CONSERVATION COUNCIL

22 September 2008

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

Dear Committee Secretary

RE SUBMISSION TO THE INQUIRY INTO THE OPERATION OF THE ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999

The Conservation Council ACT Region would like to thank the Committee for the opportunity to participate in the inquiry and provide this submission. The Conservation Council has been protecting the environmental interests of Canberra and South East Region since 1979. We are the peak community environment organisation and our mission is to achieve the highest quality environment for the Canberra region. We represent the interests of community conservation organisations in the region as well as the broader environmental interests of all Canberrans.

We have had involvement with the Environment Protection and Biodiversity Conservation Act since it was introduced and consequently have significant concerns about its capacity to deliver environmental protection. We therefore appreciate this chance to contribute to assessment of its impact to date and recommendations of ways it could be improved to achieve real conservation outcomes in the future.

Should the committee decide to hold public hearings we would very much appreciate the opportunity to participate. We look forward to the findings and recommendations of your inquiry.

Yours sincerely

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Executive Director

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Summary

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) can be described as having achieved only very limited success in its first eight years of operation. The Conservation Council ACT Region has significant concerns about both the content and the application of the EPBC Act. The current Act does not reflect accepted best practice and has not delivered the conservation outcomes boasted at the time it was enacted. It is not living up to the stated objectives and at times the EPBC process has been almost farcical.

Whilst minor amendments may make some difference at the margins, what is really needed if we are to achieve real environment protection and biodiversity conservation is significant change to both the provisions of the Act and equally as importantly, the way it is applied. This submission seeks to outline the major areas of concern that have arisen and propose a set of options for reform. If adopted, together with a change in the approach to its application, the EPBC Act could provide an appropriate and effective means of environmental protection of matters of national environmental significance (MNES).

The Conservation Council has particular concerns about the general nature of support and facilitation for development provided by the Act, at the expense of conservation outcomes. This was particularly emphasised in the 2006 amendments to the Act where there was a clearly evident desire to aid 'development interests'.[1] Not only do the provisions of the Act itself seem to shift the balance and general intention of the Act towards development, but the application of the Act to various actions over the years has created significant concern about the objectiveness of the process.

To a large extent the Act has been rendered nugatory by the manner in which it has been applied. The large range of discretionary powers has not been used to achieve the objects of the Act to protect and conserve the environment and biodiversity. By almost any measure there has been a fairly consistent decline in the Australian environment and the conservation of our heritage since introduction of the Act. The regulatory regime established by the EPBC Act has not been an effective means of protecting matters of national environmental significance. It is time to change the approach if we are to achieve better conservation outcomes and help rehabilitate what has been degraded.

The referral process needs to be amended to allow for better community participation, more stringent assessment and greater compliance monitoring. The listing process for both threatened species/communities and heritage lists should be undertaken by an independent authority to remove the politicisation of listing decisions and ensure assessments are based purely on merit and conservation need.

There is simply too much Ministerial discretion. At every stage of every process the Minister has very broad decision making powers with an insufficient framework or guidelines to govern the process. Discretionary decisions will always have to be made in a regulatory system such as this, however these decisions should be limited and subject to a prescribed process and minimum standards to ensure consistent and robust decisions are made.

There needs to be more accountability and transparency for decision makers and fewer exemptions from EPBC processes. The exemption for Regional Forestry Agreements and regions is of particular concern. Avenues of judicial review should be expanded to ensure that proper processes are followed and measures put in place that allow individuals and community groups to bona fide participate in this process without fear of financial penalty.

Whilst the Act has provided an instrument for recognising threats, issues and processes that are adversely affecting our environment it has not achieved much, if any, success in addressing these issues. There is a

[1] Environment and Heritage Amendment Act (No. 1) 2006. Explanatory Memorandum.

need for greater integration of key threatening processes in the decision making process and a genuine attempt to combat the recognised inability to deal with cumulative impacts. The glaring omission of climate change as a matter of national environmental significance and the inability of the Act to contribute in the response to climate change remains a serious shortcoming.

It is somewhat of a farce when the government is, on the one hand, giving out money for initiatives such as recovery plans and community projects for positive actions for the improvement and rehabilitation of the environment, yet actively enabling the destruction that causes those threats on the other.

List of Recommendations

Part 1

a) *Amend the objectives of the EPBC Act so that Section 3(1)(a) and (ca) read 'to protect the environment…' and ' to protect and conserve heritage' respectively (Recommendation 1)*

Part 2

2.1

a) *The period for public comment at the controlled action determination stage should be extended to 15 business days. (Recommendation 2)*
b) *The period for public comment at the assessment stage should be increased to at least 30 business days irrespective of the mode of assessment and the option for the Minister to extend the period for more complex referrals retained.(Recommendation 3)*
c) *Where an action is referred directly as a controlled action the referral documentation should be available on the DEWHA website. (Recommendation 4)*
d) *At the impact assessment stage the relevant documentation and assessment reports should be loaded onto the DEWHA website, (EPBC Regulations 2000 - Reg 5.02 already require that the information must be provided in a form that is readily able to be published on the internet) as is the case with referral documentation, so that it is easier for the public to access the information and provide comments, rather than having to obtain the information through the proponent. (Recommendation 5)*
e) *Public comments at the assessment stage should be made directly to the Minister via the department.(Recommendation 6)*

2.2

a) *The Act should be amended to provide a clearer assessment process including provisions or regulations that clearly state the types of actions to be assessed in the various methods and clear requirements of what must be done under each of those methods. (Recommendation 7)*
b) *Section 76 of the Act should be amended so that, instead of providing that the Minister may request the person proposing to take the action to provide specified information relevant to making the decision, the Minister 'must' request and consider the necessary further information. (Recommendation 8)*
c) *Once a method of assessment has been determined for a particular action the decision should not be able to be altered so as to impose a less onerous environment assessment. (Recommendation 9)*
d) *The use of 'Accredit Assessment Process' should be very limited if not removed. At a minimum it must be subject to clear guidelines and standards for its use and the process must be explicitly described in the notification document. (Recommendation 10)*
e) *Remove' referral documentation' as an assessment option. (Recommendation 11)*

2.3

a) *Subsection (2) of Section 527E should be omitted so that the Minister is required to consider both the direct and indirect consequences of the action and no further artificial limitations are imposed on what can be considered. (Recommendation 12)*
b) *The Minister should be required to consider the 'Potential impacts' of an action. This could be done by inserting a subsection (1)(c)*
'the event or circumstance is a potential consequence of the action'. (Recommendation 13)

2.5

a) *Remove the discretionary element of Section 74A and compel the Minister to refuse to accept the referral if there are reasonable grounds for believing that it is part of a larger action. Alternatively the legislation could prohibit a proponent from undertaking any subsequent*

undisclosed actions that could have been reasonably contemplated at the time of the referral, or requiring the Minister to assess any subsequent referrals as if they were part of the first. This could be done through an amendment to Section 75 altering the Minister's consideration when making a decision or as an amendment to Section 74A. (Recommendation 14)

2.6

a) *Considerations in the Section 75 determination should be expanded to include:*
    - *impact of key threatening process*
    - *cumulative impact*
    - *bioregional plans*
    - *conservation agreements. (Recommendation 15)*
b) *Section 75 also needs to clarify that impacts (either direct or indirect) which are not subject to the assessment and approval process (for example because they are covered by a bioregional plan or Ministerial declaration) but do impact on MNES must be considered. (Recommendation 16)*
c) *Section 75(2)(b) should be removed. (Recommendation 17)*
d) *Section 136 should be amended to mandate the consideration of public comments made during the controlled action and assessment stages of the process. (Recommendation 18)*

2.7

a) *Amendments should be made to remove exemptions or potential exemptions from the referral, assessment and approval process for:*
    - *Bilateral agreements (Section 29)*
    - *Bioregional plans (Section 37)*
    - *Conservation agreements (Section 37M)*
    - *Ministerial declarations (Sections 32 and 158)*
    - *Regional Forestry Agreements and regions (Section 38 RFAs / Section 40 Forestry Regions). (Recommendation 19)*

b) *Bioregional plans should be given greater consideration as a mechanism to address cumulative impacts and enable strategic assessments. (Recommendation 20)*

2.8

a) *Conditions on the use of offsets should be included in the Act or Regulations rather than as part of an unenforceable policy document. (Recommendation 21)*

2.9

a) *The ANAO recommendation to accredit Commonwealth agencies to monitor compliance should be implemented and extended to include relevant State and Territory authorities, for example the various environment protection authorities across the country. (Recommendation 22)*

2.10

a) *Omit 'approval of actions' from Section 44(c). (Recommendation 23)*
b) *Remove Section 158A. (Recommendation 24)*
c) *Section 78(1) should be amended to make it clear that timeframes for compliance cannot be extended unless the proponent can demonstrate exceptional circumstances and demonstrate that no negative impact has occurred on a MNES. (Recommendation 25)*
d) *Discretionary powers in the Act should be restricted and a tighter decision making process established. A standard for apprehended bias should be inserted to prevent what can be seen as development favouritism, and to provide for merits review as a further means of ensuring robust decision making. (Recommendation 26)*

Part 3

3.1

a) *Limitations on judicial review in the EPBC Act should be removed. (Recommendation 27)*

3.2

a) *Merits review should be available for all Ministerial decisions made under the EPBC Act. (Recommendation 28)*
b) *Judicial standing for matters arising under the EPBC Act should be extended to all those who have made submissions during the decision making process or have a demonstrable interest or involvement in the protection or conservation of the environment, heritage or the specific area alleged to be threatened by the action. (Recommendation 29)*

3.3

a) *A provision equivalent to the former Section 478 should be inserted into the Act. (Recommendation 30)*

3.4

a) *Costs protection and the clear guidelines for the award of costs should be inserted into the Act. (Recommendation 31)*

Part 4

4.1

a) *The requirement that the Minister take all reasonable steps to ensure that the lists are kept up to date should be re-inserted into the Act. (Recommendation 32)*
b) *Listing decisions should be made by the Threatened Species Scientific Community not the Minister. (Recommendation 33)*

4.2

a) *Listing decisions should be made by the Australian Heritage Council not the Minister. (Recommendation 34)*

Part 5

a) *Climate Change should be included in the EPBC Act as a matter of national environmental significance. (Recommendation 35)*
b) *Limits should be set on the amount of greenhouse gases an action can emit or cause to be emitted. (Recommendation 36)*
c) *A requirement should be inserted into the Act compelling the Minister to consider the climate change implications of an action and its contribution to Australia's greenhouse gas emissions. (Recommendation 37)*

Part 1. Objects of the EPBC Act

As an aid to the interpretation of the often complicated and interdependent provisions of the Act, it is essential that the objects properly capture what it is that the Act is seeking to do. The Act does not live up to its current objectives and they need to be strengthened and clarified to properly meet Australia's international obligations and provide better environmental outcomes.

The current objectives are in Section 3:

(1) The objects of this Act are:

- *a) to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance; and*
- *b) to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and*
- *c) to promote the conservation of biodiversity; and*
- *ca) to provide for the protection and conservation of heritage; and*
- *d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and*
- *e) to assist in the co-operative implementation of Australia's international environmental responsibilities; and*
- *f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and*
- *g) to promote the use of indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.*

In *Stocks and Parkes Investments Pty Ltd v The Minister* [1971] 1 NSWLR 932 at 940, the Court said:

> *"There is a great difference between the verb 'provide' and the verb 'provide for' or 'make provision for' and it is this difference which gives a clue to the construction of cl. 16. The difference between 'provide' and 'provide for' is that the former means to give or to make available in fact, while the latter looks to the planning stage alone. You provide for a school site by 'looking forward' and planning accordingly. You provide a school site by actually making it available."*

The Biodiversity Convention obliges Australia to take steps to promote conservation and the recovery of threatened species; see Arts 8(d), (e) and (f). Australia is also a signatory to the *Convention on Conservation of Nature in the South Pacific* (the Apia Convention). Australia acceded to the Apia Convention on 28 March 1990 and it came into force in Australia on 26 June 1990. It requires Contracting Parties to:

> *'1. ... in addition to the protection given to indigenous fauna and flora in protected areas, use their best endeavours to protect such fauna and flora (special attention being given to migratory species) so as to safeguard them from unwise exploitation and other threats that may lead to their extinction.*

These two conventions impose positive obligations on Australia to actively protect our threatened species and biodiversity. To make provision for their protection is not sufficient to meet our obligations. Given that the legislation was created to meet these obligations and relies on the conventions for Commonwealth jurisdiction to implement such an Act, it is necessary that the objectives be amended so that Section 3(1)(a) and (ca) read 'to protect the environment…' and ' to protect and conserve heritage…' respectively. (Recommendation 1)

Currently the Act is not meeting its stated objectives nor would it be meeting the proposed changes. As outlined the Act is not 'providing for' the protection of the environment because the provisions of the Act do not create an effective mechanism through which to do this. The recommendations for reform in this

submission aim to improve the EPBC Act so that it can achieve these amended objectives.

Part 2. The Referrals, Assessment and Approval Process.

In the 8 years of the Act's operation only seven referrals have been refused (one of which was subsequently approved after the commencement of legal action). It needs to be remembered that an approval by the Minister gives the proponent permission to have a significant detrimental impact on a matter of national environmental significance. The implementation of the regulatory scheme thus far has lead to an expectation that actions will be approved. This is simply not sustainable and a serious reconsideration of the approach is needed if we are to properly protect the environment.

2.1 Community Consultation

The current periods for public comment and the process for making those comments should be amended to allow for greater community participation and input. At both stages (Controlled Action and Impact Assessment) there is a need to extend the time periods for public comment.

Controlled Action
Currently the 'controlled action decision' period for public comment is ten business days. We propose that this be extended to 15 business days. (Recommendation 2)

Referral documents are often complicated and not always entirely accurate. It is essential that the community be given the opportunity to thoroughly evaluate the impacts of the proposed action and write constructive submissions that the Minister can rely upon.

Given that the only way to follow notifications of invitations for comment is through the Department of Environment, Water, Heritage and the Arts (DEWHA) website and the limitations that that imposes, particularly on those in remote communities, it is reasonable to provide a longer period for people to complete their submissions. Also given that making submissions may have implications for standing in legal proceedings (see discussion at Part 3.4) it is important that people be given more ample opportunity to provide comments.

Where an action is referred directly as a controlled action the referral documentation should be available on the DEWHA website to allow the community to begin working on submissions and understand the implications of the referral. (Recommendation 4) These referrals are acknowledged by the proponent as having a significant impact on MNES and it is reasonable that the community be given as much time as possible to understand the impacts of the referral and engage in the process.

Impact Assessment

Currently the prescribed minimum period for impact assessment comments, depending on the mode of assessment, is either 10 or 20 days and may be longer should the Minister decide in the notification to the proponent. The relevant Sections of the Act are:

- Preliminary documentation - Sections 95(2)(c) or 95A(3)(d).
- Public Environment Report - Section 98 (3).
- Environmental Impact Statement - Section 103(3).

These requirements are clarified by the regulations. Schedule 1 of the regulations provides that for an assessment approach other than one corresponding to assessment by inquiry under Division 7 of the Act, draft assessment documentation is released for public comment for at least:

(a) for assessment on preliminary documentation 14 days; or
(b) for any other assessment approach - 28 days.

The impact assessment process often involves lengthy and complex scientific documents as well as a range of other information (in the case of the recent Gunns Pulp Mill referral around 2,500 pages of material was provided by the proponent. It was later found to contain significant errors) that requires a significant amount of time to be properly considered. The public comment period is an opportunity to scrutinise assertions made within the assessment documents, which may well be contentious, and provide an alternative view.

The period for public comment at the assessment stage should be increased to at least 30 business days irrespective of the mode of assessment. (Recommendation 3) In addition, the option for the Minister to extend the period for more complex referrals should be retained.

In the context of the overall project timeframe these extensions would not make a significant difference to proponents but they would allow greater public participation which would hopefully aid Ministerial decision making and lead to better outcomes.

A further significant problem with the assessment process is that it is done through the proponent rather than the department. Sections 95B, 99 and 104 provide that public comments be given to the proponent who must then provide a summary of the public comments to the Minister and how they have been addressed (the proponent must also provide a copy of the submissions received). This is not appropriate and does not inspire public confidence in the process.

The public contribution is no less valuable than that of the proponent and it should be equally considered by the Minister. The Minister should consider the full and detailed range of public comments as delivered by those who wrote them rather than a summarised version prepared by someone with a vested interest in the outcome. Whilst the Minister does receive a copy of the comments from the proponent this is not the same as receiving them directly and it does shift the balance to proponents, giving them an extra opportunity to convince the Minister that is not available to the public.

At the impact assessment stage the relevant documentation and assessment reports should be loaded onto the DEWHA website, (EPBC Regulations 2000 - Reg 5.02 already require that the information must be provided in a form that is readily able to be published on the internet) as is the case with referral documentation, so that it is easier for the public to access the information and provide comments, rather than having to obtain the information through the proponent. (Recommendation 5).

EPBC referral 2002/713 for a tourist development on Radical Bay, Magnetic Island is an example of the impracticality of not requiring that preliminary documentation be published on the DEWHA website. In this case the documentation was lodged with DEWHA and made available for comment in hard copy at the local Council in Townsville and the Queensland EPA office during business hours only. This left

interested parties from Magnetic Island with no choice but to travel to Townsville to view the report and also to view the hundreds of pages during office hours. The developers, through their solicitor, refused requests to provide the document directly to interested parties.[2]

Comments should be made directly to the Minister via the department. (Recommendation 6) The department can then consider the assessment documentation in light of the public comments and determine whether or not to advise approval of the action and any appropriate conditions on the approval. This would improve transparency and inspire greater public confidence in the process.

2.2 Assessment Approach Decisions.

The impact assessment process is currently very ad hoc, lacks transparency and is in real need of reform. Section 87 currently outlines the process for assessment decisions.

Section 87(3) sets out the matters which the Minister must consider in making a choice under s 87(1). Those are:

(a) information relating to the action given to the Minister in the referral of the proposal to take the action; and
(b) any other information available to the Minister about the relevant impacts of the action that the Minister considers relevant (including information in a report on the impacts of actions under a policy, plan or program under which the action is to be taken that was given to the Minister under an agreement under Part 10 (about strategic assessments)); and
(c) any relevant information received in response to an invitation under subparagraph 74(2)(b)(ii); and
(d) the matters (if any) prescribed by the regulations; and
(e) the guidelines (if any) published under subsection (6).

Subsection (6) provides the Minister the ability to publish guidelines setting out criteria for deciding which approach is to be used for assessing the relevant impacts of an action. However no such guidelines have been prepared nor have any regulations been made under this section and it therefore remains an ad hoc process entirely at the Minister's discretion.

Furthermore Section 96B provides that the Minister may prepare one or more sets of standard guidelines for the preparation of draft public environment reports. Again, no such guidelines have been prepared. Schedule 4 of the Regulations provides a very broad outline of the matters to be addressed in Preliminary Environmental Review (PER) and Environmental Impact Statement (EIS) reports, however these do not include details about the types of projects they ought to cover. A statutory response is needed if we are to achieve some objective criteria for impact assessment.

It is appropriate that the system recognises that there is a range of controlled actions and some will require greater scrutiny than others. However, the absence of a clear, objective assessment process and the over reliance on assessment by preliminary documentation has lead to a lack of public confidence in the assessment process and less than ideal environmental outcomes.

Amendments to the Act are needed to provide a clearer assessment process including provisions or regulations that clearly state the types of actions to be assessed in the various methods and clear requirements of what must be done under each of those methods. (Recommendation 7)

The assessment issue (along with a range of others) was highlighted by the Tasmanian Pulp Mill Process

[2] Kirsty Ruddock, EDO North Queensland, Draft *Impact* article, 2005.

(EPBC Referrals 2004/1914, 2005/2262 and 2007/3385) and the subsequent court cases brought by The Wilderness Society.[3]

An essential element of this case relevant to the issue of the assessment process was that the Minister changed the assessment approach for the same referral when it was resubmitted by the proponent. The reason the first assessment failed was because the proponent decided they were not happy with its progress. As a result of this decision by the proponent the EPBC Act process could not be completed and therefore had to be withdrawn. The third time the same referral was considered by the Minister the lower standard assessment process of 'preliminary documentation' was chosen; the prima facie reason for this appears to be to comply with the proponent's timeline. Marshall J provided an excellent summary of the process for this referral in his judgement at paragraphs 26 to 67.[4]

This action is also the subject of another legal proceeding brought by Lawyers for Forests.[5] The case has not yet been decided, however one of the grounds relied upon is that the Minister did not have adequate information on which to make the decision. In the application to the Federal Court[6] the applicants allege that the decision was not authorised because the Act does not authorise the Minister to approve under s 133 the taking of a controlled action unless he/she believes on reasonable grounds that he/she has enough information to make an informed decision. At the time of the decision, the Minister did not believe that he had enough information, Conditions 34, 35, 36, 38 and 40 of the approval were imposed in order to obtain the information which the Minister required in order to make an informed decision as required by the Act for the purposes of controlling provisions 23 and 24A.[7]

The lack of sufficient information about the impacts of a proposed action is also found in EPBC referral 2007/3897. This action, for the clearing of fire breaks in the Yarra Ranges in Victoria, was found not to be a controlled action provided it was undertaken in the manner set out in the decision document. However important aspects of the proposed action are not yet determined, such as the exact location of fire breaks, the precise location of threatened species, and specific measures that will be undertaken to mitigate the impact on threatened species. These matters will be determined in environmental management plans that will not be approved by any Commonwealth process.

Section 76 of the Act should be amended so that instead of providing that the Minister may request the person proposing to take the action to provide specified information relevant to making the decision the Minister 'must' request and consider the necessary further information. (Recommendation 8)

The *Gunns Pulp Mill* cases also highlight the need for amendments to be made requiring that once an assessment process has been chosen, if substantially the same referral is resubmitted the same or more onerous assessment process must be applied. (Recommendation 9)

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[3] *Wilderness Society Inc v Hon Malcolm Turnbull, Minister for Environment and Water Resources* [2008] FCAFC 19 (4 March 2008).
The Wilderness Society Inc. v The Hon. Malcolm Turnbull, Minister for the Environment and Water Resources [2007] FCA 1863 (30 November 2007).
Wilderness Society Inc v Hon Malcolm Turnbull, Minister for the Environment and Water Resources [2007] FCAFC 175 (22 November 2007).
Wilderness Society Inc. v The Hon. Malcolm Turnbull, Minister for the Environment and Water Resources [2007] FCA 1178 (9 August 2007).

[4] *Wilderness Society Inc. v The Hon. Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCA 1178 (9 August 2007) at [26] to [67].

[5] *Lawyers for Forests v The Minister for Environment,* Federal Court Proceeding, VID 1112 of 2007.

[6] Available at http://lawyersforforests.asn.au/images/stories/pdfs/Further_amended_application.pdf.

[7] Application lodged by Lawyers for forests in the proceeding *Lawyers for Forests v The Minister for Environment,* Federal Court Proceeding, VID 1112 of 2007. pp 6-7 available at http://lawyersforforests.asn.au/images/stories/pdfs/Further_amended_application.pdf.

In the last 12 months (since September 07) the Minister has decided to assess the action using a bilateral agreement 36 times, Preliminary documentation 56 times, referral information 3 times, Public Environment Report 6 times, Environmental Impact Statement 5 times and through an Accredited Assessment Process 5 times.

The use of 'Accredited Assessment Process' is also a cause of some concern. The sections of the Act that cover this process are Section 84 and regulation 16.02. The concerns come about largely because of the ad hoc nature and lack of transparency of exactly what is involved in the process. There is no requirement to publish the details of the assessment process. The decision notification documents for referrals 2008/3948, 2007/3809 and 2008/3960 do not state what the accredited assessment process is. The public is left with no idea as to how these referrals are to be assessed.

The Accredited Assessment Process is usually used as a one-off process for a referral that is not covered by a bilateral agreement but is being assessed under a state process. In the creation of a bilateral agreement the public had an opportunity to comment and raise concerns about where the assessment process might not be adequate. For these processes there is no requirement for such an opportunity and the assessment becomes dependent on the State or Territory process with potentially no scrutiny available for its adequacy for EPBC Act decisions.

The use of 'Accredit Assessment Process' should be very limited if not removed. At a minimum it must be subject to clear guidelines and standards for its use and the process must be explicitly described in the notification document. (Recommendation 10)

We strongly recommend that the assessment on referral documentation option be removed. (Recommendation 11) There is not sufficient information in this document to make a properly informed decision on an action that has been determined to be likely to have a significant impact on a matter of national environmental significance.

2.3 Definition of 'Impact'

The linchpin requirement of the EPBC Act is that an action must have a 'significant impact on a matter of national environmental significance'. The term 'impact' is defined in Section 527E which was introduced into the Act on 19 February 2007;

Meaning of impact

(1) For the purposes of this Act, an event or circumstance is an impact of an action taken by a person if:
- *(a) the event or circumstance is a direct consequence of the action; or*
- *(b) for an event or circumstance that is an indirect consequence of the action--subject to subsection (2), the action is a substantial cause of that event or circumstance.*

(2) For the purposes of paragraph (1)(b), if:
- *(a) a person (the primary person) takes an action (the primary action); and*
- *(b) as a consequence of the primary action, another person (the secondary person) takes another action (the secondary action); and*
- *(c) the secondary action is not taken at the direction or request of the primary person; and*
- *(d) an event or circumstance is a consequence of the secondary action;*

then that event or circumstance is an impact of the primary action only if:
- *(e) the primary action facilitates, to a major extent, the secondary action; and*
- *(f) the secondary action is:*
  - *(i) within the contemplation of the primary person; or*
  - *(ii) a reasonably foreseeable consequence of the primary action; and*
- *(g) the event or circumstance is:*
  - *(i) within the contemplation of the primary person; or*
  - *(ii) a reasonably foreseeable consequence of the secondary action.*

Prior to the 2006 amendments the meaning of impact was defined by the Federal Court in the case *Minister for the Environment and Heritage v Queensland Conservation Council*[8] known as the 'Nathan Dams' decision. The Full Court of the Australian Federal Court found that the Minister must look at 'all adverse impacts' of an action when deciding whether the action triggers the EPBC Act and what the controlling provisions of the action are.

The new definition of 'impact' which narrows its application should be amended in order for the EPBC Act to be as effective as possible the Minister must be required to consider as many of the adverse consequences arising from the action as possible. Subsection (2) of Section 527E should be omitted so that the Minister is required to consider both the direct and indirect consequences of the action and no further artificial limitations are imposed on what can be considered. (Recommendation 12)

A further issue raised during the *Nathan Dams Case* was whether, as a matter of law, an impact may be significant because of its 'cumulative' or 'potential' impacts.[9] No direct answer was given to this question and it does appear that cumulative impacts are best dealt with through other avenues rather than in the definition (see discussion below at 2.5).

'Potential impacts', on the other hand, could readily be considered by the Minister by inserting a subsection (1)(c):

'the event or circumstance is a potential consequence of the action'. (Recommendation 13)

This would ensure that the full scope of impacts is considered by the Minister when deciding to permit an action and make it more consistent with the requirement in Section 75(2)(a) to consider 'all adverse impacts'.

2.4 Cumulative Impacts

A common criticism of the EPBC Act is its well recognised inability to deal with the cumulative impacts of a number of actions that separately do not have a 'significant impact' sufficient to trigger the Act but together are having a significant impact on MNES.[10]

There are a number of ways that this can be addressed. The 2006 amendments appeared to make some effort to address this issue. The main avenues contemplated were bioregional plans, bilateral agreements and ministerial declarations.

There is potential for each of these processes to address the issue. In our view bioregional plans are the best suited to addressing this issue. Already in Queensland under the 'Back on Track' program extensive plans have been created for the recovery of regions and the identification of the key threats to those regions and particular species within them.[11] Addressing the issue of cumulative impacts and the gradual erosion and degradation of matters of national environmental significance (MNES) requires a range of reform measures. These are discussed at points 2.5, 2.6 and 2.7 below.

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[8] [2004] FCAFC 190.
[9] See *Minister for Environment and Heritage v Queensland Conservation Council Inc and Another* (*'Queensland Conservation Council'*) [2004] FCAFC 190; (2004) 139 FCR 24 at [60].
[10] *Environment Protection and Biodiversity Conservation Bill* (1999) Explanatory Memorandum p.28.
[11] For details of this program see;
http://www.epa.qld.gov.au/nature_conservation/wildlife/back_on_track_species_prioritisation_framework/.

2.5 Staged Referrals

In the ANAO review of the EPBC Act it was found that:

"Another issue of concern is the practice of referring actions to Environment Australia in stages. In doing so, the objects of the Act may be circumvented as assessing actions in stages means the cumulative impact of a project may not be recognised. This is a difficult issue. Environment Australia is alert to the administrative challenges in managing 'staged referrals.' However, the ANAO considers that the management of staged referrals could be strengthened by making the disclosure of staged referrals more explicit in referral applications. It would also be useful to emphasise to proponents the requirement under Schedule 2 of the regulations to disclose 'any related actions' in a referral and the consequences of providing misleading or false statements."[12]

Following this and a concerted effort from environment groups, Section 74(A) was inserted into the Act in 2003 to prevent staged referrals and the dividing of actions so that each component falls under the threshold. Unfortunately it has not been successful. Not once has this section been used to reject a referral or to combine referrals to properly assess their overall impact on MNES. In the 156 times that it has been considered by the Minister it has been accepted 71 times and found not to apply in the other 85 cases. It will no doubt be argued that this section is preventing proponents from staging referrals and there has been no need for decision on this issue because of the existence of the section. However there are a number of instances where referrals have been assessed individually even though they are part of broader actions.

Referrals no. 2006/3061 and 2008/4105 are an example of an 'approval not required' decision that accepted split referrals. Referred by the same proponent these actions are for tin and sapphire mines in northeast Tasmania. Approximately 12kms apart, both mines involved the clearing of native vegetation that was habitat for listed threatened species. Referred separately these two actions were found to be not controlled actions and in both cases Section 74(A) decisions were to accept split referrals.

Another more overt example of a split referral is the developments at Cooloola Sands in Queensland (Referrals no. 2004/1709, 2004/1708, 2004/1710, 2007/3253). This action was a residential development on a 166 hectare site in, or adjacent to: the Tin Can Bay section of the Great Sandy Strait Ramsar listed wetlands and associated habitat for migratory bird species, part of a population of the listed threatened flora species *Macrozamia pauli-guiliemi*; and potential habitat for several listed threatened fauna species. In the title of the referrals it states 'Stage 1&2' and the subsequent referral 'Stages 3-5' yet these were assessed as separate actions.

The way to address this issue is to remove the discretionary element of Section 74A and compel the Minster to refuse to accept the referral if there are reasonable grounds for believing that it is part of a larger action. Alternatively the legislation could prohibit a proponent from undertaking any subsequent undisclosed actions that could have been reasonably contemplated at the time of the referral, or requiring the minister to assess any subsequent referrals as if they were part of the first. This could be done through an amendment to Section 75 altering the Ministers consideration when making a decision or as an amendment to Section 74A. (Recommendation 14)

[12] The Auditor-General Audit Report No.38 2002–03 Performance Audit, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999*, Australian National Audit Office at p 16.

2.6 Sections 75 and 136

Section 75 sets out the requirements the Minister must consider when determining whether a referral is a controlled action. It requires that the:

Minister must consider public comment

(1A) In making a decision under subsection (1) about the action, the Minister must consider the comments (if any) received:

(a) in response to the invitation under subsection 74(3) for anyone to give the Minister comments on whether the action is a controlled action; and

(b) within the period specified in the invitation.

Considerations in decision

(2) If, when the Minister makes a decision under subsection (1), it is relevant for the Minister to consider the impacts of an action:

(a) the Minister must consider all adverse impacts (if any) the action:

(i) has or will have; or

(ii) is likely to have;

on the matter protected by each provision of Part 3; and

(b) must not consider any beneficial impacts the action:

(i) has or will have; or

(ii) is likely to have;

on the matter protected by each provision of Part 3.

(2A) For the purposes of subsection (2), if the provision of Part 3 is subsection 15B(3), 15C(5), 15C(6), 23(1), 24A(1), 26(1) or 27A(1), then the impacts of the action on the matter protected by that provision are only those impacts that the part of the action that is taken in or on a Commonwealth area, a Territory, a Commonwealth marine area or Commonwealth land:

(a) has or will have; or

(b) is likely to have;

on the matter.

(2B) Without otherwise limiting any adverse impacts that the Minister must consider under paragraph (2)(a), the Minister must not consider any adverse impacts of:

(a) any RFA forestry operation to which, under Division 4 of Part 4, Part 3 does not apply; or

(b) any forestry operations in an RFA region that may, under Division 4 of Part 4, be undertaken without approval under Part 9.

This section should be amended to impose tighter requirements on the decision making process and implement a range of other elements within the EPBC Act.

Considerations in the Section 75 determination should be expanded to include:

- impact of key threatening process
- cumulative impacts
- bioregional plans
- conservation agreements. (Recommendation 15)

Section 75(2)(b) should be removed. (Recommendation 16)

Together with an expanded definition of 'impacts', detailed and clearly defined criteria for the decision making process have the potentially to greatly improve the operation of the Act, both in terms of outcomes and transparency.

Section 75 also needs to clarify that impacts (either direct or indirect) which are not subject to the assessment and approval process (for example because they are covered by a bioregional plan or Ministerial declaration) but do impact on MNES must be considered. (Recommendation 17)

Section 136 outlines the requirements for making the decision to approve or not approve the action. It should be amended to mandate the consideration of public comments made during the controlled action and assessment stages of the process. (Recommendation 18)

2.7 Exemptions and Alternatives from the Referrals, Assessment and Approval Process

There are a range of exemptions or potential exemptions or alternatives from the referrals, assessments and approvals process. Important elements in a regulatory scheme's effectiveness are that it comprehensive, consistent, transparent and robust. The existing and potential range of exemptions severely limits the effectiveness of the EPBC Act.

Amendments are needed to remove exemptions for:

- Bilateral agreements (Section 29)
- Bioregional plans (Section 37)
- Conservation Agreements (Section 37M)
- Ministerial declarations (Sections 32 and 158)
- Regional Forestry Agreements and regions (Section 38 RFAs / Section 40 Forestry Regions) (Recommendation 19)

These should not be alternatives to the assessment and approval process. Currently an action that falls under these headings may be exempt from the requirement for approval under Part 9. Rather these plans and process should be used to aid the decision making process and contribute to the decisions made at each stage of the process (controlled action, assessment and approval). This would allow the Minister to consider the impacts of any particular action in the broader context of a bioregional plan for example and better regulate what happens in a particular region to ensure that detrimental impacts on MNES are minimised.

Section 29 Bilateral Agreements

The move to assessment under bilateral agreements further complicates the assessment process. Whilst it is reasonable that resources be combined it is not appropriate that assessment standards be lowered. Clear assessment standards need to be outlined so that there is a consistent approach across the country. It is essential that consistent and guaranteed standards mean that the bilateral process achieves the same or better outcomes than would have been reached under the other assessment steams.

Using the bilateral process for assessment of actions that come under other State/Territory requirements is reasonable and efficient however supplementary information must be readily available and sought by the Minister to ensure that the particular requirements of the EPBC Act are meet.

We do not support approval bilateral agreements. The capacity for these to be created should be removed.

Section 37 Bioregional plans

Bioregional plans should be given greater consideration as a mechanism to address cumulative impacts and enable strategic assessments. (Recommendation 20) Bioregional plans should be used as a tool in the decision making process. They should not be a means of exempting actions from the referral, assessment and approval process. Bioregional plans have the potential to address cumulative impacts and threatening processes, and to help the implementation of recovery plans. In order for these plans to be effective they must be prepared or accredited by the TSSC and requirements inserted in the Act that require the Minister not to make decision inconsistent with the plans.

Section 37M Conservation Agreements
Again these types of agreements have the potential to achieve positive environmental outcomes when used in concert with rather than instead of the referrals, assessment and approvals process.

Sections 32 and 158 Ministerial declarations
This provision has only been used once. In 2004 the Minister exempted science and technology activities undertaken by the Australian Defence Force.[13] The reason provided was that it was in the national interest not to assess these projects. This is not acceptable outcome, the exact scope of the exemption is almost unascertainable and therefore very difficult to challenge and there is no real reason given as to why the exemption is required. Whilst it is reasonable to limit public access to certain ADF activities such a blanket exemption is unreasonable and certainly not conducive to good environmental outcomes.
Any such exemption 'in the national interest' should be limited to a single action with clearly defined parameters.

Section 38 and 40 RFAs
The Conservation Council does not support the exemptions given to RFA forestry activities. The *Wielangta* case[14] found that the RFA was not fulfilling the requirement to protect species and having a significant impact on MNES. The RFA system is not a credible alternative to the EPBC process. The amendment to the Tasmanian RFA following the case, made explicitly to get around the decision and frustrate the outcome of the Federal Court case, makes a farce of the claim of protection in the RFA. Furthermore it was done with no public comment or consideration of evidence from experts.

> *"Adverse impacts of forestry operations in RFA regions may well damage matters of national environmental significance, eg nationally-listed threatened species. Hence, such adverse impacts ought not be exempt from EPBC Act EIA as currently under s 75(2B). Assessment of a major development proposal such as construction and operation of Gunns' Tamar Valley pulp mill ought include its impacts in entrenching or furthering 'upstream' forestry operations to supply the mill, or otherwise affecting the locations, scale, timing, etc of forestry operations during its lifetime. These are 'impacts' of such a project as defined in the EPBC Act s 527E. Yet, if adverse, s 75(2B) prohibits the Minister from considering such impacts, thereby (as held by the Full Federal Court majority) preventing their inclusion in EPBC Act EIA – even their damaging effects on matters of national environmental significance."*[15]

It is difficult to reconcile the wholesale exemption for RFA actions when at the same time recognising that land clearing is a key threatening process and after climate change arguably the greatest threat to biodiversity in Australia.

2.8 Offsets

Whilst Section 75 requires that when considering whether an action is a controlled action the Minister must not consider any beneficial impacts of the action when it comes to approval or particular manner decisions, offsets are frequently part of decision making process.

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[13] Gazette 24/08/2004 S345see http://www.deh.gov.au/epbc/notices/pubs/s158-statement-of-reasons-defence.pdf
[14] *Brown v Forestry Tasmania* [2005] FCA 1210; [2006] FCA 468; [2006] FCA 469; [2006] FCA 1729; *Forestry Tasmania v Brown* [2007] FCA 604; [2007] FCAFC 186; [2008] HCATrans 202
[15] Tom Baxter**,** *The Need to Retool Australian EIA to Conserve Biodiversity Impacted by Forestry,* 'IAIA08 Conference Proceedings', The Art and Science of Impact Assessment 28th Annual Conference of the International Association for Impact Assessment, 4-10 May 2008, Perth Convention Exhibition Centre, Perth, available at http://dev.iaia.org/cs/session.aspx?id=CS2.11&ts=5

For examples of offsets in decision notices in relation to approvals see EPBC 2005/1997, EPBC 2005/1913, EPBC 2004/1904, EPBC 2004/1863, EPBC 2004/1708, EPBC 2003/1069, EPBC 2003/975, EPBC 2002/849, EPBC 2002/842 and EPBC 2002/733. An example of what appears to be an offset in a 'Not Controlled Action – Particular Manner' decision was in South Australia on the Fleurieu Peninsular (referral no. 2005/2060). Not only was there a lack of information in the referral document, it appears that the Minister improperly took an offset into account when making the decision. In this case it appears that fencing off 20ha of wetland was sufficient to make it acceptable to clear 2ha of wetland.

Section 134 outlines the range of conditions that can be attached to approvals. The second reading speech for the 2006 amendments to this section state, "The amendments will broaden the types of conditions to be attached to development approvals to allow voluntarily compensatory actions and financial contributions to offset the impacts of development in situations where impacts are unavoidable".

Whilst it is important that the Minister is able to attach stringent conditions on actions to prevent environmental damage, it is inappropriate for proponents of actions to potentially be able to 'buy off' their proposals. The potential for abuse of the provisions gives rise to significant concerns. Safeguards need to be put in place for the use of offsets in the decision making process.

We note the recent publication of draft guidelines on the use of offsets and whilst we do not seek to comment on those guidelines we submit that conditions on the use of offsets should be included in the Act or Regulations rather than as part of an unenforceable policy document. (Recommendation 21)

2.9 Compliance and enforcement

There is significant evidence to suggest that the EPBC Act is not well enforced and subsequently not well complied with.

The Australian National Audit Office said in 2003:

> *"Finalising compliance and enforcement guidelines and strengthening compliance networks with other levels of government and non government organisations, together with a more timely and effective approach to potential breaches of the Act, would assist in enhancing compliance and enforcement action. Greater attention to publicly reporting emerging trends and changes over time would strengthen the quality of reporting and provide a better overall picture of achievements and outstanding challenges in relation to protecting the environment and conserving biodiversity on a national scale."*[16]

They continued:

> *"Monitoring and enforcing compliance with the requirements of the Act is crucial to its effective operation. The Act provides for considerably stronger provisions for dealing with breaches of the legislation than existed under previous environment legislation. In 2001–02, the Department received 122 reports of activities that could breach the Act. To date, there have been no prosecutions brought by the Commonwealth under the Act. However, in three cases, third parties have commenced proceedings in relation to matters dealt with under the Act."*[17]

[16] The Auditor-General Audit Report No.38 2002–03 Performance Audit, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999*, Australian National Audit Office at p. 14.
[17] The Auditor-General Audit Report No.38 2002–03 Performance Audit, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999*, Australian National Audit Office p 20.

The department has consistently appeared unwilling to enforce the provisions of the Act. Especially in the early years of the Act's operation complainants alleging breaches of the Act were told that the department would not pursue the matters and they could take the alleged offenders to court and prosecute themselves. Whilst there have been penalties imposed under the Act these have often been less than would appear sufficient for strong deterrence against breaches. The most serious case brought against a breach of the EPBC Act was *Minister for the Environment and Heritage v Greentree*.[18]

A summary of the case:

> *In late 2001, Windella was sold to a number of those who were to become the defendants in the Greentree Case, at which time they were made aware of the status of the wetland as a Ramsar wetland. Less than a year later, an employee of The Wilderness Society, a non-government environment organisation, flew over Windella and noticed that vegetation had been cleared and dredging had occurred within the boundaries of the Ramsar listed wetland. She took photographs of the clearing and dredging and then provided them to the Department in early September 2002.*
>
> *On 30 September 2002, the Department sent a letter to the defendants about the alleged clearing and indicated that it wanted to conduct a site visit of the property. The defendants refused, which resulted in the Department obtaining a warrant to inspect the property. At the site inspection that followed in October 2002, Departmental officers found 'that approximately 20 per cent of the Windella Ramsar site in the north-eastern portion had been cleared of all ground cover' and that dredging had occurred within the site. Despite finding clear evidence of a serious breach of the Act, the Minister failed to initiate legal proceedings immediately to prevent the defendants from causing further damage to the ecological character of the wetland. Rather, the Department attempted to negotiate an outcome with the defendants for more than six months. When Departmental officers returned to inspect the site in late July 2003, they found the entire site had been cleared of all ground cover and that the soil had been ploughed. Only then were legal proceedings initiated.*[19]

Ultimately the Federal Court ordered the defendants in the *Greentree* case pay a pecuniary penalty of $450,000. Whilst the outcome was successful the case does raise some significant concerns about the process and reluctance of the Department to prosecute breaches of the Act. The financial penalty imposed in no way compensated for, nor restored the ecological values of the site destroyed between the notification of initial damage and inspection six months later. Nor does the level of the fine create sufficient disincentive for other agricultural companies.

Another prosecution under the EPBC Act was brought by Parks Australia who successfully prosecuted five residents of the Cocos (Keeling) Islands for possession of 216 dead booby birds and 14 dead frigate birds, both listed migratory species. All of the defendants pleaded guilty in the Cocos (Keeling) Islands Magistrate's Court on 7 December 2005 and were convicted under section 211C of the EPBC Act and released on two-year ($5,000) good behaviour bonds. Each was ordered to pay legal costs of $2,173.

There have been two other civil penalties imposed but these have been based on consent orders. One case did go to the Federal Court under Section 481 (*Minister for Environment and Heritage v Warne* [2007] FCA 599 (27 April 2007)). In this case the offender carried out commercial fishing activities in the vicinity of the Mermaid Reef National Marine Nature Reserve. On four occasions the vessel entered, and engaged in trawl fishing activities within, the Mermaid Reef Reserve. In the course of those incursions, the vessel took scampi, a species of fish classified as a protected species under the EPBC Act. The parties

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[18] *See Minister for the Environment & Heritage v Greentree (No 2)* [2004] FCA 741 and *Minister for the Environment and Heritage v Greentree* (No 3) [2004] FCA 1317.

[19] Andrew Macintosh and Debra Wilkinson. *EPBC Act – The Case For Reform*, *The Australasian Journal of Natural Resources Law and Policy [Vol. 10, No. 1, 2005] 141 at 160-161*

filed an agreed statement of facts and made joint submissions which the court gave effect to, requiring the respondent pay a $25,000 penalty and a further $27,500 in costs.

The most recent penalty imposed because of a breach of the EPBC Act was against a land owner who cleared 8ha of native grassland without approval. Section 486DA allows the Minister to enter into enforceable undertakings to remedy breaches of the Act. The acceptance of an undertaking by Hardies Hill Pty Ltd to pay $20,000 over four years is not an acceptable outcome and is not consistent with penalties in other jurisdictions, nor the previous penalties imposed under the Act.

For example, contrast this with the outcome in *Cameron v Eurobodalla Shire Council.*[20] Mr Cameron, owned residential property next to a waterfront council reserve at Bateman's Bay. He engaged a contractor to remove seven branches from gum trees on reserve obscuring water views from his property. The vegetation removal was done without a permit and Mr Cameron elected to have the matter heard in the Local Court which ordered that he pay $10,000. Mr Cameron appealed the decision to the Land and Environment Court which upheld the decision. In total Mr Cameron was required to pay around $13,000 including the prosecutor's costs.[21]

In the 2006 round of amendments there was an emphasis placed on increasing penalties to ensure compliance yet when it comes to actually applying the provisions the Department appears reluctant to enforce the Act. The cases outlined show the unwillingness of the department to impose sufficient penalties, consistent with other jurisdictions to provide a deterrence against breaching the Act. There needs to be a considered response as to how the department plans to deal with breaches and sufficient penalties to ensure deterrence for failing to comply with the Act.

The DEWHA annual report into the Act suggests that positive progress is being made;

> *"The focus of the EPBC Act on protecting matters of national environmental significance continues to positively influence the way in which developers design projects, using best practice methods and measures to minimise potential impacts on these protected matters thereby avoiding or minimising the need for assessment and approval under the EPBC Act."*[22]

However there is considerable evidence to suggest that this is not the case. There are significant gaps in the Acts coverage. Between 2001 and 2004 1.5 million hectares of deforestation occurred in Australia.[23]

In Queensland the Statewide Landcover and Trees Study[24] found that:

- 375,000 hectares of forest was cleared in Queensland in 2005-06.

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[20] [2006] NSWLEC 47

[21] Examples of other cases of environmental enforcement;
The Council of the City of Gosford v Tauszik [2005] NSWLEC 266. The offender committed an offence against s 125(1) of the EPA Act by cutting down three trees on his property in contravention of an environmental planning instrument without the council's consent. The offender was fined $25,000.
Council of Camden v Tax (2004) 137 LGERA 368: The offender committed an offence against s 125(1) of the EPA Act by cutting 40 trees in contravention of an environmental planning instrument and a condition of subdivision consent. The offender was fined $30,000.
In *R v Schembera* [2008] QCA 266 the Queensland Court on appeal imposed a fine of $30,000 on the senior executive of a mining company that had failed to comply with an environmental protection order. (At first instance a fine of $75,000 was imposed)

[22] Department of the Environment and Water Resources Annual Reports *Volume 2 Legislation Annual reports 2006–07* p 10.

[23] Beeton RJS (Bob), Buckley, Kristal I, Jones, Gary J, Morgan, Denis (2006 Australia State of the Environment Committee) 2006, *Australia State of the Environment 2006*, Independent report to the Australian Minister for the Environment and Heritage, Department of the Environment and Heritage, Canberra. P 39

[24] Department of Natural Resources and Water (2008). *Land cover change in Queensland 2005–06: a Statewide Landcover and Trees Study (SLATS) Report*, Feb, 2008. Department of Natural Resources and Water, Brisbane

- This is 7% higher than the previous period (2004–05) of 351 000 ha/year. Levels of clearing in 2005–06 are indicative of final broadscale clearing permits being activated prior to the end of broadscale clearing on 31 December 2006.
- Clearing of remnant *woody* vegetation, as defined by the Queensland Herbarium Regional Ecosystem mapping, for the period 2005–06 was 222 000 ha/year. This represents a 29% increase on the 2004–05 figures.
- Remnant woody clearing in 2005–06 amounted to 59% of total woody vegetation clearing, an increase of 10% on the 2004–05 figures. More of the increase occurred on freehold tenure (42%) than leasehold tenure (24%).[25]

As the Productivity Commission has stated in relation to the agricultural sector, "In terms of preventing activities, or of requiring activities to undergo the assessment and approval process, the EPBC Act to date has had little direct impact on the agricultural sector."[26] The referral figures support this view in 06-07 the Department received 3 referrals for the agriculture and forestry category, all of which were found to be not controlled actions.

Significant impacts are occurring and not being picked up by the Act or the Department. Most land clearing in Australia is for agricultural production and increasingly for commercial plantation forestry which often occurs in site of high biological value.[27] "As reported in SoE2001, biodiversity continues to be in serious decline in many parts of Australia."[28]

Compliance monitoring is another key issue for the Act. In 2007 the ANAO again found serious shortcomings:

> *"Particular manner actions (ie those that were not a controlled action if conducted in a particular manner, thereby avoiding the environmental Assessment process), were not subject to any formal monitoring or audit. Consequently, the department at that time was not in a position to know whether the actions undertaken by proponents were consistent with the conditions of approval. At that early stage, no legal action had been taken by the department in response to identified potential breaches of the Act."*[29]

The 2003 report recommended that:

> *" [the department] considers an accreditation scheme and/or delegations for Commonwealth agencies, such as the Great Barrier Reef Marine Park Authority, to enable third parties to sign-off that conditions have been complied with by proponents[.]"*[30]

The Conservation Council supports the ANAO recommendation and would suggest that it go beyond Commonwealth agencies to include State and Territory authorities (for example the various environment protection authorities across the country that have a much stronger on the ground presence). This would require funding to be paid by the Commonwealth for the additional services but could be a very cost

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[25] Ibid p1.
[26] Productivity Commission, *Impacts of Native Vegetation and Biodiversity Regulations*, Report No 29 (2004).
[27] Beeton RJS (Bob), Buckley, Kristal I, Jones, Gary J, Morgan, Denis (2006 Australia State of the Environment Committee) 2006, *Australia State of the Environment 2006*, Independent report to the Australian Minister for the Environment and Heritage, Department of the Environment and Heritage, Canberra p72.
[28] Ibid p36
[29] The Auditor-General, *The Conservation and Protection of National Threatened Species and Ecological Communities, Department of the Environment and Water Resources,* Audit Report No.31 2006–07 Performance Audit Australian National Audit Office (Canberra).
[30] The Auditor-General Audit Report No.38 2002–03 Performance Audit, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999*, Australian National Audit Office at p. 14.

effective way of ensuring compliance. This outcome would provide both an enforcement and capacity building role for State and Commonwealth agencies and an efficient way of monitoring the implementation of approvals and compliance.

The ANAO recommendation to accredit Commonwealth agencies to monitor compliance should be implemented and extended to include relevant State and Territory authorities, for example the various environment protection authorities across the country. (Recommendation 22)

2.10 Development Facilitation

There is certainly a perception, and justifiably so, that not only does the Act itself lean towards proponents the Minister and the Department have taken on a facilitation role for developments rather than acting as an objective regulatory authority. The way the Act has been applied and the decisions that have been made by the Minister and the Department have certainly been consistently in favour of development to the extent that they appear to have gone out of their way to accommodate proponents.

There are a number of instances where the Act itself certainly appears to favour development interests and ensure actions can go ahead even where there is a demonstrable impact on MNES.

Examples include:

Section 44(c) *ensure an efficient, timely and effective process for environmental assessment and approval of actions*. Efficient and timely assessment is reasonable and appropriate. However to explicitly anticipate approval leaves the process looking significantly less than objective. There should be no preconceived view towards approval if this is to be an effective regulatory process. "Approval of actions" should be omitted from Section 44(c). (Recommendation 23)

Section 158A provides that approval process decisions are not affected by listing events that happen after decisions are made under section 75 (ie, whether an action is controlled). 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". Section 158A should be removed from the Act. (Recommendation 24)

These are just some examples of the somewhat subtle ways in which the Act appears to favour development over conservation, or, alternatively, seems to limit the objectiveness of the regulatory process.

As well as the provisions of the Act itself, the way in which it has been applied and the decisions that have been made have favoured, even facilitated development actions. The most recent example is the Gunns' Pulp Mill (EPBC referrals 2004/1914, 2005/2262, 2007/3385). The story of this project captures many of the failings of the EPBC Act and the way it is applied by the Minister.

Most recently in the long running Gunns' Pulp Mill referral process, the Minister granted an extension of time for the proponent to comply with an approval condition to complete an environmental impact management plan. Whilst all management and protection measures should be encouraged if a project is to go ahead, it is not appropriate the conditions of an approval be changed to meet the needs of the proponent.

Of even greater concern with the process for the Gunns' Pulp Mill was the way in which the mode of assessment was changed to accommodate the proponent.

The judgement delivered in *Gunns Pulp Mill Case*[31] gives rise to serious concerns about the process:

> *"In a media release published on 4 December 2006, Senator Abetz announced the payment to Gunns of the remaining funding (of a total of $5 million) "to assist in the development of an environmental best-practice pulp mill in Tasmania". The media release went on to express support for the pulp mill."*

To have the Commonwealth supporting a project that is still being assessed is inappropriate to say the least. Further:

> *"On 19 March 2007, the Minister wrote to Gunns and stated the Australian Government's support for the pulp mill, provided it met appropriate environmental assessment requirements.*[note that the concern is not that it meet environmental standards] *The Minister stated, "I am interested in progressing an Australian Government assessment process as soon as possible to ensure that a decision can be made in a reasonable timeframe". The letter concluded:*
>
> *Given the existing RPDC process is no longer in place, Gunns will need to formally withdraw the current proposal (EPBC 2005/2262) and submit a new referral. In order to meet your mid year goal a new schedule which is both timely and ensures a robust, transparent decision will need to be agreed as soon as possible. I encourage early contact with officers in my department as soon as practicable to discuss the process."*

There was also significant pressure from Gunns to have the process completed by August 2007. It worked.

On 11 April 2007, the Minister said in a press release:

> *"A new referral was received and registered on the Department of the Environment and Water Resources website on 2 April 2007. The new referral will remain open for public comment, for 10 business days, until 18 April 2007. A decision will then be made on whether further assessment of the pulp mill is required. If further assessment of the pulp mill is required, the Australian Government would be aiming to conclude it before the end of August 2007 and the assessment would include an additional opportunity for public comment."*

The Minister should not be aiming to meet proponent's timelines. This is supposed to be an objective process applying strict statutory guidelines not one of shifting goalposts allowing proponents to pass through at their convenience.

Another example that raises a range of issues and concerns about the Act and the decision making process is referral 2005/2060. In March 2005 a referral was submitted for the construction of dams on a dairy farm on the Fleurieu Peninsular in SA. Here a part of the critically endangered ecological community, 'Swamps of the Fleurieu Peninsula' would be cleared the rest fenced off and three new dams would be built (the proponent provided no hydrological information on how the construction of the dams would affect the EPBC Act protected swamps). Also in the summary of the proposal the proponent made no mention that almost two hectares of the critically endangered community would be cleared.

In listing the swamps as a critically endangered ecological community the Threatened Species Scientific Committee said:

[31] *Wilderness Society Inc. v The Hon. Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCA 1178 (9 August 2007).

"The Swamps of the Fleurieu Peninsula's geographic distribution is "very restricted". The ecological community is confined to the Southern Mount Lofty Ranges, with a total area of less than 500 hectares (a reduction of 75% of its former range of around 2000 ha). More than 75% of remaining patches are small (5 hectares or less) and isolated… The Swamps of the Fleurieu Peninsula's very restricted geographic distribution and the high number of threats facing the ecological community means it is likely that the action of a threatening process could cause it to be lost in the immediate future."[32]

Initially the Minister declared the referral a controlled action, but later changed that decision to "not controlled action (particular manner)", the particular manner being that the fencing works be completed by 13 October 2005, the place be managed in accordance with a plan and a certified audit supplied by 13 May 2006. On 1 December 2005, when the proponent had been in breach of the particular manner specified for two months, the Minister reconsidered a second time, providing a further six months for fencing. On 25 May 2006, again, after the time period expired, the Minister made another reconsideration providing another 12 months for works to be completed. Note that the fencing and management provisions were not expressed as preconditions to the construction of the dams and that the second and third reconsiderations were based on the information provided in the first instance. Nothing had changed in the intervening period other than the proponent's failure to comply with the conditions.

The Act provides the Minister the ability to reconsider decisions:

Section 78 (1) The Minister may revoke a decision (the first decision) made under subsection 75(1) about an action and substitute a new decision under that subsection for the first decision, but only if:

(b) the following requirements are met:

(i) the first decision was that the action was not a controlled action because the Minister believed the action would be taken in the manner identified under subsection 77A(1) in the notice given under section 77;

(ii) the Minister is satisfied that the action is not being, or will not be, taken in the manner identified;

Declaring an action to be 'Not Controlled Action (particular manner)' means that provided it is done in accordance with the prescribed conditions it is not a controlled action under the Act. However if the conditions are not complied with the presumption is that the action is likely to have a significant impact on a MNES and therefore be a controlled action. Therefore Section 78 allows the Minister the ability to reconsider the decision, given that the action has not been done as specified and therefore requires assessment and approval under the Act. Section 78 is not intended to provide for rolling consent so that a proponent doesn't breach the EPBC Act.

It should also be noted that this provision has been used to improve the conservation conditions imposed on developments. However Section 78 should be amended to make it clear that timeframes for compliance cannot be extended unless the proponent can demonstrate exceptional circumstances and demonstrate that no negative impact has occurred on a MNES. (Recommendation 25)

If this is not the case the proponent is in breach of the Act and should be prosecuted for having an impact on MNES without consent.

A positive amendment made in 2006 was the insertion of Section 76B giving the Minister the ability to declare an action 'clearly unacceptable'.

This provision has been used three times (2008/4366 - Galelee coal project, 2008/4257 - Rockingham

[32] Threatened Species Scientific Committee (2003a). *Commonwealth Listing Advice on Swamps of the Fleurieu Peninsula*. Available at http://www.environment.gov.au/biodiversity/threatened/communities/fleurieu-swamps.html

Close residential development proposal at Wongaling Beach and 2007/3916 - Culling grey headed flying foxes). Whilst we do support the intention of Section 74B and the decisions that have been made using the section, it is of concern that the most recent press release on a section 74 B decision encourages the proponent to reapply even though the project, even in another location, will have detrimental environmental consequences. In that press release the Minister said, "I would encourage Waratah Coal to consider alternative sites for the port[.]"[33]

It is not the Minister's job to encourage development that will have a negative impact on MNES. The Minister should be an objective umpire who decides if actions are acceptable or not rather than an advocate for development at the expense of conservation.

This is a difficult issue to address; it requires a cultural shift as well as legislative change. Discretionary powers in the Act need to be restricted and a tighter decision maker process established. A standard for apprehended bias should be inserted to prevent what can be seen as development favouritism as well as the availability of merits review as a further means of ensuring robust decision making. (Recommendation 26)

Part 3. Judicial Review

Judicial review is an important means of ensuring transparency in the decision making process. In 2003 the ANAO found:

> *"In four of the 22 cases examined, documentation of the reasons behind the Minister's disagreement did not clearly show how the provisions of the Act were taken into account. In particular it was not clear to what extent 'all adverse impacts' had been considered and how the 'precautionary principle' had been taken into account. Consistent with the principles of administrative law, it would also have been preferable for a more detailed explanation of the reasons for the decision to be given so that the Department would have been better placed to consider the issues raised in future cases."*[34]

3.1 Review of EPBC Act Decisions

There are a number of provisions within the Act which remove the right of review by the Administration Appeals Tribunal (AAT) for decisions made by the Minister. The affected decisions are:

- Decisions to issue or refuse a permit; specify, vary or revoke a condition of a permit; impose a further condition on a permit; transfer or refuse to transfer a permit; or suspend or cancel a permit in relation to a listed threatened species or ecological community (section 206A(2)).
- Decisions to issue or refuse a permit; specify, vary or revoke a condition of a permit; impose a further condition on a permit; transfer or refuse to transfer a permit; or suspend or cancel a permit in relation to a migratory species (section 221A);
- Decisions to issue or refuse a permit; specify, vary or revoke a condition of a permit; impose a further condition on a permit; transfer or refuse to transfer a permit; or suspend or cancel a permit in relation to whales and other cetaceans (section 243A);
- Decisions to issue or refuse a permit; specify, vary or revoke a condition of a permit, impose a further condition on a permit; transfer or refuse to transfer a permit; or suspend or cancel a permit in relation to listed marine species (section 263A);

[33] The Hon Peter Garrett MP**,** *Minister Says No to Shoalwater Bay Rail & Port* **,** Media Release (PG /136), 5 September 2008.
[34] The Auditor-General Audit Report No.38 2002–03 Performance Audit, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999*, Australian National Audit Office at pp. 16-17.

Decisions to issue or refuse a permit; specify, vary or revoke a condition of a permit; impose a further condition in a permit; transfer or refuse to transfer a permit; or suspend or cancel a permit; issue or refuse a certificate under section 303CC(5) or a decision of the Secretary under a determination in force under section 303EU; make, refuse, vary or revoke a declaration under section 303FN, 303FO, 303FP in relation to international movement of wildlife specimens (section 303GJ);

- Ministerial decision to give advice in relation to contravention of a conservation order (Section 472 and 473)

These limitations on judicial review were part of the 2006 amendments to the Act. In respect of wildlife trade permits they are direct response to the decision in the Administrative Appeals Tribunal (AAT) in the Asian Elephants case.[35] The tribunal revoked the permits issued by the Minister and substituted new conditions on the re issued permits which provided better welfare outcomes for the animals. This case illustrates why it is important that an independent panel be able to assess decisions. While decisions of the Delegate of the Minister remain reviewable, it is reasonable that the Minister's decision (as he/she is exercising discretion) can be tested on appeal to the AAT.

Improving public rights to review leads to better public participation. Limitations on judicial review in the EPBC Act should be removed. (Recommendation 27)

The Administrative Review Council (ARC) suggests the principal objective of merits review is to ensure that administrative decisions are correct and preferable: correct, in the sense that they are made according to law; and preferable, in the sense that, if there is a range of decisions that are correct in law, the decision settled upon is the best that could have been made on the basis of the relevant facts.[36]

This objective is directed to ensuring fair treatment of all persons affected by a decision and also has a broader, long-term objective of improving the quality and consistency of the decisions of primary decision-makers as well as enhancing the openness and accountability of decisions made by government.[37]

The Conservation Council recommends that merits review should be available for all Ministerial decisions made under the EPBC Act. (Recommendation 28)

3.2 Standing

For the purposes of an application for an injunction Section 475 outlines the requirements for standing. These provisions expand standing rights to some degree however they do not go far enough and there has been uncertainty in their application.

In *Paterson v Minister for the Environment and Heritage & Anor*[38] at [18] Baumann FM writes "The group has therefore been in existence for less than two years". The Act does not require that a person have been involved in the issue or issues for more than two years, rather their involvement must be 'at any time during the two years immediately before the conduct'. The Federal Magistrate erred in this decision and the section needs to be amended to ensure standing is provided for those even if there

[35] *The International Fund for Animal Welfare (Australia) Pty Ltd and Ors and Minister for Environment and Heritage and Ors* [2006] AATA 94 (6 February 2006).
[36] Administrative Review Council, *What Decisions Should be Subject to Merit Review?* (AGPS, Canberra, 1999) at [1.3], http://www.ag.gov.au/agd/www/archome.nsf viewed 25 July 2008.
[37] Administrative Review Council, n 25 at [1.4] and [1.5]. See also the discussion of the objectives of merits review in Ch 2 of Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals – Report No 39* (AGPS, Canberra, 1995), http://www.ag.gov.au/agd/www/archome.nsf viewed 25 July 2008.
[38] [2004] FMCA 924 (26 November 2004).

interest is only for a single issue.

The standing was also an issue in the case *Lansen v Minister for the Environment and Heritage (No 3)*[39] case. Prior to the proceedings there was some debate about the standing of the applicants and it seemed that the respondents were going to challenge the applicants standing in the case. The applicants subsequently were forced to put considerable resources into preparing arguments on the issue. Ultimately the question of standing was not at issue in the case.

Mansfield J at [44]

> *"Although the standing of the Lansen applicants was acknowledged shortly before the hearing, in my view the position of those applicants as native title claimants under the Native Title Act 1993 (Cth) and/or as representatives of groups who had a real interest in the proposed mine development and its potential upstream and downstream consequences by reason of grants under the ALR Act in respect of areas through which the McArthur River ran was readily apparent. They nevertheless prepared substantial material to demonstrate their standing. Neither the Minister nor MRM was likely to have been unable to ascertain readily their status in relation to lands adjacent to the mine or to the McArthur River, at least soon after the proceeding was begun. In my view, it is appropriate to reflect that ultimately acknowledged outcome on that contested issue (to the commencement of the trial, or just before it) in the costs order."*

Amendments are needed to clarify and expand the standing provisions to ensure that litigants are not forced to waste resources on this issue. For all challenges arising under the EPBC Act standing should be extended to all those who have made submissions during the decision making process or have a demonstrable interest or involvement in the protection or conservation of the environment, heritage or the specific area alleged to be threatened by the action. (Recommendation 29)

3.3 Third Party Enforcement

The now repealed Section 478 of the Act prevented the Federal Court from requiring undertakings for damages as a condition of granting an interim injunction. This was an important part of the desire to increase public participation in the Act and help to ensure compliance. The Federal Court maintains a discretionary power whether to require or not require such an undertaking. Given that these actions are brought by groups or individuals, often with very limited resources, who do not stand to make any pecuniary gain, and given the public interest nature of such proceedings, it is entirely appropriate that undertakings for damages not be required so long as there is a *bona fide* case to be heard.

In *Lawyers for Forests Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 588 (30 April 2008) this issue was considered and the Federal Court did not require security for costs.

> *"The discretion to make a security for costs order is wide and unfettered but must be exercised judicially; see Bell Wholesale Co Ltd v Gates Export Corporation (1984) 2 FCR 1 at 3. As the only factor of any substance raised in support of the proposed order is LFF's impecuniosity, Gunns has not satisfied its onus of demonstrating that a security for costs order should be made. To hold otherwise would stifle the litigation and prevent an applicant with standing to bring the application from agitating a matter which it considers to involve questions of public importance and which seems, on the material currently before the Court, to be made bona fide and raises arguable questions of law."*[40]

[39] [2008] FCA 1367 (5 September 2008).
[40] Ibid at [14]

Whilst it could be argued that this case illustrates that the change is working and appropriate outcomes are occurring, it equally demonstrates that there was no need to remove the prevention which gave rise to these proceedings in the first place. These proceedings take up considerable resources for litigants trying to enforce the Act in the public interest. Such cases are not brought lightly and it is unreasonable to place an extra hurdle for public interest litigants to jump over. It is reasonable that where a *bona fide* case exists litigants be given the opportunity to have the matter heard without having to first raise a substantial fund in the event that they are unsuccessful and costs are awarded against them. (see below for discussion on costs)

A provision equivalent to the former Section 478 should be inserted into the Act. (Recommendation 30)

3.4 Costs

Currently the *Federal Court of Australia Act 1976* (Cth) s 43 gives the Court or Judge a general discretion to award costs. In *Oshlack v Richmond River Council*[41], a majority of the High Court held that the usual rule could be displaced in public interest litigation in environmental cases if special circumstances were shown. Such special circumstances could include where the prime motivation of the applicant was in upholding the public interest and the rule of law, where the applicant had nothing personal to gain from the litigation, and where a significant number of members of the public shared the stance of the applicant.

The issue of costs has been considered on a number of occasions in relation to the EPBC Act. There is no clear rule about when costs will be ordered against public interest litigants attempting to use the EPBC Act to protect the environment.

In *Blue Wedges Inc v Minister for the Environment, Heritage & the Arts*[42] (the first of the *Blue Wedges* cases) Heerey J found that Blue Wedges were not required to pay costs on the basis that the case was brought in the public interest and that there was merit in the case and the application raised novel questions of general importance as to the approval process under the EPBC Act.

In *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (No 2) [43], the second challenge to the Port Phillip Bay dredging, in this case to the approval decision itself. North J found against Blue Wedges and ordered that costs be payed. The judgement does make an interesting observation:

> *"One development in the course of the hearing should be referred to. It became evident that the assets of Blue Wedges Inc currently amount to $2700. The Court raised the question whether, in those circumstances, the applicant was prepared to make an open offer in recognition of some of the matters which had been canvassed during the hearing on costs. In response, Mr Morehead obtained instructions that the applicant would be prepared to pay $1500. It might be thought that the making of such an offer would be the end of the argument and that pursuing the matter beyond that point might be akin to seeking to squeeze blood out of a stone. However, that was not the position of the respondents, who pressed for orders. That was their entitlement. Their policy reasons for doing so must lie with them. The Court is not in a position to say whether the policy reasons are good or bad. Nonetheless, it should be observed that there is some curiosity about the strenuous persistence with which the orders continued to be sought.*

[41] (1998) 193 CLR 72.
[42] [2008] FCA 8
[43] [2008] FCA 1106.

In the end, the Court must apply the law, which in this case entitles the respondents to an order for costs."[44]

In *Lansen v Minister for the Environment and Heritage (No 3)*[45] Mansfield J ordered that the applicants pay 25% of the respondents costs.

"I have endeavoured to reflect my general assessment of the extent to which the proceeding concerned 'public interest' issues as I have discussed them above and the extent to which it concerned other issues arising under the EPBC Act."[46]

Another important case to consider the costs issue was *Wilderness Society Inc v Hon Malcolm Turnbull, Minister for Environment and Water Resources*.[47] In this case the Full Court of the Federal Court found that;

"It was of general importance both to the Minister and to the public that the law concerning the proper construction of the provisions of the EPBC Act with which this appeal was concerned should be clarified."[48]

In spite of this the court still ordered that the appellant pay 70% of the costs of the first respondent (the Minister) and pay 40% of the costs of the second respondent (Gunns Limited). The further reduction for the second respondent was because the court took the view that they had played a larger role than was necessary.

In *Forestry Tasmania v Brown*[49] the court ordered the respondent pay the costs of the appeal and the parties bear their own costs of the proceedings at first instance.

In *Mees v Kemp (No 2)*[50] Justice Weinberg noted that the proceedings had raised difficult and important questions of construction and had been brought 'selflessly'. His Honour ordered the applicant to pay 50 per cent of the first respondent's costs, noting:

"The award of costs need not be an 'all or nothing' proposition. Costs are discretionary, and although the discretion to award costs must be exercised judicially, reasonable minds can differ as to what would be appropriate in any given case."[51]

These cases illustrate that there is no clear rule about when costs will follow or the quantum of those costs. Yet all the judgements recognise that these cases are brought in the public interest on issues that a significant section of the community supports, and that have an important role in defining the application of the Act and merited judicial consideration.

Reform of the EPBC Act is needed to address the costs issue and it is appropriate that a limitation on costs be inserted into the Act particularly in respect of cases brought against the Minister.

In the recent Victorian Law Reform Commission, *Civil Justice Review,* Report 14 (2008) [52] canvases a range of options and arguments for reform in respect of costs for public interest litigants. Included in

[44] Ibid at [14-15]
[45] [2008] FCA 1367 (5 September 2008)
[46] Ibid at [53]
[47] [2008] FCAFC 19 (4 March 2008)
[48] Ibid at [9]
[49] [2007] FCAFC 186 (30 November 2007)
[50] [2004] FCA 549.
[51] Ibid at [23]

these options is an ability for a litigant to seek a pre trial order limiting the amount of costs they may be required to pay. We would support such a scheme and submit that the cap for such litigation should be set at $5000.

A further possibility is that in public interest cases brought under the EPBC Act parties bear their own costs regardless of the outcome.

At the very least the Act should set out the criteria and weight to be accorded to the various factors that must be considered when deciding costs orders for actions brought under the EPBC Act.

Costs protection and the clear guidelines for the award of costs should be inserted into the Act. (Recommendation 31)

Part 4. Listing Processes

4.1 Threatened Species / Ecological Communities

The number of species and ecological communities that are currently listed as threatened under the EPBC Act is only a small proportion of the total number that are likely to meet the listing criteria. There are approximately 2,800 threatened communities in Australia according to State and Territory assessments. However, the list of threatened communities under the EPBC Act currently includes only 36 communities.[53]

Given the inability for Section 75 decisions to be reconsidered because of changes to lists (Section 158A) it is essential that the listing of threatened species/communities be done in as timely manner as possible. Previously there was a requirement that the Minister take all reasonable steps to ensure that the lists are kept up to date. This should be reinserted to help ensure that we fulfil our international obligations to list and protect threatened species. (Recommendation 32)

The problems with the species protection regime are well illustrated in the ANAO report *The Conservation and Protection of National Threatened Species and Ecological Communities.*[54] The current listing process is not working and needs urgent amendment. It should be the Threatened Species Scientific Community, not the Minister that makes listing decisions. (Recommendation 33) This is the only way to ensure that decisions are based purely on merit.

A further issue in relation to listing is Section 189B which gives the Minister discretion to allow the Scientific Committee assessments to be made public. If the Minister does not exercise his/her discretion then the Scientific Committee assessments and advice remain confidential until a listing is made. This secrecy is unnecessary and may prevent the Scientific Committee from receiving information or advice which may impact on its decision to list a species or an ecological community.

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[52] Victorian Law Reform Commission, *Civil Justice Review,* Report 14 (2008). See chapters 10 and 11.
[53] Andrew Macintosh and Debra Wilkinson, *Environment Protection and Biodiversity Conservation Act – A Five Year Assessment*, Discussion Paper No 81 (The Australia Institute, 2005).
[54] The Auditor-General, The Conservation and Protection of National Threatened Species and Ecological Communities, Department of the Environment and Water Resources, Audit Report No.31 2006–07 Performance Audit Australian National Audit Office (Canberra).

Heritage

The ICOMOS Burra Charter[55] set out best practice guidelines for heritage conservation. The Charter recommends that heritage protection legislation should separate the two distinct steps of listing and management that occur with a heritage place.

Step one should define the significance of the place in question. There should be a clear boundary that contains the elements of heritage significance, with the significance being in turn summarised by a statement of significance. The sole criterion for this decision about the place and its extent is one of heritage significance. Step two should consider the impact of any development on the place and its heritage significance. This does not mean that development that might damage that significance cannot occur. What it does mean is that the decision maker must take this significance into account and the decision is made and explained in a transparent and accountable way.

The system under the current Act does not reflect best practice. The current system produces a situation where the decisions regarding the listing of a place and its geographic extent or recognised values are made as part of an intertwined process in which development issues are brought into the consideration. The compromises then are made in Step one, the listing phase, rather than being properly considered, assessed and acknowledged when a development impacting on the place is being considered. We refer specifically to the Burrup Peninsular in Western Australia.

The listing process for heritage places should be done independently by the Australian Heritage Council. (Recommendation 34) This would allow for a much more transparent system that adopted well recognised best practice and greater recognition of our heritage places.

Part 5. Climate Change

Since the Act was developed, acceptance of climate change as a serious matter of national environmental significance has evolved. We are in a different era of climate change consciousness than when the Act was produced, therefore climate change should now be taken into account in the assessment of potential impacts of proposals. Climate change should be included in the EPBC Act as a matter of national environmental significance. (Recommendation 35)

Limits should be set on the amount of greenhouse gases an action can emit or cause to be emitted. (Recommendation 36)

A requirement should be inserted into the Act compelling the Minister to consider the climate change implications of an action and its contribution to Australia's greenhouse gas emissions. (Recommendation 37)

The role of climate change and a climate change 'trigger' in the EPBC Act has been debated since the first EPBC Bill. The design and implementation of the current EPBC Act makes it difficult for the Act to address climate change. Specifically the 'significant impact' test has proved a real obstacle given that even very large amounts of greenhouse emitted as a result of any single action in Australia will be 'a drop in the ocean' on the world stage. However that is not to say that the EPBC Act does not have the potential to make an impact on Australia's emissions.

[55] *The Burra Charter, The Australia ICOMOS charter for the conservation of places of cultural significance* (1999). Available at http://www.icomos.org/australia/burra.html

The main two options for climate change in the EPBC Act are:

1. Listing climate change as a Matter of National Environmental Significance. A direct trigger for the operation of the Act meaning that once a project will emit or cause to be emitted, a prescribed amount of Green House Gas (GHG) it is a controlled action. This formula has been debate in parliament on a number of occasions.[56]

There is no difference in the impact of GHG emitted in one part of the country from another. Unlike all the other MNES, which different actions will effect very differently (clearing 10 hectares in one place is very different from clearing it somewhere else) GHG emissions are exactly the same irrespective of where they are emitted. This means that there is less need for Ministerial discretion and prescribed amounts could be included in the regulations and amended as GHG emissions become further constrained. One factor that the Minister might need to consider is the relative carbon intensity of different actions (burning black coal as opposed to brown). In the short term this may be an effective way of preventing the most polluting actions as a more comprehensive response to the issue is developed. It is important here that actions be considered in respect of Australia's emissions and obligations rather than it terms of total world emissions.

2. A further possibility for addressing climate change is to insert a consideration requirement that at each stage of the decision making process the Minister consider the climate change impacts of the Action and its contribution to Australia's greenhouse gas emissions. This measure should allow for a more comprehensive range of conditions to be attached to approvals (though note the concerns expressed about offsets at 2.8) and if combined with a prescribed threshold may lead to better outcomes.

The combination of these two measures and the requirement that projects only be assessed for their contribution to Australia's GHG emissions will increase the scope of the EPBC Act to address action previously excluded[57] and hopefully reduce the number of highly carbon intensive actions undertaken.

[56] See Environment and Heritage Legislation Amendment Act (2006) debates and Avoiding Dangerous Climate Change (Climate Change Trigger) Bill 2005.

[57] *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment& Heritage & Ors* [2006] FCA 736 (15 June 2006)