



Australian Conservation Foundation

**Submission to the Senate Standing Committee on Environment,
Communications and the Arts**

**Inquiry into the operation of the *Environment Protection and
Biodiversity Conservation Act 1999* ("EPBC Act")**

September 2008

ACF Submission
2008 Senate Standing Committee Inquiry – Operation of the EPBC Act

1. Introduction and Overview

Introduction

ACF welcomes the opportunity to make a submission to this Inquiry of the Senate Standing Committee on Environment, Communications and the Arts into the operation of the EPBC Act.

In ACF’s view, while the EPBC Act represents an improvement over previous Commonwealth environmental laws and has enjoyed some successes, any balanced assessment of its performance since enactment must focus primarily upon the condition of, and prognosis for, the ecological systems that the EPBC Act is intended to protect and conserve. The overall picture is one of increasing stress and decreasing resilience of our natural environment.

Continuing degradation of ecosystems and biodiversity loss highlights the need for significantly greater resources and political will to be applied to implementation and enforcement of existing EPBC Act provisions and for policy and legislative reform in key areas.

ACF believes this Inquiry can play an important role in identifying key areas for policy and legislative reform ahead of the **independent statutory review** of the EPBC Act, due for completion by mid-2010.¹ This Submission identifies both specific proposals for reform and areas in which the Inquiry may wish to make further investigations with a view to informing the statutory review process. ACF intends to present more detailed proposals for reform in the course of that process.

Structure of this Submission

This Submission is structured as follows:

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| Section 2 | Summary of key messages and recommendations. |
| Section 3 | Summary of Australia’s performance in relation to key indicators of biodiversity conservation and ecosystem management and the key reasons for continuing degradation. |
| Section 4 | The EPBC Act and biodiversity conservation in Australia. Four key shortcomings in current policy responses to Australia’s biodiversity crisis and policy recommendations for addressing them. |

¹ Section 522A EPBC Act

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| Section 5 | Improving conservation and biodiversity outcomes by including additional “triggers” for the application of the EPBC Act’s assessment and approval regime. |
| Section 6 | Improving EPBC Act assessment and approval processes to achieve better “triple bottom line” outcomes. |
| Section 7 | Improving public participation in key EPBC Act processes. |

2. Summary of Key Messages and Recommendations

| Key Messages and Recommendations | |
|---|--|
| 1. | Australia is facing a crisis in biodiversity loss and ecosystem degradation. This crisis demands urgent and coordinated action led by the Commonwealth Government. |
| 2. | The current approach to biodiversity and ecosystem conservation suffers from four fundamental shortcomings: <ul style="list-style-type: none"> • chronic underinvestment relative to the scale of the crisis; • the lack of a proactive, coordinated and integrated approach to biodiversity and ecosystem management and planning across all governments and relevant private actors; • the lack of adequate data upon which to base conservation planning; and • the lack of adequate monitoring and evaluation mechanisms to assess progress against biodiversity and ecosystem objectives and weak compliance and enforcement programs. |
| 3. | The budgetary allocation for protecting Australia’s environment should be substantially increased to safeguard our future health and prosperity. |
| 4. | Commonwealth and State/Territory Governments should use existing constitutional powers and new opportunities for inter-governmental cooperation to establish the Commonwealth’s role in leading a more coordinated approach to biodiversity conservation - in the same manner as has been accomplished for climate change and management of the Murray-Darling Basin. |
| 5. | Substantially better environmental outcomes can be achieved through a range of measures aimed at achieving a more proactive, coordinated and integrated approach to conservation and resource management. These include: |

- establishing a long term ecosystem data collection program and rigorous monitoring and evaluation frameworks;
 - adopting a habitat level approach to conservation and planning including expanded reserves (including the Indigenous Protected Areas network) and greater incentives to foster stewardship of private land use through Ecosystem Services Payments;
 - a comprehensive approach to managing our marine habitat through the adoption of an Oceans Act and the establishment of a new Oceans Policy; and
 - better utilising existing EPBC Act processes by: (i) broader use of provisions that allow proactive resource management for example strategic assessments and bioregional planning; and (ii) expediting listing of threatened species and ecological communities and developing and implementing species and threat recovery plans.
6. The EPBC Act does not adequately protect a range of matters properly regarded by Australians as having national environmental significance. Furthermore, the Act must respond to a broader range of threats to the environment. The scope of existing “triggers” for the application of the EPBC Act’s assessment and approval regime should be expanded to include additional triggers, including for new carbon intensive projects, land clearing and water allocation.
 7. Assessment and approval processes are often perceived to lack rigour and community confidence and have been criticised for susceptibility to political interference and conflicts of interest. Rigorous, transparent and independent triple bottom line assessment would do much to restore confidence in these processes. The potential for establishing a new multidisciplinary body charged with engagement in key assessment and approval processes is worthy of further consideration.
 8. Commonwealth – State/Territory bilateral assessment agreements should be revisited to reflect the new approaches outlined above.
 9. The EPBC Act should be amended to repeal the potential for bilateral agreements to devolve approval powers to a State/Territory Government.
 10. Public participation in key EPBC Act processes should be enhanced by: (i) introducing merits review of key controlled action and “listing” decisions under Parts 7 to 9 and 13 of the EPBC Act; (ii) introducing more balanced rules about the allocation of costs in public interest litigation; (iii) providing legal aid and funding for community groups (including the EDO network) to participate in key EPBC Act processes and public interest litigation; and (iv) extend minimum statutory consultation periods to enable meaningful public participation in complex processes under the EPBC Act.

3. Environmental Degradation and Loss of Biodiversity in Australia

3.1. The value of ecosystems and biodiversity

Ecosystems fundamentally influence all aspects of human well-being, including the basic material needs for life, health, security and freedom of choice and action.²

Ecosystems provide a vast range of “services” to mankind: from food, water, timber, fibre and genetic resources to the regulation of climate, soil formation, pollination, nutrient cycling, flood mitigation and cultural services including recreation, aesthetic enjoyment and spiritual fulfilment. Critically, in a period of potentially dangerous climate change, the services provided by Australian ecosystems also include carbon sequestration. A recent scientific assessment concluded that if all of the carbon currently stored in the 14.5 million hectares of eucalypt forest in south eastern Australian was released into the atmosphere, it would raise the global concentration of carbon dioxide by 3.3 parts per million by volume (“PPMV”). To put this in context, the total atmospheric concentration of carbon dioxide has increased by approximately 97 PPMV during the past 250 years.³

Aside from these material and non-material benefits, many regard the environment as having intrinsic value that should not be measured solely by current human yardsticks. There is a consistent, coherent body of ethical and religious thought that views degradation of ecological systems as a breach of our responsibility to future generations, a violation of the heritage handed to us by past generations, and something that devalues the worth of our own purposes and actions.⁴

3.2. Australia’s report card

Despite being bestowed with an extraordinarily rich natural environment, Australia has one of the worst records in the world in terms of the degradation of its ecosystems and loss of its biodiversity.

Approximately one quarter of global mammal extinctions occurring since the 17th century have occurred in Australia post European occupation. Despite being a “mega-diverse” nation, Australia has the highest percentage of threatened vertebrates and plant species in the world.⁵ Alarming, it is estimated that during the first few years of this century, 2 million mammals, 8.5 million birds and 89

² World Resources Institute, Millennium Ecosystem Assessment, *Ecosystems and Human Well-Being*, Washington (2005) p. 49

³ Mackey, B (et al), “Green Carbon: The Role of Natural Forests in Carbon Storage”, Australian National University, Canberra (2008) p.8

⁴ See Leiserowitz A and Fernandez L., “Toward a New Consciousness: Values to Sustain Human and Natural Communities”, Yale School of Forestry and Environmental Studies, New Haven (2007)

⁵ Lindenmayer D. “On Borrowed Time: Australia’s Environmental Crisis and what we must do about it” (2007) Penguin in association with CSIRO Publishing, Melbourne p.36

million reptiles died **annually** directly or indirectly as a result of land clearing activities in Australia.⁶

According to information on the Department of the Environment Water Heritage and the Arts (“**DEWHA**”) website, there are currently 91 species of mammals and 108 species of birds currently listed under the EPBC Act as critically endangered, endangered or vulnerable.⁷ Statistics compiled by DEWHA in 2001 identified 23% of Australia’s marsupials and 18% of its frogs as extinct, endangered or vulnerable at that time.⁸ These statistics are particularly alarming given that (as discussed further in section 4.4 below) there is a general lack of data regarding the health of our ecosystems.

DEWHA’s **2006 State of the Environment Report** found that:

- a large proportion of Australia’s bioregions have more than 30 per cent of ecosystems described as ‘threatened’;
- more than half of the ecosystems in developed coastal areas and in the Murray-Darling Basin are under ‘severe pressure’, with further declines expected;
- altered water flow regimes have resulted in the loss of 90 per cent of floodplain wetlands in the Murray-Darling Basin and major losses in other areas; and
- of the 74 Commonwealth-managed fisheries, a record high of 17 were considered ‘overfished’, with a further 40 uncertain but ‘likely to be overfished’.⁹

Australia’s continuing biodiversity crisis was acknowledged in the **Rudd Government’s National Platform** in the following terms:

“Australia is facing a biodiversity extinction crisis. Twenty per cent of our species are threatened with extinction by the end of this century and the number of terrestrial bird and animal species listed as extinct, endangered or vulnerable rose by 41% from 1995 to 2005. Australia leads the world in mammal extinctions and half our woodland birds could disappear by 2100.”¹⁰

This crisis has unfolded even before the impact that global warming will have upon biodiversity, if it is left unchecked in the years to come.

⁶ *ibid*, 42

⁷ See www.environment.gov.au. Information current as at 3 September 2008.

⁸ Department Environment Water Heritage and the Arts (2001) *State of the Environment Report* quoted in Lindenmayer (2007) n 5, 38

⁹ Department Environment Water Heritage and the Arts (2006) *State of the Environment Report* available at: www.environment.gov.au

¹⁰ Australian Labor Party, *National Policy Platform and Constitution* (2007) Chapter 9, *Combating Climate Change and Building a Sustainable Environment, Biodiversity and Endangered Species*, Principle 75

Australia's natural environment makes a dominant contribution to our economic well being – from agriculture and fisheries to tourism and biotechnology. Even if our ecosystems are valued solely in terms of the contribution they make to human well-being and the national economy – their rapid decline is a wake up call for urgent action.

3.3. Key causes of degradation and biodiversity loss

In a recent survey of the state of Australia's natural environment, Professor David Lindenmayer of the Australian National University succinctly outlined the key causes of ecosystem degradation and biodiversity loss in this country. They are:

- land clearing;
- land degradation (including erosion, salinity, waterlogging, compaction, mass movement of soil, chemical contamination and acidification);
- introduced animals and plants;
- invasive species;
- altered fire regimes;
- loss of old trees and hollows;
- sedimentation of aquatic areas;
- urbanisation; and
- future climate change, if not arrested. ¹¹

Australia requires an approach to tackling its serious environmental problems that is focussed upon long term solutions to these underlying problems rather than ad hoc and short term measures aimed at treating the symptoms they present.

4. The EPBC Act and Biodiversity Conservation

4.1. EPBC Act – key objectives and context

The EPBC Act has been described as the “flagship” piece of Commonwealth environmental legislation. Its key objectives include:

- protecting matters of national environmental significance;

¹¹ Lindenmayer (2007) n 5, 40-62

- promoting ecologically sustainable development or the conservation of biodiversity;
- implementing Australia’s obligations under key international treaties including the Convention on Biodiversity 1992 and the “World Heritage Convention” 1972;
- recognising the role of Indigenous people in the conservation and ecologically sustainable use of Australia’s biodiversity and promoting the **use of Indigenous knowledge of biodiversity** with the involvement of, and in cooperation with, the owners of the knowledge; and
- promoting a **cooperative approach** to the protection and management of the environment involving governments, the community, land-holders and Indigenous peoples.¹²

In furtherance of these objectives, Chapter 5 of the EPBC Act contains an extensive regime for the identification, listing and protection of threatened species and ecological communities, the identification and mitigation of key threatening processes and the development of recovery plans.

Despite this regime and the Act’s laudable objectives, the reality is that environmental degradation has continued apace since commencement of the Act in 2000. In ACF’s view, the current approach to biodiversity and ecosystem conservation suffers from **four fundamental shortcomings**:

1. chronic **underinvestment** in the financial and human resources required to address the scale of Australia’s ecosystem and biodiversity crisis;
2. the lack of a **proactive, coordinated and integrated approach** to biodiversity and ecosystem management and planning across the various stakeholders in our environment – from different levels of government to landholders, businesses and engagement with Indigenous communities in a way that recognises and utilises Indigenous knowledge;
3. an absence of adequate **data** upon which to base conservation planning and land use management; and
4. a lack of adequate **monitoring and evaluation** mechanisms to assess progress against biodiversity and ecosystem objectives and weak **compliance and enforcement programs**.

A brief discussion of each of these shortcomings and policy and legislative reforms that would address them is set out below.

¹² Section 3 EPBC Act

4.2. Underinvestment

Overview

While recent funding increases for new environmental programs are welcome, Australia continues to suffer from prolonged and chronic underinvestment in long-term biodiversity conservation and environmental management.

This underinvestment affects just about every aspect of the policy response required if Australia is to genuinely address its environmental malaise – from a better understanding of our ecosystems through scientific research and baseline data capture to fostering more sustainable land use by landholders, large scale ecosystem restoration and expansion of successful Indigenous natural resource management initiatives.

In its 2007 report, the ANAO noted that even the [relatively modest] objectives set by the EPBC Act are “demanding in terms of the administrative support required to ensure the legislative provisions are met”¹³ ANAO’s report noted further that:

- there were excessive delays in listing threatened species, with an average processing time for fish of four years;
- only 22 per cent of the 583 listed threatened species had recovery plans in place by the required deadlines;
- there was a backlog of over 700 ecological communities awaiting assessment, creating a risk that “nationally significant ecological communities eligible for listing will not be listed in a reasonable timeframe”; and
- DEWHA did not have sufficient information to know whether conditions on approved actions were being met.¹⁴

More recent information available on DEWHA’s website suggests that existing EPBC Act biodiversity conservation processes continue to be underutilised. As at 30 August 2008, only 5 critical habitats, 39 ecological communities and 17 key threatening processes had been listed. Three new species and 1 new ecological community had been listed during 2008. To date, no marine ecological communities have been listed as threatened. This under-utilisation means that **numerous threatened species and communities do not have the benefit of recovery processes under the Act and are not protected from the impact of “controlled actions”** through the EPBC Act’s project assessment and approval regime.

¹³ ANAO Report No. 31 2006-2007, The Conservation and Protection of National Threatened Species and Ecological Communities; available at www.anao.gov.au, p.13

¹⁴ *ibid*, 16-17

Commonwealth environment portfolio expenditure on the environment

DEWHA's two key environmental budgetary outcomes for the 2008-2009 fiscal year are: **(i)** the environment, especially those aspects that are matters of national environmental significance, is protect and conserved; and **(ii)** more efficient and sustainable use of Australia's water resources.

To achieve these goals of protecting and conserving our environmental assets of national significance (including our severely depleted water economic resources), DEWHA was allocated a total amount of less than **\$2.7 billion** or approximately **0.9%** of the total Commonwealth budget for 2008-2009.¹⁵ This amount includes budgeted expenditure on: **(i)** energy efficiency and climate change mitigation measures (**\$350 million**); **(ii)** conservation of land and inland waters (**\$1.3 billion**); **(iii)** conservation of coasts and oceans (**\$25 million**); **(iv)** conservation of natural, Indigenous and historic heritage (**\$45 million**); **(v)** response to the impacts of human settlements (**\$153 million**); **(vi)** sustainable management of water resources including expenditure on the Murray Darling Basin (**\$265 million**); and **(vii)** efficiency in water use (**\$560 million**).

By way of contrast, it is estimated that the 14 gold medals won by Australian athletes at the 2008 Beijing Olympics cost the Australian public up to **\$1.4 billion dollars** or **\$100 million apiece** – each single medal costing 4 times the amount allocated for conservation of our fragile coasts and oceans this fiscal year.¹⁶

As the ANAO's 2007 report has highlighted, even the modest processes contemplated by the EPBC Act in its current form require significantly greater financial resources than have been allocated to date. However Australia requires a step-change in the amount of financial resources dedicated to long term investment in the future of our environment if the necessary policy measures discussed in this Submission are to be realised and there is to be adequate investment in our institutional and human capacity - including the administrative, management and governance arrangements required to underpin funded programs and Australia's flagging research capacity in environmental science and sustainable resource management.¹⁷

Investment in Indigenous Natural Resource Management

¹⁵ Figures exclude expenditure on Australia's Antarctic programs, anti-whaling programs, the Great Barrier Reef Marine Park Structural Adjustment Package and programs funded through State and Territory Governments and other Commonwealth portfolios, including the Department of Agriculture, Fisheries and Forestry.

¹⁶ Dr James Connor, Australian Defence Force Academy, quoted in Bachelard M. "Going for gold but at what cost?" Article in the Age newspaper 24 August 2008

¹⁷ See Lindenmayer (2007) n 5, 72-75 and 98-99 for further discussion on these issues.

As the objectives of the EPBC Act acknowledge, investing in Indigenous Natural Resource Management generates numerous “triple bottom line” benefits – both for communities that are direct participants and for the broader nation. These benefits include utilising Indigenous knowledge of country to protect valuable ecosystems through programs such as Indigenous rangers, social benefits arising from facilitating a greater connection between communities and country, economic benefits for communities and the nation from direct payments for Ecosystem Services or a reduction in the community cost of Indigenous disadvantage and improved health outcomes.¹⁸

While these benefits are acknowledged through budgetary allocations to programs such as Indigenous Protected Areas (“IPA”), *Caring for our Country* and *Working on Country*, the level of investment is not commensurate with the scale of the opportunity.

Despite the fact that through the IPA program, Indigenous Australians have responsibility for managing **20% of the country** by area, only **6.7%** of funding allocated in the 2008-2009 Budget to the *Caring for our Country* program was allocated to IPAs. This multi-year funding comprises: \$50 million to expand the IPA network, \$90M to employ additional Indigenous Rangers and \$10M to assist Indigenous people enter the carbon trading market.¹⁹

4.3. A more proactive, coordinated and integrated approach

Proactive

Many of the processes of degradation described in Section 3 above are or may shortly become irreversible. There is an urgent need for an approach to conservation and resource management that is far more proactive in tackling the causes and not merely the symptoms of this decline.

Although some of the EPBC Act’s provisions hold great promise as tools for proactive resource management, these are underutilised and the Act’s general approach to identifying and protecting threatened species and communities and to environmental impact assessment (discussed below) is predominantly reactive.

¹⁸ Altman, J.C. (et al) *“The Environmental Significance of the Indigenous Estate: natural resource management as economic development in remote Australia”* (2007) Discussion Paper No. 286, Centre for Aboriginal Economic Policy Research, Australian National University, Canberra p.46.

¹⁹ See Lane, M.B. and Williams, L.J. *“Colour Blind: Indigenous Peoples and Regional Environmental Management”* (2008) Journal of Planning Education and Research. In press. See also Gilligan, B. *“The Indigenous Protected Areas Program Evaluation”* (2006) Department of Environment and Heritage, Canberra, available at www.environment.gov.au

In ACF's view the policy measures set out below would improve the EPBC Act's capacity to proactively protect the environment.

Data, Monitoring and Evaluation: mandating and providing adequate resources for the **collection of critical data** regarding the status and health of our ecosystems and for the ongoing **monitoring and evaluation** of those ecosystems (these are discussed further in Section 4.5 below);

Habitat Level Approach: complementing the EPBC Act's species and community level approach with a greater emphasis on habitat level protection by:

- expanding Australia's **National Reserve System** to facilitate genuine comprehensive, adequate and representative coverage and expansion of the IPA network;
- recognising the opportunity for biodiversity and ecosystem conservation on **private land** by allocating greater resources to fostering the development of sustainable land management practices including: revegetation, rotational grazing, sustainable product certification and regulatory control of land clearing (as a trigger for the assessment and approval process);
- substantially expanding resources available to provide incentives for these practices to be adopted through expanded conservation agreements with private landholders for ecosystem services and "**stewardship payments**" for active management programs such as those recently commenced under *Caring for our Country's* Environmental Stewardship and *Working on Country* programs;²⁰ and
- acknowledging the dynamic and inter-linked nature of Australia's marine environment by adopting an ecosystem level planning approach through an **Oceans Act** and establishing an **Oceans Authority** in accordance with previous recommendations by ACF and the National Environmental Law Association.²¹

BOX 1 – Habitat Level Approaches: landscape connectivity in Northern Australia

A significant and influential study "**The Nature of Northern Australia**"* by four leading ecologists was released last year, it details the environmental significance of Northern Australia, how the tropical environment functions and proposes pathways for sustainable development. Its main purpose is to advocate for an alternative approach to conservation management based on the maintenance of ecosystem processes at a landscape scale through managing connectivity between natural ecosystems.

²⁰ The inclusion of these measures as objectives of the *Caring for Our Country* program is welcome however substantially greater resources are required for these initiatives. See generally Altman, J.C. *et al* (2007) n.18

²¹ See Australian Conservation Foundation and the National Environmental Law Association "*Out of the blue - an act for Australia's Oceans*" (2006), available at www.acfonline.org.au

This approach requires maintenance of connectivity of native vegetation and waterways at property and regional scales. Connectivity is achieved through large scale conservation planning and collaborative partnerships across all tenures.

Specifically the approach requires:

- the establishment of an interconnected network of **conservation reserves**;
- proactive land management by landholders outside the reserve network to whom ecosystem services payments are made; and,
- sustainable development that maintains connectivity between the local and regional.

Northern Australia has globally significant natural and cultural values with the largest intact savannah landscape on the globe, nationally important habitats including rainforest, tropical heathlands and mangroves, endemic species and the majority of Australia remaining natural rivers and wetlands.

There are several key **continental scale** ecological processes and connections critical for long term maintenance of biodiversity and ecosystem health, including hydro-ecology; disturbances; long distance biological movements; strong interspecies interactions; climate change and variability; land-sea connections, and evolutionary processes.

Water (hydro-ecology), **disturbance** (fire) and **long distance biological movements** (for example, black flying foxes) are three key ecologically processes of particular important for Northern Australia. They are all inter-connected and dominate the way Northern ecosystems operate. It is therefore a priority in Northern Australia to maintain these processes through an **interconnected network of conservation reserves and proactive management off-reserve**, as well as ensuring sustainable development in the region does not compromise these processes.

The proposed approach seeks to provide **long term** protection and management of biodiversity through maintenance of landscape scale ecological processes – safeguarding against impacts of dangerous climate change and providing a secure natural resource base from which ecologically sustainable development supporting the continuation of ecosystem processes can prosper.

ACF notes that the “Nature of Northern Australia” discusses Indigenous land management examples and refers to the importance of Indigenous land and sea managers and Indigenous Ecological Knowledge (**IEK**) in the conservation approach proposed. However the publication does not seek to document or explore Indigenous perspectives or IEK of Northern Australia and acknowledges that this omission makes the analysis incomplete. ACF believes that this critical gap can be addressed in a way that can inform the development of the connectivity landscape scale conservation approach. ACF proposes further investigating this issue and providing further comment in the context of the pending statutory review of the EPBC Act.

***Woinarski, J., Mackey, B, Nix, H & Traill, B. “The Nature of Northern Australia: natural values, ecological processes and future prospects” (2007) Australian National University, Canberra, see pp.29 -30, 88**

Better Utilise Existing Processes: adopting a more proactive approach to biodiversity conservation and management by greater use of existing processes under the EPBC Act including:

- expediting species and ecological community listings in accordance with the new Government's policy commitments²²
- recognition of a far greater range of key threatening processes – including the impact of use and allocation of water resources upon environmental flows;
- developing and resourcing recovery plans and their implementation for priority threatened species and ecological communities in cooperation with States and Territories.²³
- utilising the strategic assessment (Part 10 of Chapter 4 of the EPBC Act) and bioregional planning (Part 12 of Chapter 5 of the EPBC Act) as tools for proactive resource management and planning. Provided that they adequately integrate best practice principles of strategic environmental assessment, the **Strategic Assessment** processes hold great promise as a tool for inter-governmental cooperation, system level environmental analysis, community engagement and planning outcomes (See Box 2 - Kimberley Strategic Assessment). Similarly, **bioregional planning** enable broad scale environmental assessment and planning and better facilitate consideration of cumulative impacts.²⁴

BOX 2 - Opportunities for proactive Strategic Assessment in the Kimberley

In February 2008 the WA and Commonwealth Governments signed an agreement to utilise s.146 of the EPBC Act and undertake a Strategic Assessment of a plan for a **common-user LNG hub precinct** for the processing of LNG from the Browse Basin. Both governments acknowledged the significant environmental, cultural and heritage values of the Kimberley region and the significant economic potential in relation to the extraction and processing of LNG from the Browse Basin, off the Kimberley coast. A parallel **Natural Heritage Strategic Assessment process** was also launched at that time under which the environmental, **cultural and heritage values of the broader Kimberley region** would also be assessed.

²² Australian Labor Party, National Policy Platform and Constitution 2007, Chapter 9, *Combating Climate Change and Building a Sustainable Environment, Biodiversity and Endangered Species*, Principle 75

²³ This should focus upon increasing habitat protection and seek to align recovery planning processes more formally with reserve system planning through bioregional planning processes. See Taylor, M. and Booth, C. *Building Nature's Safety Net: Protected area gaps for threatened Australian animals identified from recovery plans* (2008) WWF and Telstra, available at <http://www.wwf.org.au>

²⁴ In *Out of the blue - an act for Australia's Oceans* (2006) n 21, ACF and NELA have outlined some of the limitations of bioregional planning under section 176 EPBC Act in a marine context.

ACF welcomed these processes as a means to:

- prevent ad hoc development proliferating along the Kimberley coast;
- identify, evaluate and consider the significant conservation and cultural values of the region;
- take a regional approach to providing long-term protection and management of significant culture and conservation values;
- enable assessment of cumulative impacts of different LNG processing activities;
- reduce impacts through common siting of LNG processing activities and identifying a site with the least impacts (noting that the impacts may still be unacceptable even at the preferred site where impacts are reduced); and
- streamline Federal and State assessment processes through information sharing and coordination of legislative process requirements.

As this is the first time the Strategic Assessment provisions in Chapter 10 of the EPBC Act have been utilised in a non-fisheries context, it is critical that a robust, high-quality process is delivered - providing a **precedent for future assessments**. A critical aspect is ensuring that environmental and cultural values are properly considered and documented **before** development is assessed, approved and proceeds.

There have been several **positive aspects** of the processes to date including:

- adoption of comprehensive Terms of Reference - subject to a public comment period;
- adoption of comprehensive criteria for the Site Selection process - subject to a public comment period;
- the commitment to commence a broad regional strategic assessment of significant values of the Kimberley region;
- consideration of a broader range of impacts than can be considered under a usual EPBC Act assessment process; and.
- strong support for a comprehensive Traditional Owner consultation process through the Kimberley Land Council (acknowledging the need for free, informed TO consent).

However, ACF is concerned that LNG site selection will precede the National Heritage assessment and therefore that the **site selection and design will not be informed by critical baseline environmental and cultural data** from the Natural Heritage assessment. This is a potentially critical flaw in the process that must be addressed by expediting the Natural Heritage assessment and delaying site selection for the LNG hub. Due to the complexity and volume of assessment documents under both processes, ACF encourages participating Governments to continue to significantly extend statutory minimum **public consultation periods** for these processes (public participation in EPBC Act processes is discussed further in Section 7 below).

Proactive Approach to Species Decline: adopting a more proactive approach to species decline by protecting species in **regional decline** rather than only when they are in decline across their entire range.

Additional “Triggers”: expanding the **scope and application of the EPBC Act** to include additional “triggers” discussed in Section 5 below. This would allow the Act to protect a broader range of matters of national environmental significance and respond to a greater range of threats (eg. climate change).

Cumulative Impact Assessment:

BOX 3 - Cumulative Impacts and the EPBC Act

“**Cumulative impact assessment**” refers to assessment of the overall environmental impact of a series of unrelated developments. The EPBC Act does not require that such impacts be assessed in the course of “controlled action” assessment and approval or other planning processes undertaken under the Act.

The need for cumulative impact assessment to be explicitly mandated by the EPBC Act has been highlighted by both legal cases brought under, and academic critiques of, the Act.*

The need for such assessment is perhaps most glaringly highlighted by the cumulative impact of numerous unrelated actions upon the Murray Darling Basin (“**MDB**”) and its ecosystems.

While large scale and “one off” developments have undoubtedly taken a toll upon the MDB and its ecosystems, much damage has been sustained as a result of the cumulative impact of numerous smaller and unrelated (authorised and unauthorised) diversions of surface water, interception and extraction activities such as interception of overland flows, timber plantations and groundwater extraction. The impact of these activities highlights the problematic nature of an approach that focuses solely upon the impact that a single action in isolation will have upon environmental values.

ACF recommends that key EPBC Act processes – including the assessment and approval regime (discussed further in Section 6 below) and key regional, habitat, species and community recovery and planning processes - incorporates cumulative impact analysis.

* See for example: (i) Godden L. and Peel J. “*The Environment Protection and Biodiversity Conservation EPBC Act 1999 (Cth): Dark Sides of Virtue*” (2007) 37 MULR 106 pp.128-131; and (ii) Australian Network of Environmental Defender’s Offices “Possible new matters of National Environmental Significance under the *EPBC Act 1999*” 2 May 2005 p.6. For a critique of the retrograde definition of “impact” included in section 527E of the EPBC Act under the 2006 amendments see Godden L and Peel J

Triple Bottom Line Impact Assessment: devoting substantially greater resources to an EPBC Act assessment, approval and listing regime that stewards more comprehensive triple bottom line assessments, makes better informed and science based decisions and is less susceptible to political interference and conflicts of interest. This is discussed further in Section 6 below.

Education: investing in **education** programs about sustainable land use and the benefits of biodiversity – particularly in the agricultural sector.

Coordination and integration

Promoting cooperative and partnership approaches to the protection and management of the environment involving governments, the community, land-holders and Indigenous peoples are critical objectives of the EPBC Act.²⁵

However, protection of Australia’s precious natural environment is hampered by the lack of a coordinated, integrated and long-term approach to policy setting and implementation. ACF believes that a **leadership role is required from the Commonwealth** in relation to Australia’s biodiversity crisis in the same manner as has been acknowledged in the context of climate change.

Biodiversity and ecosystem conservation is undermined by the **lack of a single national approach to identification, protection and management**. Separate lists of threatened species based upon different definitions and inconsistent approaches are maintained by the States, Territories and the Commonwealth. While valuable work integrating these lists and approaches has begun, this has been undermined by inadequate resources and retrograde amendments made to the EPBC Act in 2006 which – among other measures²⁶ - removed the requirement for review of State and Territory lists under EPBC Act processes.²⁷ These amendments should be repealed and greater resources allocated to uniform national listing and the recovery planning process.

Similarly, there are significant opportunities for greater collaboration and coordination between different levels of government in response to the challenge posed by continuing **drought conditions**. ACF considers that the Commonwealth should lead the Council of Australian Governments (“COAG”) in the development of a long-term strategy for food security, agriculture and environmental resilience that fosters environmentally sustainable land use through stewardship payments and requires that drought assistance packages be conditional upon meeting minimum environmental standards.²⁸

²⁵ Section 39(1)(d) and (g) EPBC Act

²⁶ The amendments also repealed requirements for up to date lists of threatened species to be maintained and for each listed threatened species and ecological community to have a recovery plan in place.

²⁷ For a discussion of the practical impact of changes made to Chapter 5 of the EPBC Act under the 2006 amendments see Australian Network of Environmental Defender’s Offices “Submission on the Environment and Heritage Legislation Amendment Bill (No.1) 2006” (2006), available at <http://www.edo.org.au/edonsw/site/default.php> and Humane Society International “Submission to the Australian National Audit Office – Protecting and conserving Australia’s biodiversity Environment Protection and Biodiversity Conservation Act 1999 (2006)

²⁸ For more information see Australian Conservation Foundation “Australia’s National Drought Policy in a changing climate Submission to the Productivity Commission Inquiry into Government Drought Support” (2008) available at www.acfonline.org.au

At Commonwealth level, budgetary allocations can often **prioritise “non-statutory” programs** or programs that respond ad hoc to symptoms of environmental degradation, rather than long-term approaches. While initiatives such as Caring for our Country address important issues and (as discussed above) introduce a number of welcome measures, it is sometimes unclear to what extent funded programs are explicitly linked to, or integrated with, longer term regulatory objectives such as the identification and protection of threatened species, monitoring their recovery and monitoring and enforcement of approval conditions under processes legislatively mandated by the EPBC Act.

In relation to Caring for Our Country’s predecessor program - the National Heritage Trust - ANAO’s 2007 audit report noted that: *“Biodiversity conservation has not been a high priority for all NHT funded regions and where it has been a priority, the level of investment from the NHT is expected to achieve some 10 to 20% of high priority targets Australia wide. The department’s program evaluation (January, 2006) found that it will take a long time and sustained high levels of investment at the regional level to achieve national biodiversity conservation objectives. In some cases, funding levels are insufficient to reverse the decline in biodiversity.”*²⁹

In a 2006 submission to ANAO, Humane Society International noted that:

*“There is an urgent need for conservation programs and other national initiatives for sustainable natural resource management to be focussed on national biodiversity priorities properly articulated at the regional scale.” ...there has been a failure to translate...national objectives at the regional level, which is the level at which the Commonwealth is delivering natural resource management planning....”*³⁰

As discussed in Section 4 above, the EPBC Act explicitly recognises the importance of **Indigenous peoples’ knowledge and management of Australia’s ecosystems, biodiversity and cultural heritage**. However despite establishment of bodies such as the Indigenous Advisory Committee, it is not completely clear how this expertise is being utilised or promoted by integration into key processes under the EPBC Act. For example, it is not clear how Indigenous knowledge is utilised or promoted through the listing process for threatened species and ecological communities? The Threatened Species Scientific Committee (“TSSC”) does not include an Indigenous member having expertise in Indigenous Ecological Knowledge and there is no apparent mechanism for the TSSC to access this expertise. Further, there does not appear to be any explicit formal link between the Indigenous Advisory Committee (“IAC”) and the TSSC or other DEWHA functions under the EPBC Act. Rather, the scope of matters considered by the IAC appears to be determined solely by exercise of Ministerial discretion.

²⁹ ANAO (2006-2007) n 13,22

³⁰ Humane Society International (2006) n27,26

ACF recommends that the independent statutory review of the EPBC Act focus upon better promotion and utilisation of Indigenous expertise and the critical role Indigenous Australians play in the conservation and management of this country's biodiversity and landscapes.

Our comments above highlight the need for budgetary and strategic planning processes to better integrate and coordinate the "investment" and "regulatory" arms of government. Our suggestions below in relation to better collection and monitoring of data, the expansion of EPBC Act triggers and the better integration of aspects of Chapter 5 of the EPBC Act with the assessment and approval regime in Chapter 4 – would also facilitate a more coordinated and integrated approach to biodiversity and ecosystem conservation.

4.4. Need for adequate data

DEWHA's 2006 State of the Environment Report noted that there is a:

*"lack of long-term, systematic biodiversity information that would allow firm conclusions to be drawn about the details and mechanisms of the decline [of species in Australia]."*³¹

In relation to Australia's **marine environment**, the Report noted:

*"There is very little information about Australia's marine biodiversity, much of which might not yet have even been discovered (Ponder et al 2002). This is especially the case for species and ecosystems in more remote, deeper oceanic areas. The risk is that small, but cumulative changes might not be detected because of a lack of knowledge of these vast and varied systems."*³²

An audit of the conservation and protection of national threatened species and ecological communities conducted by the ANAO in 2007, concluded that:

*"There are uncertainties and significant scientific gaps in knowledge of species. This makes [DEWHA's] task difficult in terms of keeping [lists of threatened species and communities] current."There is a considerable risk remaining that incorrect decisions will be made in relation to other parts of the Act because only partial or incorrect information is available."*³³

As these reports highlight, it is simply not possible to adequately plan a response to species and ecosystem decline or to set and monitor indicators for progress if there is insufficient baseline data.

ACF considers that the establishment of an adequately resourced network of sites for the long-term mapping, collection and assessment of ecosystem and biodiversity

³¹ DEWHA (2006) n 9

³² *ibid* 49

³³ ANAO (2006-2007) n 13

data could address this fundamental information gap. Professor David Lindenmayer has suggested that an approach modelled upon the **Long Term Ecological Research** sites implemented in other countries (eg. USA) and that targets a sample of Australia's ecosystem types and key disturbances to them such as agricultural land use and climate change. Professor Lindenmayer estimates that such a program would cost approximately \$1 million per annum per site (or a total of \$40-\$50 million per year for a useful network of sites).³⁴

ACF recognises the important role that Indigenous people as land managers of significant parts of Australia and as custodians of Indigenous Ecological Knowledge ("IEK") could make to this research. With culturally appropriate protocols and approaches developed in partnership with Indigenous people, IEK could be incorporated into the research effort - enriching the scientific knowledge base. Such a program could facilitate training and employment opportunities and facilitate a two-way learning process.

An approach to assessing our valuable ecological resources along the lines outlined above would enable planning and conservation efforts to reflect accurate data about the resilience of systems and species to threats and would resemble approaches already taken in other contexts in Australia - including meteorology and geology. It could also form the basis for the establishment of national biodiversity or **environmental "accounts"** by which the health of natural environment and our progress against key indicators could be measured.

4.5. Monitoring and evaluation/compliance and enforcement

Monitoring and evaluation

Various reports produced by State, Territory and Commonwealth Governments and their authorities contain much useful information about environmental indicators. However there is no overarching monitoring and evaluation mechanism to assess progress against Australia's conservation goals or the effectiveness of our investments in them.³⁵

In part this shortcoming reflects the lack of useful baseline data or "environmental accounts" against which progress can be measured. However it also reflects a fundamental failure to invest in adequate monitoring and evaluation as a long-term environmental management strategy.

Without such a strategy, it is impossible to proactively plan management of our natural environment through the process of adaptive management by which monitoring results inform future policy and program choices. Similarly it is impossible to assess progress against a range of indicators or measures including those in DEWHA's State of the Environment Report, the performance of reserves, the

³⁴ Lindenmayer (2007) n 5, 6-97

³⁵ See ANAO (2006-2007) n 13 and Lindenmayer (2007) ibid 93-95

impact of fire, the effectiveness of conservation agreements or stewardship programs and the efficacy of regulatory regimes such as the EPBC Act.³⁶

Reversing the decline in Australia's biodiversity urgently requires the establishment of targeted, rigorous and efficient monitoring programs to ensure that we understand how our ecosystems work and respond both to the threats they face and the measures that are implemented to protect them. The implementation of such programs should be a pre-requisite to: the grant of key environmental approvals and permits, conservation agreements and stewardship payments, grants and certification pursuant to industry certification programs.

Compliance and enforcement

Although Australian environmental laws – including the EPBC Act – have imposed increasingly severe penal sanctions for serious breaches environmental laws, prosecutions are relatively infrequent and compliance auditing is severely under resourced.

To 30 June 2007, a total **554** decisions had been made under the EPBC Act's assessment and approval regime that either: **(i)** the referred action was not a controlled action if it is taken in the manner specified in the referral; or **(ii)** the referred controlled action could proceed subject to one or more conditions (the list of approval conditions can often be extensive). The assessment and approval regime therefore is heavily reliant upon compliance with approved environmental management plans and conditions attached to approvals to ensure that controlled actions do not result in unacceptable environmental impacts. However there have been very few successful prosecutions brought under the EPBC Act³⁷ and the approach taken to auditing and enforcing compliance with conditions can lack rigour.³⁸

Measures discussed above to foster sustainable management practices on private land imply the need for rigorous audit of compliance with conservation covenants and other conditions attached to stewardship payments if investments in these programs are to yield dividends.

³⁶ See Lindenmayer *ibid* 94-95 and Possingham H. *"The Business of Biodiversity"* (2001) *Tela: environment, economy and society* issue 9 p.27

³⁷ Macintosh A. *"Why the Environment Protection and Biodiversity Conservation EPBC Act's referral, assessment and approval process is failing to achieve its environmental objectives"* (2004) *EPLJ* 288 p. 302

³⁸ For example, a recent audit of compliance with conditions imposed upon construction and operation of the Paradise Dam found that a fishway required to be constructed on the dam suitable for the threatened Australian Lungfish was "partially compliant" in circumstances where it has operated to only allow movement of the Lungfish upstream - but not downstream. Available at www.environment.gov.au

Finally, heavy reliance has been placed upon poorly resourced community and non-governmental groups to uphold the spirit and letter of the EPBC Act.³⁹ A greater political commitment to, and investment in, enforcement activities under the Act are required if this reliance is to end and if Australia is serious about arresting environmental decline.

5. Triggers for EPBC Act Assessment and Approval Regime

5.1. Overview

Existing “triggers” for application of the EPBC Act assessments and approvals (“A&A”) regime do not reflect the range of matters regarded by Australians as of “national environmental significance” and do not adequately meet Australia’s fundamental obligation under the Biodiversity Convention to introduce “...appropriate procedures requiring environmental impact assessment of [Australia’s] proposed projects that are likely to have significant adverse effects on biological diversity...”⁴⁰ New triggers for the application of the A&A regime and improvements to existing triggers are required if the EPBC Act is to achieve its stated objectives and meet community expectations about an appropriate role for the Commonwealth in protecting our natural environment.⁴¹

5.2. New “triggers” required

ACF considers that the following matters should be included as new matters of national (and international) environmental significance:

Climate Change

The lack of an explicit mechanism to regulate emissions of greenhouse gases (together referred to as “**carbon emissions**”) has been a widely acknowledged shortcoming of the Act since inception. Current work in progress to develop a national emissions trading scheme (“ETS”), known as the Carbon Pollution Reduction Scheme (“CPRS”) is a welcome step forward in facing challenges posed by climate change. However, there is broad consensus that implementation of a comprehensive ETS alone will be an inadequate policy response to prevent mean global temperature rises reaching dangerous levels and that a portfolio approach to regulation is required.⁴² In the Australian context, a range of additional

³⁹ See Godden L. and Peel J. *“The Environment Protection and Biodiversity Conservation EPBC Act 1999 (Cth): Dark Sides of Virtue”* (2007) 37 MULR 106 and McGrath C. *“Flying foxes, dams and whales: using federal environmental laws in the public interest”* (2008) 25(5) EPLJ (in press)

⁴⁰ Article 14.1(a) Convention on Biological Diversity, opened for signature 5 June 1992 1760 UNTS 142

⁴¹ In practice, the Commonwealth has very broad constitutional powers to legislate in respect of matters concerning the environment. See McGrath C. *“Swirls in the stream of Australian environmental law: Debate on the EPBC Act”* (2006) 23 EPLJ 165

⁴² Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2007: Mitigation of Climate Change*, Contribution of Working Group III to the Fourth Assessment Report of the

complementary regulatory measures is required if we are to achieve the necessary reduction in carbon emissions of at least 30% by 2020 (against 1990 levels).

While the CPRS can play a central role in reducing the carbon emissions intensity of existing and new activities in a manner that is economically efficient and socially equitable, it should not be seen as the “silver bullet” to address climate change. It is critical to ensure that any new carbon emissions intensive projects that are proposed for development notwithstanding the CPRS - are assessed against Australia’s national interest in urgent carbon emission reductions. It is likely that certain carbon emissions intensive activities will initially be excluded from the CPRS. These include agriculture, land clearing, land use change (eg. dams) and the burning of exported fossil fuels. These exclusions and the likelihood of government subsidies to certain carbon emissions intensive industry sectors - imply a need for proposed new carbon emissions intensive projects to be subject to a regime of assessment and approval against the overarching national and global priority of achieving deep cuts in carbon emissions. Furthermore, major infrastructure projects will increasingly play a catalytic role as “gateways” for significant decreases or increases in carbon emissions depending upon whether they encourage or discourage cost-effective emissions abatement. Development decisions could prevent targets to reduce carbon emissions by 2020 from being achieved. In short, meeting our climate change challenge **requires that the market signal inherent in ETS be teamed with sound planning processes and decisions.**

ACF agrees with the new Government’s policy platform,⁴³ that the inclusion of a “climate change trigger” in the Act is an appropriate approach to these planning processes and decisions. In ACF’s view the climate change trigger should reflect the following principles:

- **Trigger:** a quantitative metric approach under which all “actions” likely to result in annualised average Scope 1 and 2 emissions of 100,000 tonnes CO₂ equivalent GHG must be referred for assessment and approval under the A&A regime. In addition, a list of designated development types should be submitted for assessment and approval based upon their environmental, social and economic impact, including Scope 3 emissions to which they contribute⁴⁴. Designated developments should include new motorways, mines, the extraction of other fossil fuels for export (and associated facilities) and dams.

IPCC (Cambridge University Press, 2007), Ch 13, p750 quoted in McGrath C. “Regulating greenhouse gas emissions from Australian coal mines” (2008) 25 EPLJ 240 p.255. Andrew McIntosh expresses a contrary view in Macintosh A. “The Greenhouse Trigger: where did it go and what of its future” in Bonyhady T. and Christoff P. Climate Law in Australia (2007) Federation Press, Sydney

⁴³ Australian Labor Party, National Policy Platform and Constitution 2007, Chapter 9 Combating Climate Change and Building a Sustainable Environment, Principle 24

⁴⁴ Scope 1, 2 and 3 emissions as defined in the World Resources Institute Greenhouse Gas Protocol

- **No “significant impact” test:** given broad scientific acceptance of the link between carbon emissions and climate change, assessment and/or approval **should not be conditional upon** establishing a causal link between carbon emissions and any particular environmental impact. Rather, and in contrast to other triggers under the Act and the approach proposed in a 2005 Bill on this issue,⁴⁵ establishing that the quantitative threshold has been met (or that the development is on the list of designated developments) should alone suffice to trigger the application of the A&A regime under the Act. This is consistent with the approach taken to the regulation of a range of other acknowledged pollutants including lead, sulphur dioxide and other industrial pollutants. It would also avoid difficulties inherent in the unnecessary and largely irrelevant exercise of establishing causal links between a particular source of carbon emissions and a particular environmental outcome;⁴⁶
- **Coverage:** the benefit of a metric threshold approach is its breadth and capacity to subject actions (including those excluded from the CPRS) to assessment against their environmental, economic and social impact (including the impact of the action upon Australia’s ability to meet its prevailing carbon emissions reduction targets). In ACF’s view it is critical also to submit a prescribed list of those actions that indirectly encourage carbon emissions intensive activity to cost/benefit analysis. In many cases, to exclude these actions from assessment of the Scope 3 emissions to which they contribute (eg. those arising from the use of a motorway by motorists or the burning of coal mined in Australia for export) from any environmental impact assessment is to ignore the most fundamental environmental impact of the activity; and
- **Facilitate appropriate mitigation measures:** subjecting proposed developments exceeding the threshold to the A&A regime would, for those developments that are approved following assessment of environmental, economic and social impact, greatly facilitate the application of appropriate environmental conditions, including appropriate carbon emissions reduction or offset measures.⁴⁷ In the case of coal export, appropriate conditions may include the utilisation of clean coal technology (if available) by overseas users of coal, in a fashion similar to export controls applicable to uranium. If there is no explicit mechanism for assessing developments against their carbon emissions impact it can be very hard to assess what measures may be appropriate to offset that impact.

Land clearance (including native vegetation)

⁴⁵ Avoiding Dangerous Climate Change (Climate Change Trigger) Bill 2005; private member’s Bill proposed by Labor Shadow Environment Minister, Anthony Albanese MP

⁴⁶ For a discussion on the merits of this approach to regulating GHG in the context of a “climate change trigger” under the Act, see McGrath C. n 42, 256-257.

⁴⁷ For a discussion of mitigation measures proposed by the Queensland Conservation Council in the 2007 Xstrata litigation, see McGrath C. ibid 261 to 262.

While some State governments have made commendable efforts to tackle broad-scale land clearing, in recent years the practice has continued to have a devastating impact upon biodiversity and salinity and is a significant contributor to Australia's carbon emissions.⁴⁸ Existing triggers under the EPBC Act do not adequately capture land clearing activities having these impacts. These impacts, the need for national regulation and for the EPBC Act to better focus on system level protection of Australia's ecosystems are acknowledged both in the Labor Government's policy platform⁴⁹ and by the broader academic community.⁵⁰

In a 2005 study on possible new triggers under the EPBC Act, The Australian Network of Environmental Defender's Offices ("ANEDO") recommended an approach to land clearance/native vegetation triggers based on three elements: **(i)** a generally applicable area threshold for clearance of native vegetation; **(ii)** a trigger for clearance of vegetation that provides habitat for listed threatened species or ecological communities or listed critical habitat; and **(iii)** a schedule of activities involving general land clearance (eg. major coastal developments) that would trigger the A&A regime. ACF considers that these recommendations offer a sound basis for approaching this issue.

Water and nationally significant wetlands

Continuing drought across broad sections of the nation and the ongoing crisis affecting the Murray Darling Basin, highlights the need for a far more proactive and national approach to managing Australia's water resources and the sensitive ecosystems that depend upon them.⁵¹

Significant water actions

The major extraction, diversion or interference with rivers or other ground or surface water resources likely to have a significant impact upon aquatic or groundwater dependent ecosystems should be subject to comprehensive EIA and approval under the A&A regime. To the extent necessary, quantitative thresholds for certain uses should be set in light of scientific evidence as to the appropriate level for the

⁴⁸ A July 2006 performance audit conducted by the NSW Auditor General found that approximately 74,000 hectares of land was cleared in 2005, 30,000 hectares of which was conducted illegally. New South Wales Auditor General's Report – Performance Audit Regulating the Clearance of Native Vegetation (July 2006); available at www.audit.nsw.gov.au

⁴⁹ Australian Labor Party, National Policy Platform and Constitution 2007, Chapter 9 *Combating Climate Change and Building a Sustainable Environment, Land Clearing, Principles 64-69*

⁵⁰ See eg. Meyers G.D. "Biodiversity Protection in Australia in the 21st Century: Where to from Here?", paper given at Biodiversity Summit (2006) available at www.biodiversitysummit.org.au

⁵¹ As the EPBC Act A&A regime does not apply retrospectively to assess the merits of previously implemented "actions", amendments to the EPBC Act alone would clearly not be a sufficient regulatory response to address the numerous environmental problems currently faced by the Murray Darling Basin.

particular location taking into account needs of the relevant ecosystems and affected communities.

Wetlands

Of the estimated 30,000 wetlands in the Murray Darling Basin, only 15 are declared wetlands under the Ramsar Convention and are therefore unprotected by the existing EPBC Act “trigger” covering wetlands of international importance.

The existing trigger should therefore be extended to enable the listing of High Conservation Value freshwater environments on the basis of specified nationally significant criteria (including the value of environments as freshwater climate refuge areas). This is consistent with Australia’s obligation under the Ramsar Convention to promote “wise use” of all wetlands in its territory through wetland conservation and management. Teaming a nationally significant wetlands trigger with a trigger relating to significant water actions (as suggested above) would make a significant contribution to reducing the impact of new developments upon sensitive wetland ecosystems.

The health of these ecosystems would also be enhanced by a more systematic compliance by Australia with its obligations under the Ramsar Convention including obligations to:

- formulate and implement planning so as to promote the conservation of listed wetlands (Article 3.1);
- promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether they are listed or not, and provide adequately for their wardening (Article 4.1);
- encourage research and the exchange of data and publications regarding wetlands and their flora and fauna (Article 4.3); and
- endeavour through management to increase waterfowl populations on appropriate wetlands (Article 4.4).

Persistent Organic Pollutants

ACF strongly supports the regulation of persistent organic pollutants, such as dioxins, at a national level. The 2005 ANEDO study outlines how Australia can implement its obligations under the Stockholm Convention on Persistent Organic Pollutants 2001 by including the regulation of processes identified under Annex C of the Convention as matters of national environmental significance.⁵²

⁵² Australian Network of Environmental Defender’s Offices “Possible new matters of National Environmental Significance under the *EPBC Act 1999*” 2 May 2005, available at <http://www.edo.org.au/edonsw/site/default.php>

Regional Planning

Plans made under statutory planning processes including Bioregional Plans made under section 176 of the EPBC Act should be considered compulsorily in the course of assessment and approval processes under Chapter 4 of the Act. This would facilitate greater integration and coordination between the planning and regulatory arms of the EPBC Act.⁵³

5.3. Improvements to and implementation of existing triggers

Improve existing triggers

ACF considers that several important improvements need to be made to existing triggers under the EPBC Act to enable the Act to achieve its objectives and meet Australia's international treaty obligations.

Necessary improvements to existing triggers include:

- **protection of the integrity of sites not just certain "values"**: existing triggers in relation to World Heritage and National Heritage sites should operate on the basis that they protect the integrity of the sites rather than certain enumerated values alone.⁵⁴
- **broaden the threatened ecological communities and species triggers** to capture "vulnerable" and not just "endangered" communities as well as "conservation dependent" species.⁵⁵

Enhance effectiveness of existing triggers

The efficacy of existing triggers could be significantly enhanced by speeding up listing processes for threatened species and communities and listing more places on the National Heritage list thereby ensuring that proposed actions having a significant impact on them are assessed under the A&A regime.

5.4. Exclusions from the EPBC Act

Existing industry-specific and ad hoc exclusions from the EPBC Act undermine the crucial function of establishing public, objective and nationally consistent reviews of contentious and environmentally risky projects.

⁵³ See generally McGrath C. n 41, 182-183

⁵⁴ ANEDO (2005) n 52, 9

⁵⁵ Section 18 EPBC Act

Regional Forestry Agreements

The exclusion of forestry operations covered by **Regional Forestry Agreements** (“RFAs”) is deeply problematic given the failure of some States to meet minimal environmental and monitoring commitments.⁵⁷ The EPBC Act should be amended to mandate adequate enforceable oversight of RFA provisions relating to threatened species and communities.

Nuclear Waste Dumps

Commonwealth legislation exempting **nuclear waste** dump site selection from the EPBC Act’s requirements should be repealed.⁵⁸

6. Assessment and Approval (A&A) Processes

6.1. Overview

The process of referral, assessment and approval of proposed developments contained in the A&A regime in Chapter 4 of the EPBC Act culminates in a Ministerial decision on whether a particular development proposal should proceed.

While these decisions undoubtedly often involve complex choices between competing policy priorities and the A&A regime has produced some positive outcomes, processes conducted under it are often criticised as lacking transparency and rigour, being based on inadequate information and susceptible to “political interference” given heavy reliance of the process upon exercise of Ministerial discretion. The process can often result in outcomes in which environmental protection and sustainability come off second best. EIA processes conducted in relation to several controversial proposals – eg. Paradise Dam, the Tamar Valley Pulp Mill and the Port Philip Bay Channel Deepening Project - have been singled out for particular criticism.

Experience to date suggests that with the exception of referrals from the **forestry and agriculture sectors** (which have been very low) the EPBC Act has attracted a large number of referrals from project proponents (to 30 June 2007, DEWHA had received a total of 2,278 referrals).⁵⁹ Balanced against this positive outcome are the lower number of referrals found to constitute “**controlled actions**” (approximately 22% of all referrals to 30 June 2007) and the number of “controlled actions” that were **refused permission to proceed** by the Minister (4 actions or 0.8% of all “controlled

⁵⁷ In the *Wielangta Forest Case*, Marshall J found in the hearing at first instance that forestry operations were not being carried out in accordance with the relevant RFA due to the failure to protect threatened species; *Brown v Forestry Tasmania* (No 4) [2006] FCA 1729

⁵⁸ *Commonwealth Radioactive Waste Management Act* 2005 (Cth)

⁵⁹ Lee Godden and Jacqueline Peel highlight the contribution that routine due diligence processes followed by proponents and their advisers in some industry sectors have made to this outcome. Godden L. and Peel J. (2007) n 39, 136

actions” to 30 June 2007). The evidence also suggests that a large proportion of “controlled actions” are assessed through the least onerous process, namely preliminary documentation provided by the proponent.⁶⁰

The forestry and agriculture sectors aside, these statistics suggest that bad environmental outcomes are more likely the result of poor environmental assessment and/or decision making than a fundamental non-compliance with referral requirements by project proponents.⁶¹ While the increasing number of “controlled action” refusals issued by the current Minister for the Environment, Heritage and the Arts is an encouraging development, ACF considers that improving assessment and approval processes should be a key focus of legislative and policy reform.

6.2. Possible role for independent multidisciplinary body⁶²

The establishment of a new independent multidisciplinary body (“IMB”) charged with implementation of key processes and decisions under the EPBC Act could play an important role in ensuring better assessment and approval outcomes.

Potential points of engagement by an IMB in the A&A regime and other key processes under the EPBC Act warranting further consideration include:

- making **controlled action** and **mode of assessment** decisions;
- **assessment process oversight** including:
 - receipt, review and analysis and of commissioned **environmental, social and economic** impact assessment (including where conducted under an accredited State process); and
 - receipt, review and **analysis of submissions**, including from the public, DEWHA and other interested parties;
- one or more of the following roles:
 - making a **threshold decision** about whether a proposed action is clearly unacceptable based upon its impact upon a protected matter, with proposed

⁶⁰ During 2006-2007 44 of 79 (or 56% of) decisions on the assessment method chose assessment on preliminary documentation. All statistics are from the DEWHA website: www.environment.gov.au

⁶¹ In relation to the agriculture and forestry sectors, ACF considers that a twin approach of broadening the scope of the EPBC Act (see section 5 above) and better resourcing of education, monitoring and enforcement (see section 4 below) would help facilitate increased referrals and better outcomes in these sectors.

⁶² ACF expects to be able to provide more detail in relation to the potential operation and role of such a body in the course of submissions made to the statutory review of the EPBC Act.

actions clearing this threshold test then referred to the Minister for further consideration and approval or rejection;

- making the final decision upon whether a “controlled action” can proceed pursuant to a publicly released decision setting out the **environmental, social and economic considerations taken into account**, subject to Ministerial “call in” powers allowing the Minister to make the final decision in defined circumstances (eg. where the action involves identified matters of national security) and subject also to merits review; and/or
- a **publicly released recommendation** to the Minister in relation to **final approval and conditions** taking into account **environmental, social and economic** impact.
- with advice from the Scientific Committee, the Indigenous Advisory Committee, DEWHA and other relevant sources, **making final decisions or publicly released recommendations in relation to key processes under Chapter 5** of the EPBC Act (including decisions regarding biodiversity priorities, listing of threatened species and ecological communities, permits and recovery plan decisions) - subject to merits review.

In relation to areas of engagement in the A&A regime, decisions and/or recommendations would be made by the IMB pursuant to more detailed “triple bottom line” criteria than currently prescribed under section 136 and other relevant provisions of the EPBC Act.

These criteria would reflect the broader range of “triggers” proposed in section 5 above, a legislated requirement to take into account all environmental impacts **including indirect and cumulative impacts**, the precautionary principle and elaborate in more detail the “social” and “economic” matters that must currently be taken into account under section 136 of the EPBC Act.⁶³ The consideration of **project alternatives**, for example those with lower carbon emissions, could also be included as an important role for the IMB.⁶⁴

In short, EIA processes conducted under the EPBC Act would prescribe a more sophisticated approach to triple bottom line cost/benefit analysis.

To facilitate this, the IMB would need to be staffed or advised by a multidisciplinary team equipped to analyse and make recommendations across environmental, social and economic indicators. The elaboration of more specific assessment criteria would

⁶³ Cumulative impacts are discussed further in Box 3 in Section 4 above.

⁶⁴ For example, water infrastructure proposals should include an assessment which project would provide water at least carbon cost. Such an assessment would include an assessment of carbon emissions arising from the capture and treatment of water, submerged vegetation, and the pumping of water to metropolitan storages.

help to facilitate both: **(i)** devolution of powers currently exercised by the Minister and **(ii)** more efficient merits review of decisions made by the IMB and/or Minister (Merits review is discussed further in section 7 below).

In ACF's view, the establishment of an independent body having these roles in conjunction with other reforms proposed in this submission may assist to:

- depoliticise key decisions under the EPBC Act;
- elevate the Environment Minister's role from primary decision maker under numerous processes under the EPBC Act to strategic oversight of the portfolio;
- foster decisions better informed by adequate information and more sophisticated triple bottom line analysis including scientific analysis of environmental impact;
- steward more independent assessment processes less susceptible to bias and conflicts of interest through greater oversight;
- facilitate better "interconnection" between the A&A regime and the biodiversity conservation and bioregional planning provisions in Chapter 5 of the EPBC Act by ensuring that A&A decisions are informed by Chapter 5 processes and vice versa; and
- ensure that EIA processes for actions having an impact on matters of national environmental significance support and supplement other Government initiatives aimed at driving a sustainability agenda for Australia; and
- significantly reduce the substantial burden currently imposed upon under resourced community members and groups wishing to participate in assessment processes.

Such a body may draw from models utilised in other jurisdictions (eg. Canada's Environmental Assessment Agency) and from Australian bodies involved in implementing other portfolios. The Australian Competition and Consumer Commission (ACCC) is an example of an independent statutory body charged with implementing legislation that seeks to reconcile complex policy objectives comparable in complexity to those faced in triple bottom line EIA.

6.3. Bilateral Agreements

While there is merit in the concept of integrating and streamlining State and Commonwealth EIA processes, there is scope for improvement in both the legislative underpinning for Commonwealth/State bilateral agreements and EIA practices implemented pursuant to them.

Particular concerns include:

- the **conflict of interest** that arises where State or Territory Governments (or statutory corporations owned by them) act as both project proponent and primary assessor. In practice, this arrangement has significantly limited the scope for Federal Environment Ministers to reject environmentally damaging proposals; and
- the possibility for Commonwealth decision making power to be delegated to the States and Territories is inconsistent both with the checks and balance system implicit in the concept of matters of national environmental significance and community expectations about a leadership role for the Commonwealth government in protecting these matters. **The ability for bilateral agreements to devolve final approval under A&A regime should be repealed.**

Our recommendations above regarding expanding the application of the EPBC Act through a broader range of triggers and improvements to A&A processes, imply that assessments conducted under bilateral agreements would:

- respond to a significantly broader range of matters of national significance;
- be required to assess a broader range of more detailed impacts, including indirect and cumulative impacts and better defined economic and social criteria; and
- be subject to greater Commonwealth oversight and supervision by an IMB.

The current Government should utilise current opportunities for intergovernmental reform to revisit the 1997 COAG Heads of Agreement and existing bilateral agreements to make changes that reflect contemporary community expectations about an appropriate leadership role for the Commonwealth in matters of national environmental significance.

7. Public Participation

“Environmental issues are best handled with the participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision making process. States shall facilitate and encourage public awareness and participation by information widely available. Effective access to judicial and administrative proceedings, including redress and remedy shall be provided.” **Rio Declaration on Environment and Development (1992), Principle 10**

While the EPBC Act mandates a number of processes that enhance public participation in decision making, there is scope for improvement in several areas as.⁶⁵

⁶⁵ Public participation is enhanced under the EPBC Act in its current form through measures such as the posting of referral and assessment documentation on the DEWHA website and the broad standing afforded to individuals and organisations under sections 475 and 487.

A recent survey of public participation in Commonwealth environmental decision making processes through **litigation conducted in the public interest** concluded that the three key obstacles to participation via this method are: **(i)** the lack of merits review; **(ii)** the threat of adverse costs orders; and **(iii)** a general lack of financial resources.⁶⁶ These are discussed below.

7.1. Merits review

In light of the need for improved assessment and decision making processes under the EPBC Act (discussed in section 6 above), ACF considers that it should be amended to facilitate merits review of key decisions under the EPBC Act – including key controlled action and “listing” decisions under Parts 7 to 9 and 13 of the EPBC Act. In ACF’s view, the positive effect that review of the quality of key decisions would have upon the integrity of decisions would outweigh the delay incurred as a result of merits review processes.⁶⁷

Merits review should be obtainable before specialist members of the Administrative Appeals Tribunal by applicants and third parties. The expansion of explicit criteria for key controlled action decisions under the EPBC Act as suggested in Section 6 above would greatly assist the efficacy of merits review by providing clearer guidance on the basis for which primary decisions must be made.

7.2. Threat of adverse costs orders, orders for security for costs and undertakings for damages

“The significant benefits of public interest litigation mean it should not be impeded by the costs allocation rules.” Australian Law Reform Commission⁶⁸

Under current rules, costs generally “follow the event” ie. at the conclusion of court proceedings, an award can be made that the unsuccessful party bear both its own legal costs plus the costs of other parties to the litigation. Furthermore, a party to litigation may apply to the court, and be granted, an order requiring the applicant to provide security for that party’s costs or (in the case of an application for an interlocutory injunction) an undertaking for damages.

The threat of these orders operates as a powerful disincentive to individuals and organisations wishing to challenge decisions made under the EPBC Act or apply for an injunction to enforce it. Individuals or community organisations face financially ruinous orders for costs in the event that they lose expensive proceedings conducted in the Federal Court of Australia.⁶⁹

⁶⁶ McGrath C. (2008) n 39

⁶⁷ For a discussion on the pros and cons of merits review of EPBC Act decisions, see *ibid* 33-35

⁶⁸ Australian Law Reform Commission Report 75, *“Costs shifting – who pays for litigation”* (1995), section 13

⁶⁹ This occurred in *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch v Minister for the Environment and Heritage* [2006] FCA 746

ACF acknowledges that relevant laws must balance deterrence of vexatious litigation on the one hand, with appropriate support for litigation brought genuinely in the public interest on the other.⁷⁰ ACF considers that a recent submission made by ANEDO to the Minister for the Environment Heritage and the Arts, strikes an appropriate balance between these policy objectives. The submission calls for amendments to the EPBC Act to:

- allow the court to consider granting an order that each party to a proceeding bear their own costs (“**own costs rule**”);
- allow the court to consider granting a **protective costs order** to an applicant confirming that the applicant will not have to pay the costs of other parties to the proceedings;
- provide explicit recognition for **maximum costs** orders under which a public interest litigant can apply to the court for an order prescribing the maximum costs exposure of the parties;
- prevent a party to proceedings under the EPBC Act from applying for an order for security for costs against a public interest applicant; and
- reinstate the prohibition (previously in section 478) upon the Federal Court requiring applicants for interlocutory or interim injunctions to provide an undertaking for damages as a condition of granting the injunction.⁷¹

7.3. Financial resources – Legal Aid and Intervener Funding

In the absence of adequate resources made available to DEWHA for enforcement and application of the EPBC Act, third parties have played a central role in these activities since commencement of the EPBC Act. In most cases, third parties including individuals and community and national environmental non-government organisations have done so in the face of significant financial risk.

The important contribution made by these groups to enforcement and application of the EPBC Act should be acknowledged by establishing Commonwealth government funding in the form of legal aid to litigation conducted under the EPBC Act in the public interest.

⁷⁰ For a comprehensive discussion of what constitutes litigation “in the public interest” in an environmental context see McGrath C., (2008) n 39, 3 to 9

⁷¹ ANEDO “Amendments to the Environment Protection and Biodiversity EPBC Act 1999 (Cth)” Letter to the Minister for the Environment Heritage and the Arts, 7 March 2008, available at <http://www.edo.org.au/edonsw/site/default.php>

Legal aid should be supplemented by a formalised intervener funding mechanism to facilitate effective participation in assessment processes by groups without access to full information or professional advice regarding complex development proposals.⁷²

The Federal Government should also bolster funding of ANEDO. ANEDO has been instrumental in providing advice to, and advocacy for, community groups in relation to a range of issues and actions brought under the EPBC Act.

7.4. Public consultation periods

Minimum public consultation periods mandated by the EPBC Act can often be too short to enable meaningful public engagement in EIA processes conducted under the EPBC Act. This is particularly the case where the action under assessment is large-scale and impacts upon communities that are socially marginalised and/or dispersed over large geographical areas. For example, in the context of the current Strategic Assessment processes on foot in the Kimberley region, the Minister is bound to advertise both draft terms of reference for the preparation of a Strategic Assessment report and the assessment report itself, for a statutory minimum period of 28 days only (although the Minister may prescribe a longer period should he or she wish to do so)⁷³ This statutory minimum is too short a period for an assessment process of this complexity where volumes of highly technical information is likely to be prepared.

ACF considers that statutory minimum time frames mandated for key steps in EIA processes conducted under the EPBC Act should be extended to enable meaningful public participation in these processes. In ACF's view, a legislatively mandated minimum period of 90 days for more complex processes is required, with the ability for longer periods to be prescribed where necessary.

8. ACF Contact Details

ACF welcomes the opportunity to opportunity to make a submission to this Inquiry of the Senate Standing Committee on Environment, Communications and the Arts and would be pleased to discuss this Submission further.

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⁷² For a comprehensive discussion on the merits of intervener funding and the need for this to supplement legal aid see Jeffrey M. I. "Environmental Governance: A Comparative Analysis of Public Participation and Access to Justice" (2005) 9(2) JSPL

⁷³ Section 146 EPBC Act

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