Windup report for the EPBC Project

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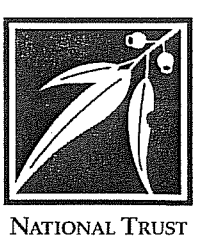

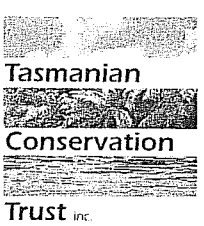

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The EPBC Project was a joint Project of WWF-Australia, the Australian Council of National Trusts and the Tasmanian Conservation Trust.

1. The EPBC Project and the EPBC Act: A Unique Viewpoint

1a. Overview of the nature and evolution of the EPBC Project

The EPBC Project[1] (formerly called the EPBC Unit) came into existence in 2000 after the controversial passage of the *Environment Protection and Biodiversity Conservation Act* 1999 (the EPBC Act). Since then, there has been strong demand for the EPBC Project's services. The EPBC Project has successfully worked with, and directly assisted, a wide range of stakeholders to increase their awareness and understanding of, and enable their participation with, the EPBC Act. In doing so, the EPBC Project assisted the Australian Government to achieve broader community understanding of the EPBC Act.

> *The EPBC Unit has made a significant contribution to the successful operation of the EPBC Act through the active engagement of stakeholders in relation to the operation and requirements of the EPBC Act.*[2]

The EPBC Project had three distinct stages of growth aimed at assisting stakeholders as their needs developed.

EPBC Project: Stage 1 (2000 – 2002)

Set up as a joint Project of WWF-Australia and the Humane Society International (HSI), the first stage established the EPBC Project (then called the EPBC Unit) as an information source about the EPBC Act. This stage didn't see the EPBC Project as a 'hands on' community information source; rather, it focused on producing written material. The Coordinator, Sophie Chapel's assistance to community groups was by way of 'briefing papers' or fact sheets on how the EPBC Act worked and how it protected the Matters of National Environmental Significance. The only face to face work done was a few reactionary briefings held in areas where a controversial EPBC Act matter had become highly public.

A portion of Sophie's time at this stage of development was taken up in the form of project management for the provision of advice by professional consultants as to how the EPBC Act was going to work in practice, as well as coordinating joint submissions on consultation papers, draft bilateral agreements and like documents.

Sophie also established a service that, although altered in the third stage, would go on to become one of the Project's core services, the EPBC Notices, then called 'EPBC Info'. During its first few months, the Project developed an email contact list of interested conservation groups. Information was circulated to members on the list detailing developments in relation to the EPBC Act, information on the new DEH website, and bi-weekly notice of referrals. Given the success of this service, in September 2000, the Project established the electronic list server. Through this list server, news and information about the EPBC Act was shared and distributed by circulation of weekly bulletins of opportunities to comment on referrals and assessments, as well as other notices published about the EPBC Act on the DEH website.

The EPBC Project was a joint Project of WWF-Australia, the Australian Council of National Trusts and the Tasmanian Conservation Trust.

Executive summary

The *Environmental Protection and Biodiversity Conservation Act* 1999 (Cth) (the EPBC Act) came into force on 16 July 2000, introducing major changes to the Australian Government's environmental assessment and approval processes. When the EPBC Act was passed, it was publicly heralded by some of Australia's biggest and most influential conservation groups as a bright new day in Australia's environmental protection regime, and it is not hard to see why. In terms of drafting, the EPBC Act really is in a class of its own in terms of the potential protection it offers to Australia's biodiversity as well as the community's rights of public participation in its processes.

It is out of the optimism that this drafting fostered that the EPBC Project was born. Initially a joint Project of WWF-Australia and the Humane Society International (HSI), and later joint Project of WWF-Australia, the Australian Council of National Trusts (ACNT) and the Tasmanian Conservation Trust (TCT), the EPBC Project was a community information service that worked with a wide range of stakeholders to increase their awareness and understanding of, and enable their participation with, the EPBC Act.

With hundreds of hours in the field talking to stakeholders, the EPBC Project occupies a unique view point on how the EPBC Act is working or at least how it is perceived by the community to be working, particularly the public participation processes and the administration.

The EPBC Act currently operates as a wholly voluntary system, only the very honest or the stupid comply fully with its processes. Compliance is almost non existent and as at June 2005 only 23% of referrals have been declared "controlled" by the EPBC Act. Of that 23%, 71% did not undergo any form of environmental impact assessment beyond the information contained in the referral documentation. And of the 23% less then 1 % of referrals were refused. Indeed, when submitting a referral, proponents have about a 0.1% chance of being refused. EPBC Statistics are set out on page 17 of the report.

Over the 6 years since the implementation of the EPBC Act, conservationists have become increasingly disheartened by the apparent failure of the EPBC Act to achieve any substantive environmental gain. Project staff made an analogy that the EPBC Act was a really big dog, with huge teeth, that is not only being muzzled, but is also being kept on a very short leash.

Communities simply do not see any benefit from their participation and it is feel that their input is ignored by DEH. These concerns are outlaid in section 2b of the paper. DEH and the Minister tend to act as though public participation is not appropriate and administer the EPBC Act as if they are apologising for it, these concerns are discussed below in section 3b.

The way forward is requires improvements in DEH's dealing with the community (section 2e), EPBC Act administration (section 3c) and the Act's Architecture (section 5b). Without significant change to in these areas, the EPBC Act it is very much in danger of becoming little more then a bothersome administrative hoop that proponents need to jump through.

EPBC Project: Stage 2 (2002 – 2003)

The second stage in the growth of the EPBC Project began with the addition of a new Project member, the Tasmanian Conservation Trust (TCT). The key focus of this stage was the development of key educational/capacity building resources and information products.

In the 8 months that Andrew Macintosh coordinated the Project, he entered into a consultation with planning professionals for them to produce the first edition of the Planning Guide. Andrew also wrote the first edition of the Guide for Conservationists, updated Sophie's fact sheets and ran 2 presentations. Again, in this phase, the focus was not on face to face communication, but rather on large scale capacity building by way of written material.

In his time as Coordinator, Andrew established another service that would become core business for the Project, the remote "advisory service". The EPBC Project began to work closely with a range of stakeholders to promote greater awareness and understanding of the EPBC Act by providing information, as required, on a daily basis by way of telephone and email. At this stage, most of the enquires are reported to have come from the larger established groups such as State Conservation Councils, State Environment Defender's Offices, Australian Conservation Foundation, The Wilderness Society, the Threatened Species Network, and Birds Australia.

EPBC Project: Stage 3 (2003 – 2006)

The third stage of the EPBC Project is where the Project's focus changes. HSI ended its association with the Project and, after the Heritage Amendments were passed in 2004 the Australian Council of National Trusts came on board to facilitate the integration of heritage into the Project's focus. The Coordinator for the third stage, Lyndall Kennedy, built on the foundations laid down by the first two stages but put much greater emphasis on actively engaging with stakeholder groups. It is also in this third stage that the EPBC Unit changed its name to the EPBC Project and became a well known "independent" information source on the operation of the EPBC Act.

The EPBC Project's main communication strategy in this third stage was increasing the EPBC Project's educational impact on the community by way of face to face workshops backed up by plain English guides, an interactive website and the over the phone advisory service. The change in stakeholder recognition of the Project is reflected in 2 surveys completed at the end of the second stage (attached as Annexure 1) and at the end of the third stage (attached as Annexure 2).

Over the third stage, the EPBC Project:

- received funding for a second staffer, Tracey Rich
- presented 138 workshops
- presented papers or posters at 10 conferences
- presented 4 workshops jointly with other EPBC Act information providers
- provided detailed advice to over 700 calls and e-mails enquiries on the EPBC Act or its processes as part of the advisory service
- established an independent and interactive website
- printed and distributed over 18,000 EPBC Project publications
- prepared and circulated 168 EPBC Notices to the EPBC Project subscriber service

- prepared and sent 21 heritage e-bulletin notices to the EPBC Project subscriber service
- published 16 articles in national magazines and journals

These activities put the Project into the forefront as the primary non-government EPBC Act information source.

Workshops

In this third stage, the Project developed and presented 5 types of workshops aimed at tailoring information to the audiences' requirements. A large part of the success of the workshops was the Project Staff's willingness to localise each workshop presentation. This included local mapping, species and issues. While this approach significantly added to the time required to prepare for each workshop, the benefit was that attendees could immediately apply the workshop content to a set of facts they were familiar with.

Over a 3 year period, the project developed and ran 138 workshops, accounting for about 430 hours of direct face to face communication. Victoria hosted the most workshops, followed by NSW and Western Australia.

State/ Territory	Number of workshops over Stage 3
VIC	29
NSW	27
WA	23
SA	21
QLD	21
TAS	9
NT	6
ACT	4
TOTAL	**138**

EPBC Act Overview workshops

The overview workshop was the original and most popular workshop. It was marketed as "the EPBC Act Explained" and was the best way to provide attendees with a simple and concise overview of the main mechanisms and features of the EPBC Act.

The workshop included an explanation of the EPBC Act referral and assessment process and a discussion of EPBC Act case law. It was very responsive to the group being presented to, integrating local content, giving area specific examples, and allowing attendees to ask questions throughout each of the sessions. One of the sessions the Project received the most positive feedback about was the referral example. Attendees were presented with a set of facts, the significance guidelines and some recovery plan information. They were then asked to decide whether they were going to make a referral and why. The purpose of the exercise was to allow attendees to work through a practical application of the material they had just been presented with to help with retention and understanding.

The overview workshop also included a section on the National Heritage system. The inclusion of this section was seen as an important aspect of the integrated approach taken by the Project staff in disseminating information about the new heritage system. EPBC Project staff identified this integrated approach as the most effective way for the Project to communicate to various stakeholders about the national heritage system.

The overview workshops drew a wide range of people, including a large number of community-based conservation groups, as well as regional natural resource management bodies and local and State government representatives.

After the initial year of Stage 3, overview workshops were run on an 'Expression of Interest' basis. This method of running workshops proved very effective and freed up the Project staff from having to do the administrative organisational aspects of the workshops as these were handled by the workshop 'host'. It also ensured that workshops were run in areas and with groups that were really interested in gaining further understanding of the EPBC Act.

Sucessful EOI's

	NSW		**TAS**		**QLD**		**VIC**		**WA**		**NT**		**SA**	
year	04	05	04	05	04	05	04	05	04	05	04	05	04	05
Community Group/NGO	3	3	4	3	9	4	6	10	7	2	1	1	3	3
State Gov	2	0	2	3	0	1	4	4	1	1	1	0	1	1
Local Gov	2	3	1	0	1	1	1	2	1	1	0	0	1	2
Industry	2	1	0	0	0	1	3	2	1	0	1	0	1	1
University	0	2	0	0	1	1	1	2	1	0	0	0	0	0
Fed Gov Facilitator	0	0	0	1	0	0	0	0	1	0	0	0	1	1
Total	**9**	**9**	**7**	**7**	**11**	**8**	**15**	**20**	**12**	**4**	**3**	**1**	**7**	**8**

Some were combined with "joint hosting". Expressions requesting more then 1 workshop (usually covering main towns over a geographic region) have only been counted once.

National Heritage System workshops

The EPBC Project's "National Heritage System" workshop provided attendees with an in-depth understanding of the National Heritage system. The workshop started with an explanation of the National and Commonwealth heritage listing processes under the EPBC Act. It then focused on building the capacity of attendees to understand the implications of heritage listing. This includes information on the management and development assessment consequences of EPBC Act heritage listing.

The types of people who attend heritage workshops were mixed and generally included professional heritage consultants and heritage advisors, heritage managers and members of voluntary heritage conservation organisations. They also included local and State government representatives (eg strategic planners who also deal with heritage and representatives from National Parks and Wildlife departments, State Heritage Councils etc).

Following the Overview model, these workshops were focussed on information that is relevant to the State or a locality, and was explained via practical examples. After the initial year, the Project's Heritage Officer, Tracey Rich, also ran these Heritage workshops based on expressions of interest.

Second stage workshop

These workshops were aimed at Community Groups and NGO's who had already had an overview workshop or had a working knowledge of the EPBC Act. They were focused more

on the process, such as how to write a submission, what the time frames are, what needs to be included for an effective submission. The workshops were well received by community groups, most expressing a desire for a longer workshop with more practical examples.

This workshop mode, renamed EPBC Act Submission Writing, aimed at capacity building skills as a new way to improve the ability of the community to engage the public processes available to them under the EPBC Act. The new workshops were an acknowledgement that information alone could not empower the community if they do not also have the skills to put that information into practice. The workshops were intended to actively provide a solution to this issue and meet stakeholder needs.

Planning workshop

The target groups for the Planing workshops included local government strategic planners, NRM group staff and representatives, catchment management authority staff and those involved in State government planning departments and other State departments engaged in planning type activities.

One of the main challenges with the development and delivery of such planning workshops was the fact that the planning system in each State and Territory is different, and the workshops had to be tailored to take this into account to at least some extent. This was exacerbated by the fact the planning systems in a number of States and Territories were currently under review.

All day workshop

Joint version

The Project developed a full-day workshop on the EPBC Act that was then delivered in conjunction with a State based environmental law information provider, such as, for example, the EDO-QLD. This workshop was a combination of a number of the workshops developed and presented by the EPBC Project, with the addition of a section presented by the EDO-QLD which focussed on the context of the EPBC Act within QLD's state environmental legislation. By involving another State-based information provider, the workshop was able to give State specific focus to topics such as the interaction between the EPBC Act and State processes such as via the bilateral.

The day was broken up into 45 minute sessions, including session on the referral and assessment process, a referral example, the national heritage system, effective submission writing, EPBC Act case law, and the section on the relevant State environmental planning and protection legislation.

Solo Version

As a result of request by stakeholders responding to the Call for Expressions of Interest asking for the overview and second stage workshops, a full day format was designed combining the Overview workshop, with a 2 hour version of the second stage workshop. The response from attendees was overwhelmingly positive. The capacity building focus of the second stage workshop crystallised the overview workshop content in a very 'hands on' and practical way. The workshop not only taught participants what they could do with the EPBC Act, but also *how* to effectively do it.

Website (www.epbc.com.au)

Developing an independent and interactive website was a key target for this stage of the Project. Initially the Project's website was housed within the WWF site, but it became clear that the Project needed a stand-alone website that was both more easily accessible and navigable by a wide range of users.

The Project designed and created a website that was accessible to community groups. It was easy to navigate, the content conformed to the content of the Project's guides, and the use of images was kept low and embedded to reduce the download time of pages when using dial up internet access.

The website was immediately popular with the community. Over the first 3 months (1 March to 30 May 2006) there were 1,374 sessions, an average of 11.64 per day. A session starts after a series of clicks on the site by an individual visitor during a specific period of time and ends when the browser is closed.

While on the site, visitors looked at 6,835 pages. This means that in each session, a visitor averaged about 5 pages before closing the browser. Visitors had also already downloaded 652.39 megabytes of information from the Project's site, including over 700 copes of the Guides.

Over-the-phone information service

The EPBC Project continued to provide over-the-phone information to any interested member of the community. However, the EPBC Project did not provide legal advice. The Advisory service was extremely popular with other groups and individuals trying to work through the public consultation processes of the EPBC Act.

The Project assisted the community with their interactions with the public processes available to them under the EPBC Act by:

- providing information on referrals;
- assisting in the decision as to whether an action should be referred to the Minister for assessment;
- providing information on how to request that the Minister 'call in' an action for assessment;
- assisting in the preparation and of submissions in response to referrals and assessments under the EPBC Act;
- providing explanation of the processes that referrals take through DEH and what the conditions on referrals may mean to the action; and
- providing information and explanation of the National and Commonwealth Heritage List criteria and listing processes.

Subscriber services

Two EPBC Project e-bulletins, "EPBC Notices" and "National Heritage News" were produced and circulated to subscriber lists of a few hundred subscribers each.

The EPBC Notices

The initial 'EPBC News" developed by Sophie became more user friendly with active hyperlinks and summaries and became the "EPBC Notices" e-bulletin. EPBC Notices has been circulated to over 500 subscribers 48 weeks a year over Stage 3 of the Project, and is a wrap-up of all the latest EPBC referrals and decisions for that period divided by State or Territory. This e-bulletin was promoted actively during EPBC Project workshops and the subscriber list continued to grow, literally until the last week of operations. Feedback on the Notices was extremely positive and indicated that the notices were the most easy and effective way of staying in touch with opportunities to engage with the EPBC Act.

National Heritage News

National Heritage News was circulated monthly through its own subscriber list. It was aimed predominantly at heritage professionals, including heritage consultants, heritage advisors and State heritage council staff.

EPBC Project Guides

The EPBC Project circulated three printed guides on the EPBC Act. These are:

- Users Guide (formerly the "Conservationists Guide")
- Field Guide (formerly the "Conservationists Field Guide")
- Guide for Planners

Copies of all of these guides have been available free at all of the workshops conducted by EPBC Project staff over the project period. In addition to the provision of these guides at workshops, Project staff continually responded to requests for additional copies of the guides, both from people who have attended workshops as well as others who have heard about them through their networks.

In this third stage of the Project the Coordinator took the first editions of the Users and Planning Guides and made the more user friendly by rewriting them in plain English and making them shorter but more comprehensive, by cutting out replicated material.

The Project received extremely positive feedback from a wide variety of stakeholders about both the quality and content of the guides, which was reinforced by the high level of demand for these resources.

Including the guides circulated at workshops and the guides circulated on request, the Project has distributed about 18,000 copies of the guides to stakeholders during the course of Stage 3 of the Project. More then 700 further guides have been downloaded directly from the Project's website.

Funding

The Australian Government as represented by the Department of the Environment and Heritage committed $876,806 to the project over 6 years by way of yearly grants.

Funding year	Phase of development	Number of Staff	Amount	Focus of Activities
2000 – 2001	1	1	$60,000	Make Submissions on regulations and bilaterals, obtain legal advice, draft briefing papers
2001 – 2002	1	1	$95,000	Make Submissions on regulations and bilaterals, obtain legal advice, draft briefing papers
2002 – 2003 (16 month grant)	1-2	1	$130,626	Produce Guides and fact sheets., telephone advisory service
2003- 2004	3	1	$102,000	Workshops, telephone advisory service, website
2004 - 2005	3	2	$238,590	Workshops, telephone advisory service, guides
2005 - 2006	3	2.3	$250,590	Workshops, telephone advisory service, website

1b. The Project's frame of reference

The EPBC Project occupies a unique view point on how the EPBC Act is working or at least how it is perceived by the community to be working, particularly the public participation processes and the administration. With hundreds of hours in the field talking to stakeholders, the EPBC Project was at the 'coal face' in terms of feedback from stakeholders on their experience interacting with the EPBC Act. At workshops and briefings the Project often bore the brunt of community frustrations with the Act and its administration by DEH.

Being non-government, the Project received unrestrained feedback from the community. The Project directly communicated with stakeholders as part of the advisory service. Many calls that came into the Project's advisory service were from community members who were confused by the process or who wanted to complain about how they felt they'd been treated by DEH.

The EPBC Project was also coordinated at every stage by a legally trained person. This allowed the Project to provide legitimate opinion and advice on the EPBC Act and its administration.

1c. Basis of this report

This report was complied at the request of the EPBC Project's steering committee. The aim of the report is to crystallise some of the issues the Project has seen with the operation of the EPBC Act over the past 3 years. This report is an internal document and is not meant for publication.

The report is based on direct experience and on feedback from stakeholders. It is not an academic or legal review of the EPBC Act and its operation. Rather, it recounts the recollections of feedback from the community, and the opinion of the EPBC Project Coordinator for Stage 3, Lyndall Kennedy.

Once the heritage provisions were inserted into the EPBC Act, the Project expanded its operations to include a heritage officer, Tracey Rich. Given that Tracey had prepared a report on the issues with the operation of the heritage provisions under the EPBC Act, heritage has not been dealt with in the substance of this report. Instead, Tracey's report is attached as Annexure 4.

1d. The EPBC Act Explained... Briefly

The EPBC Act

The *Environmental Protection and Biodiversity Conservation Act* 1999 (Cth) (the EPBC Act) came into force on 16 July 2000, introducing major changes to the Australian Government's environmental assessment and approval processes. The EPBC Act establishes an approvals regime for certain actions, in addition to any approvals required under State or local laws.

The Australian Government Department of the Environment and Heritage (DEH)[3] administers the EPBC Act on behalf of the Australian Government Minister for the Environment & Heritage (the Minister). The general rule is that "actions" that are "likely" to have a "significant impact" on a matter protected under Part 3 of the EPBC Act, must be referred to the Minister for a determination of whether environmental impact assessment is required.

Importantly, the EPBC Act does not prevent the Minister from approving an action that has, will have, or is likely to have a significant impact on one of these matters protected under Part 3. What it does do is make it an offence for anyone to undertake that action without first receiving the Minister's approval.

An "action" ...

An activity only requires approval under the EPBC Act if it is an "action". The EPBC Act defines "action" to include a project, development, undertaking, an activity or series of activities. However, the Act expressly excludes some activities that would otherwise have come within this definition. These include the decision to fund an action or issue a "governmental authorisation" for someone else to take action. So for example, a decision by an NGO to fund a landcare group to undertake weed control is not an action. It is the actual weed control by the landcare group that is the action. Likewise, a local government decision

to approve the building of a subdivision is not itself an action. However, any works done on the land, even if it is carried out in accordance with the local government permit, is an action.

that is "likely"...

Actions that are "likely" to have a significant impact on a matter protected under Part 3 require approval under the EPBC Act. In the Federal Court case of *Booth v Bosworth*[4], Justice Branson suggested the preferred interpretation of likely was that "likely" means "*prone, with a propensity or liable*", and a "*real or not remote chance or possibility regardless of whether it is less or more than fifty per cent*".

So "likely", when used in the context of determining whether an action requires or required approval under Part 3 of the EPBC Act, will be taken to include possible impacts, provided there is a real chance of the relevant impact occurring.

to have a "significant impact"...

The notion of "significant impact" is a key factor in determining whether actions require approval under the EPBC Act. However, the EPBC Act does not define the term. The only authoritative statement of the meaning of "significant impact" under the EPBC Act is again provided by the Federal Court case of *Booth v Bosworth*, where Justice Branson agreed that a "significant impact" is one that is "*important, notable or of consequence having regard to its context and intensity*". A more recent Federal Court case approved this definition[5].

DEH has also produced administrative guidelines[6] on what a significant impact is in relation to Matters of National Environmental Significance. These guidelines are not legally binding. However, they do provide a clear indication of the criteria that the Minister and DEH will apply to determine if an action triggers the EPBC Act and requires Ministerial approval.

on a matters protected under Part 3

The matters protected under Part 3 of the EPBC Act can be divided into two categories:

A. matters of National Environmental Significance (Part 3, Division 1), which are:

- the world heritage values[7] of declared World Heritage properties[8];
- the national heritage values of National Heritage places[9];
- the ecological character[10] of declared Ramsar wetlands[11];
- threatened species[12] and ecological communities[13] listed under the EPBC Act;
- migratory species listed under the EPBC Act[14];
- nuclear actions[15] that are likely to have a significant impact on the environment;
- the Commonwealth marine environment[16].

B. proposals involving the Commonwealth (Part 3, Division 2), which are actions:

- carried out on Commonwealth land[17] that are likely to have a significant impact on the environment[18] anywhere;
- taken outside Commonwealth land that are likely to have a significant impact on the environment on Commonwealth land;

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- undertaken by the Commonwealth or a Commonwealth agency[19] anywhere in the world that are likely to have a significant impact on the environment anywhere;
- likely to have a significant impact on the Commonwealth heritage values of a place listed on the Commonwealth Heritage List[20].

A common misconception is that the EPBC Act, like the law it replaced, only applies to Commonwealth land. This is not the case. There are a few provisions that only relate to Commonwealth land (Part 3, Division 2), but the majority of the EPBC Act, including those provisions that protect Matters of National Environmental Significance apply to all land types in Australia, such as privately owned or leasehold property. This means, for example, that threatened species are just as protected in the back yard of private properties as they are in a Commonwealth reserve.

EPBC Act Process

The EPBC Act referral, assessment and approval process has five basic stages.

STAGE 1	An action is referred to, or "called in" by, the Minister.
STAGE 2	The Minister decides whether the action is a "controlled action", i.e. whether it triggers the EPBC Act and requires approval, or is eligible for a manner specified decision.
STAGE 3	If the action is a controlled action, the Minister decides what level of assessment report is appropriate.
STAGE 4	The assessment is carried out.
STAGE 5	The Minister decides whether to approve, and, on what conditions.

Referral to, or calling in by, the Minister (Stage 1)

A person undertaking an action that may have a significant impact on a matter protected under Part 3 of the EPBC Act must refer details of the action to the Minister for examination of whether environmental impact assessment is required. If the person fails to make a referral in relation to the action, the Minister may "call in" the action, that is, the Minister can initiate the process. Commonwealth, State and Territory agencies may also refer actions that another person proposes, that is, these agencies can make third party referrals.

While members of the public cannot refer someone else's action to the Minister, they can contact the Minister or DEH and ask that the Minister "call in" the action. DEH will then contact the person undertaking the action and require them to provide the Minister with information about the action to assess whether a referral must be made.

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Controlled action decision (Stage 2)

Upon receiving a referral, the Minister must determine whether the action triggers the EPBC Act and thus requires environmental impact assessment and approval. At this stage the Minister can make one of three decisions:

- Approval not required – this means that the action did not trigger the EPBC Act and can proceed (assuming all other approvals are in place);
- Approval not required manner specified – this means that so long as the action is done in a particular way then the EPBC Act is not triggered and the action can proceed (assuming all other approvals are in place); or

- Approval required – this means that the proposed action is a "controlled action" as it has triggered the EPBC Act and must be assessed and approved by the Minister before it can be taken.

Approval not required - Manner specified (or Particular Manner)

The Minister can declare that an action does not require EPBC approval so long as it is done in a particular way. The Minister can only make a manner specified decision if, as part of and at the same time as the action, the proponent can do certain specified things that will ensure that the impacts on the Part 3 matters are avoided or mitigated to the extent that a significant impact will not occur.

To qualify for a manner specified decision, the manner in which it is proposed to take the action cannot simply compensate for a significant impact but must directly avoid or mitigate the physical impacts of the action. Usually this means that if the action were not done in the particular way specified it would have a significant impact on a matter protected under Part 3. For example, if a proponent is affecting an EPBC listed species by clearing its habitat, the proponent may be eligible for a manner specified decision if they are going to mitigate the impact on listed wildlife by leaving a buffer and a wildlife corridor. However, they are not eligible for a manner specified decision if they are going to compensate for the impact by planting or restoring habitat elsewhere. This planting or restoration is compensation, not mitigation, and is something that may be included in the conditions that can be attached to the approval.

Approval required decision

If the Minister determines that an action is a controlled action, the Minister must identify which provisions of Part 3 are the "controlling provisions" for the action (ie the sections of the EPBC Act that relate to the protected matters that are likely to be significantly affected by the proposed action). For example, if a proposed action requires approval under the EPBC Act because it is likely to have a significant impact on an endangered ecological community, the controlling provisions are those provisions in Part 3 that provide protection for listed threatened ecological communities — ss.18 and 18A. This decision is important as it determines the scope of the assessment that is carried out for the purposes of the EPBC Act.

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Assessment decision (Stage 3)

The Minister may choose between five alternate methods of assessment:

- accredited assessment process;
- assessment on preliminary documentation;
- public environment report;
- environmental impact statement; and
- public inquiry.

In choosing the method of assessment, the Minister will consider the information provided by the proponent on the potential impacts of the proposed action and, if the action will be carried out in a State or Territory, comments received from the relevant State or Territory Government. After the Minister chooses the assessment approach, the proponent usually carries out the majority of the work associated with the assessment.

Environmental Assessment (Stage 4)

Once the Minister has determined what level of assessment report is appropriate, an assessment must be carried out on the "relevant impacts" of the proposed action, i.e. the potential impacts of the action on the matters protected under Part 3 that the Minister determined are likely to be affected by the proposal. For example, if the Minister determines that a proposed action requires approval on the grounds it is likely to have a significant impact on a Ramsar wetland, the controlling provisions are s16 and s17B and the relevant impacts for the assessment are the potential impacts of the action on the ecological character of that wetland. The broader environmental impacts of an action will not usually be assessed on the basis that they are assessed under applicable State and Territory assessment processes.

The EPBC Act also allows the Australian Government to make bilateral agreements[21]. Under these assessment bilaterals, certain actions that require approval under the EPBC Act will be assessed under accredited State/Territory processes. What this means is that at the completion of the State/Territory assessment process, the State/Territory provides the Minister with a report on the "relevant impacts" of the proposed action. The Minister then uses this report in the same way as an EPBC Act assessment report when deciding whether or not to approve the action under the EPBC Act.

EPBC Act Approval (Stage 5)

After the completion of the assessment process, the Minister must decide whether or not to approve the proposed action and, if it is approved, whether to impose conditions on the approval. The Minister is usually required to make this decision within 30 days of the completion of the assessment process. In deciding whether or not to approve a proposed action, and what conditions to attach to an approval, the Minister must consider:

- issues relevant to the matters protected under Part 3 of the EPBC Act that the Minister determined are likely to be affected by the proposal;
- economic matters; and
- social matters.

The Minister is also required to take into account the "principles of ecologically sustainable development", the assessment report, any applicable plans and any other information presented to the Minister on the relevant impacts of the proposed activity (which presumably includes public submissions). The Minister may also consider the environmental history of the person proposing to take the action when deciding whether or not to grant an approval.

EPBC Statistics*

Each financial year, DEH publish statistics on the operation of the EPBC Act as part of its Annual report. These stats show, for example, that 62% of all referrals are declared Approval Not Required and immediately exit the EPBC Act system. While of the 23% that are required to under go assessment under the Act, 71 % are assessed simply on the Preliminary documentation that formed part of the referral. Only 8% of the referrals needing assessment actually undergo an Environmental impact assessment under the EPBC Act.

*As reported in the DEH Annual reports

	2000-01	2001-02	2002-03	2003-04	2004-05	Total	As %
Referrals							
Referrals received	294	309	337	292	360	1591	
Referrals processed	272	289	306	263	325	1556	98%
Controlled Action Decision							
Approval not required	161	196	175	194	239	962	62%
Approval not required – Particular Manner	30	17	75	38	44	212	15%
Approval Required – Controlled Action	72	95	75	54	63	354	23%
Assessment							
Referrals Assessed	17	28	35	27	38	146	
... Preliminary Document	17	23	21	21	24	104	71%
... under Bilateral	0	2	1	0	1	4	3%
... Public Environment Report	0	0	1	0	2	3	2%
... EIS	0	0	5	1	3	9	6%
... Public Enquiry	0	0	0	0	0	0	0
... Accredited Assessment	0	3	7	5	8	26	18%
Approvals							
Approved	8	26	26	27	28	115	
... with conditions	6	22	24	25	26	103	90%
... without conditions	2	4	1	1	2	10	9%
Refusals							
Refused	0	0	1	1	0	2	1%

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2. Public Participation Processes

2a. An outline of EPBC Act public participation processes

Making submissions as part of the Referral and Assessment process

Commenting on whether an action is "controlled"

As soon as practicable after receiving a referral, the Minister must publish a notice on the DEH website[22] inviting the community to provide comments on whether the action is a controlled action.[23] The community has 10 business days from the date of that notice to submit their comments on whether the proposed action is likely to have a significant impact on a matter protected under Part 3.

While 10 business days is a short amount of time, at this stage of the process the community submissions are not required to go into the merits of the action. The only relevant question at this stage is whether the project likely to have a significant impact on a matter protected under Part 3 of the Act?

Consequently, in deciding whether or not the proposal is a controlled action (i.e. whether or not it triggers the EPBC Act and needs assessment), the Minister must only have regard to the adverse impacts of the project on the matters protected under Part 3.

This means that in general terms there is no need for community submissions to counter any substantive arguments made by the proponent in the referral in terms of beneficial outcomes from the proposed action. For example, at this stage of the process the Minister can not take into account that a proposed coastal resort development will create local jobs in its construction phase and ongoing jobs in its operational phase.

The one area where it is necessary to counter substantive statements made by the proponent in its referral is if the proponent has suggested they can do certain specified things that will ensure that impacts on matters protected under Part 3 of the EPBC Act are avoided or mitigated to the extent that a significant impact will not occur. This would indicate that the proponent believes that they are eligible for a "manner specified" decision[24].

This initial phase of comments is crucial. If the Minister finds that the action is not likely to have a significant impact on a matter protected under Part 3, then the action is not a 'controlled action' and it can proceed without being assessed under the EPBC Act.

Commenting at the assessment stage

If an action is a controlled action, (i.e. it requires approval under the EPBC Act), then the community is given a further opportunity to comment on the action during the assessment phase (stage 4 of the process).

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While the EPBC Act does not provide an opportunity for comment on how the action should be assessed, there is nothing to prevent a member of the public from expressing a view as to which level of assessment is appropriate. This can be done as part of any comments made at the controlled action stage, or can be done separately by writing a letter to the Minister calling for the project to be assessed in a certain way after the controlled action decision has been made.

As discussed earlier, assessment of actions under the EPBC Act[25] can take a number of alternative forms. The Minister is responsible for determining which of these assessment approaches is appropriate for each action. How the community can participate and how long the period for comment is, will depend on what type of assessment the Minister has chosen.

The community is able to comment on:

- The adequacy of the documentation (does it consider all the relevant impacts; is any of the information inaccurate; is the science flawed; have all relevant issues and environmental impacts, both short term and long term, been adequately identified; have all important alternatives been adequately evaluated; are the references valid; will the mitigation measures work) ; and

- Whether the proposed action should be approved and, if it is approved, on what conditions (what matters should be protected; how should they be protected; what types of mitigation or compensation measures should be implemented; is it in line with the recovery or management plans).

If the action is being assessed under the EPBC Act by way of preliminary documentation, public environment report or environmental impact statement, after the close of the public submission phase, the proponent must finalise the assessment documentation after taking into account the public comments. The final assessment documentation is then submitted to the Minister, along with copies of all public submissions. After the final assessment documentation has been submitted, the Secretary of DEH must prepare a report (called an "assessment report") on the proposed action and give it to the Minister. The Minister uses this assessment report as the basis of the decision whether or not to approve the action.

If the action is being assessed under the EPBC Act by way of a public inquiry, in most cases it is likely that the public will be able to make both written and verbal submissions to the inquiry. However, there is no set procedure and the opportunities for public involvement will vary. At the completion of a public inquiry or accredited assessment, the Commissioners will provide the Minister with a report on the relevant impacts of the action. The Minister will then use this report as the basis of the decision whether or not to approve the action.

If a bilateral agreement is in place that accredits a State/Territory assessment process, the State via its assessment process will assess the project. Similarly, if a Ministerial declaration is made that accredits the assessment process of another Agency, such as the GBRMPA, that other Agency will assess the action. However, this does not alter the community's right to submit comments on the referral being assessed and it can be expected that members of the public will at least be given an opportunity to make submissions on draft assessment documentation and whether the relevant action should be approved.

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Community Participation in Biodiversity Protection

The community can also participate in the provisions under the EPBC Act that offer protection to listed threatened species and ecological communities, listed migratory species, listed marine species, and cetaceans.

Members of the public can:

- nominate species or ecological communities for listing as threatened;
- nominate key threatening processes[26];
- be involved in making recovery plans[27], threat abatement plans[28] and wildlife conservation plans[29];
- submit comment on applications for permits affecting listed species and ecological communities and cetaceans; and
- comment on strategic assessments.

Nomination

Any member of the community can nominate a native species, ecological community or threatening process for inclusion on the relevant EPBC list. Nomination forms and guidelines on making nominations are available on the DEH website[30].

Nominations are submitted to the Minister, who then gives the nomination to the Threatened Species Scientific Committee ("TSSC") for an assessment on whether the native species, ecological community or threatening process meets the listing criteria[31]. The TSSC has 12 months to provide its assessment to the Minister. After the TSSC submits its assessment to the Minister, the Minister has 90 days to decide whether or not to include the native species, ecological community or threatening process on the relevant list.

There is no statutory process for the provision of public comments on nominations. However, the Minister has instituted a practice of calling for public comments on all nominations after the TSSC has submitted its assessment. Notices calling for public comments on nominations are published on the DEH website[32].

Plans

Any group of interested people can form themselves into a recovery team to write a recovery plan or wildlife conservation plan for submission to DEH. DEH and the TSSC will then evaluate the plan to see whether it meets the requirements of the EPBC Act and to ensure that it is appropriate. The plan will then be submitted to the Minister for endorsement. Once endorsed, the plan can be implemented, monitored and evaluated by the recovery team.

Guidelines on how to write plans and what they must contain are available on the DEH Website[33].

All draft recovery plans, wildlife conservation plans and threat abatement plans are advertised for public comment before adoption by the Minister. Members of the community will have a minimum of 3 months to submit comments on a draft plan and the Minister is required to consider these comments before finalising the plan.

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Permits

A permit is required[34] to do any of the following in a Commonwealth area (which includes a Commonwealth marine area):

- take an action that results in the death or injury of a member of a listed threatened species[35], or ecological community or listed marine species[36];
- take, trade, keep or move a member of a listed threatened species[37] or ecological community or a listed marine species[38]; or
- take an action that significantly damages habitat that is listed on the Register of Critical Habitat as critical to the survival of a listed threatened species or ecological community[39];

Under Part 13, Division 3, a permit is also required to:

- kill, injure, take, trade, keep, move or "interfere with" a cetacean in the Australian Whale Sanctuary[40] or on the high seas[41] ; or
- possess a cetacean or any part of a cetacean that has been killed or taken illegally.

If members of the public whose "interests are affected" by the Minister's decision to grant a permit are dissatisfied with the decision, they can appeal to the Administrative Appeals Tribunal ("AAT")[42].

Members of the community can also apply to be included on the register for consultation on permit applications[43]. Once a year, the Minister will publish a notice on the DEH website inviting members of the public to register their names on the public consultation register. To register, all a member of the public needs to do is write to the Minister during the period specified in the notice and ask to be included on the register.

Once included on the register, the member of the public will receive notice of all permit applications made under Part 13[44] and be asked to provide comments on whether the permits should be issued.

Strategic Assessments

The Minister can agree to carry out a "strategic assessment" of a policy, plan or program[45] to consider the impacts of actions taken under a policy, plan or program on any matter protected under Part 3.

Where policies, plans and programs are assessed in this manner, the Minister can decide on a less onerous assessment approach for the assessment of actions taken under those policies, plans or programs, and, in certain circumstances, can exempt the actions from the standard assessment and approval processes under the EPBC Act.

The most common instance where strategic assessments will be used is in relation to fisheries management plans for Commonwealth managed fisheries. The EPBC Act[46] requires all fisheries management plans for Commonwealth managed fisheries to undergo a strategic assessment. Where the Minister endorses a fisheries management plan, the Minister is required to exempt actions that are approved under the plan from the requirement to obtain approval under the EPBC Act[47].

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Members of the community can comment both on the draft terms of reference for the report and the draft report itself. Again, notices calling for comment are published on DEH's website.

Community Participation with Commonwealth Marine Protected Areas

The Governor-General can proclaim[48] a Commonwealth reserve over the sea in, and seabed under, a Commonwealth marine area or over an area of sea outside Australian waters in respect of which Australia has obligations under an international agreement. These areas are commonly known as Commonwealth Marine Protected Areas ("**MPAs**").

Before proclaiming a MPA, the Director of National Parks must prepare a report on the proposed proclamation. In preparing the report, the Director must invite the community to comment on the proposed proclamation. The notice must be published on DEH's website and the Director must consider any comments received in preparing the report on the proposed proclamation.

There is a further opportunity for members of the public to participate in Commonwealth MPAs by way of the preparation of management plans. Members of the public will be given an opportunity to comment on:

- a proposal to prepare a draft management plan; and
- the draft management plan.

Notices inviting comments on these matters must be published in the Gazette, a daily newspaper circulating in each State and Territory and should also be published on DEH's website. The Director must consider any comments received in preparing a draft management plan.

Community Participation in Enforcement

Members of the public cannot refer someone else's action to the Minister even if it is clear that the action triggers the EPBC Act. What community members can do is contact the Minister or DEH and ask them to "call in" the action or to take appropriate measures. DEH will then contact the person undertaking the action and require them to provide the Minister with information so that the action can be assessed as to whether it may trigger the EPBC Act and whether the proponent needs to make a referral.

Members of the public can not directly prosecute a person for breaching the EPBC Act - only the Australian Government can do that; however, "an interested person"[49] or "person aggrieved"[50] may:

- provide DEH with enough information about the breach so that they can investigate;
- seek an injunction in the Federal Court to remedy or restrain a breach of the EPBC Act; and
- apply to the Federal Court for judicial review[51] of a decision made under the EPBC Act.

The standing requirements[52] under the EPBC Act have been broadened to include persons and companies:

> who have engaged in a series of activities related to, and companies whose objects or purpose relate to, the protection or conservation of, or research into, the environment, at any time within 2 years prior to the application being made.

Seeking an injunction

Under the EPBC Act an "interested person" can obtain an injunction to prevent or require action if another person has engaged, engages or proposes to engage in conduct consisting of an act or omission that constitutes an offence or other contravention of the EPBC Act.

In *Booth v Bosworth* for example, Dr Booth obtained an injunction to prevent a farmer, Mr Bosworth, from operating the electric grids he was using to protect his crop by killing flying foxes. Dr Booth met the standing requirements as she had been involved in the conservation of the environment. She successfully argued that Mr Bosworth's operation of his grid was a contravention of the EPBC Act as it was likely to have a significant impact on the listed world heritage values of the Wet Tropics, and Mr Bosworth had not obtained the consent of the Minister.

The EPBC Act also changes the usual requirements that the Federal Court applies before it will issue an injunction. Under the EPBC Act, the Federal Court can issue an injunction irrespective of whether it appears the perpetrator will continue to engage in the illegal conduct. This removed the need to show that there is a real ongoing risk of the perpetrator engaging in an illegal act in the future.

A person seeking an "interim injunction" (i.e. an injunction issued prior to the main hearing) is also usually required to provide a financial undertaking to the Court, so that if their case is unsuccessful, the defendant will be compensated for any loss suffered as a result of them stopping their activities. However, the EPBC Act specifically states that the Federal Court cannot require a financial undertaking as a condition of granting an interim injunction under the EPBC Act.

Internal review by the Minister

An interested person can also request that the Minister reconsider decisions made under the Act. The Minister can only reconsider controlled action decisions[53] in limited circumstances. These include where:

- there is "substantial new information" about the likely impacts of the action on a matter protected under Part 3;
- there has been a "substantial change in circumstances" since the first decision that relates to the likely impacts of the action on a matter protected under Part 3;
- the Minister determined the proposed action did not require approval because it will be carried out in a specified manner, and the action is not being, or will not be, carried out in the specified manner; or
- the Minister determined the proposed action did not require approval because it was exempt under a bilateral agreement or a declaration made by the Minister under s.33 (in relation to actions taken under an accredited management plan), and the bilateral

agreement or declaration no longer applies or the relevant management plan is no longer in force.

However, once the Minister has made a controlled action decision, that decision can only be reviewed before the proponent undertakes the relevant action. For example, if the Minister determines that land clearing is not a controlled action, then the Minister cannot change that decision after the proponent has cleared his land.

There are similar restrictions on when the Minister can revoke or suspend an approval, or amend the conditions of approval. These generally require the action to have had a significant impact on a relevant matter protected under Part 3, where the relevant impact was not identified during the original assessment and/or the proponent has contravened a condition of the approval.

Judicial review by the Federal Court

The other avenue to challenge one of the Minister's decisions is to seek judicial review of the decision in the Federal Court. The appeal is a legal review rather then a merits review so the court is asking 'in making the decision, did the Minister apply the law?" rather then "did the Minister make a good decision".

2b. The Community's experience

The 'word on the street' with regard to public participation with the EPBC Act is not pretty. Indeed, after hundreds hours speaking to stakeholders, the EPBC Project staff did not hear one report of an interaction between the Community and the EPBC Act that left the community feeling empowered. There are obviously many self reporting biases mixed up with that fact; however, even if there were a multitude of good reports that were left unsaid, the bad reports point to some serious deficiencies in the public participation processes available under the EPBC Act.

Deserved or not, a significant proportion of complaints the Project received were related to how the community felt the staff at DEH had treated them. This is caught in a few different parts – some thought DEH had dismissed them out of hand or treated them with distain, others though that DEH was protecting the proponent as if the proponent were a DEH client, others simply complain about a lack of response from DEH when they requested information. Another area of compliant was the process itself, the community feeling that their input made no difference to the outcome.

Proponents as DEH clients

A common complaint from community members was that when they deal with DEH it comes across as if DEH regards the proponent as their 'client'. One enquiry the Project received was with regard to dams being built on a nearby property. The community member complained that the proponent had been in breach of the approval a couple of times and DEH just kept extending it, without re-examining whether the action should actually be allowed to go ahead without assessment. The caller has expressed frustration that DEH staff simply told him that the decisions were made by the Minister and there was nothing he could do. Looking at referral[54], the Project could do little but agree that it perhaps was not the best decision.

In 30 May 2005 a referral went in for the construction of dams in a dairy farm on the Fleurieu Peninsular in SA. Here the sell by the proponent was that some "degrade swamps" listed as an endangered ecological community would be fenced, some would be cleared and these new dams would be built (the proponent provided no hydrological information on how the construction of the dams would effect the newly fenced EPBC Act protected swamps).

On 27 April 2005 the action was declared a Controlled Action, but on 13 May 2005 the Minister changed that decision to a Not Controlled Action - particular manner, the particular manner being that the fencing works be completed by 13 October 2005, the place be managed in accordance with a plan and a certified audit supplied by 13 May 2006. On 1 December 2005, when the proponent had been in breach of the particular manner specified for 2 months, the Minister reconsidered a second time, providing a further 6 months for fencing. On 25 May 2006, again, after the time period expired, the Minister made another reconsideration providing another 12 months for works to be completed. Note that the fencing and management provisions were not expressed as preconditions to the construction of the dams and that the second and third reconsiderations were based on the information provided in the first instance.

Not only was there a lack of information in the referral, there is some concern whether the Minister improperly took an off set into account when making a Particular Manner decision, whether the action was actually eligible for a manner specified decision and whether the Minister is using s78 in a way that was not intended. It seemed to the caller that DEH was bending over backwards to help this proponent.

s78(1)(b) of the EPBC Act provides that where the Minister makes a manner specified decision, if the Minister is satisfied that the action is not being, or will not be, taken in the manner identified, then the Minister can revoke the decision and substitute a new decision. The intention of s78(1)(b) is that where the Minister has declared that an action is not controlled because it will be done in a particular way, if it comes clear that it will not be done in that way then the Minister can revoke the not controlled decision and make it a controlled action that requires assessment. s78 is not intended to provide for rolling consent so that a proponent doesn't breach the EPBC Act.

Behind closed door meetings

Another area that gives rise to the feeling that DEH sees proponents as their clients, as well as raising community suspicions, is DEH's fondness for providing advice 'off the record' to proponents with regard to what they can do to avoid making a referral, or what should be included within the referral document so that the action can be declared Not Controlled or assessed on preliminary documentation. When the Project expressed disquiet about this practice to DEH staff, the Project was told that DEH see it as an efficiency tool and they make no secret of the fact that it is common practice. Indeed, one of the referrals the Project received a call of compliant about made the DEH Annual Report as a demonstration of "the department's ability to assist proponents with the assessment process and achieve sound environmental outcomes"[55].

The action involved a 200 ha development and operation of a pearl oyster facility at four sites in the Great Sandy Strait. The action was likely to have a significant impact on humpback whales, 4 species of turtles, dugong, Indo-Pacific humpback dolphins, and a Ramsar wetland. As stated in the annual report:

Prior to formally submitting preliminary documentation for the proposed action in August 2004, the proponent sought extensive advice from the department on the range of potential impacts that the department might need to consider during assessment under the EPBC Act. As a result of these discussions, the proponent submitted preliminary documentation that clearly addressed all the key issues of concern and enabled the proposal to be assessed on the preliminary documentation.

The concern was that DEH instructed the proponent what to include within the documents so that the assessment was little more then a tick the box exercise. This feeling was exacerbated by the fact that in 2002, the proponent had put in a referral regarding the proposed action. That referral was declared a controlled action and subsequently withdrawn in 2004. Because it was referred as a controlled action the referral document is not available on the website, so there is no way of easily ascertaining what substantive changes were made to information contained in the subsequent re-referral after the "discussions" with DEH.

Lack of Reponses to Community Input

The EPBC Project received many reports from community groups and individuals, who have endeavoured to engage with the referral and assessment system, that their comments and input are not taken seriously by DEH. In one example, a community member called us frustrated that she had not received a letter acknowledging the receipt her input into the referral and assessment process. While it may not be the case, without adequate acknowledgment of their input, the community's perception of DEH's attitude towards them is that they are little more than a troublesome stakeholder that can be 'blown off'. This it is something that could be easily improved through a standard system to respond to those who have taken time and effort to provide input.

DEH does not appear to appreciate just how much effort it takes a community group to get together and submit comments on referrals. The proponents and their consultants do this as a full time job, where as most community activists have full time jobs, and families and lives and do advocacy work in their 'spare' time. Simple acknowledgement of the input would go a long way.

In another case, a community group got together experts in particular fields to prepare a report addressing the claims made in assessment and referral documentation. Despite being put together by people who professionally worked in the field they addressed, the community felt the report was discounted out of hand by DEH. The proponent's claims were accepted as fact and the Minister made no reference to the community's report in the Statement of Reasons. Nor was there any feedback as to why the opinions of professionals paid by the proponent were more valid than the conflicting opinions of professionals who donated their time to the community.

Another all to common request was the community asking the Project to follow up on letters sent to DEH requesting that the Minister exercise his statutory power under s70 to call in a proposal for a determination as to whether it required assessment and approval under the EPBC Act. In most cases, this power is exercised through the DEH compliance team – they are the ones to process and investigate 'call in' requests. Because there is so little in the way of on-ground compliance staff around the country, the community effectively become the eyes and ears of DEH, and this is one of the ways that they seek to ensure compliance with the EPBC Act. The EPBC Project has a proforma 'call in' letter that provides a framework for community members writing these letters, and Project staff often looked over these letters before community groups send them in to the DEH compliance section.

Again a simple letter in response, indeed a pro-forma 'we got your letter and we'll get back to you' that is automatically sent out on receipt of requests for the Minister to call something in would have gone a long way to easing community concerns. The Project has assisted community members who had waited months and sent 3 – 4 letters to DEH without receiving a single response from DEH.

In addition, the Project is unsure of how many of these requests lead to subsequent 'call ins' of actions. The Project's anecdotal evidence would indicate that very few of these requests are successful, if any. From experience helping community members with this type of correspondence, at least some of these requests would be for borderline actions that might not trigger the Act. However, this same experience would indicate that at a large body of these requests are for fairly large-scale activities that may well trigger the EPBC Act.

Frustrating Community Efforts

The advice the community received from DEH about what could be done in particular circumstances was also often questionable. In some cases callers to the Project's advisory service were calling to check something that DEH had told them that "didn't sound quite right", advice such as:

- it is being assessed by the State so there is no right to public comment;
- the community can not get access to the assessment documents;
- the Proponent gets the public comments and the Minister can not see them;
- only the proponent can appeal the Minister's decisions;
- the action must happen entirely in Commonwealth waters to trigger s 23 and 24A;
- the action must result in the death of a large number of a species to trigger the Act;
- the action must occur in the wetland to trigger the Act.

There have been times when a concerned community member has called the compliance line only to be told that while it does sound like the action should have been referred, it had been done now and there was nothing DEH could do about it.

In another case, a concern citizen contacted the Director of one the DEH divisions with regard to some drilling activity at a proposed mine site. The Director told the caller that there was nothing that the caller could do and nothing that DEH could do until the company had substantially breached the EPBC Act. The Project called the DEH Director to check and confirm that he did not tell her about the ability to request that the Minister call something in, that she could get an injunction or indeed that the Minister could get an injunction.

The Project received many reports that DEH has told community members who were seeking to make request that the Minister 'call in' an action, that they have no right to third party referral of actions (when in fact they are not doing so). The Project stressed to people writing these letters or making calls that they have to be explicit in their request that they are seeking a 'call in' of the action rather than referring the action itself. Even with this express statement however, some members of the community were told by DEH staff that there was no right to request that the Minister call something in and what they were doing wasn't allowable as a third party referral.

Another perception the community obtained from their contact with DEH is that DEH is not interested in allegations of false or misleading information, even where the community can

provide evidence to support their claims that the information is false. The community's claims and evidence are usually dismissed by DEH out of hand.

Third party referrals

State and Territory agencies have the right to make third party referrals where they are aware of any action that may trigger the EPBC Act and where they have some administrative responsibility. Given the lack of DEH compliance staff in the field, this would seem to be another key feature of the EPBC Act that DEH could encourage in order to effect greater compliance with the legislation.

However, the EPBC Project has anecdotal evidence that this right is not being exercised by State agencies. One reason for this is the obvious political dynamics between the State / Territory governments and the Australian Government. For example, State Parks staff recently told Project staff that they believed an operator in a World Heritage area should have made an EPBC Act referral for development activities. These staff members attempted to get their State agency to make a third party referral of the action to DEH. However, the agency refused to do so, largely because of the political dynamics.

This left staff considering whether to write a 'call in' letter as concerned individuals. But this would have had personal and professional ramifications with regard to their positions in the Agency. So the development was never referred and nothing more was done about it, even though it was highly likely that it did trigger the EPBC Act.

During a workshop series in south west WA, State Agency Staff attended each of the 4 workshops. At each of the workshops the Project said that under s69 State Agencies can make a third party referral, where they have administrative responsibilities. At each one of the 4 workshops a staffer from a particular Agency put up their hands and said that DEH had provided workshops specifically for the agency in question and had expressly told them that they could not make third party referrals.

Suspicion missed nonfictions

Without fail, the EPBC Project would receive numerous calls after posting a "missed notification" on the EPBC Notices. A missed notification occurs, simply, when DEH has failed to adhere to the notification requirements and cures this by simply added a "missed notification" to the public notices page on the DEH website. There have been 43 missed notifications. For some more controversial projects, such as the Hazelwood mine project, DEH issued 2 missed notifications for the one referral, DEH waiting 6 months to post a "missed notification" notifying the community of the assessment approach and posting the notification of approval 10 days after the decision was made (almost halving the initial time frame available relating to appeals).

By far the majority of missed notices have related to assessment including the method of assessment (44%), the availability of assessment documentation (44%). Missing notifications relating to the availability of assessment documents puts further strain on the community's limited ability to participate in the EPBC Act processes.

Missed Public comment opportunities at the referral stage

As soon as practicable after receiving a referral, DEH will post it up on the invitations to comment page on the DEH Website. This is the only public notification of the referral. There is no notification in local newspapers. There is no notification to relevant local authorities. DEH will, however, notify a State or Territory Government contact person, whose job it is to notify relevant stakeholders (predominantly State / Territory government representatives) to let them know of the opportunity to comment on the referred proposal.

When conducting workshops with a broad range of stakeholders, this practice is met with frustration, derision and cynicism. The feeling of the general community and environmental professionals is that this is simply not an adequate notification system. In most cases, the referral (as well as the community opportunity to comment on the referral) slips by unnoticed.

The implication of this is that the proponent can get away with providing inadequate and sometimes even inaccurate information in the referral documentation, which DEH will use to make their 'controlled action' decision, and where the action is deemed a controlled action, often forms the basis of the assessment of the action.

Referrals should be widely advertised in both local and state newspapers. Such a advertisement system works adequately for most other planning schemes. The current practice assumes that the community knows about the EPBC Act, the relevant department, the website and the public notifications page. It also assumes that the community has weekly access to the internet. The Project did workshops in Western Australia where this was met with a laugh and the comment that it's hard to get a phone line out let alone an internet connection.

By solely using the public notifications page on the website, DEH is actively denying a whole segment of the community the ability to participate in the EPBC Act processes. Even if DEH chose to keep the current web-based notification scheme, there are many things that could be done to improve it such as:

- develop a subscriber service where by people can get auto notices when a referral is lodged matching their pre defined criteria, such as Local Government area, region, or State;
- automatically inform local government that a referral has been lodged in their area; and
- put a link to the public notices from the DEH home page.

This first call for public comments can be vitally important, simply because if an action is declared a Not Controlled action, it exits the EPBC Act system and may well represent an opportunity lost.

No information on actions referred as controlled

As discussed above, as soon as practicable after receiving a referral, DEH will post it on the invitations to comment page on the DEH Website. There is one exception to this, namely, the Minister is not required to call for public comment on a referral if the proponent states in the referral form that it believes the action is a controlled action.

In practical terms, this is understandable as there is no need for comments on whether something is a controlled action when the proponent submits that it is. However, the problem then becomes a lack of information about the action. When asking for comment DEH posts the referral form as submitted and any maps on the website. Because they don't call for comments where the proponent states that it is a controlled action DEH does not post the referral. When the referral is declared a controlled action, again, only the declaration is posted not the referral. This means that there is no easy way for the community to find out information about the action so they can make a decision as to whether they want to go through the process of securing access to the assessment documents, documents that they may have to pay for.

The Community also finds this practice extremely frustrating as it deprives them of the extra time whereby they could be organising themselves to put in submissions on the assessment documentation.

Short time frame

With regard to the public comment period on whether the action triggers the EPBC Act, ie whether it is a controlled action, the comment period is only 10 business days from the date that the notification is published on the DEH website. For community groups this is not nearly enough time to get a submission into DEH. Combine this with the fact that the group is often not aware until the last minute that a referral has been made and that they have the right of comment. With a time frame of only 10 business days, the right for community input into whether an action is control can not be effective.

Commenting at the assessment stage

Where a referral is being assessed by preliminary documentation, PER or EIS, the community provides comments on the assessment documentation directly to the proponent. The proponent then reviews the comments, amends the assessment documentation to take account of the comments, and provides the amended documentation along with a copy of all the public submissions to the Minster.

Understandably, the Community is loath to provide their comments to the proponent only. There does not appear that there is any audit process whereby DEH can check that all public comments are actually passed on by the proponent. Nor is there any direct acknowledgement from DEH to the community saying that comments have been received.

Communities in small towns find it especially confronting to provide comments on assessments directly to proponents rather than DEH as they are worried about the potential ramifications, socially and economically.

Another issue is simply getting access to the assessment documentation. Assessment documents are not routinely posted up in the DEH website. It is up to the community to request the documents, for which they may be charged a fee. DEH does occasionally publish assessment documentation on its website, so the idea of posting all assessment documents on the website is feasible.

Consultants have also brought other matters to the Projects attention, such as a consultant who reported to Project staff that the results of a flora and fauna assessment he had conducted for a proponent had not been included in the assessment report as tey did not

support the proponents referral statements. In another case, a consultant was asked to time a biodiversity study to coincide with diminished or less visible flora or fauna activity (eg. timing a flora survey for a period during which native orchid species are dormant).

Desk-based decision-making

DEH assessment officers rarely, if ever, visit development sites to personally assess the potential impacts of actions. By and large, DEH assessment officers rely on the integrity and completeness of referral documentation.

In addition, being a central Canberra-based agency, DEH often does not have up-to-date local knowledge of the environmental impact issues associated with the development. There are also serious issues associated with the datasets that DEH use to assess referral. This means that relevant local data and knowledge which could improve decision-making (including the development of locally-appropriate development conditions) is frequently not available to DEH whilst making decisions.

Many EPBC Project workshops participants who have previously engaged with the EPBC Act comment about inadequacies relating to data. These criticisms include:

- Lack of adequate scale of ERIN data (eg. data, especially relating to species, becomes meaningless at the local level); and
- Use of outdated data to make decisions and set conditions (eg. especially with regard to areas where money is being poured into research, and knowledge is changing rapidly).

This is desk based assessment system is exacerbated by the strong likelihood that interested and relevant local parties are highly likely to miss initial opportunities to provide input at the referral stage.

The community are often frustrated by knowing that the information provided by the proponent and the information cited by DEH are wrong. The Project assisted a local bird group who had been surveying a local wetland area weekly for 20 years. Among the group were experienced original members, ornithologists, as well as casual birders. As part of the controlled decision the group attempted to provide information to DEH based on their observations of the decline of threatened species in their area, only to feel rebuffed when the action was declared not controlled based on the information from the proponent and the DEH database.

Community groups in Tasmania also reported that the Swift Parrot mapping used by DEH is out of date and they were not able to convince DEH to update the information on the DEH database based on local knowledge. Numerous people working on Swift Parrot recovery had expressed concern to DEH that latest research data was not being accessed and used in determining likely impacts of proposals on the parrot, with subsequent negative impacts on the species and its recovery prognosis.

Costly

The EPBC Act was the first piece of legislation in Australia that gave conservationists the right of standing. This was a marked step forward in enabling the community, as well as conservation groups, to assist in the administration of the Act and the protection of the environment. The unexpected downside of this right is the appearance of DEH to make

decisions based on the outlook that if they were wrong conservation groups would challenge the decision, if there is no challenge then the decision must be OK.

While conservationists may have been given the right to appeal the Minister's decision, they have not been given the means. Appeals under the EPBC Act, other then those relating to permits, are appeals to the Federal Court. This is a costly process. In the federal court, the fee just to file the application is $1532.00 if they are incorporated and $639.00 for individuals. Then there are lawyer's fees, copying costs, costs for subpoenas and the like. The biggest spectre preventing the group from taking action, however, is the possibility that the group may have to pay the Minister's costs if they lose. Most groups simply do not have the resources to consider using the extended standing provisions.

2c. The appropriateness and effectiveness of the public participation processes

In terms of effectiveness, one of the comments the Project heard again and again, especially from community groups who had engaged in the EPBC Act processes was that participation was a waste of time and resources, as it did not make any difference to the outcome. These concerns are outlaid in section 2b of the paper. Communities simply do not see any benefit from their participation and it is felt that their input is ignored by DEH.

In terms of appropriateness, DEH and the Minister tend to act as though public participation is not appropriate. As discussed, community submissions appear to be viewed with much less weight then the views put forward by the proponent, even where the community member in question is an expert in the area. There are also some administrative processes that affect both the effectiveness and the appropriateness of public participation, and these are discussed below in section 3b.

Judicial review is one avenue for community participation that is probably the most effective means of influencing change, however it is perhaps the most difficult to mount due to the costs and liabilities associated with it. Most of the case law so far under the EPBC Act has been meaningful and positive. However, considering the breadth of the legislation and the passage of time since its enactment, there has been very little in the way of judicial review of the operation of the Act.

This dearth of precent can be traced to lack of money, risk of damages as well as lack of knowledge. As discussed, there is a real presumption in DEH that if DEH get it wrong, they've given the community the ability to take action so, they'll take action. However, this view reflects some fundamental errors in understanding about injunctions and protections against costs.

Indeed, at a workshop run in conjunction with DEH staff, the Project had to inform the DEH staffer that their workshop content was incorrect. DEH had been saying that the community was protected against cost in relation to injunctions. That is, the community could get an interim injunction at any time and not have to worry about a claim for damages should the main injunctive proceedings fail. This is simply not the case. What the EPBC Act says is that the court can not require an amount to cover a potential damages claim to be put in trust before it will grant an injunction. It does not prohibit the granting of damages itself.

All of the court action taken challenging a decision by the Minister has been taken by a conservationists and conservation or community groups. This is not surprising considering the

limited number of refusals. If the Minister refused more referrals[56], it is likely that there would have been at least a few industry challenges.

Most people are familiar with the cases and implications so this report will look at one of the decisions that was of concern to the Project. For case notes on the other main cases, please see the Project's website www.epbc.com.au/casenotes.htm

Susan Paterson v Minister for the Environment and Heritage et al

BZ111 of 2001 Federal Magistrates Court

The Paterson case didn't make the horizons of most people because it was in the Federal Magistrates Court. The Project couldn't get anyone interested in taking the appeal. The factual and legal basis of the decision is poorly set out in the Magistrates decision, making the reasoning confusing. Long term, *Paterson* may not a particularly significant decision as it should be over-ruled or distinguished in future cases; however, it is fairly probable that in future cases the Minister will try to use the *Paterson* precedent to prevent the court from hearing the appeals of a certain type of individual. *Paterson* is the kind of reasoning that conservationists need to be very wary of, as it restricts the scope of standing.

Background

The background of the case is that Powerlink QLD is putting in a transmission line that at one point traverses Paterson's property. There was some evidence and indeed an early report that identified the grass to be disturbed by the construction as a Bluegrass community (which is listed under the EPBC Act).

Paterson joined the "Power Down Under" group, a group that had been formed to fight the powerlines. It is not set out in the facts what activities Power Down Under had undertaken as a group, but a search on the internet reveals that they had undertaken the gambit of community focused dissent activities: holding community forums, writing letters to Government Departments and Politicians, running petitions, making submissions in response to State and Federal Planning applications, having stories run in the local media. The group even put in submissions on the wider energy context to the Australian Energy Regulator (which operates as part of the ACCC).

The Minister declared the transmission lines a not controlled action. Paterson asked for an internal review of the Minister's decision. The Minister upheld his original decision. Paterson then lodged a review in the Federal Magistrates Court. Before the case could go to a full hearing, the Minister challenged whether Paterson had standing to apply to the courts. Unfortunately, the Magistrate decided that despite her work with Power Down Under, Peterson did not have standing to take action. This decision was wholly incorrect.

The Magistrates decision[57]

s.487(2) of the EPBC Act widens the scope of standing to include persons and companies who have engaged in a series of activities related to, and companies whose objects or purpose relate to, the protection or conservation of, or research into, the environment, within 2 years prior to the application being made.

The Minister argued that because Paterson had only been active on this one issue, it could not be said that she had been involved in a "series of activities". Further, the Minister argued that her activities were more consistent with "mere personal opposition" to the proposed action and were not necessarily made "for the protection or conservation of the environment".

Unfortunately, the magistrate agreed with the Minister and made a fundamental error, which will, if picked up by other courts, limit the community's ability to use the appeal provisions available to them under the EPBC Act.

Why is the Magistrate wrong?

1. Calls for a "Narrow Construction" of standing

> *"The careful way in which the qualifying criteria are set out in s.487(2), coupled with the objects at s.3(1)(a) and s.3(2)(d), mean a distinction is drawn between individuals with a long standing and demonstrated interest in environmental issues, and a person who holds a strong "one off" opposition or concern about a particular action. Because it is an extension of the rights given under the ADJR Act, s.487 should be construed more narrowly."* [para 15]

This is the first fundamental error by the Magistrate. The argument simply isn't valid. The Magistrate has actively singled out a few of the EPBC Act's objects that suited his opinion and ignored the others. However, the other objects of the EPBC Act are just as relevant and support a wider construction of s.487 than that of the Magistrate.

For example, s3(1)(d) talks of "*a co-operative approach to the protection and management of the environment involving governments, the community, land-holders ....*" or s3(2)(g)(iv) which encourages "*the involvement of the community in management planning*". By limiting the meaning of "person aggrieved" within s.487, the Magistrate's construction of s.487 does not promote these objects, or other objects of the Act relating to environment protection.

The Magistrate's statement that standing rights should be "constructed more narrowly" is flawed and not based on EPBC Act precedent. In the Nathan Dam case for example, Justice Kiefel said (at para 40) that "*no narrow approach should be taken*" to the interpretation of the EPBC Act because of the high public policy apparent in the objects of the Act.

By constructing the concept of an aggrieved person narrowly, the Magistrate is further limiting who meets the criteria by, in effect, raising the bar. For example, as discussed below, in this Magistrate's opinion, groups needed to be in existence for more then 2 years and be involved with various environmental issues. This would discount any of the new "friends of" groups, and any group, even if they have been in existence for more then 2 years, who are only active in relation to their local creek or a particular species. This narrowing is wholly inappropriate.

2. Strips standing from activists involved in single issues

The Magistrate's distinction between someone with a strong "one off" opposition and individuals with a long standing and demonstrated interest in environmental issues is not based on legal precedent. There is a piece of legislation that tells the courts how to interpret law, called, not surprisingly, the *Acts Interpretation Act* 1901. Now this Act makes it clear[58] that where a court is determining what the provisions of a section of law means:

> *"a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object."*

Even if we look only to one of the objects that the Magistrate singled out, s3(2)(d), there will clearly be cases where persons with a "one-off" opposition or concern about a particular action will be the only persons willing and able to take action "that will ensure activities that are likely to have significant impacts on the environment are properly assessed" [s.3(2)(d)]. So, by excluding such persons, the Magistrate's construction of s.487 does not promote object s.3(2)(d).

A group or individual engaged in a series of activities relating to the conservation, protection or research into the environment has standing. In this case Paterson as an individual lodged a submission asking the Minster to declare the action controlled under s.75. The Minster refused to declare the action controlled under s75. Paterson tried to use s78 to get the Minister to reconsider and revoke his original s75 decision. The Minster refused. She is now seeking judicial review of the Minister's refusal to use s.78 to revoke his earlier decision under s75. Surely Mrs Paterson's participation in the process leading up to the original s.75 decision is relevant to her standing in her current application?

As for the group, they may have been formed to take on a particular issue, but given the definition of the environment they clearly engaged in a series of activities. The Magistrate seems to have taken a very limited view of what constitutes activities "...for protection or conservation of, or research into, the environment". Again there are not enough of the established facts in the judgment. But even if the group was set up to address the resident's concerns about the impacts of the transmission line on the quality of life in the community it still may meet this part of the standing test. "Environment" is broadly defined under the EPBC Act and takes in the local "ecosystem" including "people and communities", "the quality and characteristic of places" and the social and economic aspects of the community and its qualities and characteristics.

3. Requires groups to be active for more then 2 years

> *"The group has therefore been in existence for less that 2 years, and is devoted, it seems, to a single issue."*

There are two issues here. The first is the requirement for groups to be established for longer then 2 years, and the second relates to what the group's interests are.

In terms of the requirement for the group to be in existence for more then 2 years, this is simply incorrect. s847(3) expressly states that an organisation is a person aggrieved if "at any time in the 2 years immediately before the decision...". This then is not a requirement to have "at least 2 years" but rather that at some time in the two years leading up to the decision the group was active. Power Down Under does have standing, but a group that has been dormant since the 80's does not.

There is also no requirement for the group to have more then one interest or issue. The test is a "series of activities"; it is irrelevant whether these activities relating to one issue, such as a mine development or cetaceans, or multiple issues.

4. Denies Patterson any standing other then as a landholder

> "*Her own [Paterson's] personal interest is as a landowner who claims her property is affected by the action.*"

In terms of Paterson's interests, yes she did have an interest as a landowner, but she also had an interest as an individual who, by her actions, fit within the definition of an aggrieved person under s487(2). The judgement states that Paterson's interest is not in the conservation of the environment but "*as a land owner who claims her property is affected by the action*".

Despite what other agendas Paterson may have had, the basis of her claim is that the grassland community inhabiting her land may be significantly impacted by the action. The fact that she owns the land that the Bluegrass community inhabits should be irrelevant. Surely the court is not suggesting that Paterson does not have standing to protect a threatened ecological community on her land because this means that her interest is a personal one? Does this would mean that she can not protect her own land but must find an independent interested person to take the action, someone who has no equitable interest in the place being protected?

To examine this point – what does a farmer have to do have standing (as an interested person or person aggrieved rather then as a landowner) to take action to protect habitat on their land? Say we have a farmer with a wetland. The wetland is habitat for EPBC listed threatened species. The neighbour wants to do something that will affect the wetland and it has been declared not a controlled action. In order to appeal that decision the farmer has to meet the "interested person" test. The fact that he has personal interests as the land holder is not enough. What does he have to have done to that wetland in the two years prior to the Ministers decision to establish standing? Is a management regime enough? Is pulling weeds for habitat maintenance enough? Or is it the case that because he owns the land his personal interest precludes his meeting the test for any activities that potentially affect his land unless he was also involved in other environmental issues off site?

Why is the Project concerned?

Paterson is a dangerous case it:

- narrowly interprets the extended standing provisions;
- requires interested persons to be involved in more than one environmental issue;
- requires more then standard community advocacy to rate as a "series of actions";
- requires groups to have been in existence for more then 2 years;
- denies standing as 'interested persons' to individuals with an equitable interest in the relevant area; and
- shows that the Minster is willing to argue against relevant stakeholder's having standing.

The EPBC Project was a joint Project of WWF-Australia, the Australian Council of National Trusts and the Tasmanian Conservation Trust.

2d. Public perceptions of the EPBC Project

The EPBC Project was known as a quality independent information source on the operation of the EPBC Act. While there is no doubt as to the quality of the service, the independence of the Project was somewhat illusory. Every year the EPBC Project entered into a contract with DEH whereby the Project agreed to a workplan that would achieve the Project's objects which (although going through various wording depending on the DEH handler and Minister), were to:

- Promote knowledge and understanding of the *Environment Protection and Biodiversity Conservation Act 1999* ('EPBC Act') in the community; and
- Facilitate community involvement in the processes available under the EPBC Act and Regulations.

What this meant was that the Project was, in effect, gagged as to what negative comments it could make about the administration of the EPBC Act. Workshops were couched in terms of what should happen, or this is the way the Act was designed to work. In response to community concerns that were, in the majority of cases, entirely justified, the Project could do little more then state with a smile that the majority of the Project's funding came from the Government.

Although hotly denied by the Project, it was, in part, a sales person for the EPBC Act. And it quite effectively sold in the conservation field under the banner of WWF and in the Heritage field, under the National Trust logo. It would be naive not to acknowledge the fact that one of the reasons the Project continued to be funded year after year, was that the Project provided an element of legitimacy to the EPBC Act message that the Australian Government could not possibly hope to replicate within the circles and networks of the partner groups.

Community members often told the Project that they came to workshops because of the logo. Indeed, they often asked before the workshop began, 'you are from WWF right?". The opposite occurred with State Government – they often came despite it being a WWF workshop.

Let's make this clear. By operating the EPBC Project under its logo, WWF has effectively sold the EPBC Act for the past 6 years. By doing so, WWF has also told the community that the EPBC Act is working. After all, if it wasn't working to protect the environment why would the biggest conservation group in Australia be telling them about it and showing them how to use it? The same can be said for the National Trust and heritage groups, and TCT and the Tasmanian groups.

The Project went out in early 2004 and presented a workshop on the EPBC Act on an island that is within a World Heritage designated area. It was attended by around 40 people on a Sunday morning. For the next year, the Project worked closely with the two main resident's groups on the Island, reviewing their letters to the DEH Compliance Unit, letters requesting that the Minister call something in, and their interaction with the referral and assessment process. Community members put 100s of hours into the EPBC Act process, but over an 18 month period they saw no benefit from the huge amount of resources they had invested. Calls were often not acted upon, letters went unanswered, lengthy and relevant submissions were in no way acknowledged by DEH. Any display of assessment documents or plans were not required on the island but were on the mainland. After 18 months dealing with the EPBC Act the community groups gave up. They stopped participating with the EPBC Act process and unsubscribed from all of the Project's services.

In effect, what the Project had done was go out to a place and provide them with information on an Act that they'd not previously been aware of. The Project told them how the EPBC Act was supposed to function. The Project told them about their rights to participate. The Project helped them put that knowledge into practical effect. Only to have them come to the realisation that all the time and effort they had invested came to naught. The Project had empowered a community to use something that wasn't working. In other words, the Project empowered them with the knowledge to discover that the administration of the EPBC Act actively disempowers them.

2e. Suggested improvements/ responses in public processes

1. Respond

The Project's first suggested improvement is simply that DEH must improve its responses to the community. DEH should develop a set of standard 'we have received' proformas so that, for example, every time a request for the Minister to call in is received, a standard response is automatically sent that says 'we've received your letter, we're looking at it and we'll get back to you'. This simple acknowledgement would go a long way to dispelling the community's feelings of being ignored by DEH.

Of course this is not the final answer, calls must still be returned. Investigations must still be undertaken. Once the investigation is complete, a letter to the community is required.

2. Show interest and take seriously

DEH staff needs sensitivity training. They can not continue to treat community callers as bothersome. They also need to take community input seriously. The Project acknowledges that not all community input is relevant or articulated in a way that easily reveals its relevance. However, the legislature has set up a system to provide the community with a voice and it is up to DEH to assist the community to exercise that voice.

Where the statements and opinions of the proponent are taken as fact above contradictory statements and opinions of the community, especially where the community are experts or have extensive local knowledge, DEH must start providing reasons as to why the proponent's information was deemed more factual. This may stop what appears to be an automatic preference towards information provided by the proponent.

3. Train staff so they give the right information

It is alarming that information that the community receives from DEH is, in many cases, not correct. Extensive training must be undertaken so that DEH staff are giving the community information that is factual and current. Yes, technically there is no provision in the EPBC Act that specifically states that the community can request that the Minister call something in. However, there is an administrative law principle that allows the community to request that the Minister exercise a statutory authority. Telling the community there is nothing they can do, or actively blocking the request, is simply not acceptable.

4. Include Statement of Reasons where necessary

DEH should be more forthcoming with Statements of Reasons. On every referral where there has been community input into the assessment process, a Statement of Reasons should be posted on the DEH website along with the notification of approval. Statement of Reasons

should also be sent, along with a copy of the approval and conditions, to each person who provided comments.

5. Don't miss notifications

Missing notifications, even innocently, automatically raises community suspicions. DEH needs to be more careful about meeting its obligations to notify of Ministerial decisions.

6. Provide access to all referrals including those referred as controlled actions

There is no reason that the community should be denied access to referrals that have been referred as controlled actions. By failing to post these referrals DEH is actively prohibiting the community from easily attaining the information they need to decide whether they should invest in the assessment process. It also creates a great deal of community suspicion and distrust.

7. Require advertisement of referral

DEH should change current practice to ensure that notices of invitations to comment on referrals are advertised in relevant local newspapers. With referrals only being published on the DEH website site, whole sectors of the community are precluded from participation in the public processes.

8. Increase time frame from 10 days

A comments time frame of 10 business days, coupled with the advertisement solely on the DEH website, significantly impedes the communities ability to participate in the public participation processes relating to whether an action is a controlled action. DEH should consider increasing the time frame to at least 20 business days, or change the advertisement process.

9. Put assessment documents on the net

All assessment documentation should be posted up on the DEH website. This would enable easier access to the documents, reduce the need for copying, and thus alleviate the need for any costs to be charged for access to the documents. It may also increase the quality of information provided in the documentation.

10. Make the assessment documents otherwise more accessible

Ensure that documents are readily available in the immediate geographic area. If the referral relates to an inhabited island, then make sure that the assessment documentation is available on that island, not the nearest mainland port.

11. Do not charge for access to assessment documents

If DEH wants to encourage community input it can not have charges on access to assessment documentation. Again, the practice simply illustrates DEH's lack of understanding about how few resources most community groups work with.

12. Change the system for providing comments

The Community is loath to provide their comments solely to the proponent when there is no clear requirement in some cases, and no auditing in others, to make sure that all comments are

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then passed onto DEH. It would be fairly easy to set up an electronic lodgement system whereby all comments are electronically lodged and tagged with a number that would then be cross checked by DEH when the final assessment is submitted. Paper submissions could be inputted into the system and assigned a number with an automatically generated letter being sent to the commenter advising them of their document number.

13. Contact local stakeholder

DEH should start automatically contacting local stakeholder to advise them of referrals in their area. This would increase the likelihood that referrals are being assessed in a way that reflects the true state of the local situation. A system similar to the permit register could be set up; one that runs, for example, on local government areas.

14. Make more transparent in terms of behind the scenes negotiations

DEH should consider whether the perceived administrative gains achieved by way of behind closed door negotiations with proponents is worth the impact that those negotiations have on their credibility in the community.

15. Don't tell them nothing can be done about breaches. Investigate.

DEH needs to up its compliance work. Until there is a real fear of prosecution there will continue to be a lack of compliance. When the community contacts DEH with real concerns, it is inappropriate that DEH so blithely abdicate its prosecutorial role.

16. Reduce reliance on website

- Develop a subscriber service where by people can get auto notices when a referral is lodged matching their pre defined criteria, such as Local Government area, region, or State.
- Automatically inform local government that a referral has been lodged in their area.
- Put a link to the public notices from the DEH home page.

17. Give express advice to agencies about their rights for third party referrals

There is clearly a great deal of confusion within State agencies as to their rights to make third party referrals. DEH should send each agency a brief that sets out clearly what those rights are.

18. Give some definition of what is a public interest case

The prospect of having to pay costs is one of the major barriers against the community taking court action to challenge decisions under the EPBC Act. At common law, there is discretion against the normal convention that costs follow the event i.e. that the looser pays the winners cost. This discretion kicks in where the court finds that the case was taken in the public interest and had a reasonable chance of success. It may be helpful for DEH to issue some guidance on what it considers the public interest. Though there are issue with this as the court will not necessarily be guided by the guidelines and it could be used to restrict access to the discretion, especially if DEH issues guidelines that are overly restrictive

3. EPBC Act Administration

3a. What aspects are working well

Conditions

The most improved area of EPBC Act administration is the quality of conditions placed on approvals. Most approvals are now being time capped, for example, a condition of approval may be that the development must be started within 5 years or it can not start and a new referral is required.

Another key improvement is the requirement that, as a condition of approval, proponents implement the management and other impact mitigation plans that they have relied on as part of their referrals. Conditions on approvals often now require independent audit of compliance, this is a huge step forward for EPBC Act compliance.

While these are improvements on the conditions being applied to approvals, they are still not standard conditions. They should be.

Looking for answers

While not exactly 'working well', one thing that DEH is doing that will have far ranging implications is its 2 'regional planning' pilot projects. These projects are an attempt to tackle the issue of local governments zoning land in a way that is inconsistent with the EPBC Protected matters present. These programs may work out ways to pursue a more strategic, regional approach.

3b. issues with the administration of the Act

DEH administers the EPBC Act as if they are apologising for it. Decisions are deferential, conditions and compliance are set 'in consultation' with proponents. It is as if DEH has received a Ministerial saying 'the EPBC Act isn't legitimate, we're just pretending... so don't make waves'.

This section of the report details some of the long standing issues with the administration of the EPBC Act that have been raised on numerous occasions with various levels at DEH. To date, little has been done to correct them.

Significance Guidelines

As discussed, the EPBC Act is, in the most part, a self assessment system. The main means by which proponents decide whether their action triggers the EPBC Act is by way of the Significant Impact Guidelines 1.1[59]. These guidelines are a policy statement and are meant to provide an indication of how DEH, and indeed the Minister, interpret the legal definition of a significant impact, ie an impact that is "*important, notable, or of consequence, having regard*

to its context or intensity". The aim of the guidelines is to assist proponents in undertaking a 'self-assessment' to decide whether their action is likely to have a significant impact on any Matters of National Environmental Significance, in an objective way.

The Significance Guidelines assist in this self assessment by way of a checklist. For example, the Significant Impact Guidelines 1.1 for Threatened Species listed in the Endangered category under the EPBC Act state:

> An action is likely to have a significant impact on a critically endangered or endangered species if there is a real chance or possibility that it will:
>
> - lead to a long-term decrease in the size of a population;
> - reduce the area of occupancy of the species;
> - fragment an existing population into two or more populations;
> - adversely affect habitat critical to the survival of a species;
> - disrupt the breeding cycle of a population;
> - modify, destroy, remove, isolate or decrease the availability or quality of habitat to the extent that the species is likely to decline;
> - result in invasive species that are harmful to a critically endangered or endangered species becoming established in the endangered or critically endangered species' habitat;
> - introduce disease that may cause the species to decline; or
> - interfere with the recovery of the species.

The significance guidelines are administrative or policy documents and are not legally binding. However, given that they are the main tool used by proponents, they are vitally important.

The introductory paragraph should make it clear that Guidelines 1.1 is not legally binding and can not be relied upon in and of itself. Readers must be made aware that even if they do not think that their action falls foul of Guidelines 1.1, they still must apply the test as set out in *Booth v Bosworth*. Guidelines 1.1 should not present itself as a complete list of significant impacts.

Presumption of "action" being negative

As discussed above, an "action" is defined under the EPBC Act, as a *project, development, undertaking and an activity or series of activities*. In other words, an action is something that will be evidenced in someway via a physical impact. Clearing vegetation is an action, building a structure is an action, introducing polluting elements into water or air is an action.

The significance Guidelines give the following information about an action:

> ***What is an action?***
>
> *Action is defined broadly in the EPBC Act and includes: a project, a development, an undertaking, an activity or a series of activities, or an alteration of any of these things.*

The EPBC Project was a joint Project of WWF-Australia, the Australian Council of National Trusts and the Tasmanian Conservation Trust.

Actions include, but are not limited to: construction, expansion, alteration or demolition of buildings, structures, infrastructure or facilities; industrial processes; mineral and petroleum resource exploration and extraction; storage or transport of hazardous materials; waste disposal; earthworks; impoundment, extraction and diversion of water; agricultural activities; aquaculture; research activities; vegetation clearance; culling of animals; and dealings with land.

Actions encompass site preparation and construction, operation and maintenance, and closure and completion stages of a project, as well as alterations or modifications to existing infrastructure.

What the guidelines do not express is that actions that the proponent sees as positive actions are still 'actions' under the EPBC Act. The Project, when giving examples of what is an action, continually came up against the presumption by both community members and Government agencies, that if they were doing something that they saw as helping a wetland for example, they would not need to make a referral under the EPBC Act.

At this stage in the process, the trigger for the EPBC Act is not concerned with the nature of the effect, in other words an action can be "positive" or for the benefit of a matter protected under Part 3, or "negative" such as damaging a matter protected under Part 3. The EPBC Act is a self assessment system with the guidelines being the method most use to determine whether they need to make a referral. Because of the presumption that only negative effects are actions, this skews that self assessment and may lead to an 'innocent' failure to make a referral.

For example, a community sets out to clear weeds from a large section of a Ramsar site. They check the significance criteria and it is doesn't say anything about the definition of action being neutral, so they assume that they do not need to make a referral and clear a large tract of weeds from the wetland. They may have just breached the EPBC Act. In the *Minister v Greentree*[60], Mr Greentree cleared weeds, fallen dead timber and standing dead trees from a Ramsar site without the Minister's approval. The Court said that he had a significant impact and those weeds and dead trees contributed, with the other vegetation he had cleared, to habitat and roosting sites for water birds that contributed to the character of the wetland.

Likely

Likely is not defined under the EPBC Act, however, the court in Booth v Bosworth, provided guidance by way of a working definition that something is 'likely' to occur if there is a "*real or not remote chance or possibility regardless of whether it is less or more than fifty per cent*". The significance guidelines increase this threshold.

When is a significant impact likely?

To be 'likely', it is not necessary for a significant impact to have a greater than 50% chance of happening; it is sufficient if a significant impact on the environment is a real or not remote chance or possibility.

The wording a "greater than 50% chance of happening" in this explanation reads as though the chance or possibility needs to have at least a 50% chance of the impact occurring. This is incorrect. There does not need to be a 40% chance or even a 30 % chance; all there needs to be is a "real chance" of the impact occurring. What percentage "likely" takes on depends on the circumstances, context and knowledge available in each particular case.

The guidelines should be amended so that it does not read that an impact must have 'at least' a 50% chance of occurring to meet the threshold of 'likely'.

Threatened species

In January the Significance Guidelines in relation to threatened species were amended by stealth. Instead of amending the text of the criteria, DEH increased the significance threshold of the Guidelines by inserting a definition of "population". The definition of a "population" in relation to threatened species is more restrictive then it should be.

"Population" is actually defined by the EPBC Act as "an occurrence of the species in a particular area". This then is the legal definition, so that when a proponent is assessing whether they are going to have a significant impact, they are asking for example, 'am I going to disrupt the breeding cycle of the population of this species in the area around my work site'.

DEH has progressively expanded this definition in the administrative guidelines so that actions are less likely to meet the test, and thus unlikely to trigger the EPBC Act:

> *What is a population of a species?*
>
> *A 'population of a species' is defined under the EPBC Act as an occurrence of the species in a particular area. In relation to critically endangered, endangered or vulnerable threatened species, occurrences include but are not limited to:*
>
> - *a geographically distinct regional population, or collection of local populations; or*
> - *a population, or collection of local populations, that occurs within a particular bioregion.*

Requiring a geographically distinct regional population or a collection of local populations imposes a higher threshold then is intended under the EPBC Act.

Migratory Species

According to the significance criteria, an action is likely to have a significant impact on a migratory species if there is a real chance or possibility that it will:

- substantially modify (including by fragmenting, altering fire regimes, altering nutrient cycles or altering hydrological cycles), destroy or isolate an area of important habitat for a migratory species;
- result in an invasive species that is harmful to the migratory species becoming established in an area of important habitat for the migratory species; or
- seriously disrupt the lifecycle (breeding, feeding, migration or resting behaviour) of an ecologically significant proportion of the population of a migratory species.

The threshold of the guidelines is already heightened by requiring an "ecologically significant" proportion of the population to be affected. In terms of what is an 'ecologically significant proportion' of the population the significance guidelines state:

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What is an ecologically significant proportion?

Listed migratory species cover a broad range of species with different life cycles and population sizes. Therefore, what is an 'ecologically significant proportion' of the population varies with the species (each circumstance will need to be evaluated). Some factors that should be considered include the species' population status, genetic distinctiveness and species specific behavioural patterns (for example, site fidelity and dispersal rates).

This definition should be conformed to the internationally accepted definition of significant populations of 1% or more of the individuals of the Australian population of a species or sub-species of shorebird.

As with Threatened species, the threshold bar for migratory species was raised again, by adding a definition of "population".

What is the population of a migratory species?

'Population', in relation to migratory species, means the entire population or any geographically separate part of the population of any species or lower taxon of wild animals, a significant proportion of whose members cyclically and predictably cross one or more national jurisdictional boundaries including Australia.

The definition of a "population" in the context of Migratory Species is far more encompassing then it should be. A population of Migratory Species should ideally be the Population known to occur at or around a particular site, such as the number thought to use a particular wetland. The current definition does not give effect to the objects of the legislation nor the international Agreements governing Migratory Species.

Problem sale of land

A potential issue for the protection of the environment on Commonwealth land is the reluctance of DEH to deem sale an "action" under the EPBC Act. Previously DEH has been of the opinion that the sale of land, even of Commonwealth land, does not constitute an 'action' under the EPBC Act as it does not have a physical impact on the land. This is the reason that the sale off of defence and ADI land over the past three years did not require approval under the EPBC Act.

However, the Nathan Dam case said that the Minister must assess all potential impacts, including indirect consequences that are not in the control of the proponent. This may also extend what constitutes an 'action' under the EPBC Act in this way - once you sell Commonwealth land it is no longer in and off itself a trigger for the EPBC Act. This means that the 'environment' on that land loses its statutory protection as soon as the land is sold. It's arguable that the Minister must now consider the impact of that loss of protection when deciding whether or not to declare the sale a 'controlled action' and, if it is a controlled action, whether to approve the sale and on what conditions. Obviously this argument is of most importance where the land will by sale then be excluded from the operation of the EPBC Act (i.e. it doesn't have any significant populations of EPBC listed species or other Matters of National Environmental Significance on it).

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Quality of Plans

There is a growing trend for proponents to use state that they will comply with management and other mitigation plans as a method of avoiding or minimising impacts on matters protected Under Part 3. While in some cases these plans are well thought documents, a large percentage are still overarching plans filled with motherhood statements that are ambiguous as to what action they specifically require, and as such are unenforceable.

Plans relied on in referral documents must be drafted so that the obligations on the proponent are clear, unambiguous, and action orienated. The actions to be taken under the plan must provide a high degree of certainty in relation to reducing or avoiding significant impacts on the matters protected. The plans must have specific time frames attached to the actions and again, the action requirements should be made via express statements not motherhood statements. Plans should be released for public comment and peer/expert review.

Where a plan is relied on in the referral, any conditions or Particular manner must include an express provision that the proponent must implement the plan.

Issues with Bilateral Agreements

The EPBC Act allows the Minister to enter into bilateral agreements with the States and Territories. Bilateral agreements can accredit the environmental impact assessment or approval processes (or both) of a State or Territory for the purposes of the EPBC Act. Where this occurs, projects that are assessed and/or approved under the accredited State/Territory process will be exempt from the assessment and/or approval process under the EPBC Act. This effectively involves the transfer of responsibility for carrying out assessments and/or approving projects under the EPBC Act from the Australian Government to the relevant State or Territory.

Bilateral agreements can be made for any one or more of the following purposes:

- protecting the environment;
- promoting the conservation and ecologically sustainable use of natural resources;
- ensuring an efficient, timely and effective process for environmental assessment and approval of actions; and
- minimising duplication in the environmental assessment and approval process through Commonwealth accreditation of the processes of the State or Territory, or vice versa.

At this stage, the bilateral agreements that have been designed to minimise duplication in assessment processes only. They provide for the transfer of responsibility for carrying out assessments under the EPBC Act from the Australian Government to the States/Territories. These are called "assessment bilateral agreements".

Assessment bilateral have been finalised with Queensland, Northern Territory, Western Australia and Tasmania. An agreement has also been finalised with New South Wales relating to the management of the Sydney Opera House.

Not enforceable

The first issue with bilaterals is that in simple terms Bilateral agreements are not in and of themselves, enforceable. The reason for this is that bilateral agreements are not "justiciable"

(that is, enforceable) instruments under the terms of the EPBC Act. This means that neither the parties to a bilateral agreement nor the public can take action to enforce the clauses of the agreement.

To rely on the terms of a Bilateral, the community will have to rely on the assumption that some of the arrangements put in place under the bilateral agreement framework are likely to be indirectly enforceable. For example, if a project is supposed to be assessed under a process accredited under a bilateral agreement, but the accredited process is not followed and the Minister then approves the project, the Minister's decision will be open to challenge by "interested persons" on the basis that there has been a breach of the EPBC Act. That is, the breach of process is enforceable because it is a breach of the Act, not a breach of the bilateral agreement.

While the Australian Government does have some consultative cancellation powers, the EPBC Act should be amended so that bilateral agreements are justiciable and open for community challenge.

Scope for approval bilateral

The Australian Government has not yet entered into any negotiations concerning bilateral agreements that transfer approval functions from the Australian Government to the States/Territories (called "approval bilateral agreements"); however the provisions do exist within the EPBC Act.

Approval bilateral agreements exempt an action from needing EPBC Act approval if the action has been approved by a State or Territory in accordance with a bilaterally approved management plan.

A bilaterally approved management plan, to be used for the purposes of an approval bilateral agreement, must:

- be in force under a law of the relevant State or Territory, (which must be identified in the bilateral agreement); and
- have been accredited in writing by the Minister under the Act.

Before the Minister can accredit the management plan, the Minister must be satisfied that:

- there has been or will be adequate assessment of all impacts that a project is likely to have on matters protected under Part 3 of the EPBC Act;
- projects approved in accordance with the management plan "will not have unacceptable or unsustainable impacts" on any Matter of National Environmental Significance; and
- both the management plan and the State or Territory law under which it is in force meet the criteria prescribed by the regulations. (The Regulations do not currently contain criteria for approval bilateral agreements. However, regulations will have to be made for this purpose before the Commonwealth can enter into an approval bilateral agreement.)

The bilaterally accredited management plan must be tabled in both Houses of the Commonwealth Parliament, and can be disallowed by either House.

Approvals bilateral are simply not appropriate. The other provisions of the EPBC Act relating to assessment bilaterals, strategic assessments and other duplication saving tools are more

then adequate and the ability to make approval bilaterals should be removed from the EPBC Act.

Monitoring not a required Provision

The EPBC Act provides that a bilateral agreement can contain provisions about auditing, monitoring and reporting on the operation and effectiveness of the agreement. However, the Act does not require bilateral agreements to contain such provisions. The EPBC Act should be amended so that the agreement must be audited.

Application of Bilateral

The Meander Dam case is a good example of what can happen when EPBC Act actions are assessed by way of bilateral agreements. This case concerned the construction of a dam on the Meander River. A referral was submitted under the EPBC Act and it was decided to assess it under the Bilateral. This meant that the assessment documents used by the Minister to make a decision under the EPBC Act were the same documents used by the State Government to assess the project under the State processes.

The Meander Dam was approved under the State process; however, that approval was overturned by the State Resource Management and Planning Appeal Tribunal. The Tribunal found that the dam would have significant environmental impact on two listed threatened species, and that the proposed mitigation measures for these impacts were inadequate. The Tribunal also found that the economic benefit was as unlikely to be as great as that stated by the proponent, and accepted by the State Government.

In response to this, instead of appealing the decision, or reassessing the project, the State Government simply bypassed its own processes and passed enabling legislation reinstating the approval.

Despite all the issues with the State assessment and approval process, the Australian Government continued to rely on the assessment documents and used them as the basis of the EPBC Act approval.

Where a tribunal calls into question assessment documentation, or the State Government passes enabling legislation, the bilateral agreement should no longer apply.

Continuation of Staging

The splitting of projects for the purposes of the referral process significantly undermines the effectiveness of the EPBC Act. Obviously, the reason is because, if looked at individually, these smaller and less intrusive parts of the proposed action may not have a significant impact. So splitting up the referral into smaller parts reduced the probability that any one component of the development will require assessment and approval under the EPBC Act.

Conservationists see developers using this staging or splitting as a good way to get large and destructive proposals through the approval process with a limited examination. Splitting the project increases the chance that each individual component would be assessed in a less onerous manner than the entire project otherwise would be. It also increases the chance that

any approval that is granted will be subject to less onerous conditions than would otherwise be imposed on the entire development as a whole.

In the weeks after the EPBC Act was amended to provide the Minister express power to refuse to assess these split referrals, the use of staging be developers continued unabated. For example:

Ref No. 2003/1215 was Stage One of four stages of the Mitchell Park Estate. It comprised a subdivision into 189 residential allotments. The referral left out pertinent information such as: what the other stages comprised of? How big the development would be?

Despite this lack of information being out into the referral, the referral suggested that there was a "master plan". If the full development had already been planned why was it referred to the Minister in stages? And why did the Minister accept it? The referral appears was based on the view that Stage One will not have a significant impact. It did not address whether it would have a significant impact when combined with stages 2-4.

Despite all the issues with this referral, DEH declared it a Not Controlled Action.

Has much changed since then? No, since the Mitchell Park Residential Estate was accepted as a stage and declared a not controlled action, there have been 44 expressly "staged" referrals accepted by DEH, including 24 subdivisions.

DEH should consider instituting an internal administrative policy that will ensure that stage or split referrals are not examined individually.

Incomplete referrals

Under section 75 of the Act the Minister must consider "all adverse impacts" that a proposed action is likely to have on the matters protected under Part 3 when making a controlled action decision. With referrals such as Ref No. 2003/1219, the Project is concerned that the Minister may not have enough information to consider any potential impacts let alone all adverse impact

The referral purported to regard weed and native vegetation clearing and was made at the behest of the NSW Department of Infrastructure, Planning and Natural Resources. Yet it appeared likely that it should have also addressed the expansion/ creation of Cintra Estate Rural Residential Subdivision – there is simply not enough information provided to tell.

The referral does not describe the area, what vegetation is on it, or exactly what it proposed. Indeed Mr Jordon's main and repeated response is that it is private land and a local matter so the EPBC Act shouldn't apply. There is so little information in the referral that it should have been impossible for the Minister to make a controlled action decision. Despite this, it was declared a Not Controlled Action.

Acceptance of incomplete referrals has not improved in the past three years. A recent referral, 2006/2530, referred the redevelopment of a caravan park to DEH. It included the construction of 160 new units, car parking, recreational facilities, over three stages as well as demolishing the existing caravan park. The information in the referral detailed Stage 1 of the project, then said that "Stage 2 and 3 design details are unknown at time of writing; however the concept building footprints and heights of those future stages have been suggested." Despite the lack of information, DEH declared the action, the whole project, a Not Controlled Action.

DEH must start rejecting referrals that do not provide the information required, or automatically request further information, thereby stopping the statutory time frames. Continuing to make decisions based on the incomplete information provided in many referrals is simply not acceptable.

Manner Specified/ Particular Manner Decisions

As described above, the Minister can declare that an action does not require EPBC approval so long as it is done in a particular way. s77A(1) says:

> *If, in deciding whether the action is a controlled action or not, the Minister has made a decision (the component decision) that a particular provision of Part 3 is not a controlling provision for the action because the Minister believes it will be taken in a particular manner ... the notice, to be provided under section 77, must set out the component decision, identifying the provision and the manner.*

Oddly enough in terms of drafting, it is an unenforceable note rather then the actual EPBC Act provision that states

> *The Minister may decide that a provision of Part 3 is not a controlling provision for an action because he or she believes that the action will be taken in a manner that will ensure the action will not have (and is not likely to have) an adverse impact on the matter protected by the provision.*

s77A(2) goes on to say that "*A person must not take an action, that is the subject of a notice that includes a particular manner under subsection (1), in a way that is inconsistent with the manner specified in the notice*".

Introduced in the last round of amendments to alleviate concerns over the unenforceability of manner specified decisions being made by the Minister, s77A provides that where the Minister has assured himself that if the action is undertaken in a certain way, the action will not have a significant impact on the Matter Protected and will therefore not trigger the EPBC Act. This necessarily means that it is the action itself that has to be undertaken in that way, ie, the proponent must be able to do things as part of and at the same time as the action to mitigate the impacts. According to the administrative guidelines published by DEH, the particular manner must be "*clear, unambiguous, and provide a high degree of certainty in relation to reducing or avoiding significant impacts on the matters protected.*"

However, this guideline is often not followed, with many Particular Manner decisions being so ambiguous they are unenforceable. For example EPBC No. 2006/2771 Decision whether action needs approval/Approval Not Required - particular manner June 2006.

This referral is to construct and trial and iron ore mine in Western Australia. It would be a controlled action without the particular manner as it was likely to have a significant impact on the Northern Quoll, listed as endangered under the EPBC Act. However, the Minister was satisfied that, if the mine did the following things, they would not have a significant impact:

1. Prior to construction, a targeted survey for the Northern Quoll will be conducted in the area proposed for rock armour extraction and the results of this survey will be made available to DEH.

2. In the event that dens for the Northern Quoll are identified, an exclusion zone will be placed around these dens and rock material will not be sourced from within this zone.

With regard to manner 1, the obvious issues are:

- How long prior to construction should the mine do the survey?
- When/what time of year should it be done?
- Over what time period should the survey be done?
- Who should do the survey?
- What qualifications should the surveyor's have?
- Is the "area" the area proposed in the referral or a later defined area?
- They're only required to surveying the area in which they want to extract, what about the service and infrastructure zones? What about adjacent areas?

In terms of manner 2:

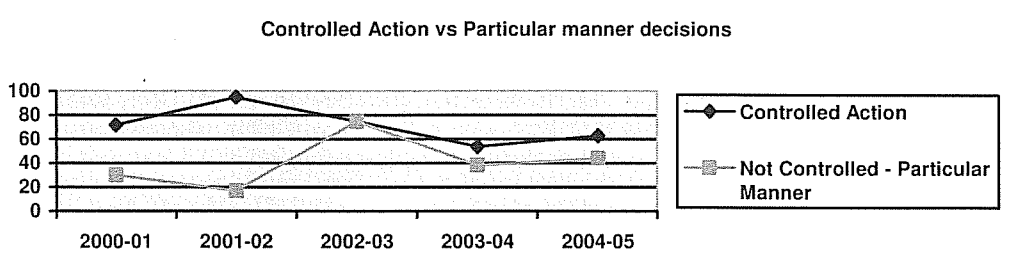
- Does the den have to be currently in use or is a suitable site enough?
- How big does the exclusion zone need to be?
- How is the exclusion zone marked?
- They can not take rock material, can they source anything else from the zone?
- What other activities can they do in these zones?

If this mine sent a couple of workers out one night to look for quolls, found some dens and designated that area as a parking zone, DEH would be hard pressed to secure a conviction.

There are also number of other issues relating to the trend to having decisions declared Not Controlled – Manner Specified that could have biodiversity conservation ramifications:

- The lack of ground-based EPBC Act compliance teams means that there is no check that conditions are being complied with.
- "Manner specified" decisions and conditions are being used when they are not eligible for use (they should only be used when the conditions applied to the development mitigate the impacts to the extent that a significant impact will not occur).
- There seems to be no mechanism to assess the effectiveness of the conditions imposed to achieve desired conservation outcomes.
- At least some of these conditions could be based on inadequate knowledge or data, as in using this decision-making option an assessment is not conducted.
- If interested stakeholders miss the initial opportunity to comment on the referral, development conditions can include too little in the way of local data and knowledge.

After a spike in issuing Manner Specified decisions in 2002/03, DEH has consistently issued a growing number of Approval Not Required – Manner Specified decisions



Approval conditions

Given that so few proposals are being refused approval, it becomes even more critical that the types of conditions being placed on development are effective if biodiversity values are to be conserved. However, the EPBC Project is also not convinced that the conditions that DEH are placing on approvals are being effective in achieving these outcomes as:

- DEH conditions appear to simply replicate State / local approval conditions;
- DEH conditions can be vague or ambiguous and would thus be unenforceable;
- Conditions that are not grounded in local knowledge or up-to-date data;
- There is no system for monitoring or checking compliance with conditions; and
- There is no system for assessing the effectiveness of conditions to achieve biodiversity conservation outcomes.

Compliance & enforcement

Lack of compliance processes & staff

The lack of compliance processes and staff is one of the most serious issues compromising the effectiveness of the EPBC Act. The issue of compliance and enforcement of the EPBC Act was raised in almost every one of the Project's workshop sessions. Stakeholders want to know what type of enforcement regime DEH has in place, and whether they have regionally-based compliance staff and/or processes in place.

When participants learn that there is only a small team based in Canberra (to cover the whole country) they frequently become cynical. It leads most people to ask why they would bother to make an EPBC Act referral of an action, if it is highly likely that there will be no consequences for failing to refer. Combine this with the fact that there have been so few refusals, many participants ask 'what is the point'?

General compliance issues include (but are not limited to):

- Lack of on-ground compliance teams around the country
- Low level of referrals because of low risks associated with being 'found out'
- Real lack of compliance with decisions / conditions
- Perceived lack of compliance with decisions / conditions
- Existing compliance staff overloaded so not able to investigate and follow up on reported breaches thoroughly
- Existing compliance team not accepting community evidence of breaches of approval conditions

For an example on the last point, community members in Cooloola in Queensland provided clear photographic evidence that an EPBC Act Particular Manner was not complied with in a Cooloola Cove residential subdivision. However, when a community member contacted the DEH compliance team, they were told that the evidence was not sufficient. There was no DEH investigation. The developer continued with non-compliant activities.

Prosecutions

DEH have only initiated three prosecutions since the introduction of the EPBC Act. One didn't get past committal, one allowed a significant reduction in penalty and the other only came about largely due to the evidence collected by conservation groups (the Greentree case). DEH is currently using a cooperative approach to enforce compliance with the Act. Where DEH investigations discover breaches of the EPBC Act, DEH are negotiating outcomes with offenders.

There are serious negative ramifications of this approach. First, we currently have very little in the way of EPBC Act precedent. And second, it has implications in terms of public perception. Not only does it appear that there is no enforcement action, but it can also lead the public to believe that DEH is "in cahoots" with the developer if they hear about negotiated outcomes (that seldom appear to incorporate input from other interested parties). Finally, and importantly, it decreased the perception among stakeholders that the EPBC Act is a legitimate piece of legislation, not a federal rubber stamping exercise.

3c. Suggested improvements/ responses

1. The significance guidelines should be amended so that:

    a) the introductory paragraph makes it clear that Guidelines 1.1 is not legally binding and can not be relied upon in and of itself. Readers must be made aware that even if they do not think that their action falls foul of Guidelines 1.1, they still must apply the test as set out in *Booth v Bosworth*. Guidelines 1.1 should not present itself as a complete list of significant impacts;

    b) it is clear that an 'action' can be positive or negative;

    c) likely does not read so that it must be 'at least' a 50% chance of occurring to meet the threshold of 'likely';

    d) the new definition of populations are removed; are

    e) the definition of an ecologically significant proportion of a population should conform to the internationally accepted definition of significant populations of 1% or more of the individuals of the Australian population of a species or sub-species of shorebird.

2. Make it clear that sale of Commonwealth land is an action.

3. Develop coordination with local councils or have State based DEH staff.

4. More referrals should actually undergo an environmental impact assessment rather than simply relying on the preliminary documentation.

5. Ensure that off-sets are not taken into account as part of controlled action decisions.

The EPBC Project was a joint Project of WWF-Australia, the Australian Council of National Trusts and the Tasmanian Conservation Trust.

6. Plans such as management and impact mitigation plans relied on as part of the referral must be drafted to include specific obligations for action rather then motherhood statements.

7. Requiring an independent certified audit of compliance should become standard conditions of approval.

8. All approvals should have a date by which the action must be taken, or the approval expires.

9. Fewer staged referrals should be accepted and clear guidelines should be developed to establish when a stage referral will be accepted and why.

10. Incomplete referrals, or referrals that contain information that is ambiguous, should be rejected by DEH.

11. A review should be undertaken on Manner specified decisions and their use by DEH.

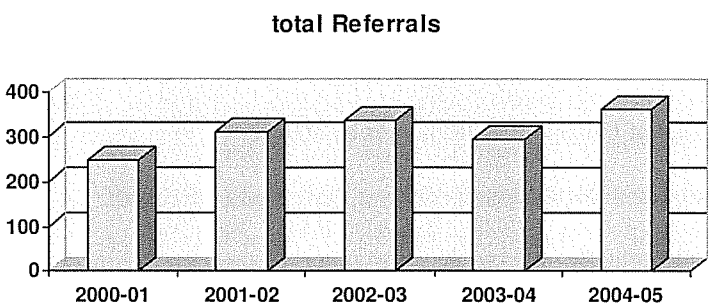
12. DEH must start actively and publicly enforcing the EPBC Act.

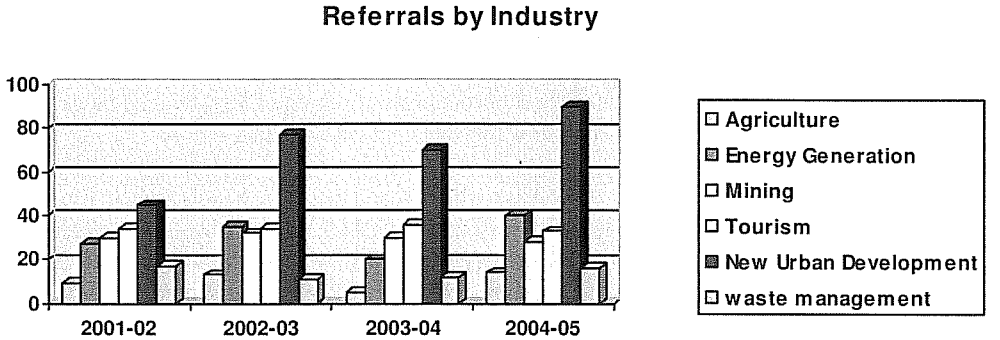
4. Broader EPBC Act Issues

4a. Broader issues that need to be resolved

Low number of referrals

The EPBC Project is of the opinion that the number of EPBC Act referrals is lower than it should be, particularly in some industry sectors. Looking at the number of annual referrals made to DEH since the introduction of the EPBC Act, it is expected that this would have consistently increased since 2000 when the Act was introduced, through to the present. However, as shown by the DEH statistics on the annual number of referrals, that this is not the case. If referrals are not being made when they should be, this has implications for biodiversity conservation.





There are a number of possible reasons for why the number of referrals made annually has remained constant.

Firstly, we have anecdotal evidence that DEH staff are actively discouraging the referral of actions in at least some situations where they may be expected, by raising the threshold level for what constitutes a 'significant impact' on a matter protected under Part 3 of the Act. This seems to be particularly true within the farming sector. Despite having extensive environmental impacts, agriculture has consistently far fewer referrals then other high impact industries. Indeed, the number of agricultural industry referral is the lowest after categories such as space transport and science.

A DEH staff member (in a senior position within the Approvals and Wildlife Division) recently addressed a seminar on the practical operation of the EPBC Act attended by EPBC Project Staff. During this session, he seemed to actively discourage the referral of actions that are in any way on the threshold of the significant impact trigger (i.e. if in doubt, don't refer). This is a direct contradiction to the approach that should be taken, i.e. if there is any doubt that the action may trigger the EPBC Act, it should be referred.

Secondly, public understanding of the EPBC Act trigger, and particularly the term 'significant impact' may have increased over the last five year. So, although the absolute number of referrals has remained constant, the 'right' referrals are now possibly being made (fewer referrals for actions likely to have little impact, more referrals for actions likely to have significant impact).

This is not, however, appear to be the case. The EPBC Project reviews all referrals as part of the production of the weekly 'EPBC Notices' e-bulletin which provides a summary of new EPBC Act referrals, by State or Territory. From this review, it would appear that numerous projects that do not appear to trigger the EPBC Act are being referred, mainly for risk-management purposes. However, there are consistently very few referrals from certain sectors from such as large-scale agricultural developments, which would require referral.

Thirdly, the consistent number of referrals from 2000 to 2006 could be because of a genuine lack of awareness of the need to refer. Again, this is likely to be more the case within certain industry sectors that do not commonly take on consultants (particularly from the larger consulting firms) to manage the environmental approvals process on their behalf.

Lastly, and potentially the most likely, the lack of significant increase in referrals over the years could be because of a public perception that there is little risk of being caught and prosecuted for contravening the EPBC Act.

Low number of refusals

By the end of June 2006, 2967 EPBC Act referrals had been made to DEH. Many of these have been for large-scale proposals a good percentage of which at least would have impacted severely on biodiversity values of different regions across Australia.

However, of these 2,967 referrals, there have only been 4 cases in which approval was not granted. This is illustrative of the leniency of DEH's EPBC Act decision-making processes. DEH are almost apologetic of the EPBC Act system, however, when the Project spoke to industry representatives at Project workshops, they have often expressed the opinion that they do not mind tough enforcement of legislation, as long as it is consistent. In fact, for them to take the legislation seriously (rather than consider it just another administrative hoop to jump through), they said that there must be a real threat of refusal if the plans and information were not adequate. The low number of refusals leads to stakeholders across the board questioning the value of the process and system.

The low number of refusals could be at least partly attributable to the range of factors the Minister must take into account when considering whether to grant approval for an action. In addition to the issues relevant to the matters protected under Part 3 of the EPBC Act, the Minister must have regard to Social and Economic matters.

This trilogy of consideration is not weighted by the Act, so how much weight each consideration is given is up to the relevant Minister (though obviously they should have due regard to the objects of the Act). In the current climate, considerations of social and economic factors over the adverse impacts of the proposal on matters protected under the Act may well explain the lack of refusal. In addition, the EPBC Act does not prohibit the Minister from approving an action that will have a significant (negative) impact on a matter protected under the Act.

4b. Issue with EPBC Act architecture

Exclusion of Government Authorisations from definition of Action

As important as what is expressly included within the definition of "action", ie a project, a development, an undertaking, an activity or a series of activities, is what has been deliberately excised out. s524 states that a "*decision by a government body to grant a governmental authorisation (however described) for another person to take an action is not an action*"[61].

The problem with the exclusion of governmental authorisations, especially those authorisations that relate to planning, land use and development, is that there is no requirement for the EPBC Act to be integrated (or even considered) during the local, regional and State land use planning activities and processes. For example:

- At the strategic planning level, areas can be zoned in ways that are not compatible with EPBC protected matters.
- In a statutory planning context, applications to undertake developments at the local level can be given approval even though they might impact severely on EPBC Act matters.
- Local and State/Territory government officials are under no obligation to inform the public about their EPBC Act referral obligations, even though a local authority is a first (and often only) port of call for those wanting development approvals.

A result of this is that local or State approval decisions are sometimes used by the proponent to encourage and justify a similar decision from DEH. For example, if a person has bought a piece of land that is zoned residential in their local plan, they will use this zoning as a reason to justify why they should be able to develop the land without excessive constraints when making an EPBC Act referral. Similarly, if a proponent has already been given local (and possibly also State / Territory government) approval, they will use this to justify why DEH should also grant approval, again with minimal constraints.

The EPBC Project's planning workshops encourage the integration of EPBC Act matters particularly into strategic planning activities. However, on a number of occasions local Government have expressed a reluctance to do this, largely because of risk issues, as well as issues relating to inadequacy of available data on EPBC matters (especially exact ranges and likely habitat of EPBC listed threatened species).

New Matters of National Environmental significance are needed

The Australian Government endeavours to achieve the objects of the EPBC Act via permit, Environmental Impact Assessment (EIA) and approval processes. With the addition of additional new MNES, the Australian Government would be better placed to achieve the EPBC Act objects, particularly those that relate to conservation and protection of biodiversity and the environment, and those relating to ecologically sustainable development and use of natural resources.

Land Clearance

New trigger - A person must not take an action that has, will have or is likely to have a significant impact on the environment by Broadscale clearing.

New definitions -
Broadscale Clearing means the removal, damage or destruction of native vegetation that:
(a) exceeds a combined area of 100 ha in any two year period, or
(b) provides significant habitat for listed threatened species or ecological communities, or
(c) is listed critical habitat.

Native vegetation means
(a) trees (including any sapling or shrub, or any scrub),
(b) understorey plants,
(c) groundcover (being any type of herbaceous vegetation), or
(d) plants occurring in a wetland,
where not less then 70% of the vegetation are Native Species

While Australia is one of the most biologically diverse nations in the world[62], it also clears more native vegetation per year than any other developed nation in the world[63]. Indeed, Australia clears as much as ten times more than the average of any other Commonwealth country and is only surpassed in its clearing by Brazil, Indonesia, Sudan and Zambia[64]. In 1990 for example, it is estimated at an area the size of 1 million rugby fields was cleared in Australia[65]. Broad scale clearing occurs in every State and Territory of Australia and is widely recognised as the key major threat to Australia's bidiversity.

In January 2003, WWF- Australia commissioned a scientific analysis of the biodiversity impacts of clearing in Queensland (which prior to 2003 averaged about 500,000 hectares per

year). That study found that land clearing killed more than 100 million birds, mammals and reptiles each year in Queensland alone. Satellite data shows that during 1999-2001, 94% of tree clearing in Queensland was for pasture [66]. Combine those figures with the reality that extensive clearing in Queensland has already lead to 107,000 hectares of land in the State showing signs of salinity, with over a third of this land no longer able to support farming[67]

It is a similar story in the other States. In NSW for example, over 60,000 hectares of native vegetation is bulldozed and burnt every year. This breaks down to around 68 average suburban blocks every hour[68]. In WA, more then 90% original vegetation in the south-west region of the State has been cleared.

The impact of broadscale clearing is undeniable. Indeed, the 2001 SoE report noted that "the destruction of habitat by human activities remains the major cause of biodiversity loss"[69]. Not only does it result in the destruction of native species, but it has the knock on effect of destroying habitat resulting in further species loss, leading to the occurrence of dryland salinity, increasing the likelihood of weed infestation and invasive species movement, leads to soil degradation and erosion, and contributes over 13% of Australia's total carbon dioxide emissions[70].

The National Objectives and Targets for Biodiversity Conservation 2001-2005 set the target of all jurisdictions having clearing controls in place that will have the effect of reducing the national net rate of land clearance to zero, by 2001[71]. However, in 2001 alone an estimated 248,000 ha of Australian land was cleared[72]. The 2001 review of the National Strategy for the Conservation of Australia's Biological Diversity, noted that object 3.2 of the National Strategy had not been achieved. [73] Objective 3.2 called for the Australian Government to "ensure effective measures are in place to retain and manage native vegetation, including controls on clearing" by ensuring that there were adequate policies and controls in place throughout the Australian jurisdiction.

Some of the States have made efforts to halt the unrelenting destruction of native vegetation. For example, the Queensland Parliament has passed the Vegetation Management and Other Legislation Amendment Act 2004, which aims to phase out the large-scale clearing of mature remnant bushland. However, one of the issue preventing State and Territory legislation from adequately protecting the environment from excessive broadscale land clearing is the differing regimes that exist throughout the country.

Without a national focus on land clearing activities, the damage to the Australian Nation will continue. In the past 10 years alone the number of terrestrial bird and mammal species assessed as extinct, endangered or vulnerable rose by 39%[74]. The treat and cost of salinity will also rise. In 2000, about 46,500 sq kms (4.6 million hectares) of agricultural land was already affected with a high salinity hazard costing an estimated $187 million in productivity[75]. The EPBC Act is the most appropriate place for the Australian Government to focus its efforts to combat the impacts of broadscale clearing.

Given the rate of biological loss and environmental degradation cause broadscale clearing, it is clear that current methods of control are failing to work and Australia is falling far short of its international obligations, such as those under Article 8 (c) – (e) the Biodiversity Convention.

With broadscale land clearing as an EPBC Act trigger, the Australian Government can actively achieve the objects of EPBC Acts by promoting the principles Ecologically Sustainable Development. In particular, principles of integrating of long and short term economic, social and equitable considerations, inter-generation equality and the conservation of biological integrity.

Greenhouse

New Trigger - A person must not take an action that has, will have or is likely to have a significant impact on the environment by resulting in, or that is likely to result in greenhouse gas emissions of

(a) over a 100,000 tonnes of carbon dioxide equivalent in any 12 month period, or
(b) 5 Mt of carbon dioxide equivalent over the likely lifetime of the action.

New Definitions

Greenhouse Gas Emission means the release of:

(a) carbon dioxide (CO_2),
(b) methane (CH_4),
(c) nitrous oxide (N_2O),
(d) perfluoromethane (CF_4),
(e) per-fluoroethane (C_2F_6), or
(f) any combination of (a) – (e) above.

Pollution from Greenhouse gas emissions is a global issue that, within the Australian jurisdiction is best dealt with at a National level. Greenhouse gas pollution from human sources has already caused a 0.6°C rise in the global average temperature above the pre-industrial level[76]. This seemly small change in temperature has already had a significant impact on the Australian environment by causing coral bleaching in our marine reserves and World Heritage areas and by increasing the severity of the recent drought and bushfires across the country.

The Inter-governmental Panel on Climate Change[77] identified a range of impacts on ecosystems, human health and the incidence of extreme weather events associated with an increase in the global average temperature of 2°C above the pre-industrial level. This dangerous temperature threshold must be avoided if the risk of large and irreversible changes is to be lowered.

By incorporating a greenhouse trigger into the EPBC Act the Australian Government could have more control over new developments and any increase or changes in existing projects where they are likely to result in the release of greenhouse emissions over a 100,000 tonnes of carbon dioxide equivalent in any 12 month period, or is likely to produce 5 Mt of carbon dioxide equivalent over the expected lifetime of the action.

Australia's Greenhouse gas emissions are increasing. Indeed, in the 10 years to 2002 Australia's total net greenhouse emissions increased 8.8% to 550 megatonnes (Mt) CO_2 equivalent[78]. Even without any further increase, given the current levels of greenhouse gas pollution and the inherent inertia of the climate system the global community is probably 'locked into' at least a further 1°C rise in the global temperature. This is likely to cause major problems for Australia with increases in extreme weather events, reducing water resources and negative impacts on natural ecosystems, agriculture and fisheries[79].

Greenhouse is already recognised by the Australian Government as a serious issue with the *National Climate Change Adaptation Programme* allocating $14.2 million for preparing Australian governments, vulnerable industries and communities for the "unavoidable impacts of climate change"[80]. Review of the National Strategy for the Conservation of Australia's Biological Diversity noted that objective 3.6 Impacts of Climate Change on Biological

Diversity[81] had not yet been achieved. By incorporating greenhouse gas emissions into the EPBC Act the Australian government will achieve national, cost effective and efficient way to legislate for any further development that will significantly add to the nation's greenhouse charge.

On 30 December 1992, Australia became the ninth State to ratify the *United Nations Framework Convention on Climate Change* (the FCCC). Under Article 4 of the FCCC, Australia is obligated to adopt national policies and take corresponding measures for the mitigation of climate change. By incorporating a greenhouse gas emissions trigger into the EPBC Act the Australian Government could give effect to its obligations while securing the objects of the EPBC Act.

Unsustainable Water Use

New Trigger - A person must not take an action that has, will have or is likely to have a significant impact on the environment by abstraction or enabling the abstraction of surface and/ or ground water resources over 10,000 megalitres.

By 2000, about one-quarter of Australia's surface water management areas were already classed as highly used or overused, with 11% of the surface water management areas and another 11% of the groundwater management units exceeding the overdeveloped threshold[82]. The addition of an EPBC trigger where any person wants to undertake an action that abstracts or enables the extraction or harvesting of surface or ground water exceeding 10, 000 megalitres will provide the Australian Government with a more direct way of regulating the impacts that water extraction has on Australia's environment. . For example, such a trigger would apply to large irrigated agriculture developments, including those harvesting water from floodplains via large scale levee banks, channels and dams, which are likely to have a significant impact on downstream aquatic ecosystems and other users.

Water extraction is a National issue that often transcends State borders (such as extraction from the Murray River). Indeed, river systems provide about 73% of the water used in Australia (~24 000 GL) with a further 21% coming from ground water aquifers[83]. Unsustainable water use is a major problem in Australia. So much so that, for example, reducing the level of water over allocation in the Murray-Darling Basin will cost $500 million over five years commencing in 2004-05.

One of the continuing issues hindering the sustainable use of Australia's water resources is the sheer size of the current diversion coupled with the differing legislative regimes in each of the States and Territories. Australia has 325 surface water management areas, based on the country's 246 river basins, and 538 groundwater management units (hydrologically connected water systems)[84]. The river systems and catchments within these areas are at differing stages of use and development and often pass through differing legislative regimes along their length. For example, irrigation corporations along the Murray, Goulburn and Murrumbidgee River systems cumulatively extract over 5,000,000 megalitres each year, effecting the environment across 3 State borders.

Unsustainable water use affects all jurisdictions across Australia, in NSW for example 87% of the river length within the State already has altered hydrologic regimes[85], while in Tasmania there as been a 173% surge in surface water use in the past 20 years[86]. In Queensland, large-scale floodplain harvester Cubbie Station on the Balonne River, has a cumulative storage capacity exceeding several hundred thousand megalitres, and Australia wide bulk water licences for irrigation corporations can exceed 2,000,000 megalitres.

The EPBC Project was a joint Project of WWF-Australia, the Australian Council of National Trusts and the Tasmanian Conservation Trust.

Water abstraction is a key threat to many many wetlands of national and international importance. The NLWRA *Terrestrial Biodiversity Assessment* study of key threats to wetlands listed in the *Directory of Important Wetlands in Australia 2001* identified hydrological change as one of the top 4 threats.[87] Additionally, water abstraction is a key threat to a number of Ramsar listed wetlands, such as the Macquarie Marshes and harvesting of overland flows, especially in highly variable river systems, reduces connectivity between floodplain features, resulting in fragmentation of freshwater ecosystems.

By adding an EPBC Act trigger for unsustainable water use, at the level of abstraction over 10,000 megalitres, the Australian Government can control the environmental impacts of large scale water projects. This will foster the Australian government's efforts to achieve the objects of the EPBC Act to provide for the protection of the environment, to promote the conservation of biodiversity, and to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources. It will also allow cooperative regimes with the States with the level of extraction proving a clear indicator of whether the proposed water use is a matter of State or National significance.

Unrelenting and unsustainable use of Australia's water resources will inevitably mean that river systems, aquifers, and caste systems will no longer be able to support their native ecosystems, which, in some cases, exist nowhere else in the world. The Biodiversity Convention requires the Australian Government to promote the protection of ecosystems and natural habitats. Additionally, the Ramsar Convention requires effective management of listed wetlands. With the continued use of Australia's water resource at the current level, Australia will fall far short of its obligations in relation to freshwater ecosystems.

The Construction and operation of Dams

New Trigger - A person must not take an action that has, will have or is likely to have a significant impact on the environment by the construction and or operation of any Large Dam.

New Definition-

Large Dam means any artificial barrier that obstructs, directs or retards natural water flow and that

(a) has a crest height of more 15 m or more; or
(b) has an impoundment capacity of over 1 M cubic metres.

Australia is the driest inhabited continent with annual rainfall averaging only 455 mm. The rainfall that does occur is distributed unevenly across the continent so that river flows are nearly 3 times more variable in Australia than the world average[88]. Perhaps a consequence of this restricted fall is Australia's fondness of damming its river systems. Australia has 447 large dams with a combined capacity of 79 000 GL of water. This is equivalent to 158 times the volume of Sydney Harbour[89]. This hydrological modification occurs throughout Australia to varying degrees and has a potentially devastating impact on the Australian environment.

The threat to the Australian environment is increasing with the unsustainable use of the available water resources. Indeed, between 1983/ 84 and 1996/97, surface water use across Australia annually increased by 69 per cent (20 300 GL)[90]. Making large dams an automatic trigger for the EPBC Act will allow the Minister to create clearer guidelines on how dams, as a MNES, will be assessed.

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The recent *Nathan Dam*[91] Federal Court Case pointed to the difficulties in assessing large scale dam proposals. The full Federal Court found that when assessing the dam, the Minister must consider "all adverse impacts" of the proposal, which was found to be "not confined to direct physical effects of the action on the matter protected by the relevant provision of Pt 3 of Ch 2 of the EPBC Act. It includes effects which are sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be, the consequences of the action on the protected matter."

Making large dam proposals an automatic trigger for the EPBC Act where they are likely to have a significant impact on the environment will provide a more direct method for DEH and the Minister to assess the likely environmental impacts of such an action reducing proponent's uncertainty and creating a common standard by which all large dam projects are assessed.

As a current example, Queensland's proposed Mary River Dam has been called in for assessment by the Commonwealth Minister for Environment and Heritage. The assessment process may well seek to focus on specific issues, such as the Queensland lung fish, however the most important factors in maintaining a functional component of freshwater biodiversity are maintenance of water quality, provision of adequate environmental flows and mitigation for potential threats such as cold water pollution. If it seeks to adequately assess this large dam's impact on MNES, the Commonwealth may well need to assess the project on the basis of its wider impact on water.

The issues preventing the issue of dams from being adequately dealt with in the current regime, despite the COAG agreement, are not only the differing legislative regimes but also the failure of some of the States to adequately enforce the existing regimes. In NSW and Victoria there are approximately 30 large dams that breach statutory pollution laws (NSW) or water quality protection policies (Vic) regarding water temperature regimes. For example, from the information available it would appear that 18 large dams owned by State Water in NSW regularly discharge water that exceed the maximum allowable 2 degree Celsius temperature range established by Schedule 3 of the *Protection of the Environment Operations (General)* Regulation 1998:

cl. 10. Any thermal waste (being any liquid which, after being used in or in connection with any activity, is more than 2 degrees Celsius hotter or colder than the water into which it is discharged).

Amendments to the NSW Water Management Act 2000 that passed in 2005 mean that if dam operators have in place a management plan that sets out future management of cold water issues, then they are exempt from the *Protection of the Environment Operations Regulation.* Some, but not all, have management plans in place and mitigation efforts are often ineffective in the short-term. Commonwealth oversight on development and implementation of cold water mitigation may improve river health over hundreds of kilometres of water courses in the Murray Darling basin.

Large dam projects can have a devastating impact on fresh water ecology and biodiversity, not only by restricting water flow but also by changing nutrient levels, thermal pollution, sediment build up and simply, by being in the way and preventing movement. Dams also destroy the ecosystem in the inundation zone, and can effectively starve down stream ecosystems of the water they need to survive.

The Commonwealth and States agreed in 1994, in COAG's National Water Initiative, that "*proposals for investment in new or refurbished water infrastructure continue to be assessed as economically and ecologically sustainable prior to the investment occurring*" (Section 69).

By adding an EPBC trigger on the development of large dams, the Commonwealth will play a leading role in implementing this section of the National Water Initiative. Large Dam projects throughout Australia should be a MNES, and be built in accordance with the overarching principles of ecologically sustainable development. This would help the Australian government achieve the objects of the EPBC Act, especially those in relation to ecologically sustainable development through the conservation and ecologically sustainable use of natural resources as well as promoting the conservation of biodiversity.

5a. Lessons learnt

When the EPBC Act was passed, it was publicly heralded by some of Australia's biggest and most influential conservation groups as a bright new day in Australia's environmental protection regime, and it is not hard to see why. In terms of drafting, the EPBC Act really is in a class of its own in terms of the potential protection it offers to Australia's biodiversity as well as the community's rights of public participation in its processes.

It is out of the optimism that this drafting fostered that the EPBC Project was born. Australia finally had a National regime that should escape the local politics that are the scourge of local and State development regimes. It was an environmental protection system with conservation and green groups having automatic standing to take injunctive action and to appeal decisions. The conservation movement had gained tremendous rights and WWF-Australia, the Humane Society International and the Tasmanian Conservation Trust thought it proper that they run a program to inform the movement what those rights were and to empower their use.

However, over the 6 years since the implementation of the EPBC Act, conservationists have become increasingly disheartened by the apparent failure of the EPBC Act to achieve any substantive environmental gain. Project staff used to make an analogy that the EPBC Act was a really big dog, with huge teeth, that is not only being muzzled, but is also being kept on a very short leash. Without significant change to the administration of the EPBC Act it is very much in danger of becoming little more then a bothersome administrative hoop that proponents need to jump through.

It is the administration of the EPBC Act that is firmly squandering its potential.

The suspicion that the EPBC Act was not going to be an effective environmental tool came when after 3 years of operation only a single referral had been refused. Not to mention the fact that that refusal only came after the Federal Court issued an injunction staying that the proponent had been in breach of the Act as he was likely to be having a significant impact on a world heritage area. This after the Government initially refused to act against the proponent saying that his actions were outside of the scope of the EPBC Act.

It was perhaps at this time, at the end of Stage 2 of the Project, that the Project partners should have looked at the EPBC Act and its administration and asked whether the Project could achieve its purpose given that the administration of the Act was compromising them. They were in effect selling a system that simply wasn't working.

However, at 3 years, the EPBC Act was still relatively new. In reviewing its operation at that stage, it must be kept on mind that DEH has had to perform a remarkable shift in focus. They went from a Commonwealth Department with no real hands on biodiversity protection role, other then policy and some legislation restricted to Commonwealth land, to a Department in charge of administering a national environmental protection regime. There was little internal experience in writing binding conditions for example. Conditions that were not suggestions of conduct, but that had to be clear unambiguous orders for conduct.

In waiting until the sixth year of operation, it could not be said that the Partner groups did not give the administration time to catch up with the EPBC Act's potential.

Besides the administration of the EPBC Act, one of the major impediments to the EPBC Project achieving its goals was the very thing that allowed it to exist - DEH funding. Without DEH funding, the EPBC Project could simply not afford to undertake the extensive workshop schedule that empowered the community. Yet by taking that funding, the EPBC Project, and indeed to a large degree the Partner groups, were effectively gagged against saying anything overtly negative about the administration of the EPBC Act. This effective implied control of the EPBC Act message sold by the Project was reinforced every year due to the need to put in yearly applications for funding.

As set out in this report, many things about the EPBC Act and its administration need to change. The following suggestions, coupled with the administrative changes set out in 2e and 3c of this report will enable the EPBC Act to come closer to achieving its potential.

5b. Suggestions for a way forward

Referrals

1. The EPBC Act is operating at present as a wholly voluntary system. It is heavily reliant on the honesty and goodwill of proponents to refer their own actions to the Minister for approval. This means that there are potentially thousands of referable actions that are being undertaken in breach of the EPBC Act. The EPBC Act should be amended to:

   a) either: specifically allow any person to refer an action to the Minister for assessment as to whether it is a controlled action.

   b) or: include an express right for any person to advise the Minister of an action that may need EPBC approval and a corresponding express obligation for the Minister to require the action taker to provide such information as is necessary for the Minister to determine whether to call in the action for a controlled action decision.

2. Increase the time periods available for public comment at both the controlled action and the assessment stages of the assessment and approval process. Community groups find it almost impossible to meet the current time frames.

3. Ensure that notices of invitations to comment on referrals are advertised in relevant local and national newspapers. Currently referrals are only published on the DEH website site. No everyone has access to the internet, especially in remote areas, so restricting notification to the internet effectively precludes participation by whole sectors of the community.

4. Require that a copy of each referral be published on DEH's website, even where the proponent has stated that the action is a controlled action and regardless of whether the referral is open to public comment. This allows the public to begin working on submissions for the assessment stage of the process as early as possible.

Reconsideration of decisions

5. Require public consultation as part of the Minister's reconsideration of a controlled action decision.

Choice of Assessment Approach

6. The choice of assessment approach and the reason for that choice is currently a grey area in the EPBC Act processes. The public has no right to comment on what assessment approach is most appropriate for the particular referral. The EPBC Act should be amended to require public comments to be invited and taken into account in relation to the choice of assessment approach

7. Require guidelines to be published that provide clear criteria for the choice of assessment approach.

8. With 18% of referrals being assessed by accredited assessment there is the possibly that referrals are being assessed to different standards. Regulations are required to prescribe minimum standards, public comment periods, and the scope/content of the assessment.

9. 71% of referrals are being assessed on preliminary documentation, ensure that only a minority of relatively minor referrals are assessed on preliminary documentation; assess the majority by way of an environmental assessment.

Assessment

10. Ensure that Ministerial declarations to accredit assessment processes expire after 5 years (as is currently the case for assessment bilateral agreements). Before it expires, the Minister must review the declaration and publish a report of the review.

11. Subject assessment bilateral agreements to parliamentary scrutiny and disallowance (as is currently the case for approval bilateral agreements)

12. Once the EPBC Act is triggered (ie once the action has been declared a controlled action), ensure that all environmental impacts (and not just impacts relating to the matters protected under Part 3) are assessed and taken into account in the assessment and approval process. Assessments are currently unrealistically narrow in their focus, which effectively prevents the Act from achieving its object of providing protection for the environment and promoting ecologically sustainable development.

13. Ensure that assessment documentation under accredited assessment is required to be made widely available.

14. Make all assessment documentation available on the DEH website.

15. Require copies of public comments on assessment documentation to be provided to the decision maker and taken into account (rather than the proponent revising documents to take into account public comments).

16. Specifically provide that assessment must expressly include cumulative impacts.

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17. Institute a system whereby audits can be undertaken to ensure that all comments are received by DEH.

18. Remove the ability for proponents to charge the community for access to the assessment documents.

Approval

19. Remove the capacity for approval powers to be delegated to States through approval bilateral agreements.

20. Remove the capacity for approval powers to be delegated to other Commonwealth agencies through Ministerial declarations.

21. Improve the quality of conditions to ensure legal enforceability of conditions.

22. Ensure that time restrictions on approvals, compliance with plans, and independent auditing become standard EPBC Act approval conditions.

23. Ensure that Statements of Reasons are developed for all approvals that received comments at the assessment stage.

RFA Exemption

24. Amend 40(1) to exclude new forestry operations in RFA regions where the operation requires the clearing of remanent native vegetation or listed critical habitat.

25. Exclude forestry operations where the operation will or is likely to have a significant impact on a Matter of National Environmental Significance – allowing the Minister to place conditions on the operation to minimise those impacts.

26. Require strategic assessment of forestry operation and the institution of management plans to minimise impacts on Matters protected under Part 3 of the Act.

27. Amend the definition of "forestry operations" to expressly exclude matters not directly connected to the operation such as run-off into streams, effect of clearing on places outside the RFA region.

Matters of National Environmental Significance

28. New matters of National Environmental Significance should be added to the EPBC Act to give effect to the objects of the Act.

    a) Broadscale Land Clearing - The clearing of native vegetation over 100 ha in any two year period, or the clearing of any area of native vegetation that provides significant habitat for EPBC Act listed threatened species or ecological communities, or that is on the Critical habitat list.

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b) Greenhouse - Any actions likely to result in greenhouse gas emissions of over a 100,000 tonnes of carbon dioxide equivalent in any 12 month period or is likely to produce 5 Mt of carbon dioxide equivalent over the likely lifetime of the action.

c) Unsustainable Water Use - The abstraction of surface and ground water resources over 10,000 megalitres.

d) Dams - The construction and operation of any large dam, defined as having a crest height of 15 m or more or a capacity of over 1 M cubic metres

Conservation of Biodiversity

Species and Communities

29. Add 'near threatened' to the categories for threatened species (to ensure consistency with IUCN categories)

30. Add 'near threatened' and 'conservation dependent' to the threatened ecological community categories to mirror the threatened species provisions, with ecological communities in the category of 'vulnerable' to become a Matter of National Environmental Significance.

31. Provide for interim protection for threatened species and ecological communities to cover them in the period between nomination and listing.

32. Migratory Species trigger should be extend to include the highly migratory species listed in Annex I of United Nations Convention on the Law of the Sea.

33. Require inventories for threatened species, ecological communities, migratory species and marine species on Commonwealth land to not only identify and state the abundance of the relevant species, but also to identify range, habitat, critical habitat, and corridors where known.

34. Amend the provisions relating to wildlife conservation plans so that:

    a) the preparation of wildlife conservation plans compulsory, rather than at the Minister's discretion;
    b) Commonwealth agencies are required to not act inconsistently with wildlife conservation plans, rather than just taking reasonable steps to act in accordance with wildlife conservation plans; and
    c) Commonwealth agencies are required to implement wildlife conservation plans in Commonwealth areas (as is required for recovery plans).

Critical Habitat

35. Provide a formal process for public nominations of 'critical habitat', equivalent to the threatened species nomination process.

36. Provide a mechanism for automatic consideration for listing in the critical habitat register of habitat identified as critical in TSSC listing advice and/or recovery plans

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37. Extend powers to protect critical habitat for threatened species and ecological communities, by including offences for damaging critical habitat *outside* Commonwealth areas

Key Threatening Processes

38. Ensure that once a key threatening process is listed a threat abatement plan for that key threatening process must be developed and within a specified time frame.

Invasive Species

39. Invasive species are one of the major threats to Australia's biodiversity.
    a) either: Develop and implement strong regulations for the control of invasive species under s301A of the EPBC Act;
    b) or: Insert a new Part into the EPBC Act to regulate the control of invasive species.

Commonwealth reserves

40. Regulations or amendments that explicitly prohibit killing, injuring, taking, trading or moving any member of a native species (including species not listed under the EPBC Act) in a Commonwealth reserve.

Compliance and Enforcement

41. Broaden standing provisions to allow 'any person' rather than just 'interested persons' to apply to the Federal Court for an injunction or judicial review

42. Create guidelines to define the scope of public interest litigation under the EPBC Act to assist in costs orders.

43. Significantly increase the maximum penalty that can be prescribed for offences in the EPBC regulations from 50 penalty units ($5,500) (50 penalty units) so that the penalty acts as a reasonable deterrent.

44. Amend the penalty provisions under Part 12 of the Regulations so they are strict liability offences.

45. Engage in proactive compliance and auditing. Breaches should be prosecuted.

46. Where negotiated settlements are reached, these should be in the form of enforceable covenants and contracts, not hand shake agreements.

47. Investigate the possibility of institution an on the spot fine system for minor breaches.

Miscellaneous

48. Review and allow for public comment on the review of all conventions to which Australia is a signatory to review whether those conventions are applicable to the operation and

objects of the EPBC Act, and include relevant conventions in the list of agreements in relation to which regulations may be made under the EPBC Act.

49. Amend s391 to ensure the precautionary principle must be taken into account when making all relevant decisions under the EPBC Act.

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1 Initially a joint project of WWF-Australia and the Humane Society International, with funding support from the Department of the Environment and Heritage.

2 Department of the Environment and Heritage annual report 2004-05, Volume two, Legislation annual reports, Operation of the Environment Protection and Biodiversity Conservation Act 1999, Section 1.5 *Department of the Environment and Heritage, 2005*

3 DEH was formerly known as Environment Australia or EA.

4 [2001] FCA 1452

5 *Minister for the Environment and Heritage v Greentree* (No.2) [2004] FCA 741

6 www.deh.gov.au/epbc/assessmentsapprovals/guidelines/administrative/index.html

7 The "world heritage values" of a declared World Heritage are the "natural heritage" and "cultural heritage" values contained in the property as described in the nomination documents and other materials prepared by the World Heritage Committee.

8 "Declared World Heritage properties" are Australian properties on the World Heritage List kept under Article 11 of the World Heritage Convention. The Minister may also, in certain circumstances, declare that a property is a declared World Heritage property for the purposes of the EPBC Act. Australia currently has 16 World Heritage properties.

9 National Heritage Places are natural, historic and indigenous places that have been listed on the National Heritage List because the place has outstanding heritage values to the Nation. However, the values are only an EPBC Act trigger for

- constitutional corporations (such as companies),
- anyone anywhere in Australia if in the course of trade or commerce,
- anyone in a Territory or Commonwealth area,
- anyone anywhere in Australia to the extent that the heritage values are indigenous heritage values, and
- anyone anywhere in Australia in respect of any area where Australia has obligations under Article 8 the Biodiversity Convention (usually natural heritage areas).

10 The term "ecological character" is defined as:
"...the sum of the biological, physical, and chemical components of the wetland ecosystem, and their interactions, which maintain the wetland and its products, functions, and attributes".

11 Declared Ramsar wetlands" are wetlands included on the List of Wetlands of International Importance under Article 2 of the Ramsar Convention. The Minister may also deem wetlands to be declared Ramsar wetlands in certain circumstances. There are over 57 listed Ramsar wetlands in Australia.

12 The list of threatened species is divided into six (6) categories: "extinct", "extinct in the wild", "critically endangered", "endangered", "vulnerable" and "conservation dependent". Threatened species (except "extinct" and "conservation dependent" species) are matters of National Environmental Significance. There are over 1600 listed threatened species in these categories.

[13] The list of threatened ecological communities has three categories: "critically endangered", "endangered" and "vulnerable". Threatened ecological communities (except "vulnerable" ecological communities) are matters of National Environmental Significance. There are more than 28 ecological communities in these categories

[14] The list of migratory species under the EPBC Act contains mostly bird and marine species and includes:

- all species included on the appendices to the Bonn Convention for which Australia is the "Range State" under the Convention; and
- all species included in the lists established under the Chinese-Australia Migratory Bird Agreement ("CAMBA") and the Japan-Australia Migratory Bird Agreement ("JAMBA").

[15] For the purposes of the EPBC Act nuclear action includes:

- establishing or significantly modifying a nuclear installation;
- transporting spent nuclear fuel or radioactive waste products arising from reprocessing;
- establishing or significantly modifying a facility for storing radioactive waste products arising from reprocessing;
- mining or milling uranium ores, excluding operations for recovering mineral sands or rare earths;
- establishing or significantly modifying a large-scale disposal facility for radioactive waste;
- de-commissioning or rehabilitating any facility or area in which an activity described above has been undertaken;
- any other type of action set out in the EPBC regulations.

[16] The matters of National Environmental Significance concerning the Commonwealth marine environment are:

- activities taken in a Commonwealth marine area that are likely to have a significant impact on the environment;
- activities taken outside a Commonwealth marine area that are likely to have a significant impact on the environment in a Commonwealth marine area;
- fishing in a Commonwealth managed fishery that is likely to have a significant impact on the environment.

[17] The EPBC Act definition of Commonwealth land is quite broad and includes land owned or leased by the Commonwealth or a Commonwealth agency (including land on Norfolk Island), land in an external Territory (except Norfolk Island) the Jervis Bay Territory, and airspace over any of that land. Importantly, the definition includes land owned and leased by the Department of Defence.

[18] Environment is defined to include:

- ecosystems and their constituent parts, including people and communities;
- natural and physical resources;
- the qualities and characteristics of locations, places and areas;
- the social, economic and cultural aspects of any of the above points;
- the heritage values of places.

[19] The EPBC definition of Commonwealth Agency is also broad and includes any Australian Government Minister, a body corporate established for a public purpose by Commonwealth law, and a company in which the Commonwealth owns more than half the voting stock. There are a number of exemptions from the definition including Telstra Corporation Ltd, and certain Aboriginal Land Trusts and Councils.

[20] The Commonwealth Heritage List is a list of natural, indigenous and historic heritage places on Commonwealth land, in Commonwealth waters or under Australian Government control, that have been identified by the Minister as having Commonwealth heritage values. There are more than 340 places on the Commonwealth Heritage List

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