5 September 2008

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

Via email: eca.sen@aph.gov.au

Re. Senate Standing Committee on Environment, Communications and the Arts – Inquiry into Operation of the Environmental Protection and Biodiversity Conservation Act 1999

Dear Secretary

The Minerals Council of Australia (MCA) welcomes the opportunity to provide comment on the operation of the *Environment Protection and Biodiversity Conservation Act 1999* ('the Act'). Members of the MCA, representing over 85% of minerals production in Australia, have a long-standing commitment to sustainable development including the responsible stewardship of natural resources.

The MCA strongly advocates the principle of minimum effective regulation – that the development of good regulatory process should be informed by the following principles:

- regulatory approaches should not be used unless a clear case for action exists, including an evaluation of why existing measures are not sufficient to deal with the issue;
- a range of policy options (including self-regulatory and co-regulatory approaches) have been assessed and found wanting;
- the regulation represents the greatest net benefit to the community;
- the regulation developed is the most efficient means of achieving the desired outcome at least cost to industry;
- effective guidance is provided for both regulators and stakeholders to ensure that the regulations are correctly implemented and monitored;
- mechanisms such as sunset clauses or periodic reviews are built into the legislation to ensure that the regulations remain relevant over time; and
- there is effective consultation with stakeholders at key stages of the development and implementation of the regulation.

Based on DEWHA statistics, the minerals industry has been one of the major stakeholders in the operation of the Act. We estimate that our members spend millions of dollars every year on documentation for the Commonwealth to meet the Act's documentation requirements.

The MCA does not seek a diminution of measures to protect the environment, but rather promotes improvements to the efficiency and co-ordination of legislation within and between jurisdictions. In this context, the MCA supports the intent of the inquiry, and notes that it will provide a useful platform for the independent 10-year review of the Act.

Should you have any further questions regarding this issue, please do not hesitate to contact me directly, or Dr Jason Cummings – Assistant Director Environmental Policy on 02 6233 0627, who has carriage of this matter in the MCA Secretariat.

Yours sincerely,

MELANIE STUTSEL
DIRECTOR – ENVIRONMENTAL AND SOCIAL POLICY

MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO THE SENATE ENVIRONMENT, COMMUNICATIONS AND THE ARTS COMMNITTEE ON THE OPERATION OF THE *ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999*

5 SEPTEMBER 2008

SUPPORTED BY:

THE MCA's VICTORIAN DIVISION

THE CHAMBER OF MINERALS AND ENERGY OF WESTERN AUSTRALIA

QUEENSLAND RESOURCES COUNCIL

SOUTH AUSTRALIAN CHAMBER OF MINES AND ENERGY

NSW MINERALS COUNCIL

Executive Summary

The minerals industry is a significant manager of the landscape, particularly in regional and remote Australia, and based on DEWHA statistics, has been one of the major stakeholders in the operation of the Act. The Minerals Council of Australia, representing 85% of minerals production, does not seek a diminution of measures to protect the environment, but rather improvements in the efficiency and co-ordination of legislation within and between jurisdictions.

The Minerals Council of Australia expresses concern that the:

- inquiry is founded in the assumption that extinctions of species in Australia are continuing, and therefore the Act is not working, when the species extinction rate across the last two decades is probably 'zero';
- operation of the EPBC Act is not assessed easily, or objectively, whilst the performance monitoring and reporting for the Act is based on process rather than outcomes; and
- majority of resources invested through the operation of the Act (both from government and industry) are targeted at projects that are undertaken utilising leading-practice mitigation and management techniques, whilst the degradation pressures that lead to the establishment of the Act are largely not captured in the project-by-project approach.

Regarding the current implementation of the Act, we recommend the following be considered so that resources can be more efficiently utilised, and better-targeted at the drivers of landscape degradation:

- providing better guidance on the definition of an 'action', specifically regarding a project's upstream and downstream scope for assessment;
- providing better guidance on the definition of an 'action', specifically regarding where to 'draw the line' on enabled impacts and requirements for the supplementary assessments of enabled impacts, when they are included in a previous assessment;
- providing a seconded officer to industry's that intersect significantly with the Act's implementation, to provide better advice on whether a referral is actually required and where assessment efforts should be targeted;
- using a risk based approach to align the types of actions that will lead to impacts on different matters of national environmental significance; and
- enabling the consideration of offsets in determining whether an impact is significant at the referral stage.

Regarding implementation of the Act in the medium-long term, we recommend consideration of:

- the removal of the Commonwealth from project-by-project approvals processes;
- the establishment and full implementation of bilateral agreements for assessments and approvals;
- establishment and endorsement of regional planning instruments that meet EPBC Act protection requirements under bilateral approvals, whereby other jurisdictions then subsequently review and regulate projects; and
- Commonwealth activities being focussed more appropriately on strategic investments and planning support, and assessing outcomes through monitoring and auditing compliance.

Regarding some emerging issues, we recommend:

- reduced overlap of monitoring, reporting and compliance requirements between Commonwealth and State jurisdictions;
- better consideration of the leading-practice regulation development to which the Commonwealth has committed, especially through the development of an EPBC Act offsets policy;
- establishment of more rigorous processes to support Section 78 reviews; and
- better alignment of regional natural resource management planning, and the operation of the Act, to minimise duplicate planning processes, and land use conflicts, whilst maximising industry investment in the process and landscape (use of offsets, data collected etc.).

Introduction

The Australian Minerals Industry

Members of the MCA, representing over 85% of minerals production in Australia, have a long-standing commitment to sustainable development including the responsible stewardship of natural resources. See www.minerals.org.au for a list of our members. Most minerals operations are in regional and remote Australia. Many companies own or manage larger tracts of land than those that are subject to extraction activities. Additionally many companies undertake exploration activities across land owned or leased by others. In regional and remote Australia, minerals companies are a major contributor to natural resource management, including biodiversity conservation outcomes.

Traditionally, the investment that mining operations made in landscape management was mandated by regulatory authorities through the impact assessment process, including the application of the EPBC Act. However, companies now recognise that initiatives to better-manage their non-operational lands beyond duty of care requirements reflect on their 'social license to operate'. Accordingly there has been an increasing effort by minerals companies to invest in landscape management far-beyond mandated requirements. Some of these examples include partnerships with Commonwealth-funded bodies, and all include local community engagement:

- The Lake Cowal Foundation: http://www.lakecowalfoundation.org.au/ in Western NSW
- The Anglesea Heath Cooperative Agreement: http://www.alcoa.com/australia/en/info_page/anglesea_strong.asp in Eastern Victoria
- The Bendigo Mining Environment Fund: http://www.bmnl.com.au/our_environment/community_relationship/environment_fund.htm chaired by the Mayor of Bendigo
- biodiversity assessment in the Bowen Basin: http://www.fba.org.au/programs/miningbiodiversity.html
- biodiversity assessment and planning in the Pilbara with the Australian Museum: http://www.austmus.gov.au/riotintopartnerships/pilbara/outcomes.htm

The minerals industry is a significant manager of the landscape, particularly in regional and remote Australia, where our investments in monitoring, reporting and on-ground natural resource management outcomes are ever-increasing. Based on DEWHA statistics, the minerals industry has been one of the major stakeholders in the operation of the Act. We estimate that our members spend millions of dollars every year on documentation for the Commonwealth to meet the Act's documentation requirements.

In this submission, the MCA does not seek a diminution of measures to protect the environment, but rather promotes improvements to the efficiency and co-ordination of legislation within and between jurisdictions.

The MCA strongly advocates the principle of minimum effective regulation – that the development of good regulatory process should be informed by the following principles:

- regulatory approaches should not be used unless a clear case for action exists, including an evaluation of why existing measures are not sufficient to deal with the issue;
- a range of policy options (including self-regulatory and co-regulatory approaches) have been assessed and found wanting;
- the regulation represents the greatest net benefit to the community;
- the regulation developed is the most efficient means of achieving the desired outcome at least cost to industry;
- effective guidance is provided for both regulators and stakeholders to ensure that the regulations are correctly implemented and monitored;
- mechanisms such as sunset clauses or periodic reviews are built into the legislation to ensure that the regulations remain relevant over time; and
- there is effective consultation with stakeholders at key stages of the development and implementation of the regulation.

Concern Regarding the Terms of Reference Framework

The first term of reference for the committee assumes that there is an ongoing extinction crisis in Australia:

> 'The Senate notes the continuing decline and extinction of a significant proportion of Australia's unique plants and animals'.

Unfortunately this does not set an objective platform for this crucial review.

Australia has had the highest documented extinction rate of vertebrates in the world, but there is scant evidence that it is 'continuing' or 'worsening'. The high extinction 'rate' is largely a result of historic land clearing for agricultural pursuits, and the synergistic effects of the incursion of exotic animals (predators and herbivores), during the first half of the last century (for example see Short and Smith 1994 for the mammals story). If we chose to measure and communicate the rate of documented extinctions across the last decade [or two], it could well be 'zero'.

The fact that there is not clear-cut evidence that the 'decline and extinction' is continuing or worsening is significantly due to cooperative efforts from government, landholders, and non-government organisations (and presumably this review will determine whether the EPBC Act has been an efficient, value-adding, tool in that process). The impetus, enthusiasm and understanding of the needs for much of the work to halt the decline has been previously developed through alarmist approaches, but it is time to take a more mature approach. Stakeholders are limited in their capability to be consulted and engaged repeatedly (Seymour et al. 2007), so we need to refine the type and volume of material presented, and deliver objective messages to support decision making processes.

Based on the EPBC Act listings, since 2001 there have not been any additional species listed as 'extinct' (DEWHA 2008), and the last well documented 'extinctions' are generally considered to be the gastric brooding frogs in the 1980's. We anticipate new evidence from the Senate Committee, possibly documented through the National Land and Water Resources Audit's Terrestrial Biodiversity Assessment (due 'within weeks', NLWRA pers. comm.), which may provide some quantitative evidence of the 'continuing decline and extinction' of our native plants and animals (obviously we hope this is not the case, but do hope for some objective quantification of the scale of the problem). Similar national assessments have been limited in the past as they have relied on judgements from conservation agency staff, rather than scientifically quantified patterns of changes in distributions and abundance.

Any potential species loss is clearly a significant environmental and social concern. However, the terms of reference claim that a 'significant proportion' of flora or fauna are 'declining [to] extinction' is simply not supported by the readily available data. The EPBC Act has approximately 1,800 threatened or extinct species of flora and fauna, and based on the criteria for listing, some of these may simply be rare, and not declining. Based on DEWHA's (1994) estimates of 23,000 flora, 2000 vertebrate, and 225,000 invertebrate species, the proportions of at-risk species are: 0.7% if invertebrates are included, or 7.2% if they are excluded (DEWHA 1994). If we use the other estimate of 600,000 species on the DEWHA website, the 'significant proportion' reduces to 0.3% of our natural inventory.

Clearly these are gross figures, which undervalue the importance of endemism, but provide some important context and consideration of the alarmist approach, which assumes that the 'ongoing extinction crisis' notion should not be tested. There is a need for better quantitative data to objectively and scientifically communicate the nature of the problem, rather than relying on opinion-based feedback (e.g. see the 2002 Terrestrial Biodiversity Audit).

The scope of the EPBC Act is to determine the conditions under which projects can proceed, whilst protecting matters of national environmental significance (MNES). Whilst the Committee's terms of reference are framed with the assumption that species are continuing to decline to the point of extinction, there is the risk that the application and operation of the Act will not be assessed objectively. The focus of the review should be on the operation of the Act, as the title of the inquiry suggests, viewed objectively. Any relationship between the Act's operation and changes in the distribution and abundance of MNES need to be considered based on the best available scientific information, with a critical examination and subsequent understanding of the limitations and gaps in that scientific information.

The Minerals Industry is a Significant Stakeholder in the Operation of the EPBC Act

Although the immediate direct footprint of our operations is small, increasing from 0.02% (DAFF 2006) to 0.2%[1] of the landscape in the last decade, the impacts of our operations in the landscape can be locally significant, not well understood, and easily attract attention from other landscape managers. Despite this low footprint, the Australian minerals industry generates approximately 8% of national GDP, compared, for example, to 3% GDP from agriculture, which uses approximately 50% of the landscape.

Because the local impacts of an operation are obvious in the landscape, the land use is temporary [with leases to be transferred back to the government], and poor environmental performance had historically resulted in legacy sites, the industry has now had several decades of tight regulation regarding environmental performance, including 'natural resource management' on the land it manages.

In several areas of natural resource management, this has lead to the investment in research, and development of leading practice, upon which many current activities are based. For example, the minerals industry has lead the development of technologies for rehabilitation, including on-ground activities and frameworks for rehabilitation planning, monitoring and reporting. Other examples include the development of leading practice for stakeholder engagement, impact assessment and site water management. Of course, these initiatives have been undertaken with other partners, including regulatory authorities, academic institutions and other landholders.

According to annual departmental reports on the operation of the Act, the minerals industry is consistently one of the major stakeholders in the implementation of Act, despite our very low environmental footprint, and very high investment in remediation of those impacts. Key areas that the industry seeks to highlight to the Committee include:

- assessing performance of the EPBC Act;
- improving efficiency of the existing process;
- resources for the Act's implementation; and
- emerging issues in the implementation and operation of the EPBC Act; including:
    - monitoring, reporting and compliance concerns;
    - Section 78 reviews;
    - development of an EPBC Act offsets policy; and
    - lack of strategic alignment of EPBC Act requirements and other government natural resource and conservation management programs.

These issues are interrelated, and mostly correspond to items 2a), 2b) and 2d) of the Committee's terms of reference.

[1] latest BRS compilation of ACLUMP (Australian Collaborative Land Use Mapping Programme) Catchment Scale Land Use data

Discussion and Comments for Consideration by the Senate Committee

Assessing Performance of the EPBC Act

The concern raised above regarding the alarmist nature of the Committee's framework for the inquiry, is directly related to the successful prosecution of the subsequent terms of reference, particularly via assessing the success of the operation of the EPBC Act. The Objects of the Act are to [amongst other things]:

- provide for the protection of…matters of national environmental significance (MNES);
- promote ecologically sustainable development through the conservation and use of natural resources; and
- promote the conservation of biodiversity.

After nearly 10 years of operation, it is very difficult to assess whether the Act has been successful in achieving these objectives, since the performance monitoring is based on 'volume-of-process' rather than 'outcomes'. Routine annual reports from the Department responsible for administering the Act focus on the number of referrals, number of assessments, number of recovery plans and number of listed entities, without quantifying whether the entities for which we generate this documentation are recovering, stable, or continue to decline (i.e. whether the Act is working).

'Objectives of legislation should be clearly specified in terms of desired environmental outcomes, so that regulations and decisions link back to these objectives and performance of the regimes can be monitored and assessed' (Productivity Commission 2004). Additionally, implementation of the Act is requiring industry to deliver outcomes (see for example the draft offsets policy), so it is appropriate that the legislation itself is monitored based on outcomes.

It is concerning that the number of referrals is a key performance measure, and should be considered to increase for the Act to be successful (ANAO 2007). As companies are repeatedly subjected to the EPBC Act process, they are better accustomed at determining whether a referral should be made or not, and, as per the leading-practice hierarchy for environmental management, would design projects to first avoid impacts on MNES, therefore also reducing the likelihood of referrals.

As a major investor in the EPBC Act project assessment and approvals process, spending millions of dollars annually on documentation, the minerals industry is concerned that there is no evidence to demonstrate that the protected matters, their populations and distributions, are now more secure. Just as the ANAO (2008) recommended better outcomes monitoring for natural resource management [and conservation] incentive programs, so to should there be better outcomes-focussed monitoring for regulatory instruments. In their 2007 comments on recovery plans, the ANAO recommended measuring the progress of species against temporal goals, this notion should be developed to assess the overall utility and efficiency of the Act.

We also remain concerned that the volume of effort and documentation developed to assess projects through the EPBC Act, is not actually targeted at the drivers of landscape degradation. Rather, we are focussing on assessing impacts of projects that are implemented using leading-practice environmental management and rehabilitation measures (at least for the minerals industry), whilst that investment (of industry and government capacity and resources) could be better placed reversing the decline, largely caused by historical land-clearing and the introduction of exotic species (SoE 2002).

Further, the Act has created a 'documentation wave'. Companies now generate referrals that are of a similar scale to impact assessment documentation, to ensure that their risk of compliance is passed to the Commonwealth, and demonstrate that all possible activities have been undertaken to minimise impacts on MNES, and thereby reducing the ongoing role of the Commonwealth Government. The complexity and volume of documentation being handled by the Commonwealth, has been sited as a reason for declining performance in timeliness (ANAO 2007). Whilst the Act's implementation success is measured based on the volume of documentation generated, and assuming that more is better, the actual volume generated will be encouraged to rise, generating ongoing implementation capacity constraints.

The previous Senate Committee analysis, based on amendments to the Act, noted:

- 'the Department considered that the proposed amendments would facilitate a shift in the Australian Government's focus from ad-hoc project-by-project approvals to a focus on a more strategic framework'

- [the proposed amendments] 'will improve environmental protection by focusing more on outcomes than process while maintaining our strong commitment to protecting Australia's unique and iconic natural, cultural and Indigenous heritage'

Based on our experience, these findings from the previous Senate Committee review which are appropriate as objectives for the Act's implementation, are yet to be fully realised.

Improving Efficiency of the Existing Process

To improve performance, and implementation of the Act in the short to medium-terms, based on the minerals industry experience, through reducing the number of unnecessary referrals (ANAO 2007) and impact assessment material that is not focussed on the drivers of degradation, the MCA recommends:

- providing better guidance on the definition of an 'action', specifically regarding a project's upstream and downstream scope for assessment;
- providing better guidance on the definition of an 'action', specifically regarding where to 'draw the line' on enabled impacts and requirements for supplementary assessments of enabled impacts, when they are included in a previous assessment;
- providing a seconded officer, as per the National Farmers Federation model, to those industry's that actually intersect significantly with the Act's implementation, to facilitate better advice on whether a referral is really required and where impact assessment efforts should be targeted;
- using a risk based approach to align the types of actions that will lead to impacts on MNES, rather than the current assumption that all actions will influence all MNES, until proven otherwise – there is now a decade of documentation to support refinement of the current 'shotgun' approach; and
- enabling the consideration of offsets in determining whether an impact is significant at the referral, and therefore for industry at the pre-referral, stage.

In the longer-term, the MCA considers that it should not be necessary for the Commonwealth to be involved in project approvals. Accordingly, the establishment and full implementation of bilateral agreements for assessments and approvals is fundamental and crucial to aligning the Commonwealth's capabilities with its mandate. Establishment and endorsement of regional planning instruments that meet EPBC Act protection requirements, whereby other jurisdictions subsequently review and regulate projects in line with the EPBC Act-approved instruments, would be a much more efficient model. Commonwealth activities could then also focus more appropriately on strategic investments and planning, and assessing outcomes through monitoring and auditing compliance.

Resources for the Act's Implementation

In previous submissions to the Commonwealth Government, the MCA has advocated increased funding for the administration of the Act. The Act's responsibilities continue to expand as more entities are listed and more referrals are made. Resource limitations have previously been noted by the Department the ANAO and others, and will presumably be reiterated in other submissions to the Committee. The MCA seeks to reiterate these concerns with a recent example from one of our regional associates:

> 'Our experience has also been that the level of Federal interest has varied greatly, from no communication for extended periods, to intense discussions and interest, presumably depending on the resources available to manage compliance and outcomes. Some [mining companies] have had contact with at least 6 different people in relation to EPBC over the past 12 months, most have come and gone. There needs to be some effort put into building a relationship with designated regulators if we are to try and get some environmental benefit from this legislation.'

Clearly resource limitations within the Department lead to high staff turnover and inefficiencies. This places an increasing onus on industry to retain corporate knowledge about an EPBC Act process for a site, and repeatedly introduce operations and activities to new regulatory staff.

By striving to reduce regulatory overlap, moving the Commonwealth department away from project-by-project assessments, and into more strategic roles, these limitations can be addressed (without additional resources being required). The first stage of this process would be the full implementation of all existing assessment bilateral

agreements, resolution of the outstanding assessment agreements, and investing much greater effort into developing approvals bilateral agreements. In 1997, the Commonwealth and State Governments, through COAG, agreed to work towards establishing bilateral agreements. See Table 1 for an overview of the status of bilateral agreements. Eleven years after the COAG agreement, we are still striving for the shaping and development of approvals bilaterals, and the better implementation of assessment bilaterals.

Table 1 Summary of bilateral agreements between the Commonwealth and jurisdictions

Jurisdiction	Assessment Bilateral	Approvals Bilaterals
QLD	YES	0
NSW	YES	1
ACT	DRAFT	0
VIC	NO	0
SA	YES	0
NT	YES	0
WA	YES	0
TAS	YES	0

Monitoring, Reporting and Compliance Concerns

Feedback from MCA members indicates that the compliance requirements of an approval under the Act are applied in a strict, and thorough manner. There are however, reporting obligations for both the State and Federal requirements, with onerous and unnecessary overlap.

Obligations under the EPBC Act should be delegated to regulators at a State or regional level wherever possible. In most cases State or regional staff will be undertaking very similar monitoring and compliance functions, to meet State requirements, and are usually more familiar with the ecological intricacies of the system being managed. For example, in Victoria, there is a significant EPBC Act overlap with Victoria's Native Vegetation Framework (VNVF), and the experience is that State VNVF obligations are in practice merged with the EPBC Act obligations, when establishing offsets. In some cases, complying with EPBC requirements has been hindered due to Victorian regulatory processes associated with VNVF, and potentially vice-versa.

Our members have also requested further guidance around the documentation requirements for a 'certificate' for reporting compliance, and the use of electronic records as 'proof' for compliance audit purposes.

Section 78 Reviews

Under Section 78 of the EPBC Act, the Minister can review decisions, where either 'substantial new information' or a 'substantial change in circumstances' arises. This is a necessary and important review mechanism. However, there are some concerns in the minerals industry that this process could be inappropriately used as a mechanism to support spurious claims by project detractors seeking to delay projects for reasons other than the protection of MNES. Accordingly, the MCA considers that an independent process be established to:

- Determine whether a review is warranted, that is, the materiality of the 'substantial new information' or 'change in circumstances'; and
- Disallow 'new information' for which there is no reason that it could not have been presented during the stakeholder engagement and impact assessment process.

Additionally, the inclusion of sunset clauses should be considered, whereby the window to present 'new information' is defined. Any party planning to present new information should be required to communicate that to the proponent, and the Department, including its intended nature, at least 30 days before doing so (this would provide some equity in enabling a response to be developed by the proponent in the mandated 10 day period). The ecological information involved in these assessments is very complex, and requires significant time to capture, synthesise and report. Therefore, there needs to be some scrutiny over 'new information' and some more equitable opportunity for project proponents to respond.

Development of the EPBC Act Offsets Policy

From the Office of Best Practice Regulation Website:

> *Member countries of the Organisation for Economic Cooperation and Development (OECD) are embracing the notion of regulatory governance which involves the issues of transparency, accountability, efficiency, adaptability and coherence. Major tools identified by the OECD to improve the efficiency and effectiveness of regulation include:*
>
> - *the use of regulatory impact analysis;*
> - *the systematic consideration of alternatives;*
> - *wide public consultation; and*
> - *improved accountability arrangements in the review of existing regulations and the development of new ones.*
>
> *Determining whether regulation meets the dual goals of 'effectiveness' and 'efficiency' requires a structured approach to policy development that systematically evaluates costs and benefits; including:*

- *the problem to be addressed and the related policy objective should be identified as first steps in the policy development process;*
- *the consideration of a range of options for achieving the objective (as well as a 'no action' or status quo option);*
- *an analysis of the likely economic, social and environmental consequences; and*
- *the policy development process should at least ensure that the benefits to the community of any regulation actually outweigh the costs, and give some assurance that the option chosen will yield the greatest net benefits.*

Both the Australian Government and the Council of Australian Governments (COAG) have made a commitment to improve the mechanisms for consultation with business and supporting appropriate consultation with all relevant stakeholders.

Consultation ensures that both those affected by the regulation and the regulator have a good understanding of what the problem is, alternative options to solve the problem, possible administrative mechanisms, possible compliance mechanisms and associated benefits, costs and risks. Lack of consultation can lead to regulation that is inappropriate to the circumstances, costly to comply with and poorly adhered to.

Both the Australian Government and COAG have adopted seven principles of best practice consultation.

(Commonwealth of Australia 2008)

The MCA considers that, to date, the development of the EPBC Act offsets policy has been far from best-practice policy development, especially from a consultation and stakeholder engagement process perspective.

An EPBC Act offsets policy is a significant policy instrument that will influence the minerals industry, akin to regulation in its scale of financial implications. For example, in 2007, a single operation in Western Australia was required to provide over $7.3 million in an 'offsets package' for a range of activities that have traditionally been the role of government conservation and NRM organisations, including:

- funding for government conservation agency personnel;
- funding for regional conservation and other stakeholder non-government organisations (ongoing and establishment); and
- development of threatened entity recovery plans.

The minerals industry was not consulted on the development of the draft policy. This is despite being recognised as leaders in the development and application of rehabilitation and offset practices and theory, evidenced by:

- the international scientific journal *Restoration Ecology* recently devoting an entire issue (2007: 15 s4) to the initiatives of Alcoa in managing and rehabilitating Jarrah Forest in Western Australia;
- the Commonwealth Environment department documenting best practice environmental [and natural resource management] for the mining industry through the 1990's, which provided guidance for a variety of stakeholders;
- the 2006 State of the Environment report ('SoE 2006'; Beeton et al. 2006), which recognised:
  - ⇨ '…many environmental issues are addressed by industry and mining groups at a standard that exceeds that of public sector groups. In some instances, the corporate knowledge base is higher in the private sector than in the public sector. In the longer term, this will cause problems in environmental reporting unless the environmental reporting systems are adapted to include these sectors'; and
- in the single financial year 2000-2001 the minerals industry spent $98 million on 'minesite rehabilitation' within 0.2% of the landscape (ABS 2002; not CPI indexed for comparison), roughly 10% of the total investment of NHT2 and NAP (AANO 2008), which was spread across several years and approximately 50-70% of the landscape.

Had the EPBC Act administrators engaged with industry in the development of the draft policy, as the Department routinely does on other issues (e.g. materials stewardship, National Pollutant Inventory), the draft policy would have been much further advanced and useful, providing a more meaningful public consultation period (see the MCA's submission on the draft policy at **Attachment 1**).

To date the MCA is unaware of the proposed further consultative mechanisms to support refinement of the policy. Further consultative mechanisms are anticipated, based on the guidelines for policy development to which the Commonwealth has committed. Given the scale of investments made by industry in 'offsets packages' (the example sited above, from one operation, is equivalent to the funding provided to the ACT Government through the NHT2 process), the importance of implementing best-practice regulation development in this policy arena should not be underestimated.

There are serious outstanding concerns that the minerals industry has in the development and application of offsets through the EPBC Act, which require further consultation and refinement, to ensure the maximum benefits from our limited resources. Key concerns include:

- the expectation that offsets are now standard, rather than their application as a final measure that is required for an impact that is not considered acceptable by any other means;
- taking voluntary leading-practice initiatives in the use of offsets, by companies trying to differentiate themselves from their peers through excellent social and environmental performance, and adopting them as a regulatory baseline (this becomes a dis-incentive for industry to improve voluntarily);
- non contemporaneous offset decisions from different jurisdictions, resulting in inflated offset requirements without any scientific foundation for the arrangements (for illustration: a State jurisdiction will 'negotiate an offset requirement' and the Commonwealth will simply 'multiply it by 2', without consideration of the science underpinning the original decision and the corresponding role or value of the multiplier);
- inconsistencies developing between Commonwealth and State offset principles and practices;
- the need for better planning and location of offsets in the landscape, in an integrated whole-of-government approach;
- the lack of consideration of offsets at the referral stage, which seems incongruous with their philosophical application (raison d'être);
- the incorporation of 'risk of failure' of management actions in offset ratios, for an industry that already pays for the same risk for rehabilitation success through financial surety and lease relinquishment requirements; and
- requirements for industry to have to demonstrate 'real conservation outcomes' from their offset packages, when this is not required of either the Act's implementation, or other landscape managers.

The MCA looks forward to contributing further to the refinement and use of an offsets policy under the EPBC Act. Additionally, the role of an offsets policy and offsets themselves, in the implementation of the Act, should be considered by the upcoming review, or this Inquiry.

Lack of Strategic Alignment of EPBC Act Requirements and Other Government Natural Resource and Conservation Management Programs

Project approvals for minerals operations, and the application and use of offsets or other mechanisms to support environmental management, are influenced by a variety of landscape managers, often within and across the same physical areas, including:

- local government (e.g. statutory 'local environment plans', particularly at the rural – urban interface);
- State government agencies (e.g. utilities – 'infrastructure planning', conservation agencies – 'biodiversity strategies', water planning authorities – 'statutory water plans');
- regional NRM organisations (e.g. 'catchment action plans'); and
- Commonwealth, State and local government development approval processes (e.g. which additionally determine where NRM 'offset' resources are placed in the landscape, with or without strategic planning support).

Recently the Commonwealth and WA State Governments have proclaimed 'strategic assessments' under the EPBC Act as another vehicle for regional planning. The fragmented approach may continue without due consideration of its efficiency. There are currently two separate Senate Inquiries, investigating 'conservation and natural resource

management' and the operation of the 'Environmental Protection and Biodiversity Conservation Act'. Both Inquiries should recommend an integrated natural resource management approach from the top.

These traditionally duplicative, part overlapping, and often conflicting land use planning processes can result in considerable land use conflicts or inefficiencies, including:

- Wasted resources in duplicated planning processes, and as noted in Seymour et al. (2007), burn-out of heavily engaged stakeholders;
- A misalignment of land capability, its use and subsequent water resource requirements;
- Lack of collation and use of the vast amounts of ecological data collected by industry;
- Potential limitations on future land uses based on the location of offset arrangements or conservation agreements, that do not consider future land use options;
- A lack of understanding amongst stakeholders regarding land use planning, access arrangements, and future land use potential;
- Ad-hoc and cumulative impacts of proposals not being well assessed (across spatial and temporal scales); and
- A fragmented approach to stakeholder engagement, resulting in stakeholders being unaware of the implications of some land use planning decisions on their future social and economic opportunities.

The MCA considers that it may be opportunistic for the two current Senate Committee inquiries to consider whether there is a better 'whole-of-government', and 'whole-of-user', landscape planning model that can meet the EPBC Act, natural resource management and conservation planning objectives of the nation.

The MCA's concern here, is that industry's substantial contribution to landscape management, including operational and non-operational land investments in rehabilitation, and investments in project approvals processes, is often not being implemented as part of a long-term strategic landscape planning and management process, and therefore, may not lead to the best outcome possible for society.

Summary Recommendations

Regarding the terms of reference:

The MCA recommends:

- The operation of the Act be assessed within a framework of the best available scientific information regarding the changes in species distributions and abundances, rather than the assumption that there is an ongoing 'decline and extinction crisis'.
- In the absence of the such information, the Senate Committee recommend it be obtained, so that resources can be allocated based on appropriate information.

Regarding the assessment of the Act's performance:

The MCA recommends:

- The Senate Committee note the focus of the Act's performance-monitoring and -reporting is targeted at process, and there is actually little evidence to determine its effectiveness on biodiversity outcomes.
- The Senate Committee consider that an increase in process is not necessarily an improvement in performance in meeting the Act's objectives.
- The Senate Committee consider whether the ongoing investment from Government and Industry, in the resource-intensive project-by-project approach, is the best value-for-money way to reach the Act's objectives.

Regarding efficiency improvements for the current administration of the Act:

The MCA recommends:

- The development of better guidance on the definition of an 'action', specifically regarding a project's upstream and downstream scope for assessment.
- The development of better guidance on the definition of an 'action', specifically regarding where to 'draw the line' on enabled impacts and requirements for supplementary assessments of enabled impacts, when they are included in a previous assessment.
- Provision of a seconded officer to those industry's that intersect significantly with the Act's implementation, to facilitate better advice on whether a referral is really required and where impact assessment efforts should be targeted.
- The development of better guidance to align the types of actions that will lead to impacts on MNES, using a risk-based approach, rather than requiring all impacts be assessed for all protected species within the locality.
- Enabling the consideration of offsets in determining whether an impact is significant at the referral, and therefore for industry at the pre-referral, stage.
- Resourcing for the Act's implementation be better targeted through implementation of efficiency measures and / or targeting activities to better-meet the Act's objectives, or in lieu of that approach, be expanded.

Regarding potential improvements for the Act's administration in the medium-long term:

The MCA recommends:

- The removal of the Commonwealth from project-by-project approvals processes, via the establishment of 'EPBC Act-compliant' guidelines and frameworks to support nationally consistent approvals processes implemented by State and regional jurisdictions.
- The establishment and full implementation of bilateral agreements for assessments and approvals.
- Establishment and endorsement of regional planning instruments that meet EPBC Act objectives and protection requirements under bilateral approvals, whereby other jurisdictions then subsequently assess and regulate projects.
- Commonwealth activities being focussed on strategic investments, planning support for jurisdictional processes, and assessing outcomes of the Act through monitoring MNES and auditing project and process compliance.

Regarding several emerging issues:

The MCA recommends:

- Better alignment of regional natural resource management planning, and the operation of the Act, to minimise duplicate planning processes, and land use conflicts, whilst maximising industry investment in the process and landscape (use of offsets, data collected etc.).
- The two Senate Committees currently assessing landscape management and conservation planning processes consider a joint report or joint set of recommendations.
- The Senate Committee note that there are emerging concerns that Section 78 of the Act may be used inappropriately, and that there are opportunities to improve the review process, through the inclusion of robust and independent mechanisms;
- The Senate Committee note that (1) the development of the EPBC Act offsets policy to date cannot be considered in-line with the Commonwealth commitment to best-practice regulation development, and (2) that there are significant financial ramifications of the policy's implementation for the minerals industry.
- The Senate Committee note that there are numerous outstanding concerns regarding the development and application of the EPBC Act offsets policy, including but not limited to:
    - The expectation that offsets are now standard, rather than their application as a final measure that is required for an impact that is not considered acceptable by any other means;
    - Taking voluntary leading-practice initiatives in the use of offsets, by companies trying to differentiate themselves from their peers through excellent social and environmental performance, and adopting them as a regulatory baseline (this, perversely, becomes a disincentive for industry to improve voluntarily);
    - Non contemporaneous offset decisions from different jurisdictions, resulting in inflated offset requirements without any scientific foundation for the arrangements;
    - State and Commonwealth offset policies, if they are both required, having their principles aligned;
    - The need for better planning and location of offsets in the landscape, in an integrated whole-of-government approach;
    - The lack of consideration of offsets at the referral stage, which seems incongruous with their philosophical application (raison d'être);
    - The incorporation of 'risk of failure' of management actions in offset ratios, for an industry that already pays for the same risk for rehabilitation activities through financial surety; and
    - Requirements for industry to have to demonstrate 'real conservation outcomes' from their offset packages, when this is not required of either the Act's implementation, or other landscape managers.

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