australian network of environmental defender's offices

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

September 2008

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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Executive Summary

The Australian Network of Environmental Defender's Offices Inc (**ANEDO**) is a network of 9 community legal centres in each state and territory, specialising in public interest environmental law and policy. ANEDO welcomes the opportunity to provide comment on the Inquiry into the operation of the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*. ANEDO has commented extensively on the EPBC Act. Please refer to our previous submissions when considering this response.[1]

ANEDO submits that this inquiry is a useful tool for elucidating key issues in the lead up to the 10 year legislative review of the EPBC Act. The 10 year review presents an excellent opportunity for strengthening and improving the Act, addressing flaws in the legislation, and redefining the Commonwealth's role in environmental protection.

ANEDO is working with peak environmental groups and signed a joint letter to the Minster (23rd May 2008) setting out preliminary areas for reform of the Act. The 4 areas identified in the joint letter were:

1. Scope and application of the EPBC Act

- Utilise current opportunities for Federal-State reform to broaden the range of matters that are regarded as having national environmental significance ("**NES"**), thereby meeting community expectations about an appropriate role for the Commonwealth in protecting the environment.
- Repeal industry specific exclusions, such as forestry operations under Regional Forestry Agreements, that are failing to protect biodiversity in our high value forest regions.

2. Assessment and approval regime

- Effectively regulate actions that may impact upon matters of NES through robust assessment and approval processes that draw upon independent scientific advice and comprehensively assess the direct, indirect and cumulative impacts on all aspects of the environment.
- Utilise current opportunities for Federal-State reform to substantially improve assessment processes and repeal the potential for EPBC Act approvals to be delegated.

3. Public participation

- Enhance the scope for meaningful public participation in EPBC Act processes by increasing public consultation periods and reinstating and expanding the right to appeal the merits of key decisions.

[1] ANEDO Submissions include: *EPBC Act: Recommendations for Reform***,** 5 March 2008**;** *Submission on the Use of environmental offsets under the EPBC Act 1999 - Discussion Paper***,** 3 December 2007**;** *Submission on the Environment and Heritage Legislation Amendment Bill (No. 1) 2006* - 27 October 2006**;** *Possible new matters of National Environmental Significance under the EPBC Act 1999***,** May 2005**;** and *Global Climate Change and the Great Barrier Reef: Australia's obligations under the World Heritage Convention* September 2004**.** Available at: http://www.edo.org.au/edonsw/site/policy/

- Acknowledge the valuable contribution to EPBC Act interpretation and enforcement made by civil society by removing the significant barriers posed by the risk of orders for security for costs or for costs following the event.

4. Resources and enforcement

- Devote a level of resources to implementation and enforcement of the EPBC Act commensurate with the consequences for the nation of allowing environmental degradation to continue on its current path.
- Utilise these resources to expedite a range of critical actions including assessment, listing and threat recovery processes and to enforce compliance with the Act generally (including conditions attached to approvals).

ANEDO submits that in order to better implement our obligations under international environmental law, the Commonwealth must take a stronger role in environmental protection under the EPBC Act. This is becoming increasingly urgent considering the rate of biodiversity loss and the potential impacts of climate change.

This submission discusses a redefined Commonwealth role, and provides comment on the 7 terms of reference:

1. General comment on the role of the Commonwealth in environmental law
    1.1 The broader role of the Commonwealth in natural resource management
    1.2 Scope of EPBC Act
    1.3 Improved implementation of international obligations

2. Referrals, Assessments and Approvals (**ToR a**)
    2.1 Comment on Audit report
    2.2 The importance of 3rd party rights to challenge and public participation
    2.3 The use of accreditation mechanisms
    2.4 The use of offsets
    2.5 Review of administrative guidelines

3. Threatened Species and Ecological Communities (**ToR b**)
    3.1 The Audit Office Report findings
    3.2 Streamlining of listing process
    3.3 Recovery planning
    3.4 Critical habitat
    3.5 Resources for recovery planning

4. Cumulative Impacts (**ToR c**)
    4.1 Current inadequacy of Act to address cumulative impacts
    4.2 Role of strategic assessments

5. Effectiveness of responses to key threats (**ToR d**)
    5.1 The need for new triggers/MNES
    - climate change
    - land clearing
    - invasive species
    - water extraction
    5.2 Improving current triggers

5.3 The Commonwealth's role in adaptation

6. Effectiveness of RFAs (**ToR e**)

7. Impact of other environment funding programmes (**ToR f**)

8. Programme changes and Funding Cuts (**ToR g**)

8.1 Improve resourcing for implementation of the Act – planning and assessment

8.2 Improve resourcing for enforcement

1. General comment on the role of the Commonwealth in environmental law

There has been a fundamental shift in recent years towards the 'nationalisation' of environmental issues. Governments have recognised that proper environmental protection is predicated upon a uniform and consistent approach to the environment. At the same time, climate change has emerged as the critical global environmental issue deserving attention. Increasingly, the linkages between climate change, environmental protection, natural resource management and biodiversity conservation are being recognised and better understood. Recognition and management of such linkages will require changes to the regulatory architecture, and should underpin the EPBC Act review process.

The most recent State of the Environment Report 2006 reached the sobering conclusion that "…*biodiversity continues to be in serious decline in many parts of Australia*,"[2] and the Terms of Reference for the Inquiry state:

> (1) The Senate notes the continuing decline and extinction of a significant proportion of Australia's unique plants and animals, and the likelihood that accelerating climate change will exacerbate challenges faced by Australian species.

To halt this decline, it is necessary for the Commonwealth Government to have a more active role. Three broad areas of reform/restructure are needed:

> **1)** Reform the EPBC Act to implement a broader role for the Commonwealth in natural resource management;
> **2)** Broaden the scope of the EPBC Act; and
> **3)** Improve national implementation of international obligations.

Each of these areas can be addressed by amending the Act, with the Commonwealth jurisdiction justified by the external affairs power in the Constitution.[3]

1.1 The broader role of the Commonwealth in natural resource management

Traditionally natural resource management and land use planning has been regulated by State and Territory legislation in Australia. The introduction of the EPBC Act in 1999 gave the Commonwealth a limited role to intervene when such decisions affected a matter of national environmental significance (MNES). ANEDO submits that the role is currently too narrow and the Act does not allow the Commonwealth to effectively engage in the most pressing environmental issues such as impacts of climate change.

1.2 Scope of EPBC Act

As noted, the limitation of Commonwealth action to the current MNES is operating to hamstring the Commonwealth from taking broad positive action to protect biodiversity, and address the most serious environmental issues facing Australia – such as climate change, land clearing and over extraction of water. New MNES triggers are needed to

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[2] *State of the Environment Report* 2006, Department of Environment and Heritage, Canberra. Available at: http://www.environment.gov.au/soe/2006/index.html.
[3] Section 51(xxix).

expand the scope of the Act. These are discussed below in relation to **term of reference (d).**

1.3 Improved implementation of international obligations

Australia is a signatory to the *Convention on Biological Diversity* 1992 and the *United Nations Framework Convention on Climate Change* 1992 (UNFCCC) and a plethora of other international environmental agreements, relating to both specific species (such as whales), to processes (such as trade in endangered species) to pollution (sea dumping) etc.

It is not sufficient to simply ratify an agreement, Australia can do more to implement these international agreements through our domestic legislation. This requires both robust, comprehensive and well designed national legislation, and sufficient resources and political will to effectively implement the legislation.

While the EPBC Act does implement some international agreements relatively well (for example, CITES), it currently does not address our international obligations arising under major Conventions such as the UNFCCC. Other international agreements, such as the Ramsar Convention are only partially implemented.[4]

ANEDO submits that analysis of the current implementation of international obligations must form a specific part of the 10 year review to develop recommendations for how the EPBC Act can be amended to improve implementation of Australia's obligations. The review should consider ways to enhance compliance with, and implementation of international obligations, at the federal and state level in Australia.

Summary and recommendations

- The current role of the Commonwealth in environmental protection is limited by the EPBC Act framing of MNES, and as such Australia is not adequately implementing our international environmental obligations.
- ANEDO therefore submits that analysis of the current implementation of international obligations must form a specific part of the 10 year review to develop recommendations for how the EPBC Act can be amended to improve implementation of Australia's obligations.
- In addition, the review should examine the current role of the Commonwealth in natural resource management more broadly, with a view to developing recommendations for improving linkages between natural resource management, biodiversity conservation, and climate change adaptation.
- ANEDO recommends the scope of the EPBC Act be expanded to include new MNES triggers addressing greenhouse gas emissions, land clearing and over extraction of water.

[4] For further comment on the implementation of Australia's obligations under the Ramsar Convention, please see the ANEDO Submission on the Commonwealth *Water Bill 2007*, 9 August 2007, available at: http://www.edo.org.au/policy/water_bill070824.pdf.

2. Referrals, Assessments and Approvals (ToR a)

a. The findings of the National Audit Office Audit 38 Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999;

ANEDO has previously raised significant concerns with the referrals, assessments and approvals regime under the EPBC Act. We identified a number of flaws in relation to the 'streamlining' amendments passed in 2006.[5]

The rationale behind the 2006 amendments relating to referrals and assessments was to speed up development approvals for development proponents.[6] While ANEDO supports an efficient process, we raised significant concerns that the focus on reducing timeframes must not be at the expense of transparency, accountability and rigorous environmental impact assessment.

Up until recently, there seems to have been a reluctance to use the powers under the EPBC Act given to the Minister to refuse developments. Instead, all major developments have been approved, mostly with extensive conditions.[7] Many of these conditions require the further provision of management plans before actions can commence. However, it is yet to be seen whether such management plans will actually prevent harm to the threatened and migratory species they are designed to protect, or appropriately safeguard against damage to World Heritage values. Similarly, there is no guarantee that attaching conditions will be sufficient to effectively protect the environment.

Our key concerns with the 2006 reforms (that are now law) include:

- **Fast track approvals** – ANEDO submitted that all referral information (especially where assessment is based on referral information or preliminary documentation) be published for comment, and the process should be strengthened by requiring the designated proponent to provide a summary of all comments received to ensure all views are addressed.[8]
- **Financial contributions** – In relation to amendments providing that the type of conditions the Minister can attach to approvals can include financial contributions towards projects not directly related to the controlled action, ANEDO submitted that: any such financial contribution must go toward remediation and conservation projects and not simply go to Consolidated Revenue, that there should be a nexus between the conservation project and the development project itself on equity grounds, and that the basis for the calculation should be set down in regulations for transparency and accountability.[9]
- **Effect of new listings on approved actions** - The amendments provided that approval decisions are not affected by listing events that happen after decisions

[5] *ANEDO submission on the Environment and Heritage Legislation Amendment Bill (No. 1) 2006* - 27 October 2006. Available at: http://www.edo.org.au/edonsw/site/policy.php.
[6] As indicated in the Explanatory Memorandum and second reading speech to the Bill.
[7] The approvals that have been granted to date, include the building of a marina and subsequent clearing of coastal habitat adjoining the Great Barrier Reef World Heritage Area which affected migratory and threatened species in the area (Port Airlie), several mining operations, and two new dams (Paradise Dam in Queensland and Meander Dam in Tasmania). Environmental groups have criticised these approvals and the conditions placed upon many of the proposals, as not going far enough to protect the environment.
[8] See Division 3A, sections: 92 – 95.
[9] See section 134.

whether an action is controlled are made.[10] In a case where it is solely the project that imperils the species, this creates an impossible situation. The Channel Deepening project in Port Phillip Bay in Victoria threatened a unique sponge community which was only discovered during the assessment process. The threat to this community was not able to be taken into account as it was listed after the referral. ANEDO submits that this approach is inconsistent with the principles of ESD, privileging development interests and certainty over the environment, and almost certainly ensuring the loss of species over time. A better approach would be to allow the Minister to exercise such powers in limited circumstances.

- **Referrals containing options and variations** - The amendments expanded the referral and assessment process to allow proponents to submit proposals containing several alternative locations or timeframes.[11] ANEDO submitted that this is a reasonable amendment only where the level of information prepared in relation to each option is comprehensive and not reduced. Location is crucial to determining environmental impact and so assessment must be comprehensive for each specific option. Any such alternative location/proposal must be the subject of public scrutiny and not altered after public advertising.
- **Policy statements -** The Act now allows the Minister to make policy statements to guide operation of the amended processes. ANEDO supported this amendment, and recommended that DEH clarify the legal status of the policy statements for users. However, we submit that where guidelines contain operational or compliance rules then it would be more appropriate to have such detail included in regulations for greater certainty.
- **Early refusals, concurrent controlled action and EIA decision -** ANEDO supported the early refusal provision. We note that perhaps until recently, the Minister very rarely uses their discretion to not allow an action beyond "first base" where the impacts are just too significant. EDO submits that early refusal is appropriate in some circumstances, for example in relation to the proposal to build a weir across the Murray just above the Coorong and Lower Lakes, which has the potential to environmentally devastate this RAMSAR listed site.
- **Public consultation -** The amendments established a requirement for the Minister to provide a proponent with an opportunity to comment on the proposed approval decision and conditions. ANEDO submitted that the Minister should also be required to consult with the public on proposed conditions. Using the proposed Gunns Pulp Mill as an example, additional scope for comment at this point might provide greater reassurance that views have been taken into account in the approval decision. Additional opportunities for public involvement can only enhance the legitimacy of the proposal and further refine the conditions of approval.
- **Commercial in confidence information -** There were a number of amendments relating to commercial in confidence information.[12] There is

[10] See Division 3A, section 158. Any subsequent listing of species or declarations of heritage areas or Ramsar wetlands cannot result in the approval being "revoked, varied, suspended, challenged, reviewed, set aside or called in question." The relevant section is to have effect "despite any other provision of this Act and despite any other law."

[11] Section 72(3). Alternative options may relate to: location of action, timeframe of action, or activities which will comprise the action.

[12] For example, the new section 74(3A) allows the Minister to withhold certain information when publishing a referral under section 74(3); and the new section 170BA allows a proponent to request the Minister for permission to withhold commercial-in-confidence information when publishing assessment documentation in accordance with Division 4, 5 or 6 of Part 8 of the Act. The Minister may agree to

potential for abuse of these provisions, and the potential to undermine the transparency and accountability of the regime. Commercial-in-confidence can be used to hide from scrutiny information which undermines a proponent's case. The rationale that release of information would cause "competitive detriment"[13] should not be relevant to referral and assessment information.

- **Surveys and Inventories -** Identifying and monitoring biodiversity is a fundamental element of conservation. Comprehensive and accurate data is needed to underpin any credible regulatory scheme. ANEDO submitted that instead of making data gathering and collating discretionary, the Act should be strengthened by providing more information about species and communities to allow for better decision-making. For example, we submitted that the Act require inventories for threatened species to not only identify and state the abundance of relevant species, but also to identify range, habitat, critical habitat, and corridors where known.
- **Mining approvals in Commonwealth reserves -** ANEDO strongly opposed the amendments facilitating mining in Commonwealth reserves.

In relation to **term of reference (a)** we make comment in regard to:

1) The Audit report results and approval statistics more broadly under the Act;
2) The importance of public participation and third party rights to challenge the referrals, assessments and approvals process;
3) The use of accreditation mechanisms to accredit state processes;
4) The use of offsets; and
5) The need to review the current Administrative Guidelines.

2.1 The findings of the National Audit Office Audit 38 Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999.[14]

The overall conclusions of the Audit Report, which was conducted primarily to examine the "quality and timeliness" of environmental assessments and approvals under the Act, included that:

- the referral, assessment and approval processes under the Act are generally thorough and well documented (para 9);
- staff in Environment Australia have been active in assisting organisations undertaking an action to determine whether their action is likely to have a 'significant impact', but there was a need for more specific guidance and promotion of the Act in relation to what constitutes a 'significant impact' which may increase relevant referrals (para 11);
- timeliness of decision making processes under the Act compare favourably with process at State and Territory levels (para 12);
- implementation of monitoring and enforcement mechanisms are areas that need to be developed (para 14); and that

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commercial-in-confidence material being withheld if satisfied of the matters in section 170BA(5) of the Act.

[13] For example, as stated in section 74(3B)(a).

[14] *National Audit Report: "Referrals, Assessments and Approvals under the Environment protection and Biodiversity Conservation Act 1999"* The Auditor General, Audit Report No. 38, 2002-03 Performance Audit, Australian National Audit Office.

- greater attention to publicly reporting emerging trends and changes over time would assist in overall environmental protection (para 15).

The Report also noted that:

- referral guidelines were not specific enough to industry sectors or particular environmental risks to allow an initial decision by a proponent on whether an action is likely to have 'significant impact'" (para 19);
- compliance with the requirements of the Act is apparent, however, improved consistency and documentation of the Precautionary Principle would also assist the process (para 20);
- concern over Staged Referrals and cumulative impacts, and suggest greater emphasis on proponents to be aware of the requirement to disclose 'any related action' (para 21);
- concern over the lack of specific guidelines on the provision of accurate and complete information, for things such as fauna surveys (para 22);
- where the Department and the Minister had different views, the documentation did not clearly show how the provisions of the Act were taken into account or to what extent 'all adverse impacts' had been considered or how the Precautionary Principle had been taken into account, and that it would have been preferable for more detailed explanation of the reasons given (para 23).
- clearer information should be made available to all Commonwealth departments and agencies on whether an action is likely to have a significant impact (para 36);
- a lack of prosecutions brought by the Commonwealth (para 37);
- deficiencies in formal monitoring and auditing (para 40); and that
- responses to potential breaches of the Act have focussed on the 'less robust options' and that finalising compliance and enforcement procedures and guidelines and stronger disclosure of legal compliance requirements across the Commonwealth would also assist (para 41).

EDO offices have also observed serious flaws in the referrals and assessment process, such as: incorrect or misleading referral forms, false and misleading information, failure to properly consider the precautionary principle, the consideration of short-term economic impacts, and importantly, failure to identify 'significant impact.' These are illustrated by the case studies below. (Case studies of failure to consider cumulative impacts are included in **Part 4**).

Case studies: Problems with the current referral, assessment and approval process

Incorrect or misleading referral forms

Since the EPBC Act came into force in 2000, the Department has been producing Referral Forms that do not comply with the EPBC Regulations. Schedule 2 of the Regulations, *Information that must be included in Referrals*, clearly states:[15]

"4 Description of the proposal

4.01 A description of the proposed action, including:

(a) details of the location of the project area;

[15] Department of the Environment and Water Resources. *Environment Protection and Biodiversity Conservation Regulations 2000*. (Statutory Rules 2000 No. 181 as amended, prepared by the Office of Legislative Drafting and Publishing, Attorney-General's Department, Canberra, 19th February 2007, Schedule 2, p. 206).

(b) the latitude and longitude of the action;
(c) the timeframe in which the action is proposed to be taken;
(d) activities proposed to be carried out in the action;
(e) an explanation of the context, including any relevant planning framework, in which the action is proposed;
(f) whether the action is related to other actions or proposals in the region."

Section 4.01 (f) of Schedule 2 of the Regulations, *"whether the action is related to other actions or proposals in the region"*, never formed part of the old Referral Form nor does it form part of the new Referral Form. On 26 October 2007 EDO NSW sent correspondence to the [then] Commonwealth Minister for the Environment in relation to the non-compliance of the [then] revised 'Referral of Proposed Action Form'. The response from the Government was:

"The EDO's letters stated that the referral form was not compliant with the EPBC Act and Regulations, because it did not separately require likely indirect impacts of an action to be described. We do not consider that the "referral of proposed action" form itself needs to separate out direct and indirect impacts of particular actions. The form referred to guidance on the Department's website as to what matters need to be referred under the Act: EPBC Act Policy Statement 1.1*, which states that all direct and indirect impacts should be considered. Since NSW EDO's letters, the referral form has, however, been updated and it refers to the need to address both direct and indirect impacts of a proposed action. The updated referral form can be viewed on the Department's website at www.environment.gov.au/epbc/assessments/referral-form.html."*

False and misleading information

Jag Marine Group Pty Ltd, Bowen Marina (EPBC 2006/2602)

In this matter, the proponent included a number of clearly false and misleading statements in its February 2006 referral to the then Environment Minister, including incorrectly describing of the location of the project as being within an existing marina and adjacent to the Point Abbott Port (a major facility for the export of coal). The only reasonable view is that the proponent did this in an attempt to reduce concerns over obvious impacts upon water quality which would be caused by "the storage and handling of contaminants such as fuels, anti-fouling compounds, and other pollutants" associated with this commercial operation (Point Abbott Port is some 21 kilometres north of the proposed project site).

These false and misleading statements by the proponent were brought to the attention of the Department and their inaccuracy was not disputed either by the Department or the proponent. However, not only did the Department take no action whatsoever against the proponent, the Department essentially dismissed any concerns about the false and misleading nature of those statements:

1. In her letter to Ian Lee dated 25 June 2007 (received 5 July 2007), the then Assistant Secretary of the Environment Assessment Branch, Approvals and Wildlife Division, within the Department advised that:

   "… this information has been reviewed in light of your claims and I do not consider that the

[16] Queensland Conservation Council, "Rivers Alive", 2004.
[17] Environmental Protection Agency (Qld), Endangered Animals, Fitzroy Turtle, 2004.
[18] Middleton, Vicki. *Statement of Reasons – Approval under the Environment Protection and Biodiversity Conservation Act 1999.* (Department of the Environment and Water Resources, Moolarben Coal Mine Pty Ltd, EPBC 2007/3297, 26th November 2007, p. 11).
[19] Gerard Early. *Statement of Reasons for Decision under Section 133 of the Environment Protection and Biodiversity Conservation Act.* (Department of the Environment and Heritage, Transtate Airlie Beach Pty Ltd, Port of Airlie Integrated Tourist Resort and Marina, EPBC 2001/298, 13th September 2004, pp. 10, 11 & 16)
[20] Department of State Development and Department of Tourism, Racing and Fair Trading. *Marina Demand Study.* (Commissioned by Whitsunday Region Interdepartmental Committee, Queensland Government, 2001).
[21] Department of the Environment, Water, Heritage and the Arts. *Marine Species Conservation: Loggerhead turtle.* (Commonwealth of Australia, 19 July 2007, downloaded from the website 25th December 2007).

assessment document is in breach of section 489 of the EPBC Act."; and

2. When requested for a Statement of Reasons under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) in relation to this decision, the Department's Tania Rishniw advised in her letter to Ian Lee dated 3 August 2007 (received 9 August 2008) that:

> *"My consideration of the information you provided alleging that false and misleading information had been provided by Cardno Pty Ltd in relation to the Bowen Marina, was not a decision under an enactment and therefore it is not a decision to which the ADJR Act applies…You may be sure, however, that the department takes any allegations of false and misleading information seriously. In this instance, a review of all the information provided was undertaken in light of your submission and it was determined that the information appropriately represented the proponent's actions as they relate to the EPBC Act."*

Failure to properly consider the precautionary principle

Bowen Central Coal Management Pty Ltd (EPBC Ref. 2005/2070)

Despite the very real risk of this proposal having significant adverse impacts upon two species listed as "vulnerable" under the EPBC Act (the Squatter Pigeon (southern), *Geophaps scripta scripta*; and the Fitzroy Tortoise; *Rheodytes leukops*), and despite the clear and complete absence of any evidence (whether from the proponent or otherwise) that the proposal would <u>not</u> have significant adverse impacts upon these two species, and this proposal was found <u>not</u> to be a controlled action. Therefore, the proponent's statements in its referral documentation were relied upon by the Department without further investigation as to the truth or otherwise of those statements and the proposal was deemed <u>not</u> to require approval under the EPBC Act. It is obvious from the following, and the Department's decision in relation to this proposal, that the Department had <u>not</u> properly applied the Precautionary Principle in its assessment, particularly in relation to the potential significant adverse impact upon the Fitzroy Turtle:

In relation to the Squatter Pigeon (southern)

1. the proponent admits that the proposal would require the clearing of 45 hectares of the known 215 hectares (21%) of habitat available to the Squatter Pigeon (southern); and
2. it is universally accepted that clearing and other loss of habitat is a major threat to the future survival of species; and

In relation to the Fitzroy Tortoise

3. The following statement by the Queensland Conservation Council:

> "The Fitzroy River tortoise (*Rheodytes leukops*) can only be found in the Fitzroy basin including the Fitzroy, Mackenzie, Dawson, Connors and **<u>Isaac Rivers</u>**. Sightings of the species is rare as it does not bask and rarely surfaces.....
>
> .... The Fitzroy river turtle is listed as vulnerable by both Environment Australia and the Environmental Protection Agency (Queensland). <u>The species was only first discovered in 1980 and more research is needed to understand both the biology and the conservation issues affecting this unique creature.</u>"[16] (emphasis added).

4. The following statement is from the Queensland's Environment Protection Agency:

> **"Threatening processes:** This turtle is threatened by the pollution and siltation of rivers and creeks, and the modification of riparian (waterway) vegetation by grazing and agricultural practices, **<u>mining</u>**, and timber harvesting. It is also likely that foxes eat their eggs.
>
> **Actions:** The Action Plan for Australian Reptiles identifies a number of actions to protect the Fitzroy River turtle. These are:
>
> - *To prevent pollution and silting of the Fitzroy River and its tributaries,*
> - *To increase public awareness of the species,*
> - *To reduce erosion, and*
> - *To increase the amount of native vegetation along the river edges.* [17]

The consideration of short-term economic impacts

Moolarben Coal Mine Pty Ltd (EPBC 2007/3297)

Despite two of the main objects of the EPBC Act being "to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and to promote the conservation of biodiversity", assessments of proposals referred to the Minister under the EPBC Act often seem to give weight to relatively short-term economic considerations, rather than longer-term considerations, which require that environmental sustainability be a core objective. For example, in relation to the proposal from Moolarben Coal Mine Pty Ltd, the Delegate made the following statement in the Statement of Reasons:[18] *"I noted that the action has an estimated value of $150 million, would directly employ approximately 220 construction workers and at its peak 317 permanent employees, and that when full capacity is reached (year four) the estimated tax revenue to the Australian Government would total approximately $59 million. Together with payroll tax and coal royalties the total public sector benefit is estimated at more than $10 million per annum."*

Failure to identify 'significant impact

Xstrata clearing – vegetation clearing from Newlands Mine to Collinsville

In or about August 2006, the Queensland Department of Natural Resources, Mines and Water ("DNRW") gave approval to Xstrata Coal to clear vegetation to establish a track for the purpose of transporting a 4,000 tonne 'dragline' from Xstrata's Newlands Mine to their mine at Collinsville. A bitumen-sealed public road ran between the two mines and Xstrata could have used that road to transport that dragline, albeit it at a cost of $50 million. The cost for transporting the dragline between the two mines using the vegetation-cleared track approved by the DNRW was reported to be only a tenth of that cost ($5 million). The proposed action was not referred to the Commonwealth Environment Minister despite the track which the proponent proposed to clear (and that which was *actually* cleared) traversing several regional ecosystems including threatened ecological communities under the EPBC Act. Quite obviously, the clearing presented a clear risk that the proposed action was "likely to have a significant adverse impact" on matters of national environmental significance, namely listed threatened species, and threatened and endangered ecological communities, threatened fauna species, Migratory Terrestrial Species, Migratory Wetland Species and Migratory Marine Species, including:

- Bluegrass (*Dichanthium* spp.) dominant grasslands of the Brigalow Belt Bioregions (North and South) (EPBC Act status: endangered);
- Brigalow (*Acacia harpophylla* dominant and co-dominant) (EPBC Act status: endangered);
- Semi-evergreen vine thickets of the Brigalow Belt (North and South) and Nandewar Bioregions (EPBC Act status: endangered); and
- *Croton magneticus* (EPBC Act status: vulnerable);
- *Eucalyptus raveretiana* (Black Ironbark) (EPBC Act status: vulnerable); and
- *Leucopogon cuspidatus* (EPBC Act status: vulnerable).
- *Erythrotriorchis radiatus* (Red Goshawk) (EPBC Act status: vulnerable);
- *Geophaps scripta scripta* (Squatter Pigeon (southern)) (EPBC Act status: vulnerable);
- *Neochmia ruficauda ruficauda* (Star Finch (eastern, Star Finch (southern)) (EPBC Act status: endangered);
- *Poephila cincta cincta* (Black-throated Finch (southern)) (EPBC Act status: endangered);
- *Rostratula australis* (Australian Painted Snipe) (EPBC Act status: vulnerable);
- *Dasyurus hallucatus* (Northern Quoll) (EPBC Act status: endangered); and
- *Egernia rugosa* (Yakka Skink) (EPBC Act status: vulnerable).

EDONQ reported the proponent's failure to refer the matter to the Commonwealth

Environment Minister under the EPBC Act (then First Assistant Secretary, Policy and Compliance Section – Approvals and Wildlife Division), and requested that the matter be investigated. It took the Department some 11 months to provide the following response in relation to the considerable concerns raised by EDONQ despite the Department obviously having no opportunity to properly assess the extent of the risk, or the actual impact, that the clearing would cause significant adverse impacts upon matters of national environmental significance, either *before* the clearing (the Department was not aware of the proposal) or *after* the clearing (by conducting the clearing prior to the Department's knowledge the proponent essentially destroyed any evidence which may have otherwise been available to the Department in its assessment):

> *"The information held by the Department* [DEWR]*, including an independent expert's survey results, does not show that the dragline relocation is likely to have significant impacts on matters of national environment significance. Accordingly, the Department has decided to cease further investigation of the matter.*
> *The parties involved in the dragline relocation activity have been advised by the Department of their obligations under the* Environment Protection and Biodiversity Conservation Act 1999 *with regards to referral of any future works where a significant impact is likely or there is any doubt about the level of impact."*

No action was taken against either the proponent, or DNRW, for the failure to properly refer the proposal to the Commonwealth Environment Minister under the EPBC Act.

Port of Airlie Marina and Residential Development (EPBC 2001/298) – Significant impact on dugongs

The proposed Port of Airlie Marina and Residential Development will, when complete, occupy approximately a third of Boathaven Bay (locally known as Muddy Bay) at Airlie Beach, Queensland. The Muddy Bay development (which is just around the corner from the Port of Airlie Marina and Residential Development) has seen the loss of several hectares of seagrass beds as well as the loss of many mature mangroves. Dugongs were often seen in the bay feeding on the seagrass but due to the activities of the development have possibly now disappeared from the area. In Australia, dugongs are not presently listed as threatened under the EPBC Act. However, dugongs are protected because they are a "listed migratory species" and a "listed marine species". This development was approved by the Commonwealth Environment Minister on 14th July 2004. On the 27th July 2004, Ian Lee (as the then President of Wildlife Whitsunday) requested a Statement of Reasons for the decision from the then Commonwealth Minister for the Environment. The *Statement of Reasons* contained the following:[19]

> "26. I found that Boathaven Bay has more than 105ha of seagrass beds. I found that seagrass beds may be lost over an area of 16ha *[15.23%]* as a result of the proposed action. However I also found that the seagrass cover varies significantly throughout the 16ha, and that the 16ha represents a maximum seagrass area that may fluctuate on a seasonal and annual basis. I found that seagrass beds provide important habitat for syngathid species (sea horse and pipefish species), Dugongs, Green Turtles and other marine species. I found that although Dugongs occur in the Whitsunday area, it is not considered a major Dugong area. I also found that the Dugongs that use the area may be able to relocate to other areas if a large portion of the seagrass is lost. I found that the loss of the seagrass beds will reduce the total area of habitat of other species that rely on the seagrass ecosystem. ." (emphasis added)

Proposed Expansion of Bowen Marine (EPBC 2006/2602) – Significant impact on loggerhead turtles

The township of Bowen in north Queensland sits on Edgecumbe Bay, a dugong protected area. Bowen has a marina with 142 moorings and 33 private berths. It was expected that future expansion would accommodate 100 extra berths.[20] Edgecumbe Bay is also home to marine turtles, both green and loggerhead. The loggerhead turtle is listed both as an "endangered species" and as a "migratory species" under the EPBC Act. The species is severely threatened.[21] No studies were undertaken by the proponent to ascertain what impacts the development would

have on the marine turtles or for that matter other listed threatened species that utilise the marina, the channel to the east of the marina, and/or the Magazine Creek area. In those circumstances, it is abundantly clear that, in the absence of findings from any such study, a prudent and proper assessment of the potential impacts was simply not possible.

In light of the ANAO findings and identified flaws, ANEDO supports: improvements in defining significant impact, formalising comprehensive monitoring and auditing, and increasing clarity and detail around how provisions of the Act and the precautionary principle are taken into account.

2.2 The importance of public participation and 3rd party rights to challenge the referrals, assessments and approvals process

The ANAO has noted: "there are significant challenges in administering referrals for legislation that relies largely on self-regulation."[22] The high degree of self-regulation in the referral process means that transparency, accountability and a role for public participation is fundamental. The role of third party enforcement is highly relevant to this fact.

It is essential that the Act contain robust provisions to enshrine 3rd party rights to challenge the referrals, assessments and approvals process. This is fundamentally important for transparency and accountability.

Case study – The need for 3rd party enforcement

An example of a successful third party enforcement action is *Booth v Bosworth,* which effectively ensured that the EPBC Act operated to protect values of the world heritage Wet Tropics area, by stopping the unlawful electrocution of almost 20% of the Spectacled Flying-fox population by a local lychee farmer. Without this third party action, the Spectacled Flying-fox population would have continued to decline rapidly, causing significant impact on the World Heritage values of the Wet Tropics due to the species' crucial role in seed dispersal and pollination.

Similarly, lack of Commonwealth enforcement of the EPBC Act left an individual to halt operation of electric grids by action under the Queensland Nature Conservation laws in the *Yardley Flying Fox case***.** The Commonwealth declined taking any enforcement action despite admission that 1100 spectacled flying foxes, by then listed as vulnerable under EPBC Act, were killed by Yardleys on a lychee farm near Cairns.[23]

In order to improve public participation under the Act, ANEDO makes the following recommendations:

- a retention of the current (or broader) standing provisions contained in the Act,

[22] 2008 Audit Report "The Conservation and protection of National Threatened Species and Ecological Communities" The Auditor General, 2008 Audit Report "The Conservation and protection of National Threatened Species and Ecological Communities", 2006-7 Performance Audit, Australian National Audit Office, 2007, para 42.
[23] See: *Booth v. Yardley Anor* [2006] QPEC 119 (30 November 2006), and *Booth v. Yardley Anor* [2008] QPEC 5 (8 February 2008).

- the incorporation of provisions that alleviate adverse costs orders upon potential environmental public interest litigants,
- the reinstatement of section 478 to amend the current situation in which applicants are required to provide an undertaking for damages to successfully obtain an interim or interlocutory injunction,
- the removal of applications for security for costs against public interest litigants,
- the opportunity for third parties and applicants to obtain merits review on decisions that effect matters of national environmental significance, and
- the opportunity for public interest litigants to apply for an upfront costs order prior to commencing the litigation process.

Specific recommendations to achieve these improvements include:[24]

- The insertion of a provision into the Act that allows the court to consider granting an order that each party to a proceeding bear their own costs.
- The insertion of a provision into the Act that allows the court to consider granting a protective costs order to a party to the proceeding (or include public interest costs orders in the *Federal Court Rules*).
- The insertion of a provision into the Act allowing public interest parties to apply for a maximum costs order.
- The insertion of a provision into the Act that prevents a party from making an application for security for costs against a public interest applicant.
- Reinstate the repealed section 478 into the Act in its original form:

  478 No undertaking as to damages

  The Federal Court is not to require an applicant for an injunction to give an undertaking as to damages as a condition of granting an interim injunction.
- The insertion of a provision into the Act that allows the court to grant the opportunity for third parties and applicants to obtain merits review on decisions regarding "controlled actions" under Parts 7-9 of the Act.
- The insertion of a provision into the Act that allows the court to grant the opportunity for third parties and applicants to obtain merits review on decisions regarding the "listing process" under section 184 of the Act.
- The repeal of the amendments made to the following sections as a result of the *Environment and Heritage Legislation Bill (No.1) 2006* that abolish the right of appeal to the AAT: 206A, 221A, 243A, 263A, 303GJ, 472 and 473.

2.3 The use of accreditation mechanisms

The 2006 amendments provided for a range of accreditation mechanisms for assessment processes.

Accreditation of plans, regimes and policies

The 2006 amendments granted the Minister power to approve, with or without conditions, the taking of certain actions in accordance with a policy, plan or program that

[24] For further detail see ANEDO EPBC Act amendment package submission at: http://www.edo.org.au/policy/epbc_amendment_package080305.pdf.

has been endorsed under a strategic assessment. These actions would then be able to be carried out without the need for separate assessment and approval.

ANEDO strongly supports measures to better assess cumulative impact (as discussed below in **Part 4**). However, the 2006 reforms do not necessarily guarantee a high quality of the strategic assessments and the accredited plans and policies. The desire for certainty should not be at the expense of ability to respond to changing circumstances or new information – this is particularly important in the context of the irreversibility of biodiversity loss and the uncertainty resulting from climate change.

We reiterate our concern that mechanisms designed for the benefit of avoiding the need for separate approvals may be abused and lead to poor environmental outcomes unless the accredited plans and policies are robust and underpinned by comprehensive environmental assessment. It is unclear whether different assessment standards are required in relation to the various instruments amenable to accreditation, including 'conservation agreements', 'bioregional plans', a 'policy, plan or program' and/or 'local planning schemes.' There is potential for this mechanism to create significant loopholes and allow large projects to avoid federal environmental impact assessment.[25] Further specific detail is required regarding how schemes such as local schemes will be assessed and accredited. Clarification is needed on how long each instrument is accredited for, public participation in accreditation, and when accreditation can be revoked.

Actions covered by Ministerial declarations or bioregional plans

The amendments also provided for the making of declarations that actions do not need approval under Part 9.[26] The ability to approve actions undertaken in accordance with a strategic assessment or bioregional plan may be an acceptable reform in theory, but it is impossible to be certain at this stage without knowing the level of detail associated with the strategic assessment or bioregional plan. If a strategic assessment is at a high level of generality, the impacts of particular actions under that strategic assessment may be impossible to meaningfully assess until the community is presented with the detail of a specific action. Obviously if that was the case, the prospect of not assessing that individual action would be a retrograde step. In either case, the Minister's capacity to exempt specific actions from assessment should be limited to situations where specific actions can be clearly anticipated at the time of the strategic assessment, the impacts of actions such as the specific action were specifically considered as part of the strategic assessment, and the Minister is not aware of any new information that could reasonably suggest that the assessment of the strategic proposal could now not be considered to have adequately dealt with the issues that might be associated with the specific proposal.

Bilateral Agreements

The 2006 amendments allow a bilateral agreement to make a declaration in relation to a broader range of accredited management arrangements and processes than previously.[27]

[25] For example, the new section 146M excludes certain nuclear actions, but would allow a state or territory uranium mining policy to be endorsed, and therefore proposed uranium mines under an endorsed policy would be exempt from consideration under the EPBC Act.
[26] Subdivision B, Section 37A.
[27] Sections 33 and 46.

This raised a number of concerns. The definitions of 'bilaterally accredited management arrangement' and 'bilaterally accredited authorisation process' are extremely broad and can include any arrangement or process in force under State or Territory law. Accreditation is subject to parliamentary scrutiny and disallowance, however there is a lack of detail regarding the criteria and specific processes for accreditation. Furthermore, once accredited, the accreditation no longer expires after 5 years, and can continue for a period specified in the agreement.

The accreditation provisions potentially pave the way for large areas or classes of actions to avoid individual Environmental Impact Assessment (EIA) under the EPBC Act. The decision to allow a proponent to avoid undertaking an EIA appears to rest exclusively with the Minister. Whether this will safeguard environmental outcomes is contingent upon the quality of the accredited arrangements. In the absence of comprehensive detail, it is difficult to have confidence that this streamlining of approval requirements will function to protect matters of national environmental significance. Often state laws are not effective in protecting such matters, and the only ability to regulate impacts occurs through the EPBC Act. For example, the False Cape development near Cairns did not require thorough assessment under Queensland legislation because it was under an existing rezoning approved in 1987.

A number of EDO offices have made comment on proposed bilateral agreements where the Commonwealth accredits state planning processes.

Case studies: Flaws in bilateral agreements

NSW Commonwealth Bilateral Agreement

In December 2006, the Commonwealth released a draft bilateral agreement to accredit the planning processes under the NSW *Environmental Planning and Assessment Act 1979*. Due to the discretionary nature of the NSW assessment process, particularly with regard to major projects falling under Part 3A of the NSW Act, it was impossible to know with certainty exactly what process is being accredited, as the discretion built into Part 3A is so broad.[28]

The NSW EDO therefore recommended that the references to Part 3A be removed from Schedule 1 of the Draft Agreement, and that EPBC Act assessment remain as a check for the projects of greatest impact in NSW. This would be consistent with the Commonwealth laws performing a gate-keeper role for potentially undesirable projects.[29]

Although no other submissions were received, the bilateral agreement was gazetted. In effect this means that the Commonwealth has accredited an extremely discretionary process, with no guarantee that comprehensive environmental assessment will occur for major projects that have potentially significant impacts.

Queensland Commonwealth Bilateral Agreement

The Queensland bilateral agreement gives supervision of EIS processes for most significant

[28] The Minister has ultimate discretion under section 75J and that Director General requirements for Environmental Assessment reports are discretionary, and therefore there is no minimum standard for assessment.

[29] See: *EDO Comment on the Draft Agreement between the Australian Government and the State of New South Wales*, 5 December 2006, available at http://www.edo.org.au/edonsw/site/pdf/subs06/epbc_assessment_bilateral_comment061205.pdf.

projects to the Queensland Coordinator General within the Department of Infrastructure and Planning, rather than the Environment Department (EPA). The Queensland Coordinator General's Department was historically to promote development of the state and thus the Coordinator general is generally pro development, whereas the EPA are concerned with environmental impacts which makes them a more appropriate body to carry out EIS accredited for EPBC Act purposes.

Additionally, use of the Coordinator General-run EIS process under the bilateral agreement allows proponents to avoid the false and misleading information provisions in the EPBC Act, as the Queensland legislation does not have similar prohibitions on such information in EIS. There is serious concern amongst the conservation sector about 'greenwashing' in many Queensland EIS, yet the bilateral agreement allows this to occur by circumventing the EPBC Act provisions.

South Australia Commonwealth Bilateral Agreement

The South Australian bilateral agreement reflects major project provisions under the State Development Act, which is arguably a lesser standard for EIS than the processes outlined in the EPBC Act. The bilateral agreement also results in decisions of the State Minister not being reviewable meaning there is a lack of accountability.

Northern Territory McArthur Mine case

Mount Isa Mines (MIM) had approval for underground mining of the McArthur River Project (and later, open cut mining). In May 2002, the Commonwealth entered into a Bilateral Agreement with the Northern Territory, which provides an action does not need to be assessed under the EPBC Act if it is assessed pursuant to the "modified procedures" in the Procedures. The EPBC Act was triggered by potential environmental impact of the underground mining on a vulnerable species of Freshwater Sawfish listed under the EPBC Act, as well as a number of listed migratory species found in the McArthur River. Due to the Bilateral Agreement, the assessment was undertaken under the *Environmental Assessment Act (NT)*. One flaw in this process is that there is no opportunity for public comment or appeal rights available at this stage under the NT system. A further problem was that the process enabled the mine to change assessment from an EIS to a PER.

Victoria

Victoria does not have a bilateral agreement. The current Victorian alternative is ad hoc accreditation of Victorian assessments on a case by case basis. This results in a lack of certainty and consistency and a high degree of reliance on the Victorian process. In highly politicised government backed projects such as the Channel deepening project and the Desalination plant there is little confidence in Victorian processes being credible and impartial. ANEDO would therefore not support accreditation of Victorian processes under an EPBC Act bilateral agreement as this would not establish best practice.

We note that other concerns have been raised. The Audit Report (discussed above) noted that "bilateral agreements are more likely to become the main means of improving the efficiency of the assessment process," but cautioned that: "Commonwealth/State tensions need to be resolved need to be resolved before accreditation can work efficiently."[30]

[30] *National Audit Report: "Referrals, Assessments and Approvals under the Environment protection and Biodiversity Conservation Act 1999"* The Auditor General, Audit Report No. 38, 2002-03 Performance Audit, Australian National Audit Office (para 30).

2.4 The use of offsets

A key part of current approvals process is the ad hoc use of offsets as conditions for approved projects. ANEDO is of the view that the use of offsets under the EPBC Act needs to be strictly confined due to the many inherent limitations of offsets. While there may in some instances be a need for "flexibility" in the implementation of the Act, we consider that flexibility must not be at the expense of the environmental protection objectives of the Act.

An emphasis on offsetting is inconsistent with the first listed object of EPBC Act which is "to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance" (section 3(1)(a)). The idea that impacts on such unique matters of national environmental significance can simply be offset, is deeply concerning. In many cases it will not be possible to offset impacts on specific unique places and species.

Despite this fundamental problem, we note that offsetting currently occurs on a case by case basis for controlled actions under the Act, usually through the imposition of conditions of consent.[31] There is no standard scientific methodology for assessing quantity, quality or location of offsets, and there is little evidence of success of offsets, as illustrated by case studies.

Case studies - Limitations of offsets

South Eastern Red-Tailed Black Cockatoo (Victoria)

One key limitation of offsetting schemes is the time lag between losses as a result of an action and the gains delivered by an offset. While the losses from permitted actions are typically immediate, without an insistence on offsets credits already being in place at the time that the loss occurs, the gains from offsets will often not be available for many years. A good example of this issue can be found in the continuing loss of feeding habitat for the South Eastern Red-Tailed Black Cockatoo (RTBC). Scientific research has demonstrated that mature bulokes of 100 or more years of age are critical feeding habitat for the RTBC.[32] The Recovery Plan for the Cockatoo recognises that feeding habitat is the most important limiting factor for the birds. Despite the listing of the RTBC under the EPBC Act (and Victorian and South Australian legislation), habitat in the form of mature paddock trees continues to be lost. Where EPBC Act referrals of tree clearing proposals have occurred, clearing has invariably been permitted subject to conditions requiring a mixture of revegetation and better protection of existing remnants. While there is no doubt as to the potential of these activities to contribute to the conservation of the RTBC in the long term, the emphasis on long term gains through offsetting rather than immediate protection is exacerbating the already serious "bottleneck" in feeding habitat experienced by the RTBC

Western Ringtail Possum (Western Australia)

The Western Ringtail Possum (WRP) is found only in the south west of Western Australia (WA)

[31] The activity report for 2006 indicated that 138 of 152 controlled actions were approved with conditions: *Environment Protection and Biodiversity Conservation 1999 Activity Report* 30 June 2006, available at: http://www.environment.gov.au/epbc/statistics/index.html.

[32] See Maron, M (2005) Agricultural change and paddock tree loss: Implications for an endangered sub-species of Red-Tailed Black Cockatoo. Ecological Management and Restoration 6, 206-211.

and is listed as vulnerable under the EPBC Act and threatened under WA law. The main threats to the possum are loss of habitat, introduced predators and changing fire regimes[33]. In coastal areas, habitat is being cleared at a significant rate due mainly to residential and holiday developments. The WRP has been the subject of an informal offsets program under the EPBC Act. Scientific evidence indicates that this "offsetting" is inappropriate in the circumstances and does not result in a net conservation benefit to the species. The WA Department of Environment and Conservation (DEC) manages a translocation program for WRPs. A number of referred developments under the EPBC Act which require clearing of WRP habitat have been approved subject to WRPs being translocated[34]. Indeed DEC often requires possum translocation for developments that have been assessed at the Federal level[35]. Approvals under the EPBC Act have allowed the clearing of habitat on the condition that WRP's are translocated according to the DECs requirements and protocols. DECs requirement is that proponents pay DEC to translocate the possums and conduct monitoring for the first 12 months (currently $41,200 for up to 10 possums, $45,900 for 11 – 15 possums, etc).

The DEC translocation program has been running since 1991. The program and in particular its monitoring component is largely dependent on payments from developers and therefore, when development decreases, the monitoring program ceases. It is difficult to state exactly how many WRPs have died after translocation, due to a lack of adequate monitoring and a lack of complete publicly available figures, however the data that is publicly available indicates that translocation results in a very high mortality rate for the translocated possums. Evidence indicates that the majority of WRPs die within 12 months of translocation. This evidence does not support the contention that translocation results in a net conservation benefit for the WRP. However translocation continues as an offset measure.

Mission Beach Cassowary population (North Queensland)

A resort development at Mission Beach in Far North Queensland was allowed to proceed on the condition that appropriate riparian habitat for the highly endangered Cassowary was revegetated and preserved as an offset. The overall result has been a net loss of habitat and further decline in the EPBC-protected species. Well known Cassowary researcher Les Moore has observed that the coastal population in the Mission Beach area is declining rapidly. The reasons for this decline include long-term loss of habitat, fragmentation, unviable isolated populated sizes and road fatalities. In particular, the development has lead to increased traffic in the area which has had a significant negative impact on the species. Mr Moore observes: "30% of all the animals that die at Mission Beach are run over by cars. The survival rate of Cassowary chicks is currently 4-6%".

As a condition of consent, money was given to a Queensland government agency for research into traffic impacts. This money has yet to be spent, with no research being undertaken and no funds dispersed. Furthermore, the revegetated riparian area required as an offset has not yet delivered any viable Cassowary habitat. It will be some time before the revegetated area is ready to support Cassowary populations. Thus, in the short term there has been no discernible gain in habitat, while the development has led to a clear loss of viable habitat. This example highlights why offsets should not apply to habitat that is critical to the survival of a species. Development cannot be justified in this circumstance on the basis that the impacts could be offset elsewhere. The Mission Beach habitat should have been categorised as a 'no go' or 'red flag' area incapable of being offset.

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[33] Department of Environment and Conservation (WA) Fauna Species Profile Western Ringtail Possum *Pseudocheirus occidentalis*.

[34] For example the Cape View development, EPBC 2006/3070 ; Dalyellup Estate EPBC 2006/3075 (if recommended by DEC); Lowe development EPBC 2006/3023 (if recommended by DEC); Dawson's Beach Estate EPBC 2005/2153 (if recommended by DEC); Novacare Lifestyle Village EPBC 2001/311; South Busselton Primary School EPBC 2001/290.

[35] For example Ray Village Busselton EPBC 2007/3533 (57 WRPs to date).

ANEDO submits that the EPBC Act should focus on firstly avoiding and/or minimising impacts on matters of national environmental significance, and second, achieving the goal of 'enhancing' rather then merely 'maintaining' environmental quality. Such a goal recognises that the environment has been significantly degraded as a result of past human impacts, and that action is required to halt and reverse this trend.[36] It also gives greater certainty to achieving the minimum goal of maintaining environmental quality, due to the limitations and risks associated with offsets.[37]

2.5 The need to review the current Administrative Guidelines

ANEDO made a submission in 2005 on improving the Administrative Guidelines under the EPBC Act. Our key recommendations included that:

- The definition of 'population' in the draft guidelines and/or the criteria itself should be modified to remove the potential 'loophole' in relation to the criterion of an action leading to a long-term decrease in the size of a population, while maintaining the benefit of the definition in relation to the criterion of an action fragmenting an existing population into two or more populations;
- The term 'area of occupancy' should be clearly defined to provide clear guidance and easy application;
- The definition of 'invasive species' should be redefined to clearly incorporate native species;
- The term 'habitat critical to the survival of an endangered ecological community'. should be defined in a similar way to the term 'habitat critical to the survival of a species', including not only habitat identified in a recovery plan and/or listed on the Register of Critical Habitat, but also other areas necessary for the long-term maintenance of the ecological community;
- The definition of 'population' should be redefined in relation to migratory birds visiting Australia from other countries to only comprise the population of the species that visits Australia;
- The definition of 'ecologically significant proportion' should be expanded to include: ecological factors that should be considered in each case in determining what is an ecologically significant proportion of a population.; and a range of examples (which includes a range of species with different population sizes and life cycles) identifying what is, or may be considered to comprise, an ecologically significant proportion of a population;
- Clear reference should also be included regarding descriptions of the ecological character of relevant wetlands in order to provide guidance on the meaning of the term that is more specific to each wetland; and
- The Guidelines should include a specific reference to the fact that greenhouse gas emissions from mines are a relevant indirect and/or offsite impact.

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[36] Western Australia Environmental Protection Authority (2006) *Environmental Offsets. Position Statement No. 9.*

[37] ANEDO' full submission on the use of offsets under the EPBC Act is available at: http://www.edo.org.au/edonsw/site/pdf/subs07/epbc_offsets071204.pdf.

While some of these issues have been partially addressed, the main problem still stands that is, a 'population' generally means a 'regional population' and not a local population.[38] This has the following problems:

1) A local population may be destroyed, but unless that will cause a significant impact on the regional population, the impact is not significant.
2) In order to make a proper assessment, a consultant needs to establish the importance of a local population in maintaining the regional population. However, information on the importance of a local population in maintaining the regional population and on the size of the regional population is often lacking (in these cases, consultants often assume that the regional population is large, and therefore can conclude that an impact on a local population will not be significant).
3) The regional approach does not effectively address cumulative impacts because, as indicated in (2), consultants often assume that the regional population is large, and therefore can conclude that an impact on a local population will not be significant.

An example is assessment in relation to the Anvil Hill coal mine in NSW. The consultant did not establish the size of the population of an orchid at the site (the local population), but assumed it was small compared to the size of the regional population (there was some data to suggest that the regional population was large), and therefore concluded that the impact would be unlikely to be significant. In contrast, the clients of the EDO had evidence to suggest that the local population was large.

ANEDO submits that a better option would be to define a population to be the population that occurs at the site and adjoining areas.[39] This means that if half the site is cleared, the impact is likely to be significant. There is no need to determine the importance of the population at the site in maintaining the regional population.

[38] See page 11 of the EPBC Guidelines.
[39] See NSW, DECC guidelines on the 7 part test, available at:
http://www.environment.nsw.gov.au/threatenedspecies/tsaguide.htm.

Summary and recommendations

- Make amendments to address flaws noted in the Audit Report relating to: improvements in defining significant impact, formalising comprehensive monitoring and auditing, and increasing clarity and detail around how provisions of the Act and the precautionary principle are taken into account.
- The Commonwealth Government should reassess the 2006 amendments and reinstate transparent and comprehensive assessment processes regarding: fast track approvals, financial contributions, effect of new listings, referrals containing options, policy statements, early refusals, and commercial in confidence information.
- Strengthen 3rd party enforcement provisions by:
  - The insertion of a provision into the Act that allows the court to consider granting an order that each party to a proceeding bear their own costs.
  - The insertion of a provision into the Act that allows the court to consider granting a protective costs order to a party to the proceeding (or include public interest costs orders in the *Federal Court Rules*).
  - The insertion of a provision into the Act allowing public interest parties to apply for a maximum costs order.
  - The insertion of a provision into the Act that prevents a party from making an application for security for costs against a public interest applicant.
  - Reinstate the repealed section 478 into the Act in its original form:

    478 No undertaking as to damages

    The Federal Court is not to require an applicant for an injunction to give an undertaking as to damages as a condition of granting an interim injunction.
  - The insertion of a provision into the Act that allows the court to grant the opportunity for third parties and applicants to obtain merits review on decisions regarding "controlled actions" under Parts 7-9 of the Act.
  - The insertion of a provision into the Act that allows the court to grant the opportunity for third parties and applicants to obtain merits review on decisions regarding the "listing process" under section 184 of the Act.
  - The repeal of the amendments made to the following sections as a result of the *Environment and Heritage Legislation Bill (No.1) 2006* that abolish the right of appeal to the AAT: 206A, 221A, 243A, 263A, 303GJ, 472 and 473
- Review bilateral agreements and other accreditation mechanisms to ensure only best practice assessment processes are accredited.
- Clarify criteria and process for the different plans, policies and strategic assessments, and ensure public involvement and transparency.
- Establish clear scientific rules for the limited use of offsets under the Act.
- Review the Administrative Guidelines to improve consideration of potential impacts.

3. Threatened Species and Ecological Communities (ToR b)

b. Lessons learnt from the first 10 years of operation of the EPBC Act in relation to the protection of critical habitats of threatened species and ecological communities, and potential for measures to improve their recovery;

As noted in the 2007 Audit Report *The Conservation and Protection of National Threatened Species and Ecological Communities*,[40] and acknowledged by the Senate and the Department, biodiversity continues to decline in Australia. Threatened species are rarely if ever taken off lists due to successful recovery.

Key Findings of the 2007 Audit Report included:

- as of 30 June 2006, there were 1,684 species listed in six different categories (para 11), however the list of threatened species is not sufficiently up to date (para 17);
- much work remains to be completed, and that it is likely there will be substantial inconsistencies and gaps in the national list of species when compared to the lists of the States (para 18);
- there are "uncertainties and significant scientific gaps in knowledge of species" which makes the department's task difficult in terms of keeping the list current (para 16);
- progress under the previous requirements of the Act in listing EC's was slow, with a substantial backlog in processing of public nominations (para 21);
- for marine fish, excessive delays in expert advice, average consideration 4 years (para 13);
- "there is a considerable risk remaining that incorrect decisions will be made in relation to other parts of the Act because only partial or incorrect information is available… updating information on listed species should be given priority" however "resource limitations and competing priorities have constrained progress" (para 19);
- in addition to the requirements of the Act, Commonwealth, Sate and Territory Ministers also committed in 2000 to have recovery plans in place for all critically endangered and endangered species by 2004". This was not met with only 126 (22%) of the 583 species having plans completed by 2004 (para 29);
- statutory timeframes in Commonwealth areas were generally not met (para 30); and
- the requirement of the Act to review all recovery plans and TAPs every five years was not met and of the 56 recovery plans due for review only one was completed and that "further progress could reasonably have been expected" (para 31).

Some reasons for delays and backlogs in listing were identified as: technical challenges in defining EC's and their boundaries; expanded consultation process; changes in priority away from addressing public nominations to strategic assessment of national priorities; and limited resources (para 22).

[40] 2008 Audit Report "The Conservation and protection of National Threatened Species and Ecological Communities" The Auditor General, 2008 Audit Report "The Conservation and protection of National Threatened Species and Ecological Communities", 2006-7 Performance Audit, Australian National Audit Office, 2007.

In terms of compliance, ANAO found that "implementation of the compliance and enforcement strategy has generally been slow", the Department did not know "whether conditions on the decisions are generally met or not", and "there has been insufficient follow up on compliance" (para 48), and "consequently, the Department has not been well positioned to know whether or not the conditions that are being placed on actions are efficient or effective" (para 49).[41]

ANEDO supports the 8 recommendations made by ANAO,[42] namely:

Short term

- Improving the accuracy and completeness of the lists
- Establishing a priority order for recovery plans (*Note: ANEDO would clarify this recommendation to reinstate recovery plans as mandatory requirements*)
- Promoting the requirements of the Act
- Strengthening compliance and enforcement

Long term

- The lists should be regularly updated
- Building compliance partnerships with relevant bodies
- Consider the scope of assistance to local government in priority areas to assist in mapping and documentation
- Giving sufficient priority to monitoring and reporting to Parliament on the timeliness and effectiveness of Commonwealth recover actions.

This section addresses 4 key concerns:

1) Effective listing processes,
2) Critical habitat,
3) Recovery planning and
4) Resources.

3.1 Effective listing processes

ANEDO raised concerns with the streamlining of listing process (both for species and heritage listing) that occurred by amendment of the Act in 2006. At the time, we raised concerns that the amendments pre-empted the findings of the 2007 Audit Office Report.

Key issues of concern relate to the streamlining of nomination and listing processes. Our concerns include:[43]

- **The repeal of section 185** – in effect, this amendment meant that the Scientific Committee is no longer required to assess the State and Territory lists gazetted by

[41] 2008 Audit Report "The Conservation and protection of National Threatened Species and Ecological Communities" The Auditor General, 2008 Audit Report "The Conservation and protection of National Threatened Species and Ecological Communities", 2006-7 Performance Audit, Australian National Audit Office, 2007.
[42] See paras 60 and 61.
[43] ANEDO's full submission on the 2006 amendments is available at: http://www.edo.org.au/policy/epbc_amendment_bill061027.pdf

Minister Robert Hill in 2001.[44] While this may have lightened the administrative burden for the Department and the Scientific Committee, and eased political pressure regarding controversial listings, but it is a heavy handed and arbitrary approach. It is contrary to the principles of ESD and good governance to deal with the back log of listings in this way. The removal of obligations to process and assess nominations is a serious flaw in the Act.

- **Annual thematic nominations** – The 2006 amendments significantly limit the public and scientific involvement in the listing of species. In deciding upon a theme, the Minister has broad discretion which may relate to a particular group of species, a particular species or a particular region of Australia.[45] This is not a definitive list of criteria and so in practical terms, this means that a range of considerations may come into play, not just the conservation status of the species. It is likely that the more controversial species (such as those currently commercially exploited) are unlikely to qualify thematically. ANEDO reiterates our concern that nomination and listing must be based on the conservation status of the species only.
- **Priority assessment list** - The amendments provided that once all nominations relating to the theme for the year are received, the Scientific Committee has 40 days to give the Minister a "priority assessment list."[46] There is no explicit reference to conservation status as being a relevant consideration for inclusion on the Priority Action List. This is inconsistent with Australia's obligations under the *Convention on Biological Diversity*. There is no public consultation on the proposed list, and the Minister may have regard to "any matter that the Minister considers appropriate" in reaching this decision. It is therefore possible under the amendments for a nominated species to be removed from the final Priority Assessment List on commercial or economic grounds, regardless of the conservation status of that species.
- **Timeframes for listing** – The amendments also removed the statutory deadlines for the Scientific Committee to assess public nominations within 12 months and the Minister to decide on nominations 90 days after receiving advice, and allowed for extensions on assessments up to 5 years. As previously submitted, ANEDO recommends a tighter timeframe should be included, for example, 2 years, within which the Minister must decide whether to list threatened ecological communities. The loss of species over the last 5 years demonstrates the dangers of this approach. DEH and the SC should be provided with additional resources to enhance their capacity to complete assessments in a timely manner. This is consistent with the application of the precautionary principle as enshrined in the Act.
- **Access to information** - The amendments prohibit the Scientific Committee from disclosing any information used to make an assessment of any proposed amendments to the Act's list of threatened species until the amendment has been registered. Environment groups such as HSI have previously requested that the advice be made public. ANEDO supports this request.

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[44] The Department had failed to process section 185 and many public nominations under section 191 to date, despite obligations to do so.

[45] Section 194D.

[46] The criteria to which the Scientific Committee must have regard in deciding what should be included in the proposed priority action list include: any conservation themes determined by the Minister; the SC's own views about what should be given priority; the SC's capacity to deal with assessments while still performing other functions; and any other matters the SC considers appropriate: section 194G.

3.2 Critical habitat

This is a seriously underutilized mechanism in the Act, with only 5 critical habitats currently listed on the Register,[47] and currently has some limitations.

The 2006 amendments provided that: in considering whether to list habitat on the Register the Minister must take into account the potential conservation benefit of listing the habitat; additional considerations may be added or explicitly prohibited in the regulations; and that particular material on the register may not be publicly available if "the interests of relevant landholders may be impeded or compromised."[48] The consideration of conservation benefit is not the definitive consideration as the amendments provide a broad discretion for other considerations, including political considerations, to be taken into account or prescribed by regulations. "Interests" of landholders is not defined, and this discretion has the potential to undermine transparency.

With regard to critical habitat, ANEDO has previously submitted that a formal process for public nominations of 'critical habitat', including timeframes within which listing decisions should be established. The Act should also be amended to provide a mechanism for automatic consideration of critical habitat identified in Action Plans for listing in the register, analogous to the previous section 185 'bulk listing' provisions for ecological communities. A minimum timeframe of 2 years should be established, within which existing recovery plans (ie, recovery plans that were made before 16 July 2000) must be revised to identify critical habitat (as required for new recovery plans under *EPBC Regulation* 7.11), which must in turn be considered for listing on the critical habitat register (under *EPBC Regulation* 7.09)

Furthermore, ANEDO reiterates our previous recommendation that provision is made for emergency interim protection orders to be made in relation to critical habitat. An example of where such an order would be appropriate is Mission Beach in North Queensland. Currently there are several proposed developments in cassowary habitat that are not being declared controlled actions (as the areas are not large). An interim protection order could allow the impacts to be more properly assessed before incremental loss significantly affects the cassowary population.[49]

3.3 Recovery planning

Individual EDO offices have observed a trend of downgrading recovery planning in response to resource issues in a number of jurisdictions.[50] This has been done by removing mandatory planning requirements. Sections 267 and 269AA of the EPBC Act

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[47] Register of Critical Habitat**:** *Diomedea exulans* (Wandering Albatross) - Macquarie Island; *Lepidium ginninderrense* (Ginninderra Peppercress) - Northwest corner Belconnen Naval Transmission Station, ACT; *Manorina melanotis* (Black-eared Miner) - Gluepot Reserve, Taylorville Station and Calperum Station, excluding the area of Calperum Station south and east of Main Wentworth Road; *Thalassarche cauta* (Shy Albatross) - Albatross Island, The Mewstone, Pedra Branca; *Thalassarche chrysostoma* (Grey-headed Albatross) - Macquarie Island. The register is available at: http://www.environment.gov.au/cgi-bin/sprat/public/publicregisterofcriticalhabitat.pl.

[48] Section 207A(1) and section 207A(3)(3A).

[49] This would be consistent with for example, the Victorian *Flora and Fauna Guarantee Act,* which provides for interim protection for threatened species and ecological communities between nomination and listing. The killing of the Grey-headed Flying Foxes in Melbourne's Botanic Gardens while the species was being considered for *EPBC Act* listing, is an example of the need for such an amendment.

[50] For example, by amendments to the *Threatened Species Conservation Act 1997* (NSW).

provide that it is no longer compulsory to have a recovery plan. The Bill provides broad Ministerial discretion regarding recovery plans. Furthermore, section 270(2A) requires that certain issues such as the identification of critical habitat in a recovery plan, need only be addressed to the extent to which it is practicable to do so.

In addition to becoming discretionary in some jurisdictions, rather than mandatory, recovery planning is often hampered by lack of resources (discussed below), time delays, and also the consideration of socio-economic interests rather than focusing on the science, as illustrated by the following case study.

Case Study: Recovery Plan for the Giant Freshwater Crayfish (Tasmania)

A Recovery Team was formed in 1997 (as part of the Regional Forest Agreement process) to develop a recovery plan for the *Astacopsis gouldi*, the world's largest freshwater crayfish. The recovery team comprised thirteen members, including representatives of the Department of Primary Industries, Water and Environment, Forestry Tasmania and a number of scientific, conservation and community stakeholders. The development of a recovery plan was given further emphasis when the *Astacopsis gouldi* was listed as a threatened species under the EPBC Act at the Act's commencement in 2000.

Contrary to the Recovery Plan Guidelines, no research plan was implemented initially to prioritise and identify research objectives. As a result, despite 10 years of negotiation over the terms of the plan, significant knowledge gaps remain concerning the habitat range and behaviour of the freshwater crayfish.

This proved a significant stumbling block, particularly in relation to the extent of buffer zones necessary to protect the crayfish from the impacts of logging. One scientific expert reported that 12 of the recovery team members voted to adopt a precautionary approach and require 30 metre buffer zones around all headwater streams where logging and heavy machinery were not permitted. This restriction was supported by advice from a visiting international expert, Dr Premek Hamr. However, the forestry representative on the recovery team objected to the requirement, saying that there was no science to support the need for such extensive buffer zones.

The debate continued over a number of years without resolution. The recovery team presented a draft recovery plan to the Tasmanian government which required a 30 metre buffer, but the government requested that the draft plan be amended to provide that a 30 metre buffer zone "may" be required. The majority of the recovery team opposed this amendment. In 2005, with no possibility of resolving the impasse between the forestry representative and the other members of the recovery team, the recovery team was disbanded. A draft recovery plan was prepared by the Tasmanian government which required 30 metre buffer zones only in headwaters where the *Astacopsis gouldi* has been recorded. This plan was ultimately endorsed by both the Federal and State governments in 2006.

A scientific expert on the recovery team, Todd Walsh, has strongly criticised the recovery plan process and described the final document as "fundamentally flawed". Mr Walsh was extremely disappointed at the length of time taken to adopt a recovery plan, the lack of transparency in the process and the unbalanced influence of industry stakeholders, the failure to adopt a precautionary approach or to facilitate further research into the conservation needs of the species.

ANEDO submits that recovery planning should be mandatory, with sufficient resources allocated to ensure that it is done effectively.

3.4 Resources

The National Audit Office Report No. 31 stated:

> "with the current levels of resources and staff … there is a high risk that nationally significant Ecological Communities … will not be listed within a reasonable timeframe."[51]

The overall audit concluded that protecting and conserving threatened species and ecological communities still remains a challenge for the department due to the: **s**cale of the prescribed tasks; technical requirements for assessing, protecting and conserving over a thousand species and hundreds of ecological communities; and limited resources.[52] The Report identified 4 key areas of non compliance relating to: maintenance of the list of TS and EC's, surveying species on Commonwealth land, completing recovery plans in time, and reviewing State and Territory listed ECs.[53]

The Report also noted 4 unsuccessful attempts by the then DEH to seek additional funding, and notes that the NHT provided $18 million, however this was insufficient to address the resources shortfall.[54] The Report stated:

> "The department has indicated to the ANAO that it has been very aware of its lack of capacity to properly administer the requirements of the Act," [55]

and concluded:

> "the threats to biodiversity in Australia remain and further attention to the administration of the Act is required if it's objectives are to be realised."[56]

Similar to the limited funding for recovery planning, the funding for Threat Abatement Plans has been inadequate. For example, many TAPs relating to invasive species are mostly ineffective because they are not adequately funded. The consequences of this may have significant environmental and economic impacts. For example, unless the TAP for *Phytophthera* is implemented comprehensively, we stand to lose large swathes of native trees, and possible extinctions, but hardly any money is going to it.[57]

While we support initiatives for implementation of the Act to be efficient and effective, we maintain that there should be an overall increase in resources to DEWR to obviate the need to sacrifice individual planning for certain species. Recovery and threat abatement plans are vital tools for conserving threatened species in Australia, and must be fully supported as a priority for the Australian Government. ANEDO submits that recovery plans should remain mandatory. Similarly, any decision to revoke a recovery plan must involve a transparent process for public comment.

Also, consistent with previous submissions, ANEDO recommends that provisions relating to wildlife conservation plans (sections 285-300A) should be strengthened

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[51] Para 24.
[52] Para 50.
[53] Para 51.
[54] Para 54.
[55] Para 56.
[56] Para 58.
[57] See Invasive Species Council Submission to this Inquiry.

beyond current requirements for conservation advices:[58] first, to make the preparation of wildlife conservation plans compulsory, rather than at the Minister's discretion; second, to require Commonwealth agencies to act in a manner consistent with wildlife conservation plans, rather than just taking reasonable steps to act in accordance with wildlife conservation plans (s286); and third, to require Commonwealth agencies to implement wildlife conservation plans in Commonwealth areas (as required for recovery plans – see s269). Similarly, once a key threatening process is listed, the development of a threat abatement plan for that key threatening process should be compulsory, and not at the discretion of the Environment Minister.

Summary and recommendations

- That the Senate Inquiry note the findings of the Audit Report and recommend the Government address the deficiencies through appropriate amendments and resourcing.
- The Commonwealth Government should reassess the 2006 amendments and reinstate a science-based public process for nominations and listing, including: a requirement to address the back log of nominations (reinstate section 185); require nominations be considered on conservation status only; require public consultation on the priority assessment list; set clear timeframes for assessing nominations (maximum 2 years); and provide for access to nomination information.
- Strengthen critical habitat provisions by establishing a formal public nomination process with timeframes, and providing for emergency interim protection orders.
- Strengthen recovery planning provisions, including reinstating mandatory planning with increased funding to achieve this.
- Ensure adequate resources are made available to the Department to address implementation deficiencies identified.

[58] Section 266B of the EPBC Act requires that there is a mandatory approved conservation advice for each listed threatened species (except for extinct or conservation dependant categories) and each listed threatened community. Conservation advices are not legislative instruments.

4. Cumulative Impacts (ToR c)

c. The cumulative impacts of EPBC Act approvals on threatened species and ecological communities, for example on Cumberland Plain Woodland, Cassowary habitat, Grassy White Box Woodlands and the Paradise Dam;

4.1 The Act does not adequately assess cumulative impacts

ANEDO has consistently submitted that a key flaw of the Act as currently drafted is that it fails to adequately account for cumulative impacts. While amendments to the Act have enabled a development to be considered as a whole rather than in stages (where approval may often be granted in stages through State laws), there is no assessment of the overall impact of a series of unrelated developments, for example on critical habitat for certain species or World Heritage values. For example, in the context of the Great Barrier Reef World Heritage Area, which extends over 2000 km, a development proponent may argue that one development will not impact significantly on the values. This conclusion would be different if cumulative development impacts were properly assessed. Similarly, if the impacts of several developments on migratory birds are each assessed in isolation, it is difficult to prove that any one development will have a significant impact on a particular species. However, if considered cumulatively, there may clearly be a significant impact. This is evident in a number of case studies. The Act also cannot effectively consider "legacy" decisions that may have been made before the Act was introduced, but that have significant cumulative impacts over time, for example, impacts on the Coorong.

Case studies – Failure to account for cumulative impacts

Mission Beach

Most developments at Mission Beach involve single blocks where the impact of the development may technically only impact the habitat of one cassowary. However, when considered cumulatively it is clear that the impact of a number of single block developments is significant for the limited remaining cassowary habitat in the area.

McArthur River

There was little consideration of cumulative downstream impacts on turtles and dugongs.

Cooloola, vegetation clearing for Airpark

The decision relating to Cooloola, vegetation clearing for Airpark (EPBC 2001/1283) involved a failure to consider cumulative impacts on a RAMSAR wetland, and it was decided that the clearing was not controlled action if carried out in the manner specified.

Sonoma Coal Project **(EPBC 2005/2080)**

In approving the proposal the Delegate found that *"clearing of the estimated 58 hectares of Brigalow vegetation is not likely to have a significant impact on the listed Brigalow community (Acacia harpophylla dominant and co-dominant)*"[59]. However, there seemed to be no consideration given to other

[59] Flanigan, Mark. *Statement of Reasons for Decision on Not Controlled Action under the Environment Protection and Biodiversity Conservation Act 1999*. (Australian Department of the Environment and Heritage, Sonoma Coal Project, EPBC 2005/2080, 21st June 2005, p. 3).

activities in the area or region when determining whether a significant impact would be had upon the listed Brigalow community. For example, what seemed to be ignored in this assessment was the EPBC Act approvals which were granted for the clearing of Brigalow by other mining companies within the region. If multiple proposals were referred for assessment under the EPBC Act to, inter alia, clear areas of the same listed vegetation (for example, 60 hectares each) of which there only remained 1,000 hectares in the area, then it is inappropriate and inadequate to fail to consider the impact of each of those proposals *together* upon the relevant threatened community. In this example, if the proposal was assessed in isolation (as per the present approach) then the decision may very well be that there would not be any significant impact (only 60 of 1,000 hectares, or 6%). However, if all of the proposal were considered together, then the full impacts would be clearer (600 of 1,000 hectares to be cleared, or 60%) and a proper assessment could take place. In relation to Brigalow, in 2000 it was estimated that this endangered ecological community had been devastated to the point that it now had less than 10% coverage. Since 2000, the agricultural and mining sectors have been allowed to continue clearing Brigalow at an alarming rate. It is estimated that now only 7% of the endangered Brigalow community remains however, EPBC Act approvals are still being issued to allow clearing to continue. The same could be said for Bluegrass another endangered ecological community of the Brigalow Belt that has been consistently cleared by the agricultural industry and the mining sector.

As an example, in his recent Comments on a Referral regarding a proposed coal mine at Moranbah Ian Lee noted the following:[60]

> "There are already several large coal mining operations active in the Bowen Basin where approx. 85% of Queensland's coal comes from. These mining operations have seen the clearing of land and the loss of endangered ecological communities (bluegrass and brigalow) and the increased loss of habitat for endangered species (eg. Squatter pigeon). The coal mining operations in the region which have been approved by the Minister for the Environment and Water Resources are:
>
> MIM – Rolleston operation
> Ensham – Emerald
> XStrata – Glenden
> Poitrel – Moranbah
> Kestrel – Moranbah
> Ellensfield – Nth Bowen basin
> Carborough Downs – Moranbah
> IP Coal – Moranbah
> Sonoma – Collinsville
> Isaac Plain – Moranbah
> Hard Creek – Nebo
> Wollombi – Suttor Creek
> Olive Downs – Bowen Basin
> Pacific Coal – Clermont
> Minerva Coal – Springsure
> Goonyella Riverside – near Moranbah
> Broadlea Coal project – near Moranbah
> Bowen Central – Moranbah
>
> It can be clearly seen how all the clearing of endangered ecological communities and habitat for endangered species can all of a sudden become significant."

The use of offsets to ameliorate the cumulative impacts of projects is discussed above in **Part 2**.

4.2 Role of strategic assessments

As discussed above (in **part 2**) a number of other broader landscape scale assessment options are now being explored, including strategic assessments, bioregional plans etc. These have the potential to consider a range of impacts on a broader scale, but whether they result in adequate assessment of cumulative impacts and adequate protection of

[60] Lee, Ian. *Comments on Anglo Coal (Grosvenor) Pty Ltd, Mining, Moranbah, Qld: The Grosvenor Coal Mine Project, Reference No. EPBC 2007/3785.* (1st November 2007, s2.2.1, p. 5).

biodiversity across the landscape will depend on the criteria considered and the process for assessment.

Summary and recommendations

- ANEDO submits that the EPBC Act must be amended to include a transparent assessment process that takes into account the cumulative impacts of development in an area or on a species population, as opposed to assessing individual developments in isolation.

5. Effectiveness of responses to key threats (ToR d)

d. The effectiveness of responses to key threats identified within the EPBC Act, including land-clearing, climate change and invasive species, and potential for future measures to build environmental resilience and facilitate adaptation within a changing climate;

As noted above, ANEDO submits that the Act as currently drafted does not allow the Commonwealth to engage effectively in important environmental issues. This section discusses:

1) New MNES triggers relating to: greenhouse gas emissions, land clearing, invasive species, water;
2) How to improve current MNES triggers; and
3) Comments on the Commonwealth's role in adaptation to climate change.

5.1 New Matters of National Environmental Significance

Consistent with our previous submission ANEDO recommends additional amendments to provide for new MNES.

Greenhouse Gas emissions

Undoubtedly one of the more prominent absences from an Act that purports to regulate matters of national environmental significance and implement international environmental obligations, is the lack of an effective "greenhouse trigger".

ANEDO recommends that the Act be amended to include a greenhouse gas emission trigger that recognises any action that would result in the emission of over 100,000 tonnes of CO2 equivalent per year as a matter of national environmental significance. This could be supplemented by provision for all projects on a designated development list (including expansion of existing projects and significant land use change, including significant land clearing and motorway projects) to trigger the approval provisions. This would ensure the trigger was more comprehensive in capturing diffuse emissions.

The focus for addressing climate change in Australia is very much on the proposed Carbon Pollution Reduction Scheme and emissions trading. ANEDO submits that an ETS alone is not sufficient to address climate change, and that a range of other necessary measures should be established in other legislation.[61] For discussion of necessary complementary measures, see ANEDO submission on the CPRS Green Paper.[62]

In Opposition, the ALP has consistently supported the inclusion of a climate change trigger. It was documented in the Minority Report by Labor and Australian Greens Senators in response to the *Environment and Heritage Legislation Amendment Bill (No.1) 2006,* that "Labor and Australian Green Senators strongly support the inclusion of a climate change trigger in the EPBC Act."[63] Additionally, in an address to the Sydney Institute in

[61] See EDO NSW *Model Climate Law Project - Discussion Paper*, 17 April 2008, available at: http://www.edo.org.au/edonsw/site/pdf/pubs/model_climate_law_project080417.pdf.
[62] Available at: http://www.edo.org.au/policy/080910carbon_greenpaper.pdf.
[63] The Senate, Standing Committee on Environment, Communications, Information Technology and the Arts. *Environment and Heritage Legislation Bill (no.1) 2006 [Provisions]*, at pg 70.

April 2005, the need was specifically recognised "to have a greenhouse trigger in the EPBC Act."[64] Furthermore, Mr Albanese in a speech regarding the *Environment and Heritage Legislation Amendment Bill (No. 1) 2006*, moved that an amendment be inserted to "establish a climate change trigger to ensure that large scale greenhouse polluting projects are assessed by the Federal Government"[65].

The ALP now has the opportunity to strengthen this fundamentally important piece of environmental legislation and ensure that this issue that has been so widely recognised as being of key importance, is now incorporated into the Act.

Current assessments of coal mining and greenhouse intensive operations are failing dismally in addressing the impacts associated with GHG emissions, as illustrated in the case studies below.

***Moolarben Coal Mine Pty Ltd, (*EPBC 2007/3297)**

Without a proper 'greenhouse trigger' in the EPBC Act, there is no guarantee that the impact of Greenhouse Gas Emissions ("GEGs") will be properly considered when proposals referred to the Commonwealth Environment Minister are assessed under the Act, a point which this case clearly demonstrates.

In addition to the science underpinning climate change having been broadly accepted for many years, the Commonwealth's own Threatened Species Scientific Committee has established that the release of GGEs is a "key threatening process" under the EPBC Act, with the process being listed on 4 April 2001. Despite those facts, the Commonwealth still failed to properly consider the release of GGEs as a result of the Moolarben Coal Mine proposal, and displayed an illogical approach to the assessment that failed to appreciate the nature of GGEs, and their role in effecting climate change:

> "I found that contributions from the proposed coal mine operations and the burning of coal by third parties are likely to be negligible compared to total Australian greenhouse gas emissions. I further found that the Australian contribution to current annual greenhouse gas emissions, though relatively large on a per capita basis, is only one amongst many contributions that are made from a number of sources by all other industrialised countries. I found that, while there is a relationship between the amount of carbon dioxide in the atmosphere and warming of the atmosphere, the climate system is complex. I found that a possible link between the additional greenhouse gases arising from the proposed action and a measurable or identifiable increase in global atmospheric temperature is speculative only and unlikely to be identifiable. I further found that climatic processes linking specific additional greenhouse gas emissions to potential adverse impacts on matters protected by Part 3 of the EPBC Act are uncertain and conjectural only."[66]

It is clear that the Departmental officer(s) who assessed this proposal did not comprehend or appreciate the nature of GGEs and the role which their release into the environment plays.

[64] Garrett. P., 6 April 2005, *Australia: After Kyoto,* Address to the Sydney Institute.
[65] Albanese A, Speech given 30 October 2006 'Environment and Heritage Legislation Amendment Bill (No. 1) 2006, Consideration in Detail. Available at: www.anthonyalbanese.com.au/file.php?file=/news/NPZGSOUJUWTLSLZHVLEFXUQQ/index.html
[66] *Statement of Reasons – Approval under the Environment Protection and Biodiversity Conservation Act 1999*. (Department of the Environment and Water Resources, Moolarben Coal Mine Pty Ltd, EPBC 2007/3297, 26th November 2007, p. 11).

Such a conclusion is supported by the following statement made by a Departmental Officer on 26th November 2007[67] (which, we note, is exactly the same as a Statement made by another Departmental Officer on the 5th October, 2005[68])

> "18. … … I also considered that the Australian contribution to current annual greenhouse gas emissions, though relatively large on a per capita basis, is only one amongst many contributions that are made by all other industrialised countries. … …
> 22. I formed the view that, while it is clear that, at a general global level, there is a relationship between the amount of carbon dioxide in the atmosphere and warming of the atmosphere, the climate system is complex and the processes linking specific additional greenhouse gas emissions to potential impacts on matters protected by Part 3 of the EPBC Act are uncertain and conjectural."

Whilst climate science progressed between the date of the first statement (5th October 2005) and the date of the second statement (26th November 2007) so as to extinguish any reasonable doubts that climate change was reality and that anthropogenic GHG emissions were a major contributing factor, the view and approach taken to assessments of EPBC Act referrals clearly did not change at all. Whilst the assessment process under the EPBC Act *may* look sound, when viewed externally, it is clear that it has failed to properly assess the actual or likely impacts of climate change, as it simply does not include it as a relevant consideration.

In addition, this matter was considered well after Emeritus Professor Ian Lowe, delivered his report to an objections hearing in the Queensland Land and Resources Tribunal on 15 January 2007[69] on how the mining, transport and use of coal from a mine contributes to global warming and climate. The report contained a number of relevant statements, including the following (emphasis added):

> "23. An initial point to understand in assessing the contribution that these emissions will make to climate change and global warming is that greenhouse gas emissions are additive, i.e. any emissions add to the amount of greenhouse gases already in the atmosphere. While different greenhouse gases persist in the atmosphere for different lengths of time, CO2 remains in the atmosphere for around 50-200 years. As a consequence of this, CO2 emitted into the atmosphere from the mine could influence the atmospheric concentrations of CO2 for up to two centuries. It is not possible to link these emissions to any particular impact on a specific part of the environment in Queensland, Australia or globally, other than to contribute to greenhouse gases in the atmosphere and thereby contribute to global warming and climate change. The impacts of greenhouse gas emissions from this mine should, therefore, be understood as contributing to the cumulative impacts of global warming and climate change.
> 24. In assessing the contribution of the emissions from the proposed mine, it is important to understand that geological structures now trap the carbon contained in the coal, so that the carbon is completely isolated from the atmosphere and will not contribute to global warming or climate change in its current form. It would, therefore, be wrong to say that "the mining of this coal will not make any difference to global warming because if this mine does not proceed the coal will just come from another mine somewhere in the World". It is true that there is a large amount of coal in the World and that the coal could be supplied from another mine. However,

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[67] *Ibid.*
[68] Flanigan, Mark. *Affidavit of Mark Flanigan.* (Filed in the Federal Court of Australia, 5th October 2005)
[69] Queensland Land and Resources Tribunal, Tribunal Reference nos. AML 207/2006 and ENO 208/2006, Tenure identifier: 4761-ASA 2, 15 January 2007, pp. 9-11.
[70] New Scientist. *Fred's footprint: A can load of energy.* (New Scientist Environment, Tuesday, May 8, 2007)
[71] See *Gray v The Minister for Planning, Director-General of the Department of Planning and Centennial Hunter Pty Ltd* [2006] NSWLEC 720 ('Anvil Hill Case').
[72] See *ACF v Minister for Planning* [2004] VCAT 2029.

> that reasoning ignores the fact that coal is a finite resource, so the mining and use of the coal from this mine will release to the atmosphere fossil carbon that would otherwise be trapped in the ground. Such reasoning also ignores the growing recognition that reasonable and practicable measures should be required to avoid, reduce or offset the greenhouse gas emissions from all human activities, including the proposed mine. Global warming and climate change are massive problems for society that, ultimately, need to be addressed through action at the level of individual projects such as this proposed mine.

It is obvious that reliance cannot be placed solely upon individual Departmental officer(s) assessing proposals which include the release of GGEs to ensure that GGEs and their impacts, and contributions to climate change, are properly considered.

Assessment of Aluminium smelters and refineries in Bowen

Gladstone in central Queensland is recognised by international scientists[70] as *"one of the greenhouse-gas emissions hubs of the world."* It is home to the largest aluminium refinery, Queensland's largest power station, Australia's largest cement operation, and a huge coal export terminal and storage depot. The Queensland Government has recently been pushing for another major industrial estate in Bowen in North Queensland which, if those plans proceed to completion, will be home to heavy industries such as an alumina smelter and refinery, iron ore smelter, and a chemical industry. It is expected that the Chalco refinery will produce approx. 2.1 million tonnes of aluminium per year. The production of 2.1 Mt pa of aluminium by the east coast smelter/refinery will produce somewhere in the vicinity of 44.7 million tonnes of CO^2 per annum. To put this into a broader perspective, that is equivalent to 8.13% of Australia's greenhouse gas emissions in 2003. By making climate change part of the EPBC process it gives the Minister the opportunity to place conditions on approvals. Those conditions may come in form of off-sets, for example, native tree plantations (that meet sustainability criteria), revegetation of degraded areas, monetary assistance to communities to assist in establishing renewable energy sources or environmentally sound waste management, etc.

Other states

Other EDO offices have also found that States often do not require comprehensive assessment of the emissions of these major projects, for example, Anvil Hill in NSW.[71] In the case of the Victorian EES for the proposed expansion of the Hazelwood coal mine in Victoria, the State government attempted to exclude consideration of greenhouse gas impacts from the inquiry. The only reason these impacts were included was as a result of a successful legal challenge by conservation groups.[72]

Land clearing

The clearing of native vegetation in Australia has a range of well recognized serious environmental consequences. These include: destruction of biodiversity habitat, degradation of soil, degradation of water quality, increased salinity, release of greenhouse gas emissions, and adverse effects on ecosystem services and broader catchment health. The Australian Government's *State of the Environment Report (2001)* identified land clearing the single biggest threat to wildlife in Australia.

Although we recognise that most States have some legislation in place to regulate land clearing, illegal clearing continues to occur and significant levels of clearing are still

lawful,[73] and state laws are sometimes poorly enforced. We submit there is still a role for the Commonwealth in assessing impacts of significant clearing proposals.

ANEDO therefore recommends that the Act be amended to include a comprehensive land clearing trigger would require three main alternative elements. First, a trigger for the clearing of native vegetation over 100 ha in any two year period; second, a trigger for the clearing of any area of native vegetation which provides habitat for listed threatened species or ecological communities, or listed critical habitat; and third, a schedule of activities that would trigger the Act regardless of the hectares proposed to be cleared (for example, major coastal resort developments).

Invasive species

Currently, the main way that invasive species are recognised in the EPBC Act are (a) through KTPs and Threat Abatement Plans and (b) assessment of proposals to import new species.

The risk assessment process for imports of new species seems to work relatively well, with some loopholes,[74] and is a rare example of the precautionary principle being implemented. ANEDO supports the continuation and strengthening of these controls due to the potentially serious environmental and economic consequences invasive species can have. ANEDO would therefore strongly support the development of regulations.[75]

However, due to the lack of EPBC Regulations on invasive species and deficiencies in State legislative lists of invasive species (except WA), ANEDO submits that the control of invasive species could be improved by inclusion of an invasive species trigger. Currently, graziers are planting a variety of invasive pasture plants in areas from which they may spread to natural environments and cause harm to MNES. But there is no obvious route to trigger an assessment despite potentially significant impacts – for example, tall Wheat Grass in Victoria has the potential to invade virtually all the Ramsar-listed saline and sub-saline wetlands in Victoria as well as non-listed wetlands, and is being promoted and planted as a salinity solution.[76] ANEDO therefore recommends there be consideration of appropriate threshold conditions for triggering an assessment (such as where an action involves any species from a national environmentally harmful invasive species list in sensitive locations).

For further ways to strengthen the Commonwealth role in controlling invasive species, ANEDO supports recommendations made in the submission by the Invasive Species

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[73] SLATS data release by the Queensland Government in August 2008, shows Queensland still has extensive rates of clearing with 375000 hectares being cleared during 2005-2006: *Land Cover Change in Queensland 2005-2006. Statewide Landcover and Trees Study Report*, Department of Natural Resources and Water.

[74] For example, already naturalised and invasive species can be imported freely unless there are active formal control efforts.

[75] There is potential under Section 301A to develop regulations for the control of non-native species - including the establishment and maintenance of a list of species, other than native species, whose members threaten or would likely threaten biodiversity; and the regulation of trade in particular species. The *Turning Back the Tide* report recommended "that the Commonwealth, in consultation with the States and Territories, promulgate regulations under section 301A of the EPBC to prohibit the trade in invasive plant species of national importance, combined with State and Territory commitment to prohibit these same species under their respective laws.

[76] Carol Booth *pers. comm.*

Council, including the recommendation to adopt a precautionary and effective national approach to regulating invasive species based on s301.

Water

The Commonwealth has signaled a clear intent to become more involved in water management, especially in the Murray Darling Basin. ANEDO supports an enhanced Commonwealth role for such a vital cross jurisdictional issue. During debate on the 2007 *Water Bill* ANEDO made recommendations on including environmental protections in the Bill. The Government response at the time was that the Water Act was resource use legislation, and environmental considerations (such as environmental flows to wetlands) were already dealt with under the EPBC Act.[77]

It is essential that there are clear links between the Water Act and the EPBC Act to ensure environmental considerations are fully considered and do not disappear down the gap between the two Acts. The Government has recently shown a willingness to consider environmental implications of water releases, but only in the context of impact on existing MNES, namely, a threatened species, as illustrated in the case study below.

Case study: Water release from lake crescent, Tasmania

On 9 May 2008, Federal Environment Minister Peter Garrett refused the Tasmanian Government's application to release 3300 ML of water from Lake Crescent. The proposed release of water was designated for the emergency supply of irrigation water to farmers in the Clyde Valley in the Central Highlands of Tasmania. The proposed release triggered the operation of the EPBC Act as it was likely to have a significant impact on a Ramsar wetland, the Interlaken Lakeside Reserve, and on a listed threatened species, the Golden Galaxias fish.

In November 2007, then Environment Minister Malcolm Turnbull granted an exemption under s.158 of the *EPBC Act*, determining that it was in the national interest not to require EPBC Act approval for releases from Lake Crescent until 31 May 2008. Minister Turnbull found:

- the proposed release of water was likely to have a significant impact on the Golden Galaxias and the Interlaken Lakeside Reserve. Therefore, approval would be required if no exemption was granted, which would create unacceptable delays in the provision of water to the region.
- without significant rainfall or a release from Lake Crescent there would be critical shortfalls in water supplies for human needs and stock watering in the Clyde Valley;
- there was no readily available alternative to the proposed release of water for providing water to Bothwell. He was satisfied that measures would be taken to restrict water usage in Bothwell and minimise the water releases.

When the exemption expired, the Tasmanian Government applied for approval for a further release of water from Lake Crescent. In May 2008, Minister Garrett refused to grant permission for the further release. The Minister determined that 'the release of water from Lake Crescent could have had a serious long-term impact on the endangered golden galaxias fish and the Interlaken Lakeside Reserve Rasmar site.' Minister Garrett acknowledged the difficulties created by the drought conditions being faced by local farmers, but considered that the potential impact on endangered species and protected habitats of the proposed water release were too significant to ignore.

[77] The full ANEDO submission on the Water Bill is available at: http://www.edo.org.au/policy/water_bill070824.pdf.

ANEDO therefore recommends a more comprehensive approach - that a trigger be included in Part 3 for abstraction of surface and ground water resources over 10,000 megalitres which is likely to have a significant impact on aquatic or groundwater-dependent ecosystems. The focus of the trigger should be on major development projects in the Murray Darling Basin. Criteria for assessing impact should be based on interference with rivers caused by major works (such as dams over a certain size); the extraction or diversion of volumes of water over a certain amount of that are likely to impact upon compliance with the MDBC cap. This is consistent with the NWI objective to have better environmental impact assessment (EIA) for large water infrastructure.

In addition, serious environmental implications can result from the failure to release environmental flows of water to regions in need. The Coorong and Lower Lakes face permanent environmental damage due to the government's failure to release such environmental flows. The National Water Plan, agreed to in March this year by the Commonwealth Government and the State Governments, is likely to take until at least 2011 to implement. This is too late for the internationally listed site which faces permanent damage if environmental flows are not released urgently.

The EPBC Act does not presently contain a trigger requiring a release of such flows.[66] ANEDO proposes a more proactive approach being a trigger enabling the Minister to release environmental flows to areas in need.

For further details on these triggers and other possible matters of national environmental significance, please refer to our previous submission: *Possible new matters of National Environmental Significance under the EPBC Act 1999* - May 2005.[78]

5.2 Amendments to improve the current MNES

Consistent with our previous submissions, ANEDO has identified areas where the current triggers should be improved to better protect MNES.

Wetlands of international importance[79]

ANEDO submits that the current trigger should be expanded beyond wetlands of international importance, [80] to include wetlands of *national* importance, for example, those listed in the *Directory of Important Wetlands in Australia*. It is essential that these wetlands, already recognised and listed as nationally important, receive commensurate protection as a matter of national environmental significance.

Listed migratory species[81]

The trigger should be further strengthened by including the highly migratory species listed in Annex I of United Nations *Convention on the Law of the Sea* in the list of international agreements dealing with migratory species in Section 209 (3) of the *EPBC Act*. The species in Annex I should be considered Matters of National Environmental Significance, as is the case for all the other migratory species listed on international

[78] Available at: http://www.edo.org.au/edonsw/site/policy.php.
[79] See sections 16-17B *EPBC Act 1999*.
[80] Section 334 of the EPBC Act merely provides that the Commonwealth government has responsibility to protect RAMSAR listed sites.
[81] See sections 20 and 20A *EPBC Act 1999*.

agreements to which Australia is a signatory. The trigger should also include ROKAMBA, not just JAMBA and CAMBA. As noted above, the cumulative impacts on migratory species are not currently comprehensively considered under the Act, and should be strengthened. This could be addressed by strengthening the Administrative Guidelines (as discussed above).

Protection of the environment from nuclear actions[82]

Whilst having a broader impact base than other triggers (ie, 'the environment' as opposed to a particular value), this trigger is limited by the current definition in section 22 of nuclear action and nuclear installation. Section 22(1)(g) provides that additional nuclear actions may be defined by the regulations. For example, Clause 2.01 provides that a nuclear action includes establishing, significantly modifying, decommissioning or rehabilitating a facility where radioactive materials are, were, or are proposed to be used or stored. Despite the additional detail provided by the *EPBC Regulation 2000,* the current scope is too narrow, and does not comprehensively cover all actions that may pose a threat to the environment and public safety.

ANEDO submits that section 22(1) should be extended. A revised list should include the following:[83]

- nuclear actions relating to military facilities, operations and exercises,
- mining or processing of Australian fertile and fissile materials including uranium and minerals sands,
- transportation of radioactive materials and products, including spent nuclear fuel, or radioactive products arising from reprocessing,
- a requirement to take into account the downstream uses of the nuclear material domestically and internationally; and
- irradiation of foods and other products for human use or consumption.

Marine environment[84]

Currently the trigger only relates to Commonwealth managed fisheries in Commonwealth marine areas, with state and territory managed fisheries being exempt.[85] We note that State and territory managed fisheries are still subject to provisions relating to migratory species and threatened species, and subject to state fisheries management legislation.

This trigger should be comprehensive in its coverage to ensure the best environmental outcomes for Commonwealth marine areas, and consequently the trigger should be extended to include State and territory managed fisheries operating in Commonwealth marine areas, unless those fisheries are appropriately accredited.

The provisions for the accreditation of fisheries management regimes (for example, bycatch action plans) need to be strengthened to include strict and comprehensive criteria to be met prior to accreditation; extensive public consultation prior to accreditation; and 2 yearly reviews and audits of accredited management regimes.

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[82] See sections21 – 22A *EPBC Act 1999*.
[83] See also the Combined Groups' submission 2002 *op cit.*
[84] See sections 23 – 24A *EPBC Act 1999*.
[85] Section 23(5) *EPBC Act 1999*.

Furthermore, the list of marine species under section 250 should be amended to include shark species such as basking, whale and blue sharks and others. This would help prevent recreational shark killing in Commonwealth waters.

5.3 Commonwealth role in climate change adaptation?

The already significant challenges of biodiversity conservation across Australia will be exacerbated by the impacts of climate change. It is now recognised that species will change in their distribution and abundance, ecosystem structures and functions will be altered, significant extinctions are likely to occur and that adaptation options may be limited for some ecosystems.[86] The *National Biodiversity and Climate Change Action Plan 2004 -2007* has identified a number of direct and indirect impacts of climate change on species and ecosystems. Direct impacts include:

- Reductions in the geographic range of species
- Changes to the timing of species' lifecycles
- Changes in population dynamics and survival
- Changes in the location of species' habitats
- Increases in the risk of extinction for species that are already vulnerable
- Increased opportunity for range expansion of invasive species
- Changes in the structure and composition of ecosystems and communities
- Changes in coastal and estuarine habitat due to rising sea levels

Indirect impacts of climate change include influencing the intensity and magnitude of existing stresses, such as invasive species and fire regimes, on biodiversity and ecosystem structures, functions and processes.[87] These projections will pose additional problems for conservation management in Australia.

Responding to climate change impacts on biodiversity will require a range dynamic and responsive tools, and overarching approaches. The issue of unsustainable land management practices and the perilous state of our biodiversity are not just a result of climate change, however a changing climate exacerbates the legacy of past practices and more recent failures to address this legacy. Measured against their own goals, policy initiatives in the area of land management and biodiversity conservation over the last 20 to 30 years have had either mixed success or have been found wanting.

While climate change poses a challenge, it should not be used as an excuse to lower our expectations or reduce our conservation targets. The threat of climate change highlights the need and presents an opportunity for a renewed commitment to the conservation of biodiversity. It also increases the urgency of commitments already made.

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[86] See generally the Intergovernmental Panel on Climate Change (2007) *Synthesis Report Working Group II 11.4, Summary for Policy Makers* at p 65 and also Adger WN, Agrawala S, Mirza MMQ, Conde C, O'Brien K, Pulhin J, Pulwarty R, Smit B and Takahashi K (2007) "Assessment of adaptation practices, options, constraints and capacity" in Parry ML, Canziani OF, Palutikof JP, van der Linden PJ and Hanson CE (eds) *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change,* Cambridge University Press, Cambridge, UK, 717-743 at p 719.

[87] *National Biodiversity and Climate Change Action Plan 2004 -2007* at pp 12 and 14. See also Thomas C (2003) "Climate change and habitat fragmentation" in Green RE, Harley M, Miles L, Scharlemann J, Watkinson A and Watts O (2003) *Global Climate Change and Biodiversity* University of East Anglia, Norwich at p 22.

Climate change should be seen as more than something that requires us to do better at what we have already committed to do. Much of our current legislative framework reflects an assets based approach to biodiversity and land management, and is based on a view of ecosystems as relatively static. The fact of climate change and the likelihood of rapid change, together with the significant uncertainties about what it will mean for land and biodiversity, require an institutional framework that is more focussed on managing and responding to a dynamic system.

We note that there are programs underway, for example exploring connectivity in landscapes to build resilience (Biolinks in Victoria, and the Alps to Atherton corridor) and Federal funding to assess protected areas and climate change.[88] ANEDO recommends that the Commonwealth undertake an assessment of current conservation tools under the EPBC Act, including recovery plans, threat abatement plans, strategic assessments, critical habitat, adding new MNES, in order to ensure a range of tools are available for instigating adaptation responses as new science and projections emerge.[89]

[88] For a critique of current conservation tools, see Jeff Smith "How adaptable are our conservation regimes?" Paper presented to the ACEL Conference, ANU, Canberra 2008 (ACEL publication pending)
[89] *Ibid.*

Summary and recommendations

- ANEDO submits that the Act be amended to include new MNES:
- **Greenhouse gas emissions** - ANEDO recommends that the Act be amended to include a greenhouse gas emission trigger that recognises any action that would result in the emission of over 100,000 tonnes of CO2 equivalent per year as a matter of national environmental significance. This could be supplemented by provision for all projects on a designated development list to trigger the approval provisions.
- **Land clearing** - ANEDO recommends that the Act be amended to include a comprehensive land clearing trigger would require three main alternative elements. First, a trigger for the clearing of native vegetation over 100 ha in any two year period; second, a trigger for the clearing of any area of native vegetation which provides habitat for listed threatened species or ecological communities, or listed critical habitat; and third, a schedule of activities that would trigger the Act regardless of the hectares proposed to be cleared (for example, major coastal resort developments).
- **Invasive species** - ANEDO recommends there be consideration of appropriate threshold conditions for triggering an assessment where an action involves any species from a national environmentally harmful invasive species list in sensitive locations.
- **Water extraction, and environmental water flows** - ANEDO recommends that a trigger be included for abstraction of surface and ground water resources over 10,000 megalitres which is likely to have a significant impact on aquatic or groundwater-dependent ecosystems. The focus of the trigger should be on major development projects in the Murray Darling Basin. ANEDO also proposes a more proactive approach being a trigger enabling the Minister to release environmental flows to areas in need
- ANEDO submits that the current triggers relating to wetlands, migratory species, nuclear actions and the marine environment be strengthened.
- ANEDO recommends that the Commonwealth undertake an assessment of current conservation tools under the EPBC Act, including recovery plans, threat abatement plans, strategic assessments, critical habitat, adding new MNES, in order to ensure a range of tools are available for instigating adaptation responses as new science and projections emerge.
- The Commonwealth should also take a lead role in funding and coordinating adaptation programmes, consistent with implementing Australia's international obligations.

6. Effectiveness of RFAs (ToR e)

e. The effectiveness of Regional Forest Agreements, in protecting forest species and forest habitats where the EPBC Act does not directly apply;

ANEDO submits that RFAs have been largely ineffective in ensuring the protection of forest species and forest habitats.

Regional Forest Agreements were accredited by the Commonwealth on the basis that the states had conducted a thorough environmental assessment of their forests and had ensured that their protected areas were 'Comprehensive, Adequate and Representative' according to specific criteria (JANUS criteria).[90] The remainder of the forest areas would be available for harvesting as long as they were ecologically sustainable operations. Once the assessment process was complete, RFAs were signed applying to various forestry regions around Australia. Areas managed under these RFAs are exempt from the EPBC Act on the basis that an environmental assessment had already been undertaken and that environmental considerations were implicit in the RFAs.

ANEDO contends that despite the rhetoric on 'sustainable forestry', RFAs have not been effective in protecting forest species and habitats and they do not comply with the principles of ecologically sustainable development and the conservation of biodiversity.

Assessment underpinning RFAs

ANEDO submits that the comprehensive regional assessments (CRAs) conducted by the states, which formed the basis for RFAs, were flawed. As noted by IFAW in their submission:

> "… serious flaws in the information and scientific process underpinning the RFAs undertaken to date have been identified.[91]."

Indeed, the assessments conducted by the states to determine which areas were to be protected as part of the RFA process, were insufficient. For example, most of the assessments conducted depended largely on existing information and outdated maps and not on localised, on the ground information about particular areas. As a result in many cases the science underpinning the assessments was uncertain and based on ad hoc and incomplete information.[92] Moreover, the assessments were not conducted based on ecological criteria but on state boundaries.[93] As a result, contiguous areas on various state borders were categorised as separate regions despite clear ecological connections. Another key problem with RFAs is that they provide no capacity to incorporate new

[90] Compliance with the criteria meant that the protected reserves had to cover the full range of forest community types, be sizeable enough to allow for species survival and reflect the diversity of the individual communities: Hollander, R (2004), "Changing place?: Commonwealth and State Government performance and regional forest agreements' Paper presented to the Australasian Political Studies Association Conference, University of Adelaide.

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

[92] Hollander, R (2004), "Changing place?: Commonwealth and State Government performance and regional forest agreements' Paper presented to the Australasian Political Studies Association Conference, University of Adelaide; Redwood, J. 'Sweet RFA' (2001) **26** *Alternative Law Journal* 255.

[93] Hollander, R (2004), *op cit*; Mackey, B (1999). 'Regional forest agreements – business as usual in the Southern Region? *National Parks Journal* 43(6); 10-12.

conservation findings that come to light as a result of new scientific discoveries.[94] The lack of a mechanism to vary RFAs where subsequent research demonstrates an 'ecological need for more stringent conservation measures' is inconsistent with the precautionary principle.[95] The *Regional Forests Agreement Act 2002* also makes variance unlikely as it requires the Commonwealth to pay compensation for alteration to an RFA.

ANEDO submits that RFA's are not scientifically robust as they are not based on sound ecological information and on-the-ground surveys, nor do they adequately provide for the protection and recovery of threatened species. This falls far short of the environmental assessment provisions that would have applied under the *EPBC Act*.

JANUS criteria and their application

The JANUS criteria were a nationally developed standard for determining which areas of forest should be protected in reserves. States were required to conduct an assessment using the JANUS criteria as a prerequisite to the approval of RFAs. The JANUS criteria established four principal objectives for biodiversity conservation:

- *To maintain ecological processes and the dynamics of forest ecosystems in their landscape context*
- *To maintain viable examples of forest ecosystems throughout their natural ranges*
- *To maintain viable populations of native forest species throughout their natural ranges; and*
- *To maintain the genetic diversity of native forest species.*

Despite these good intentions, there were clear problems with the JANUS criteria. Commentators have highlighted the narrow conceptualisation of wilderness, the simplified systems used to classify forest types and the difficulties in determining adequacy.[96] Others have criticised the watering down of the original criteria due to additions and deletions that were made "to avoid the necessity to conform to any concrete targets".[97] Furthermore, there are clear examples of states that did not fully implement the criteria, such as NSW. The initial application of the criteria in NSW identified over one million hectares of public land in north-west NSW required for addition to the reserve system to comply with the national reserve criteria.[98] However, the NSW Government only added 358,200 hectares to the reserve system as a result of lobbying by the forestry industry. Also, only 29% of priority fauna populations have fully achieved reservation targets in North-east NSW.[99] Hence, even though a scientific assessment was undertaken to determine the areas required for reservation it was 'pure politics' that determined the size of areas to be reserved in NSW.[100] Despite this, the North-East NSW RFA was later approved.

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[94] Hollander, R (2004), *op cit*; Redwood, J. 'Sweet RFA' (2001) **26** *Alternative Law Journal* 255.
[95] McDonald, J. *op cit.*
[96] Hollander, R (2004), *op cit*; Mackey, B (1999) *op cit.*
[97] Kirkpatrick, J (1998) "Nature Conservation and the Regional Forest Agreement Process' 5 *Australian Journal of Environmental Management* 31-37.
[98] Pugh, D (1998) "Establishing a CARR reserve system in North-East New South Wales", Nature Conservation Council and North East Forest Alliance
[99] Flint, C, Pugh, D, Beaver, D (2004) "The good, the bad and the ugly: science, process and politics in forestry reform and the implications for conservation of forest fauna in north-east New South Wales In *Conservation of Australia's Forest Fauna* (2nd ed) 2004, Royal Zoological Society of New South Wales, pp222-255.
[100] *Ibid.*

The flaws in the RFA mechanism and their failure to protect forest species and habitats are well illustrated by recent litigation in Tasmania.

Case study: Weilangta Case[101]

Senator Bob Brown brought an injunction under s475 of the Act restrain the logging of old growth forest in the Weilangta area of southern Tasmania. He was concerned about the impact of these forestry activities on three federally listed endangered species; the Tasmanian Wedge-tailed Eagle, the Swift Parrot and the Wielangta Stag Beetle.[102] He took the matter to court on the basis that an environmental assessment should have been conducted under the EPBC Act. His main contention was that neither the "comprehensive, adequate and representative" reserve system nor the "relevant management prescriptions" provided for in the Tasmanian Regional Forest Agreement were adequate to restore populations of the Broad-toothed Stag Beetle. The trial judge, Justice Marshall, agreed that there would be a significant impact on these species by the planned logging at Wielangta. His Honour's key findings included:

- That Forestry Tasmania ("FT") had failed to protect "Priority Species" through the CAR reserve system or through "relevant management prescriptions" as required by clause 68 of the Tasmanian RFA, therefore the logging operations were not "in accordance with" the RFA and were not exempted from the EPBC Act; and
- That FT had failed to protect the Priority Species because the Act was to be construed to "view protection of the environment as an act of not merely keeping threatened species alive, but actually *restoring their populations so that they cease to be threatened*" (emphasis added). This was because an RFA was held to provide an alternative method by which the objects of the Act may be achieved in a forestry context. This meant that the standard of protection required of an RFA is high.

As a result of his findings, Marshall J concluded that the forestry operations at Wielangta did not enjoy the exemption from the ordinary environmental protection provisions of the *EPBC* Act. Therefore, the forestry operations were in breach of the EPBC Act.

Although Marshall J's decision was overturned on appeal by the Full Federal Court, the decision has served to highlight the fact that the Tasmanian RFA does not provide for the protection of endangered forest species and habitats. Indeed, the Full Federal Court did not overturn Justice Marshall's conclusion that the Tasmanian Wedge-tailed Eagle, the Swift Parrot and the Wielangta Stag Beetle were suffering significant impacts from logging under the terms of the RFA.

The RFA process constituted a significant abdication by the Commonwealth of its responsibilities for forests.[103] Under section 38 of the EPBC Act the Commonwealth undertakes to refrain from exercising its environmental legislative powers for the duration of the Agreement (20 years), having 'accredited' the relevant state forestry practices and laws. ANEDO submits that excluding areas or processes from the Act is only valid where the process in place for assessing those areas is equal to preferably better than EPBC Act processes. We do not support exclusions for particular activities or areas, unless there is genuine duplication of assessment requirements, and it is guaranteed that best practice assessment will occur. This is not the case under RFAs, and as noted above, there is no guarantee of best practice assessment occurring under bilateral agreements.

[101] *Wielangta Forest* [2006] FCA 1729 (Unreported, Marshall J, 19 December 2006) at 293.
[102] Svenson, J, (2006) 'Bob Brown and the Beetle: How two birds and a beetle saved a forest" 84 *Impact,* Environmental Defender's Office (NSW).
[103] Hollander, R (2004), *op cit*, Mackey, B (1999) *op cit.*

The legislative exemptions that apply to RFA areas have removed two strong mechanisms available to the Commonwealth: export licences and assessment under the EPBC Act. ANEDO submits that it is inappropriate for the Commonwealth to remain in a position where it cannot regulate forestry activities given Australia's international obligations to protect forests and threatened species and the widening concern about the effects of deforestation on climate change.

The Commonwealth's subordinate role in relation to RFA forestry operations has been further cemented by amendments in 2006. A new section 75(2B) was inserted into the Act in order to limit the considerations that the Minister must take into account in making a decision about whether a proposed action needs approval. In particular, it stated that the Minister must not consider any adverse impacts of any RFA forestry operation (as defined by section 38) or forestry operation in an RFA region (as defined by section 40). ANEDO opposed this amendment, considering this limit on Ministerial consideration to be unwarranted. We reiterate our concern that it is artificial in the extreme to excise certain potential real impacts of a proposal because of an artificial (policy-derived) exemption.

ANEDO submits that RFAs have been ineffective in protecting forest species and habitats. RFAs are the result of a flawed and scientifically unsound process that privileged economic concerns over the environment. In light of our concerns detailed above, forestry operations in areas covered by RFAs should be subject to an independent environmental assessment that is localised and scientifically robust. We submit that in order for forest species and habitats to be substantively protected, the EPBC must apply to RFA forestry operations that are likely to have significant impacts on biodiversity and threatened species. Hence, consistent with the joint environment groups' letter, ANEDO supports repealing the industry specific exclusion from the EPBC Act for forestry operations under RFAs, as these are failing to protect biodiversity.

Summary and recommendations

- ANEDO recommends that section 75 (2B) be repealed to enable the Minister to consider any adverse impacts that might arise under an RFA forestry operation under Division 4 of Part 4.
- We call for the removal of the exemption for RFA's from the EPBC Act.
- We submit that scientifically robust environmental assessments of forestry operations must be undertaken under the EPBC Act for operations that are likely to have a significant impact on biodiversity and listed threatened species.

7. Impact of other environment funding programmes (ToR f)

f. The impacts of other environmental programmes, eg EnviroFund, GreenCorps, Caring for our Country, Environmental Stewardship Programme and Landcare in dealing with the decline and extinction of certain flora and fauna;

ANEDO submits that there must be a strategic overhaul and vast increase in the major funding programs (previously NHT, now Caring for Our Country), and a review of complementary programmes. There is an urgent need for Commonwealth leadership in two ways: the Commonwealth must use not only its legislative powers but its fiscal strength to ensure that all levels of government contribute to biodiversity goals.

In relation to Commonwealth investment in biodiversity conservation actions,[104] the Audit Office Report noted the following:

- "The NHT ($1.3 billion over six years from 2002) and the Biodiversity Hotspots ($36 million over four years from 2004) are the Australian Government's main financial assistance programs established to help restore and conserve Australia's biodiversity" (para 34);
- "there is a lack of standard, meaningful and quantified monitoring and evaluation systems for the national investment stream" (para 36);
- "it will take a long time and sustained high levels of investment at the regional level to achieve national biodiversity conservation objectives" and "in some cases, funding level are insufficient to reverse the decline in biodiversity" (para 37);
- "The Biodiversity Hotspots program has experienced slow progress since it's announcement in 2004" with "spending was just over one third of the total financial commitment and well behind the original appropriations" (para 38); and
- "of the funds spent to date under the Biodiversity Hotspots programs… two of the three investments… were not within the identified biodiversity hotspots" (para 40).

NHT funding and a number of smaller funding programmes now come under the umbrella of the Caring for Country Program of $2.25 Billion over 5 years. ANEDO supports the recommendations of HSI, WWF and the ACF in relation to ensuring that the expenditure is strategic and effective.

Recommendations for the Caring For Our Country (CFOC) Funding Program[105]

"HSI along with ACF and WWF considers CFOC will only be successful if it works in the following manner:
• leverages cooperative biodiversity action through other government policies and programs such as the proposed Carbon Pollution Reduction Scheme;
• engages all levels of government and stakeholders in working towards the same priority outcomes and targets;
• employs effective measures for transparent monitoring and reporting on progress; and,
• ratchets up the total level of investment in conservation and environmental repair.

[104] 2008 Audit Report "The Conservation and protection of National Threatened Species and Ecological Communities" The Auditor General, 2008 Audit Report "The Conservation and protection of National Threatened Species and Ecological Communities", 2006-7 Performance Audit, Australian National Audit Office, 2007.
[105] Extract from the HSI Technical Bulletin, Issue 12, August 2008.

In view of the critical challenges facing our wildlife through climate change, reduction in river flows and other stresses, HSI considers that in five years time CFOC must deliver the following:
• understanding Australia's key biodiversity priorities, bioregion by bioregion as a basis for cooperative government and non-government action;
• construction of a strong network of protected areas to save our unique wildlife and build resilience to climate change;
• enhanced off-reserve conservation outcomes through a range of innovative measures such as a revised National Biodiversity Strategy and national strategies for our sensitive wetlands and coastal areas; and,
• greatly enhanced protection of endangered and vulnerable species and ecological communities as well as natural heritage areas through effective administration and resourcing of the *Environment Protection and Biodiversity Conservation Act."*

ANEDO supports complementary programmes that fund on ground work to protect and conserve biodiversity. These are invaluable, not only for improved environmental outcomes, but also for educating and involving local communities in biodiversity conservation. ANEDO strongly supports incentives for biodiversity stewardship on private land and Aboriginal managed lands. We support the creation of further opportunities to promote caring for country in indigenous communities through creating Indigenous ranger positions and establishing joint management arrangements.

Notwithstanding the benefits of these projects, it is important to note that such programmes alone will not halt biodiversity decline. It is essential to have a robust legislative framework in place to ensure environmental protection and safeguards apply, before the community spends time and effort undertaking works. EDO NSW has come across examples whereby the revegetation work of local coast care groups has been undermined by subsequent planning approvals and developments. Similarly, in Queensland, private areas included in the national reserve system are not protected from mining and EDO QLD is aware of at least one example where exploration for coal mining is directly threatening the areas, despite Commonwealth funding for rehabilitation and management of the areas. There is no value directing funds at programmes that are unable to protect flora and fauna long-term, and that may be nullified by other actions under state legislation.

Summary and recommendations

- ANEDO submits that there must be a strategic overhaul and vast increase in the major funding programs (previously NHT, now Caring for Country), and a review of complementary programmes.

8. Programme changes and Funding Cuts (ToR g)

g. The impact of programme changes and cuts in funding on the decline or extinction of flora and fauna.

ANEDO has consistently submitted that one of the greatest flaws of the EPBC Act relates to the fact that there have been inadequate resources made available for implementation of the Act. This is noted above in relation to recovery planning (in **Part 3**) and in relation to funding programmes are included above (in **Part 7**), but also applies to areas such as enforcement of the legislation.

8.1 Better resourcing for implementation of the Act

As noted this is of vital importance if the EPBC Act is to actually conserve any of Australia's biodiversity. EDO offices have observed the results of inadequate resourcing on how officers perform duties under the Act. For example, in Queensland, the response to requests for the Minister to require a proponent to refer a matter, is typically by a letter rather than a thorough investigation.

8.2 Resourcing for improved monitoring, compliance and enforcement

Case studies of poor enforcement

Paradise Dam

An example of poor enforcement of the EPBC Act in Queensland relates to the breach of conditions regarding the Paradise Dam Fishway which was required to be suitable for lungfish (EPBC 2001/422). The downstream section of the Fishway has not worked since the dam became operational in December 2005 yet the Commonwealth refuses to take action for a breach of condition.[106]

Superb parrots

An administrative error by the Victorian Department of Sustainability and Environment led to the logging of Superb Parrot Habitat in a Special Protection Zone in Barmah Forest. Despite the Parrot being listed under the EPBC Act, no enforcement action was taken by the Commonwealth Department and remediation was not required.

Firebreak clearing

The most significant vegetation clearing in Victoria in recent years has been undertaken by State government agencies to create fire breaks around water catchments. The initial clearing, which included habitat for listed species such as Leadbeaters Possum and the Baw Baw Frog, was not referred to the Commonwealth. Although further proposals have now been referred, there has still been no action taken to address the initial failure to comply with the Act.

[106] An audit was undertaken by the Department which reported on 5th July 2007 that there was only "partial compliance" by the dam operators with the conditions regarding the fishway: *Final Compliance Audit Report, Paradise Dam, Audited 25-28 June 2007*. Letters by Queensland conservation groups on 17th April 2008 urging the Minister to take action to enforce the Act for breach of he condition, met with no response.

Developer seeking variation of approval without having complied with the earlier conditions

Approval was given to a developer to proceed with a new residential development on one of Victoria's most significant remaining grasslands at the former Laverton RAAF base. Not only will this lead to the loss of significant grasslands and habitat for species listed under the Act such as the Striped Legless Lizard, approval was granted despite non compliance with conditions for the management of the site under the previous approvals granted under the former Commonwealth legislation, the EPIP Act.

EDO offices have also been made aware of very low numbers of compliance officers in charge of vast areas, making inspection and enforcement highly unlikely. This undermines the deterrence value of having enforcement and penalty provisions in the Act. We submit that it is essential to have a sufficient number of on-ground officers to effectively implement the enforcement provisions of the Act.

Summary and recommendations

- ANEDO submits that funding for implementation of the legislation must be a priority for the Commonwealth Government in order to improve the implementation of Australia's international environmental obligations and to broaden the scope of the Act to address the major environmental challenges facing Australia.
- Resource increases are needed as part of the 10 year review to address the deficiencies noted by the Audit Office and throughout this submission relating to gaps in data, and capacity for assessing, listing and planning effectively.
- Resource increases are vitally needed for on-ground officers working on compliance and enforcement.