective greenhouse gas trigger led to the flow-on effects and cumulative impacts of the proposal on 'matters of national environmental signficance' not being given adequate consideration in that case.

Therefore, it is submitted that the EPBC Act is too narrow in its focus and is not as comprehensive as it needs to be to protect matters that are legitimately of 'national

[13] McGrath, C. 'Swirls in the stream of Australian environmental law: Debate on the EPBC Act', *Environment and Planning Law Journal* (2006) 23: 165- 184 at 182.
[14] Relevant constitutional heads of power with respect to external affairs, trade and commerce, and corporations have been broadly construed by the High Court: see, e.g. *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1; *Commonwealth v Tasmania* (1983) 158 CLR 1; *New South Wales v Commonwealth* (2006) 231 ALR 1. In practice, such expansion has given the Commonwealth Parliament 'the Constitutional power to regulate… most, if not all, maters of major environmental significance anywhere within the territory of Australia': Senate Environment, Communications, Information Technology and the Arts Committee, Parliament of Australia, *Commonwealth Environment Powers* (1999) [2.19]. See also Justice Catherine Branson, 'The *Environmental Protection and Biodiversity Conservation Act* 1999 – Some Key Constitutional and Administrative Issues' (1999) 6 *Australian Journal of Natural Resources Law and Policy* 33.
[15] The *Environment Protection and Biodiversity Conservation Act 1999* (Cth), Chapter 2.
[16] [2006] FCA 736 (Unreported, Dowsett J, 15 June 2006).

environmental significance'. Notably, the restricted number of triggers for environmental impact assessment constrains the circumstances in which the Federal Government will be involved in decision-making regarding the environmental assessment and approval of projects. However, under the EPBC Act, there is capacity for further 'matters of national environmental significance' to be identified and added, whether by way of amendment or via regulations issued under the Act.[17]

Recommendations

- That other potential 'matters of national environmental significance' be added to the EPBC Act under Part 3, including:
  - A greenhouse gas emissions trigger that may also work towards protecting and enhancing greenhouse sinks;[18]
  - Ozone depleting substances;
  - Agricultural land clearing;
  - Genetically modified organisms which may have adverse environmental effects;
  - Management of hazardous wastes;
  - Prevention of land and water degradation, including water extraction.[19]

4. Integrating Bio-regional Marine Plans

The EPBC Act specifically enables (though does not require) the Minister to prepare, or co-operate, in the preparation of bioregional plans.[20] The advantage of bioregional planning is that conservation of ecosystems can be based on a broad appreciation of their range rather than geographically limited to particular areas. Additionally, activities having impacts within and across terrestrial and marine ecosystems are given consideration and become subject to strategic planning.[21] Thus, a bioregional plan will provide the 'blueprint' for the sustainable management of natural resource within a bioregion.

[17] *EPBC Act s 25*. New 'matters of national environmental significance' triggers added by way of regulation under s 25 must follow the Act's mandated processes for consultation with state and territory governments. Prior to its amendment in late 2006, s 28A of the Act also required the Commonwealth Environment Minister to review the impact assessment triggers every five years and to prepare a report as to whether further 'matters of national environmental significance' should be included. However, this review requirement has now been repealed.

[18] See, eg, Nick Minchin, 'Responding to Climate Change: Providing a Policy Framework for a Competitive Australia' (2001) 24 *University of New South Wales Law Journal* 550, 550-1. See also Commonwealth Department of the Environment and Water Resources, 'Possible Application of a Greenhouse Trigger under the *Environment Protection and Biodiversity Conservation Act [EPBC] 1999*' (Consultation paper, Environment Australia, 1999); Environmental Defender's Office New South Wales, *ANEDO Submission 'EPBC Act: Recommendations for Reform* (March 2008) available online http://www.edo.org.au/policy/epbc_amendment080305.htm

[19] Council of Australian Governments, *Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment* (1997) attachement I pt II.

[20] Section 176 of the *EPBC* Act. A bioregion is an area comprising a whole ecosystem or several interconnected ecosystems, characterised by landforms, vegetation cover, human culture and history.

[21] For further discussion of the advantages of bio-regional marine planning see McGrath, C. 'Swirls in the stream of Australian environmental law: Debate on the EPBC Act', *Environment and Planning Law Journal* (2006) 23: 165- 184 at 178.

Currently, ecosystem-based regional marine plans are prepared under Australia's Oceans Policy.[22] However, the *EBPC Act* does not provide an overarching framework for full consideration of the effects of multiple users on the marine environment. The lack of any federal statutory process into which they are integrated is an obvious deficiency. Integrating these plans into decision making in Part 9 of the EPBC Act would improve the legislative framework for the Act and would thereby enable the broad ecological footprint of a project with the potential to impact (directly or indirectly) upon a marine ecosystem to be rigorously assessed.

Recommendations

- A substantive amendment to the EPBC Act mandating the Minister to consider any relevant bio-regional marine plan when assessing referrals under Part 9 of the Act.

5. The Ad-hoc Application of Environmental Offsets

The informal use of offset-like measures at the controlled action decision stage of EPBC Act approval processes is unlikely to achieve the objectives of the Act. Remediation or mitigation requirements in conditions on EPBC Act approvals do not extend beyond the operating life of the development, and are expressed in extremely vague terms that do not necessarily lead to real conservation outcomes.[23] The use of conditions on approvals also encumbers project developers with conservation responsibilities which they are unable or unprepared to implement, and which the DEWHA is ill-resourced to enforce.

The regulatory approval process under the EPBC Act should seek to prevent damage to ecosystems rather than placing undue reliance on offsets that aspire to replace losses with reconstructed ecosystems. It has been suggested that mitigation policies should include recognition that compensation sites may never fully replace natural sites and that the time required for restoration may exceed traditional expectations and will thereby contribute to species decline due to a loss of native habitat that cannot be immediately restored.[24]

Recommendations

- That conditions on approvals be enshrined in legally-binding agreements that are registered on land title and have effect in perpetuity[25], in order to provide more certain and assessable conservation outcomes.
- That any conditions to approvals incorporate long-term commitments to monitoring and include clear restoration goals and a design that enables experimental evaluation in a rigorously controlled and replicated manner.[26]

[22] Section 176 (bioregional plans) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). At this stage, only a Bioregional Profile has been produced for the South-west Marine Region (there are 5 Marine Regions).
[23] Conditions based upon 'mitigation', 'offsets', 'credits' or 'no net loss' policies have been applied to developments that destroy or degrade natural assets and are predicated on undertakings to carry out compensatory actions elsewhere, such as restoration of degraded ecosystems or reconstruction of habitat. These conditions are rarely monitored for compliance.
[24] Zedler, J.B. and Callaway, J.C. (1999) 'Tracking wetland restoration: do mitigation sites follow desired trajectories?' *Restoration Ecology* 7: 69-73.
[25] This is a feature of offset schemes such as the New South Wales *BioBanking Bill*, Queensland's Vegetation Incentives Program, and the Victorian BushTender program.
[26] See Chapman, M.G. and Underwood, A.J. (2000) 'The need for a practical scientific protocol to measure successful restoration.' *Wetlands* (Australia) 19: 28-49; Wilkins, S., Keith, D.A., and Adam P. 'Measuring

- DEWHA should require the modification of design of developments to reduce or avoid impacts all together instead of offsetting biodiversity losses. Furthermore, the DEWHA must show the political will to refuse projects where no feasible restoration technology exists to achieve critical habitat replacement.

6. Effectiveness of the Regional Forestry Agreement (RFA) Exemption

Regional Forest Agreements, of which there are now 10 covering forest areas in four states,[27] are the outcome of an inter-governmental forestry management process that was initiated in the early 1990s by the National Forestry Policy Statement and associated Comprehensive Regional Assessment of Australian forests.[28] Under section 38 of the EPBC Act the Commonwealth undertakes to refrain from exercising its environmental legislative powers for the duration of the Agreement (20 years), having 'accredited' the relevant state forestry practices and laws. However, serious flaws in the information and scientific process underpinning the RFAs undertaken to date have been identified.[29] These flaws call into question the capacity of the concluded RFAs to observe the precautionary principle.

In an illustrative case, Marshall J of the Federal Court in *Wielangta Forest*[30] determined that forestry operations in the area were not being carried out 'in accordance with' the RFA due to various management failures and hence did not enjoy exemption from the ordinary environmental protection provisions of the *EPBC* Act.[31] Marshall J was of the opinion that the promotion of biodiversity conservation sought by the legislation:

> "can only be achieved by favouring a construction of the *EPBC* Act which views protection of the environment as an act of not merely keeping threatened species alive, but actually restoring their populations so that they cease to be threatened."[32]

Thus, the RFA exemption may no longer hold whereby agreements are not effectively implemented and do not deliver actual conservation outcomes in terms of protecting and restoring populations of threatened species. Whilst there is limited scope for agreements to be amended, the Federal Government in accordance with its obligations under the Convention on Biological Diversity, should ensure that Comprehensive Adequate and Representative (CAR) Reserve Systems and Ecologically Sustainable Forest Management (ESFM) are in accordance with best practice and are rigorously assessed and reviewed every five years.

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success: Evaluating the restoration of grassy eucalypt woodland on the Cumberland Plain, Sydney, Australia' *Restoration Ecology* (2003) 11(4): 489-503.

[27] Department of Agriculture, Fisheries and Forestry, *Regions* (7 August 2008) http://www.daffa.gov.au/rfa/regions. The forest regions covered are the Eden, north-east (upper and lower) and southern regions in NSW; the East Gippsland, Central Highlands, North East, Gippsland and western regions in Victoria; the south-west forest region in WA; and the whole of the state of Tasmania. The Commonwealth and state governments completed a Comprehensive Regional Assessment for the south-east Queensland region, but did not sign a regional forest agreement. The RFAs cover regions where commercial timber production is a major native forest use.

[28] *National Forestry Policy Statement* (1992).

[29] See McDonald, J. 'Regional Forest (Dis)agreements: The RFA Process and Sustainable Forest Management' (1999) **11** *Bond Law Review* 295; Redwood, J. 'Sweet RFA' (2001) **26** *Alternative Law Journal* 255.

[30] [2006] FCA 1729 (Unreported, Marshall J, 19 December 2006). See also *Brown v Forestry Tasmania* (No 4) (2006) 157 FCR 1

[31] *Wielangta Forest* [2006] FCA 1729 (Unreported, Marshall J, 19 December 2006) at 293.

[32] *Wielangta Forest* [2006] FCA 1729 (Unreported, Marshall J, 19 December 2006) at 300.

Recommendations

- That the Commonwealth should intervene to regulate activities under an RFA if information comes to light that demonstrates a real threat to an endangered species, or world heritage or national estate values.
- That section 75 (2B) be repealed to enable the Minister to give adequate consideration to any adverse impacts that might arise under an RFA forestry operation under Division 4 of Part 4.
- That RFAs be amended specifically 'to protect' listed threatened species under the EPBC Act and to provide for threatened species management plans to be submitted to the DEWHA as a condition for exemption.

7. Compliance and Enforcement

Monitoring and enforcing compliance with the provisions of the EPBC Act is crucial to the effective operation of the Act. However, under the previous Liberal Government, the implementation of environmental laws, regulations, and standards suffered from a lack of resources to undertake appropriate monitoring activities and reluctance to use stringent enforcement actions toward recalcitrant polluters and offenders. The implementation difficulties that the EPBC Act has faced as a result of the vagaries of government administration and the limited resources available to environmental groups to scrutinise decision-making under the legislation, threaten to seriously undermine the EPBC Act*'s* effectiveness as an environmental protection tool.

The Australian National Audit Office has found that the DEWHA did not have sufficient information to know whether conditions on the decisions are generally met or not.[33] Still more alarming is the likelihood that the outcomes of administrative audits based on numbers of dollars spent, hectares planted, or volunteers engaged may be misinterpreted as signals of habitat restoration success in the absence of a satisfactory ecological audit. Clearly, the conspicuous absence or inadequacy of ecological audits in restoration and bio-offset projects needs an urgent remedy.

Moreover, the main impetus for change to the EPBC Act has come from the ruling courts, combing with the activism of environmental groups, rather than through consistent government action (the Greentree decision[34] notwithstanding). In order to counteract deficient political will, the opportunity for both applicants and third parties to apply for merits review must be reinstated. Pursuing accountability through legal means can come at a significance cost, particularly where court actions before the Federal court are involved. The EPBC Act provisions currently impede environmental organisations and NGOs from commencing litigation due to excessive costs, and thereby limit their ability to assist conservation of biodiversity and cultural heritage.[35]

[33] Australian National Audit Office. 'The Conservation and Protection of National Threatened Species and Ecological Communities', Audit Report No. 31 2006-07 at p 25.
[34] *Minister for the Environment and Heritage v Greentree (No 1)* [2003] FCA 857; *Minister for the Environment and Heritage v Greentree (No 2)* [2004] FCA 741; *Minister for the Environment and Heritage v Greentree (No 3)* [2004] FCA 1317.
[35] Macintosh, A. (2004) 'Why the Environment Protection and Biodiversity Conservation Act's Referral, Assessment and Approval Process is Failing to Achieve its Environmental Objectives', *Environment and Planning Law Journal* **21**: 288.

Recommendations

- That the DEWHA be compelled to publish twice yearly a list of firms (companies, industry, property development) that either do not comply with the EPBC Act or whose environmental performance is of concern (that is, a Public Disclosure Strategy).
- That the DEWHA be required to undertake an ecological audit of funded restoration projects, which addresses the extent to which the restored areas follow a trajectory towards some specified target state and that represents 'natural' or undegraded conditions.[36]
- That further indirect modes of regulation be evaluated as an effective means for influencing the behaviour of environmental actors, rather than relying on government action and sanctioning.[37]
- The insertion of a provision into the EPBC Act that allows the court to grant the opportunity to obtain merits review on decisions regarding 'controlled action' decisions under Parts 7-9 of the Act.
- The insertion of a provision into the EPBC Act that allows the court to grant the opportunity to obtain merits review on decisions regarding 'listing process' under section 184 of the Act.
- That the former protection provided under EPBC Act s478 be reinstated in its original form. This would prevent the Federal Court from requiring undertakings for damages as a condition for granting an interim injunction, which is a significant benefit for public interest litigation.

[36] Success may be assessed by measuring aspects of species composition, community structure and ecosystem function. See [36] Zedler, J.B. and Callaway, J.C. (1999) 'Tracking wetland restoration: do mitigation sites follow desired trajectories?' *Restoration Ecology* 7: 69-73.

[37] See Peter N Grabosky, 'Governing at a Distance: Self-Regulating Green Markets' in Robyn Eckersley (ed), *Markets, the State and the Environment: Towards Integration* (1995) 197; Catherine Lyall and Joyce Tait (eds) *New Modes of Governance: Developing an Integrated Policy Approach to Science, Technology, Risk and the Environment* (2005).