The Australian Environment Act

Report of the Independent Review of the ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999

OCTOBER 2009

Final Report

The Hon Peter Garrett AM MP
Minister for the Environment, Heritage and the Arts
Parliament House
CANBERRA ACT 2600

Dear Minister

Independent Review of the *Environment Protection and Biodiversity Conservation (EPBC) Act 1999*

I am pleased to provide you with the Report of the Independent Review of the *EPBC Act 1999* (the Act) in accordance with section 522A.

As well as the operation of the Act and the extent to which its objects have been achieved, the Review has had particular regard to the:

- Australian Government's overarching policy objective of promoting sustainable economic development while protecting biological diversity and maintaining essential ecological processes and systems;
- desire to work in partnership with the states and territories on environmental issues;
- focus on reducing regulation while maintaining effective environmental standards;
- need to facilitate Australia's international obligations;
- requirement to conform to the Expenditure Review Principles; and
- commitment to seeking government, industry and community input.

The EPBC Act is a hard Act to follow in both senses.

First, the Act was deliberately drafted with large sections of text repeated in an endeavour to make it easy to understand, but has actually produced the obverse outcome. The Act is currently too repetitive, unnecessarily complex and, in some areas, overly prescriptive. It needs restructuring to make it more accessible, easier to navigate and reduce the regulatory and resource burden on those impacted by the Act, requiring the recasting of many of its provisions.

While this Report recommends significant changes to the Act's operation and administration, it brought about important reforms and there are many positive features that should be retained, including:

- clear specification of matters of National Environment Significance;
- the Environment Minister's role as the decision-maker;
- public participation provisions;
- explicit consideration of social and economic issues;
- statutory advisory mechanisms; and
- the strong compliance and enforcement regime.

The EPBC Act is, however, a product of its time. The Review provides the opportunity to set the framework for future generations in the area of national environmental regulation, as a response to the body of information that has been acquired during the intervening ten years, and new and emerging issues affecting our environment.

In polls taken by the Australian National University during the middle of 2008, a period coinciding with onset of the global financial crisis, the economy and the environment were viewed by respondents as the two dominant problems facing the country – outranking water management, health care and education by a large margin.[1]

While environmental issues dominated the public consciousness, a majority – 56 per cent of respondents – considered that the Australian Government is doing too little.[2] The public has a higher expectation of the Government's role in protecting the environment than is currently being delivered.

1 The Australian National University, ANUpoll *'Public Opinion Towards the Environment – Results from the ANU Poll'*, (Report 3, October 2008), p.7: http://www.anu.edu.au/anupoll/images/uploads/ANUpoll_report3_october2008.pdf.

2 Ibid.

It comes as no great surprise then, that the Review attracted a wide range of contributions, including 220 written submissions and 119 comments following release of the Interim Report. Input was received from interested individuals, environmental groups, non government organisations, statutory committees, industry representatives, Government departments and agencies.

The review process also involved extensive targeted face-to-face consultations and workshops with environmental and heritage groups, Indigenous representatives, industry associations, academics and scientists.

This Report took all that into account in reviewing the EPBC Act and, consistent with the objective of protecting the environment and biological diversity and maintaining ecological processes, recommends reforms that:

- promote the sustainability of Australia's economic development;
- reduce and simplify the regulatory burden;
- ensure activities under the Act represent the most efficient and effective ways of achieving desired environmental outcomes; and
- are based on an effective federal arrangement.

An integrated package revolving around nine core elements follows:

- redraft the Act to better reflect the Australian Government's role, streamline its arrangements and rename it the *Australian Environment Act*;
- establish an independent Environment Commission to advise the government on project approvals, strategic assessments, bioregional plans and other statutory decisions;
- invest in the building blocks of a better regulatory system such as national environmental accounts, skills development, policy guidance, and acquisition of critical spatial information;
- streamline approvals through earlier engagement in planning processes and provide for more effective use and greater reliance on strategic assessments, bioregional planning and approvals bilateral agreements;
- set up an Environment Reparation Fund and national 'biobanking' scheme;
- provide for environmental performance audits and inquiries by the Environment Commission;
- create a new matter of national environmental significance for 'ecosystems of national significance' and introducing an interim greenhouse trigger;
- improve transparency in decision making and provide greater access to the courts for public interest litigation; and
- mandate the development of foresight reports to help government manage emerging environmental threats.

The Report is divided into two parts. Part I provides a high level summary for opinion leaders and details the associated recommendations. Part II deals with the issues in greater depth, setting out the reasoning behind each of the 71 primary recommendations. Adoption of this integrated package of reforms will place Australia at the forefront of best practice and set the standard for others to follow. Conclusions and findings that are more advisory in nature are interspersed throughout the text of Part II for your Department to pursue.

In closing, I acknowledge the dedication, professionalism and commitment of the Expert Panel and Secretariat who assisted in researching and writing this report. Any errors, omissions or oversights are my responsibility.

Yours sincerely

Allan Hawke
EPBC Act Reviewer

30 October 2009

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Final Report

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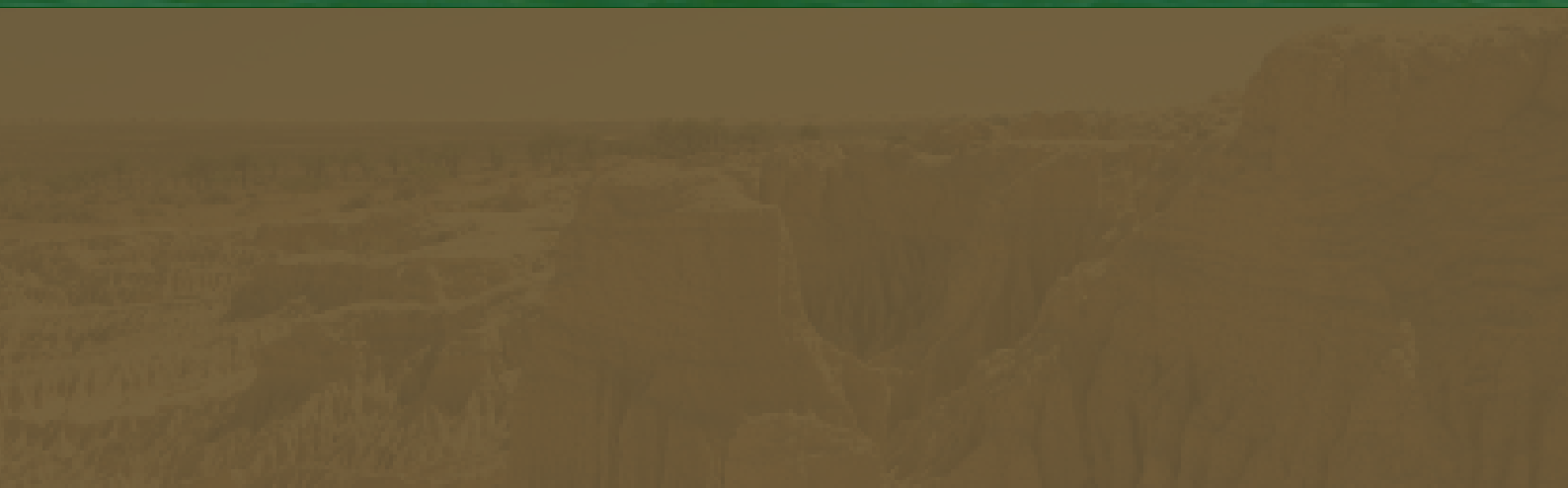
PART ONE



Introduction

1 On 31 October 2008, the Minister for the Environment, Heritage and the Arts, the Hon Peter Garrett AM MP, commissioned an independent review of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).

2 The Review was undertaken in accordance with s.522A of the EPBC Act and the Terms of Reference (Appendix 1).

3 This Report presents the findings and recommendations of the Review in two Parts:

- Part I provides a high level summary of the process, findings and recommendations of the Review against the Terms of Reference; and
- Part II provides greater explanation of the issues and information considered by the Review, which forms the basis of its findings and recommendations.

4 The EPBC Act has made a significant contribution to environmental regulation in Australia. When enacted, the Act brought about many important reforms, and in many respects is still regarded as world leading.

5 The Act is, however, a product of its time. There is now an opportunity to build on its framework for national environmental regulation for future generations, having particular regard to the information acquired over the intervening ten years since the Act commenced, and the new and emerging issues affecting our environment.

6 The Review proposes a package of reforms that build on the current Act and are directed at better placing the Australian Government in managing the environmental challenges of the future. The core elements of the reform package are to:

- redraft the Act to better reflect the Australian Government's role, streamline its arrangements and rename it the *Australian Environment Act*;
- establish an independent Environment Commission to advise the government on project approvals, strategic assessments, bioregional plans and other statutory decisions;
- invest in the building blocks of a better regulatory system such as national environmental accounts, skills development, policy guidance, and acquisition of critical spatial information;
- streamline approvals through earlier engagement in planning processes and provide for more effective use and greater reliance on strategic assessments, bioregional planning and approvals bilateral agreements;
- set up an Environment Reparation Fund and national 'biobanking' scheme;
- provide for environmental performance audits and inquiries;
- create a new matter of national environmental significance for 'ecosystems of national significance' and introduce an interim greenhouse trigger;
- improve transparency in decision-making and provide greater access to the courts for public interest litigation; and
- mandate the development of foresight reports to help government manage emerging environmental threats.

Background

7 The *Australian Constitution* (the Constitution) does not expressly confer power on the Commonwealth Parliament to make laws with respect to the environment. While there was already significant interest in environmental matters at the time the Constitution was being developed, which saw some colonists in the 1880s argue for Federation on the basis that a federal government would be able to create uniform national laws for the protection of endangered species,[1] this had little impact on the drafting of the Constitution.

8 When Federation occurred, the new Commonwealth was quick to use its general powers for environmental ends. Within a decade, the Commonwealth had used its trade and commerce power to regulate trade in endangered birds as part of an international movement to stop the slaughter of birds for the millinery trade.[2]

9 Until the 1970s, the Commonwealth had no 'comprehensive regime for the protection of the environment',[3] and regulation of most environmental matters was left to the States and Territories. The *Environment Protection (Impact of Proposals) Act 1974* (Cth) (EPIP Act) only applied to decisions involving the Commonwealth or a Commonwealth authority, and the Environment Minister's role was advisory only.[4] The trade and commerce power was the Commonwealth's prime basis for protecting the environment – most notably, when it came to stopping the export of mineral sands from Fraser Island, upheld by the High Court in *Murphyores Inc Pty Ltd v Commonwealth*.[5] There was no overarching legislation that governed the Commonwealth's involvement in environmental matters.[6]

10 In the 1980s, further High Court judgments made explicit the foundation for the Commonwealth's role in environmental matters – these cases clarified the scope of the external affairs power in s.51(xxix) of the Constitution by confirming that, under this provision, the Commonwealth has jurisdiction to make laws for the purposes of implementing Australia's international obligations. The *Tasmanian Dam case* also demonstrated the importance of the corporations power as a basis for the Commonwealth to make laws relating to the protection of the environment.[7]

11 In 1999, the Commonwealth Parliament passed the EPBC Act which repealed the EPIP Act and merged a number of other statutes into a single overarching framework for national environmental regulation.

12 The changes wrought by the commencement of the Act were far reaching. For the first time, there was a national approach to environmental protection and the Environment Minister was placed at the centre of decision-making for matters of national environmental significance (NES). Accordingly, Parliament established a statutory requirement (in s.522A) that, prior to the Act's tenth anniversary:

> (1) The Minister must cause independent reviews to be undertaken by a person or body of:
>
> (a) the operation of this Act; and
>
> (b) the extent to which the objects of this Act have been achieved.[8]

13 This is the first such review conducted under s.522A.

1 Tim Bonyhady, *The Colonial Earth*, 2000.
2 *Commonwealth of Australia Gazette*, 1908, p.1571; 1909, p 1175.
3 Douglas Fisher, *Australian Environmental Law* (2003), p.289.
4 *Environment Protection (Impact of Proposals) Act 1974* (Cth) s.5.
5 *Murphyores Inc Pty Ltd v Commonwealth* [1976] HCA 20.
6 See e.g. the discussion in Douglas Fisher, *Australian Environmental Law* (2003), p.98.
7 *Commonwealth v Tasmania* (1983) 158 CLR 1.
8 *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s.522A.

Scope of the Review

Terms of Reference

14 The scope of the Review was determined by s.522A of the Act and the Terms of Reference (see Appendix 1). In summary the Review was asked to assess the operation of the Act and the extent to which its objects have been achieved since the Act commenced. The Review was also asked to examine the appropriateness of current matters of NES and the effectiveness of biodiversity and wildlife conservation arrangements under the Act, and to have regard to key Australian Government policy objectives, including the following:

- to promote the sustainability of Australia's economic development to enhance individual and community well-being while protecting biological diversity and maintaining essential ecological processes and systems;
- to work in partnership with the States and Territories within an effective federal arrangement;
- to facilitate delivery of Australia's international obligations;
- to reduce and simplify the regulatory burden on people, businesses and organisations, while maintaining appropriate and efficient environmental standards in accordance with the Australian Government's deregulation agenda; and
- to ensure activities under the Act represent the most appropriate, efficient and effective ways of achieving the Government's outcomes and objectives consistent with Expenditure Review Principles.

Senate Inquiry

15 In March 2009, the Minister asked the Review to also consider the Reports, findings and recommendations from the Senate Standing Committee on Environment, Communication and the Arts' *Inquiry into the Operation of the Environment Protection and Biodiversity Conservation Act 1999* (Cth).[9] The findings and recommendations of the Senate Committee were discussed in the Interim Report of the Review and are also considered throughout Part II of this Report.

Independent Review of Australia's Quarantine and Biosecurity Arrangements (Beale Review)

16 The Minister also sought advice from the Review on the implications for the Act arising from the *One Biosecurity Report* of the *Independent Review of Australia's Quarantine and Biosecurity Arrangements*.[10] A copy of the advice is provided at Appendix 6 of this Report.

Council of Australian Governments Working Groups

17 At its December 2007 meeting, the Council of Australian Governments (COAG) established seven working groups to develop and monitor the implementation of policy reforms that are of national significance and require cooperative action by Australian governments. The work of two of these working groups were of particular relevance to this Review, namely:

- the Infrastructure Working Group (IWG); and
- the Business Regulation and Competition Working Group (BRCWG).

18 The IWG and BRCWG have been examining options for improving the national regulatory system. This has involved consideration of the Commonwealth, State and Territory regulatory systems and the way the two interact. In particular, the BRCWG has been examining opportunities for harmonising environment and planning regulation. The work of both groups has been considered as part of the Review.

9 The Senate Standing Committee on Environment, Communication and the Arts, *The operation of the Environment Protection and Biodiversity Conservation Act 1999*: First and Second Report (2009): http://www.aph.gov.au/senate/committee/eca_ctte/epbc_act/index.htm.

10 The Independent Review of Australia's Quarantine and Biosecurity Arrangements Report to the Australian Government, *One Biosecurity – A Working Partnership* (30 September 2008): http://www.daff.gov.au/quarantinebiosecurityreview.

Australia 2020 Summit

19 The Australia 2020 Summit identified a number of ideas about the future direction for environmental policy in Australia and the role of the Australian Government in managing environmental issues.[11] A number of these ideas have been considered by the Review, including:

- the desirability of a set of national environmental accounts;
- the potential role for the Australian Government in leading a nationally consistent approach to urban and regional planning, and transforming the ecological footprint of the built environment;
- the need to develop markets for ecosystems services, including stewardship payments and biodiversity banking (biobanking);
- the need to determine a process for the community to define the objectives and trade-offs to achieve sustainability, particularly in the context of the uncertainty created by climate change; and
- the need for improved scenario planning for future environmental changes.

20 The 2020 Summit participants agreed that Australia should aspire to be a leader in taking effective action on climate change and water management, with environmental issues integrated into decision-making. Other ideas included the need to focus on a healthy ecology, incorporate environmental considerations into economic assessments and develop sustainable cities.

21 The Australian Government's response to the 2020 Summit Outcomes observed that climate change and sustainability issues are some of the greatest social, economic and environmental challenges of our time.[12]

The Australian National University Poll on the Environment

22 In a Poll taken by the Australian National University (ANU) in 2008, a period coinciding with the onset of the global financial crisis, the economy and the environment were viewed by respondents as the two dominant problems facing the country – outranking water management, health care and education by a large margin.[13]

Purpose of this Report

23 The aim of this Report is to review the performance of the Act and, consistent with the objective of protecting the environment and biological diversity and maintaining ecological processes, to recommend reforms that:

- promote the sustainability of Australia's economic development;
- reduce and simplify the regulatory burden;
- ensure activities under the Act represent the most efficient and effective ways of achieving desired environmental outcomes; and
- are based on an effective federal arrangement.

24 In accordance with the Terms of Reference and the other mandates given to the Review, this Report considers the options for reform of environmental regulation in the context of those reforms also contributing to improved environmental protection. This Report offers a comprehensive solution to the issues identified over the course of the Review. The recommendations made in this Report should be implemented as a package.

11 Australian Government, *Australia 2020 Summit* (2009): http://www.australia2020.gov.au/final_report/index.cfm.

12 Australian Government, *Responding to the Australia 2020 Summit: Population, Sustainability, Climate Change, Water and the Future of our Cities* (2009), p.66: http://www.australia2020.gov.au/response/index.cfm.

13 The Australian National University, ANUpoll *'Public Opinion Towards the Environment – Results from the ANU Poll'*, (Report 3, October 2008), p.7: http://www.anu.edu.au/anupoll/images/uploads/ANUpoll_report3_october2008.pdf.

Review Process

25 The Review was undertaken by Dr Allan Hawke. Dr Hawke has extensive public policy experience, having served as the Secretary of three Departments – the Department of Veterans' Affairs, the Department of Transport and Regional Services and the Department of Defence – and as the Australian High Commissioner to New Zealand. Dr Hawke has participated in other Inquiries and is currently Chairman and Director of a number of private and public sector Boards. Dr Hawke was appointed a Fellow of the Australian Institute of Public Administration in 1998 and a Fellow of the Australian Institute of Management in 1999 in recognition of his outstanding contribution to public service. In 2001, Dr Hawke was appointed a Fellow of the Australian Institute of Company Directors and was named as one of Australia's Top 30 True Leaders.[14]

26 In undertaking the Review, Dr Hawke was supported by an Expert Panel comprising:

- **Professor Tim Bonyhady** – Director of the Australian Centre for Environmental Law and the Centre for Climate Law and Policy at the Australian National University;
- **Professor Mark Burgman** – Adrienne Clarke Chair of Botany and Director of the Australian Centre of Excellence for Risk Analysis at the University of Melbourne;
- **The Honourable Paul Stein AM** – former judicial officer in various New South Wales courts from 1983 to 2003, including the Land and Environment Court, the Court of Appeal and the Supreme Court; and
- **Ms Rosemary Warnock** – former CEO of Castrol Asia Pacific and more recently CEO of the Clean Energy Council in 2008. She is currently an Executive Mentor with Merryck & Co.

27 The Review was also ably assisted by a Secretariat comprising Mark Flanigan, Ashleigh Saint, Ilse Wurst, Caroline Reynolds, Caroline Nordang, Elizabeth McMillan, Mark Allen, Jonathon Hutton, Kate Palmer and Lisa Strickland.

Public Consultation

28 To ensure consideration of a wide range of views, numerous opportunities for public input were provided over the course of the Review.

Discussion Paper

29 The first stage of the public consultation process coincided with commencement of the Review on 31 October 2008 through release of a Discussion Paper, and call for public submissions.

30 The purpose of the Discussion Paper was to stimulate discussion about the Review. It set a framework for public input by providing an explanation of the main provisions of the Act, a summary of how the provisions had been implemented since the Act commenced in 2000, and posing questions about the operation of the Act.

31 The Discussion Paper can be viewed on the Review website at:
↘ **http://www.environment.gov.au/epbc/review/publications/discussion-paper.html**

Summary of Public Submissions

32 In response to the initial call for public submissions, 220 formal written submissions were received. A list of submitters, unless confidentiality was requested, is provided at Appendix 2 of this Report. Copies of the submissions, unless confidential, are available at:
↘ **http://www.environment.gov.au/epbc/review/submissions/index.html**

33 A Summary of Public Submissions was published on 29 June 2009. This document provided an overview of the issues raised in the written submissions. It also provided information about submitter groups and common themes raised in submissions from those groups. The document was aimed at capturing, as far as possible, the common issues raised in submissions, but was not intended to be a comprehensive list of all the issues raised with the Review.

14 The Australian Financial Review, *"Boss" Magazine* (2001).

34 The Summary of Public Submissions can be viewed on the Review website at:
➘ **http://www.environment.gov.au/epbc/review/publications/public-submissions-summary.html**

Targeted Face-to-Face Consultations

35 The second stage of the public consultation process was a series of targeted face-to-face consultations. Meetings were held in each of the Australian capital cities during the period from March to May 2009. Further meetings were held with some parties during the preparation of the Final Report.

36 Input was sought from submitters and others with an interest in the Act to ensure broad-based input to the Review.

37 Following the close of the formal submission period, some additional materials were received during face-to-face consultations. These were also considered during preparation of this Report.

38 A list of organisations and individuals who participated in these consultations is provided at Appendix 3.

Interim Report

39 The third stage of public consultation process sought public comments on an Interim Report which was released on 29 June 2009.

40 The Interim Report identified the major issues raised over the course of the public consultation and provided commentary on these issues. It also referred to issues identified in the two reports from the Senate Standing Committee on Environment, Communications and the Arts' *Inquiry into the Operation of the EPBC Act*,[15] and other issues identified by the Review and related Government inquiries. The Interim Report did not make recommendations.

41 The Interim Report can be viewed on the Review website at:
➘ **http://www.environment.gov.au/epbc/review/publications/interim-report.html**

Comments on the Interim Report

42 In response to the call for comments on the Interim Report, 119 written comments were received. A list of those who provided comments on the Interim report, unless confidentiality was requested, is provided at Appendix 2 of this Report. Copies of the comments, unless confidential, are available at:
➘ **http://www.environment.gov.au/epbc/review/comments/index.html**

Workshops

43 A number of workshops were held to explore issues in greater depth.

44 One issue that was raised frequently with the Review was the notion of 'landscape-scale' approaches to biodiversity protection. To explore the effectiveness of the current biodiversity conservation provisions under the Act, the Review convened a workshop of biodiversity and landscape planning experts to consider options for broader landscape or ecosystem approaches to biodiversity conservation.

45 Comments on the Interim Report led the Review to convene and support further workshops to explore issues in greater detail with:

- heritage groups;
- peak environmental non-government organisations (NGOs);
- experts from the Australian National University, CSIRO and the University of Canberra; and
- infrastructure and industry organisations.

46 Details of the workshops participants are provided at Appendix 3.

15 The Senate Standing Committee on Environment, Communication and the Arts, *The operation of the Environment Protection and Biodiversity Conservation Act 1999*: First and Second Report (2009): http://www.aph.gov.au/senate/committee/eca_ctte/epbc_act/index.htm.

Input from Statutory Bodies and Government

47 The Review also consulted with, and obtained input from, three statutory bodies that have an advisory role under the EPBC Act, namely, the Australian Heritage Council (AHC), the Indigenous Advisory Committee (IAC), and the Threatened Species Scientific Committee (TSSC).

48 The views of Australian Government agencies were sourced via an Inter-Departmental Committee, and directly to fill out the picture on some issues. Discussions were also held with State and Territory Government officials.

Statistics on Public Input Received

49 The Review's initial invitation for comments attracted a total of 220 submissions. The Interim Report drew an additional 119 written responses. Materials were also provided to the Review informally, confidentially or during public consultations.

50 Input was received from a wide range of sectors. Many submissions were from environmental NGOs (32%) and other NGOs, such as industry bodies (21%). A significant number of responses also came from individuals (21%). Other submissions were received from research groups and academics (8%), individual corporations (5%) and from Local, State, Territory and Australian Government bodies (13%).

Other Reports

51 Coincident with the timing of this Review, other reviews considered issues that were relevant to this Report. These are discussed below.

52 The Senate Standing Committee on Environment, Communications and the Arts conducted an Inquiry into the Operation of the EPBC Act and natural resource protection programs. The Committee produced two reports – the first was tabled on 18 March 2009 and the second on 30 April 2009. Both reports included additional comments from Coalition Senators and the Australian Greens.[16] As noted earlier, the Minister referred the findings and recommendations of the Committee to this Review for consideration. These were discussed in the Interim Report and are also considered throughout this Report.

53 Other reviews touching on the operation of the Act that were referred to the Review and are considered in this Report include:

- the *One Biosecurity Report of the Independent Review of Australia's Quarantine and Biosecurity Arrangements*;[17]
- the Productivity Commission's *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector*;[18] and
- an in-confidence Report of the COAG Infrastructure Working Group.

Issues and Recommendations

54 The Act establishes a national approach to a wide range of environmental protection and biodiversity conservation matters, and places the Environment Minister at the centre of decision-making for matters of NES.

55 The Act codifies the Australian Government's role in protecting matters of NES, regulating the environmental impacts of actions involving the Commonwealth and actions on or affecting Commonwealth land. It is also the primary tool for regulating wildlife trade and protecting World, National and Commonwealth Heritage properties, places and values.

16 The Senate Standing Committee on Environment, Communication and the Arts, *The operation of the Environment Protection and Biodiversity Conservation Act 1999*: First and Second Report (2009): http://www.aph.gov.au/senate/committee/eca_ctte/epbc_act/index.htm.

17 The Independent Review of Australia's Quarantine and Biosecurity Arrangements Report to the Australian Government, *One Biosecurity – A Working Partnership* (30 September 2008): http://www.daff.gov.au/quarantinebiosecurityreview

18 Australian Government Productivity Commission, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector – Productivity Commission Research Report* (30 April 2009): http://www.pc.gov.au/projects/study/upstreampetroleum.

The Act is Supported

56 Public comments received by the Review were broadly supportive of the Act. While this Report recommends significant changes to the Act's operation and administration, it is important to acknowledge the many positive features that should be retained.

57 The support that exists for the Commonwealth's role in environmental regulation is even more important. While arguments were received both for and against an expansion of the Commonwealth's role, there was general agreement that the Commonwealth has a legitimate and necessary role in regulating impacts on matters of NES and protecting Australia's environment.

58 The positive features of the Act include:

- clear identification of the matters of NES;
- the Environment Minister's role as the key decision-maker;
- public participation provisions;
- explicit consideration of social and economic issues;
- statutory advisory mechanisms; and
- the strong compliance and enforcement regime.

Clear Identification of the Matters of NES

59 The Act clearly identifies that the Commonwealth's focus in protecting the environment is on matters of national environmental significance. Conferring power on the Commonwealth to protect the matters of NES and regulate the possible impacts on those matters is a significant improvement on the previous regime where the Commonwealth's environmental impact assessment and approval process was triggered in an *ad hoc* fashion and by factors not necessarily related to environmental concerns.

The Environment Minister's Role as Decision-Maker

60 The Act establishes the Environment Minister as the primary decision-maker on environmental matters. This is a fundamental and positive change from the previous regime where the Environment Minister's role was limited to providing advice to other Australian Government Ministers making decisions affecting the environment (including heritage).

Provision for Public Participation

61 The Act provides substantial opportunities for the public to engage in environmental decision-making. Effective management and protection of the environment requires engagement of the community, as many actions impacting on matters of NES (both actions with significant adverse impacts and recovery actions) rely on local and regional participants. An important part of engaging the community involves seeking community input when actions are proposed or species, ecological communities or heritage places are nominated for listing. This Report recommends changes to the public participation process to build on the current Act's provisions for public engagement and disclosure.

Explicit Consideration of Social and Economic Issues

62 The corner stone principle on which the Act is based is the internationally recognised notion of 'ecologically sustainable development' (ESD). The primary aim of the Act is to regulate impacts on the environment through promoting ESD. Achieving ESD requires integration of environmental, social and economic factors into decision-making. While the Act affords a high priority to environmental considerations, the requirement to consider social and economic issues explicitly in deciding project approvals under the Act is a positive attribute.

Role of Statutory Advisory Bodies

63 An important feature of the Act is the role it provides for statutory advice bodies, in particular, the AHC, the IAC and the TSSC. The requirements for these bodies to provide advice prior to key decisions being made under the Act, and the ability for the Minister to call on the expertise of these bodies when considered necessary, is an important feature of the Act and is essential in ensuring that decisions are made on the best available advice.

Strength of the Compliance and Enforcement Regime

64 The Act provides for a wide array of enforcement mechanisms that encourage compliance and allow flexibility in the approach that can be used to deal with breaches. These tools include compliance action to deal with breaches of varying severity and consequence.

Some Areas for Improvement

65 While submissions were generally supportive, suggestions about areas where the Act could be improved, expanded or refined included:

- clarifying the purpose and objects of the Act;
- confusion about the different roles of the Commonwealth and the States and Territories in environmental regulation;
- room for improving the relationship between the Commonwealth and the States and Territories to encourage collaboration in environmental management;
- earlier engagement by the Australian Government in the planning process as a means of streamlining environmental regulation;
- further matters of NES for possible inclusion as triggers under the Act;
- alternative approaches to biodiversity conservation, including decision-making at a landscape scale and the potential to better implement an ecosystems approach to environmental management. Those who suggested this idea were driven by concerns about the need to manage cumulative impacts and threats to biodiversity, such as climate change;
- scope for improved arrangements for performance auditing and compliance, including auditing Regional Forest Agreements (RFAs) and other bilateral agreements;
- scope for increasing transparency of decision-making;
- a call for greater access to merits review; and
- concerns relating to administration, including the development of better policy advice.

66 Concerns about the capacity of the Department of the Environment, Water, Heritage and the Arts (DEWHA) to resource the activities necessary to ensure efficient and effective operation of the Act were also pervasive. These concerns were shared, one way or another, by all sectors consulted.

67 Representatives of infrastructure developers held the view that investment in the basic environmental information and skills necessary to support future development should be regarded as a 'national infrastructure building project' in its own right. The petroleum sector estimated, using modelled numbers,[19] that the opportunity cost associated with the need to undertake extensive time-consuming field studies ahead of new developments was $300 million per year that a project was delayed for the average LNG project.

19 APPEA estimate based on a 'typical' LNG project having a NPV of $2.7billion – See Productivity Commission, *Upstream Oil & Gas Industry Strategy – Platform for Prosperity* (2009) http://www.appea.com.au/content/pdfs_docs_xls/IndustryStrategy/Strategic%20Leaders%20Report.pdf.

68 To reduce regulatory burden, two things must occur:

- the regulatory environment needs to be reformed so that unnecessary regulation is removed and more efficient approaches are adopted; and
- administration needs to be funded so that early investments can be made in the things that will make the regulatory system work smoothly. These include funding the basic building blocks for best practice administration, such as skills development, engagement in strategic planning, development of better policy advice, improvements in spatial information, and investment in business management systems.

69 Efficient operation of the regulatory system is important to the wider economy. Investment in the administration and information base supporting the system should be regarded as fundamental to building the national infrastructure and funded accordingly. The Australian Government's infrastructure package provides a suitable vehicle to achieve this.

70 The difficulty associated with administration of the legislation was frequently raised with the Review. The recommendations of the Review deal with the regulatory environment but, if not adequately resourced, they risk promising much but delivering little.

71 The Report presents two types of conclusions. The first are the headline recommendations, detailed at the end of this Part of the Report. These are the initiatives that the Australian Government should implement expeditiously as part of a package of reforms that will set the long-term environmental legislative framework for Australia. The second are conclusions or findings that are more advisory in nature. These are interspersed throughout the text of Part II of the Report and have been provided to DEWHA to progress where appropriate.

Operation of the Act

72 Regulation and management of the Australian environment occurs within a federal structure. The role of the Commonwealth continues to be shaped by intergovernmental agreements and environmental policies.

73 Although the Act is often thought of solely as the primary environmental impact assessment legislation at the national level, it also performs a range of other important functions, such as:

- identification and protection of matters of NES;
- regulation of activities by Australian Government agencies and on Commonwealth land;
- identification and management of World, National and Commonwealth heritage places, properties and values;
- assessment and regulation of international wildlife trade to ensure that native species are not over-exploited and that imported wildlife is not a threat to the Australian environment or species survival;
- development of threat abatement and recovery plans;
- declaration and management of Commonwealth national parks and other protected areas (terrestrial and marine);
- establishment of the Australian Whale Sanctuary; and
- compliance and enforcement.

The Role of the Commonwealth in Environmental Matters

74 The Commonwealth's role in environmental regulation should be to:

- ensure that matters of NES are properly managed and protected;
- ensure that the impacts from actions by the Australian Government do not have unacceptable outcomes;
- promote national standards; and
- facilitate the creation of effective and efficient national institutional arrangements.

75 The role recommended above is similar to the subsidiarity principle that is applied to heritage protection. It is widely accepted that the Australian Government's role when it comes to heritage protection is to identify and protect Commonwealth, National and World Heritage. The State and Territory governments are responsible for state, regional and local heritage protection. A similar concept needs to be applied to other areas of environmental protection. The Environment Minister is not, and should not be, the arbiter of last resort on all environmental issues.

76 The Act is just one tool available to the Australian Government to meet its obligations with respect to the environment. Other legislation and/or program initiatives such as Caring for our Country, are better suited to dealing with some issues.

77 The success of the Act is often dependent on its interaction with other Commonwealth and State and Territory legislation. The Review identified a number of areas where this interaction could be improved. Some recommended actions in this area include:

- to the extent possible in a federal system, remedy inconsistencies between the Commonwealth and State and Territory regulatory systems, and the variation within the State and Territory systems, in pursuit of a national approach to environmental regulation. Inconsistencies and gaps in regulation cause confusion, particularly for stakeholders that deal across jurisdictions;
- moving the Australian Government's focus to landscape scale environmental impact assessments. While it will be necessary to retain single project assessments, real efficiency and environmental benefits could be gained by moving to greater use of strategic assessments and regional planning tools;
- moving the Australian Government's focus to greater use of regional and ecosystems strategies for recovery actions for threatened species, while retaining single species recovery plans as these will still be necessary in some cases;
- removing duplication of processes under the Act, particularly in the area of management planning for heritage and other protected areas;
- reducing the amount of regulation by multiple authorities or regulatory agencies; and
- building a suite of suitable standards for environmental assessment and management.

78 Five processes define the future direction:

- **harmonisation** – Commonwealth, State and Territory regimes and practices should be harmonised where appropriate;
- **accreditation** – the Commonwealth should focus on accreditation of State and Territory processes that meet requisite Commonwealth standards;
- **standardisation** – the Commonwealth should attempt to create regulatory systems that are uniform across the Commonwealth, States and Territories;
- **simplification** – the Commonwealth should streamline Environmental Impact Assessment (EIA) processes; and
- **oversight** – the Commonwealth should be engaged in performance monitoring of accredited systems.

Harmonisation

79 The benefits of bilateral agreements and strategic assessments in generating efficiencies in environmental management and harmonising Commonwealth and State and Territory processes are widely recognised and supported. Both COAG and State and Territory Governments individually have expressed strong support for assessment bilateral agreements, approval bilateral agreements, and strategic assessments. COAG has:

> agreed to the identification of opportunities for strategic assessments under the *Environment Protection and Biodiversity Conservation Act 1999* to avoid unnecessary delays in development approval processes. Strategic assessments are conducted over an entire region and provide a mechanism to approve classes of development which have been assessed under this process, rather than conducting individual assessments and approvals. Strategic assessments provide certainty for development proponents and reduce duplication, while providing greater protection for the environment.[20]

80 Steps need to be taken to make this approach a reality.

Accreditation

81 The Commonwealth should give full faith and credit to State and Territory systems that are proven to provide good environmental outcomes.

Standardisation

82 The Commonwealth, State and Territories each maintain separate environmental regulatory systems and all are different in one way or another. This causes confusion among stakeholders and users of the legislation, as requirements between jurisdictions are not consistent and are at times duplicative. The Australian Government should consider the potential for further work to be done, under the auspices of COAG or another multi-jurisdictional forum, to reduce inconsistencies in the environment and planning sphere. This is particularly the case in regards to threatened species listing.

Simplification

83 The Commonwealth should take a leadership role in simplifying the EIA process. This should be through greater use of joint assessment panels whereby the Commonwealth and State or Territory assessment processes are brought together early in the process to reduce duplication of effort and encourage consistency in the setting of conditions on project approvals.

Oversight

84 Where approval bilateral agreements are used in the future, a Commonwealth monitoring and performance audit power should remain to ensure that the process accredited is achieving the outcomes expected. Performance audit criteria need to be specified for the accredited system before approval is granted.

International Obligations

85 The need to deliver Australia's international obligations is at the heart of the Act. The framework established under the Act is, to a large extent, guided by Australia's international environmental obligations, the treaties and declarations of most relevance being the:

- *Antarctic Treaty;*
- *Convention on the Conservation of Migratory Species of Wild Animals* (Bonn Convention)*;*
- *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES)*;*
- *Convention on Biological Diversity* (Biodiversity Convention)*;*
- *Convention on Wetlands of International Importance especially as Waterfowl Habitat* (Ramsar Convention)*;*
- *International Convention for the Regulation of Whaling* (International Whaling Convention)*;*

20 Council of Australian Governments Business Regulation & Competition Working Group, *3 July 2008 Communiqué* (2008), p.1 http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/docs/business_regulation_competition_working_group.pdf.

- Migratory Bird Agreements –
  - — *Japan-Australia Migratory Bird Agreement* (JAMBA),
  - — *China-Australia Migratory Bird Agreement* (CAMBA), and
  - — *Republic of Korea-Australia Migratory Bird Agreement* (ROKAMBA);
- *Rio Declaration on Environment and Development;* and
- *Convention Concerning the Protection of the World Cultural and Natural Heritage* (World Heritage Convention).

86 The Act requires the Minister to 'not act inconsistently' with certain international obligations when making decisions to approve actions under the Act. This double negative weakens the provision. The Review recommends that the Act be amended to create a positive duty to 'act consistently' with Australia's international obligations.

Ecologically Sustainable Development

87 The principles of ESD are defined in the Act and form an important part of its current objects. Despite the challenges presented by the concept of ESD, there is 'no other credible candidate for an integrative policy framework.'[21]

88 Sustainable development continues to be the policy goal at an international level,[22] with general acknowledgement that incorporating environmental considerations into decisions related to social and economic development is the best method of improving environmental outcomes.[23] In response to those who argue the concept should be abandoned, Professor Stephen Dovers says that:

> The lack of implementation and achievement should not surprise. If we understand sustainable development as a *higher order social goal*, quick gratification is unlikely… [it is] rather a generational challenge to knowledge, policy and behaviour, and institutional reform…Other such goals – democracy, equity, peace, the rule of law – have been around far longer, are still hotly contested, but few would abandon them impatiently.[24]

89 The principles of ESD should continue to be the guiding principles for administering the Act. The recommendations of this Report are intended to make the Act, and the way it is administered, reflect the principles of ESD better. In affirming the principles of ESD as the cornerstone of the Act, some amendments need to be made to the objects and structure of the Act to make their expression clearer.

An Australian Environment Act for the Future

90 The Act's current title is arguably misleading as it covers some aspects of the legislation but not all. Some submissions called for heritage to be added to the title. To specify all the matters dealt with in the Act would create a cumbersome title. Heritage values and social, economic and cultural qualities and characteristics of places all fall within the concept of 'environment'. This concept should be reinforced in the legislation.

91 A change in the Act's title to the *Australian Environment Act* would embrace the all encompassing nature of the environment and the Act's role as national legislation.

92 It is clear from comments that many people, including professionals, find the Act hard to understand and navigate. The Act is currently repetitive, lengthy, unnecessarily complex, often unclear and, in some areas, overly prescriptive. As a consequence many provisions need to be re-drafted.

93 The simplest way to achieve the necessary reordering and redrafting would be to repeal the Act and replace it with a new *Australian Environment Act*. A complete redraft will enable legislators to use modern drafting techniques which will also aid simplification and clarity of the Act in general, although the effect of many of the provisions that exist currently in the Act will not change.

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21 Stephen Dovers, 'Policy and Institutional Reforms' in David Lindenmayer, Stephen Dovers, Molly Harriss Olson and Steve Morton (eds), *Ten Commitments: Reshaping the Lucky Country's Environment* (2008), p.216.

22 See e.g. *United National Millennium Development Goals* (2000) http://www.un.org/millenniumgoals/environ.shtml.

23 See e.g. United Nations Development Programme and United Nations Environment Programme, *Mainstreaming Poverty-Environment Linkages into Development Planning: A Handbook for Practitioners* (2009) p.6 http://www.unpei.org/PDF/PEI-full-handbook.pdf.

24 Stephen Dovers, 'Policy and Institutional Reforms' in David Lindenmayer, Stephen Dovers, Molly Harriss Olson and Steve Morton (eds), *Ten Commitments: Reshaping the Lucky Country's Environment* (2008), p.216.

Unified Approaches

94 Significant simplification can be achieved by creating unified approaches for the key processes under the Act. This includes:

- public consultation processes and timeframes;
- application processes;
- publication requirements;
- processes for developing and approving management plans; and
- arrangements for issuing permits.

Significant Impact

95 The concept of 'significant impact' is central to the Act. That is, developments that have, will have or are likely to have a significant impact on a matter of NES require approval from the Environment Minister. Failure to seek approval may attract significant penalties.

96 All sides of the debate were concerned that the concept of 'significant impact' is inexact and therefore makes application of the Act uncertain. Unfortunately, no better test is available for determining when an impact moves from the realm of a local or State or Territory issue to one that demands national intervention.

97 Further work is necessary, however, to interpret the concept for the different matters of NES. Investment in better policy advice and guidance would greatly increase efficiency in decision-making and certainty for developers. This would, in turn, result in better environmental outcomes and less non-compliance.

98 Many recommendations of the Review focus on ensuring that, in future, the Australian Government's involvement in environmental regulation reflects its role in the Federation. In particular, the recommendations seek to ensure Australian Government interventions are strategic in nature and limited to matters of national interest. The temptation for the Commonwealth to cover the field in environmental regulation must be avoided – it is neither appropriate nor realistic. Restructuring the Act will help to ensure the Australian Government takes a strategic approach towards environmental protection in the national interest.

Decision-Making

99 A widespread concern raised across the course of the Review was a lack of trust in the quality of decisions made under the Act. This is no surprise in such a contested area of public discourse like environmental regulation. No evidence of inappropriate decision-making was produced.

100 Nevertheless, this concern underlines the importance of building public trust in the decisions made under the Act. The Review's recommendations to strengthen decision-making include:

- measures to clarify the basis of decision-making and the discretion available to decision-makers;
- increasing transparency by requiring detailed reasons to be provided for decisions under the Act; and
- changing review arrangements, including removing financial barriers to public interest litigation.

101 As the key decision-maker under the Act, the Environment Minister's decisions include those relating to:

- the assessment and approval of controlled actions;
- the approval of strategic assessments and management plans;
- listing threatened species and ecological communities;
- listing National Heritage and Commonwealth Heritage Places; and
- approval of wildlife imports, exports and associated management arrangements.

102 The governance and advisory mechanisms operating under the Act were also considered at length. The statutory advisory bodies that report to and assist the Minister in administering the Act are the:

- Threatened Species Scientific Committee (TSSC);
- Biological Diversity Advisory Committee (BDAC);
- Indigenous Advisory Committee (IAC); and
- Australian Heritage Council (AHC), established under the *Australian Heritage Council Act 2003* (AHC Act).

103 There is no doubt about the ongoing need for statutory advisory bodies to support decision-making under the Act. The question is whether the autonomy, role and functions of these committees should be expanded.

104 In light of the fact that BDAC has not been operating and much of its work is already subsumed by the TSSC, the Review recommends that BDAC be disbanded and its functions be transferred to the TSSC. The name of the TSSC should be changed to the 'Biodiversity Scientific Advisory Committee' to properly reflect the new role and functions of the Committee under the Act.

105 The Review recommends that the Minister should be retained as the primary decision-maker. In the interests of transparent decision-making, the advice from the statutory advisory bodies should be made publicly available at the time the Minister makes the relevant decision.

An Independent National Environment Commission

106 Following consideration of the role and functions of the current advisory bodies, it was noted that there is no body that can provide advice to the Minister for the purposes of making decisions arising out of the environmental impact assessment and approvals regime. An independent National Environment Commission should be established, comprising a National Environment Commissioner and two Deputy-Commissioners, to fill this gap. In order to minimise the costs of this proposal, the Commission should be serviced by DEWHA.

107 The Commission's proposed functions would include:

- responsibility for managing the provision of environmental data and information, and reporting on that information;
- providing advice to the Environment Minister for the purposes of decision-making for the environmental impact assessment and approvals processes under the Act, including decision-making on project assessments, strategic assessments and bioregional plans;
- responsibility for monitoring, audit, compliance and enforcement activities under the Act; and
- providing other reports and advice to the Environment Minister arising under the Act upon request, which could include advice about policies and programs.

Costs of Administering the Act

108 As discussed earlier, ensuring adequate resources is vitally important to the efficient operation of the Act. This, in turn, is critical for ensuring that the Act's administration does not cause unnecessary economic impact.

109 One option is to institute fees and cost recovery under the Act. A number of issues need to be considered, not least of which is the substantial cost already met by proponents in the preparation of environmental documentation. Another is the risk of perverse outcomes arising from application of cost recovery in circumstances where proponents could avoid the cost by active non-compliance.

110 Cost recovery arrangements are already in place for permits issued under the Act. These should be retained, but should also be reviewed to determine whether the current charges imposed are an accurate reflection of the costs involved in assessing the permit applications. The Australian Government may wish to consider creating a cost recovery system on a whole of government basis where charges payable are revised on an annual basis to take into account adjustments in the Consumer Price Index or other factors that may affect the costs of the activity to government.

111 The Australian Government's *Cost Recovery Guidelines*[25] set out a series of principles which are to be used in determining whether cost recovery is appropriate for any particular activity carried out by an Australian Government agency. The Review does not recommend imposing cost recovery on project approval decisions. Apart from issues that may arise in determining the 'cost' of obtaining an approval decision, imposing cost recovery for project approvals could create a perception that proponents were 'buying' their approval.

112 However, consideration should be given to imposing a charge at the assessment approach decision point to recover the costs of administering the assessment and approval process. An additional point in the assessment and approval process at which costs could also be recovered is in cases where additional information is required because of inadequacies in the information supplied by the proponent.

113 Options for allowing proponents to 'opt in' to a full cost recovery system should also be developed as a means of funding and managing large, time-critical projects that require additional government resources to assess.

Extent to Which the Objects Are Being Achieved

114 Like other legislation aimed at protection of the environment, the Act has a multitude of objects. The current objects of the Act are both procedural and aspirational. Clarification of the Act's objects would sharpen its focus, contribute to increasing efficiency and improve administration.

115 As part of giving the new *Australian Environment Act* a much clearer sense of direction, the Act should have a primary object. Identifying an object that reflects the aim of protecting the environment within the context of ESD is important. However, establishing an object that promises strict environmental protection when it is clear that in certain circumstances social and economic considerations will legitimately be brought into decision-making, risks drawing the legislation into disrepute and should be avoided.

116 In order to make the objects clearer, and increase their utility as guideposts for decision-makers, the Review recommends that the objects of the Act be recast along the following lines:

(1) the primary object of this Act is to protect the environment, through the conservation of ecological integrity and nationally important biological diversity and heritage.

(2) in particular, this Act protects matters of national environmental significance and, consistent with this, seeks to promote beneficial economic and social outcomes.

(3) the primary object is to be achieved by applying the principles of ecologically sustainable development as enunciated in the Act.

(4) the Minister and all agencies and persons involved in the administration of the Act must have regard to, and seek to further, the primary object of this Act.

(5) in pursuing the primary object, the Minister should:

(a) encourage public participation in the making of decisions that impact on the environment;

(b) promote cooperation with State, Territory and Local government in environmental protection and management;

(c) assist in the co-operative implementation of Australia's international environmental responsibilities;

(d) recognise the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity;

(e) promote the use of Indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge; and

(f) promote fair and efficient decision making.

25 Australian Government Department of Finance and Deregulation, *Australian Government Cost Recovery Guidelines* (2005): http://www.finance.gov.au/publications/finance-circulars/2005/docs/Cost_Recovery_Guidelines.pdf.

Data and Information for Decision-Making

117 Australia does not have reliable, comprehensive environmental information systems available for mapping, monitoring, forecasting and reporting on environmental conditions. The lack of this critical information base not only has a negative impact on the nation's capacity to monitor the effectiveness of environmental policy interventions, but also results in a considerable cost burden on industry.

A National Environmental Information Management System

118 The Wentworth Group, like the 2020 Summit, raised the need for an effective national environmental information management system, arguing that:

> The lack of an environmental accounting framework is considered to be a fundamental weakness of Australian environmental policy. It can not be fixed by simply re-structuring the delivery of existing programs. It can only be fixed by building a national but regionally based monitoring, data collection, evaluation and reporting system.[26]

119 The Review recommends development of a set of national environmental accounts that are based on regional information. The appropriate institutional arrangements for such a nation building endeavour will need to be considered. Investing in creating the skills to undertake this work within local government, particularly in regional areas, should have a positive impact on local government land-use planning.

120 A central reliable repository of environmental data would aid in enhancing efficiencies in the environmental impact assessment and approval process – both for individual and landscape-scale project assessments. The Database should be accessible and easy to use.

121 The Database should also provide a sound basis for progressing the Review's recommendation to establish a single national list of threatened species by providing a national information base from which listing and recovery decisions can be informed.

Code of Conduct

122 The call for greater access to environmental data and information was also made to the Review in the context of a desire to increase confidence in the quality of decisions made under the Act.

123 Under the assessment and approvals process under the Act, the Minister relies in part on information provided by the proponent and environmental consultants when making approval decisions. Some scepticism was expressed about the quality of information submitted to the Minister for consideration as part of the referral and approvals processes.

124 After further deliberation and consultation with environmental practitioners, the Review recommends that the Australian Government, in consultation with the environment and planning consulting industry, should develop an industry Code of Conduct for consultants supplying information for the purposes of the environmental impact assessment and approval regime under the Act.

Management Arrangements

125 There is scope for redrafting the protected area provisions to make them clearer. In particular, the arrangements governing the development of management plans for protected areas, including heritage sites, Ramsar wetlands and Commonwealth reserves need to be reformed to make the system less prescriptive and more outcomes focused.

126 There is also a need to enable the Environment Minister to initiate preparation of management plans for World Heritage properties, National Heritage places and Ramsar wetlands where collaborative processes have not produced effective plans. In these circumstances, the Environment Minister should consult with the owner and/or manager of the protected area.

127 The Act should also allow for the accreditation of management plans where those plans meet the requirements of the Act and Regulations. Such accreditation would be subject to performance auditing. Greater reliance on strategic systems-based decision-making and approvals must be accompanied by a strong system of performance auditing and compliance to ensure that the approved plans live up to their claims.

26 *Accounting for Nature: a Model for Building the National Environmental Accounts for Australia*, Wentworth Group of Concerned Scientists (2008).

Heritage

128 Prior to 2004, heritage was managed under the *Australian Heritage Commission Act 1975*. That Act established the Australian Heritage Commission (AHC) and created the Register of the National Estate (RNE), which was a landmark list of heritage places of historic, natural and Indigenous value. The Commission entered more than 13,000 places into the register.

129 The AHC provided advice on proposals that potentially had an adverse impact on places included in the RNE, however, it did not have the power to provide a legally binding decision. The Commission's advice was limited in its ability to be enforced.

130 In 2004, amendments to the Act gave heritage a new status. For the first time at the national level, actions affecting heritage places were subject to a formal statutory approval process. In addition, the scope of protection was greatly expanded with the creation of the National and Commonwealth Heritage Lists.

131 The heritage provisions in the Act provide for protection of the heritage values of Australian places included in the World Heritage List (WHL) and National Heritage List (NHL) as matters of NES. These provisions also cover actions by the Commonwealth or actions on Commonwealth land that may affect the environment, including heritage values of places. Proposals likely to have a significant impact on the heritage values of a listed place require a decision by the Environment Minister about whether, and under what conditions, a proposal should proceed.

132 A number of submissions focused heavily on heritage issues. A few of these suggested that there should be some form of return to the previous heritage arrangements.

133 While some may have concerns regarding particular decisions or issues with administration of the Act, it remains an advance over the earlier regime in the Review's opinion. The old regime did have its strengths, *but* there is no compelling argument to return to the old system.

134 The complexity of the Act was regularly raised and suggestions were made that there should be a separate Heritage Act or the EPBC Act made more intelligible with regard to heritage matters. Separation of heritage from the Act would be a retrograde step. Heritage needs to take its place as an integral part of environmental management and regulation. It should not be seen as a marginal activity.

135 The heritage community felt there had been a loss of commitment by the Australian Government to promote the heritage agenda more widely. This was put down to a shift in focus associated with adoption of the subsidiarity principle along with the 2004 amendments, where the Australian Government focuses on Commonwealth, National and World Heritage and the States and Territories are responsible for state and local heritage.

136 The AHC should thus play a more active role in the promotion of heritage conservation as something of importance to the national consciousness. Care should be taken, however, that in becoming more active in promoting the importance of heritage the AHC does not lose sight of its statutory role. That is, the community would soon lose faith in the objectivity of a 'campaigning' AHC.

137 As explained earlier, the AHC's functions are conferred under the AHC Act and the EPBC Act. In line with the call for increased clarity about the Commonwealth's role with respect to heritage, it would be appropriate to consolidate the AHC's functions within a single piece of legislation.

138 The provisions in the AHC Act should accordingly be merged and incorporated into the *Australian Environment Act*. In doing so, there should be no diminution of the role, functions and degree of independence of the AHC. The AHC would remain the independent expert advisory body for the Minister on heritage matters.

139 Merging the AHC Act provisions into the *Australian Environment Act* would mean that the AHC and users of the heritage legislation would be able to refer to a single Act when determining the role and functions of the AHC. It would also bring the AHC in line with the statutory advisory bodies established under the Act.

Indigenous Involvement

140 The Act provides for involvement of Indigenous peoples in conserving Australia's biodiversity, including by protecting the traditional use of land and water by Indigenous peoples, protecting Indigenous heritage and providing for Indigenous involvement in managing Commonwealth reserves.

141 The idea of a National Indigenous Knowledge Centre was one of the outcomes from the 2020 Summit.[27] An Indigenous Knowledge Centre building on the current role of the Australian Institute for Aboriginal and Torres Strait Islander Studies could, among other things, make an important contribution to research to use traditional knowledge in support of sustainable management of country. This would represent a useful source of information to support administration of the Act.

142 The Australian Government has made progress in facilitating Indigenous consultation in biodiversity conservation planning. There is a need to build on this work to ensure consultation processes are flexible and transferable to decision-making under the Act where Indigenous interests are affected. Improved Indigenous consultation processes could be facilitated by strengthening regional representative bodies and through the development of principles and guidelines for Indigenous consultation which are based on reciprocal responsibility.

143 Indigenous peoples have long established systems of knowledge and practice relating to the use and management of biological diversity on Australia's natural environment. Strategic assessments and regional planning both present good opportunities to build Indigenous consultation strategies that are meaningful and capable of facilitating Indigenous interests in long-term decision-making.

Matters of NES

144 The current matters of NES under the Act are:

- World Heritage properties;
- National Heritage places;
- wetlands of international importance;
- listed threatened species and ecological communities;
- listed migratory species protected under international agreements;
- the Commonwealth marine environment;
- nuclear actions; and
- the Great Barrier Reef Marine Park[28].

145 Relatively few submissions dealt with the current matters of NES, suggesting these matters are generally accepted as being appropriate matters for the Commonwealth to regulate in the national interest. Submissions that did comment on the current matters of NES were mainly concerned with issues of interpretation and implementation.

146 Many submissions called for the creation of new matters of NES – essentially seeking an expansion of Australian Government jurisdiction. The main suggestions were:

- greenhouse gas emissions or climate change impacts;
- water issues – including water extraction, wild rivers and wetlands of national importance;
- land clearance;
- gene technology or release of genetically modified organisms (GMO);
- invasive species; and
- wilderness areas, habitat-related matters of NES, and Biosphere reserves.

27 Australian Government, *Australia 2020 Summit* (2009): http://www.australia2020.gov.au/final_report/index.cfm.

28 *Great Barrier Reef Marine Park and Other Legislation Amendment Act 2008* (Cth) Sch 4, Item 2.

147 Inclusion of a new matter of NES must be justified and limited to environmental matters that are nationally significant. It was argued in public comments that the Act is limited in its ability to deal effectively with biodiversity and ecosystem health, that is, that individual listings of individual species and ecological communities cannot focus on broader issues pivotal to the survival and health of those species, being the ecosystems within which they exist. Many of the suggested new triggers relate in one way or another to this concern.

Ecosystems of National Significance

148 The recent report to the Natural Resource Management Ministerial Council, *Australia's Biodiversity and Climate Change*,[29] recommends the focus of biodiversity conservation efforts at a national level should be to protect a 'representative array' of ecosystems.[30]

149 Shifting the focus to include an ecosystem level would enhance the ability of the Commonwealth to engage more strategically in biodiversity conservation. This shift would also be consistent with Australia's international obligations under the Biodiversity Convention, which calls for protection of ecosystems, as well as individual species.

150 The Review recommends establishing a new matter of NES for 'ecosystems of national significance' so that the Commonwealth will be better placed to proactively manage and protect ecosystems that are at risk.

151 Criteria for listing an ecosystem of national significance should be focused on the 'nationally significant ecological value' of the ecosystem.

152 To be eligible for listing as an ecosystem of national significance, an ecosystem would have to meet prescribed criteria specified in the Act or Regulations. The Review recommends that an ecosystem should be characterised as having significant national value if it satisfies one or more of the following:

- it has high comparative biological diversity, within its ecosystem type;
- it provides critical nationally important ecosystem functions;
- it has a significant potential contribution to building resilient sustainable landscapes;
- it contains high value remnants of a particular type of habitat;
- it contains high value areas that create connectivity between other ecosystems;
- it is significant in building a comprehensive, adequate and representative system of habitat types in Australia;
- it provides habitat critical to the long-term survival of a significant number of threatened species listed under this Act;
- it is a climate change refuge of national significance; or
- it is under severe and imminent threat.

153 Ecosystems currently under-represented in existing environmental management regimes should be considered a priority for listing.

Greenhouse Gas Emissions and Climate Change

154 The issue of a greenhouse trigger was also raised in many submissions. Commentators on this issue largely fell into two groups – those supportive of a trigger and those opposed.

155 The Review recognises that the Carbon Pollution Reduction Scheme (CPRS) is intended to be the primary mechanism for regulating Australia's carbon emissions, and that any additional regulation through the Act or otherwise must be complementary to that market mechanism.

29 Australian Government Biodiversity and Climate Change Expert Advisory Group, *Australia's Biodiversity and Climate Change: a strategic assessment of the vulnerability of Australia's biodiversity to climate change – Technical Synthesis* (2009).

30 Australian Government Biodiversity and Climate Change Expert Advisory Group, *Australia's Biodiversity and Climate Change: a strategic assessment of the vulnerability of Australia's biodiversity to climate change – Technical Synthesis* (2009) p.42.

156 In light of the current uncertainty surrounding the CPRS, and the urgency in starting to tackle Australia's carbon trajectory, the Review recommends that the Government consider implementing the following:

- an interim greenhouse trigger, to be introduced as soon as possible by way of Regulations, continuing until commencement of the CPRS and 'sun-setting' once the CPRS is operational; and
- a requirement to consider cost-effective climate change mitigation opportunities in strategic assessments and bioregional plans.

Effectiveness of Biodiversity and Wildlife Management

Regional Forest Agreements

157 One of the most contentious issues arising during consultations was the treatment of Regional Forest Agreement (RFA) forestry operations under the EPBC Act. RFAs were designed to be a tool for managing forest resources to deliver environmental outcomes as well as economic and resource security to the forest sector.

158 Notwithstanding the benefits of RFAs, there is significant community concern that the environmental outcomes from RFAs are not being delivered. Public submissions to the Review were critical of the content and administration of the RFAs, as well as the limited mechanisms to ensure RFA forestry operations are compliant and best practice. The public lacks confidence that the RFAs are meeting the objectives, both environmental and economic, they were designed to achieve.

159 Re-involvement of the Commonwealth in coupe-by-coupe assessment of forest practices would not represent best practice regulation, and would cause unnecessary duplication and delay without necessarily providing increased conservation benefits.

160 While the RFA provisions of the Act read like an exemption, they operate more akin to a licence with authorisation issued on the terms outlined in the RFA. If the terms of the agreement continue not to be complied with, then sanctions should be applied.

161 Like other sectors, retaining the social licence to operate often requires not only doing the right thing, but proving it. The issue of concern to the review is that the current process for review and auditing RFAs is neither independent nor transparent, and more importantly, in most cases, required reviews are not being undertaken. Long-term sustainability of the forests and forest industry require this to be rectified. Accordingly, the existing approval granted by s.38 should continue – conditional on better, more independent systems of performance assessment to ensure that the terms of the RFAs are being followed and the desired outcomes are being achieved. If the terms of the RFAs are not being met, then the full protections of the Act should apply to forest activities.

Listing Threatened Species

162 Currently, the Commonwealth, States and Territories each maintain separate lists of threatened species and ecological communities. This duplication is a significant cause of regulatory inefficiency.

163 Although the TSSC and DEWHA have been working towards administrative changes to address misalignment of the current threatened species lists and prevent further misalignment in the short term, a long-term comprehensive national approach is needed to integrate listings across jurisdictions.

164 A single, national list of threatened species and ecological communities would provide better coordination of legal and administrative processes and simplify the process of prioritising and coordinating recovery actions, delivering significant regulatory and conservation benefits. The key to establishment of a single national list of threatened species and ecological communities will be the development of agreed standards for listing criteria and protocols, listing processes and documentation standards. A dedicated task force should be established to facilitate this.

Fisheries Management

165 Fishing is another important industry based on the use of natural resources. Nearly all commercial fisheries are subject to environmental performance assessment under the Act. Commonwealth managed fisheries undergo strategic assessments and all export fisheries undergo wildlife trade assessment under the Act.

166 Submissions from industry, fisheries managers and community groups recognised that the requirement to undergo Australian Government environmental assessment has resulted in significant improvements in the environmental performance of fisheries. Still, industry and fishery managers expressed concerns that these arrangements are unnecessarily complex.

167 The Review recommends that the assessment requirements for fisheries be consolidated in the Act and a single strategic assessment process be used for all fisheries. This would require reform of the wildlife trade sections of the Act.

168 Concerns were also raised about the relationship between fishery management and threatened species listing. Possible reforms for improving the relationship between the threatened species listing process and fisheries management include:

- improving communications associated with assessment of listing nominations;
- supporting the continued use of the IUCN listing guidelines with additional protocols for application to marine species; and
- harmonising the Commonwealth Fishery Harvest Strategy Policy and the listing criteria under the Act into a seamless hierarchy, with management targets based on the ecological function of targeted species.

Wildlife Trade

169 The wildlife trade provisions of the Act are far reaching yet often overlooked. They provide for management of trade in internationally threatened species, as well as managing the biosecurity risks to the Australian environment associated with importation of potentially threatening species and over-harvesting of native species for export. As noted earlier, advice was provided to the Minister regarding opportunities associated with incorporating the non-CITES import controls within a single biosecurity agency. A copy of this advice is provided at Appendix 6.

170 The remainder of the wildlife trade provisions are complex and represent an unnecessary regulatory burden. Significant efficiencies could be gained by amending these provisions so that they are more streamlined. Like the fishery assessments, the focus should be on assessing whole sectors through harvest management arrangements rather than ineffectively attempting to regulate individual trades.

Threats

171 Environmental issues and challenges have changed since the Act commenced nearly ten years ago. The Australian Government needs to be capable of adapting and responding to emerging threats and a changing environment.

172 Emerging issues are difficult to manage from a regulatory perspective as traditional regulation tends to be a reactive and somewhat inflexible instrument. Yet the Act must be equipped with tools to address emerging threats and remain relevant in the environment protection sphere. It is commonplace in business and industry to manage uncertainty by identifying existing and potential threats and positioning the organisation to deal with them. The principal challenge is to find a credible signal among the vast amount of available information.

173 Foresighting is the process of gathering and interpreting information to identify emerging threats and determine what might be done to mitigate them. It can provide expanded perceptions of options for investing scarce resources and improve strategic planning.

174 The issues that are currently challenging to address include:

- climate change adaptation;
- invasive and exotic species, including hybrids;
- genetically modified organisms; and
- emerging technologies such as nanotechnology.

175 Creation of a mechanism based on the concepts of foresight and scenario planning and capable of providing institutional advice on emerging issues would be a useful way forward. The Review recommends that the Act require mandatory 'outlook' reports that identify emerging threats to the environment and provide policy options to address these threats. The aim would be to drive management focus to the highest priority threats.

Compliance and Enforcement

176 The Act provides a regulatory framework that includes a suite of compliance and enforcement options spanning from criminal and civil penalties, to administrative remedies such as enforceable undertakings. This range of compliance and enforcement options is necessary to provide an effective and flexible regulatory system.

177 The powers available under the Act are generally appropriate and adequate. Recommendations are made to refine these powers but the most important need is to consolidate the compliance provisions.

178 In the past, compliance and enforcement activities have been limited. Responding to ANAO findings, DEWHA has allocated substantially more resources to compliance and enforcement activities. In 2007 a dedicated Compliance and Enforcement Branch was established to undertake the full range of monitoring, audit, compliance and investigative functions.

179 The civil and criminal penalty provisions are generally considered to be adequate and are high in comparison with other environmental protection legislation. For example, a person who takes an action that has a significant impact on a listed threatened species may incur a civil penalty of a maximum of $550,000. The maximum penalty for a body corporate for the same offence is $5.5 million.

180 In addition to these penalties, civil powers are being used increasingly to secure financial contributions to remediation and recovery works. Payments may therefore be made as a component of conditions of approval, as part of a conservation agreement, as part of remediation settlements or for penalties for offences under the Act.

An Environment Reparation Fund

181 In Canada, a statutorily established Environment Damages Fund gives courts a way to guarantee that money from pollution penalties and settlements is invested to repair the damage done by the pollution.

182 A similar arrangement in Australia would be beneficial. The Review recommends that the Act provide for establishment and administration of an Environment Reparation Fund. Consideration should also be given to linking the financial arrangements associated with biobanking to the fund.

Expenditure Review Principles

183 Under the Terms of Reference, the Review was asked to consider the Australian Government's Expenditure Review Principles in the context of the recommendations put forward in this Report.

184 The Expenditure Review Principles were communicated to Australian Government Ministers in April 2008. They require that all policies and programs designed and undertaken by Australian Government agencies must be assessed against the following questions:

- Is the Act appropriate in dealing with a market failure?
- Is the Act effective in achieving its objectives?
- Is the Act an efficient means of delivering policy objectives?
- Does the Act provide clearly defined lines of responsibility (integration)?
- Are the outcomes measurable (performance assessment)?
- Is the Act consistent with long term strategic policy directions?

Appropriateness

185 The Explanatory Memorandum to the 1998 EPBC Bill justified introduction of the Bill as necessary to correct a market failure relating to environmental protection:

> Many of the benefits provided by the environment are used free of charge, and often access cannot be denied. Without government involvement, free access and use can result in adverse effects on the environment.
>
> Any use of environmental resources may involve some loss of environmental quality. If the users of environmental resources do not pay for the use of those resources, or are not otherwise made responsible, the resources will be used excessively, and impose losses not only on those currently alive, but also on those yet to be born. Governments can intervene to correct this failure.[31]

186 The rationale above for the Australian Government's role in environmental regulation is still true – without government involvement, parties would be able to use environmental resources freely, and without regard to adverse environmental impacts and the principles of ESD. There is therefore a fundamental and significant role for the Australian Government in environmental protection.

187 The Australian Government's environmental protection role is expressed through both funding and regulation. The regulatory approach to environmental protection taken through the Act is generally the appropriate approach, guided by the clear goals of environment protection and the sustainable development and use of resources. It also demonstrates the value of the environment to Australians by creating penalties for certain failures to protect the environment.

188 It is, however, also important to examine chances for streamlining legislation and reducing duplication in regulation, where this does not lead to poorer environmental outcomes. Legislation is well-suited to prohibiting certain harmful actions, but is not always the best or only tool to encourage positive actions. Funding programs such as Caring for our Country can create significant incentives for parties to manage their land and properties in a way that benefits the environment. The disadvantage of such programs is that it is almost impossible to require all relevant parties to apply for the incentives under these programs.

189 The need to strike the appropriate balance between voluntary environmental improvements through program participation and legislation imposing mandatory requirements should always be at the forefront in determining environmental policy goals and objectives.

Effectiveness

190 The question of whether the Act is effective in achieving its objects is discussed earlier. Discussions have centred on the current arrangements, for example, the effectiveness of biodiversity conservation, given the continuing decline in Australia's biodiversity.[32]

191 It will continue to be a challenge to determine effectiveness while there are significant gaps in data collection in areas covered by the Act[33] and a lack of benchmarks upon which to measure the Act's performance. It is in part for this reason that this Report recommends that a set of National Environmental Accounts be produced on a regular basis.

Efficiency

192 In asking whether the Act is an efficient means of delivering policy objectives, the Australian Government must first outline its policy objectives for environmental matters, including biodiversity conservation and heritage management and protection.

193 The Act was envisioned as the most efficient manner to deliver the Australian Government's policy objectives in 1998. The Explanatory Memorandum to the 1998 EPBC Bill stated that the Act was introduced to improve the processes of environmental management from the *ad hoc* approach used before commencement of the Act. The Act was also introduced to better recognise and implement the principles of ESD.[34]

31 Environment Protection and Biodiversity Conservation Bill 1998 Explanatory Memorandum p.5.

32 *State of the Environment Report 2006*, http://www.environment.gov.au/soe/2006/publications/report/biodiversity-1.html.

33 As noted in the *State of the Environment Report 2006*, http://www.environment.gov.au/soe/2006/publications/summary/intro-key-findings.html.

34 Environment Protection and Biodiversity Conservation Bill 1998 Explanatory Memorandum p.5-6.

194 Whether the Act is the most efficient manner of delivering the Australian Government's policy objectives is a difficult question to answer for a number of reasons. Due to the unique environmental, social, economic and political context in which the Act operates, it is difficult to meaningfully compare the efficient and effective operation of the Act in comparison to environmental regulatory regimes in other jurisdictions (both domestically and internationally). The answer to this question is therefore based largely on subjective criteria.

195 It will be better answered if the Act has more clearly defined outcomes for assessment and management planning decisions, as recommended in this Report.

Integration

196 Whether or not the Act provides clearly defined lines of responsibility is addressed to some extent in discussions of duplication of processes (as duplication is a good indicator of a failure to integrate). This is reflected in the recommendations for reducing duplication in the areas of threatened species listing, management planning and environmental impact assessment.

Performance Assessment

197 The objects of the Act are difficult to measure. They contain concepts that are difficult to define operationally. In addition, most of these concepts cannot be easily assessed over short periods of time – the principles of ecologically sustainable development, for example, include concepts such as intergenerational equity which can only be assessed over an intergenerational timeframe.

198 As discussed earlier, the Review recommends that the objects of the Act be recast and that management planning and recovery activities focus on outcomes rather than process. These changes, together with the Environmental Information Management System, should aid in future assessments, both qualitative and quantitative, of the performance of the Act.

Strategic Policy Alignment

199 In responding to the recommendations made in this Report, the Australian Government should consider its long-term policy goals for management and protection of the environment on a whole of government basis.

Conclusion

200 The aim during this Review has been to examine the operation of the Act and identify opportunities to reduce the regulatory burden while maintaining or enhancing the protections provided to the environment. The reforms proposed represent an integrated and balanced package. Their implementation will modernise Australia's national environmental regulation framework.

201 Australia's unique biodiversity, already under threat from a wide range of stressors, now faces a further risk from a rapidly changing climate, the effects of which are already discernible. Emerging pressures demand adaptive responses and a rethinking of legislative frameworks. Failure to adapt is likely to have serious environmental, social and economic impacts.

202 The reforms proposed are wide ranging. As a consequence, an extensive communications strategy will be needed to inform and educate those affected by the new Act.

203 A poll conducted by the ANU found that while environment issues dominate the public consciousness a significant portion of those surveyed – 56 per cent of respondents – consider that the Australian Government is doing too little. The implication is that the public has a higher expectation of the Government's role in protecting the environment than is currently being delivered.[35]

204 When the EPBC Act commenced, a group of environment non-government organisations were funded to provide a community advisory service. Judging by the feedback provided to the Review, this was a very successful initiative – one that deserves to be repeated.

205 Given the range of industries and regions potentially impacted by the Act consideration should also be given to a multimedia communications strategy featuring the Minister.

35 ANUpoll, Report 3 October 2008, Public Opinion Towards the Environment, Professor Ian McAllister Australian National University.

Recommendations

Chapter 1 – Operating Framework of the Act

Recommendation 1

The Review recommends that the *Environment Protection and Biodiversity Conservation Act 1999* be repealed and replaced with a new Act, the *Australian Environment Act*, which will:

(1) be restructured and drafted to modernise, clarify, simplify and streamline both language and process;

(2) reduce duplication of processes; and

(3) increase the focus on strategic approaches to environmental management.

Recommendation 2

The Review recommends that the Act:

(1) confirm ecologically sustainable development (ESD) principles as the overarching principles underpinning decision-making under the Act;

(2) emphasise that environmental considerations are to be considered first when making decisions under the Act – 'decision-making should integrate both long-term and short-term environmental, social, economic and equitable considerations effectively'; and

(3) emphasise ESD principle (d) – 'the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making'.

Recommendation 3

The Review recommends that the objects of the Act be revised along the following lines:

(1) the primary object of this Act is to protect the environment, through the conservation of ecological integrity and nationally important biological diversity and heritage.

(2) in particular, this Act protects matters of national environmental significance and, consistent with this, seeks to promote beneficial economic and social outcomes.

(3) the primary object is to be achieved by applying the principles of ecologically sustainable development as enunciated in the Act.

(4) the Minister and all agencies and persons involved in the administration of the Act must have regard to, and seek to further, the primary object of this Act.

(5) in pursuing the primary object, the Minister should:

  (a) encourage public participation in the making of decisions that impact on the environment;

  (b) promote cooperation with State, Territory and Local government in environmental protection and management;

  (c) assist in the co-operative implementation of Australia's international environmental responsibilities;

  (d) recognise the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity;

  (e) promote the use of Indigenous peoples' knowledge of biodiversity with the involvement of, and in cooperation with, the owners of the knowledge; and

  (f) promote fair and efficient decision-making.

Chapter 2 – A National Approach

Recommendation 4

The Review recommends that the Commonwealth work with the States and Territories as appropriate to improve the efficiency of the Environmental Impact Assessment (EIA) regime under the Act, including through:

(1) greater use of strategic assessments;

(2) accreditation of State and Territory processes where they meet appropriate standards;

(3) accreditation of environmental management systems for Commonwealth agencies where the systems meet appropriate standards;

(4) publication of criteria for systems and processes that would be appropriate for accreditation;

(5) creation of a Commonwealth monitoring, performance audit and oversight power to ensure that any process accredited achieves the outcomes it claimed to accomplish;

(6) streamlining and simplification of assessment methods, including combining assessment by preliminary documentation and assessment on referral information and removal of assessment by Public Environment Report;

(7) establishing joint State or Territory and Commonwealth assessment panels;

(8) use of joint assessment panels or public inquiry for projects where the proponent is either the State or Territory or Australian Government; and

(9) greater use of public inquiries and joint assessment panels for major projects.

Recommendation 5

The Review recommends that Australian, State and Territory governments move to a single national list of threatened species, including marine species and ecological communities, through accreditation of State and Territory processes for listing endemic species. This process should include:

(1) agreed accreditation for listing;

(2) agreed protocols;

(3) minimum procedural standards; and

(4) consistent documentation standards.

Chapter 3 – Regional Approaches

Recommendation 6

(1) The Review recommends that the Australian Government:

(a) expand the role of strategic assessments and bioregional plans so that they are used more often; and

(b) strengthen the process for creating these plans and undertaking these assessments, so they are more substantial and robust;

(2) The Review further recommends that the Act be amended to provide:

(a) for bioregional plans to -

(i) change the terminology from 'bioregional plans' to 'regional plans';

(ii) allow the Commonwealth to unilaterally develop regional plans; and

(iii) ensure that the process for delineating a region for the purpose of the Act is flexible; and

(b) for strategic assessments to -

(i) specify mandatory required information for strategic assessments;

(ii) insert an 'improve or maintain' test for the approval of a class of actions in accordance with an endorsed plan, policy or program;

(iii) enhance provision for public engagement; and

(iv) create a 'call in' power for plans, policies and programs likely to have a significant impact on matters of National Environmental Significance , and amending the term 'action' to incorporate these plans, policies or programs; and

(c) for creation of a broad performance audit power to assess the performance of accredited systems.

Recommendation 7

(1) The Review recommends that:

(a) the Council of Australian Governments (COAG) develop a national biodiversity banking (biobanking) system and standards; and

(b) the Australian Government in the interim, accredit State and Territory biobanking schemes, subject to their meeting acceptable standards.

(2) The Review further recommends that the Act should be amended to:

(a) facilitate and promote the use of biobanking as part of project approvals; and

(b) facilitate the operation of a national biobanking scheme.

Chapter 4 – Matters of National Environmental Significance (NES)

Recommendation 8

The Review recommends that the Act be amended to include 'ecosystems of national significance' as a new matter of national environmental significance. The 'matter protected' should be the ecological character of a listed ecosystem.

The criteria used to identify ecosystems should be along the following lines:

(1) the ecosystem is of significant national value for one or more of the following reasons:

- (a) it has high comparative biological diversity, within its ecosystem type;
- (b) it provides critical nationally important ecosystem functions;
- (c) it has a significant potential contribution to building resilient sustainable landscapes;
- (d) it contains high value remnants of a particular type of habitat;
- (e) it contains high value areas that create connectivity between other ecosystems;
- (f) it is significant in building a comprehensive, adequate and representative system of habitat types in Australia;
- (g) it provides habitat critical to the long-term survival of a significant number of threatened species listed under this Act;
- (h) it is a climate change refuge of national significance; and/or
- (i) it is under severe and imminent threat; and

(2) ecosystems that are currently under-represented in existing environmental management regimes should be considered as a priority for listing.

Recommendation 9

The Review recommends that water plans that authorise actions that, as a whole, have, will have or are likely to have a significant impact on a protected matter undergo strategic assessments and approvals.

The Review recommends that the Basin Plan prepared under the *Water Act 2007* (Cth) be strategically assessed to ensure activities authorised by the Plan are compliant with the Act. Water plans that fully comply with the requirements of the accredited Basin Plan should not require assessment under the Act.

Recommendation 10

The Review recommends that:

(1) an interim greenhouse trigger, with a threshold of at most 500,000 tonnes of carbon dioxide equivalent emissions, be introduced as soon as possible by way of Regulation to sun-set upon commencement of the Carbon Pollution Reduction Scheme; and

(2) the Act be amended to insert a requirement to consider cost-effective climate change mitigation opportunities as part of strategic assessments and bioregional planning processes.

Recommendation 11

The Review recommends that the Australian Government consider implementing additional protection for non-forest native vegetation through the eligibility requirements for reforestation projects under the Carbon Pollution Reduction Scheme (CPRS), for example by not issuing credits for activities that are occurring on land that has been cleared of remnant native vegetation within a specified time frame. Such a system would need to be supported by strong monitoring and compliance.

The Review further recommends that the monitoring of land clearance activities associated with the compliance needs of both the CPRS and the Act be integrated into a single system.

Chapter 5 – Biodiversity

Recommendation 12

The Review recommends that the Act be amended to:

(1) require the identification of critical habitat for listed threatened species at the time of listing; and

(2) discontinue the Register of Critical Habitat once information about critical habitat has been included in listing documentation.

Recommendation 13

The Review recommends that the Act be amended to require the Threatened Species Scientific Committee to indicate in the listing process the areas necessary for an ecological community to persist and maintain its ecological function.

Recommendation 14

The Review recommends that the Act be amended to include vulnerable ecological communities as a matter of national environmental significance protected under Part 3.

Recommendation 15

The Review recommends that s.186(2)(b) of the Act be amended to require the Environment Minister, in deciding whether to list a threatened species or ecological community, to take the principles of ecologically sustainable development into account only in exceptional situations where social or economic costs associated with listing are overwhelming and the environmental benefits are known to be slight.

Recommendation 16

The Review recommends that the Act be amended to give the Environment Minister the power to make emergency listings of threatened species and ecological communities, provided the Minister believes that:

(1) the native species or ecological community meets the criteria for the listing category for which it is nominated; and

(2) a threat to the native species or ecological community is severe and imminent.

Recommendation 17

The Review recommends that the provisions of Part 13 of the Act relating to migratory species listed on Appendix II of the Bonn Convention be reviewed and amended to allow the take of Appendix II migratory species, subject to management arrangements demonstrating that the take would not be detrimental to survival of the species.

Any such amendments should ensure that the Act provides appropriate protection consistent with Australia's international obligations.

Recommendation 18

The Review recommends that the Act be amended to:

(1) allow greater flexibility in the development of recovery and threat abatement plans, particularly to allow for their development at regional scales; and

(2) create opportunities for better linkages to funding initiatives.

Recommendation 19

The Review recommends that the Act be amended to:

(1) better define key threatening processes (KTPs);

(2) allow greater flexibility in the criteria for eligibility for listing a KTP; and

(3) allow strategic identification of KTPs at a range of scales.

Recommendation 20

The Review recommends that the Act be amended to provide for greater flexibility in the development and implementation of Threat Abatement Plans and allow transition to regional planning approaches and strategic threat management.

Recommendation 21

The Review recommends that the Act be amended to require the development of a 'threat abatement advice' at the time of listing a Key Threatening Process.

Recommendation 22

The Review recommends that the Act be amended to:

(1) move Part 8A of the EPBC Regulations, which regulate access to biological resources in Commonwealth areas, into the Act;

(2) increase the penalty provisions for non-compliance with Part 8A;

(3) require benefit-sharing agreements to refer to 'equitable' sharing of benefits arising from the use of biological resources in Commonwealth areas; and

(4) require informed consent where Indigenous knowledge is accessed or used for non-commercial purposes on Commonwealth land.

Chapter 6 – Current and Emerging Threats

Recommendation 23

The Review recommends that:

(1) the Council of Australian Governments (COAG) develop criteria and management protocols for the movement of potentially damaging exotic species between States and Territories, working towards a list of 'controlled' species for which cost-effective risk-mitigation measures may be implemented;

(2) the Act be amended to require periodic preparation of mandatory 'outlook' reports that identify emerging threats to the environment and provide policy options to address emerging environmental issues; and

(3) the Australian Government establish a Unit or Taskforce devoted to foresighting to identify and guide management responses to emerging threats.

Chapter 7 – Individual Project Approvals

Recommendation 24

(1) The Review recommends that the Australian Government, in consultation with the environment and planning consulting industry, develop an industry Code of Conduct for consultants supplying information for the purposes of the environmental impact assessment and approval regime under the Act.

(2) The Australian Government must decide whether the Code will be enforced by:

  (a) prescribing the code under the *Trade Practices Act 1974*, and allowing enforcement of breaches by the Australian Competition and Consumer Commission; or

  (b) DEWHA, under a suite of new Code of Conduct audit and enforcement powers.

(3) To complement the Code of Conduct, the Review recommends that the Environment Minister:

  (a) audit the information in referral documentation and/or assessment information; and

  (b) audit protected matters to test if the predictions made in Environmental Impact Assessments were correct.

Recommendation 25

The Review recommends that the Act be amended to confer power on the Environment Minister to weigh a wide range of environmental considerations when making an approval decision. There are three options for amendment:

If a project triggers the Act, the Minister:

(1) must consider the whole of the environment, that is, all environment matters the project impacts upon;

(2) may call in the impacts on the whole of the environment for assessment, if it is considered that the action is of 'national importance'; or

(3) may consider impacts on all protected matters affected by the project, including impacts that are not significant.

Recommendation 26

The Review recommends that the Act be amended to confer power on the Environment Minister to request information on alternatives for projects referred for approval under the Act.

Recommendation 27

The Review recommends that the operation of the environmental impact assessment (EIA) regime be clarified by:

(1) amending the Act -

(a) to ensure that the provisions governing project EIA are as efficient as possible while retaining transparency of decision-making;

(b) to allow the Minister to stipulate when actions will not have a significant impact;

(c) to allow consideration of previously authorised conditions of approval when a prior authorisation requires reapproval under the Act;

(d) to ensure that the controlled action decision remains strictly a jurisdiction question;

(e) to clarify the threshold for making a particular manner decision;

(f) to ensure that compliance and audit functions are available in respect of monitoring particular manner decisions; and

(g) to improve the capacity of the Minister to vary conditions attached to an approval decision made under the Act.

(2) DEWHA developing -

(a) policy advice to help increase clarity in determining what would constitute a significant impact against each matter of national environmental significance, including particular threatened species and ecological communities;

(b) policy guidelines to ensure that where relevant, bioregional plans provide context for the test of 'significant impact'; and

(c) guidelines on continuing use and prior authorisation.

Chapter 8 – Heritage

Recommendation 28

The Review recommends that:

(1) regulation of World, National and Commonwealth Heritage matters be retained in the Act; and

(2) DEWHA develop a guide to the heritage provisions of the Act to assist those with specific interest in heritage matters in applying and understanding the relevant provisions.

Recommendation 29

The Review recommends that the Act be amended to:

(1) simplify the nomination, prioritisation, assessment and listing processes for National and Commonwealth Heritage; and

(2) provide for greater transparency, which should be achieved by –

(a) the Australian Heritage Council (AHC) making strategic nominations and determining its work plan;

(b) producing guidelines on the documentation requirements for heritage nominations;

(c) notifying owners of places if a heritage nomination relating to that place is to be assessed;

(d) inviting public comments when places are added to the Priority Assessment List and when the potential heritage values of those places are identified; and

(e) publishing AHC advice and recommendations at the time of the Minister's listing decision.

Recommendation 30

The Review recommends that:

(1) the Australian Government provide greater leadership for heritage protection and management by engaging with the Australian Heritage Council and actively promoting a national approach to heritage; and

(2) the Act should be amended to -

(a) clarify the requirements for Commonwealth agency heritage strategies;

(b) require airport environment strategies to include a heritage assessment against the Commonwealth heritage criteria; and

(c) institute comprehensive heritage protection in the 'designated areas' of the Australian Capital Territory.

Recommendation 31

The Review recommends that the Act be amended to:

(1) recognise a range of management arrangements, including management plans, that are required to be outcome focussed; and

(2) allow for flexible format and content requirements for management arrangements to provide for efficiency in planning and management without compromising good heritage outcomes.

Chapter 9 – Protected Areas and Management Planning

Recommendation 32

The Review recommends that, as for heritage management plans, the Act and Regulations be amended so that:

(1) management plans focus on outcomes rather than content and processes;

(2) the format, requirements and process for developing management plans is flexible – guidelines for the preparation of management plans should be revised to reflect this flexibility; and

(3) a single management plan can satisfy numerous planning requirements.

Recommendation 33

The Review recommends that the Act be amended to:

(1) require management plans to identify and provide guidance on what is likely to have a significant impact on areas protected by the Act; and

(2) allow accreditation of management plans that meet the requirements of the Act and Regulations – accreditation would be subject to performance auditing.

Recommendation 34

The Review recommends that the Act be amended to:

(1) enable the Environment Minister to initiate preparation of management plans for World Heritage properties, National Heritage Places and Ramsar wetlands where the collaborative processes have not produced effective plans; and

(2) require the Minister to consult with the owner and/or manager of the protected area when preparing these plans.

Recommendation 35

The Review recommends that the Act be amended to streamline and rationalise the provisions governing management plans and permitting activities in Commonwealth reserves so that the provisions apply to both terrestrial and marine reserves.

Recommendation 36

The Review recommends that the Act and Regulations be reviewed and amended to ensure that biodiversity in conservation zones is adequately protected while the conservation zones are being assessed for inclusion in a Commonwealth reserve.

Recommendation 37

The Review recommends that the Act be amended to repeal the biosphere reserve provisions, recognising that the Man and the Biosphere Program does not depend on domestic legislation.

Chapter 10 – Regional Forest Agreements

Recommendation 38

The Review recommends that the current mechanisms contained in the Act for Regional Forest Agreement (RFA) forest management be retained, but be subject to rigorous independent performance auditing, reporting and sanctions for serious non-compliance.

The Commonwealth and States should agree on sustainability indicators by the end of 2010. Subject to the concurrence of the Environment Minister, these indicators would provide a basis for performance auditing.

The RFA reviews undertaken by the Commonwealth Forestry Minister (Forestry Minister) and the relevant State party, in consultation with the Environment Minister, should be expanded to focus on the performance of RFAs in meeting their agreed outcomes, including protecting biodiversity and continuous improvement of a State's Ecologically Sustainable Forest Management (ESFM) framework.

The Act should be amended so that the Environment Minister may apply the full protections of the Act, if, after consulting with the Forestry Minister, the Environment Minister is satisfied that the review:

(1) has not occurred within the timeframe specified in the RFA;

(2) indicates serious non-performance, including -

  (a) failure to implement and maintain forestry codes of practice;

  (b) failure to commit to and implement recovery plans for listed threatened species in RFA areas;

  (c) failure to establish management plans for Comprehensive, Adequate and Representative (CAR) reserves;

  (d) failure of the ESFM framework to protect species;

  (e) failure to investigate alleged breaches of the RFA and correct any proven breaches; or

  (f) the audit outcomes are not implemented to agreed standards; or

(3) does not provide enough information to judge if there are serious non-performance issues.

The Review notes that a number of RFA reviews are outstanding and recommends a transitional period for the conduct of these reviews. Section 38 will continue to apply to RFA forestry operations if the Environment Minister certifies that the review process has been satisfactorily conducted within two years of the commencement of the amendments.

Recommendation 39

The Review recommends that the Australian Government work with the States to:

(1) improve the independence of compliance monitoring; and

(2) develop processes to make publicly available information about the number and nature of complaints about Regional Forest Agreement operations and the results of any investigations.

Chapter 11 – Marine and Fisheries

Recommendation 40

The Review recommends that the Act be amended so that the fishery provisions under Parts 10, 13 and 13A are streamlined into a single strategic assessment framework for Commonwealth and State and Territory-managed fisheries to deliver a single assessment and approval process.

Recommendation 41

The Review recommends that the Australian Government:

(1) integrate the Commonwealth Fisheries Harvest Strategy Policy (HSP) framework with the threatened species listing process for marine fish; and

(2) ensure the HSP biological reference points reflect the biology of the species and its role in ecosystem function rather than standard default settings such as reduction of population.

Chapter 12 – Wildlife Trade

Recommendation 42

The Review recommends that the wildlife trade provisions in the Act be amended to:

(1) remove duplication between the objects of Part 13A and the objects and subsequent provisions recommended by the Review for the *Australian Environment Act*;

(2) shift focus from the individual permitting system to assessment and accreditation of management arrangements for whole sectors, complemented by appropriate record keeping and monitoring activities – an accredited operation would be permitted to export without the need for permits (excluding specimens listed on CITES); and

(3) streamline the different categories of approved sources for trading wildlife and wildlife products.

Chapter 13 – Decision-making under the Act

Recommendation 43

The Review recommends that the Act be amended to prescribe mandatory criteria that must be considered when making decisions under the Act, which should include:

(1) a requirement that the Minister have regard to the best available information sufficient for making that decision;

(2) where appropriate, the decision must be consistent with -

  (a) the principles of ecologically sustainable development;

  (b) Australia's obligations under relevant international agreements;

  (c) management principles prescribed under the Regulations; and

  (d) a plan prepared under the Act; and

(3) a requirement that the Minister should consider, where relevant –

  (a) the ability of the protected matter to respond to current and emerging threats and the reasonably foreseeable impacts of the decision on that ability; and

  (b) the level of uncertainty in scientific information provided.

Chapter 14 – Transparency of Processes under the Act, including Public Participation

Recommendation 44

The Review recommends that in order to increase public participation and transparency of processes under the Act, that it be amended to:

(1) require publication of a greater range of information, including but not limited to the following -

  (a) advice provided to the Environment Minister by the Threatened Species Scientific Committee for consideration in making a listing decision under the Act – to be released at the time of the Minister's decision;

  (b) advice provided to the Minister by the Australian Heritage Council for consideration in making a listing decision under the Act – to be released at the time of the Minister's decision;

  (c) statements of reasons for all decisions made by the Minister and delegates under the Act – to be released at the time of the decision;

  (d) reports and outcomes from audits undertaken under the Act;

  (e) expert reports considered by the Minister or a delegate when making decisions under the Act – to be released at the time of the decision, or when provided to the proponent;

  (f) all additional information requested from proponents to support decision-making under the Act;

  (g) environmental management plans made in accordance with an approval under the Act; and

  (h) all submissions received in accordance with the Act;

(2) ensure that, to the extent it is technologically feasible, all documentation and information required to be published is made available in electronic form; and

(3) remove the requirement on proponents under ss.95B(4), 99(4) and 104(4) to republish documentation where public comments have not been received and the proponent has advised that no amendment to the original documentation is required, and replace it with a requirement that DEWHA publish a notice on its website stating that no comments were received and no changes are required to be made to the original documentation.

Recommendation 45

The Review recommends that public participation under the Act be improved by:

(1) the Act being amended to –

  (a) clarify periods and processes for public participation under bioregional assessments;

  (b) give the Minister the discretion to seek and consider public comment on environmental management plans;

  (c) ensure no public consultation process can be shorter than 11 business days; and

  (d) define 'business day' to exclude any day from 24 December to 1 January (inclusive);

(2) DEWHA –

  (a) developing principles and guidelines for best practice public consultation; and

  (b) strengthening involvement of Indigenous peoples in the workings of the Act by:

    (i) developing guidelines based on reciprocal responsibilities;

    (ii) working through established representative bodies such as Land Councils; and

    (iii) strengthening processes for early engagement with Indigenous groups in strategic assessment and regional planning.

Recommendation 46

The Review recommends that in order to improve transparency under the Act:

(1) the Act be amended to require establishment of a user friendly and cost effective system of email alerts, which interested parties can subscribe to, to receive information about the Act and processes under the Act;

(2) the Australian Government consider the merits of including a requirement that DEWHA report against a set of key performance indicators for public awareness of the Act and effective engagement in the processes under the Act, as part of the Department's annual reporting obligations under the Act; and

(3) that DEWHA –

  (a) improve and maintain its website to enhance accessibility to information;

  (b) focus on increasing its specialist industry knowledge to ensure effective engagement with stakeholders through a range of mediums; and

  (c) implement a comprehensive communications campaign featuring the Environment Minister, to promote awareness and understanding of reforms undertaken in response to this Review.

Chapter 15 – Merits Review and Access to Courts

Recommendation 47

The Review recommends that the Act be amended to require that requests for reconsideration of a controlled action decision be required to be made within 11 business days of the decision, unless the request for reconsideration is based on substantial new information or a substantial change in circumstances not foreseen at the time the first controlled action decision was made, and this new information or change of circumstances relates to the likely impact that the action has, will have or is likely to have on a protected matter.

Recommendation 48

The Review recommends that subsection 303GJ(2) of the Act be repealed so that Ministerial decisions of the type specified in subsection 303GJ(1), that is, decisions about whether to grant permits for activities affecting protected species and the international movement of wildlife, and advice about whether an action would contravene a conservation order, are subject to merits review.

Recommendation 49

The Review recommends that the Australian Government consider amending the Act so that the controlled action and/or assessment approach decisions are open to merits review.

Recommendation 50

The Review recommends that the Act be amended to prescribe an extended definition of legal standing for the purpose of merits review applications for decisions made under the Act to include those persons who made a formal public comment during the relevant decision-making process.

Recommendation 51

The Review recommends that a provision be inserted in the *Australian Environment Act* like the repealed s.478, to the effect that the Federal Court is not to require an applicant to give an undertaking as to damages as a condition of granting an interim injunction.

Recommendation 52

The Review recommends that the Act be amended to prohibit the ordering of security for costs in public interest proceedings.

Recommendation 53

The Review recommends that the Act be amended to empower the Federal Court to decide, as a preliminary matter, whether a case is a 'public interest proceeding' and, if so, to determine the appropriate form of 'public interest costs order'.

Chapter 16 – Compliance and Enforcement, Monitoring and Audit

Recommendation 54

The Review recommends that the Act be amended to bring together and rationalise the range of compliance and enforcement powers and responses available to regulate actions likely to impact on matters protected under the Act.

Recommendation 55

The Review recommends that the Act be amended to allow for the full suite of administrative, civil and criminal remedies to be applied to any contravention or suspected contravention of the Act.

Recommendation 56

The Review recommends that the Act be amended to provide for:

(1) the publication of documents relating to regulatory activities under the Act;

(2) the issue of Warning Notices, including specification of the circumstances when they can be issued;

(3) the sharing of information (obtained both voluntarily and through the use of compulsory or coercive processes) with State and Territory agencies; and

(4) offence provisions specific to non-compliance with s.449BA(b) conditions set by the DEWHA Secretary when specimens are released to the holder or owner.

Recommendation 57

The Review recommends that the provisions of the Act relating to the whale and dolphin watching industry be amended to streamline and ensure consistency of legislation across all jurisdictions, and provide greater certainty for the industry and appropriate protection for cetaceans.

Recommendation 58

The Review recommends that the Act be amended to give the DEWHA Secretary power to issue Environment Protection Orders (EPOs) which should specify:

(1) the circumstances in which an EPO can be issued;

(2) the content of an EPO;

(3) the circumstances for extensions and review of an EPO; and

(4) the penalties for contravention of an EPO.

Recommendation 59

The Review recommends that the Act be amended to confer on the Federal Court power to specify processes for the management of expert opinion evidence and expert witnesses, including to:

(1) encourage the use of a single expert, and

(2) require parties to confer before the hearing to produce a joint report in which they set out the matters agreed, the matters on which they cannot agree and the reason for the disagreement.

Recommendation 60

The Review recommends that the Act be amended to establish an Environment Reparation Fund and specify:

(1) the establishment of the fund;

(2) the structure and function of the fund; and

(3) the ongoing administration of the fund.

Recommendation 61

The Review recommends that the Act be amended to give the Minister the discretion to undertake compliance and performance audits.

Chapter 17 – Cost Recovery

Recommendation 62

The Review recommends that the cost recovery mechanisms under the Act, be improved by:

(1) introducing a fee for referring an action or applying for a permit;

(2) introducing cost recovery for the environmental impact assessment of proposed actions levied on a sliding scale and charged at the time the method of assessment is set;

(3) amending the Act to allow the Australian Government to recover costs associated with commissioning additional information required because of inadequacies in the information supplied by a proponent;

(4) developing options for allowing proponents to 'opt in' to a full cost recovery system for management of large, time-critical projects that require additional government resources to assess; and

(5) reviewing and modernising fees and charges under the Act so they are adjusted according to movements in the Consumer Price Index and other relevant factors.

Chapter 18 – Relationship with other Commonwealth Legislation

Recommendation 63

The Review recommends that the provisions of the *Environment Protection (Alligator Rivers Region) Act 1978* (Cth) be incorporated into the Act and that the role of the Supervising Scientist be expanded to include all uranium mining activities in Australia.

Recommendation 64

The Review recommends that the Act be amended to incorporate the requirements of the following pieces of Commonwealth legislation to remove overlaps and duplication in assessment and authorisation processes:

- *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth);
- *Environment Protection (Alligator Rivers Region) Act 1978* (Cth);
- *Environment Protection (Sea Dumping) Act 1981* (Cth);
- *Historic Shipwrecks Act 1976* (Cth); and
- *Protection of Movable Cultural Heritage Act 1986* (Cth).

The Review further recommends that Part V of the *Sea Installations Act 1987* (Cth) be retained but the rest of the Act, and the *Sea Installations Levy Act 1987* (Cth), be repealed.

The Review also recommends that the Australian Government consider the reviews of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), *Historic Shipwrecks Act 1976* (Cth), *Protection of Movable Cultural Heritage Act 1986* (Cth) and Commonwealth maritime enforcement legislation in tandem with this Report.

Recommendation 65

The Review recommends that s.160 of the Act be amended to require the Airports Minister to consult with the Environment Minister when considering whether to approve a draft environment strategy under the *Airports Act 1996* (Cth).

Recommendation 66

The Review recommends that the Australian Government consider streamlining the relationship between the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), the *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (Cth), and the EPBC Act with a view to maximising regulatory efficiency while retaining strong environmental safeguards.

Chapter 19 – National Environmental Accounts

Recommendation 67

(1) The Review recommends that the Australian Government, in the interests of promoting ecologically sustainable development, develop a system of environmental accounts to:

(a) establish baseline national environmental information;

(b) provide capacity to systematically monitor changes in the quality of the Australian environment;

(c) provide an information basis for improved regional planning and decision-making; and

(d) provide a secondary objective of strengthening the capacity of Local Government land-use planning decision-making.

(2) The Review recommends that the Australian Government:

(a) strengthen arrangements for continued State of the Environment (SoE) reporting; and

(b) link information requirements for SoE reporting to the development of the National Environmental Accounts.

Chapter 20 – Governance Arrangements for Decision-Making

Recommendation 68

The Review recommends that the Biological Diversity Advisory Committee be disbanded and its functions be transferred to the Threatened Species Scientific Committee (TSSC).

The Review further recommends that the name of the TSSC be changed to the 'Biodiversity Scientific Advisory Committee' to reflect the new role and functions of the Committee under the Act better.

Recommendation 69

The Review recommends that the Act be amended to establish a formal link between:

- the Indigenous Advisory Committee (IAC) and the new Biodiversity Scientific Advisory Committee; and
- the IAC and the Australian Heritage Council.

Recommendation 70

The Review recommends that the provisions of the EBPC Act and the *Australian Heritage Council Act 2003* (Cth) be merged, and incorporated into the *Australian Environment Act*, so that the functions of the Australian Heritage Council are conferred under a single Act.

Recommendation 71

The Review recommends that an independent National Environmental Commissioner and National Environment Commission be established under the Act and supported by DEWHA.

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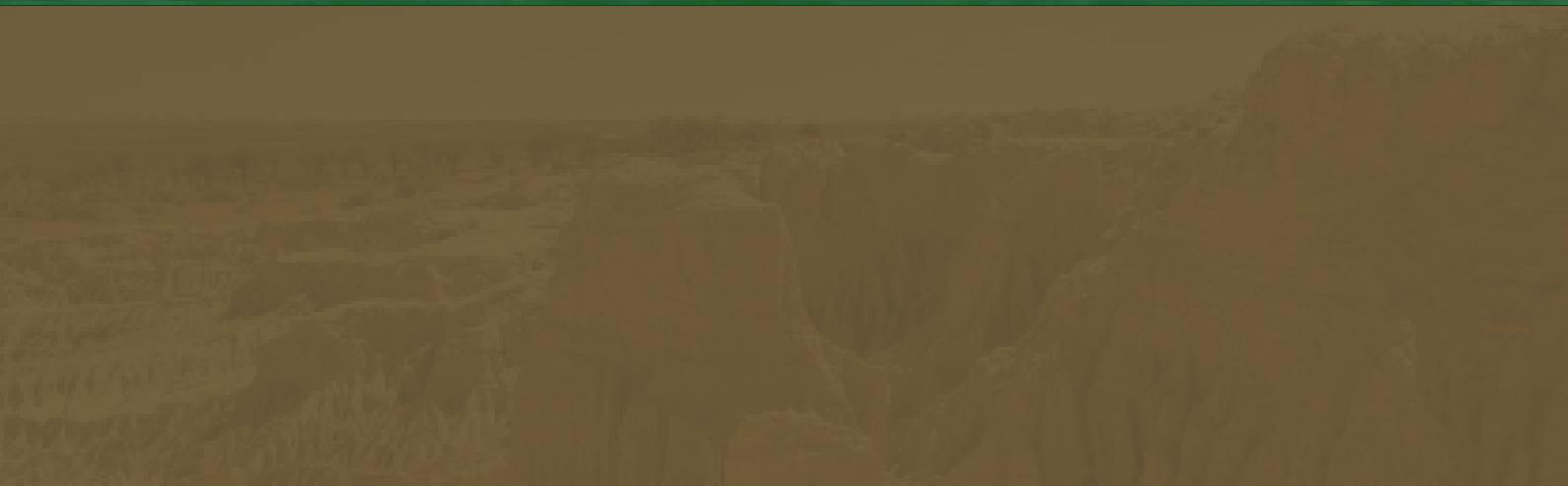
Chapter One

OPERATING FRAMEWORK OF THE ACT



Chapter 1: Operating Framework of the Act

1.1 The 1992 Council of Australian Governments' (COAG) *Intergovernmental Agreement on the Environment* (IGAE) established a framework for intergovernmental action on environmental issues. Under the IGAE, the Australian Government and all State and Territory governments agreed to integrate environmental considerations into their decision-making and pursue the principles of ecologically sustainable development (ESD).

1.2 The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the Act) is the primary vehicle for implementing ESD at the Commonwealth level. It establishes a national approach to a wide range of environmental protection and biodiversity conservation matters, and places the Commonwealth Environment Minister at the centre of national decision-making for matters of national environmental significance (NES).

1.3 The Act reflects the role of the Australian Government in protecting matters of NES and regulating the environmental impacts of actions involving the Commonwealth or actions on or affecting Commonwealth land. It is also the primary tool for regulating wildlife trade and managing and protecting Commonwealth, National and World Heritage places and values.

1.4 Public comments received by the Review broadly supported the Act. While this Report contains recommendations for significant changes to the operation and administration of the Act, it is important to acknowledge that the Act has many positive features that should be retained.

1.5 The following features should be retained:

- *Clear specification of matters of NES*

This clarifies the Commonwealth's focus in protecting the environment as being primarily about protection of the matters of NES. This is a significant improvement on the previous regime (under the *Environment Protection (Impact of Proposals) Act 1974* (Cth)) where the Commonwealth environmental impact assessment and approval process was triggered in an *ad hoc* fashion by factors not necessarily related to matters of national environmental concern.

- *The role of the Environment Minister as the decision-maker*

This is a fundamental and positive change from the previous regime where the Environment Minister's role was limited to providing advice to other Commonwealth Ministers making decisions affecting the environment.

- *Requirements for consultation*

Effective management and protection of the environment requires the engagement of the community. A large proportion of actions impacting on matters of NES, including actions likely to have a significant impact and recovery actions, rely on local and regional actors. For example, community input is sought when actions are proposed or when species, ecological communities or heritage places are nominated for listing. While changes to enhance the public participation processes are recommended in Chapter 14, the provisions which require public consultation prior to making decisions under the Act should be retained.

- *Explicit consideration of social and economic issues in decision-making*

Achieving ESD requires integration of environmental, social and economic factors into decision-making. While the Act affords a high priority to environmental considerations, the requirement to consider social and economic issues in making decisions under the Act is also a positive attribute that should be retained.

- *Statutory advisory mechanisms*

An important feature of the Act is the key role played by statutory advisory bodies, including the Australian Heritage Council (AHC), the Indigenous Advisory Committee (IAC) and the Threatened Species Scientific Committee (TSSC). The requirements for these bodies to provide advice to the Minister prior to key decisions being made under the Act are important in ensuring that the Minister's decisions are made in light of the best available advice from experts in the field.

- *The strength of the compliance and enforcement regime*

The Act provides for a wide array of enforcement mechanisms to encourage compliance with the Act. This allows for flexibility in approach when dealing with breaches of the Act.

Structure and Complexity of the Act

1.6 It is clear from comments that many people, including professionals, find the Act hard to understand and navigate. As a result many have called for simplification of the Act. For example, Dr Gerry Bates commented that:

> The concepts (controlling provisions' etc), organisation and language all conspire to make this Act virtually unintelligible to anyone who hasn't a few days to waste unravelling it …. The Act needs an overhaul to convert concepts and principles into coherent and readily understood language.[1]

1.7 The Act was deliberately drafted with large sections of text repeated. This strategy was designed to help make the Act easy to understand, but has unintentionally resulted in the converse. The Act is currently too repetitive, lengthy, unnecessarily complex and, in some areas, overly prescriptive. If the Act is intended to encourage public participation and provide best practice regulation, it should be restructured to make it more accessible and easier to navigate and many of its provisions should be recast. By making the Act easier to use, these changes should also reduce the regulatory and resource burden on those impacted by the Act.

1.8 The current title of the Act is arguably misleading, as the title covers some aspects of the legislation but not all. In particular, it does not reflect the role of the Commonwealth in heritage protection and management. Nor does it reflect that this is national legislation.

1.9 While biodiversity conservation is a key part of the Act, it is only one part of an Act that manages many different interactions between people and the Australian environment. Some comments from the heritage sector argued that the Act's name should be changed to include heritage.[2]

1.10 Section 528 of the Act defines 'environment' to include:

(a) ecosystems and their constituent parts, including people and communities;

(b) natural and physical resources;

(c) the qualities and characteristics of locations, places and areas;

(d) heritage values of places; and

(e) the social, economic and cultural aspects of a thing mentioned in paragraph (a), (b), (c) or (d).

1.11 Hence 'environment' captures all the matters dealt with in the Act. To try to identify each of these matters individually in the title would be extremely cumbersome. Simplifying the title of the Act to the *Australian Environment Act* would reflect the all-encompassing nature of the environment and indicate that it is national legislation.

1.12 Many of the Review's recommendations are focused on ensuring that future involvement of the Australian Government in environmental regulation reflects its role in the federation. Australian Government interventions need to be nationally focused and strategic. Any temptation to try to cover the field in environmental regulation should be avoided. The Act should be restructured so as to support a more strategic, targeted and efficient involvement of the Australian Government in environmental protection and management.

1.13 Reordering and redrafting the Act would assist in placing the emphasis on more strategic approaches to regulation and help reduce repetition. Significant simplification could be achieved by creating unified approaches for:

- public participation, consultation processes and timeframes;
- application processes;

1 Interim Report Comment 30: Dr Gerry Bates, p.1.

2 Interim Report Comment 64: International Council on Monuments and Sites (Australia), p.9.

- publication requirements;
- processes for developing and approving management plans; and
- arrangements for issuing permits.

1.14 The simplest way to achieve this reordering and redrafting would be to repeal the Act and replace it with a new *Australian Environment Act*. A complete redraft will enable legislators to use modern drafting techniques which will aid simplification and the clarity of the Act in general, although the effect of many of the provisions that exist currently in the Act will not change.

1.15 References are made throughout this report to 'amending the Act'. This has been used as a deliberate drafting device to facilitate ease of understanding of the proposals for amendment. It is envisaged that the *Australian Environment Act* will incorporate the changes that are recommended.

1.16 In recommending the introduction of the *Australian Environment Act*, the Review has taken into account the elements to be considered when preparing a Regulatory Impact Statement.[3]

1.17 As an example, the Act could be restructured along the following lines.

- Part 1: **Operating framework**, to incorporate:
  - provisions relating to objects and the principles of ESD; and
  - general decision-making criteria for decisions made under the Act (incorporating the provisions currently in Part 16 of the Act).
- Part 2: **Protected matters**, to incorporate:
  - matters of NES (currently in Part 3 of the Act); and
  - actions which do not require approval under the Act (currently in Part 4 of the Act).
- Part 3: **Strategic and landscape approaches to protecting the environment**, to incorporate:
  - bioregional planning (currently in Part 12 of the Act);
  - strategic assessments (currently in Part 10 of the Act); and
  - conservation agreements (currently in Part 14 of the Act).
- Part 4: **Individual project assessments and approvals**, to incorporate:
  - bilateral agreements (currently in Part 5 of the Act); and
  - the process of project-by-project environmental impact assessment and approvals (currently in Parts 7, 8, 9 and 11 of the Act).
- Part 5: **Conservation of biodiversity and heritage**, to incorporate:
  - listing processes for matters of NES and Overseas Places of Historic Significance to Australia and declarations of Commonwealth reserves (currently in Parts 13, 15 and 15A of the Act); and
  - with the exception of provisions relating to permits, most of the provisions for protection and conservation of biodiversity, most of which are currently in Part 13 of the EPBC Act, including:
    - protection of whales and other cetaceans (currently in Part 13, Division 3);
    - conservation advice, recovery plans, threat abatement plans and wildlife conservation plans (currently in Part 13, Division 5);
    - access to biological resources (currently in Part 13, Division 6 and Part 8A of the EPBC Regulations); and
  - provisions for declaring historic shipwrecks.[4]

3 These elements are outlined at Department of Finance and Deregulation, *Australian Government RIS* (2008) http://www.finance.gov.au/obpr/ris/gov-ris.html.

4 See Recommendation 64 in Chapter 18, which proposes that the provisions of the *Historic Shipwrecks Act 1976* (Cth) be incorporated into the amended Act.

- Part 6: **Managing protected areas**, to incorporate:
  - management planning requirements for World Heritage properties, National Heritage places, Ramsar wetlands, Commonwealth Heritage places, Commonwealth reserves, marine reserves (currently in Part 15) and ecosystems of national significance (refer to Chapter 4); and
  - the regime for protecting historic shipwrecks.
- Part 7: **Permits**, to incorporate:
  - permits for actions affecting listed species in or on a Commonwealth area (currently in Part 13, Divisions 1, 2 and 4, Subdivision B);
  - permits relating to whales and other cetaceans (currently in Part 13, Division 3, Subdivision F);
  - permits for international movement of wildlife (currently in Part 13A of the Act); and
  - permits for activities under the:
    - *Australian Heritage Council Act 2003* (Cth);
    - *Environment Protection (Sea Dumping) Act 1981* (Cth);
    - *Historic Shipwrecks Act 1976* (Cth); and
    - *Protection of Movable Cultural Heritage Act 1986* (Cth).[5]
- Part 8: **Public participation processes** for all decisions taken under the Act, to consolidate public participation provisions currently spread throughout the Act. The amended Act would contain a single public participation process for all decisions made under the Act (also including the provisions of Parts 11A and 20A of the Act).
- Part 9: **Monitoring, compliance and enforcement**, to incorporate:
  - monitoring and audit powers (refer to Chapter 16); and
  - remedies available for breaches of the Act (incorporating provisions currently in Parts 17 and 18 of the Act).
- Part 10: **Advisory committees and other statutory bodies**, to incorporate:
  - The TSSC, IAC, AHC, Director of National Parks and Supervising Scientist[6] (similar to the provisions currently in Part 19 of the Act); and
  - The Environment Commission (refer to Chapter 20).
- Part 11: **Reports and environmental accounts**, to incorporate:
  - reporting requirements for annual reports and the State of the Environment reports currently in Part 21 of the Act.
- Part 12: **Special accounts**, including
  - The proposed Environmental Reparations Fund (refer to Chapter 16); and
  - The National Cultural Heritage Account (as currently exists under the *Protection of Movable Cultural Heritage Act 1986* (Cth))[7]
- Part 13: **Definitions and miscellaneous provisions**.

1.18 Chapter 18 discusses the relationship of the EPBC Act with other key pieces of Commonwealth legislation.

5 See Recommendation 64 in Chapter 18, which proposes that the provisions of these Acts be incorporated into the amended Act.

6 See Recommendation 63 in Chapter 18, which proposes that the provisions of the *Environment Protection (Alligator Rivers Region) Act (1978)* (Cth) be incorporated into the amended Act.

7 See Recommendation 64 in Chapter 18, which proposes that the provisions of this Act be incorporated into the amended Act.

Recommendation 1

The Review recommends that the *Environment Protection and Biodiversity Conservation Act 1999* be repealed and replaced with a new Act, the *Australian Environment Act,* which will:

(1) be restructured and drafted to modernise, clarifying, simplify and streamline both language and process;

(2) reduce duplication of processes; and

(3) increase the focus on strategic approaches to environmental management.

Overarching Principles in the Act

1.19 As noted earlier, the Act is the primary vehicle for implementing ESD at the national level. The principles of ESD are set out in s.3A of the Act:

(a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;

(b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation [the precautionary principle];

(c) the principle of inter-generational equity – that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;

(d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making; and

(e) improved valuation, pricing and incentive mechanisms should be promoted.

1.20 Following the conclusion of the IGAE, ESD principles began to be incorporated into Australian environmental legislation. State and Territory planning and environment protection legislation started to contain objects that sought to achieve ecological sustainability[8] or promote the ESD principles.[9]

1.21 The Explanatory Memorandum to the Environment Protection and Biodiversity Conservation Bill 1998 (Cth) noted that the principles of ESD 'are now universally accepted as the basis upon which environmental, economic and social goals should be integrated in the development process.'[10] The enactment of the Act was intended to correct a 'failure to fully recognise and implement' these principles[11] at a national level.

1.22 One of the important facets of the Act has been its focus on ESD-based decision-making. Many submissions both directly and indirectly supported this focus and argued for its retention. For example, Professor Lee Godden, Ms Anne Kallies and Ms Carly Godden argued in their submission that 'there is a strong need to have ESD in a prominent position in the Act'.[12]

1.23 On the other hand, other public comments argued strongly that the Act is failing to protect biodiversity, and a shift from an ESD focus to a stricter environmental protection focus is needed.[13]

8 *Integrated Planning Act 1997* (Qld) s.1.2.1.

9 *Environment Protection Act 1993* (SA) s.10(1). See also *Protection of the Environment Operations Act 1997* (NSW) s.3; and *Environment Protection Act 1997* (ACT) s.3(1).

10 Explanatory Memorandum, Environment Protection and Biodiversity Conservation Bill 1998 (Cth) p.6.

11 Explanatory Memorandum, Environment Protection and Biodiversity Conservation Bill 1998 (Cth) p.6.

12 Interim Report Comment 92: Professor Lee Godden, Ms Anne Kallies and Ms Carly Godden, p.4.

13 See e.g. Interim Report Comment 68: Garners Habitat Action Group and Interim Report Comment 72: Ms Maria Riedl.

1.24 Using ESD principles as guiding principles for the Act poses significant challenges. For example, it is difficult to determine how the principles can be operationalised at the individual decision level, particularly when attempting to consider inter-generational equity and other long-term environmental, social, and economic considerations. Defining success in achieving ESD, given the inherent ambiguity of the ESD principles, is another challenge.

1.25 Despite these challenges, there is 'no other credible candidate for an integrative policy framework'.[14] Sustainable development continues to be a key policy goal at an international level,[15] with general acknowledgement that incorporating environmental considerations into decisions related to social and economic development is the best way to improve environmental outcomes.[16] Professor Stephen Dovers argues that:

> The lack of implementation and achievement should not surprise. If we understand sustainable development as a *higher order social goal*, quick gratification is unlikely… [it is] rather a generational challenge to knowledge, policy and behaviour, and institutional reform.[17]

1.26 The ESD principles should continue to be the guiding principles for administering the Act.

1.27 Some people have tended to view the Act as purely a development control instrument. It is important to note that the Act also provides the enabling framework for:

- threatened species and community identification, management and recovery at a national level;
- management of threatening processes and invasive species;
- identification and management of National, Commonwealth and World heritage;
- creation and management of national reserves;
- marine planning for the Commonwealth marine environment;
- environmental assessment of fisheries management regimes; and
- management of international wildlife trade.

1.28 The recommendations made in this Report are intended to make the Act, and the way it is administered, better reflect the principles of ESD.

1.29 In affirming the principles of ESD as the cornerstone of the Act, some amendments to the objects and structure of the Act are needed.

1.30 An inherent tension arises from weighing the competing principles of ESD. Decision-making outcomes will often differ depending on the proportionate weighting afforded to environmental, social or economic considerations in each case. As much of the decision-making under the Act involves weighting of these considerations and value judgements, a high degree of transparency is needed if the public and proponents are to have trust in the system. This theme is developed in Chapter 14.

1.31 The Act should be amended to make it clear that environmental considerations are to be given primacy over social and economic considerations. Where other considerations are deemed to outweigh environmental ones, it is important that the public understand the decision-maker's reasoning. Recommendation 44 proposes that the Act require decision-makers to publish a statement of reasons with each decision.

1.32 In order to emphasise that environmental considerations are to be considered first, ESD principle (a) should be modified – that is, this principle should read as 'decision-making processes should integrate both long-term and short-term environmental, social, economic and equitable considerations effectively'. This is not just a symbolic change – it is important that decision-makers under the Act give priority to environmental considerations.

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14 Stephen Dovers, 'Policy and Institutional Reforms' in David Lindenmayer, Stephen Dovers, Molly Harriss Olson and Steve Morton (eds) *Ten Commitments: Reshaping the Lucky Country's Environment* (2008), p.216.

15 See e.g. *United National Millennium Development Goals* (2000) http://www.un.org/millenniumgoals/environ.shtml.

16 See e.g. United Nations Development Programme and United Nations Environment Programme, *Mainstreaming Poverty-Environment Linkages into Development Planning: A Handbook for Practitioners* (2009) p.6 http://www.unpei.org/PDF/PEI-full-handbook.pdf.

17 Stephen Dovers, 'Policy and Institutional Reforms' in David Lindenmayer, Stephen Dovers, Molly Harriss Olson and Steve Morton (eds) *Ten Commitments: Reshaping the Lucky Country's Environment* (2008), p.216.

1.33 A recurring theme in public comments throughout the Review has been the Act's perceived failure to manage adequately the cumulative environmental impacts of actions or threatening processes (including climate change) at a landscape or ecosystem scale.[18] Dr Keith Sainsbury noted that:

> Management at the landscape or regional ecosystem level is one of the biggest challenges to Ecologically Sustainable Development, and climate change is going to exacerbate this challenge. Failure of management at this level has already caused our worst failures in sustainable development, particularly in catchments (e.g. Murray-Darling) and coasts (e.g. the estuaries and coasts of most of our large cities). The economic and social cost of rebuilding failed regional ecosystems is huge, and it simply cannot be done in some contexts.
>
> Management at the landscape or regional ecosystem level is needed to address cumulative impacts and cross sectoral (i.e. multiple use) impacts of development, to provide strategic regional planning of development, and to provide mechanisms for dispute resolution. …
>
> At present there are very few mechanisms to coherently or effectively address these issues. The EPBC mechanisms are reactive and mostly triggered by particular events, threats or developments, rather than being proactive, broadly focused and a 'normal' part of planning.[19]

1.34 The nature and scale of current and emerging pressures facing the Australian environment require a landscape response. Consistent with the 'ecosystems approach' adopted by Parties to the *Convention on Biological Diversity* (Biodiversity Convention),[20] the objects and principles of the Act should aim to facilitate positive biodiversity and environmental outcomes at an ecosystems level. This means that the Commonwealth's role in environmental protection should focus on key ecosystem services and functions as well as individual species.

1.35 In placing greater focus on the ecosystems level, the Commonwealth should not abandon its commitment to protecting the environment on the species and ecological communities levels. One reason is the intrinsic environmental value of species and ecological communities. Another is that the current level of engagement of the members of the public with the Act is a function of their ability to relate to a tangible entity, such as an individual species, to achieve outcomes for something they can see, and to feel that they are making a difference. Species and ecological communities are pivotal points of value that often drive the community's level of engagement in environmental issues.

1.36 The Act has made a significant positive difference to the protection of matters of NES. However, the Commonwealth's ability to manage and protect the environment into the future can be improved. The range of approaches for protecting the environment under the Act needs to be expanded to encompass landscapes and ecosystems. This expansion of Commonwealth regulation could also enhance coordination and efficiency in environment protection at a national level. This is discussed further in Chapter 2.

1.37 The result of this shift should be protection of a 'representative array of ecosystems'[21] to allow species the maximum chance of survival in a changing climate. As stated by the Biodiversity and Climate Change Expert Advisory Group in its recent report on *Australia's Biodiversity and Climate Change*:

> Not only is it important to have well-functioning ecosystems, but the full diversity of these systems needs to be included in areas managed for conservation. This basic principle of conservation needs renewed emphasis and re-interpretation under climate change. The principle of representativeness – representing all biodiversity in appropriately managed systems – remains essential under climate change. However, the purpose is now to represent as many different combinations of underlying environments and drivers, rather than specific arrays of current species. While the particular assemblages of species or genes in a single location may change, aiming to encompass diversity provides the best likelihood of having favourable conditions for all biodiversity somewhere. This applies at all scales from local through regional to national, in that a diversity of several stages (e.g. time since fire) should be maintained locally; all environments should be represented in regional reserve systems, and a diversity of landscape architectures in terms of the arrangements of patches and connecting habitats should be represented in regional on- and off-reserve landscapes.[22]

18 See e.g. Submission 35: Shoalhaven City Council, p.2; Submission 172: Department of Sustainability and Environment, Victoria, pp.4-5; Submission 164: Minerals Council of Australia, p.16; Submission 151: Southern Rivers Catchment Management Authority, p.1; Submission 87: Environment Institute of Australia and New Zealand; and Submission 84: Bird Observation and Conservation Australia, p.1.

19 Interim Report Comment 8: Dr Keith Sainsbury, p.1.

20 The *Convention on Biological Diversity* done at Rio de Janeiro on 5 June 1992 (Biodiversity Convention). The principles of the ecosystems approach are outlined at 1.45 below.

21 Biodiversity and Climate Change Expert Advisory Group, *Australia's Biodiversity and Climate Change: Technical Synthesis* (2009) p.42.

22 Biodiversity and Climate Change Expert Advisory Group, *Australia's Biodiversity and Climate Change: Technical Synthesis* (2009) pp.42-43.

1.38 Hence the Act should, where relevant, emphasise principle (d) of the ESD principles:

> 'the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision making'.

1.39 Emphasising this principle should focus the Act (and the Commonwealth's administration of the Act) on the 'bigger picture'. While retaining the ability to protect individual species and ecological communities, the Act would focus on the broader intent of preserving the integrity of the ecosystems in which they exist. The primacy of this consideration is underlined in the discussion of the objects of the Act below.

Recommendation 2

The Review recommends that the Act:

(1) confirm ecologically sustainable development (ESD) principles as the overarching principles underpinning decision-making under the Act;

(2) emphasise that environmental considerations are to be considered first when making decisions under the Act – 'decision-making should integrate both long-term and short-term environmental, social, economic and equitable considerations effectively'; and

(3) emphasise ESD principle (d) – 'the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making'.

Key International Obligations

1.40 As discussed in the Interim Report, the Act is intended to be part of Australia's implementation of international environmental agreements to which it is a Party. Australia's international obligations with respect to the environment are implemented variously under Commonwealth and State and Territory legislation.

1.41 The agreed division of responsibility for the environment between the Australian, State and Territory and Local governments is set out in the 1997 Agreement between COAG and Local Government representatives, the *Heads of agreement on Commonwealth and State roles and responsibilities for the Environment*[23] (Heads of Agreement). The Heads of Agreement outlines 30 matters of NES on which the Commonwealth should focus its involvement.

1.42 The Heads of Agreement provides that the Commonwealth assessment and approval processes would only be triggered by proposals that may have a significant impact on the following seven matters of NES:

- World Heritage properties;
- Ramsar listed wetlands;
- places of national significance;
- nationally endangered or vulnerable species and communities;
- migratory species and cetaceans;
- nuclear activities; and
- management and protection of the marine and coastal environment.[24]

23 Council of Australian Governments, *Heads of agreement on Commonwealth and State roles and responsibilities for the Environment* (1997) http://www.environment.gov.au/epbc/publications/coag-agreement/index.html.

24 *Heads of agreement on Commonwealth and State roles and responsibilities for the Environment* (1997) Attachment 1, http://www.environment.gov.au/epbc/publications/coag-agreement/attachment-1.html.

1.43 The remaining 23 matters of NES were agreed as matters in which the Commonwealth has interests and responsibilities, but which would not immediately trigger the Commonwealth environmental assessment and approval processes under what became the EPBC Act:

- reducing emissions of greenhouse gases and protecting and enhancing greenhouse sinks;
- regulation of ozone depleting substances;
- conservation of biological diversity;
- protection and management of forests;
- genetically modified organisms which may have an adverse impact on the environment;
- agricultural, veterinary and industrial chemicals;
- matters requiring national environment protection measures;
- management of hazardous wastes relating to Commonwealth obligations arising from the *Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal*;[25]
- access to biological resources;
- international trade in wildlife arising from obligations under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*;[26]
- development and maintenance of national environmental and heritage data sets arising from intergovernmental arrangements and international obligations;
- applying uniform national emissions standards to motor vehicles;
- policies and practices of a State resulting in potentially significant adverse external effects in relation to the environment of another State, where the States involved cannot resolve the problem;
- 'national interest ' environmental matters as covered by the *Telecommunications Act 1997* (Cth);
- quarantine matters;
- aviation airspace management including assessment of aircraft noise and emissions;
- Natural Heritage Trust Programmes;
- implementation of the National Strategy for Ecologically Sustainable Development;[27]
- nationally significant feral animals and weeds;
- conservation of native vegetation and fauna;
- prevention of land and water degradation;
- matters that are from time to time agreed by the Commonwealth and the States as being matters of national environmental significance; and
- proposals on Commonwealth lands and waters and proposals which are beyond the jurisdiction of States and Territories (e.g. foreign aid proposals).[28]

1.44 Key among the international agreements to which Australia is a party is the Biodiversity Convention, under which Australia has several obligations. The Biodiversity Convention does not specify a particular level of government that should have primary responsibility for implementing Parties' obligations under the Convention. This is a matter to be determined by each Party to the Convention for their own purposes. Under the Heads of Agreement, the Australian Government has a key role in implementing some of the obligations arising under the Convention, such as those that relate to the protection of threatened species and ecological communities, and the management of protected areas.

25 *Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, done at Basel on 22 March 1989.

26 *Convention on International Trade in Endangered Species of Wild Fauna and Flora*, done at Washington on 3 March 1973.

27 National Strategy for Ecologically Sustainable Development, (1992) http://www.environment.gov.au/esd/national/nsesd/index.html.

28 *Heads of agreement on Commonwealth and State roles and responsibilities for the Environment* (1997) Attachment 1, http://www.environment.gov.au/epbc/publications/coag-agreement/attachment-1.html.

1.45 The Conference of the Parties to the Convention has affirmed on several occasions that 'the ecosystems approach should be the primary framework of action to be taken under the Convention'.[29] The ecosystems approach, as applied under the Biodiversity Convention, contains 12 principles:

- Principle 1: The objectives of management of land, water and living resources are a matter of societal choices.
- Principle 2: Management should be decentralised to the lowest appropriate level.
- Principle 3: Ecosystem managers should consider the effects (actual or potential) of their activities on adjacent and other ecosystems.
- Principle 4: Recognising potential gains from management, there is usually a need to understand and manage the ecosystem in an economic context. Any such ecosystem-management programme should:
  - reduce those market distortions that adversely affect biological diversity;
  - align incentives to promote biodiversity conservation and sustainable use; and
  - internalise costs and benefits in the given ecosystem to the extent feasible.
- Principle 5: Conservation of ecosystem structure and functioning, in order to maintain ecosystem services, should be a priority target of the ecosystem approach.
- Principle 6: Ecosystems must be managed within the limits of their functioning.
- Principle 7: The ecosystems approach should be undertaken at the appropriate spatial and temporal scales.
- Principle 8: Recognising the varying temporal scales and lag-effects that characterise ecosystem processes, objectives for ecosystem management should be set for the long term.
- Principle 9: Management must recognise the change is inevitable.
- Principle 10: The ecosystems approach should seek the appropriate balance between, and integration of, conservation and use of biological diversity.
- Principle 11: The ecosystems approach should consider all forms of relevant information, including scientific and indigenous and local knowledge, innovations and practices.
- Principle 12: The ecosystems approach should involve all relevant sectors of society and scientific disciplines.[30]

1.46 The Act should be amended to incorporate these principles of the ecosystems approach.

1.47 Many of the Review's recommendations are aimed at furthering an ecosystems approach to biodiversity conservation, for example by protecting ecosystems of national significance, promoting regional approaches to environmental protection and providing for management plans that are able to adapt to changing environmental conditions.

Objects of the Act

1.48 Like many other Acts aimed at protection of the environment, the EPBC Act has a multitude of objects. Redrafting the objects of the Act would clarify its focus, increase efficiency and improve administration.

1.49 In order to give the amended Act a much clearer sense of direction, it should have a primary object. It is important that this object reflects the aim of the Act, which is to protect the environment within the context of ESD. An object that promises strict environmental protection risks drawing the legislation into disrepute when it is clear that social and economic considerations will sometimes legitimately be considered by decision-makers under the Act. This intent could be reflected by creating a primary object along the following lines:

(1) The primary object of this Act is to protect the environment, through the conservation of ecological integrity and nationally important biological diversity and heritage.

29 See e.g. Conference of the Parties (COP) Decision II/8; Decision IV/1 B; Decision V/6; Decision VI/12; Decision VII/11; and Decision IX/7.

30 Convention on Biological Diversity, *Principles* (2007) http://www.cbd.int/ecosystem/principles.shtml.

1.50 Consistent with Recommendation 2 above, this provision elevates consideration of the environment as the primary object of the Act, with social and economic issues only to be taken into account as secondary considerations. The conservation of ecological integrity is included in the primary object to emphasise principle (d) of the ESD principles. Nationally important heritage is also included in the primary object, as 'ecological integrity' and 'biological diversity' do not capture all of the possible heritage values.

1.51 The proposed primary object also highlights that the Australian Government's focus for environmental matters is on *nationally* important biodiversity and heritage. It is important to remember that the Australian Government's role is to act in Australia's 'national' interest. The focus of the Act must therefore continue to be on matters of *national* environmental significance and *nationally* important biodiversity and heritage, leaving other environmental matters of importance at a State, Territory or local level to those State, Territory and Local Governments as the more appropriate managers.

1.52 Subsequent provisions should be inserted in the Act to specify how this object is to be achieved. These provisions should read as follows:

(2) In particular this Act protects matters of national environmental significance and, consistent with this, seeks to promote beneficial economic and social outcomes.

(3) The primary object is to be achieved by applying the principles of ecologically sustainable development as enunciated in the Act.

(4) The Minister and all agencies and persons involved in the administration of the Act must have regard to, and seek to further, the primary object of this Act.

1.53 These secondary objects reflect an appropriate focus on matters of *national* environmental significance (instead of all environmental matters).

1.54 The objects currently in section 3(1)(d) to (g) of the Act should then be included in a new, and better focused, set of subsidiary objects, as follows:

In pursuing the primary object, the Minister should:

(a) encourage public participation in the making of decisions that impact on the environment;

(b) promote cooperation with State, Territory and Local government in environmental protection and management;

(c) assist in the cooperative implementation of Australia's international environmental responsibilities;

(d) recognise the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity;

(e) promote the use of Indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge; and

(f) promote fair and efficient decision-making.

1.55 The subsidiary objects affirm that the Commonwealth does not, and should not, act in isolation in protecting and managing the environment. While the Commonwealth should take a leadership role in protecting matters of NES, protection of these matters requires the cooperation of all levels of government and the broader community. The subsidiary objects affirm this principle.

Recommendation 3

The Review recommends that the objects of the Act be revised along the following lines:

(1) the primary object of this Act is to protect the environment, through the conservation of ecological integrity and nationally important biological diversity and heritage.

(2) in particular, this Act protects matters of national environmental significance and, consistent with this, seeks to promote beneficial economic and social outcomes.

(3) the primary object is to be achieved by applying the principles of ecologically sustainable development as enunciated in the Act.

(4) the Minister and all agencies and persons involved in the administration of the Act must have regard to, and seek to further, the primary object of this Act.

(5) in pursuing the primary object, the Minister should:

  (a) encourage public participation in the making of decisions that impact on the environment;

  (b) promote cooperation with State, Territory and Local government in environmental protection and management;

  (c) assist in the co-operative implementation of Australia's international environmental responsibilities;

  (d) recognise the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity;

  (e) promote the use of Indigenous peoples' knowledge of biodiversity with the involvement of, and in cooperation with, the owners of the knowledge; and

  (f) promote fair and efficient decision-making.

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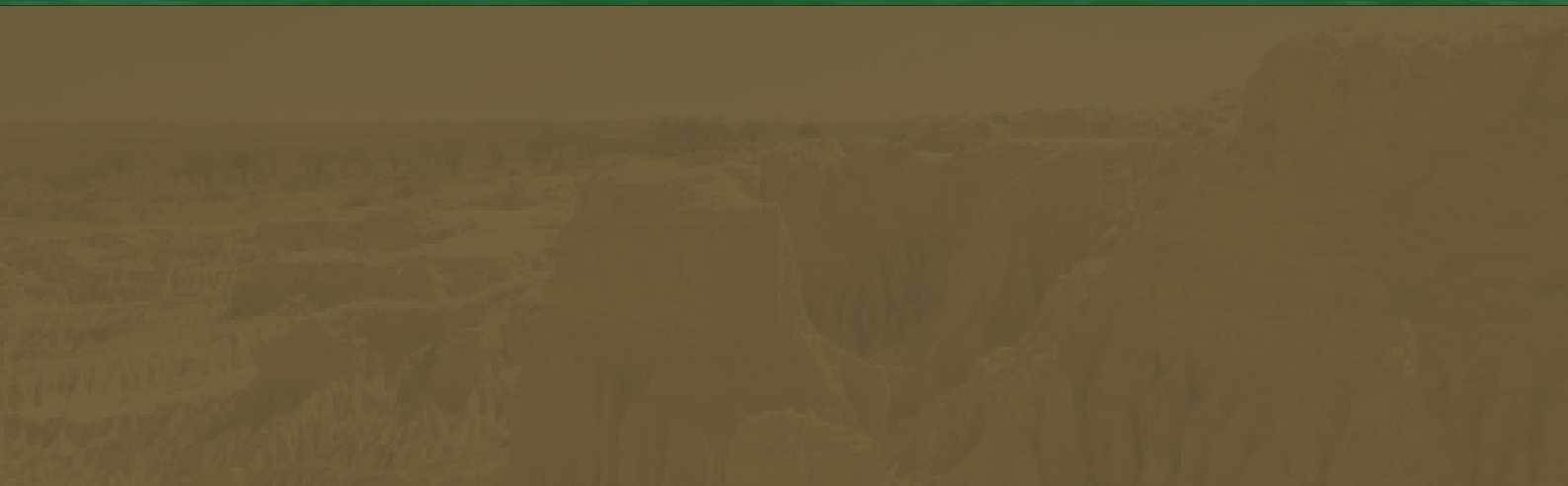
Chapter Two A NATIONAL APPROACH



Chapter 2: A National Approach

A National Approach to Environmental Protection

2.1 Commonwealth regulation and management of the environment occurs within a federal structure. The role and content of the Act continues to be shaped by key intergovernmental agreements and environmental policies.

2.2 The changes recommended by this Review are designed to support and emphasise the Commonwealth's role in setting national standards and where appropriate initiating mechanisms that encourage the States and Territories to adopt these standards.

2.3 This Chapter discusses ways in which a national approach to environmental protection can be progressed with maximum procedural efficiency and makes recommendations focused on the Commonwealth taking a greater leadership role in managing and conserving Australia's environment.

2.4 The recent report commissioned by the Natural Resources Management Ministerial Council (NRMMC) *Australia's Biodiversity and Climate Change*[1] highlights the challenges faced by our biodiversity and ecosystems nationally. In particular, the report highlights the magnitude and rate of climate change, which pose particularly severe threats to natural ecosystems. The interaction of climate change and existing stressors means that significant change is required to Australia's policy and management frameworks.

2.5 The authors of the NRMMC report suggest that strategies based on building resilient landscapes, proactive interventions and flexible policy and management approaches will be best suited to managing these systemic changes. The Commonwealth's role, and the role of the Act itself, should be to establish a regulatory environment that works to support these changes over time.

2.6 The Australian Government's role in environmental regulation should be:

- to ensure that matters of national environmental significance (NES) are properly managed and protected;
- to ensure that impacts from actions by the Australian Government do not have unacceptable environmental outcomes;
- to promote national standards; and
- to facilitate the creation and maintenance of effective and efficient national institutional arrangements.

2.7 A good example is the subsidiarity principle that is applied to heritage protection. It is now widely accepted that the Australian Government's role is to identify and protect national and world heritage. The responsibility for state, regional and local heritage protection rests with State and Territory governments. A similar concept needs to be pursued for other matters of environmental protection. The Commonwealth Environment Minister is not, and should not be seen as, the sole arbiter on all environmental issues.

2.8 This Chapter focuses on national approaches to impact assessment and the listing of threatened species and ecological communities. Regional planning and strategic assessment are covered in later chapters.

2.9 This Review's recommended changes to the Act rest on the existing constitutional powers of the Commonwealth and do not require further authorisation. Nonetheless, it would be helpful for COAG and local government representatives to negotiate a new implementation agreement, similar to the 1997 *Heads of agreement on Commonwealth and State roles and responsibilities for the Environment*[2] (Heads of Agreement) to ensure that the proposed changes are implemented in a nationally consistent and streamlined approach.

1 Biodiversity and Climate Change Expert Advisory Group, *Australia's Biodiversity and Climate Change: a strategic assessment of the vulnerability of Australia's biodiversity to climate change – Technical Synthesis (2009).*

2 Council of Australian Governments, *Heads of agreement on Commonwealth and State roles and responsibilities for the Environment* (1997) http://www.environment.gov.au/epbc/publications/coag-agreement/index.html.

Working with States and Territories to Improve Efficiencies in Impact Assessment

The Commonwealth's Role in a National System

2.10 The Commonwealth's role in a national system should be one of leadership, as a champion of the national interest, and a standard-setter in environmental management. Five processes define how this role can be operationalised in an efficient and non-duplicative manner:

(1) **harmonisation** – the Commonwealth should harmonise its practices with State and Territory regimes to the extent possible;

(2) **accreditation** – the Commonwealth should focus on accreditation of State and Territory processes that meet requisite Commonwealth standards;

(3) **standardisation** – the Commonwealth should facilitate uniform regulatory systems between the States and Territories;

(4) **simplification** – the Commonwealth should provide streamlined Environmental Impact Assessment (EIA) processes; and

(5) **oversight** – the Commonwealth should engage in performance monitoring of accredited systems.

The Drive for Regulatory Efficiency and Harmonisation

2.11 This Review has been guided by key Australian Government policy objectives, including:

- to work in partnership with the States and Territories within an effective federal arrangement;
- the Australian Government's deregulation agenda to reduce and simplify the regulatory burden on people, businesses and organisations, while maintaining appropriate and efficient environmental standards; and
- to ensure activities under the Act represent the most appropriate, efficient and effective ways of achieving the Government's outcomes and objectives in accordance with the Expenditure Review Principles.[3]

2.12 While the Act is the Commonwealth's primary piece of national environmental legislation, the States and Territories each have their own legislation.

2.13 Sometimes, the responsibilities of these two levels of government overlap, creating inefficiencies and duplication. State and Territory regimes may also have different approaches to environmental issues (such as threatened species listing) compared with the Act. Different administrators can make different judgments, often resulting in tensions. This is not always, or even usually, a bad outcome. The strength of the Australian Federation is the creative policy tension brought about by the federal system.

2.14 A number of potential inefficiencies have been identified within the operation of the Act, partly arising from overlaps with State and Territory legislation. These include:

- inconsistencies with and differences between State and Territory regulatory systems, creating gaps in regulation and confusion for cross-jurisdictional stakeholders;[4]
- a focus on individual project assessments rather than landscape based assessment;[5]
- a focus on recovery of single species;[6]
- duplication of processes;[7]

3 Terms of Reference for the Independent Review of the *EPBC Act*, 3(b), (d) and (e).

4 Interim Report Comment 5: Invasive Species Council (Australia); Interim Report Comment 6: The Australasian Native Orchard Society; Submission 89: WA Recreational and Sports Fishing Council; and Submission 164: Minerals Council of Australia.

5 Interim Report Comment 32: Magnetic Island Community Development Association; Interim Report Comment 76: Institute of Foresters of Australia; Interim Report Comment 93: Country Fire Authority (Victoria).

6 Interim Report Comment 49: CSIRO.

7 Interim Report Comment 95: National Farmers' Federation; Interim Report Comment 80: Australian Industry Greenhouse Network; Interim Report Comment 3: Mr Matthew Dickie; Interim Report Comment 9: Timber Communities Australia (Derwent Valley Branch); and Interim Report Comment 11: Timber Communities Australia (Meander Resource Management Group).

- regulation by multiple authorities/regulatory agencies;[8] and
- lack of suitable standards.[9]

2.15 Ms Julie Vint forcefully put the case for harmonisation of laws and policies:

> Australia is inherently important. Australia is nationally environmentally significant as a whole. One piece is no more important than another and one part is inextricably linked to all the others. To have more than one policy state by state, territory by territory, local government by local government is nonsense, incomprehensible, complacent, inefficient and unachievable… To have fragmented legislation across the country via states, territories and local governments has proven unworkable.[10]

2.16 An ecosystem based approach to environmental management, with the Commonwealth accrediting and monitoring the performance of state systems, is likely to provide efficiency dividends and reduce duplication.

2.17 However, a focus on proactive ecosystem based management does not mean that there should be no further case-by-case project assessment. Similar to the continuing need for protection of individual threatened species or threatened ecological communities, a system of individual project approvals will still be needed.

2.18 Despite the continued support for project level assessment, submissions and consultations identified a number of ways to improve the efficiency of the assessment processes without compromising environmental outcomes. Discussion of possible improvements follows. Recommendations relating to the detail of project assessments are found in Chapter 7, and specific issues relating to regional approaches are dealt with in Chapter 3.

Accreditation of State Processes

2.19 The Interim Report outlined the benefits of bilateral agreements and strategic assessments in generating efficiencies in environmental management and in harmonising Commonwealth, State and Territory processes. Both COAG[11] and State and Territory governments have expressed strong support for assessment bilateral agreements, approval bilateral agreements, and strategic assessments.[12] COAG has:

> agreed to the identification of opportunities for strategic assessments under the *Environment Protection and Biodiversity Conservation Act 1999* to avoid unnecessary delays in development approval processes. Strategic assessments are conducted over an entire region and provide a mechanism to approve classes of development which have been assessed under this process, rather than conducting individual assessments and approvals. Strategic assessments provide certainty for development proponents and reduce duplication, while providing greater protection for the environment.[13]

2.20 The Queensland Government suggested that:

> The use of strategic assessment processes should be promoted with a view to 'front loading' local area or issue specific plans, therefore minimising the need for assessment and approval or individual components of large, multifaceted development proposals.[14]

The South Australian Government suggested that the Commonwealth accredit actions under various South Australian environmental statutes.[15]

8 Interim Report Comment 84: Australasian Regional Association for Zoological Parkes and Aquaria.
9 Interim Report Comment 85: Environment Institute of Australia and New Zealand.
10 Interim Report Comment 21: Ms Julie Vint, p. 4.
11 See e.g. Council of Australian Governments, *3 July 2008 Communique* (2008) http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/index.cfm.
12 Including: Submission 205: Government of New South Wales; and Submission 200: Government of Tasmania.
13 Council of Australian Governments, *3 July 2008 Communique* (2008) http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/index.cfm.
14 Submission 196: Government of Queensland, p.2.
15 Submission 199: Government of South Australia.

Bilateral Agreements

2.21 Chapter 3 of the Act empowers the Minister to enter into bilateral agreements with the States and Territories as a means of streamlining environmental regulation.

2.22 There are two forms of bilateral agreement:

- an assessment agreement – where State or Territory processes are used to assess the environmental impacts of a proposed action but the approval decision is made under the Act; and
- an approval agreement – where actions that are subject to a bilaterally accredited management arrangement or authorisation process in place under State or Territory law do not require further assessment or approval under the Act.

2.23 Assessment bilateral agreements are in place with all States and Territories, and an approvals bilateral is in place with the NSW Government to protect the National Heritage and World Heritage values of the Sydney Opera House.

Assessment Bilateral Agreements

2.24 Industry groups and State and Territory governments generally supported assessment bilateral agreements as mechanisms for reducing duplication and streamlining processes. Actions assessed under bilateral agreements undergo a single assessment which then provides the basis for both the Commonwealth and the State or Territory approval decisions.[16]

2.25 However, many submissions raised concerns about the quality of assessments completed under bilateral agreements. They argued that the bilateral process was used solely to streamline assessments, and not to create a higher standard of impact assessment.[17] Rather, bilateral agreements were seen as simply encouraging accreditation of the process that was the 'lowest common denominator',[18] or a 'race to the bottom'.[19]

2.26 The concerns of environmental groups were echoed in the report of the Senate Inquiry, which recommended:

> that the Independent Review of the EPBC Act and / or the ANAO examine the effect of existing bilateral agreements on the quality of environmental assessments of matters of national environmental significance. The committee suggests that particular regard be given to the transparency of, public engagement in, and appeal rights in relation to assessments performed under a bilateral agreement, compared to the conditions that would have existed had the assessment been performed under the EPBC Act.[20]

2.27 The Interim Report examined the effect of existing assessment bilateral agreements and found that criticisms of accredited State processes failed to recognise that the concerns they have with the State legislation do not pass through to the EPBC Act decisions. However, approvals bilateral agreements should not be entered into where they curtail or diminish rights of appeal.

2.28 The rationale for assessment bilateral agreements is that multiple assessments of a single action do not make sense when relevant information for all decisions can be obtained from a single assessment.

2.29 In practice, the main issue with the assessment bilateral agreements is the breakdown in relations between State and Territory agencies and Commonwealth assessors. The strain in the relationship is most evident in NSW, with strong criticisms of the operation of the bilateral agreement seen in submissions to this Review[21] and to the Senate Inquiry.[22] The NSW Government submitted 'that implementation of [bilateral agreements] has been characterised by complexity and delay'.[23] The Commonwealth and NSW Government have since undertaken an operational review that identified practical initiatives to ensure effective future relationships. A number of these initiatives are reflected in this Review's recommendations.

16 See e.g. Interim Report Comment 48: Powerlink; Submission 67: Santos; Submission 164: Minerals Council of Australia; and Submission 97: Mr Peter Hemphill and Mr Tom Kaveney.

17 See e.g. Submission 55: Conservation Council (ACT Region); and Interim Report Comment 31: Mr Ed Wensing.

18 Submission 161: National Parks Australia Council; and Interim Report Comment 77: National Parks Association (NSW).

19 Interim Report Comment 92: Professor Lee Godden, Ms Anne Kallies and Ms Carly Godden.

20 The Senate Standing Committee of Environment, Communication and the Arts, *The operation of the Environment Protection and Biodiversity Conservation Act 1999: First Report* (2009) para.[6.15] (Senate Committee Report) available at http://www.aph.gov.au/senate/committee/eca_ctte/epbc_act/report/index.htm.

21 Submission 189: The Australian Network of Environmental Defender's Offices; Interim Report Comment 58: NSW Young Lawyers – Environmental Law Committee.

22 Senate Committee Report, paras. [4.11-4.17].

23 Submission 205: Government of New South Wales, p.1.

2.30 Amendment of the legislation or the bilateral agreements is unlikely to improve the operation of the agreements. What is required is better understanding between the two regulators. DEWHA needs to establish administrative arrangements designed to improve the working procedures between Commonwealth and State agencies. This could include cooperation earlier in the assessment process, development of closer working relationships, collaboration between Departments, and standardisation of process and information requirements. An ongoing process is also needed to ensure that the schedule of administrative arrangements specified in each bilateral agreement is kept up-to-date.

2.31 If the Act is amended following this Review, the existing assessment bilateral agreements would need to be renegotiated as soon as possible to reflect the changes to the Act. The processes accredited under the agreements would need to meet the prescribed standards of the amended Act and those recommended by the Senate Inquiry.[24] This would be a step towards greater standardisation of EIA processes, discussed in further detail below.

Assessment Bilateral Agreements and State Government Projects

2.32 A range of submissions generally supported bilateral agreements, but argued they should not be used to assess state government affiliated projects.[25] The essence of the argument was that a state agency assessing a state government project may be prone to bias, may understate the environmental impacts of a project, overstate the effects of mitigations, offsets and conditions, and be insensitive to public comments.[26] At the Infrastructure Workshop held on 10 September 2009, the counter argument was put forward – that state government projects are sometimes subject to more stringent assessments than private sector projects.

2.33 To address the apprehension of bias in these assessments, it is recommended that these projects be assessed by public inquiry or joint-panels involving Commonwealth and state representatives. Details of the operation of joint-panels are set out later in this Chapter.

Approval Bilateral Agreements

2.34 Industry groups and State and Territory governments have called for greater use of approval bilateral agreements.[27] The Council for the Australian Federation noted that:

> Approvals bilaterals have the potential to:
>
> - reduce the timeframes for obtaining approvals;
> - avoid potential inconsistency of conditions;
> - avoid inconsistent administration of assessment and approvals; and
> - reduce the administrative requirements that States and Territories bear under the EPBC Act, because the entire process would be accredited.[28]

2.35 Environmental NGOs were generally opposed to the use of approvals bilateral agreements believing they represent an abdication of Australian Government responsibility, and that State and Territory governments would inevitably have regard only to State and Territory concerns and ignore the national interest.[29] The NGOs' view is that approval bilateral agreements would result in the removal of beneficial Commonwealth environmental regulation.

2.36 As noted in Chapter 3, the Commonwealth should give full faith and credit to state systems that are proven to provide good environmental outcomes. Where approval bilateral agreements are used in the future, the Commonwealth will need a monitoring, performance audit and oversight power to ensure that the process accredited is achieving the outcomes it claimed to accomplish. Performance audit criteria will need to be specified for the accredited system before approval is granted.

24 Senate Committee Report, Recommendation 6.
25 See e.g. Submission 41: Mr Steve Burgess and Ms Elaine Bradley; Submission 45: Mary River Catchment Coordinating Committee.
26 Submission 72: Mr Lyndon DeVantier.
27 See e.g. Submission 12: Nexus Energy; Submission 97: Mr Peter Hemphill and Mr Tom Kaveney; Interim Report Comment 48: Powerlink.
28 Letter from the Hon Anna Bligh (Chair of the Council for the Australian Federation) to Dr Allan Hawke, 13 August 2009, pp. 3-4.
29 See e.g. Submission 182: Humane Society International.

2.37 The criteria should include at a minimum that the accredited system:

- improves or maintains all matters of NES, including;
  - the persistence of threatened and migratory species;
  - the integrity of threatened ecological communities and critical habitat;
  - the function of the Commonwealth marine environment;
  - the values of heritage areas;
  - the character of Ramsar wetlands; and
  - the character of ecosystems of national significance;
- provides a transparent and robust system of compliance auditing;
- ensures decisions are made that identify and manage uncertainties;
- demonstrates active adaptive management in responding to emerging threats, non-compliance and public concerns;
- clearly identifies when considerations other than environmental impacts, for example social and economic considerations, are taken into account in decision-making;
- allows meaningful public participation and input;
- provides a decision-making framework that prevents significant environmental impacts where possible, mitigates unavoidable impacts, and offsets any impacts that will occur;
- produces a transparent and verifiable report of environmental performance; and
- maintains sufficient landscape function, including habitat and biodiversity values.

If anticipated outcomes are not achieved, the consequences should be clearly specified, including the reimposition of prescriptions.

2.38 If approval bilateral agreements are to be used under the Act, the Commonwealth will need to accredit processes that contain a range of procedural safeguards and appeal rights. National standardisation of EIA methods could support a move to approval bilateral agreements in the future. To this end, the Commonwealth should retain the option to enter into approval bilateral agreements.

Strategic Assessments

2.39 The Senate Inquiry notes that 'while strategic impact assessments appear to be supported in theory, the evidence suggests they may be controversial in practice'.[30] Since the commencement of this Review, and the conclusion of the Senate Inquiry, a number of strategic assessments have commenced. These assessments will provide lessons for future strategic assessment practice.[31]

2.40 The benefits of strategic assessments outweigh the potential risks. There should be increased use and improvements to the useability of strategic assessments, subject to the changes which are outlined in Chapter 3.

Defence Activities and Defence Managed Lands

2.41 The Act prescribes regulation of:

- an action taken by any person on Commonwealth land that is likely to have a significant impact on the environment;[32]
- an action taken by any person outside of Commonwealth land that is likely to have a significant impact on the environment on Commonwealth land;[33] and
- an action taken by a Commonwealth agency anywhere in the world that is likely to have a significant impact on the environment.[34]

30 Senate Committee Report, para. [3.53].

31 See e.g. the ANEDO's comments on the strategic assessment of Melbourne Urban Growth Boundary – Interim Report Comment 94: The Australian Network of Environmental Defender's Offices; see also Interim Report Comment 88: WWF.

32 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.26(1).

33 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.26(2).

34 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.28.

2.42 This requirement creates a regulatory burden on Commonwealth agencies, and particularly affects the Department of Defence, which describes itself as:

> The largest public sector land owners in Australia, directly responsible for managing over 2.8 million hectares of land. Defence sites are located in all types of environments across the Australian landscape, and generally have high to very high ecological values.[35]

2.43 The Department of Defence administers an environmental management system (EMS) over Defence land.[36] There is no doubt that the Defence's extensive EMS duplicates many of the requirements of the Act. This duplication can lead to delays in approval processes, and unnecessary expenditure of resources.

2.44 The environmental assessment work undertaken by Defence should be recognised. Whether this is by way of synchronisation or integration of Defence's EMS into the Act's EIA processes, or some degree of accreditation of Defence systems (subject to regular review or audit) is a matter for further consideration. If such a process were to be employed, it could provide a suitable model for other Australian Government agencies.

2.45 Defence's EMS could be accredited under the Act (outlined in Chapter 3), provided it meets the required standards. If the Environment Minister did accredit an EMS, the Minister would need to maintain an oversight and performance audit capacity to ensure that the EMS is being adequately implemented and is having the environmental outcomes predicted at the time of accreditation – that is, it should satisfy the performance audit criteria outlined above. Accreditation has potential for streamlining processes and creating efficiencies for both the Department of Defence and the Environment Minister, while maintaining high environmental standards. As with an approval bilateral agreement, if anticipated outcomes are not achieved, the consequences should be clearly specified, including the potential for reimposing prescriptions.

2.46 Other federal agencies have indicated that the Act's requirements may duplicate their existing environmental management programs. This creates unnecessary burdens for agencies that already have systems in place to manage protected matters. Regulation of agencies with appropriate EMSs places an extra burden on DEWHA, without achieving any additional environmental benefits. Consequently, there may be scope for other agencies, such as AusAID and the Department of Finance and Deregulation, to seek similar accreditation of their EMSs and processes.

Assessment Methods

Standardisation of State, Territory and Commonwealth Environmental Impact Assessment Regimes

2.47 Submissions to this review highlighted the structural and procedural differences between the impact assessment regimes of the States and Territories and the Commonwealth. It was suggested that these differences created inefficiencies and delays.[37]

2.48 In 1991, Governments within Australia tried to streamline the assessment methods by adopting a series of principles intended to guide impact assessment regimes.[38] This process has been continued through the negotiation of assessment bilateral agreements between the Commonwealth and State and Territory governments, subject to the requirement of the Act and its Regulations.[39]

35 Department of Defence, *Submission to the Senate Inquiry into the operation of the EPBC Act* (2009) http://www.aph.gov.au/senate/committee/eca_ctte/epbc_act/submissions/sub67.pdf.

36 Department of Defence, *Defence Environmental Management – Environmental Management System* (2009) http://www.defence.gov.au/environment/ems.htm.

37 See e.g. Interim Report Comment 5: Invasive Species Council (Australia); Interim Report Comment 6: The Australasian Native Orchard Society; Interim Report Comment 95: National Farmers' Federation; Interim Report Comment 80: Australian Industry Greenhouse Network; Interim Report Comment 3: Mr Matthew Dickie; Interim Report Comment 9: Timber Communities Australia (Derwent Valley Branch); and Interim Report Comment 11: Timber Communities Australia (Meander Resource Management Group).

38 See Australian and New Zealand Environment and Conservation Council (1991) *A National Approach to Environmental Impact Assessment in Australia*.

39 *Environmental Protection and Biodiversity Regulations 2000* (Cth) reg. 3.01.

2.49 Some benefits would derive from ensuring that EIA regimes operate on a similar set of principles, but real gains in efficiencies would result from a single unified system of impact assessment. Professor Lee Godden, Ms Anne Kallies and Ms Carly Godden commented that:

> This submission supports the approach that bilateral agreements have, by and large, failed to achieve significant gains in the standards set for assessments and it would strongly favour national standards in all jurisdictions. This could be achieved through CoAG, but would be better advanced through mirror 'legislation.'[40]

2.50 Creating a uniform set of assessment methods to be used by the State, Territory and Australian governments would involve technical and political complexities, and such standardisation would need to be developed through COAG.[41] A uniform system would ideally be implemented through 'mirror-legislation' or a model code, but could also be set up through standard assessment guidelines. Development of standardised EIA methods would generate efficiencies, particularly for companies operating in multiple jurisdictions, and could provide the basis for greater use of approval bilateral agreements.

2.51 National standardised methods of EIA would require substantial environmental scrutiny and public participation. The standards would need to be documented and publicly available, and provide clear rules on the requirements and differences between each of the assessment methods. These rules would then form the basis for determining the most appropriate assessment method for each project. Dialogue about EIA standards would need to continue through forums such as the Australia and New Zealand Environment Conservation Council, which should then provide feedback about appropriate impact assessment standards in the Australian Federation.

2.52 Another recommendation, detailed in Chapter 7, is to develop a voluntary prescribed code of conduct for consultants involved in assessments or referrals under the Act. This recommendation aims to improve the quality of EIA information. It is envisaged that this code would set out professional standards for impact assessment professionals. Chapter 7 explores the potential for this code to apply across State and Territory jurisdictions.

Streamlining of EPBC Act Assessment Methods

2.53 Five forms of environmental impact assessment are available under the Act. Assessment may be done using:

(a) information included in the referral;

(b) preliminary documentation provided by the proponent;

(c) a public environment report (PER);

(d) an environmental impact statement (EIS); or

(e) a public inquiry.

2.54 While it is important to have a 'hierarchy' of assessment methods,[42] there is a degree of duplication between the forms of assessment and a lack of legislative guidance on the role, form and requirements of each method. Noting that two recent reviews of State legislation have discussed reducing the types of assessment methods,[43] the number of options under the Act could be reduced to the following assessment approaches:

(a) assessment by preliminary documentation;

(b) assessment by EIS; and

(c) assessment by public inquiry/joint assessment panels.

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40 Interim Report Comment 92: Professor Lee Godden, Ms Anne Kallies and Ms Carly Godden, p.10. This proposal is also supported by the NFF – Interim Report Comment 95: National Farmers' Federation.

41 An example of the political complexities is a concern raised by the NFF that standardisation raises a possibility that state responsibilities will be subsumed – see Interim Report Comment 95: National Farmers' Federation, p.8.

42 A point made by the NFF, who claims that: 'A referral for a significant mining action would necessarily be different to that for a dairy effluent dam. More importantly, the referral documentation should be sufficient on which to base a decision for approval' Interim Report Comment 95: National Farmers' Federation, p.13.

43 Including Environmental Protection Authority, *Review of the Environmental Impact Assessment Process in Western Australia* (2009), pp. 23-28; and the recent discussion paper, Environment Protection Authority (NT) *Review of the Environmental Impact Assessment Procedures of the Northern Territory* (2009), p.32.

2.55 This Review proposes combining assessment by referral information and assessment by preliminary documentation by expanding the definition of preliminary documentation to include information provided in the referral.

2.56 The Review also proposes that assessment by public environment report be removed from the Act due to its similarities to assessment by EIS.

2.57 Specific criteria should be developed in the Regulations to clarify when assessment by preliminary documentation would apply and when it should be by EIS, so as to meet the Australian Government's obligations under the IGAE.[44] These criteria should clearly differentiate between the circumstances requiring these two assessment methods and could include factors such as the nature of the action and its impacts, and the degree of documentation produced by the proponent.

2.58 The decision to assess by public inquiry or joint assessment panel should be subject to a broader Ministerial discretion, without criteria being specified, and should not be limited to projects of a particular size or description.

Single Public Comment Period Provisions

2.59 As noted in Chapter 1, the Act has developed over time with a range of convoluted and duplicated provisions. These can be hard to follow and introduce unnecessary complexity. An example of this is the numerous provisions relating to public comment in the Act.[45]

2.60 Recommendation 1 proposes amending the Act to create a single Division specifying the requirements for public consultation for all decisions made under the Act, including assessment and approval decisions. This issue is discussed further in Chapter 1.

Assessment Panels and Public Inquiries

2.61 Public inquiry is a much underused method of assessment. The benefits of public inquiries were outlined in an August 2009 discussion paper of the Australian Law Reform Commission, *Royal Commissions and Official Inquiries,* as including:

- greater public confidence in processes, including reduction in potential for perceived bias;
- provision of expertise to handle an investigation or assessment;
- provision of administrative resources to deal with very complex matters;
- investigation or assessment of issues involving governments (including, for example, assessment of State government projects);
- a means of providing independent input and dealing with controversial issues;
- greater capacity for public input and interaction with the commissioners of the inquiry – including face-to-face interaction; and
- a more transparent process of environmental scrutiny.[46]

Submissions that commented on assessment methods were generally supportive of assessment by panels and public inquiry.[47]

44 Including that 'assessing authorities will provide information to give clear guidance on the types of proposals likely to attract environmental impact assessment and on the level of assessment required', *Intergovernmental Agreement on the Environment* (1992) Sch.3, Part 3(iii).

45 Including: *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss. 75(1A), 93(2), 93(3), 93(4) and (5), 95, 95A, 95A(3), 95(1), 95C, 96A, 98, 99, 100, 101-104.

46 As noted in the Australian Law Reform Commission, *Discussion Paper 75 (DP 75) – Royal Commissions and Official Inquiries* (2009), Chapter 2.

47 See e.g. Interim Report Comment 88: WWF; and Interim Report Comment 92: Professor Lee Godden, Ms Anne Kallies and Ms Carly Godden.

2.62 The Canadian Environmental Assessment Agency describes the benefits of environmental assessment by panels:

> Review panels have a unique capacity to encourage open discussion and exchange of views regarding the environmental effects of a project. In particular, the panel holds public hearings where the public can listen to the views of government experts, the proponent can present the project and explain the anticipated environmental effects, and interested groups and members of the public can present evidence, relay concerns and make recommendations.[48]

2.63 Public inquiry has been available as a method of assessment since the commencement of the Act, however, it has not been used to date. The Review proposes that two types of assessment panels be available:

- assessment by public inquiry should be continued – this power could be expanded so it could be used at any time and would be wholly at the discretion of the Environment Minister; and
- assessment by joint planning panels should be introduced – this power would allow the Environment Minister to enter into agreement with a State or Territory (or even a multilateral agreement) to undertake a joint inquiry cooperatively to examine all environmental matters relevant to a project.

2.64 Public inquiry and joint assessment panels should assess both major projects and important smaller projects. Panels would be of particular use for the assessment of multiple related projects, such as works proposed for the Lower Lakes and Coorong. The actions assessed will have to have a significant impact on a matter or NES and typically projects could involve large capital investment, actions that have national importance, actions that generate high public interest, actions where the State/Territory or Australian Government is a proponent, or actions that occur across jurisdictional boundaries.

Unilateral Powers Of Inquiry Under Bilateral Agreements

2.65 At present, the existing assessment bilateral agreements limit the Commonwealth's capacity to call for panel inquiries. At the same time, there are concerns about states assessing state projects under bilateral agreements. The Environment Minister should have the power to unilaterally decide to undertake assessment by a panel of inquiry, regardless of the existence of a bilateral agreement. Notably, such a power was included in the most recent iteration of the Queensland-Commonwealth bilateral agreement.

Assessment by Joint Assessment Panels

2.66 Assessment by joint assessment panels could provide a cooperative approach and allow for a single streamlined process for proponents. For these reasons, joint panels should be preferred over the Minister's power for public inquiry, but the public inquiry option should remain for circumstances where joint assessments cannot be agreed or are not warranted.

2.67 As the jurisdiction of the Act is predicated on a test of significant impact on a matter of NES, and not determined by prescribed categories of development, the types of projects that trigger the Act range from spatially and financially small operations to large and internationally significant ventures. Submissions called for assessment methods that could appropriately deal with major projects.[49] COAG has endorsed integrated assessment of major infrastructure projects, stating that:

> major infrastructure projects will require an integrated assessment and approval process encompassing all statutory assessments and approvals by the three levels of government with target time periods for each stage of the process.[50]

2.68 Major projects that have a high risk of significant environmental impact should be subject to panel assessment that engages early and provides a high level of scrutiny. There are already examples of use of assessment panels in State and Territory jurisdictions.[51]

48 Canadian Environmental Assessment Agency, *Cost Recovery for Review Panel Management* (2008) p.1 http://www.ceaa.gc.ca/013/011/recovery_e.htm.

49 See e.g. Submission 196: Government of Queensland.

50 Council of Australian Governments, *2 July 2009 Communique* (2009) http://www.coag.gov.au/coag_meeting_outcomes/2009-07-02/docs/20090702_communique.pdf.

51 For e.g. Joint Regional Planning Panels in NSW and Planning Panels in Victoria.

Operation of Joint Assessment Panels

2.69 The Review proposes a joint assessment panel model that relies on the proponent opting in to the process, and the State or Territory and Commonwealth Ministers agreeing to the assessment. The proponent has to opt in so that neither the State or Territory nor the Commonwealth process begins before the joint assessment panel is convened.

2.70 The decision to opt in may be made either at the referral stage or immediately after the publication of an EIS. A decision early in the process to establish a joint panel is essential, as it would be difficult to commence a joint panel assessment after either jurisdiction's assessment has substantially started. The incentive for proponents to choose this method is a single expedited assessment process. As noted above, major projects where the proponent is a State government or associated body should be subject to either public inquiry or joint panel assessment. Timeframes for the operation of the panel should be agreed when the proponent opts in to the process.

2.71 To give effect to the joint panel assessment processes, the Act would have to be amended, as would State and Territory EIA regimes.

2.72 A joint panel assessment process would begin with the appointment of an expert panel of three members by joint agreement of the respective governments. One option would be to select panel members on an *ad hoc* basis on the basis of their qualifications, which could include impact assessment, economics, governance, ecology and natural sciences or social and Indigenous knowledge and experience. Another option would be to create a permanent panel of commissioners like the Productivity Commission. Tenure would allow panel members to develop considerable skills in assessment of controversial projects.

2.73 The proponent would be directed by the panel to produce an assessment report addressing the relevant impacts. As the panel would consider both State, Territory and Commonwealth protected matters, its terms of reference could allow consideration of the whole of the environment, rather than just protected matters.

2.74 The panel assessment process would ensure transparency of decision-making through a requirement to publish all relevant information, including reports, public submissions and transcripts from consultations – although the panel should retain the power to receive information *in camera*, and commercial-in-confidence and defamatory material should not be made public.

2.75 The joint panel would make a decision about the project including, if the project is approved, the nature and type of conditions and offsets. This advice would then be supplied to the relevant State or Territory decision-maker and the Commonwealth Environment Minister who would make their respective decisions, or could agree to a joint approval considering all environmental matters, with a single set of conditions. A proportion of the cost of the assessment would be shared by the proponent – details of this cost recovery are covered in Chapter 17.

2.76 This assessment process is intended to address a range of issues raised through the Review's public consultation processes. Proponents who agree to a major project assessment would have a single expedited and uniform process of assessment. Proponents would gain certainty and be provided with multiple opportunities to monitor and provide input into the assessment process. Proponents would also be certain that the assessment was primarily undertaken by experts in relevant fields.[52] As the panel would generate a single advice for both the State or Territory and Commonwealth Ministers, it would likely result in a uniform set of conditions agreed by both regulators.

2.77 The public interest would be served by a joint panel process, as it would involve a high level of transparent decision-making and public consultation, including the opportunity for face-to-face meetings. This would enable greater participation by persons who have limited capacity to make written submissions, and allow objectors to hear the responses to their issues immediately. The use of experts would generate a greater confidence in the quality of information in the process, and a panel of three people would reduce the potential for bias or personal interest entering decision-making.

2.78 The regulators would be better served by a harmonised and streamlined process. The cost-recovery element would reduce the financial burden for government associated with assessments.

52 This addresses concerns raised in Submission 164: Minerals Council of Australia, about the specific expertise of DEWHA assessment officers.

Recommendation 4

The Review recommends that the Commonwealth work with the States and Territories as appropriate to improve the efficiency of the Environmental Impact Assessment (EIA) regime under the Act, including through:

(1) greater use of strategic assessments;

(2) accreditation of State and Territory processes where they meet appropriate standards;

(3) accreditation of environmental management systems for Commonwealth agencies where the systems meet appropriate standards;

(4) publication of criteria for systems and processes that would be appropriate for accreditation;

(5) creation of a Commonwealth monitoring, performance audit and oversight power to ensure that any process accredited achieves the outcomes it claimed to accomplish;

(6) streamlining and simplification of assessment methods, including combining assessment by preliminary documentation and assessment on referral information and removal of assessment by Public Environment Report;

(7) establishing joint State or Territory and Commonwealth assessment panels;

(8) use of joint assessment panels or public inquiry for projects where the proponent is either the State or Territory or Australian Government; and

(9) greater use of public inquiries and joint assessment panels for major projects.

Threatened Species and Ecological Communities Listing

Alignment of Lists

The Current Approach

2.79 The Act provides the legal framework for the conservation and sustainable use of Australia's biodiversity. Part 13 of the Act provides for the listing of nationally threatened native species and ecological communities, migratory species and key threatening processes.

2.80 The list of threatened species and ecological communities is the trigger for legislative protection mechanisms under the Act and provides the basis for the Commonwealth's jurisdiction for approvals, permits, recovery and threat abatement plans. The species-by-species and ecological communities listing approach is an important component of the conservation and protection of biodiversity under the Act and should be maintained.

2.81 At the commencement of the Act in 2000, a large number of threatened species, ecological communities and key threatening processes (KTPs) listed under the previous legislation[53] were transferred to the Act. This consisted of 1568 species, six KTPs and 21 ecological communities. Since then, approximately 238 species, 12 KTPs and 25 ecological communities have been added to the lists. In the same period, approximately 56 species have been taken off the list of threatened species.

2.82 Currently, the Commonwealth, State and Territories each maintain separate lists of threatened species and this duplication of government process is a significant cause of regulatory inefficiency. In the 2007-08 period, 45% of controlled action decisions were triggered by the potential for impacts on threatened species and ecological communities, so the flow-on effect of reducing duplication and increasing efficiency in EIA processes through the accreditation of State and Territory listing processes would be significant.[54]

53 *Endangered Species Act 1992* (Cth).

54 DEWHA, *Annual Report 2007-08 Volume 2* http://www.environment.gov.au/about/publications/annual-report/07-08/index.html

2.83 While cross-jurisdictional agreements have been useful, significant change is still required to achieve real progress in species alignment, with ongoing changes to State and Territory listings outstripping the capacity of the Commonwealth to keep up. DEWHA has identified some 2,500 threatened species as requiring assessment nationally, and 150 species that may require delisting from the Act.

2.84 The process of maintaining separate lists of threatened species and ecological communities by the Commonwealth, States and Territories has resulted in multiple lists which are misaligned in terms of eligibility for listing, listing categories and the levels of protection afforded to threatened species and ecological communities. This misalignment has, in some instances, created barriers to conservation outcomes, increased the administrative burden of maintaining the lists and resulted in duplication of effort and lack of clarity for stakeholders.

2.85 In all jurisdictions a person wishing to undertake a development must consult two threatened species lists, the state or territory list and the national list, to determine if their project needs approval. In all likelihood there will be two listing advices, two species profiles explaining the ecology of the species and potentially two policy advices about what impacts are thought to be important, and all will be slightly different.

2.86 Currently, each jurisdiction uses slightly different assessment approaches and listing categories, often resulting in the same species or ecological community being listed in different categories. The level and type of information required to make a decision varies between each jurisdiction, with the same species frequently being recommended for different categories by different jurisdictions, based on the same data set.

2.87 In 2007, the ANAO recommended that efforts be increased to improve the accuracy and completeness of the lists, including establishment of an intergovernmental process to align them.[55]

Recommended Approach to Listing Threatened Species And Ecological Communities

2.88 The TSSC and DEWHA have been working towards administrative changes to address misalignment of the current threatened species lists and prevent further misalignment in the short term. This has involved cooperative arrangements with certain states and changes to practices in the TSSC.

2.89 However, a long-term comprehensive national approach is needed to better integrate listings across jurisdictions.[56] Stakeholders supported reforms to fix the problems arising as a result of the multiple lists across jurisdictions.[57] The Council for the Australian Federation noted that reform of policies and procedures concerning species listings could potentially:

- reduce project costs in preparing assessments based on inconsistent or erroneous triggers;
- reduce timeframes in assessments;
- reduce the potential for inconsistency in conditions;
- allow the Commonwealth lists to benefit from data and knowledge held by the States and Territories; and
- promote information sharing between the States and Territories and the Commonwealth.[58]

A single, national list of threatened species and ecological communities would provide better coordination of legal and administrative processes and simplify the process of prioritising and coordinating recovery actions, delivering significant regulatory and conservation benefits. The question is, how is this to be achieved?

2.90 COAG should pursue the establishment of a single system as a matter of priority. In the interim, the following approach should be developed:

- the Australian Government should
  - — focus on listing species that range across state borders;
  - — accredit State and Territory listing processes so that State and Territory endemics listings are adopted in the national list;

55 Australian National Audit Office Report No.31 of 2006-07, *The Conservation of National Threatened Species and Ecological Communities*.
56 Interim Report 105: Threatened Species Scientific Committee, p.2.
57 See e.g. Submission 150: New South Wales Scientific Committee, p.7; Submission 181: WWF, p.19; Submission 149: Urban Taskforce Australia, p.12.
58 Letter from the Hon Anna Bligh (Chair of the Council for the Austrian Federation) to Dr Allan Hawke, 13 August 2009.

- Australian, State and Territory governments should cooperate to:
  - streamline the listing approach, including by agreeing on the listing process, public consultation requirements and the level of documentation required to support listings;
  - use internationally recognised IUCN categories for species, with agreement on standardised categories and criteria for ecological communities, agreement on protocols for interpreting categories; and
  - use a consistent approach to the de-listing of species.

2.91 The role of the TSSC in advising the Minister on the amendment and updating of national lists for threatened species and ecological communities should continue. The TSSC would continue to assess nominations using a policy based approach that reflects the most efficient allocation of resources, and making recommendations to the Minister that are supported by the best available science. The role of the TSSC is discussed further in Chapter 5.

2.92 If the process of adopting state endemic lists is to be successful in both reducing duplication and improving the timeliness of listing decisions, the system would need the following characteristics:

- agreement on listing standards and categories;
- full faith and credit given by the Commonwealth to agreed state processes; and
- the TSSC to review state endemic listings against standards, not re-examine the merits of listing.

2.93 The key to the system will be the development of agreed standards for listing criteria and protocols, listing processes and documentation standards. To facilitate this process, a dedicated task force should be established. This group should include appropriate Commonwealth, State and Territory representatives who would establish the criteria, categories and documentation and coordinate the initial review of lists, including de-listings.

2.94 The establishment of a single national list, including de-listings, should occur within a 12 month time-frame. Further, a single set of information relating to all species and ecological communities on the national list should be established as an electronic database which is updated as new information becomes available. This information should be publicly available.

Recommendation 5

The Review recommends that the Australian, State and Territory governments move to a single national list of threatened species, including marine species and ecological communities, through accreditation of State and Territory processes for listing endemic species. This process should include:

(1) agreed accreditation for listing;

(2) agreed protocols;

(3) minimum procedural standards; and

(4) consistent documentation standards.

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Chapter Three REGIONAL APPROACHES

Chapter 3: Regional Approaches

3.1 This Chapter considers assessment of environmental impacts at a regional scale. It discusses the potential for regional approaches, as well as their implementation to date. It also proposes improvements to legislation and practices to make them more effective.

3.2 A combination of regional assessment tools is proposed to allow the Commonwealth to engage on a landscape scale, including through strategic assessments and bioregional plans. These approaches would guide priorities and focus Australian Government efforts on practices that provide the most effective and efficient means of environmental protection.

3.3 A recurring theme in submissions and public consultations was that the Act and current administration:

- do not deal well with general pressures on biodiversity and the environment;
- have difficulties in dealing with cumulative impacts;
- are often triggered late in the development process and therefore have only a marginal success in protecting matters of national environmental significance (NES); and
- cause inefficiency for developers as the Act is applied toward the end of an often long State or Territory planning process.

These issues are particularly evident in areas with high economic and population growth.

3.4 Regional approaches allow proactive and strategic handling of environmental issues. The CSIRO commented that:

> In the longer term, for the Act to be effective it may need to focus more on reducing the rate at which species become threatened, and on protecting other values (e.g. values derived from the functioning of whole ecosystems and landscapes). To enable this, landscape and bioregional approaches, coordinating local and place-based activities, would be much more important – for example, seeking to protect a diversity of environments or habitats while also focussing on the ability of all ecosystems, regardless of how modified, to support biodiversity and provide ecosystems services.[1]

3.5 Submissions raised concerns about the cumulative impacts of multiple developments. The Australasian Native Orchid Society suggested that:

> To add some long term certainty to the protection of any area containing threatened species [the Society] would like to see the development concerned assessed not as an isolated development but in the context of other developments which are or may be proposed for that immediate area and the region in general. The pressure on any threatened species is greatly increased by piece by piece development, which when individually assessed may be approved but if the wider view is taken, will prove to be death by a thousand cuts.[2]

The possibility for project assessment to deal with cumulative impacts is discussed in Chapter 7. However, strategic assessments and other landscape-approaches offer feasible, equitable and cost-effective ways of addressing the cumulative impacts of actions in an area or region.

3.6 A greater emphasis on strategic assessments and other landscape approaches would also address much of the criticism of the Act in the academic literature and from developers, where it has been argued that the project assessment regime under the Act duplicates State regimes – and hence is not always as cost-effective as it could be – while failing to address key threats to biodiversity.[3] A switch to landscape assessments is seen as one of the most promising solutions.[4] The need for better approaches to strategic engagement is highlighted, particularly by the urban development and infrastructure sectors.

1 Interim Report Comment 49: CSIRO, p.3.

2 Interim Report Comment 6: The Australasian Native Orchid Society, p.7.

3 Andrew Macintosh, 'The *Environment Protection and Biodiversity Conservation Act 1999* (Cth); An Evaluation of its Cost-Effectiveness' (2009), 26 *Environmental and Planning Law Journal*, p.337; Andrew Macintosh, *The EPBC Act Survey Project: Preliminary Data Report* (2009) available at http://law.anu.edu.au/acel/EPBC_Survey_Report_%207sept09.pdf.

4 Andrew Macintosh and Debra Wilkinson, 'EPBC Act – The Case for Reform' (2005) 10 *Australasian Journal of Natural Resources Law and Policy*, p.139; Andrew Macintosh, 'Evaluating the Success or Failure of the EPBC Act: A Response to McGrath' (2007) 24 *Environmental and Planning Law Journal*.

3.7 Better integration of protected matters into planning systems would result in considerable savings in time, effort and assessment costs. The risks of duplication would also be greatly reduced. The Urban Development Institute of Australia submitted that:

> The industry strongly supports early strategic involvement, and definitely prior to rezoning, to ensure certainty into the development process. It is not in Australia's best interests to have capital tied up in projects that are at high risk of not achieving approval. In an ideal situation, the three tiers of government will have mapped out in advance where development can occur, general requirements for development in particular areas, the land that needs to be reserved for environmental sustainability and the infrastructure, including public transport, which will achieve overall sustainability for the development.[5]

3.8 As noted in Chapter 2, the move toward regional planning approaches does not mean abandonment of project assessment. Project assessment will continue to be required where strategic assessments and bioregional plans are not in place and where proponents wish to undertake development that is not covered by accredited plans.[6]

3.9 The legislation should create a range of regulatory tools so that the most appropriate mechanism can be used to manage problems at different spatial and temporal scales. Hence the regulatory 'tool-box' should be expanded to incorporate broader landscape approaches.

The Next Generation of Planning for ESD

3.10 Australia has a strong history of land use and conservation planning. Integration has, however, often been limited. Mr David Robinson posits that 'land planning retains an urban focus, and is not integrated with natural resource management legislation.'[7] Placing maintenance of ecological processes and conservation of ecosystems at the heart of future planning processes offers an opportunity to invest in Australia's long term economic and environmental future.

3.11 The Act currently contains mechanisms enabling strategic assessments and bioregional planning. These mechanisms were enhanced in the 2006 amendments so that strategic approvals can be granted – that is, if the Minister is satisfied that a plan will deliver acceptable environmental outcomes, then developments in accordance with the plan do not require further Australian Government assessment.

3.12 As noted in Chapter 2, Council of Australian Governments (COAG) has agreed that strategic assessments should be used as a means of harmonising environmental regulation across the federation.

3.13 While the 2006 amendments went some way to improving the strategic assessment and regional planning provisions of the Act, more needs to be done to ensure that these methods of engagement are used as the default. Improvements need to be made in two key areas:

- changes are required to ensure that greater use is made of regional approaches; and
- safeguards need to be created to ensure that plans are robust and fit for purpose.

3.14 Strategic assessments and bioregional plans have potentially different roles. This distinction has not been sharply drawn to date.

3.15 Strategic assessment allows for assessment and potential approval of actions taken in accordance with a plan, policy or program. Conceptually, strategic assessments occur where a plan, policy or program has been conceived and is being developed. Experience shows that the earlier that the Australian Government is involved in the development of the plan to be assessed, the greater the likelihood that the plan will deliver nationally focused outcomes.

3.16 Bioregional plans, on the other hand, have the potential to be developed from scratch where there is no pre-existing landscape planning or where existing landscape plans are due for review.

5 Submission 95: Urban Development Institute of Australia, p. 7.

6 Submission 199: Government of South Australia.

7 David Robinson 'Strategic planning for biodiversity in New South Wales' (2009) 26 *Environment and Planning Law Journal* 213, p. 213.

Bioregional Planning

The Role of Bioregional Plans

3.17 One of the main attractions of the bioregional planning mechanism is that it allows the Australian Government to create an integrated framework for Commonwealth interests at a regional scale. Matters that could foreseeably be guided and coordinated include:

- identification of areas where important matters of NES exist in a landscape;
- a mechanism to guide future development to areas of low environmental impact, including setting the context in which development will occur, and to manage cumulative impacts;
- offsets and biodiversity banking;
- prioritisation of recovery plans and actions;
- management of threats through identification and implementation of threat abatement plans;
- development of contingency plans to deal with uncertainties in environmental outcomes;
- management planning, including for Ramsar sites, Commonwealth land and Heritage areas;
- development of the National Reserve System (NRS) through providing guidance on new areas to be listed and providing protection for 'buffer zones';
- listing of ecosystems of national significance; and
- funding, such as through Caring for our Country, environmental stewardship payments and other relevant programs.

Bioregional plans could also guide efforts on other issues, including climate change adaptation, water use and infrastructure planning.

Initiation of Bioregional Plans

3.18 Work has started on five marine bioregional plans, but no terrestrial bioregional plans have been initiated to date. The current provisions of the Act limit the ability of the Minister to make a bioregional plan in places outside a Commonwealth area. The Minister may cooperate with a State or Territory in making a plan not wholly within a Commonwealth area. This represents a significant limitation on the capacity to undertake regional planning for issues of Australian Government interest.

3.19 The Act should be amended to:

- remove the Commonwealth area limitation; and
- enable the Minister to instigate a bioregional plan in areas where protected matters are present.

3.20 The preference is to develop plans in collaboration with States and Territories. Development of plans that meet both national and state environmental requirements would provide the maximum environmental, social and economic benefit. However, the Commonwealth should also have a power to generate plans if agreement to collaborate cannot be reached. If a bioregional plan is developed by the Commonwealth alone, then it would only identify and prescribe management arrangements for environmental matters of Commonwealth interest.

Development of Bioregional Plans

3.21 The Act does not define bioregions. The Explanatory Memorandum which accompanied the Act also provided little guidance as to the form, content or scale of the regions to be covered:

> [a bioregion is] an area of one whole or several interconnected ecosystems characterised by its landforms, vegetative cover, human culture, and history. In determining the boundaries of a bioregion account will be taken of administrative and other regional boundaries. A bioregional plan provides a 'blueprint' for the ecologically sustainable management of natural resources within a bioregion, taking into account social and geographic elements.[8]

3.22 Consequently, questions exist about the scale on which these plans might be made. In determining the scale of these plans, several factors need to be considered.

3.23 First, the region should be ecologically coherent to allow appropriate consideration of environmental matters and ecological function. A sharp boundary is essential to provide certainty for proponents and State governments. While difficulty may arise when drawing a sharp spatial boundary around 'fuzzy' ecological concepts, catchment boundaries often provide a natural and unambiguous template.

3.24 Second, planning must be on a scale that is meaningful for people and communities. For example, land-use planning generally occurs at a scale of 1:50 000, whereas conservation planning occurs on a larger scale. To integrate conservation and land-use planning, a common scale needs to be found. Planning also needs to take into account considerations of political geography, such as State and Local government borders, so that the responsibility for management can be clearly vested.

3.25 The final issue with scale is the need to consider existing regional maps and plans. For example, local government areas, existing bioregional mapping,[9] natural resource management regions[10] and catchment management authorities all provide useful examples of boundaries and come with considerable amounts of information.

3.26 The determination of boundaries for bioregional plans would need to take these factors into account. Ultimately they should be determined by a match of ecosystems and governance systems, as outlined by Costanza et al:

> the causes of many sustainability problems lie in "scale" problems. Large-scale ecosystems are not simply small-scale ecosystems grown large, nor are micro-scale ecosystems mere microcosms of large-scale systems. The driving forces and feedback mechanisms in large- and small- scale systems operate at different levels and exhibit distinct patterns. The solution, then, is to match ecosystems and governance systems in order to maximise the compatibility between these two types of systems.[11]

3.27 Submissions supported the legislation providing for flexibility around the areas defined as 'bioregions' for the purpose of bioregional planning, to allow work to occur at an appropriate scale.[12] The legislation should allow for such flexibility. Any attempt to specify an ideal is likely to result in years of debate distracting from the work of actual planning.

3.28 The workshop held at the ANU on 27 August 2009 to discuss the Interim Report suggested that the term 'bioregional' be replaced by the term 'regional'. This view was also reflected in submissions:

> there are two potentially competing definition of Bioregion, one based on scientific factors, and the other EPBC Act one encompassing all and sundry. I recommend that Bioregional Plans be referred to under the Act instead as Regional Plans. Bioregions as scientifically determined by the federal government do not correspond to regional administrative boundaries.[13]

3.29 The provisions which allow for the creation of bioregional plans do not prescribe timeframes or methods for public comment. While extensive public input into the creation of bioregional plans is essential, it is also important to have flexibility in the method of consultation. Flexibility to tailor public consultation to suit the development of a complex, multi-user bioregional plan will create better opportunities for meaningful engagement. For example, holding a series of public hearings may yield better results than having a prescribed period for written public comment.

8 Explanatory Memorandum, Environment Protection and Biodiversity Conservation Bill 1999 (Cth) para. [280].

9 For further information on existing bioregions see the IBRA regions: http://www.environment.gov.au/parks/nrs/science/bioregion-framework/ibra/index.html.

10 For further information on NRM regions see: http://www.nrm.gov.au/nrm/region.html.

11 Robert Costanza, Bobbi Low, Elinor Ostrom and James Wilson, *Institutions, Ecosystems and Sustainability* (2001), p.7.

12 As was suggested in Interim Report Comment 40: Mr Jamie Pittock.

13 Interim Report Comment 101: Ms Caroline Copley, p.7.

Lessons from Marine Bioregional Planning

3.30 Currently marine bioregional plans are being developed for each of Australia's five marine regions to provide strategic guidance for Government decision-makers and marine users by:

- describing the Region's ecological processes and conservation values, including mapping sites of importance for protected species and communities;
- identifying regional priorities for action, based on an assessment of threats to conservation values and long term policy goals; and
- developing strategic guidance for proponents and decision-makers; for example by providing a regional context for national guidelines to help proponents within a region consider whether their action might result in a significant impact on matters of NES.

3.31 Dr Keith Sainsbury has questioned the achievement of the marine bioregional planning, due to the issues in managing multiple users:

> Within the Commonwealth jurisdiction there was no basis under the EPBC Act or the Policy to require that the different users, Commonwealth policy makers and Commonwealth regulators fully engaged in and adhere to a bioregional plan, or to provide effective and binding dispute resolution. The result has been a retreat from the original goals of integrated multiple-use planning and management, even within the Commonwealth jurisdiction, and a focus on the subset of matters that are enabled by the current EPBC Act – most notably the development of the National Representative System of Marine Protected Areas. The system of protected areas is a useful development in itself, with potential benefits at the landscape level. But it is in effect a single sectoral management measure (i.e. to achieve conservation outcomes), it is only a part of what is required to address planning and management of multiple uses for sustainable development of regional ecosystems.[14]

Ensuring that a bioregional plan has force to ensure adherence with the plan should be an essential requirement of new bioregional plans. Bioregional plans should at the very least be binding on the Australian Government. Ideally when developed as collaborative projects, the plans should also require conformity of land use decision-making at a State, Territory and Local government level. Accordingly, the compliance and enforcement sanctions of the Act should attach to these plans.

Strategic Assessments

3.32 Strategic assessments have been widely supported as a mechanism to improve environmental outcomes and produce regulatory efficiencies.[15] To date, strategic assessments have been completed and approved for 18 Commonwealth managed fisheries.[16]

3.33 The concept has only recently been applied to land-use planning and so is a developing field. At the time of writing, three terrestrial strategic assessments have commenced:

- the common-user liquefied natural gas (LNG) hub and heritage assessment in the West Kimberley (WA);
- the Molonglo and North Weston Structure Plan (ACT); and
- Melbourne's Urban Growth Boundary Expansion (Victoria).

While none have been completed to date, the assessments have achieved various milestones, including the selection of James Price Point on the Dampier Peninsula for detailed assessment for the Kimberley LNG hub and commencement of the public consultation phase of the Melbourne growth strategy.

14 Interim Report Comment 8: Dr Keith Sainsbury, p.1.

15 See e.g. Interim Report Comment 40: Mr Jamie Pittock.

16 A further 102 State and Territory managed fisheries have undergone environmental performance assessment using a similar approach to strategic assessment.

3.34 The benefits of strategic assessments include:

- early consideration of matters of NES in the planning process;
- greater certainty for local communities and developers over future development;
- reduced administrative burden for proponents and governments; and
- increased capacity to achieve better environmental outcomes and address impacts at the landscape scale.

3.35 Public submissions were generally supportive of strategic assessments.[17] According to Mr Ed Wensing:

> [strategic assessment] can be used in almost any situation to resolve a dispute or problem. It is a way of thinking, as much as it is a process that can be applied to determine the values and priorities, and as a basis for decision making about the use and development of land and natural resources for a particular spatial area.[18]

State and Territory governments also support strategic assessments. The Council of the Australian Federation stated that:

> Increased use of strategic assessments, where appropriate, could potentially:
>
> — increase confidence in State/Territory and local government land use planning, environmental constraints and the development potential of land;
>
> — 'bring forward' the EPBC Act assessment, reducing the likelihood of later referrals/approvals required, with associated time and cost benefits;
>
> — reduce piecemeal assessments, and improve cumulative impact assessments;
>
> — allow for improved integration of State/Territory planning with Commonwealth assessments; and
>
> — reduce the potential for major project delays.[19]

3.36 Strategic assessments and approvals can also provide targeted accreditation for possible actions under a plan, policy or program.

Lessons from Strategic Assessments

3.37 Although strategic assessments are seen as a beneficial tool for developing regional approaches, they do carry some risks. This has led to concerns with:

- the strategic assessments commenced to date;[20]
- the information requirements for strategic assessments;
- the provision for public participation in strategic assessments; and
- discretion available to the decision-maker when strategic assessment approval decisions are made.

3.38 The Government of Western Australia submitted that:

> In relation to strategic assessment, it is noted while it is strongly advocated in several submissions, there remains considerable uncertainty as to appropriate methodologies and circumstances for its application, the scale at which it might operate, the extent to which it can reasonably substitute for project-by-project assessment, how it can deal with mitigation strategies including offsets, and its capacity to address intractable land use conflicts. There is limited experience in use by both Commonwealth and states and territories.[21]

17 See e.g. Interim Report Comment 49: CSIRO; Interim Report Comment 32: Magnetic Island Community Development Association.

18 Interim Report Comment 31: Mr Ed Wensing, p.9.

19 Letter from the Hon Anna Bligh (Chair of the Council for the Australian Federation) to Dr Allan Hawke, 13 August 2009.

20 Including Interim Report Comment 94: The Australian Network of Environmental Defender's Offices; and Interim Report Comment 57: Dr Kirsten Parris and colleagues – the University of Melbourne, RMIT University and La Trobe University.

21 Interim Report Comment 117: Western Australian Government, p.1.

Strategic Assessments to Date

3.39 Commentary on the strategic assessments commenced to date includes:

- the process should commence early in the formulation of a plan, policy or program to achieve maximum benefits;[22]
- a strategic assessment should deal with alternative scenarios;[23]
- strategic assessment should have meaningful public engagement;[24]
- the process should put in place a rigorous, information-based process to develop objective, quantitative procedures for assessing the adequacy of plans, policies and programs seeking approval;[25] and
- the approach should add value to existing plans, by ensuring they satisfy the requirements of the Act.[26]

3.40 The process of Biodiversity Certification (biocertification), as occurs in NSW under the *Threatened Species Conservation Act 1995* (NSW), is analogous to EPBC Act strategic assessment, in that persons taking development consistent with a planning instrument that is biocertified do not require further approvals relating to biodiversity under the *Environmental Planning and Assessment Act 1979* (NSW).[27] The relevant test for whether the NSW Environment Minister can certify a planning instrument is whether the planning instrument, in combination with other measures taken, will 'lead to the overall improvement or maintenance of biodiversity values.'[28]

3.41 The commencement of several Commonwealth strategic assessments and the lessons learned from these processes is strengthening DEWHA's practice. The CSIRO notes the increased capacity for strategic assessments:

> Australia is widely recognised as a world-leader in the development and application of rigorous science-based approaches to landscape-scale biodiversity conservation assessment and planning. Scientific and technical expertise to inform and support any strengthening of the role of strategic assessment under the Act is now well developed in a number of Australian universities, government departments and research agencies.[29]

As with all regulatory processes, best practice will continue to evolve. Iterative learning must occur to continually improve the quality of assessments.

3.42 The Review suggests that Commonwealth, State and Territory agencies undertake training and development to enhance their skills in developing the tools for strategic assessments (such as planning, policies and programs). This could focus on the requirements and benefits of strategic assessment, or could investigate how State or Territory level plans, policies or programs can satisfy the requirements of the Act.

Information Requirements for Strategic Assessments

3.43 As a result of the range of activities potentially approved by a strategic assessment, and the long-term nature of the approval decision, the assessment process must involve a number of safeguards.

3.44 The Act currently specifies form and content requirements for project assessment referrals.[30] Referrals which do not meet these requirements are considered invalid and are not accepted. Similarly, form and content requirements for strategic assessments should be inserted into the Act. Specific requirements should be contained within the Regulations.

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22 Interim Report Comment 94: The Australian Network of Environmental Defender's Offices.

23 Interim Report Comment 94: The Australian Network of Environmental Defender's Offices.

24 Interim Report Comment 88: WWF, p.16.

25 Interim Report Comment 49: CSIRO; Interim Report Comment 57: Dr Kirsten Parris and colleagues – the University of Melbourne, RMIT University and La Trobe University.

26 Interim Report Comment 49: CSIRO; Interim Report Comment 95: National Farmers' Federation.

27 *Threatened Species Conservation Act 1995* (NSW) s. 126I.

28 *Threatened Species Conservation Act 1995* (NSW) s. 126G.

29 Interim Report Comment 49: CSIRO, p. 5.

30 See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.7. The content of the requirements are found in *Environment Protection and Biodiversity Conservation 2000* (Cth) reg. 4.03 and Schedule 2.

3.45 The current provisions for strategic assessments only require development of terms of reference and a draft report.[31] To date Commonwealth strategic assessments have dealt with spatial plans, and there has been greater consideration of the minimum information required for these assessments to be credible. A strategic assessment of a spatial plan should, at minimum require:

(a) collation of reasonably available information, and should identify and fill critical knowledge gaps:

- information should include the spatial extent of threatened species, ecological communities or heritage areas;
- the assessment should present maps of habitat for listed threatened species, ecological communities, heritage areas and other important environmental components; and
- the process should include a call for relevant, existing data from researchers, consultants and others;

(b) identification of matters of NES and establishment of outcome objectives for the plan, policy or program;

- the assessment should state the minimum acceptable conservation outcomes for each of the environment and heritage values that the plan considers;

(c) examination of development and land-use options with the aim of minimising impacts on protected matters and retaining ecological integrity;

(d) an analysis of the consequences of the different options including:

- estimates of impacts;
- how the plan avoids, offsets and mitigates impacts on protected matters; and
- a measure of the uncertainty associated with the analysis;

(e) a description of mitigation measures, and quantification of expected benefits including:

- how future conservation 'gains' will be funded, measured and enforced; and
- analysis of the adequacy of the extent of habitat that will exist following the implementation of the plan, policy or program; and

(f) a description of adaptive management approaches in the plan, policy or program – these should:

- indicate what actions will follow, should planned conservation actions not be implemented, or should expected outcomes from conservation actions not be achieved (that is, contingency plans should be clearly documented to account for environmental uncertainties); and
- allow for the unexpected, including new discoveries of species, habitats and/or communities of conservation concern in areas to be impacted by the proposed development.[32]

As strategic assessment practice develops for the assessment of policies and programs, different minimum information requirements may be appropriate for these assessments.

3.46 Legislating for a test of 'adequacy' in terms of data quality is extremely difficult. A preferable approach would be to establish guidelines that describe the requisite standard for information.

3.47 Formal guidelines should be established to guide the conduct of strategic assessments. These should build on the established 'Strategic Assessment Endorsement Criteria', which have been a common feature of the terms of reference of all strategic assessments to date.[33] These criteria:

- include the extent to which a plan, policy or program:
  - protects the environment (focusing on protected matters);
  - promotes ESD;

31 See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss.146(1B) and s146(2).

32 Adopted from Interim Report Comment 64: Dr Kirsten Parris and colleagues – the University of Melbourne, RMIT University and La Trobe University; and Interim Report Comment 94: The Australian Network of Environmental Defender's Offices.

33 See the DEWHA, *Kimberley agreement* (2009) p.17 http://www.environment.gov.au/epbc/notices/assessments/pubs/kimberley.pdf; DEWHA, *the Molonglo and North Weston Structure Plan agreement* (2009), p.5 http://www.environment.gov.au/epbc/notices/assessments/pubs/act-terms-of-reference.pdf; and DEWHA, *the Melbourne Urban Growth Centre agreement* (2009) p.13 http://www.environment.gov.au/epbc/notices/assessments/pubs/melbourne.pdf.

- promotes the conservation of biodiversity; and
- provides for the protection of heritage;

- set out minimum standards of acceptable environmental impacts; and
- provide a set of higher level considerations.

These criteria influence development of the plan, policy or program by outlining the basic decision-making for any subsequent strategic approval.

3.48 In addition to the existing endorsement criteria, the guidelines could specify the following requirements:

(a) the area considered for strategic assessment should make ecological sense (i.e., comprise an ecoregion or a catchment) or provide meaningful protection of heritage values;[34]

(b) the strategic assessment should indicate how much data and knowledge is required to make a good decision – that is, it should clearly describe and justify the minimum adequate data and knowledge set. Considerations should include the quality of data and current, remotely acquired data (especially in rapidly changing areas);

(c) critical gaps in the data should be identified and filled with targeted field surveys at appropriate times of the year, following best-available survey guidelines, so that the conditions for the minimum adequate data set are achieved. Sufficient time should be given to arrange access to private land, where required;

(d) wherever possible and relevant, strategic assessments should include models of species persistence (particularly those that are informed by process models and community composition models). This is because perfect information on populations and species can never be obtained and so modelling is essential for conservation planning, particularly across private land and in peri-urban areas;

(e) the strategic assessment should employ accepted existing information and best-practice conservation planning tools and protocols to maximize the effectiveness of conservation actions;

(f) all stages of the strategic impact assessment process should be documented in a clear and transparent manner; and

(g) the strategic assessment should include precise recommendations for measurement endpoints that can be used in subsequent audits to verify predictions and assumptions of the effectiveness of conservation actions and the value of conservation outcomes.

Creation of published guidelines which outline these requirements would send a clear message about the requirements of a strategic assessment. It would also guide best practice by DEWHA officials.

3.49 The establishment of minimum form and content requirements for strategic assessments, as well as best practice guidelines, should ensure high quality information is available to the decision-maker, and ultimately ensure public confidence in the process.

Strategic Assessment Decision-Making

3.50 When making a decision to approve a class of actions under an endorsed plan, policy or program, the Minister must adhere to a number of formal legislative requirements. These include that the approval is in writing, specifies the details of the class of actions to be approved, and complies with consultation requirements.[35]

3.51 The Minister must take into account a limited number of considerations when approving the taking of actions in accordance with an endorsed policy, plan or program. The Minister must consider issues relevant to the protection of matters of NES,[36] economic and social matters,[37] and the principles of ESD[38] and must not act inconsistently with relevant international conventions.[39]

34 Noting that a plan, policy or program may not always have a spatial expression.
35 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss. 146C-M.
36 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.146F(1)(a).
37 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.146F(1)(b).
38 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.146F(2).
39 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss.146G-L.

3.52 Submissions supported a stronger test for deciding whether or not to approve the taking of actions in accordance with an endorsed plan, policy or program.

3.53 One possibility of a test to guide approval of a class of actions under an endorsed plan, policy or program is the 'improve or maintain' test used in NSW.[40] Another is the 'no net loss' test used in Victoria.[41] Of these tests, the 'improve or maintain' test is preferred because of its existing application in the biodiversity certification arena, its potential for exceeding the *status quo* through the concept of 'improvement' and its applicability to both the natural and cultural environment. Chapter 14 proposes that a statement of reasons be published with every approval decision under the Act. In this case, the statement of reasons should provide an explicit and quantifiable description of the tradeoffs and gains resulting from the approval which have led to the conclusion that natural and cultural values are improved or maintained.

3.54 There is, however, a case for going further and adopting a test that requires the endorsed policy, plan or program to 'improve matters of national environmental significance'. One reason for doing so is the significant degradation of much of the Australian environment. Rather than simply trying to maintain the current quality of the environment, government should try to enhance it to compensate for the losses of the past. Another reason is to guard against implementation falling short of the 'improve' requirement. If this were to happen, the existing environmental quality may at least be maintained, which would seem to be a minimum standard.

3.55 There may be some situations where an 'improve' test cannot be satisfied. While it may be possible to 'improve' some cultural places – for example by repairing degraded fabric of structures, removing graffiti, reinstating lost view lines or re-establishing cultural practices and traditions, it may not be possible to do so where a cultural site is in good condition. The same may also be true in relation to some parts of the natural environment.

3.56 Public participation also needs to be considered. Under the Act, s.146(1B)(b)(ii) provides for 'the publication of the draft terms of reference for public comment for a period of at least 28 days'. Section 146(2)(b) provides for 'the publication of the draft report for public comment for a period of at least 28 days'.

3.57 Given the scale of strategic assessments, they will usually be much more complex than individual project assessments, and therefore the public will need more time to participate. As a result of their experience with the Melbourne strategic assessment process, environmental groups have called for further time to be allotted for consultation on the draft report.

3.58 The Review proposes that the two periods for public comment provided for in the Act remain. While 15 business days may be sufficient for public comment on the draft terms of reference, as this documentation is likely to be considerably less detailed than a draft report, the period for comment on the draft report should be extended to a minimum of 60 business days. The Review also recommends other forms of early engagement, such as community meetings and information sessions, be provided. While the period for public comment enshrines minimum standards, capacity to employ other methods of consultation should be encouraged.

3.59 There is also merit in the ANEDO's submission that in making a decision the Minister must have regard to:

- the strategic assessment report;
- any report by an expert panel;
- any public submissions on the strategic assessment report; and
- any public submissions made during the assessment.

Information about these documents should be provided in any report to the Minister seeking endorsement or approval of a strategic assessment.

3.60 While a strategic assessment may authorise impacts on matters of NES, it is essential that it improves or maintains biodiversity integrity in a region.

40 *Threatened Species Conservation Act 1995* (NSW) s. 126G.

41 Department of Sustainability and the Environment, *Victoria's Biodiversity Strategy* (1997).

Call in Powers for Strategic Assessments

3.61 The uptake of strategic assessments has been surprisingly slow given that:

- COAG promotes the adoption of strategic assessments as a way of reducing regulatory burden;
- the Council of Australian Federation supports the concept; and
- the states almost unanimously supported the concept in their submissions to the Review.

3.62 The slow uptake of this approach may be put down to a number of things, not least reluctance of the States and Territories to adopt an approach that they do not yet fully understand. A number of less noble motivations are also likely, including rivalry within State planning and conservation agencies. The slow transition to a more strategic approach threatens the efficiency gains that are potentially available to industry and government.

3.63 The current strategic assessment process requires the person or agency responsible for a plan, policy or program to enter an agreement to undertake the assessment. The effect of this is that the Australian Government is unable to assess a plan unless invited to by the person or agency responsible for the plan.

3.64 This places the Australian Government in an invidious position – it can be accused of causing regulatory inefficiencies but is powerless to initiate the early planning interventions that will solve the problem. The Act should be amended to include a 'call in' power where a plan is to be made that is likely to have a significant impact on protected matters. The power could be activated policy or program by failure of the person or agency responsible for the plan, policy or program to engage in a collaborative strategic assessment.

Australian Government Activities

3.65 As noted in Chapter 2, the Act applies to Australian Government agencies and to activities on Commonwealth land. In these cases, the protected matter is not just matters of NES, but all aspects of the environment. As one of the largest holders of Commonwealth land, these provisions have implications for the activities of the Department of Defence. They also have implications for agencies such as AusAid and the Department of Finance and Deregulation.

3.66 Consultations with the Department of Defence have identified a number of issues, including that:

- the Act applies to the activities of the Australian Defence Force overseas, creating logistical difficulties in conflict situations;
- the Act applies to the broader environment (i.e. beyond just matters of NES) on Defence land, which may restrict activities on land set aside for training;
- the permitting requirements to take, injure or kill a threatened species or ecological community on Commonwealth land are onerous; and
- the Act should be able to protect strategic infrastructure assessment from encroachment by incompatible land uses.

Most of these issues relate to the regulatory burden imposed on the Department of Defence. The application of the Act to Australian Government agencies and land is designed to ensure that the Government applies the same standard to itself as to other users of the environment. It would therefore be inappropriate to reduce the level of regulation below that applying to the rest of the community.

3.67 However, there may be an opportunity for the Department of Defence, and other Australian Government agencies, to seek accreditation of their environmental management systems. This would be consistent with recommendations made elsewhere in this report and would represent a far more efficient means of managing impacts on Commonwealth land. The Department of Defence already makes significant investments in an environmental management system. Subject to the operation of independent performance auditing, this system could be accredited so that individual activities conducted by the Department of Defence do not require additional assessment and approval under the Act. This should include impacts on individual species (an area currently subject to case-by-case permits).

3.68 The final issue raised by Defence is the protection of strategic infrastructure from encroachment by incompatible land uses. For example, concerns were raised that State and Local government approvals of residential developments near the Department of Defence airbases or firing ranges may not take into account the noise generated by the Department of Defence facilities. This can lead to noise complaints by the new residents and eventual limitations on the use of critical Defence infrastructure.

3.69 The operation of the call in powers identified above would be important in this context. The Act already contains a provision requiring approval of activities adjacent to Commonwealth land that are likely to have a significant impact on that land. The ability of the Australian Government to call in land use plans in the vicinity of the Department of Defence and other critical infrastructure would be a good way of ensuring that the opportunity costs associated with these developments are properly considered.

3.70 The current provisions governing strategic assessments and accreditation approaches were originally designed for application to private entities and State and Territory governments. As a result, some amendment of the Act may be required to facilitate appropriate assessment and accreditation of Commonwealth entities.

Performance Auditing and Oversight of Accredited Processes

3.71 One of the lessons of the Regional Forest Agreements (RFA) process is that the Commonwealth should retain a continuing performance audit function for approval systems that are accredited. The Act should be amended to insert a performance auditing power covering:

- the operation of plans, policy and programs endorsed under strategic assessments;
- approved bioregional plans;
- assessment and approval bilateral agreements;
- RFAs (discussed in Chapter 10); and
- accredited Commonwealth agency environmental management system.

The purpose of this oversight is not to undermine the accreditation, but rather to ensure that the accredited process is achieving the planned outcomes. This performance auditing would also feed into the system of environmental accounting described in Chapter 19.

3.72 Performance audit criteria and arrangements need to be specified for the accredited system before approval is granted. The criteria should include at a minimum that the accredited system:

- improves or maintains all matters of NES, including;
  - the persistence of threatened and migratory species;
  - the integrity of threatened ecological communities and critical habitat;
  - the function of the Commonwealth marine environment;
  - the values of heritage areas;
  - the character of Ramsar wetlands; and
  - the character of ecosystems of national significance.
- provides a transparent and robust system of compliance auditing;
- ensures decisions are made that identify and manage uncertainties;
- demonstrates active adaptive management in responding to emerging threats, non-compliance and public concerns;
- clearly identifies when considerations other than environmental impacts, for example social and economic considerations, are taken into account in decision-making;
- allows meaningful public participation and input;

- provides a decision-making framework that prevents significant environmental impacts where possible, mitigates unavoidable impacts, and offsets any impacts that will occur;
- produces a transparent and verifiable report of environmental performance; and
- maintains sufficient landscape function, including habitat and biodiversity values.

As proposed above, strategic assessments and bioregional plans should identify precise measurement endpoints that can be used in subsequent audits to verify predictions of and assumptions about the effectiveness of conservation actions and the value of conservation outcomes. If anticipated outcomes are not achieved, the consequences should be clearly specified, including the reimposition of federal prescriptions.

Recommendation 6

(1) The Review recommends that the Australian Government:

(a) expand the role of strategic assessments and bioregional plans so that they are used more often; and

(b) strengthen the process for creating these plans and undertaking these assessments, so they are more substantial and robust;

(2) The Review further recommends that the Act be amended to provide:

(a) for bioregional plans to -

(i) change the terminology from 'bioregional plans' to 'regional plans';

(ii) allow the Commonwealth to unilaterally develop regional plans; and

(iii) ensure that the process for delineating a region for the purpose of the Act is flexible; and

(b) for strategic assessments to -

(i) specify mandatory required information for strategic assessments;

(ii) insert an 'improve or maintain' test for the approval of a class of actions in accordance with an endorsed plan, policy or program;

(iii) enhance provision for public engagement; and

(iv) create a 'call in' power for plans, policies and programs likely to have a significant impact on matters of National Environmental Significance , and amending the term 'action' to incorporate these plans, policies or programs; and

(c) for creation of a broad performance audit power to assess the performance of accredited systems.

Market Approaches to Secure Regional Biodiversity Outcomes

3.73 The lack of a suitable pricing signal is regarded as one of the facilitators of biodiversity loss nationally, because in many circumstances landowners have little or no economic incentive to retain native vegetation and biodiversity on their land. Previously there have been positive environmental outcomes where the Australian Government has provided financial incentives to manage biodiversity, through programs such as Landcare.

3.74 Economists have long recognised that many aspects of the natural environment lie outside the market mechanisms that provide society with clear signals about emerging scarcity. The low, or zero, price we have traditionally placed on biodiversity is one of the fundamental drivers of the persistent decline in species numbers and variety across the Australian continent. The latest OECD Environment Policy Review of Australia noted that despite wide recognition of the need to more appropriately value biodiversity, and despite a number of promising pilot programs in this area, market-based conservation measures were one of the key areas in Australia 'where efforts are not commensurate with the challenge.'[42] This contrasts with the success of governments over the past five years in establishing markets for water and allowing prices that increasingly reflect the full costs of production (or replacement).

3.75 Use of market-based mechanisms to deliver biodiversity conservation outcomes on private land has been trialled in Australia and elsewhere for more than a decade. A number of schemes designed to enhance market signals are under development around the country. For example, the Australian Government is applying market-based approaches more broadly in water management and carbon emission reforms. The use of markets in these areas aims to place more appropriate prices on natural assets and environmental services associated with these sectors to optimise environmental, social and economic outcomes.

3.76 There is an important relationship between the development of market-based mechanisms to promote conservation and the operation of development control legislation. New South Wales' Biodiversity Banking Scheme and Victoria's BushBroker are examples of state run market-based incentives programs. At the Commonwealth level the Government is investing in the Environmental Stewardship Program using a market mechanism to allocate funds.[43] The program focuses on matters of NES as these represent the most vulnerable and at risk environmental assets which fall substantially under the Australian Government's responsibility.

3.77 One approach to establishing a better market signal is the concept of conservation or biodiversity banking (biobanking). The concept has its genesis in wetland mitigation banks created in the United States in the early 1980s.[44] Biobanking involves government setting a limit on the harm that can come to species or habitat, and then allowing the market to resolve the cost of offsetting the impacts above the cap.

3.78 The intention is to place a price upon impacts on species and ecosystems, and at the same time make conserving them profitable.

3.79 The purpose is to promote avoidance of the destruction of important habitat . When avoidance cannot be achieved then the aim is to ensure that compensatory activity is undertaken in the most ecologically effective parts of the landscape, and that agreements account for both the expected value of the compensation and the uncertainty associated with attaining the desired outcome.

3.80 Under conventional project approval arrangements the tendency is to have a series of small, disjunctive mitigation and offset outcomes. These case-by-case arrangements have little or no long term management, cannot adequately be defended from surrounding incompatible land uses, are difficult to monitor and enforce, and rarely serve their intended long term conservation purpose.[45]

42 Organisation for Economic Co-operation and Development, *Environment Performance Review: Australia* (2008).

43 Further information on the Environment Stewardship Programs is available at http://www.nrm.gov.au/stewardship/.

44 Nathaniel Carroll, Jessica Fox and Ricardo Bayon (eds) *Conservation and Biodiversity Banking – A Guide to Setting Up and Running Biodiversity Credit Trading Systems* (2008).

45 Deborah L Mead, 'History and Theory: The Origin and Evolution of Conservation Banking' in Nathaniel Carroll, Jessica Fox and Ricardo Bayon (eds) *Conservation and Biodiversity Banking – A Guide to Setting Up and Running Biodiversity Credit Trading Systems* (2008).

3.81 Offset and mitigation sites generated by *ad hoc* project-by-project approvals often have a number of problems that mean they are less successful than they could be. These include:

- failure to implement the mitigation conditions;
- sites are too small to be ecologically sustainable;
- absent or insufficient long term management;
- no contingency arrangements for unexpected events (such as fire); and
- lack of community support resulting in vandalism.

3.82 Biobanking arrangements should be linked to regional planning, to focus conservation efforts on strategically located sites and to generate long-term ecological and conservation gains. Biobanking should also be designed to ensure funds are available for long term management of these areas.

3.83 The NSW Government has described biobanking as:

> A market-based scheme that provides a streamlined biodiversity assessment process for development, a rigorous and credible offsetting scheme as well as an opportunity for rural landowners to generate income by managing land for conservation.
>
> Biodiversity Banking (biobanking) enables 'biodiversity credits' to be generated by landowners who commit to enhance and protect biodiversity values on their land through a biobanking agreement. These credits can then be sold, generating funds for the management of the site. Credits can be used to counterbalance (or offset) the impacts on biodiversity values that are likely to occur as a result of development. The credits can also be sold to those seeking to invest in conservation outcomes, including philanthropic organisations and government.[46]

3.84 In Australia the New South Wales BioBanking and the Victorian BushBroker schemes are the most developed. However, no trades have occurred under the NSW scheme. Queensland recently commenced operation of EcoFund, a government sponsored broker for trades. No other States or Territories have formal biobanking schemes.

3.85 Jurisdictions in Australia have developed different measures of biodiversity value. They include 'Habitat Hectares'[47] in Victoria and 'Biometrics'[48] in New South Wales as well as other systems.[49] These measures are the currencies that define tradeoffs in biodiversity management. Biodiversity value may be defined in many ways, but in the context of biodiversity conservation policy usually it is a measure of the extent to which a site can sustain viable populations of indigenous plant and animal species.[50] Investment planning, including allocation of limited incentive funding, biodiversity offsets and biobanking schemes, require estimates of the current and future biodiversity values of both development (loss) and offset (gain) sites.[51]

3.86 A systemic approach to biobanking could bring considerable benefits to biodiversity conservation.

3.87 The primary and arguably most important driver determining initial demand in a biobanking market system is the level of regulatory enforcement associated with requirements to avoid impacts on species and habitats.[52] In this respect, if a biobanking scheme were to be introduced nationally, then the Act would have a significant role to play in the scheme's operation.

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46 NSW Department of Environment and Climate Change, *BioBanking* http://www.environment.nsw.gov.au/biobanking/.

47 David Parkes, Graeme Newell and David Cheal, 'Assessing the quality of native vegetation: The 'habitat hectares' approach' (2003) 4 *Ecological Management and Restoration*.

48 Phil Gibbons, Sue Briggs, Danielle Ayers, Julian Seddon, Stuart Doyle, Peter Cosier, Chris McElhinny, Vanessa Pelly and Kevin Roberts, 'An operational method to assess the impacts of land clearing on terrestrial biodiversity' (2008) 9 *Ecological Indicators* 23.

49 Helen Regan, Frank Davis, Sandy Andelman, Astrid Widyanata and Mariah Freese, 'Comprehensive criteria for biodiversity evaluation in conservation planning' (2007) 16. *Biodiversity and Conservation*.

50 David Keith and Emma Gorrod, 'The meanings of vegetation condition' (2006) 7 *Ecological Management and Restoration*.

51 Helen Regan, Frank Davis, Sandy Andelman, Astrid Widyanata and Mariah Freese, 'Comprehensive criteria for biodiversity evaluation in conservation planning' (2007) 16. *Biodiversity and Conservation*; Phil Gibbons and David Lindenmayer, 'Offsets for land clearing: No net loss or the tail wagging the dog?' (2007) 8 *Ecological Management and Restoration* 26-31; and DECC, *Biodiversity Banking and offsets scheme: Scheme overview* (2007).

52 Craig Denisoff, 'Business Considerations' in Nathaniel Carroll, Jessica Fox and Ricardo Bayon (eds) *Conservation and Biodiversity Banking – A Guide to Setting Up and Running Biodiversity Credit Trading Systems* (2008).

3.88 The concept of biobanking received general support in submissions and public consultation process, with submissions suggesting that the Commonwealth should be a leader in promoting improved valuation and market mechanisms for biodiversity management.[53]

3.89 The main risks associated with the development and operation of a biobanking scheme should be addressed in its design. These risks include:

- trades will be used as a means of simply buying development approvals – that is, all reasonable effort will not be made to avoid impacts;
- there will be a net loss of biodiversity if trades simply occur on a one for one basis;
- the system of determining the 'credit' required to offset a particular impact will not adequately factor in risks such as the lag in rehabilitating new areas, bank failures and stochastic impacts such as fire; and
- insufficient resources will be set aside to provide for long-term management of the resultant secured areas.

Any scheme adopted by the Australian Government should anticipate these problems and factor them into its biobanking design.

3.90 Effective biobanking will require metrics that better reflect the value of vegetation for biodiversity,[54] especially because the habitat value of vegetation is different for each species. Effective measures should incorporate:[55]

- protection of degraded habitat critical to the survival and persistence of important species and communities;
- the dynamic nature of landscapes – for example, recently-burned patches should not receive an artificially low value because they temporarily lack certain habitat characteristics; and
- spatial context, to account for metapopulation dynamics.

The challenge will be in finding surrogates that are complex enough to capture important values, without being overly burdensome to implement in practice.

3.91 The burden of proof in demonstrating the success of a restoration project or the value of an offset should be borne by the proponent. The proponent should demonstrate that the trade is in favour of the environment, using agreed measurement protocols verified by independent audit.

3.92 The Australian Government's position should be predicated on the principle of 'maintain or improve' and should take into account the uncertainties inherent in offset activities. The maintain and improve test should be interpreted in an ecological context, that is the aim should be to maintain or improve the likelihood of species, communities and habitat persisting in the landscape.

3.93 One strategy is that the loss of biodiversity values should only be compensated by sites on which the biodiversity offset has already been rehabilitated or re-established. That is, the biobanking scheme should be treated as a savings bank rather than a trading bank, in which trading is only possible once it can be demonstrated that assets have matured. Mature investments could then be sold to a party interested in liquidating an equivalent amount and quality of vegetation.

3.94 Biobanking systems that take into account ecological uncertainties must increase the area and condition of the traded entity – the equivalent in economics is applying a discount rate to calculate net present value. In ecology, the uncertainties are so large that the discount rate makes many trades unworkable for proponents. Thus, the savings bank option is likely to be valuable for both proponents of development and those whose primary motivation is to protect the environment. A savings bank will provide a platform for equitable trades where uncertainty does not inflate unreasonably the area that has to be rehabilitated.

53 See e.g. Submission 92: Friends of Grasslands; and Submission 3: Australian Forest Growers.

54 Michael McCarthy, Kirsten Parris, Rodney van der Ree, Mark McDonnell, Mark Burgman, Nicholas Williams, Natasha McLean, Michael Harper, Rachelle Meyer, Amy Hahs and Terry Coates, 'The habitat hectares approach to vegetation assessment: An evaluation and suggestions for improvement' (2004) 5 *Ecological Management and Restoration* 24.

55 Sarah Bekessy, Brendon Wintle, David Lindenmayer, Michael McCarthy, Mark Colyvan and Hugh Possingham. (pers. comm.).

3.95 A biobanking scheme predicated solely on already created biodiversity credits may be slow to establish, because of the shallowness of the biodiversity market, coupled with the lag time to develop credits. The lag time to rehabilitate degraded environments could extend to decades. The depth of the market is an important consideration. If the transaction costs are too high, including in time, then there will be no incentive for developers and the *status quo* is likely to prevail.

3.96 Design issues will be important to both the environmental and economic success of the scheme. It would therefore be appropriate for the scheme to evolve in a staged manner over a number of years with each version becoming more sophisticated.

3.97 If each State and Territory, and indeed the Australian Government, develop separate biobanking methodologies, inefficiencies will occur. This will compound the costs to business, increase the regulatory burden and diminish the environmental benefit that could potentially be unlocked by an appropriate scheme. These concerns were particularly highlighted in local government submissions.[56]

3.98 The Australian Government should therefore take a leadership role on this issue, either by:

- working through COAG to develop consistent standards for the operation of biobanking schemes; or
- by creating a national biobanking scheme.

3.99 A national biobanking scheme has some attraction given that the rules governing valuation, establishment of credits, retirement of credits, management of endowment funds, saving and investments, as well as recording and monitoring trades and the outcomes of management goals embedded in trades are likely to be complex. It is highly unlikely that national standards alone would result in identical schemes in each jurisdiction. A national scheme could also be harmonised with carbon offset credits issued under the Carbon Pollution Reduction Scheme (CPRS). The cost to business of having different schemes in each jurisdiction could be significant over time. Differences in schemes would also limit the ability of assessors to work across jurisdictions and the ability to have interstate trades, an issue that is particularly important on the eastern seaboard.

3.100 If a national scheme is impractical then the Government should consider using approval bilateral agreements to develop a national standard. Many submissions suggested that the Australian Government should accredit the current state-based schemes as a step towards reducing duplication and inefficiency in condition setting.[57]

3.101 Biobanking (or offsetting) should never be the first action taken when conserving biodiversity in a land development context – the approach should always be avoidance, mitigation and then offsetting.[58] The Act should reflect this.

3.102 As biobanking develops as a policy response, it is becoming clear that it should not be looked at in isolation:

> Biodiversity banking will be most effective when built into planning at a much broader spatial and ecological scale. Otherwise, we risk winning the environmental battle but losing the war.
> We need to ask what is the endgame for any given landscape?… And perhaps most important: How do we get there?[59]

Accordingly, the biobanking provisions in the new Act should link to the development of the regional plans.

3.103 Market-based approaches are intended to find the most cost effective intervention. However, in the absence of complete information a market-based approach such as biobanking will not result in an efficient outcome. To be successful, market-based approaches need to be underpinned by reliable information about the environmental goods and services being traded. A comprehensive environmental information base, such as the environmental accounting system recommended in Chapter 19, would provide the necessary underpinnings to develop this approach.

56 Submission 77: Local Government and Shires Association of NSW.

57 See e.g. Submission 47: Landcom; Submission 77: Local Government and Shires Association of NSW; Submission 97: Mr Peter Hemphill and Mr Tom Kaveney; and Submission 205: Government of New South Wales.

58 This is in accordance with the Senate Committee Report Recommendation 9.

59 Nathaniel Carroll, Ricardo Bayon and Jessica Fox, 'The Future of Biodiversity Offset Banking' in Nathaniel Carroll, Jessica Fox and Ricardo Bayon (eds) *Conservation and Biodiversity Banking – A Guide to Setting Up and Running Biodiversity Credit Trading Systems* (2008), p.224.

Recommendation 7

(1) The Review recommends that:

(a) the Council of Australian Governments (COAG) develop a national biodiversity banking (biobanking) system and standards; and

(b) the Australian Government in the interim, accredit State and Territory biobanking schemes, subject to their meeting acceptable standards.

(2) The Review further recommends that the Act should be amended to:

(a) facilitate and promote the use of biobanking as part of project approvals; and

(b) facilitate the operation of a national biobanking scheme.

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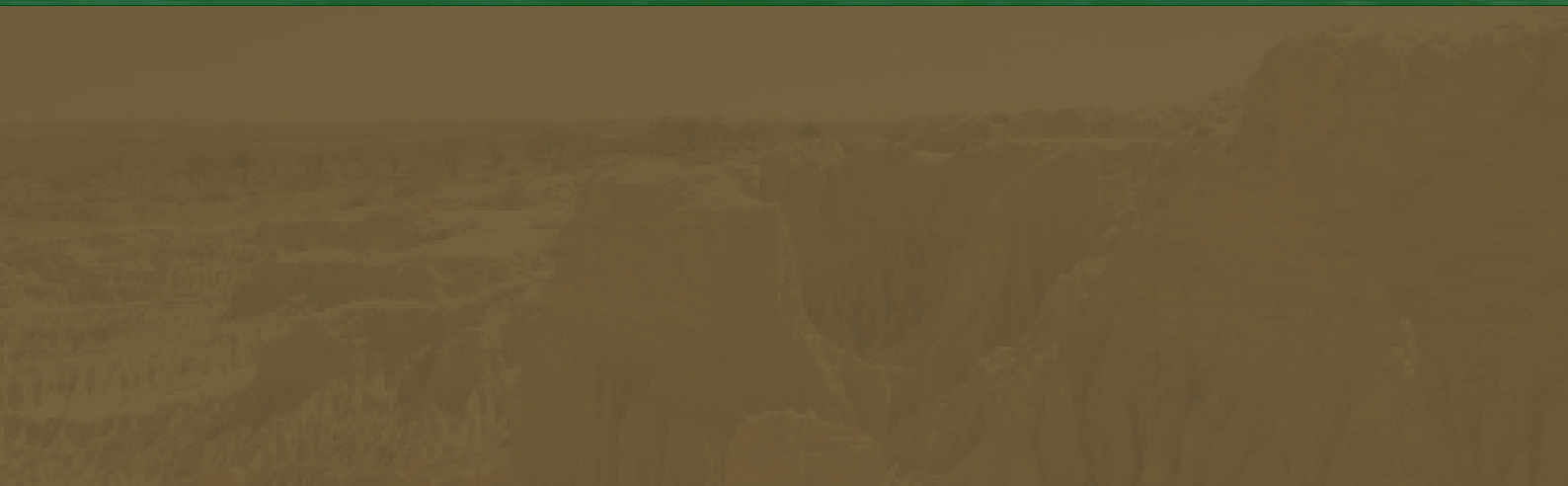
Chapter Four

MATTERS OF NATIONAL ENVIRONMENTAL SIGNIFICANCE



Chapter 4: Matters of National Environmental Significance

4.1 The focus of the EPBC Act is on protecting matters of national environmental significance (NES). The 1997 Council of Australian Governments (COAG) Heads of Agreement includes a statement about the Commonwealth's role in environmental assessment and approval of proposals, which is limited to assessing those proposals which may have a significant impact on seven defined matters of NES:

- World Heritage properties;
- Ramsar listed wetlands;
- Places of national significance;
- Nationally endangered or vulnerable species and ecological communities;
- Migratory species and cetaceans;
- Nuclear activities; and
- Management and protection of the marine and coastal environment.[1]

4.2 These matters are considered to be of national environmental significance mainly because of the existence of international obligations, including under the World Heritage Convention,[2] the Ramsar Convention,[3] the Biodiversity Convention,[4] the Bonn Convention,[5] the International Whaling Convention[6] and bilateral regional agreements relating to migratory birds.[7] They also include matters in which the Commonwealth was already involved, such as the conservation of threatened species and ecological communities (through the *Endangered Species Protection Act 1992* (Cth)) and the preservation of places of national significance (particularly through the maintenance of the Register of the National Estate under the *Australian Heritage Commission Act 1975).*

4.3 The COAG Heads of Agreement also sets out 23 additional matters of NES in relation to which the Commonwealth has 'interests and obligations'.[8] In 1999, consistent with the COAG Heads of Agreement, these matters of NES were excluded from the list of protected matters that would trigger the assessment and approval processes of the Act. While some of these matters were thought to be addressed better through cooperation with the States and Territories and through program funding (such as Natural Heritage Trust Programmes), others were already regulated in other national legislation (such as the regulation of ozone depleting substances).

4.4 Some of these matters, such as access to biological resources and international trade in wildlife arising from obligations under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora*,[9] have subsequently been incorporated into the Act.

1 Council of Australian Governments, *Heads of agreement on Commonwealth and State roles and responsibilities for the Environment* (1997) http://www.environment.gov.au/epbc/publications/coag-agreement/index.html.

2 The *Convention Concerning the Protection of World Cultural and Natural Heritage* done at Paris on 23 November 1972 (World Heritage Convention).

3 The *Convention on Wetlands of International Importance, especially as Waterfowl Habitat* done at Ramsar on 2 February 1971 (Ramsar Convention).

4 The *Convention on Biological Diversity* done at Rio de Janeiro on 5 June 1992 (Biodiversity Convention).

5 The *Convention on the Conservation of Migratory Species of Wild Animals* done at Bonn on 23 June 1979 (Bonn Convention).

6 The *International Convention for the Regulation of Whaling*, done at Washington on 2 December 1946 (International Whaling Convention).

7 Migratory Bird Agreements – *Japan—Australia Migratory Bird Agreement* done at Tokyo on 6 February 1974 (JAMBA); *China—Australia Migratory Bird Agreement* done at Canberra 20 October 1986 (CAMBA); and *Republic of Korea—Australia Migratory Bird Agreement* done at Canberra 6 December 2006 (ROKAMBA).

8 Council of Australian Governments, *Heads of agreement on Commonwealth and State roles and responsibilities for the Environment* (1997) http://www.environment.gov.au/epbc/publications/coag-agreement/index.html.

9 The *Convention on International Trade in Endangered Species of Wild Fauna and Fauna* done at Washington on 3 March 1973 (CITES).

Scope of Environmental Impact Assessment under the Act

4.5 Actions proposed on or affecting land other than Commonwealth land, or actions taken by proponents other than Commonwealth agencies, require approval under the Act only if they are likely to have a significant impact on the following matters of NES, currently defined in Part 3 of the Act:

- World Heritage properties;
- National Heritage places;
- wetlands of international importance;
- listed threatened species and ecological communities;[10]
- migratory species protected under international agreements;
- the Commonwealth marine environment;
- the Great Barrier Reef Marine Park[11]; and
- the environment, where the action proposed is a nuclear action (including uranium mines).

4.6 An action that has, will have or is likely to have, a significant impact on the environment generally (i.e. not limited to impacts on matters of NES), requires approval under the Act where:

- the action proposed is on, or will affect Commonwealth land; or
- Commonwealth agencies are proposing to take an action.

4.7 In this Report 'protected matters' include all of the matters outlined in this section (i.e. matters of NES and matters discussed above in relation to Commonwealth land and actions by Commonwealth agencies).

4.8 Relatively few submissions dealt with the appropriateness of the current matters of NES, which suggests that they are generally accepted. Those submissions that did comment on the current matters of NES were mainly concerned with issues of interpretation and implementation.

4.9 While there is some potential for the scope of the nuclear actions matter to be clarified (as suggested by some public comments), the matters currently protected by the Act remain appropriate as matters on which the Commonwealth should focus its attention and maintain a leading role in their protection. Accordingly, they should be retained.

4.10 The key criticism of the current matters of NES was that there were not enough matters for the Act to deal adequately with environmental challenges. This argument is discussed further below.

Nuclear Actions

4.11 One existing matter of NES that could be modified is nuclear actions. Nuclear actions are considered to be a matter of NES because of their potentially significant impacts on public and environmental health and community concern about nuclear actions. As noted in Attachment 1 to the 1997 COAG Heads of Agreement:

> The Commonwealth has a responsibility and an interest in relation to the assessment and approval of mining, milling, storage and transport of uranium and the development and implementation, in consultation with the States, of codes of practice as provided under the *Environment Protection (Nuclear Codes) Act 1978* for protecting the health and safety of the people of Australia, and the environment, from possible harmful effects associated with nuclear activities.

10 Excluding species listed as conservation dependent or ecological communities listed as vulnerable.

11 *Great Barrier Reef Marine Park and Other Legislation Amendment Act 2008* (Cth) Sch 4, Item 2.

4.12 There is, however, the question of why regulation of uranium mines should be different from that applicable to other forms of mining. This issue was raised by the mining industry:

> The inclusion of uranium mining under the Act as a 'nuclear action', and therefore automatically defined as a controlled action, is seemingly inconsistent with the other matters of national environmental significance (NES), which are legitimate matters for environmental protection under the Act. Uranium mines should be assessed under the Act as for any other mine where the action will have, or is likely to have, a significant impact directly on matters of national environmental significance. SACOME questions whether the act of mining uranium should, of itself, be classified as a 'nuclear action' for the purposes of the EPBC Act. The Chamber believes the other definitions captured by the Act are more in line with what constitutes a 'nuclear action'.
>
> Irrespective of the definition of 'nuclear action' the Act does not clearly define mining in the context of uranium. The Chamber is concerned that some activities could technically invoke the Act and be deemed controlled actions because they involve the extraction of material that contains uranium, although not the target resource. These include geothermal and mineral sands operations, and could also extend to oil and gas operations. The Department of Environment, Water, Heritage and the Arts (DEWHA) web site clarifies that mineral sands is excluded as a nuclear action, although the EPBC Act itself and the relevant guidelines (EPBC Act Policy Statement 1.1 – Significant Impact Guidelines, May 2006) does not clearly articulate this exemption.
>
> The Act and guidelines/policies need to be clear on matters around what constitutes a nuclear action. For operations where uranium is incidental to projects such as geothermal, mineral sands, and oil and gas, these should be specifically excluded as a nuclear action under the Act.[12]

4.13 The suggestion to clarify the scope of the matter of NES relating to nuclear actions has merit and should be explored further by the Australian Government. The controls on nuclear activities other than mining remain suitable at this time, but would need to be revisited if the current policy setting about nuclear power changes. [13]

New Matters of NES

4.14 To justify the inclusion of a new matter of NES, there must be an identified 'gap' or policy failure in the current protected matters. Many submissions argued that the current policy failure is that the Act is not dealing well with biodiversity systematically. The focus on threatened species and ecological communities has generated long lists, but operationally it is difficult to deliver healthy environmental systems with a focus on individual components.

4.15 Key areas of policy gap identified include:

- climate change adaptation – the Australian Government should focus less on protecting the last few populations of a particular species or ecological community, and more on establishing resilient and adaptive landscapes;
- approaches to biodiversity conservation – the balance of government intervention should move from crisis management towards prevention;
- cumulative impacts – ensuring that environmental outcomes across the landscape are reasonable is difficult when controls are exercised on a case-by-case basis;
- protection of ecosystem integrity; and
- regulation of 'not yet threatened' or keystone species.

4.16 Submissions proposed several new matters of NES for inclusion in the Act, such as:

- greenhouse gas emissions or climate change impacts;
- water issues (including water extraction or interception, wild rivers and wetlands of national importance);
- land clearance;
- gene technology or release of genetically modified organisms;

12 Submission 111: South Australian Chamber of Mines and Energy, p.3.

13 See e.g. Uranium Industry Framework Steering Group, *Report of the Steering Group* (2006) http://www.ret.gov.au/resources/mining/australian_mineral_commodities/uranium/Documents/UIF_Steering_Group_Report.pdf. The Australian Government (through the Australian Research Council) is also currently funding research by the National Academies Forum on 'Understanding the Formation of Attitudes to Nuclear Power in Australia', due to report in 2010.

- invasive species;
- vulnerable ecological communities (in addition to the current matter of NES, 'threatened species and ecological communities');
- wilderness areas, habitat-related matters of NES , and Biosphere reserves;
- persistent organic pollutants;
- Commonwealth marine species in State waters;
- acts of corporations;
- landscape-scale matters;
- ozone depletion;
- management of hazardous wastes;
- national level policies;
- local government planning or significant planning areas;
- migratory fish under Annex 1 of United Nations Convention on the Law of the Sea; and
- specific areas in Australia, for example, the Murray–Darling Basin or the Coorong.

Ecosystems of National Significance

Ecosystems Approach to Biodiversity Conservation

4.17 A significant number of public comments called for the Act to use 'landscape' approaches to biodiversity conservation.[14]

4.18 Some comments called for the Act to address the maintenance of ecosystems and ecosystem function, instead of focusing only on species and ecological communities.[15]

4.19 Adoption of a landscape approach to biodiversity conservation involves taking a holistic approach to biodiversity management and recovery actions. While there is provision to manage some areas on an ecosystem scale (such as World Heritage areas and Ramsar wetlands), protection of biodiversity at an ecosystem level is at present limited to ecosystems that happen to occur within areas protected for other reasons; that is, in World Heritage areas, National or Commonwealth Heritage places, wetlands of international importance or Commonwealth marine areas. Terrestrial ecosystems outside of protected heritage places or listed wetlands can therefore only be protected indirectly if a proposed action triggers an assessment because of the likelihood of a significant impact on a threatened species or ecological community.

4.20 Recent reports on the impacts of climate change on Australia's biodiversity conclude that many species are likely to become increasingly threatened as the impacts of climate change become more pronounced. It is unclear how species will cope with the changing environment, but it is likely that the structure of ecological communities will change as species adapt.[16] Several submissions called for the focus of the Act to change from protecting species to protecting a diversity of habitats:

> It is quite possible for management to continue to be mostly place-based (property based agreements, protected areas, etc), but with long-term outcomes that relate less to fixed species and communities. To enable this, landscape and bioregional approaches, coordinating local and place-based activities, would be much more important – for example, seeking to protect a diversity of environments or habitats while also focussing on the ability of all ecosystems, regardless of how modified, to support biodiversity and provide ecosystems services. To underpin this, greater priority may need to be placed on understanding and protecting the properties of landscapes and ecosystems that might provide a greater chance for species to adapt to climate change, ensure whole landscapes remain rich and diverse, and allow key ecosystem processes to continue.[17]

14 See e.g. Interim Report Comment 32: Magnetic Island Community Development Association, p.5.

15 See e.g. Interim Report Comment 47: Mr Jim Walker, p.1.

16 See e.g. Biodiversity and Climate Change Expert Advisory Group, *Australia's Biodiversity and Climate Change: a strategic assessment of the vulnerability of Australia's biodiversity to climate change – Technical Synthesis (*2009) p.23; and Interim Report Comment 49: CSIRO, pp.2-3.

17 Interim Report Comment 49: CSIRO, p.3.

4.21 Protection of ecosystems should give the Commonwealth the best opportunity to preserve comprehensive, adequate and representative ecosystems. The report on *Australia's Biodiversity and Climate Change* notes that:

> Biodiversity conservation in a changing climate requires a re-evaluation of what we are managing for. The rate of change within natural systems could be very swift compared to the past and the magnitude of change could be large. Management approaches that seek to maintain current spatial arrangements of species will be very difficult to implement under a changing climate – and could well become counterproductive. Management objectives will need to be reoriented from preserving all species in their current locations to maintaining the provision of ecosystem services through a diversity of well-functioning ecosystems.
>
> Concepts such as resilience and transformation provide positive, proactive avenues for reducing the vulnerability of biodiversity to climate change. The emphasis is on making space and opportunities for ecosystems to self-adapt and reorganise, and on maintaining fundamental ecosystem processes that underpin vital ecosystem services.
>
> Progress in biodiversity conservation over the past several decades provides a solid base on which to tackle the climate change threat. A blend of existing and new policy and management strategies and tools is required. They can be grouped into three areas: (i) building resilience; (ii) proactive interventions; and (iii) flexible policy and management approaches.[18]

4.22 The report considered that there are several components in building resilience:

> ***Maintain well-functioning ecosystems***
> With decades or centuries of projected climate change that is significant in magnitude but uncertain in detail, the single most important adaptation strategy is the maintenance of well-functioning ecosystems. However, a key question is when, under climate change, does maintenance of resilience of existing ecosystems become counterproductive and facilitation of transformation into new ecosystems become more appropriate? Better regional and local monitoring is required to inform such decisions.
>
> ***Protect a representative array of ecosystems***
> The principle of representativeness – representing all biodiversity in appropriately managed systems – remains essential. However, under a rapidly changing climate, the purpose may change – to represent as many different combinations of underlying environments and drivers, rather than specific arrays of current species. Nevertheless, the National Reserve System remains the pillar of biodiversity conservation in the 21st century, and needs to be strengthened with ambitious conservation targets and the means to achieve them.
>
> ***Remove or minimise existing stressors***
> Climate change exacerbates the effects of many existing stressors, which continue to be the biggest threat to Australia's biodiversity. Accelerating the control or elimination of existing stressors offers an extremely low-risk, high-payback starting point in building resilience of natural systems to climate change.
>
> ***Build appropriate connectivity***
> With increasing pressure on species to migrate in response to a changing climate, and for ecosystems to disassemble and reassemble, there needs to be a greater focus on achieving appropriate types of landscape and seascape connectivity to 'give space for nature to self-adapt'. A key strategy is to integrate all types of protected areas into a single national system, and to facilitate better integration of off-reserve conservation with protected areas.
>
> ***Identify and protect refugia***
> There is a need to ensure that key sites likely to provide refugia in the face of climate change are identified and included in reserves or otherwise managed to protect their values.[19]

4.23 Ensuring the ongoing survival of significant ecosystems should establish a network of climate refugia for species as they attempt to adapt to the predicted significant changes to the Australian environment.

4.24 For these reasons, the Act would be more effective in conserving Australia's biodiversity if it could protect biodiversity at an holistic ecosystem level where species' interactions with the living and non-living environment could be assessed and managed appropriately.

18 Biodiversity and Climate Change Expert Advisory Group, *Australia's Biodiversity and Climate Change: a strategic assessment of the vulnerability of Australia's biodiversity to climate change – Summary for policy makers* (2009) p.13.

19 Biodiversity and Climate Change Expert Advisory Group, *Australia's Biodiversity and Climate Change: a strategic assessment of the vulnerability of Australia's biodiversity to climate change – Summary for policy makers* (2009) p.42.

4.25 As discussed in Chapter 5, the Act currently provides for the listing of critical habitat for threatened species and ecosystems. However, critical habitat currently only receives substantive protection on Commonwealth land. In addition, the impacts of climate change are likely to cause species' habitat to shift, which will lead to difficulties in defining this critical habitat. The report on *Australia's Biodiversity and Climate Change* recommends that the focus of biodiversity conservation efforts at a national level should be to protect a 'representative array' of ecosystems.[20] The obvious way of doing so is for the Act to provide for the protection of *ecosystems* of national significance, in addition to the current protections provided to threatened species and ecological communities.

4.26 Shifting the focus from species-by-species protection and recovery up to an ecosystem level would broaden the scope of Commonwealth involvement in biodiversity conservation. This shift is consistent with Australia's international obligations under the Biodiversity Convention, which calls for protection of ecosystems, as well as individual species[21] – though it is not, and should not be, the Commonwealth's responsibility to manage the whole Australian environment.

4.27 In keeping with the objectives of the IGAE, the Australian Government should maintain its focus on nationally significant environmental matters. Similar to the current arrangements for heritage protection where the Australian Government is responsible for protecting places of international and national significance (and not places of State or local significance), the Commonwealth should protect ecosystems of *national* significance by including such ecosystems as a matter of NES.

Identifying, Defining and Protecting Ecosystems of National Significance

4.28 'Ecosystem' is defined in the Act as 'a dynamic complex of plant, animal and micro-organism communities and their non-living environment interacting as a functional unit.'[22] The challenge in defining this matter of NES will be in determining which ecosystems are 'nationally significant'.

4.29 While there are potentially some challenges in doing so, protecting ecosystems under the Act is an achievable goal with significant merit in light of the scientific research on current and emerging threats to biodiversity. Protecting ecosystems creates a mechanism for protecting biodiversity at a broader level than the existing mechanisms for protecting species and ecological communities. As Paul Adam has observed:

> some of the difficulties which have arisen could have been avoided if the highest level of biodiversity recognised in legislation had been labelled 'ecosystem' rather then 'community', as this would allow greater weight to be given to abiotic factors in identifying and recognising entities in the field.[23]

Criteria for Listing an Ecosystem of National Significance

4.30 There are two options for defining and listing ecosystems of national significance.

Option A – first principles approach

4.31 Ecosystems could be listed in a similar fashion to threatened species and ecological communities. The TSSC would receive nominations and provide advice to the Minister before the Minister made a decision whether or not to list the nominated ecosystem.

4.32 Ecosystems would be defined primarily on the basis of species composition – essentially by identifying ecological characteristics from first principles as currently occurs for listing ecological communities. Descriptions of composition could be supplemented by information on vegetation structure, habitat characteristics and disturbance regimes in space and time. Biogeochemical attributes, landscape elements, soils, other abiotic elements, and ecosystem services could provide useful surrogate measures of occurrence.

4.33 Small-scale maps would be used to identify areas (e.g. of bioregions or subregions) within which communities and ecosystems of national significance lie, and to specify exact locations of boundaries (undertaken by 'accredited' professionals).

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20 Biodiversity and Climate Change Expert Advisory Group, *Australia's Biodiversity and Climate Change: a strategic assessment of the vulnerability of Australia's biodiversity to climate change – Technical Synthesis* (2009) *p.42.*

21 *Convention on Biological Diversity* done at Rio de Janeiro on 5 June 1992 (Biodiversity Convention) art 8.

22 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.528.

23 Paul Adam, 'Ecological communities – the context for biodiversity conservation or a source of confusion?' (2009) 13(1) *The Australasian Journal of Natural Resources Law and Policy* (2009) 7, p.7 in Interim Report Comment 74: Paul Adam, p.12.

4.34 Ecosystems of national significance would be circumscribed and assessed throughout their national range, to avoid issues such as excessive subdivision of ecosystems by artificial boundaries (e.g. jurisdictional borders).

4.35 The risk in this approach is that effort would be diverted from actual protection to questions of definition.

Option B – characteristics or values approach

4.36 This approach rests on identifying those parts of the landscape that need Australian Government intervention in order to deal with the national policy gaps identified above. This values approach to listing ecosystems is preferred.

4.37 The criteria for listing an ecosystem could be developed using a system similar to that followed for identifying natural heritage places, Ramsar wetlands and places included in the National Reserve System (NRS). That is, the purpose or aim of listing and the characteristics (values) that must be protected would be identified, and criteria developed from there. The Comprehensive, Adequate, Representative (CAR) objectives used by the NRS are a good starting point. The priorities currently adopted for the NRS could be applied to listing ecosystems of national significance, such as prioritising ecosystems that:

- currently receive little legal protection;
- offer refuge or are centres of native species richness; or
- play a key role in habitat connectivity, to allow corridors for species movement.[24]

4.38 In determining whether particular ecosystems fall within these priorities, or whether the CAR objectives are being met in protecting a representative array of terrestrial ecosystems, decision-makers could have regard to the Interim Biogeographic Regionalisation for Australia[25], the bioregional map of terrestrial ecosystems used in determining whether a bioregion is adequately represented in the NRS. For marine ecosystems and bioregions, decision-makers could have regard to bioregions mapped in the Integrated Marine and Coastal Regionalisation of Australia.[26]

4.39 The United Nations Food and Agriculture Organisation (FAO) uses the following criteria to identify vulnerable marine ecosystems:

(i) uniqueness or rarity;

(ii) functional significance of the habitat;

(iii) fragility;

(iv) life-history traits of component species that make recovery difficult; and

(v) structural complexity.[27]

These criteria could be adapted to terrestrial ecosystems.

4.40 Another reference point in determining whether an aquatic ecosystem is of national significance could be the Australian and New Zealand Environment and Conservation Council (ANZECC) criteria for listing a wetland on the list of Wetlands of National Importance. The ANZECC criteria provide that a wetland can be included on this list if it:

- is a good example of a wetland type occurring within a biogeographic region in Australia;
- plays an important ecological or hydrological role in the natural functioning of a major wetland system/complex;
- is important as the habitat for animal taxa at a vulnerable stage in their life cycles, or provides a refuge when adverse conditions such as drought prevail;
- supports 1% or more of the national population of any native plant or animal taxa;

24 DEWHA, *National Reserve System: Scientific Framework* (2009) http://www.environment.gov.au/parks/nrs/science/scientific-framework.html.

25 DEWHA, *Identifying priorities: Australia's bioregions (IBRA)* (2009) http://www.environment.gov.au/parks/nrs/science/ibra.html.

26 DEWHA, *Integrated Marine and Coastal Regionalisation of Australia* (2008) http://www.environment.gov.au/coasts/mbp/imcra/index.html.

27 Food and Agriculture Organisation of the United Nations, *International Guidelines for the Management of Deep-Sea Fisheries in the High Seas: Annex F of the Report of the Technical Consultation on International Guidelines for the Management of Deep-sea Fisheries in the High Seas* (2008) p.44 ftp://ftp.fao.org/docrep/fao/011/i0605t/i0605t00.pdf.

- supports native plant or animal taxa or communities which are considered endangered or vulnerable at the national level; or
- is of outstanding historical or cultural significance.[28]

4.41 There should be two pathways for identifying ecosystems of national significance:

(a) through a listing process similar to that currently used for listing threatened species and ecological communities under the Act; or

(b) through the regional planning process. In preparing regional profiles, areas that meet the criteria for listing as an ecosystem of national significance could be identified and subsequently protected.[29]

4.42 Listing and protecting ecosystems of national significance would therefore be strongly linked to the regional planning process. Regional plans would address all the matters protected under the Act (including ecosystems of national significance) and NRS areas in the particular region. Commonwealth involvement in the regional planning process could enable the Commonwealth to take a more strategic approach to protecting matters of NES, but the Commonwealth would focus its full regulatory powers only in specified areas (such as National Heritage places, Ramsar wetlands and listed ecosystems of national significance).

4.43 Listing of ecosystems should involve spatial identification through mapping. Creating defined boundaries for listed ecosystems would mean that protected ecosystems would be easier to protect, as land managers and the community would be able to more readily identify the location and boundaries of the protected site. Using mapping to define the boundaries of listed ecosystems could sacrifice some level of detail in dealing with ecosystem changes, but this potential disadvantage would be outweighed by the advantages of using boundaries that are measurable and easier-to-understand. This approach would be similar to the approach taken in mapping World Heritage areas, where the boundaries encapsulate the protected system, but not always absolutely.

Proposed Criteria

4.44 If option 2 were adopted by the Australian Government, the criteria for listing an ecosystem of national significance should be similar to those currently used for assessing National Heritage List nominations. These criteria would be based on the ecosystem having 'nationally significant ecological value' because of certain characteristics of the ecosystem.

4.45 For example, to be eligible for listing as an ecosystem of national significance, an ecosystem would have to meet one or more of the following criteria:

The ecosystem is of significant national value for one or more of the following reasons:

(a) it has high comparative biological diversity within its ecosystem type;

(b) it provides critical nationally important ecosystem functions;

(c) it has a significant potential contribution to building resilient sustainable landscapes;

(d) it contains high value remnants of a particular type of habitat;

(e) it contains high value areas that create connectivity between other ecosystems;

(f) it is significant in building a comprehensive, adequate and representative system of habitat types in Australia;

(g) it provides habitat critical to the long-term survival of a significant number of threatened species listed under this Act;

(h) it is a climate change refuge of national significance; and/or

(i) it is under severe and imminent threat.

28 Environment Australia, *Australian Wetlands Database: Criteria for determining important wetlands* (2001) http://www.environment.gov.au/water/publications/environmental/wetlands/database/key.html.

29 The regional planning process is discussed in more detail in Chapter 3.

4.46 Ecosystems that are currently under-represented in existing environmental management regimes should be considered as a priority for listing.

4.47 The above criteria incorporate the priorities adopted for including areas in the NRS.[30]

Protection of the Ecological Character of Listed Ecosystems

4.48 The requirement to refer actions for assessment and approval under the Act should apply to actions that have, will have or are likely to have a significant impact on the ecological character of an ecosystem of national significance.

4.49 While several concepts could theoretically form the basis for triggering the EIA provisions of the Act (such as ecosystem services, function, or processes[31]), using 'ecological character' is preferred as the 'matter protected' for several reasons.

4.50 Ecological character is defined in the Ramsar Convention Official Guidelines (as adopted by the Conference of the Parties) as 'the combination of the ecosystem components, processes and benefits/services that characterise the wetland at a given point in time'[32]. This concept is a familiar one for users of the Act, as the Act protects the ecological character of Ramsar wetlands (wetlands of international importance), and could be adapted to apply to non-wetland ecosystems.

4.51 Another reason for protecting ecological character instead of ecosystem function or services is that it should be far easier to define what constitutes a significant impact on the *character* of an ecosystem than it would be to define what constitutes a significant impact on the *functioning* or *processes* of an ecosystem, as ecosystems tend to react to change in a non-linear (and therefore unpredictable) fashion.[33] Regulating impacts on ecological character is a simpler concept to understand than attempting to regulate impacts on services or processes. Further, protecting the ecological character of the listed ecosystem allows for protection of ecosystem services as a component of the ecological character of the ecosystem, without having to define what would be a significant impact on a service such as climate regulation.

4.52 In determining whether there has been a significant adverse impact on an ecosystem of national significance, guidance could be taken from the FAO guidelines:

> Significant adverse impacts are those that compromise ecosystem integrity (i.e. ecosystem structure or function) in a manner that: (i) impairs the ability of affected populations to replace themselves; (ii) degrades the long-term natural productivity of habitats; or (iii) causes, on more than a temporary basis, significant loss of species richness, habitat or community types. Impacts should be evaluated individually, in combination and cumulatively.
>
> When determining the scale and significance of an impact, the following six factors should be considered:
>
> (i) the intensity or severity of the impact at the specific site being affected;
>
> (ii) the spatial extent of the impact relative to the availability of the habitat type affected;
>
> (iii) the sensitivity/vulnerability of the ecosystem to the impact;
>
> (iv) the ability of an ecosystem to recover from harm, and the rate of such recovery;
>
> (v) the extent to which ecosystem functions may be altered by the impact; and
>
> (vi) the timing and duration of the impact relative to the period in which a species needs the habitat during one or more of its life-history stages.[34]

30 DEWHA, *National Reserve System: Scientific Framework* (2009) http://www.environment.gov.au/parks/nrs/science/scientific-framework.html.

31 *For more information on the relationship between the concepts of ecosystem services, function and processes, see e.g. Millennium Ecosystem Assessment, Ecosystems and Human Well-being* (2005) http://www.millenniumassessment.org/en/Framework.aspx. The Ramsar Convention website defines these concepts' interrelationship within the definition of 'ecosystems' as follows:
'ecosystems are described as the complex of living communities (including human communities) and non-living environment (Ecosystem Components) interacting (through Ecological Processes) as a functional unit which provides inter alia a variety of benefits to people (Ecosystem Services).' *A Conceptual Framework for the wise use of wetlands* (2005)
http://www.ramsar.org/cda/ramsar/display/main/main.jsp?zn=ramsar&cp=1-31-105%5E20842_4000_0__.

32 *A Conceptual Framework for the wise use of wetlands* (2005)
http://www.ramsar.org/cda/ramsar/display/main/main.jsp?zn=ramsar&cp=1-31-105%5E20842_4000_0__.

33 See e.g. Biodiversity and Climate Change Expert Advisory Group, *Australia's Biodiversity and Climate Change: a strategic assessment of the vulnerability of Australia's biodiversity to climate change – Technical Synthesis (2009) p.33.*

34 Food and Agriculture Organisation of the United Nations, *International Guidelines for the Management of Deep-Sea Fisheries in the High Seas: Annex F of the Report of the Technical Consultation on International Guidelines for the Management of Deep-sea Fisheries in the High Seas* (2008) p.41
ftp://ftp.fao.org/docrep/fao/011/i0605t/i0605t00.pdf.

4.53 In proposing that the Act protect the ecological character of an ecosystem, the Review recognises that the absence of ecological character descriptions of Ramsar wetlands has caused significant problems in the past. This has consequences for both assessments of the impact of proposed actions on Ramsar wetlands and the preparation of management plans. In order to avoid this problem, the ecological characters of ecosystems of national significance should be described at the time of listing, similar to the requirement for values statements to be prepared for World Heritage areas at the time of listing.

4.54 Following the listing of an ecosystem as an 'ecosystem of national significance', management planning requirements similar to those proposed for listed Ramsar wetlands and World Heritage areas should apply. The form of these management plans is discussed in Chapter 7. These management plans would be good candidates for strategic assessments under the Act.

Recommendation 8

The Review recommends that the Act be amended to include 'ecosystems of national significance' as a new matter of national environmental significance. The 'matter protected' should be the ecological character of a listed ecosystem.

The criteria used to identify ecosystems should be along the following lines:

(1) the ecosystem is of significant national value for one or more of the following reasons:

- (a) it has high comparative biological diversity, within its ecosystem type;
- (b) it provides critical nationally important ecosystem functions;
- (c) it has a significant potential contribution to building resilient sustainable landscapes;
- (d) it contains high value remnants of a particular type of habitat;
- (e) it contains high value areas that create connectivity between other ecosystems;
- (f) it is significant in building a comprehensive, adequate and representative system of habitat types in Australia;
- (g) it provides habitat critical to the long term survival of a significant number of threatened species listed under this Act;
- (h) it is a climate change refuge of national significance; and/or
- (i) it is under severe and imminent threat; and

(2) Ecosystems that are currently under-represented in existing environmental management regimes should be considered as a priority for listing.

The Relationship with Ecological Communities and Species Listing and Management under the Act

4.55 The move towards an ecosystems-focused approach to protection of biodiversity would lead to changes in the current approach in listing threatened species and ecological communities. The Act would still provide for the listing of species (discussed further in Chapter 2), as, despite the increased focus on regional approaches, listing of threatened species would act as a complementary approach, particularly in the transition to regional approaches. Ecological communities would also continue to be listed, but the listing of ecosystems of national significance would be expected to offer a more comprehensive approach to protecting biodiversity in the future.

4.56 Climate change impacts together with existing stresses on biodiversity are likely to lead to significant changes in the composition of ecological communities across Australia. Consequently, the Commonwealth's resources would be better directed towards protecting a representative array of habitats than focussing on attempting to protect all the components of ecological communities which may change fundamentally from the composition and distribution as defined at the time of listing.

Relationship with Other Matters of NES Proposed in Submissions

4.57 Numerous submissions called for other new matters of NES, including land clearance, wetlands of national significance, water extraction or interception and wilderness areas (including wild rivers), to be recognised and regulated under the Act.

Land Clearance

4.58 Land clearance was acknowledged in both the 2001 and 2006 State of Environment reports as a key threat to Australia's biodiversity. Clearance of native vegetation results in habitat loss and can therefore have significant adverse impacts on ecosystem function.[35] While the rate of clearance decreased by about 38% between 1993 and 2003,[36] 1.5 million hectares of forest (including native and non-native vegetation) were cleared across the continent between 2000 and 2004.[37] Many feel that this level of land clearance is not acceptable and requires attention.

4.59 Many submissions called for land clearance to be included as a matter of NES due to its adverse impacts on biodiversity.[38] These arguments were supported by the Senate Committee Inquiry into the operation of the Act, which recommended that the Australian Government consider including a land clearance trigger in the Act.[39]

4.60 At the moment land clearance is the subject of State and Territory legislation which has had variable degrees of success. However, to regulate land clearance at a national level would be a significant challenge. Land clearance actions are easily divisible into smaller actions, and it might not be easy for decision-makers to recognise these small actions as part of a larger action. It would also be almost impossible to set a threshold at which point the clearance reaches a nationally significant level, as a clearance of 10 hectares of vegetation in one location may have a significant impact on local ecosystem function, whereas clearance of 10 hectares in another location may have little impact on the relevant ecosystem.

4.61 Rather than including land clearance as a matter of NES, a better approach may be to look at the motivations behind calls for land clearance to be included.

4.62 A possible mechanism to decrease the amount of land clearance in Australia would be to secure greater compliance with the existing triggers in the Act that cover land clearing – for example, where clearing is likely to have a significant impact on a threatened species ecological commnuity or a Ramsar wetland. The low rates of referral for land clearing under the Act cannot be entirely explained on the basis of the existing use provisions in the Act. These low rates of referral may be due to non-compliance.

4.63 One option for improving compliance is for the Commonwealth to devote greater resources to the enforcement of the existing provisions. Another option is for the Commonwealth to enhance compliance by increasing the level of resources dedicated to educating the general community about obligations to protect the environment, including ecosystems, wetlands, threatened species and the other matters of NES.[40] While increasing resources for community education is more of an administrative issue than a regulatory issue, it is in keeping with the new objects of the Act recommended by the Review, which encourage community engagement under the Act.[41] Public participation is discussed further in Chapter 14.

4.64 The proposed new ecosystems trigger is also significant in this context as it provides a mechanism for protecting the environment in a holistic manner, instead of attempting to manage individual pressures on ecosystems, such as land clearance. Adding 'ecosystems of national significance' as a matter of NES under the Act would require assessment and approval of actions that have, will have or are likely to have a significant

35 Robert JS Beeton, Kristal I Buckley, Gary J Jones, Denise Morgan, Russell E Reichelt, Dennis Trewin, *Australia – State of the Environment 2006* (2006), Chapter 8.1.

36 Australian Bureau of Statistics, *Measures of Australia's Progress, 2009* (2009) http://betaworks.abs.gov.au/betaworks/betaworks.nsf/projects/MeasuresOfAustralia'sProgress/environment/biodiversity.htm.

37 Robert JS Beeton, Kristal I Buckley, Gary J Jones, Denise Morgan, Russell E Reichelt, Dennis Trewin, *Australia – State of the Environment 2006* (2006), Chapter 8.1.

38 See e.g. Submission 151: Southern Rivers Catchment Management Authority, p.4; Submission 153: The Wilderness Society, p.2; and Submission 194: Australian Conservation Foundation, p.19.

39 The Senate Standing Committee of Environment, Communication and the Arts, *The operation of the Environment Protection and Biodiversity Conservation Act 1999: First Report* (2009) para.[2.59] (Senate Committee Report) available at http://www.aph.gov.au/senate/committee/eca_ctte/epbc_act/report/index.htm.

40 This is consistent with the DEWHA's *Compliance and Enforcement Policy* (2008) p.3.

41 For a further discussion on the objects of the Act and recommended duties for the Commonwealth, refer to Chapter 1.

impact on a listed ecosystem. Such actions should include significant native vegetation clearance and water extraction or interception in these ecosystems, as these actions are likely to have a significant impact on ecosystem character. Including land clearance as a separate matter of NES would lead to a significant level of duplication.

Wetlands of National Significance

4.65 Several submissions suggested that wetlands of national significance be included as a matter of NES.[42]

4.66 The Commonwealth environment protection regime contains a logical inconsistency, in that heritage places of national significance are afforded protection under the Act, but wetlands are only protected if they are of international significance. 'Key environmental assets' (including wetlands) in the Murray-Darling Basin will be protected under the Basin Plan, which is scheduled to commence in 2011.[43] But unless wetlands are of international significance or within the Murray-Darling Basin, they are not protected at the Commonwealth level. This creates a key regulatory gap where a major proportion of *nationally* significant wetlands are not protected at the *national* level.

4.67 Given Recommendation 8 to include ecosystems of national significance as a new matter of NES under the Act, the Review considers it unnecessary to separately list wetlands of national significance as a matter of NES. Wetlands are types of ecosystems that would be appropriate for listing as ecosystems of national significance, provided the relevant thresholds for listing are met. However, if ecosystems of national significance are not included as a new matter of NES, wetlands of national significance should be protected as a matter of NES under the Act alongside wetlands of international significance.

Water Extraction and Use

4.68 The over-allocation and use of water resources are recognised as significant drivers of change in Australia's biodiversity.[44] Climate change is expected to lead to increased periods of drought across parts of Australia,[45] increasing pressure on already stressed water resources.

4.69 It is important to note that the Act is not the only instrument through which the Commonwealth regulates and manages the environment. Over the last few years the Commonwealth has gone to great lengths to address over-use and over-extraction of water through the *Water Act 2007* (Cth) (Water Act) and the National Water Initiative (NWI). While the Water Act only applies to the Murray-Darling Basin, it allows the Commonwealth to take a strategic approach to water management at basin level. The Commonwealth approach to water management in other parts of Australia should be guided by the NWI, as implementation of the NWI should lead to governance arrangements at the State and Territory level that result in better management of the use and allocation of Australia's water resources.

4.70 Implementation of the NWI has, however, been at times slow and inconsistent across jurisdictions.[46] While there has been a considerable amount of work done at the Commonwealth level to address water management, the delay between launching initiatives or passing legislation and actually implementing them can be significant.

4.71 There is therefore some scope for amending the Act to complement these initiatives. However, including water extraction or use as a matter of NES under the Act is not the best mechanism for effectively managing water resources. The size of water resources and catchment areas, the scale of existing and predicted future pressures on these resources, and the environmental flow requirements of these resources vary dramatically across Australia. As with setting a threshold for a land clearance trigger, setting a threshold for a nationally significant level of extraction would be very difficult. Even if this threshold were determined, it would be almost impossible to accurately predict whether a particular water extraction pursuant to a water access entitlement would have a significant impact on the water resource over the longer-term. This is mainly because water allocations can vary significantly over the course of a year and the potential for variation of allocations over a longer period of time is even greater.

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42 See e.g. Interim Report Comment 46: Save Ralphs Bay.

43 Murray-Darling Basin Authority, *Key elements of the Basin Plan* (2009) http://www.mdba.gov.au/basin_plan/concept-statement/key-elements.

44 Biodiversity and Climate Change Expert Advisory Group, *Australia's Biodiversity and Climate Change: a strategic assessment of the vulnerability of Australia's biodiversity to climate change – Technical Synthesis* (2009) p.6.

45 See e.g. Biodiversity and Climate Change Expert Advisory Group, *Australia's Biodiversity and Climate Change: a strategic assessment of the vulnerability of Australia's biodiversity to climate change – Technical Synthesis* (2009) p.17.

46 National Water Commission, *Second Biennial Assessment of Progress in Implementation of the National Water Initiative* (2009) http://www.nwc.gov.au/www/html/147-introduction---2009-biennial-assessments.asp.

4.72 The challenges in setting extraction limits and determining whether an extraction would have a 'significant impact' on a protected matter suggest that there would be limited value in attempting to regulate individual extractions of water. However, the impracticability of including water extraction as a matter of NES does not mean that the Act should or could not be used better to address over-extraction and use of water.

4.73 The impacts of water extraction and use can already be assessed under the Act where that extraction or use has, will have or is likely to have a significant impact on a listed wetland, heritage place, species or ecological community. Listing ecosystems of national significance would allow the Commonwealth to focus on protecting significant ecosystems and managing threats to those ecosystems as a unit, instead of managing the individual threats (such as over extraction of water or land clearance) to those systems.

4.74 In addition to the issue of determining significant impact, the issue of regulation of water extraction and use was raised during discussions at a workshop held at ANU by the Review on 27 August 2009. Some of the attendees at the workshop noted that, while the recent changes to water governance in Australia were a positive step, States and Territories have been slow to implement the NWI (a conclusion supported by the Second Biennial Assessment of NWI implementation).[47] It was thought that further measures may need to be taken to encourage better water management practices by States and Territories and catchment management authorities.

4.75 A better method of addressing the adverse impacts of water extraction on protected matters would be to require strategic assessments for all water plans that authorise actions that, as a whole, have, will have or are likely to have a significant impact on a protected matter. Where water plans already provide protection for matters of NES in the relevant area, approval of a strategic assessment under the Act would create certainty for persons affected by the plan, as further environmental approvals would not be required under the Act for actions authorised under the relevant plan. Strategic assessments of water plans that authorise actions that have, will have or are likely to have a significant impact on a protected matter should lead to better environmental outcomes for the protected matters and the environment more generally. Over time this amendment should reduce the regulatory burden on individual water projects that may impact on protected matters.

4.76 Strategic assessments of these plans would avoid considerable uncertainty for those operating in accordance with the plans because there would be no further requirements for assessments under the Act and this would represent a significant regulatory efficiency.

4.77 This requirement could operate in a similar manner to the arrangements currently applicable to management plans for fisheries managed under the *Fisheries Management Act 1991* (Cth).[48]

4.78 Similarly, amendments to the Act could require the Environment Minister to make agreements for strategic assessments with the body responsible for the adoption or implementation of a water plan that authorises actions that have, will have or are likely to have a significant impact on a protected matter. An agreement should be made either:

- whenever it is proposed to make or review a water plan that authorises actions that have, will have or are likely to have a significant impact on a protected matter; or
- within five years of the commencement of the amendments to the Act for all relevant water resource management areas that did not have plans at that time.

4.79 To avoid regulatory overlap with the Water Act, the amended EPBC Act could provide that water plans that must comply with the requirements of the Basin Plan do not require assessment under the *Australian Environment Act*. However, this exemption should be contingent on the Basin Plan being strategically assessed.

4.80 The NWI sets up a helpful framework for more sustainable water resource management in Australia. It is hoped that requiring strategic assessments of water plans will encourage States and Territories to fully implement their obligations under the NWI. Strategic assessments of water plans should therefore be required to consider the plan's consistency with the objectives, outcomes and actions set out in the NWI.

47 National Water Commission, *Second Biennial Assessment of Progress in Implementation of the National Water Initiative* (2009) http://www.nwc.gov.au/www/html/147-introduction---2009-biennial-assessments.asp.

48 These provisions are set out in *Environment Protection and Biodiversity Conservation Act 1999* (Cth) pt.10, div.2.

Recommendation 9

The Review recommends that water plans that authorise actions that, as a whole, have, will have or are likely to have a significant impact on a protected matter undergo strategic assessments and approvals.

The Review recommends that the Basin Plan prepared under the *Water Act 2007* (Cth) be strategically assessed to ensure activities authorised by the Plan are compliant with the Act. Water plans that fully comply with the requirements of the accredited Basin Plan should not require assessment under the Act.

Addressing Climate Change under the Act

4.81 The most recent science on climate change indicates that:

> The climate system appears to be changing faster than earlier thought likely. Key manifestations of this include the rate of accumulation of carbon dioxide in the atmosphere, trends in global ocean temperature and sea level, and loss of Arctic sea ice.[49]

4.82 The biodiversity consequences of rapid changes in climate are predicted to be severe:

> Australia's unique biodiversity, already under threat from a wide range of stressors, now faces a further threat from a rapidly changing climate. Effects of climate change are already discernible at the genetic, species and ecosystem levels in many parts of the continent and coastal seas.
>
> Biodiversity is one of the most vulnerable sectors to climate change. Many of Australia's most valued and iconic natural areas, and the rich biodiversity they support, are among the most vulnerable to climate change.[50]

4.83 The recent reports *Australia's Biodiversity and Climate Change* and *Faster Change and More Serious Risks* add weight to the climate change concerns raised in the Interim Report. These reports confirm that the question 'if climate change is not a matter of national environmental significance, what is?', still has considerable resonance.[51]

4.84 Effective policies to mitigate and adapt to climate change are critical to long term management of Australia's biodiversity.

4.85 Current greenhouse mitigation activity and how the Act may support and enhance our national mitigation effort is considered below. The potentially adverse impacts on biodiversity as a result of measures to mitigate emissions and adapt to climate change are also addressed. Incorporating better consideration of climate change adaptation for biodiversity through regional approaches, recovery plans, listing decisions and environmental impact assessments under the Act is considered as part of emerging threats in Chapter 6.

Climate Change Mitigation under the Act

4.86 The Government's primary mechanism to deliver greenhouse mitigation, the Carbon Pollution Reduction Scheme (CPRS), was voted down in the Senate in August 2009. The Government has proposed re-introducing the CPRS for a vote in November 2009.

4.87 The implications for this Review in considering the potential to use the Act to drive mitigation, are that:

- when and whether a market-based mechanism to reduce greenhouse gas emissions is introduced remains uncertain; and
- the content of the scheme also remains uncertain because of the likelihood that the final CPRS will be amended prior to its passage through the Senate.

49 Will Steffen, *Climate Change 2009 – Faster Change and More Serious Risks*, (2009).

50 Biodiversity and Climate Change Expert Advisory Group, *Australia's Biodiversity and Climate Change: a strategic assessment of the vulnerability of Australia's biodiversity to climate change – Summary for policy makers* (2009).

51 Interim Report, para.[8.47].

4.88 Based on currently available information, if the CPRS is passed later this year implementation will not begin until 1 July 2011. A slow start is also likely with a fixed price for the first year of the scheme. While the Review's recommendations accommodate potential delays in implementation of the CPRS, if the form of the CPRS changes substantially then the discussion and recommendations here would need to be revisited.

4.89 Although the proposed CPRS will cover a significant proportion of Australia's emissions, some sectors of the economy will not be covered, and other sectors will be not be subject to an effective carbon price signal due to market barriers.

4.90 The issue of a greenhouse trigger was raised in a substantial number of submissions. The submissions fell into two groups, those supporting a trigger and those opposed.

4.91 Submissions in support of a trigger:

- identified areas that would fall outside a market-mechanism;[52]
- supported an interim trigger due to a need to act urgently;[53]
- believed that the CPRS would be too weak and required supplementation;[54]
- believed that a trigger may lead to transformed thinking across governments;[55] or
- were sceptical about the successful operation of market-mechanisms.[56]

4.92 Opponents to a greenhouse trigger argued that 'the ETS is real and imminent, it will result in a price signal for carbon, and the market will respond, industry is in fact already responding in anticipation',[57] and that it should be the sole mechanism to reduce carbon emissions.[58]

4.93 Other submissions contended that:

- a greenhouse trigger would not be complementary to the CPRS;[59]
- the EPBC Act is not the appropriate mechanism for dealing with greenhouse emissions;[60]
- a trigger may target inappropriate activities;[61] or
- the need for greenhouse gas mitigation was limited due to Australia's small contribution to global emissions.[62]

4.94 Some groups opposed to a greenhouse trigger indicated their preferred model for a trigger if it were to proceed.[63] These concerns and issues have been taken into account in the proposed position outlined below.

4.95 The Senate Committee Report also considered the potential of a climate change trigger under the Act, and recommended that the appropriateness and nature of such a trigger (should it be required) be carefully considered in the light of the findings of this Review, and in the context of the Government's overall response to climate change, in particular the CPRS.[64]

4.96 The Review recognises that the CPRS is intended to be the primary mechanism for regulation of Australia's carbon emissions, and that any additional regulation through the EPBC Act or otherwise must be complementary to that market mechanism.

52 See e.g. Interim Report Comment 3: Mr Matthew Dickie; Interim Report Comment 40: Mr Jamie Pittock.
53 See e.g. Interim Report Comment 31: Mr Ed Wensing; Interim Report Comment 26: Healesville Environment Watch; and Interim Report Comment 3: Mr Matthew Dickie.
54 See e.g. Interim Report Comment 26: Healesville Environment Watch; Interim Report Comment 98: Greenpeace Asia Pacific.
55 Interim Report Comment 88: WWF.
56 See e.g. Interim Report Comment 36: The Green Institute.
57 Interim Report Comment 24: Australian Petroleum Production and Exploration Association.
58 Interim Report Comment 80: Australian Industry Greenhouse Network.
59 Interim Report Comment 89: Timber Communities Australia (South East Region).
60 Interim Report Comment 48: Powerlink.
61 Interim Report Comment 10: Timber Communities Australia (Huon Valley Resource Centre).
62 Interim Report Comment 95: National Farmers' Federation.
63 Interim Report Comment 48: Powerlink.
64 The Senate Committee Report para.[2.58].

4.97 In light of the current uncertainty about the CPRS, and the urgency in starting to tackle Australia's carbon trajectory, it is proposed that the Government implement the following:

- an interim greenhouse trigger to be introduced as soon as possible by way of Regulation, to sunset upon commencement of the CPRS; and
- a requirement to consider cost-effective climate change mitigation opportunities as part of strategic assessments and bio-regional planning processes.

An Interim Trigger

4.98 New matters of NES can be inserted into the EPBC Act, either by amendment of the legislation, or through prescription in the Regulations. The process of prescription in the Regulations requires the Minister to:

- inform relevant State and Territory Ministers and seek comments within a specified period of at least 28 days;
- consider any comments received; and
- consult with the relevant Ministers with a view to agreeing on the action to be prescribed and the matters protected.[65]

4.99 The use of Regulation to insert a greenhouse gas trigger into the Act is preferred, because of the need to act quickly. This would ensure that emissions-intensive developments properly consider and implement low cost abatement solutions in their construction and operation, reducing the 'lock-in' of carbon intensive activities over the life of the project.

4.100 A trigger threshold of at most 500,000 tonnes of carbon dioxide equivalent emissions is suggested on the basis of prior research and previous proposals, noting that previous triggers considered by both major parties have recommended thresholds of 500,000 tonnes.[66]

4.101 The Australian Government could also explore the utility of a lower threshold, such as 100,000 tonnes, to drive abatement across the economy more comprehensively, pending the CPRS. The Review notes that reporting is already required under the *National Greenhouse and Energy Reporting (NGER) Act 2007* for corporate groups emitting 125,000 tonnes per annum (which will drop to 75,000 tonnes by 2010-11), and individual facilities emitting 25,000 tonnes per annum. It is anticipated that the availability of emissions information through NGER Act reporting would assist the effective operation of the greenhouse trigger and compliance by industry.

4.102 The Act would be triggered if the threshold were exceeded in *any* 12 month period over the life of the project or activity. While further work is needed to define the emissions to be accounted for, the Review encourages consideration of options to capture both direct and indirect domestic emissions to the extent that this is possible, such that projects (eg. major transport infrastructure) that will result in significant indirect emissions (eg. car pollution) are subject to assessment under the Act. It is intended that the trigger would capture a wide range of actions, including projects that would have a large amount of emissions released during construction, and those that would result in a large amount of emissions released during any period of operation.

4.103 The trigger should focus on domestic emissions in sectors intended to be covered by the CPRS. Issues may arise where activities result in significant emissions outside Australia. For example, it could be argued that coal exports to countries with a functioning market-mechanism should not be caught by the greenhouse trigger, but coal exports to countries with no market-mechanism should be regulated by the Act.[67] The Review does not support using the proposed trigger to capture coal exports because companies engaged in the mining of coal have limited capacity to reduce emissions produced overseas substantially (except perhaps by preferencing the mining of black coal over brown coal).[68]

65 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.25.

66 Including, for example, the triggers proposed by Senator Robert Hill in 2000 and the *Avoiding Dangerous Climate Change (Climate Change Trigger) Bill 2005* (Cth) introduced by the current Government while in Opposition.

67 See Interim Report Comment 3: Mr Matthew Dickie for an argument that all coal exports should be regulated by the EPBC Act.

68 Interim Report Comment 3: Mr Matthew Dickie recommends that coal mine operators could offset the emissions or there could be capacity to refuse coal mines. These approaches are not supported under the proposed trigger.

4.104 Where substantial emissions are produced overseas for items consumed in Australia, such as consumer imports, an argument could be made for applying the Act to these activities. Capturing overseas emissions could go some way to ensuring domestic emissions intensive industries are not tempted to move overseas. However, such a measure presents complex and contentious issues in relation to border and trade policy, and may not be consistent with international strategies to combat climate change. Consequently, the greenhouse gas trigger should be limited to actions that produce emissions domestically.

4.105 The introduction of an interim trigger may have an additional benefit of removing the incentive for organisations to seek to benefit from delaying the introduction of the CPRS, as the greenhouse trigger would fill the current regulatory void.

Complementarity with the CPRS

4.106 Projects likely to be caught for assessment by the proposed greenhouse trigger would also be likely to be subject to a price on carbon once the CPRS commences. To ensure that an interim trigger would not interfere adversely with the CPRS, it is proposed that the trigger cease operation once the CPRS commences.

4.107 Further, to ensure that assessment does not require the implementation of mitigation options at a cost higher than the price of carbon as projected over the life of the project, only cost-effective mitigation conditions should be imposed as part of an approval under the Act. The framework for setting conditions would need to be developed by the Australian Government to ensure cost-effective (not zero cost) mitigation options are considered and implemented where feasible and appropriate.

4.108 As with other approval decisions, the Minister would have a power to refuse activities deemed to be unacceptable. Guidance would need to be developed to inform the exercise of this discretion.

4.109 APPEA's comments on the Interim Report raised a concern about the potential overlap between an interim trigger and the proposed CPRS:

> Many oil and gas projects are designed to operate for well over 20 years, and some for well over 50 years. The industry is concerned that the conditions of approval imposed under a greenhouse trigger, even if the trigger itself was in place for a short time and phased out on the commencement of the ETS, could leave project proponents with a legacy of requirements that sit over and above any emissions trading related liabilities for many decades.[69]

4.110 The primary focus of the greenhouse trigger should be to encourage low cost abatement over the life of projects to be considered at the design and development phase. The proposed interim greenhouse gas trigger should only place on-going conditions of approval on a project where mitigation obligations are cost-effective. If conditions are placed on projects that require mitigation activities post commencement of the CPRS, appropriate arrangements should be implemented to enable projects to transition to the market system.

Ongoing Consideration of Climate Change Mitigation

4.111 Once a functioning market mechanism is in place some instances will remain where the market mechanism will not deliver least-cost abatement. This would include the activities of sectors not covered by the CPRS such as agriculture, or covered sectors where market barriers persist and prevent adoption of least cost abatement opportunities. There might be some cases where the EPBC Act could be utilised to deliver lower cost abatement across the economy.

Sectors not covered by the CPRS

4.112 In terms of non-CPRS covered sectors, it is recognised that greenhouse emissions from deforestation are potentially substantial – estimates suggest they may account for around 11 per cent of Australia's emissions.[70] As outlined earlier in this Chapter, legislation exists in all States and Territories to manage deforestation and land clearance, and emissions from these activities have been declining.

4.113 Setting a greenhouse trigger in relation to land clearance under the Act would face difficulties. As discussed earlier it is not appropriate to regulate general land clearance through the Act. A carbon-specific trigger for land clearance is also not appropriate. However, given the threat that climate change poses to biodiversity and the role that emissions from land clearance activities play in contributing to this threat, there is a need to examine whether there are other options for reducing the release of carbon associated with land clearance.

69 Interim Report Comment 24: Australian Petroluem Production and Exploration Association, p.3.

70 Australian Government, *Carbon Pollution Reduction Scheme White Paper* (2008) p.6-59.

In this context it is noted that the Australian Government intends to consider the scope for application of the CPRS to non-covered sectors in 2013.[71] This gap in policy coverage presents a risk that more remnant vegetation will have been cleared by this time.

4.114 Mechanisms over and above the State and Territory vegetation management systems could be warranted to address emissions from land clearance effectively. CPRS coverage of land clearance would appear to be the most sensible option. However, the administrative and policy complexities associated with extending the CPRS to land clearance are complex.

4.115 An alternative option would be a simplified land clearance offsets system, which would require a person proposing to clear vegetation to make a carbon offset payment. Payments would be made to a government-managed Fund that would be used to finance offset projects – this could potentially be coupled with the biodiversity offset requirements recommended in Chapter 7 of this Report. In order to avoid complex site-by-site calculations of the actual carbon stored in vegetation on a property, the carbon accounting mechanism would need to be based on the use of fixed vegetation categories.

4.116 While simpler than a site-by-site assessment, a land clearance offsets system is still likely to carry significant administration and compliance costs. If extending the coverage of the CPRS to fill the gap is not possible, the Australian Government should explore the potential for a land clearance offsets system further. The full cost benefit analysis that would be required has not been possible as part of this Review.

Sectors covered by the CPRS

4.117 Transport infrastructure and urban planning are examples of where market failures are likely to persist following introduction of the CPRS, and where there may be a case for the Act to require consideration of greenhouse gas abatement opportunities in the design and development phase of projects.

4.118 For example, the construction of major transport infrastructure such as a highway is subject to a split incentive market barrier, whereby the major emitters of carbon over the life of the road will be the road users, not those constructing the road. This means that the CPRS will not provide incentives for parties constructing the road to implement abatement options – such as a bus lane or cycle way – and the commuters using the road once constructed will be unable to bring about necessary changes. As a result, abatement opportunities at an overall lower cost to society will be forfeited over the life of the project. Other urban design developments can face similar market barriers.

4.119 A greenhouse mitigation trigger could require assessment of cost-effective abatement options on a project-by-project basis in instances where a market failure will persist following the introduction of the CPRS and prevent uptake of least cost abatement opportunities available over the life of a project/ activity.

4.120 While recognising that barriers to cost-effective mitigation exist, a greenhouse trigger is not considered to be the most appropriate form of intervention at the project level. Rather, the assessment of mitigation opportunities is more appropriately considered as part of Local, State or Territory Government development approvals processes. The Review understands that the Australian Government is working collaboratively with States and Territories through COAG on this issue.

4.121 The Local Government and Planning Ministers' Council has been tasked with addressing the opportunities that can be derived from building lot or precinct level layout that support good solar access to living areas, solar hot water, and solar photovoltaic systems for new buildings under the National Strategy for Energy Efficiency.[72] The Council has also agreed to collaborate with the Climate Change & Water Working Group, Australian Transport Council, and the Ministerial Council on Police & Emergency Management to develop a national framework and tools for use by local government to inform planning for climate change mitigation and climate change adaptation.[73] The Review supports this work and encourages timely delivery of effective policies on these issues.

4.122 While individual project assessment allows identification of local mitigation opportunities, the scale of large urban design and transport infrastructure projects provides greater potential for realising the best mitigation opportunities through holistic landscape assessments.

71 Australian Government, *Carbon Pollution Reduction Scheme White Paper* (2008) p.6-46.

72 Council of Australian Governments, *National Strategy on Energy Efficiency* (2009) rec 3.3.5 http://www.coag.gov.au/coag_meeting_outcomes/2009-04-30/docs/National_strategy_energy_efficiency.pdf.

73 Local Government and Planning Ministers' Council, *Eighth meeting communiqué – 8 May 2009* (2009) http://www.lgpmcouncil.gov.au/communique/20090508.aspx.

4.123 Strategic environmental assessment of transport and land-use planning at the system level would allow consideration of the cumulative effects of large-scale policies and programs, highlight the potential contradictions between policy goals, and allow effective identification and implementation of mitigation opportunities early on in overall design processes.

4.124 As noted in Chapters 2 and 3, strategic assessments are beneficial and proactive tools for environmental management. The most effective method available to the Government to ensure that transport and land-use planning incorporate significant carbon mitigation measures is through the strategic assessment process.

4.125 The Act should be amended to require consideration of cost-effective mitigation options, where relevant, as part of strategic assessment processes.

4.126 The scope of strategic assessment processes under the Act is not prescriptive. This allows targeted assessment of issues particular to a region, or issues identified as a priority for the assessment by the Commonwealth and proponents. Certain plans, policies and programs will lend themselves more readily to assessment of greenhouse mitigation options. Hence, when arrangements for strategic assessment processes are initiated and assessments approved, the potential for the strategic assessment process to consider greenhouse mitigation opportunities should be a consideration.

Complementarity with the CPRS

4.127 Consideration of greenhouse mitigation options within the strategic assessment process would be complementary to the CPRS where the assessment and approval process focussed on:

- low cost abatement options unlikely to be realised because of the persistence of a market barrier; and
- non-offset abatement options – that is, a focus on abatement that can be achieved while undertaking the activity, rather than defaulting to offsets such as purchasing of imported credits. This would encourage the pursuit of low cost abatement options within the Australian economy and would avoid duplication or adverse interaction with the CPRS.

Recommendation 10

The Review recommends that:

(1) an interim greenhouse trigger, with a threshold of at most 500,000 tonnes of carbon dioxide equivalent emissions, be introduced as soon as possible by way of Regulation to sun-set upon commencement of the Carbon Pollution Reduction Scheme; and

(2) the Act be amended to insert a requirement to consider cost-effective climate change mitigation opportunities as part of strategic assessments and bioregional planning processes.

Voluntary abatement efforts

4.128 The scope for voluntary abatement to contribute to reducing Australia's overall emissions in CPRS-covered sectors was raised with the Review. The concern is that a cap and trade system potentially reduces the incentive for households and individuals to undertake voluntary abatement. While outside the scope of the Act, the importance of providing credible ways for the community to contribute to the national abatement effort through voluntary action is noted.

4.129 It is understood that as a response to this issue the Government will take additional GreenPower purchases above 2009 levels into account in setting CPRS caps. Further the Government proposes to take into account other indicators of voluntary action when setting future CPRS caps. Other indicators may include energy efficiency activities among households and businesses where improvements can be detected, construction or renovation of houses to a star-rating above the minimum required, and trend improvements in fuel efficiency.[74]

4.130 These initiatives are welcomed.

74 Department of Climate Change, *CPRS – Household Assistance* (2009) http://www.climatechange.gov.au/emissionstrading/householdassistance/index.html.

Addressing Potentially Adverse Impacts of Climate Policy on Biodiversity

4.131 The intention of the CPRS is to allow CPRS permits to be issued to eligible reforestation projects, and to allow these permits to be sold in the voluntary market or to entities that have obligations under the CPRS. At a workshop at ANU on 26 August 2009 Professor Brendan Mackey expressed concern that this mechanism could potentially create a perverse incentive to clear non-forest native vegetation. It was also suggested that additional incentives could be introduced to encourage positive biodiversity outcomes within CPRS reforestation projects.

4.132 Reforestation projects will be required to comply with Kyoto forests requirements. That is, reforestation projects on land that has been cleared of forest after 31 December 1989 will not meet the Kyoto definition and will not be eligible to receive credits under the CPRS. This Kyoto protection for native forests does not extend to non-forest native vegetation, such as grasslands and shrublands.

4.133 The principle safeguard proposed is reliance on a combination of existing Commonwealth, State or Territory land clearing controls.

4.134 Given the potential for the economic incentive to clear non-forest native vegetation under the reforestation mechanism, and the shortcomings of some vegetation management regimes in effectively protecting non-forest native vegetation types, it may be prudent for the Australian Government to take additional steps to limit the risk of adverse impacts on biodiversity.

4.135 While the Australian Government is working with States and Territories to improve the national vegetation management regime through the National Vegetation Framework, additional protection could be afforded to non-forest native vegetation through the eligibility requirements for reforestation projects under the CPRS. This could be achieved, for example, by not issuing credits for reforestation activities on land that was cleared within a specified time frame of a wider range of native vegetation than currently provided for under the Kyoto forests definition. Such a system would need to be supported by strong monitoring and compliance.

4.136 There are considerable administrative efficiencies associated with integrating the compliance efforts under the Act with those necessary to support the efficacy of the CPRS carbon forests. This would reduce the burden on landholders of having two arms of government potentially monitoring their land clearing activities.

4.137 It is more broadly noted that significant investment and effort is being undertaken in developing accounting, monitoring and compliance systems for the management of carbon. The Australian Government should seek out opportunities where these systems can, in current form or through minor modification, contribute additional benefit to society through improved compliance and monitoring of other environmental values.

4.138 A second issue arising with reforestation projects is the potential to encourage improved biodiversity outcomes through the conversion of cleared land to biodiverse habitat. Under the proposed CPRS mechanism, the owners of reforestation projects choose the type of forests to plant, and whether to harvest the forest or keep it intact for carbon sequestration and other benefits. Without additional drivers to pursue more biodiverse crops, there is the potential for the most commercially sound reforestation projects to involve planting of single or a limited number of non-native species, because of superior carbon sequestration or easier management.

4.139 In the interests of administrative and market efficiency, the Review does not recommend that reforestation projects be required to achieve additional biodiversity outcomes, such outcomes could be encouraged through additional incentives.

4.140 DEWHA is preparing a policy on how environmental offsets can be used effectively to address impacts of projects assessed under the Act.[75] This policy is intended to provide a clear methodology for the creation of effective biodiversity offsets within the scope of environmental impact assessments and approvals under the Act. Chapter 3 proposed the establishment of a biodiversity offsets bank, to enhance the effective use of a biodiversity offsets system.

4.141 The Review recognises that significant environmental outcomes might be achieved by permitting the 'bundling' of different offsets within one parcel of land, though this would need to be managed carefully to ensure the integrity of the offsets created.

75 DEWHA, *Use of environmental offsets under the Environment Protection and Biodiversity Conservation Act 1999* (2007) http://www.environment.gov.au/epbc/publications/draft-environmental-offsets.html.

4.142 The Review suggests that the Australian Government explore the creation of a standard to underpin the measurement, valuing and interaction of the multiple environmental values that could attach to one parcel of land, and the way in which credible offsets can be created based on these values. This could then facilitate and provide incentives for the engagement of CPRS reforestation project managers to enhance the biodiversity values of their projects in order to participate in other environmental markets, such as the bio-banking scheme discussed in Chapter 3.

4.143 A further step to enhance support for biodiversity through the CPRS would be to expand eligibility for credits under the reforestation mechanism to other revegetation activities, such as the creation of non-forest native vegetation including grasslands and shrublands.

4.144 Chapter 6 discusses how climate change adaptation considerations for biodiversity should be incorporated in regional approaches, recovery plans, listing decisions and environmental impact assessments. Strategies aimed at adapting human settlements and activities to climate change also have the potential to impact adversely on biodiversity if not properly managed. For example, adapting agricultural practices to a changing climate could involve the introduction of exotic or genetically modified species, which have the potential for significant adverse impacts on biodiversity.

4.145 Where actions to adapt to climate change have the potential to significantly impact on matters of NES, they are required to be assessed and approved under the Act. The recommendation in Chapter 6 to incorporate consideration of the adaptive capacity of biodiversity in decision-making should ensure that inadvertent adverse impacts of adaptation policy on biodiversity are avoided.

Recommendation 11

The Review recommends that the Australian Government consider implementing additional protection for non-forest native vegetation through the eligibility requirements for reforestation projects under the Carbon Pollution Reduction Scheme (CPRS), for example by not issuing credits for activities that are occurring on land that has been cleared of remnant native vegetation within a specified time frame. Such a system would need to be supported by strong monitoring and compliance.

The Review further recommends that the monitoring of land clearance activities associated with the compliance needs of both the CPRS and the Act be integrated into a single system.

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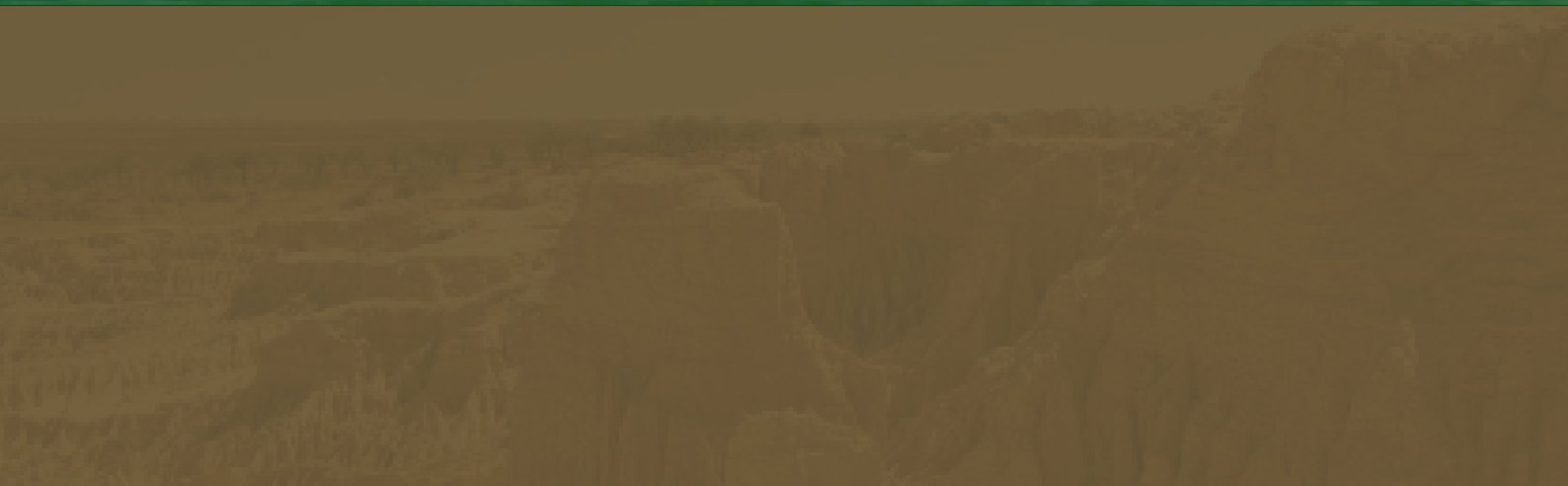
Chapter Five BIODIVERSITY



Chapter 5: Biodiversity

5.1 The EPBC Act provides a legal framework for a wide range of environmental protection and biodiversity conservation initiatives. Australia's Biodiversity Conservation Strategy 2010-2020 recognises that the Government's investment in development and implementation of biodiversity policies and programs has achieved a range of biodiversity and conservation goals.[1] Many of these achievements have resulted from the commitment and ongoing work of regional bodies, local community groups and individuals.

5.2 In order to build on these achievements, the Australian Government's conservation goals need to be reassessed and the existing biodiversity conservation tools expanded through greater use of landscape scale or regional planning approaches.

5.3 However, the identification and listing of threatened species, ecological communities and key threatening processes, the proposed listing of 'ecosystems of national significance' (discussed in Chapter 4), and recovery actions, should remain a key component of the national approach to protecting biodiversity under the Act. These mechanisms provide a framework from which regional approaches to recovery and other conservation planning activities can be developed and implemented.

5.4 Streamlining the existing mechanisms available under the Act for the protection and conservation of biodiversity, including the listing, recovery and threat abatement processes, should increase efficiency. Adoption of a single national list of threatened species and ecological communities, as recommended in Chapter 2, would result in better coordination of legal and administrative processes and deliver significant regulatory and conservation benefits.

Decoupling of Decisions on Listing from the Prioritisation of Recovery Planning and Conservation Activities

5.5 The lists of threatened species and ecological communities provide an explicit, objective framework for the classification of threatened species and ecological communities according to their risk of extinction. They also provide a focus for planning and help raise public awareness of biodiversity conservation issues. The prescribed listing criteria do not include social and economic considerations, such as potential management costs or imposts on developers. This should remain the case.

5.6 Listing threatened species and ecological communities also provides protection under the Act. Protection includes the obligation on developers, land owners and managers to ensure that all activities that have, will have, or are likely to have a significant impact on a listed threatened species or ecological community, are referred for approval under the Act. In contrast to a listing decision, Part 3 of the Act requires the Minister to take into account social and economic matters when deciding whether to approve an action.

5.7 Decisions about the development and implementation of recovery plans and other conservation actions are made separately from a listing decision. Setting priorities for recovery and other conservation activities separately from listing means that prioritisation of recovery effort can be targeted more strategically on those taxa where the risks are imminent and prospects of successful action are good. Recovery effort would be more likely to be effective and would be informed by other ecologically sustainable development (ESD) considerations (such as social or economic factors).

5.8 The NSW Scientific Committee stressed the importance of this distinction, suggesting that linking the listing process with prioritisation of recovery planning and management activities generates a public perception that socio-economic considerations influence the listing process, leaving it open to potential abuse.[2]

5.9 The Committee noted:

> The schedules of listed species and communities under the EPBC Act perform two separate functions: a reporting role, to inform the public about the status of Australia's biodiversity; and a planning role to inform decisions about conservation of the listed species and communities.[3]

1 More information on Australia's Biodiversity Conservation Strategy 2010-2020 (March 2009) can be found at http://www.environment.gov.au/biodiversity/strategy/draft-strategy.html.

2 Submission 150: New South Wales Scientific Committee, p.2.

3 Interim Report Comment 45: New South Wales Scientific Committee, p.1.

5.10 The prioritisation and implementation of recovery and conservation activities should continue to be independent of the listing process. Keeping the listing process separate from any management consequences reduces the risk of extraneous factors influencing the listing decision. Increasing the transparency of these decisions should also increase community confidence that they are independent decisions. The need for greater transparency in decision-making is discussed in Chapter 14.

Critical Habitat

5.11 Section 207A of the Act allows the Minister to maintain a Register of Critical Habitat for listed threatened species and ecological communities. The protection provisions for listings on the Register of Critical Habitat only apply in Commonwealth areas. To date, critical habitat has only been listed for five listed threatened species.

5.12 The Threatened Species Scientific Committee (TSSC) considers whether critical habitat should also be listed when a threatened species or ecological community is listed. The Committee only recommends listing of critical habitat where there is clear conservation benefit and sufficient information available to describe location and extent accurately.[4]

5.13 Submissions criticised the under-utilisation of the Register of Critical Habitat,[5] arguing that identifying and listing critical habitat is an important tool for protecting against cumulative impacts and will be of even greater importance in the face of climate change. A recent assessment of the impact of climate change found that key sites likely to provide refuge in the face of climate change need to be identified and included in reserves or otherwise managed to protect their values.[6] Submissions also argued that critical habitat should be automatically listed on the Register at the time a threatened species or ecological community is listed.

5.14 The value of identifying habitat critical to the survival of a threatened species is well recognised.[7] Mr Martin Taylor[8] provided the example of the *Endangered Species Act 1988* (US) which requires that critical habitat be designated for all listed species, 'encompassing all land and waters essential to the conservation of the species'.[9]

5.15 Under s.270 of the Act, habitat critical to the survival of a listed threatened species or ecological community must, to the extent practicable, be identified during the development of recovery plans.[10] Although the habitat is rarely listed on the Register of Critical Habitat, identification provides clear direction to assist recovery effort and decision-making in relation to assessment of significant impacts.

5.16 Some habitat is already protected through the provisions of the Act regulating impacts on listed threatened species, listed ecological communities, Commonwealth reserves and National heritage places and under some State and Territory legislation. While further protection may occur as a result of adoption of the 'ecosystems of national significance' trigger (discussed in Chapter 4) and through the expanded use of regional planning and strategic assessments, there is value in identifying critical habitat for threatened species more generally.

5.17 A description and spatial identification of critical habitat should be prepared for all threatened species at the time the species is listed. This should focus on the extent of critical habitat necessary to ensure an acceptably small risk of extinction and to maintain the ecosystem function of the species.

5.18 Further, the definition of critical habitat needs to be reviewed to provide greater flexibility, particularly in instances where information may be limited. The TSSC has proposed an alternative definition:

> That geography/place necessary for the persistence of viable populations given plausible futures of impinging factors.[11]

5.19 Identification of critical habitat for ecological communities at the time of listing would have limited value and so is not proposed.

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4 Interim Report Comment 105: Threatened Species Scientific Committee, p.32.

5 See e.g. Submission 184: Australian Conservation Foundation, p.8; Submission 182: Humane Society International, p.18.

6 Biodiversity and Climate Change Expert Advisory Group, *Australia's Biodiversity and Climate Change: a strategic assessment of the vulnerability of Australia's biodiversity to climate change – Summary for policy makers (2009).*

7 Interim Report Comment 25: Professor Hugh Possingham.

8 Interim Report Comment 1: Mr Martin Taylor.

9 Martin Taylor, Kieran Suckling and Jeffery Rachlinski 'The Effectiveness of the Endangered Species Act: A Quantitative Analysis' (2005) 55 *Bioscience*.

10 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.270.

11 Interim Report Comment 105: Threatened Species Scientific Committee, p.33.

5.20 The Australian Government should utilise the critical habitat provisions more effectively but maintaining a separate register of critical habitat is unnecessary. Identification of critical habitat during the development of recovery plans, threat abatement plans, conservation advice and regional plans would result in critical habitat being factored into decision-making under the Act and also raise community awareness of areas requiring protection. Greater use of regional and multi-species recovery plans would also facilitate identification of critical habitat of value to multiple species. The Register of Critical Habitat should be discontinued and the transition period prior to abandoning the Register appropriately managed.

Recommendation 12

The Review recommends that the Act be amended to:

(1) require the identification of critical habitat for listed threatened species at the time of listing; and

(2) discontinue the Register of Critical Habitat once information about critical habitat has been included in listing documentation.

Ecological Communities

5.21 Listing ecological communities under the Act complements the species-by-species listing approach. Listed ecological communities may occur in terrestrial, freshwater aquatic and/or marine environments.

5.22 While the Act (s.528) defines an ecological community,[12] describing ecological communities is inherently complex due to the difficulties in defining highly dynamic communities from first principles and the effects of natural and anthropogenic disturbance. Ecological communities are a dynamic assemblage of species which exist naturally in a range of states and transition from one state to another and from one ecological community to another, often with no clear demarcation between them.[13]

5.23 In responding to the challenge in describing ecological communities and in the absence of an international standard, the TSSC and DEWHA have worked to develop an approach to listing ecological communities that is scientifically credible, easily understood by the public and capable of being used in natural resource management regimes.

5.24 Currently, listed ecological communities include only higher quality patches of vegetation. The motivation for this strategy is that it simplifies definition by reducing ambiguity regarding what is and what is not protected, it removes the potential for protecting areas that may be difficult or impossible to remediate, and it ensures conservation resources are generally directed to the most valuable remaining examples.

5.25 Unfortunately, this approach comes at a cost. It results in protection of smaller and more fragmented patches of vegetation than would be the case under more inclusive definitions and may create disincentives to rehabilitate degraded areas on private land.

5.26 The Act should move away from listing ecological communities and instead adopt a landscape scale approach to regional planning in which conservation objectives for all ecological communities are considered. This approach would look at all condition classes simultaneously, aiming to secure adequate protection for the ecological community as a whole. The aim would be to identify the area and spatial configuration necessary to maintain an ecological community in the face of changed disturbance regimes, isolation and edge effects and could include patches of vegetation of varying quality. Regional approaches are discussed in Chapter 3.

5.27 Until regional approaches are adopted, protection of ecological communities through listing under the Act will remain important. The TSSC should have regard to future management of these areas and ensure that lower quality areas are included where they are important for the persistence of ecological communities and for ensuring the integrity of their function in a landscape context.

12 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.528.

13 Robert JS Beeton and Chris McGrath 'Developing an Approach to the Listing of Ecological Communities to Achieve Conservation Outcomes' (2009) *Australian Journal of Natural Resource Law and Policy* 38.

Recommendation 13

The Review recommends that the Act be amended to require the Threatened Species Scientific Committee to indicate in the listing process the areas necessary for an ecological community to persist and maintain its ecological function.

Protection of Vulnerable Ecological Communities

5.28 The Act provides for listing of ecological communities according to three categories, namely, critically endangered, endangered and vulnerable.

5.29 The enforcement provisions of the Act are not triggered because vulnerable ecological communities and actions that have, will have or are likely to have a significant impact on a vulnerable ecological community do not require approval under the Act. Submissions were critical of this situation, noting that, similar to threatened species, ecological communities listed under all categories of threat should be considered matters of NES.[14]

5.30 The Review agrees that ecological communities listed as vulnerable should be afforded protection under the Act. Hence vulnerable ecological communities should be included as a matter protected under Part 3 of the Act. This would mean that actions that have, will have or are likely to have a significant impact on a vulnerable ecological community would need to be referred for a decision under the Act and would be protected through the Act's compliance and enforcement regimes.

Recommendation 14

The Review recommends that the Act be amended to include vulnerable ecological communities as a matter of national environmental significance protected under Part 3.

Decisions on Listing Native Species

5.31 In deciding whether to list a native species or ecological community under the Act, the general principles of ESD do not apply. The Environment Minister may only consider matters relating to:

- whether the native species or ecological community is eligible to be included in that category; or
- the effect that including the native species or ecological community in that category could have on the survival of the native species or ecological community.[15]

5.32 As a general principle, the Minister makes all the listing decisions under the Act, acting on advice from expert committees. The TSSC provides the expert advice on threatened species and ecological communities.

5.33 Some submissions argued that listing decisions should be made by the expert panel. This will not improve environmental outcomes and could be detrimental in some situations.

5.34 The current decision-making structure provides important checks and balances. Ministerial discretion provides a strong motivation for the TSSC to ensure that its advice is thorough, balanced and well argued. This in turn creates confidence in the system and guards against erosion of the TSSC's credibility. Public release of the TSSC's advice, recommended in Chapter 14, will enhance transparency and accountability.

5.35 In all but the most exceptional circumstances, the Minister would be expected to act consistently with expert advice. However, the prospect remains that in rare circumstances a Minister may depart from expert advice. This has occurred twice to date.

14 Submission 101: Mr Jamie Pittock, Dr Debra Saunders and Ms Karen Stagoll, p.9.

15 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss.186(2) and 187(2).

5.36 As noted above, the Act constrains the discretion available to the Minister when considering listing threatened species and ecological communities. The question is whether increased discretion would be in the national interest in those rare circumstances where social and economic costs of listing (as a consequence of the onus to avoid significant impacts) are overwhelming and the environmental benefits are equivocal or marginal. It may also be warranted in situations where listing could have perverse environmental outcomes.

5.37 There are risks attached to increased discretion. The argument could be made that codifying the discretion to enable consideration of social and economic factors, no matter what the circumstances, would invite abuse.

5.38 On balance, the current decision-making arrangements should be retained, with the TSSC continuing to prepare and provide listing advice to the Minister based on scientific and expert judgement. However, should the Minister be required in the future to take the principles of ESD into account when making listing decisions, the Minister's ability to decide not to list should be constrained to exceptional situations where the social or economic costs associated with listing are overwhelming and the environmental benefits are known to be slight.

5.39 Section186(2)(b) of the Act should be amended to reflect this limitation and, as recommended in Chapter 14, to ensure transparency in decision-making, the Minister should publish the reasons for the listing decision at the time the decision is made.

Recommendation 15

The Review recommends that s.186(2)(b) of the Act be amended to require the Environment Minister, in deciding whether to list a threatened species or ecological community, to take the principles of ecologically sustainable development into account only in exceptional situations where social or economic costs associated with listing are overwhelming and the environmental benefits are known to be slight.

Nomination Process for Listing

5.40 Support was mixed for the theme based public nomination process introduced as part of the 2006 amendments to the Act. The Humane Society International argued that it created a triage and drip-feed process and called for reinstatement of the previous process with improvements and adequate funding.[16] The Australian National Environmental Defender's Offices (ANEDO) also argued that the current process significantly limits public and scientific involvement in the listing of threatened species.[17] Other submissions supported public nomination but felt that the process of preparing a nomination for listing was excessively bureaucratic and time consuming, making it difficult for some less resourced or less technical members of the community to be involved.[18]

5.41 The nomination process should continue to be used to prioritise the listing of threatened species and ecological communities as this is a more strategic approach to listing species and ecological communities in the greatest need of protection. The deadlines for completing assessment of the selected nominations should also be retained.

5.42 The EPBC Regulations set out the information required to nominate a threatened species, ecological community or key threatening process for consideration for listing under the Act.[19] The Regulations require that a nomination must include information relating to the category for which the species or ecological community is nominated plus information supporting why the nominator thinks the species or ecological community fits within the nominated category. Additionally, in making a nomination for listing an ecological community, the nominator must provide information about the biological and non-biological components of the ecological community and the processes by which these components interact (if known).[20]

16 Submission 182: Humane Society International, p.4.
17 Submission 189: The Australian National Environmental Defender's Offices, p.42.
18 Submission 51: Healesville Environmental Watch, p.1.
19 *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg. 7.2.
20 *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg.7.05 and reg.7.06.

5.43 The requirements for nomination of a threatened species, ecological community or key threatening process should be simplified to allow for easier use and greater public participation in the nomination process. All nominations would be assessed by the TSSC with those that meet the requirements of the nomination criteria and assessed as warranting priority for potential listing, proceeding to the Proposed Priority Assessment List (PPAL). Following the Minister's decision on the Finalised Priority Assessment List (FPAL), the TSSC would request further documentation from the nominator in support of the listing nomination.

5.44 Concerns were raised in submissions and public consultations about the transparency of, and public participation in, the nomination and listing process. To address these concerns, the advice provided by the TSSC to the Minister should be published at the time a listing decision is made. Transparency and public participation in decision-making under the Act are discussed further in Chapter 14.

'Emergency' and 'Near threatened' Listing Categories

5.45 The addition to the Act of a 'near threatened' category, similar to that available under the IUCN framework, where a species is close to qualifying for or is likely to qualify for a threatened category in the near future, is not likely to provide significant conservation outcomes. The move towards broad-scale landscape approaches to biodiversity protection and conservation, such as regional planning, should be a more efficient way of protecting species, habitats and ecological communities that may not qualify for listing under existing categories.

5.46 A number of submissions[21] called for an 'emergency' listing power to be added to the Act for threatened species and ecological communities. It was argued that the current threatened species and ecological communities listing process does not provide for circumstances where there is the potential for immediate significant threats to a species or ecological community or impacts from a threatening process.

5.47 The provisions of ss.194G(b) and 194G(d) allow the TSSC to consider nominations additional to those put forward in the PPAL. The public is also able to contact the Minister directly to advise of potential or imminent impacts on a species or ecological community or of a threatening process. Under s.503, the Minister may direct the TSSC to advise on matters relating to the administration of the Act, including enquiring into the status of a species, ecological community or threatening process.

5.48 Emergency listing may be important in circumstances in which a nationally significant value is threatened by imminent destruction. Such a provision exists under s.324JL for emergency listing of heritage places.

5.49 The Minister should be given a new discretionary power to make emergency listings of threatened species and ecological communities. In order to ensure that calls for emergency listing do not waste scarce resources nor distract efforts from other priorities, nominators should be expected to:

- establish that the native species or ecological community would meet the criteria for the listing category for which it is nominated; and
- establish the case that a threat to a native species or ecological community is severe and imminent.

5.50 When invoking the emergency listing provision, the Minister should have regard to the above points and may also seek and consider additional advice from the TSSC.

Recommendation 16

The Review recommends that the Act be amended to give the Environment Minister the power to make emergency listings of threatened species and ecological communities, provided the Minister believes that:

(1) the native species or ecological community meets the criteria for the listing category for which it is nominated; and

(2) a threat to the native species or ecological community is severe and imminent.

21 See e.g. Submission 150: New South Wales Scientific Committee, p.5; Submission 172: Department of Sustainability and Environment (Victoria), p.9; and Submission 181: WWF, p.22.

Migratory Species

5.51 The Act provides for the protection of listed migratory species which are included on the Appendices of the *Convention on the Conservation of Migratory Species of Wild Animals* (Bonn Convention) or other international agreements.[22] Only species listed under the Bonn Convention or included on other specified international agreements are included in the list of migratory species under the Act.

5.52 Migratory species that have been categorised as being in danger of extinction throughout all or a significant proportion of their range are listed on Appendix I of the Bonn Convention. Migratory species that have an unfavourable conservation status or would benefit significantly from the international co-operation that could be achieved by an international agreement are listed in Appendix II of the Bonn Convention.

5.53 The Bonn Convention stipulates that parties that are Range States of a migratory species listed in Appendix I shall prohibit the taking of animals belonging to such species.[23] For Appendix II species, parties that are Range States are required to endeavour to conclude agreements where these should benefit the species. In doing so they should give priority to those species in an unfavourable conservation status. The secretariat to the Bonn Convention stated:

> CMS [the Bonn Convention] does not prohibit the sustainable use of non-endangered species; indeed, it recognizes that many of these animals are an important source of income and food for local populations […] The flexible approach of the CMS is likely to have appeal for countries that may wish to continue utilization of some migratory species. By allowing populations of a given species to be listed separately in Appendix I (and Appendix II), CMS retains a measure of flexibility to concentrate on those populations most in need of urgent action.[24]

5.54 All migratory species listed under Appendix I or II of the Bonn Convention are automatically included on the migratory species list under the Act. Listed migratory species are protected under the Act by virtue of their status as a matter of NES. Other provisions of the Act (for example Part 13, Division 2) also afford specific protections to migratory species.

5.55 The listing of all Appendix I and II Bonn Convention species as migratory under the Act goes beyond the extent of Australia's international obligations, affording a higher level of protection to Appendix II species than is otherwise required. For migratory species in the Commonwealth marine environment, protection of Appendix II species can impact on commercial fishing of non-listed species where the listed species is a component of the incidental catch or bycatch.

5.56 It was argued during consultations with Australian Government agencies that the Act should be amended to better reflect the differences in, and intention behind, the Bonn Convention Appendices to allow Australia the flexibility to determine appropriate management strategies to conserve Appendix II species. The Humane Society International opposes this suggestion:

> When Australia is a range state for a CMS listed species this means we are required to conserve the species within its range in Australia and the principal tool for achieving this is protection under domestic law.[25]

5.57 The need to protect and conserve Appendix I species is not questioned. The contentious issue is the level of protection to be given to Appendix II species.

5.58 The clear intent of the Bonn Convention is to differentiate between Appendix I and II species and, in turn, the level of protection required. This is not reflected in the Act. In some cases this may give rise to unnecessarily restrictive measures in relation to species that do not have an unfavourable conservation status.

5.59 A number of approaches are available for ensuring an appropriate level of protection for species listed in Appendix II of the Bonn Convention.

5.60 One option is to remove all Appendix II species listed on the Bonn Convention from the Act's migratory species list. This would be neither practicable nor environmentally sound. To do so may lead to unforeseen consequences as a result of removing all the attendant protection provisions.

22 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.209(3).

23 The *Convention on the Conservation of Migratory Species of Wild Animals* done at Bonn on 23 June 1979 (Bonn Convention), Article III (5).

24 Bonn Convention Secretariat, *Convention on Migratory Species* (2009) http://www.cms.int/about/faqs_en.htm.

25 Interim Report Comment 096: Humane Society International, p.11.

5.61 Another option is to give the Environment Minister discretion to decide which Appendix II listings should be included on the migratory species list. Decisions could be guided by prescribed criteria. While this option might provide flexibility, it would increase the administrative burden associated with needing to make separate decisions every time the Appendix II list changes.

5.62 A third option is to determine the level of regulation required under Part 13 of the Act to protect migratory species in Commonwealth waters. A person would be guilty of an offence if they injure, kill, take or trade an Appendix I migratory species. However, the level of regulation applying to Appendix II species could replicate the provisions relating to CITES-Appendix II species, where take and trade is allowed subject to a non-detriment finding. This would be consistent with the extent of Australia's obligations under the Bonn Convention.

5.63 Under option three, taking of Appendix II fish species would be allowed in a fishery if the fishery's management arrangements demonstrate that the take of a migratory species listed on Appendix II is not detrimental to the survival of the species in Commonwealth waters. The take of these species would be subject to strict conditions, regular review and compliance with Australia's international obligations.

5.64 Migratory species listed on Appendix I and Appendix II of the Bonn Convention would continue to be protected as a matter of NES under the Act. However, the Part 13 provisions would allow for the managed take of migratory species listed on Appendix II, provided the requirements of the Act were met. If further protection was warranted, Appendix II migratory species would still be eligible for listing as threatened through the species listing process.

5.65 Such an approach would better reflect the Bonn Convention.

Recommendation 17

The Review recommends that the provisions of Part 13 of the Act relating to migratory species listed on Appendix II of the Bonn Convention be reviewed and amended to allow the take of Appendix II migratory species, subject to management arrangements demonstrating that the take would not be detrimental to survival of the species.

Any such amendments should ensure that the Act provides appropriate protection consistent with Australia's international obligations.

5.66 The Act's list of migratory species on DEWHA's website has been criticised for inconsistencies in how the list is presented. It was suggested that interpreting the lists to include all species from the families is nonsensical because so many of the species are not migratory.[26]

5.67 In the interests of keeping the public informed of environmental decisions and their responsibilities under the Act, publication of the list of migratory species should be clear and current.

Recovery Planning

5.68 Recovery planning under the Act is a key mechanism for the long-term recovery of threatened species and ecological communities. As of at June 2009, 354 recovery plans were in place and 259 were in preparation for listed threatened species and ecological communities.

5.69 Submissions supported the need to have recovery plans as a tool to guide the effective implementation of recovery and other conservation efforts[27] and criticised the 2006 amendments to the Act that removed the requirement for mandatory recovery plans for all listed threatened species and ecological communities.[28]

26 Interim Report Comment 13: Mr Mick Welsh.

27 Submission 188: Nature Conservation Council of New South Wales.

28 Submission 181: WWF; Submission 181: Nature Conservation Council of New South Wales.

Implementation of Recovery Plans

5.70 Much of Australia's biodiversity conservation achievements are due to the commitment and ongoing work of governments, regional bodies, local community groups and individuals collaborating on the implementation of recovery plans.

5.71 Submissions noted the need for prioritisation of recovery plan implementation and were critical of the inadequate investment in recovery activities by the Australian Government. The lack of linkages between the implementation of recovery activities and Australian Government funding programs was also criticised.[29] The Nature Conservation Council of South Australia argued:

> There has been too great an emphasis on planning at the expense of implementation. While recovery plans are useful documents, they do not make tangible progress in recovery of species and communities without implementation. Investment in recovery planning cannot be justified if there is insufficient investment in implementation.[30]

5.72 The Act provides guidelines for the development of recovery plans, including criteria for content of the plans and other matters that must be taken into account when developing plans.[31] The intent of the criteria is to promote consistency in approaches and allow for the development of recovery plans at a range of scales. The criteria are, however, prescriptive, contributing to a focus on process rather than outcomes. As with other management planning arrangements discussed in Chapter 9, the recovery planning provisions should be amended to increase their workability.

5.73 The prioritisation of resource allocation to recovery efforts for threatened species and ecological communities has received little attention. Methods for setting priorities for recovery actions often focus exclusively on threat status or iconic species, with funding allocated accordingly. This approach often fails to consider the cost of management, the technical capacity to manage and the potential for the species to recover.[32]

5.74 Increased transparency, accountability and efficiency is needed for public investment in biodiversity conservation, including the implementation of recovery plans. Prioritisation and decision-making tools may assist in achieving systematic and defensible biodiversity investment decisions. A review of systems currently available for biodiversity investment prioritisation has shown there is a wide array of tools, resources, and decision frameworks available to managers and decision-makers. These tools need to be carefully examined and trialled to clarify which are the most appropriate for resolving biodiversity prioritisation issues.[33]

5.75 One such tool is the Project Prioritisation Protocol (PPP), which provides an operational model for considering the costs and benefits of resource allocation for conservation of threatened species. This model is being used by the New Zealand Department of Conservation to assist in the efficient allocation of resources among management projects for threatened species and ecosystems.[34]

5.76 The PPP framework provides a systematic, transparent, and repeatable method for the prioritisation and reporting of recovery actions. This approach has merit and along with other approaches should be critically assessed with a view to establishing a suitable framework for prioritisation of recovery actions under the Act.

29 Submission 181: WWF, p.23.

30 Submission 23: Nature Conservation Council (South Australia), p.5.

31 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.270.

32 Liana N Joseph, Richard F Maloney and Hugh P Possingham 'Optimal Allocation of Resources among Threatened Species: a Project Prioritization Protocol' (2009) 23 *Conservation Biology*).

33 Brendan A Wintle, *A review of biodiversity investment prioritization tools* (2008). A report to the Expert Working Group toward the development of the *Investment Framework for Environmental Resources*.

34 Liana N Joseph, Richard F Maloney and Hugh P Possingham 'Optimal Allocation of Resources among Threatened Species: a Project Prioritization Protocol' (2009) 23 *Conservation Biology*.

Regional Recovery Planning

5.77 A more strategic approach to biodiversity conservation under the Act will require better integration of recovery and threat abatement planning with regional and other planning initiatives. The goal should be to deliver targeted, better coordinated and effective recovery and threat abatement actions at a range of scales.

5.78 This approach was supported by submissions. For example:

> HSI has long recommended systematic bioregional planning for biodiversity conservation to establish regional strategies for the conservation of EPBC matters of NES with cooperation between state and local governments and local NRM and catchment planning committees. Similarly, [HSI] support multi-species regional recovery plans for threatened species and ecological communities.[35]

5.79 Traditionally, recovery planning has focused on development of plans for single species and, in some instances multi-species plans. In seeking to improve recovery efforts, DEWHA has been exploring the use of regional plans that consider the needs of more than one threatened species or ecological community.

5.80 Initial reviews of this approach have shown that it is a potentially valuable mechanism to better integrate and coordinate the recovery needs of listed threatened species and ecological communities across a defined part of the landscape. This is particularly so when the natural distribution of a species is captured within the defined regional boundary, individual species recovery needs are identified and common threatening processes across the landscape can be managed. However, it should be noted that a regional approach will not always be appropriate for the recovery needs of some species and single species approaches will still be required.

5.81 The TSSC supports the expanded use of regional and/or landscape/seascape functional units for recovery and threat abatement planning. It also notes the cost effectiveness of targeting multiple entities that occur in the same region and face the same predominant threats. The TSSC proposes a strategic approach which includes:

- single entity recovery plans for a relatively small number of high priority species and ecological communities;
- group plans for species and ecological communities clustered by criteria such as management requirements, habitat needs, taxon, shared threats or location; and
- regional plans that incorporate recovery and threat abatement priorities for all matters protected under the Act occurring in that region.[36]

5.82 The TSSC also supports the development and implementation of a monitoring and evaluation framework to measure the results of recovery actions on listed threatened species and ecological communities. Information gained as part of monitoring and evaluation should feed into the National Environmental Accounts system discussed in Chapter 19.

5.83 Funding opportunities should be made available to national and regional scale biodiversity programs to enable the Australian Government to meet its responsibilities for management and recovery of matters protected under the Act. Currently, there is no link between recovery planning initiatives and Caring for our Country, the Australian Government's key environment funding initiative.[37] This should be addressed as part of the broader recommendation to provide greater flexibility in the development and implementation of recovery and threat abatement plans, particularly at the regional level.

Recommendation 18

The Review recommends that the Act be amended to:

(1) allow greater flexibility in the development of recovery and threat abatement plans, particularly to allow for their development at regional scales; and

(2) create opportunities for better linkages to funding initiatives.

35 Interim Report Comment 96: Humane Society International, p.7.

36 Interim Report Comment 105: Threatened Species Scientific Committee, p.26.

37 Further information on DEWHA's Caring for our Country funding initiative is at http://www.nrm.gov.au.

Key Threatening Processes (KTPs)

5.84 A 'threatening process' is defined under s.188 of the Act as a process that threatens or may threaten the survival, abundance or evolutionary development of a native species or ecological community.[38] A threatening process may be considered eligible to be listed as a KTP if it:

- could cause a native species or ecological community to become eligible for listing in a category other than conservation dependent;
- could cause a listed threatened species or listed threatened ecological community to become eligible for listing in a category representing a higher degree of endangerment; or
- adversely affects two or more listed threatened species (other than conservation dependent species) or two or more listed threatened ecological communities.[39]

5.85 The listing of a KTP under the Act is the first step in developing and supporting efforts to ameliorate the impact of a particular threat. The listing of a KTP under the Act is a precondition for a decision to prepare a threat abatement plan (TAP).[40]

5.86 While the KTP nomination and listing process are important steps for highlighting the impact of certain processes on biodiversity and for engaging the community in the process, they do not lend themselves well to the strategic identification or prioritisation of threats or their management. Further, public nomination does not allow for linkages to existing funding programs or building on recovery plans or strategic assessments. The Australian Conservation Foundation suggested that:

> For KTPs and their associated TAPs to effectively operate to address these threats and pressures, a systematic process to identify KTPs integrated with major biodiversity protection programmes is required. Currently the nomination of KTPs is reliant on public nominations through the annual cycle.[41]

5.87 The definition of a threatening process and the criteria for eligibility to list a KTP are prescriptive and do not recognise the potential for threatening processes to impact on other matters protected under the Act, for example existing matters of NES such as Ramsar wetlands and migratory species, as well as the proposed new matter of NES, 'ecosystems of national significance'.

5.88 The Act should be amended to provide a better definition of a KTP and allow greater flexibility in the criteria for eligibility for listing a KTP. These amendments should accommodate a broader range of matters protected under the Act and provide the framework for strategic approaches to the identification and management of emerging threats, discussed further in Chapter 6.

5.89 Public nomination and objective scientific assessment are important elements of the listing process, however, KTP listing processes could also benefit from strategic prioritisation. One approach would be to rank the severity of threats and the ease with which they may be mitigated or remediated, either in the listing process or in the decision about TAPs. This would provide a basis for prioritising effort and investment. It should also ensure that those ranked as higher priority attract ongoing funding and effort over others determined as lower priority.

5.90 There are a number of ways to build in this prioritisation:

- the KTP is ranked (possibly against existing KTPs) in the listing decision document; or
- prioritisation is reflected in the Environment Minister's response decision (development of a TAP or other action); or
- the Environment Minister is required to establish a KTP strategy in which the priority KTPs are identified, listed, and made publicly available.

5.91 The criteria and reasons for a KTP's ranking should be consistent and defensible and reflect the prioritisation of other activities such as recovery and conservation planning. To provide for greater transparency and accountability, the method used for prioritising and the information used in decision-making should be made publicly available. This would enable public nominations to focus on new threats and gaps in the national list.

38 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.188.
39 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.188.
40 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.270A.
41 Submission 194: Australian Conservation Foundation, p.7.

5.92 The identification and management of emerging threats is discussed in Chapter 6 and a recommendation is made to establish a team responsible for foresighting to identify and guide management responses to emerging threats. This team could also be tasked to prioritise KTPs (both existing and emerging). This approach would allow the early identification of a broader range of threats at a range of scales and allow for the development and implementation of management strategies, either through TAPs, recovery planning and/or as part of regional planning approaches.

5.93 The existing public nomination process for KTPs should continue, but the Act should be amended to provide for greater flexibility in listing eligibility and for the prioritisation of KTPs. These amendments should provide the framework for strategic approaches to the identification and management of emerging threats.

Recommendation 19

The Review recommends that the Act be amended to:

(1) better define key threatening processes (KTPs);

(2) allow greater flexibility in the criteria for eligibility for listing a KTP; and

(3) allow strategic identification of KTPs at a range of scales.

Threat Abatement Plans (TAPs)

5.94 When a KTP is listed under the Act, the Environment Minister must decide whether to develop a TAP.[42] TAPs establish a national framework to guide and co-ordinate the Australian Government's response to KTPs listed under the Act. A TAP is developed if the Environment Minister believes that implementing a TAP is a feasible, effective and efficient way to abate the threat.[43] The Act also requires the Minister to take into account advice from the TSSC when considering whether to develop a TAP.[44] The Minister is required to review all no-TAP decisions at least every five years.[45]

5.95 The Act specifies that the development of a TAP must, among other things:

- provide for research, management and other actions necessary to reduce the KTP to an acceptable level in order to maximise the chances of the long-term survival in nature of native species and ecological communities affected;
- state the objectives to be achieved, the actions to achieve these objectives and the criteria against which the objectives are to be measured;
- have regard to the objects of the Act;
- have regard to the most efficient and effective use of resources;
- meet Australia's international obligations; and
- have regard to the role and interests of Indigenous people in the conservation of Australia's biodiversity.[46]

5.96 Traditional approaches to the development of TAPs, combined with the prescriptive nature of the criteria for listing KTPs, has resulted in a system that lacks flexibility. The limitations of the current approach include:

- the reliance on public nominations of KTPs which restricts the ability to take a strategic approach to prioritising investment in threat abatement;
- the precise wording of the KTP listing limits the range of TAP responses;
- the limited responses available to a KTP listing – either to have a TAP or to not have a TAP; and
- limited on-ground actions that the Australian Government can undertake in implementing a TAP.

42 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.270A.
43 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.270A(2).
44 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.274.
45 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.279.
46 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.271.

5.97 The Australian Government could utilise the TAP provisions more effectively, particularly within the proposed strategic approach to the identification and management of new and emerging threats. The use of TAPs should be focused on cases where nationally significant assets are in urgent need of protection, national strategies do not already exist, interventions are likely to be cost-effective and research would have national or strategic application. A more flexible approach to the development and implementation of TAPs would provide for strategic planning and more efficient delivery of on-ground threat abatement activities. A more flexible approach would also facilitate better use of resources and should result in better environmental outcomes.

5.98 A new approach to the development of TAPs should:

- allow for flexibility in the types and scale of TAPs that can be developed;
- be outcomes focused and allow for adaptive management approaches;
- include what needs to be done to achieve outcomes;
- provide mechanisms and incentives to facilitate delivery of on-ground threat abatement activities by State and Territory agencies;
- include the requirement to develop a management plan if appropriate;
- have regard to and/or be integrated with recovery, regional and other planning initiatives;
- be linked to or be part of the responsibility of the team tasked with developing and implementing foresighting and strategic activities;
- include linkages to Australian Government funding programs such as Caring for our Country; and
- require mandatory reporting on outcomes.

Recommendation 20

The Review recommends that the Act be amended to provide for greater flexibility in the development and implementation of Threat Abatement Plans and allow transition to regional planning approaches and strategic threat management.

5.99 As discussed above, when a KTP is listed, the Environment Minister must decide whether to develop a TAP or not. This narrow response option provides no opportunity to make instructive advice available to key stakeholders or inform decision-making for listed KTPs when a TAP is not developed.

5.100 Many State and Territory authorities have moved away from TAPs in response to KTPs and towards more strategic priority actions or defined research activities. For example, the Department of Environment and Climate Change (NSW) (DECC) considers that an integrated approach to threat abatement planning and recovery strategies is required to recover threatened species and manage the threats they face.[47] DECC now prepares a Priority Action Statement (PAS) to promote the recovery of threatened species and the abatement of key threatening processes in NSW. Most PASs also contain threat abatement strategies with more specific priority actions contained within them.[48]

5.101 An alternative approach might be to develop a 'threat abatement advice' similar to a conservation advice currently made at the time a threatened species or ecological community is listed under the Act.[49] Conservation advice contains guidance on immediate recovery and threat abatement activities that can be undertaken to ensure the conservation of a newly listed threatened species or ecological community.

47 *Introducing the NSW Threatened Species Priority Action Statement (PAS)* (2007) http://www.environment.nsw.gov.au/resources/threatenedspecies/threatspecpas07168.pdf.

48 *About the NSW Priority Action Statement* (2007) http://www.threatenedspecies.environment.nsw.gov.au/tsprofile/home_PAS_new.aspx.

49 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.266B.

5.102 A 'threat abatement advice' should be developed when a KTP is listed. This practice would provide an important mechanism to inform recovery and regional planning and other decision-making under the Act and may be more instructive to land managers than a TAP. A threat abatement advice should include, but not be limited to, a statement that sets out:

- the grounds on which the KTP is listed;
- the main factors that are the cause of it being listed; and
- information about appropriate management strategies to address the threat.

Recommendation 21

The Review recommends that the Act be amended to require the development of a 'threat abatement advice' at the time of listing a Key Threatening Process.

Access to Biological Resources

5.103 Access to biological resources in Commonwealth areas (including terrestrial and marine areas) is regulated through Part 8A of the EPBC Regulations.[50] The Regulations implement Australia's obligations under the *United Nations Convention on Biological Diversity* (CBD) and accord with the Bonn Guidelines, agreed at the 6th Conference of Parties to the CBD.[51] State and Territory governments have jurisdiction over access to biological resources outside Commonwealth areas.[52]

5.104 The Regulations require persons who want to access biological resources in Commonwealth areas to obtain a permit from the 'access provider'.[53] In most cases this is likely to be the Commonwealth, represented by the Genetic Resource Management Section in DEWHA.

5.105 The process for obtaining a permit depends on the purpose for which access is required. One of the key objectives of the permitting regime under Part 8A is to ensure benefit-sharing arrangements are in place for commercial scientific research. Benefits negotiated in these agreements can be both monetary and non-monetary, examples of which are provided on DEWHA's website.[54] The Regulations also contain a number of mechanisms to provide for future commercial research, including renegotiation of the conditions imposed for non-commercial access and access through other legislative regimes that are exempt under Part 8A permitting requirements.

5.106 To date, all of the permits issued under Part 8A of the Regulations have been permits for non-commercial access. However, several commercial benefit-sharing agreements have been negotiated for access to biological resources controlled under other Commonwealth laws, in accordance with permitting exemptions under Part 8A.[55]

5.107 If the access is for non-commercial scientific research, the applicant does not need to negotiate a benefit-sharing agreement and need only obtain written permission from the access provider in order to receive a permit. A statutory declaration must also be made confirming non-commercial intent and acceptance of the obligation to negotiate a benefit-sharing agreement with the access provider should the purpose of the research change to a commercial one.[56]

50 *Environment Protection and Biodiversity Conservation Regulation 2000* (Cth) reg.8A.

51 Secretariat of the Convention on Biological Diversity, *Bonn Guidelines on Access to Genetic Resources and Fair and Equitable Sharing of the Benefits Arising out of their Utilization* (2002) http://www.cbd.int/doc/publications/cbd-bonn-gdls-en.pdf.

52 DEWHA, *Access to biological resources in States and Territories* (2009) http://www.environment.gov.au/biodiversity/science/access/states/index.html.

53 *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth).

54 Department of the Environment and Heritage, *Genetic Resources Management in Commonwealth Areas* (2005) http://www.environment.gov.au/biodiversity/publications/access/regs/pubs/regs.pdf.

55 *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg.8A.05 confers power on the Minister to exempt specified biological resources or collections from the permitting requirements.

56 *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg.8A.13.

5.108 Section 301 of the Act states that the Regulations may provide for the equitable sharing of the benefits arising from the use of biological resources in Commonwealth areas. However, the Regulations state that a benefit-sharing agreement must provide for 'reasonable' benefit-sharing arrangements, including protection for, recognition of and valuing of any Indigenous people's knowledge to be used.[57] The NSW Young Lawyers Environmental Law Committee argued that the use of 'reasonable' provided for less than Australia's obligations under international law in the CBD:

> This requirement is inadequate in ensuring equitable benefits are obtained by Indigenous knowledge holders. Indigenous peoples have very little bargaining power in such arrangements and this provision fails to improve this position, as it does not create any concrete obligation for an access applicant to directly provide a portion of the profits from the use of traditional knowledge to the knowledge holders.[58]

5.109 The Act should be redrafted to ensure that the terminology used in provisions relating to benefit-sharing agreements is consistently applied, and with the word 'reasonable' replaced with 'equitable'.

5.110 Part 8A of the Regulations is intended to also deal with *ex-situ* collections of biological resources, but as currently drafted, regulates the 'taking' (collecting) of biological resources in Commonwealth areas.[59] The concept of 'taking' is not generally relevant to *ex-situ* collections of biological resources. In those circumstances, a person will generally be a 'recipient' of biological resources. Part 8A of the Regulations should be amended to clarify that those persons who "receive or hold" biological resources from Commonwealth *ex-situ* collections are subject to the requirements of the provisions.

Nationally Consistent Approach

5.111 A publication entitled '*Nationally Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources*' (Nationally Consistent Approach) was released and endorsed by the Natural Resource Management Ministerial Council (NRMMC) in 2002.[60]

> The goal set down in the Nationally Consistent Approach is to position Australia to obtain the maximum economic, social and environmental benefits from the ecologically sustainable use of its genetic and biochemical resources whilst protecting our biodiversity and natural capital.[61]

5.112 The Nationally Consistent Approach intended that similar regimes would be established in each Australian jurisdiction to regulate access to biological resources. However, this intention has not yet been realised.

5.113 Each jurisdiction has different rules and requirements for accessing biological resources. This is a potential source of confusion for permit applicants and land managers. It also creates an unnecessary need for multiple permits where bioprospecting ventures occur across jurisdictional boundaries.

5.114 It is outside the scope of this review to suggest changes to the provisions of State or Territory legislation. However, the adoption of the Nationally Consistent Approach in all Australian jurisdictions to regulate access to biological resources throughout Australia would reduce uncertainty in this area. The Nationally Consistent Approach should be revisited to reinvigorate its implementation across Australia.

57 *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg.8A.08.

58 Interim Report Comment 58: New South Wales Young Lawyers Environmental Law Committee, p.14.

59 *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg.8A.05(1).

60 The Natural Resources Management Ministerial Council is comprised of all Commonwealth State/Territory and New Zealand Government Ministers responsible for natural resource management. Further information about the Ministerial Council at: http://www.mincos.gov.au/about_nrmmc.

61 Department of the Environment and Heritage, *Nationally Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources* (2000) p.7 http://www.environment.gov.au/biodiversity/publications/access/nca/pubs/nca.pdf.

Commercial Permits and Penalty Provisions

5.115 The Regulations require that persons who wish to access biological resources in Commonwealth areas obtain a permit from the Environment Minister and consent from the 'access provider'. The penalty for accessing biological resources in Commonwealth areas without a permit is 50 penalty units (equivalent to $5,500).[62]

5.116 Submissions argued that the current regime does not appropriately value biological resources, and that the remedies for breaches of the permit system are inadequate. It was argued that, given the potentially large profits to be made, a maximum penalty of $5,500 lacks deterrent value and undermines the effectiveness of the Regulations.[63] Mr Brad Sherman commented:

> These potential problems are exacerbated by the fact that it is possible to imagine the situation where a company makes a calculated decision to collect biological samples without an access permit. While the fine of $5,500 and the adverse publicity may provide some disincentive against this happening, a company may decide that is outweighed by the legal costs and by the moneys that they would have to pay under a benefit sharing agreement with the access provider.[64]

5.117 As part of the broader recommendations in Chapter 16, Part 8A Regulations should be brought into the Act to increase community awareness of the provisions and continue the general streamlining, simplification and accessibility of the compliance and enforcement provisions under the Act. As part of the broader rationalisation of the current compliance and enforcement provisions, the penalty provisions for non-compliance with regards to access to biological resources should also be reviewed to provide a more meaningful deterrent.

Indigenous Knowledge

5.118 The requirement to respect Indigenous knowledge stems, in part, from the Australia's obligations under the CBD.

5.119 One of the objects of the regime for regulating access to biological resources in Commonwealth areas under Part 8A of the Regulations is to recognise the special knowledge Indigenous persons hold about biological resources.[65]

5.120 Under Part 8A of the Regulations, the Environment Minister can issue a permit to access biological resources for commercial purposes if satisfied that, among other things, prior informed consent to access on Indigenous people's land within Commonwealth areas has been obtained. Benefit-sharing agreements must provide for reasonable benefit-sharing arrangements, including protection for, recognition of and valuing of any Indigenous people's knowledge to be used.[66] Full disclosure must be made in all permit applications of any use of Indigenous knowledge and the terms on which that knowledge is to be used.

5.121 The use of Indigenous knowledge is also dealt with by the Nationally Consistent Approach (discussed earlier).[67] One of the general principles of the Nationally Consistent Approach is that all parties should 'recognise the need to ensure the use of traditional knowledge is undertaken with the cooperation and approval of the holders of that knowledge and on mutually agreed terms'.

5.122 Indigenous peoples have well established systems of knowledge and practices relating to the use and management of biological diversity in Australia's natural environment. Submissions were critical of the lack of recognition and protection of this knowledge under the Act and argued that Indigenous peoples have the right to have this knowledge recognised and protected, as well as the right to share equitably in any benefits derived from its use. The Australian Human Rights Commission argued that consideration should be given to providing not only for the recognition and use of Indigenous knowledge, but also for protecting this knowledge.[68]

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62 *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg. 8A.06(1).

63 Interim Report Comment 42: Dr Sarah Holcombe, Dr Matthew Rimmer and Terri Janke, p.16.

64 [67] Brad Sherman, 'Regulating Access And Use Of Genetic Resources: Intellectual Property Law And Biodiscovery' (2007) 25(7) *European Intellectual Property Review* p.301 – cited in Submission 137: Dr Matthew Rimmer, p.42.

65 *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg.8A.01.

66 *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) reg.8A.08.

67 Department of the Environment and Heritage, *Nationally Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources* (2000) http://www.environment.gov.au/biodiversity/publications/access/nca/pubs/nca.pdf.

68 Submission 193: Australian Human Rights Commission.

5.123 Dr Sarah Holcombe, Dr Matthew Rimmer and Ms Terri Janke were of the view that the Act does not provide a framework for protecting and managing the use of Indigenous knowledge.[69] They argued that, while prior informed consent procedures and contractual provisions can give a degree of legal certainty for protecting Indigenous knowledge, there should be recognition of Indigenous knowledge as intellectual property.[70] Further, Part 8A was failing to achieve its objects of recognising the special knowledge Indigenous peoples hold about biological resources.

5.124 The adoption of guidelines for the management of Indigenous knowledge was also suggested. In this respect, the *Guidelines for Indigenous Ecological Knowledge Management*, recently developed for the Northern Territory Natural Resource Management Board, were put forward as a possible model.[71]

5.125 Guidelines that provide a framework for activities and decision-making involving Indigenous knowledge would likely be a valuable tool in many circumstances. However, the challenge would be in developing guidelines that were flexible enough to be meaningfully applicable to all aspects of managing Indigenous knowledge.

5.126 While the above concerns are acknowledged, it must be noted that the Act is primarily directed at protecting biological and heritage resources. It is not within the realm of the Act to specifically regulate Indigenous Intellectual Property rights generally. The benefit-sharing agreements required under the Regulations, which must provide for protection, recognition and valuing of Indigenous knowledge, are considered adequate in the context of a regime that is directed at regulating access to biological resources in Commonwealth areas for environmental protection and biodiversity conservation reasons. It is not proposed that specific guidelines on regulating access to Indigenous knowledge be developed under the auspices of the Act.

5.127 A gap exists in Part 8A of the Act regarding the requirement for prior, informed consent for the use of Indigenous knowledge and the terms on which that knowledge is used. Informed consent is required where access to biological resources is sought on Indigenous people's land, and the use of Indigenous knowledge must be disclosed in the benefit-sharing agreement required for commercial or potential commercial purposes. However, where Indigenous knowledge is accessed under a non-commercial permit and not in relation to resources accessed on Indigenous peoples land, the Environment Minister is not required to be satisfied with respect to arrangements to protect, recognise and value the use of Indigenous knowledge.

5.128 The Regulations should be amended to remedy this oversight and ensure consistency with the Nationally Consistent Approach.[72]

Recommendation 22

The Review recommends that the Act be amended to:

(1) move Part 8A of the EPBC Regulations, which regulate access to biological resources in Commonwealth areas, into the Act;

(2) increase the penalty provisions for non-compliance with Part 8A;

(3) require benefit-sharing agreements to refer to 'equitable' sharing of benefits arising from the use of biological resources in Commonwealth areas; and

(4) require informed consent where Indigenous knowledge is accessed or used for non-commercial purposes on Commonwealth land.

69 Interim Report Comment 42: Dr Sarah Holcombe, Dr Matthew Rimmer and Ms Terri Janke, p.8.

70 Interim Report Comment 42: Dr Sarah Holcombe, Dr Matthew Rimmer and Ms Terri Janke, p.12.

71 Interim Report Comment115: Dr Sarah Holcombe. The Natural Resource Management Board NT, *Guidelines for Indigenous Ecological Knowledge Management* (April 2009) are available at: http://www.nrmbnt.org.au/files/iek/IEK%20&%20NR%20in%20the%20NT%20Guidelines%20for%20IEK%20Management.pdf.

72 Australian Government Department of the Environment and Heritage, '*Nationally Consistent Approach for Access to and the Utilisation of Australia's Native Genetic and Biochemical Resources*' (2000): http://www.environment.gov.au/biodiversity/publications/access/nca/pubs/nca.pdf.

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Chapter Six

CURRENT AND EMERGING THREATS

Chapter 6: Current and Emerging Threats

6.1 Environmental issues and challenges have changed markedly over the last ten years. The Australian Government needs to be able to adapt and respond to emerging threats and a changing environment. As highlighted by the Australian Network of Environmental Defender's Offices:

> There are a number of new emerging pressures […] that may require changes to the decision-making process. In order to respond to these unforeseen circumstances and the problems they may create, the Act will need to be malleable to ensure that it can adapt and respond appropriately to new and existing environmental pressures.[1]

6.2 The Act does not, nor should it, carry the entire burden of responsibility for responding to emerging environmental issues. However, the Act must be equipped with tools to address emerging threats to remain effective in national environment protection.

6.3 It is commonplace in business, industry and some areas of government to manage uncertainty, in part by identifying emerging threats and positioning the organisation to deal with them. The principal challenge is to find a credible signal among the vast amount of information available.

6.4 The precautionary principle, one of the principles of ecologically sustainable development (ESD) under the Act, manages uncertainty by stipulating that if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation. In this regard, a lack of full scientific certainty about impacts on the environment from current threats, such as established invasive species, is part of current decision-making.

6.5 Chapter 13 discusses how decisions made under the Act potentially have an important impact on the ability of, for example, a threatened species to respond to current and emerging threats. The Environment Minister should be required to consider the reasonably foreseeable impacts of decisions on the ability of a protected matter to respond to current and emerging threats.

6.6 Provisions in the Act to deal with emerging issues are limited. The current tools for identifying and managing particular threats are key threatening processes (KTPs) and threat abatement plans (TAPs). A threatening process is defined as a KTP if it threatens or may threaten the survival, abundance or evolutionary development of a native species or ecological community.

6.7 As discussed in Chapter 5, when a KTP is listed under the Act, the Environment Minister must decide whether to develop a TAP for that KTP. A TAP is developed if the Environment Minister believes that implementing a TAP is a feasible, effective and efficient way to abate the threat. TAPs provide for research, management and any other actions necessary to reduce the impact of a listed KTP on native species and ecological communities.

6.8 While KTPs provide a pathway for protecting biodiversity against current threats, they are a relatively weak instrument. Their listing under the Act does not provide a mandate for action – rather it is a precondition for a decision to prepare a TAP. Further, KTPs do not strategically identify emerging threats to the environment. As the environment changes, a process is needed for identifying emerging threats and developing adaptive management measures to deal with them.

6.9 Foresighting[2] is the process of gathering and interpreting information to identify emerging threats and determine what might be done to mitigate them. Tools include environmental scanning, scenario planning, cross-impact analysis, causal layers analysis, emerging issues analysis and syndromic surveillance. These tools can provide expanded perceptions of options for investing scarce resources, and improve strategic planning.[3] Foresighting activities evolve according to the changing needs and resources of the organisation they serve. New opportunities arise as technology develops, and as the organisation faces new challenges.

1 Submission 189: The Australian Network of Environmental Defender's Offices, p.90.

2 Joseph Voros 'A generic foresight process framework' (2003) 5 *Foresight* p.10.

3 See e.g. Joseph Voros (2003) 5 *Foresight*, p.10; Sohail Inayatullah, 'Six pillars: futures thinking for transformation' (2006) 10 *Foresight* p.4; and Ronald Fricker, 'Syndromic surveillance' in Edward Melnick and Brian Everitt (eds) *Encyclopaedia of Quantitative Risk Assessment* (2008).

6.10 Scenario planning is particularly well developed in business. It employs a diverse cross-section of relevant people to develop credible models of an organisation's future. These are cross-examined and used to develop strategies that keep the organisation 'safe'. It depends on selecting variables that influence and shape potential outcomes, thinking through the likely strategic responses for each scenario, and finding practical ways of measuring the impact of these variables, providing forewarning when different scenarios emerge, and guidance to launch the appropriate strategic response. In this regard, analytics, a term used to describe the use of statistics and data mining to provide organisational and business intelligence, is an important element of foresighting.

6.11 Foresighting typically also involves other strategies, including specialists who assist an organisation to develop ideas about emerging issues, and informal networks of professionals who gather specialist information and then share it with colleagues.

6.12 Internationally, the United Kingdom's Department of Environment Food and Rural Affairs has invested considerably in horizon scanning and related activities,[4] as have the Centres for Animal Health in the United States.[5] In Australia, the Inter-Departmental foresight group (the 'Australasian Joint Agency Environmental Scanning Network') shares outputs of environmental scanning, meets periodically to discuss such material, and provides consolidated reports.

Climate Change

6.13 Climate change is a threat, or more appropriately a risk, to biodiversity conservation. As climate change will have a large impact on biodiversity, the Review has taken a holistic approach to managing climate change adaptation, with adaptation issues being addressed throughout this Report, including when considering regional approaches, recovery plans, listing decisions and environmental impact assessments.

6.14 The view that 'climate change threatens biodiversity directly, by affecting ecosystem processes and habitats, and indirectly, by compounding the impacts of existing and ongoing pressures on biodiversity',[6] was confirmed in a recent study by the Natural Resources Management Ministerial Council (NRMMC) *Australia's Biodiversity and Climate Change*.[7] Hence the Review proposes that climate change adaptation issues be addressed by:

- considering emerging threats in decision-making (see Chapter 13 and this Chapter);
- using regional and landscape approaches (see Chapter 3); and
- improving biodiversity protection generally, including by addressing existing stressors, managing threats, and extending the types of matters protected.

6.15 This approach addresses a number of issues raised in submissions, including the need to:

- improve the capacity and flexibility of the Act to respond to environmental pressures;[8]
- explicitly bring climate change considerations into decision-making throughout the Act;[9] and
- shift to a paradigm that 'manages the change to minimise the loss'.[10]

4 Defra, *Horizon* Scanning (2006) http://horizonscanning.defra.gov.uk/.

5 United States Department of Agriculture – Animal and Plant Health Inspection Service, *Centres for Epidemiology and Animal* Health (2009) http://www.aphis.usda.gov/about_aphis/programs_offices/veterinary_services/ceah.shtml, especially in its Center for Emerging Issues at http://www.aphis.usda.gov/vs/ceah/cei/.

6 Submission 145: Office of the Environmental Sustainability Commissioner (Victoria), p.3.

7 Biodiversity and Climate Change Expert Advisory Group, *Australia's Biodiversity and Climate Change: a strategic assessment of the vulnerability of Australia's biodiversity to climate change – Summary for policy makers* (2009). This was also raised in a number of submissions including: Interim Report Comment 5: Invasive Species Council.

8 Submission 181: WWF, p.25.

9 Submission 182: Humane Society International, p.4.

10 Submission 135: CSIRO, p.3.

Australia's Biodiversity and Climate Change

6.16 *Australia's Biodiversity and Climate Change* outlines the likely severity of climate change impacts on biodiversity:

> The magnitude and rate of climate change pose particularly severe challenges for natural ecosystems. The interaction of climate change with existing stresses – such as land clearing, fire and invasive species – and the different migration rates of species and consequent formation of novel ecosystems, add further levels of complexity. Significant changes are required in policy and management for biodiversity conservation to meet these types of challenges.[11]

6.17 The report also notes that:

> predicting the future effects of climate change on Australia's biodiversity in […] iconic areas and elsewhere is challenging for a variety of reasons:
>
> - climate change will interact with other stressors that are currently affecting biodiversity;
> - responses to the physical and chemical changes associated with climate change are individualistic – that is, they occur at the level of the individual;
> - properties of ecological systems – communities of interacting species and their abiotic environment – are often non-linear, and can be difficult to understand and predict. A change in the average value of a variable, such as temperature, may not be as important ecologically as a change in the variability or extremes of that variable; and
> - basic knowledge is generally lacking about limiting factors, genetics, dispersal rates, and interactions among species that comprise Australian communities and ecosystems.[12]

6.18 However, the report concludes that general trends can be identified by returning to basic principles. The CSIRO has commented that 'while impossible to predict with complete accuracy, it is highly likely that the proportion of species threatened with extinction in Australia will increase considerably.'[13]

6.19 The NRMMC report also outlines five principles for biodiversity management in light of climate change. These include that:

- *in situ* conservation may no longer be appropriate for all species and ecological communities. Instead the focus should remain on maintaining the provision of ecosystem services through a diversity of well-functioning ecosystems;
- there should be a focus on enhancing ecosystem resilience, including through developing connectivity of fragmented ecosystems, enhancing the National Reserve System, protecting key refugia, implementing more effective control of invasive species, and developing appropriate fire and other disturbance management regimes;
- risk assessments should be used to identify vulnerable species and ecosystems;
- policy and legislative frameworks should be reoriented, including by introducing integrated regional approaches tailored for regional differences in environments, climate change impacts and socio-economic trends; and
- climate change mitigation is vital.[14]

6.20 These principles have shaped the general approach of this Report and are addressed in further detail below.

11 Biodiversity and Climate Change Expert Advisory Group, *Australia's Biodiversity and Climate Change: a strategic assessment of the vulnerability of Australia's biodiversity to climate change – summary for policy makers* (2009), p.1.

12 Biodiversity and Climate Change Expert Advisory Group, *Australia's Biodiversity and Climate Change: a strategic assessment of the vulnerability of Australia's biodiversity to climate change – summary for policy makers* (2009), p.5.

13 Interim Report Comment 49: CSIRO, p.3.

14 Biodiversity and Climate Change Expert Advisory Group, *Australia's Biodiversity and Climate Change: a strategic assessment of the vulnerability of Australia's biodiversity to climate change – summary for policy makers* (2009), pp. 1-2.

Climate Change as an Emerging Threat

6.21 Chapter 13 recommends that the Minister, when making decisions under the Act, should be required to consider the reasonably foreseeable impacts of decisions on the ability of a protected matter to adapt to current and emerging threats. This would include the emerging threat of climate change.

6.22 Uncertainties relating to the impacts of climate change on biodiversity still abound.[15] As the science surrounding these issues develops – for example, as the impacts of climate change on particular species and ecosystems become clearer – then science will more clearly guide decisions under the Act. The likely biodiversity impacts of climate change are being worked on by institutions such as the CSIRO, the Climate Change Institute at the Australian National University (ANU) and related work at other universities and the Australian Government Department of Climate Change.

6.23 Decisions that can readily incorporate climate change as an emerging threat include:

- endorsing a strategic assessment, or approving a class of actions that are in accordance with an endorsed plan, policy or program;
- listing a threatened species or ecological community;
- making a recovery plan for a species;
- TAPs;
- deciding whether a project has a significant impact on a matter of national environmental significance (NES); and
- approving a project and determining the conditions of approval for a project.

6.24 Climate change considerations could include the effect of the decision on the long term persistence of any matter of NES; whether or not a particular matter of NES was sensitive to the impacts of climate change; and whether management prescriptions or interventions would be successful in light of climate change.

Climate Change Adaptation and the Management of Ecosystems

6.25 Submissions have called for greater use of landscape approaches to biodiversity protection to manage the impacts of climate change better.[16]

6.26 The CSIRO argues that a species-by-species approach to environmental protection will have to be modified in light of the impacts on biodiversity from a changing climate. The CSIRO recommends that 'to do this the overarching approach in the Act may need to recognise a fluid relationship between space (i.e. a location), the environment (or habitat, including climate) and the biota.'[17]

6.27 *Australia's Biodiversity and Climate Change* reaches a similar conclusion to the CSIRO:

> Management objectives will need to be reoriented from preserving all species in their current locations to maintaining the provision of ecosystem services through a diversity of well functioning ecosystems… The emphasis is on making space and opportunities for ecosystems to self-adapt and reorganise, and on maintaining fundamental ecosystem processes that underpin vital ecosystem services.[18]

6.28 A number of landscape or regional approaches should be pursued, including strategic assessments, bioregional planning, conservation advice, the proposed new system of biodiversity banking, recovery planning, listing of KTPs, TAPs and ecosystems of national significance (a proposed new matter of NES). These approaches should encourage broader decision-making and active adaptive management, providing mechanisms better suited to dealing with climate change adaptation.

6.29 Finally, the CSIRO suggests that, due to the uncertainties surrounding landscape approaches, it would be premature to abandon current biodiversity management approaches – a position taken up in Chapter 3.

15 See e.g. Interim Report Comment 49: CSIRO.

16 See e.g. Interim Report Comment 36: The Green Institute; Interim Report Comment 49: CSIRO.

17 Interim Report Comment 49: CSIRO, p.3.

18 Biodiversity and Climate Change Expert Advisory Group, *Australia's Biodiversity and Climate Change: a strategic assessment of the vulnerability of Australia's biodiversity to climate change – summary for policy makers* (2009), p.13.

Invasive/ Exotic Species and Conventionally Bred Variants

6.30 An invasive species is a species occurring, as a result of human activities, beyond its accepted normal distribution and threatening valued environmental, agricultural or other social resources by the damage it causes. Invasive species include diseases, fungi and parasites, feral animals, insects and other invertebrates, marine pests and weeds.

6.31 The Invasive Species Council states that:

> Along with land clearing and climate change, invasive species are one of the three top threats to Australia's biodiversity and many matters of national environmental significance. But the EPBC Act does not provide an adequate framework to address their threats, particularly the threats of invasive species already in Australia.[19]

6.32 Further, the Invasive Species Council suggests that the impacts of invasive species have been more severe in Australia than any other continent:

> In its vulnerability, the 'island continent' is more island than continent, for due to evolutionary isolation and restricted distributions, island species tend to be susceptible to being overwhelmed by invasive species. And the worst for Australia is yet to come with most invasive species having occupied only a portion of their potential range, and interactions with climate change likely to considerably worsen their impacts.[20]

6.33 Implementation of the proposed biosecurity reforms, including establishment of the new Biosecurity Authority, should improve pre-border and at-border environmental biosecurity and post-border responses to accidental incursions, provided environmental considerations are appropriate. However, the new Authority will not address established exotic pests. It is also unclear whether the Authority will assess risks posed by the importation of new genetic variants of existing invasive species.

6.34 The Act has limited ability to deal with established exotic pests or emerging threats as a result of invasive species. KTPs can be listed and TAPs developed and implemented. Examples of invasive species listed as KTPs are rabbits, foxes, cats, pigs, goats, rodents on islands, red imported fire ants, *Phytophthora cinnamomi, chytrid fungus* and Psittacine beak and feather disease.

6.35 The Australian Government also funds a range of activities to reduce the threat of invasive species through national projects and Caring for our Country.

6.36 The definition of a KTP and criteria for listing are prescriptive and do not recognise the potential for threatening processes to impact on other matters protected under the Act (discussed further in Chapter 5). Amendments to the criteria for developing a TAP would provide greater flexibility and would facilitate their development for issues identified through the strategic KTP identification process and/or as part of regional planning approaches.

6.37 The Invasive Species Council recommends that s.301A of the Act, which allows regulations to be made to control non-native species, could be used to address many of the major deficiencies in post-border regulation of invasive species. They suggest that s.301A could be used to:

- list different categories of invasive species, such as a National Quarantine List, National Alert List and National Control List which would be used to guide Commonwealth and State/Territory action; and
- efficiently prohibit the trade and use of invasive species that are having a significant impact on biodiversity, including matters of NES. This would also prevent the naturalisation or spread of invasive species.[21]

6.38 These suggestions are consistent with the recommendations of the 2004 Senate Inquiry into invasive species.[22]

6.39 Currently, several thousand plant species persist as ornamentals or as naturalised populations in urban settings. They represent a vast reservoir of potential future problems. Movement of these species within Australia is effectively unconstrained and response to the issues they raise varies substantially between the States and Territories.

19 Submission 166: Invasive Species Council (Australia), p.3.

20 The Invasive Species Council *Backgrounder: The invasion of risks of introducing new genetic variants of exotic plants and animals* (2009), p.1.

21 Interim Report Comment 5: Invasive Species Council (Australia).

22 The Senate Environment, Communications, Information Technology and the Arts Committee, *Turning Back the Tide: the Invasive Species Challenge* (2004) http://www.aph.gov.au/SENATE/committee/ecita_ctte/completed_inquiries/2004-07/invasive_species/report/index.htm.

6.40 The provisions of s.301A have never been used. These provisions allow the Commonwealth to make a list of non-native species that could threaten biodiversity and implement plans to reduce, eliminate or prevent the impacts of species that appear on this list. While the exercise of this power may help to manage the impact of invasive species, a compliance system incorporating state border controls would be required to make it effective.

6.41 As noted by the Invasive Species Council, the main concern about potential reforms to better address invasive species threats is the cost of implementation. While any new measures would involve expense, in light of the environmental impacts and production losses due to weeds and other invasive species, it is expected that any reforms should engender a high return on the investment.

6.42 Although the compliance aspects of s.301A may be problematic, this provision provides an opportunity to create a new, targeted list of 'controlled' species, with the objective to regulate and/or prohibit actions involving non-native species that appear on this list. This could enable more effective interventions for some of the invasive species that are listed as KTPs.

6.43 There may be value in further exploring the potential use of s.301A in managing post-border regulation of invasive species, bearing in mind the potential compliance and enforcement issues it may raise. Movement of established, potentially damaging exotic species between States and Territories represents a substantial failure of State and Territory-based environmental regulation. Development of national protocols, in cooperation with the States and Territories, for assessing resident, potentially damaging exotic species, and for designing and implementing criteria to manage their movement within Australia, may be a useful first step towards remedying this situation.

Genetically Modified Organisms

6.44 Biotechnology is a broad term that covers the practical use of biological systems to produce goods and services. Traditionally it encompassed the transformation of materials by micro-organisms, and methods of propagation, such as plant cloning or grafting.

6.45 Recent advances in biotechnology provide ways of introducing very precise changes to genetic material that allow the transfer of properties of a single gene from one organism to another. These new techniques, commonly referred to as 'gene technology', involve the modification of organisms by the direct incorporation (or deletion) of one or more genes to introduce or alter a specific characteristic or characteristics. Organisms created using gene technology techniques are referred to as 'genetically modified organisms' (GMOs).

6.46 The Office of the Gene Technology Regulator (OGTR) has been established within the Australian Government Department of Health and Ageing to provide administrative support to the Gene Technology Regulator (the Regulator) in the performance of functions under the *Gene Technology Act 2000* (Cth).

6.47 The Gene Technology Act introduced a national scheme for the regulation of GMOs in Australia. The Act aims to protect the health and safety of Australians and the Australian environment by identifying risks posed by or as a result of gene technology, and by managing those risks through regulating certain dealings with GMOs.[23] Approval under the EPBC Act is still required should a proponent intend to release a GMO that will have or is likely to have a significant impact on a matter protected under the Act.

6.48 Under the Gene Technology Act, any 'intentional release' of a GMO into the environment requires a licence. Prior to issuing a licence, the Regulator must prepare a Risk Assessment and Risk Management Plan (RARMP) for each application.

6.49 While the Environment Minister does not have any decision-making powers, the Regulator must seek advice from the Environment Minister and other agencies and authorities for all applications to release a GMO into the environment, with the exception of limited and controlled release (field trial) applications. Initially, advice is sought on matters relevant to the preparation of the RARMP and the Regulator must take into account any advice provided by the Environment Minister. The Regulator must also seek advice from the Environment Minister on the RARMP following its preparation and must have regard to advice provided by the Environment Minister when deciding whether or not to issue the licence.

23 Office of the Gene Technology Regulator, *Homepage* (2009) http://www.ogtr.gov.au/internet/ogtr/publishing.nsf/Content/home-1.

6.50 The Gene Technology Regulator should continue to take into account all issues raised by the Environment Minister in the assessment of potential risks to the environment from the release of a GMO.

6.51 Indirect or secondary impacts such as changes in land use, land clearance and chemical-use pattern changes that may arise as a consequence of new innovations should be considered as part of the risk assessments undertaken by the OGTR. These issues should also be captured in the advice provided by the Environment Minister to the OGTR.

6.52 Considering the range of potential impacts and flow-on effects as a consequence of new innovations in agriculture, an alternative approach to risk assessment would be to conduct broad strategic assessments. The Act could support this strategic approach by including the ability to assess cumulative impacts in a manner appropriate for GMOs and other emerging technologies.

Emerging Technologies

6.53 Nanotechnology is an emerging technology involving the manipulation of matter at the nanoscale to create new properties for use in many diverse areas including medicine, manufacturing and environmental applications. Nanotechnology is developing at a rapid rate but the impacts it may have on the environment remain largely unknown.

6.54 Given the early stage in nanotechnology development, it would be prudent to bear in mind the impact such emerging technologies may have on the environment and how they may be addressed under the Act. Processes associated with the manufacture, use or disposal of nanomaterials could be considered as actions that may have a significant impact on matters protected under the Act. It is important that the Act be able to assess the risk posed by these materials on matters protected under the Act.

6.55 GMO and nanotechnology assessments under the Act pose some difficulties – for example, it may be difficult to identify who is taking an action where multiple parties may have taken a collective action such as releasing a product that affects a protected matter some distance from the area of release. The most effective method would be to identify the technology provider as the party taking the action. However, as they are not physically taking the action, this approach may not work under the current provisions of the Act.

6.56 Hence the Act needs to be able to identify as persons taking an action, the developers/providers of products derived from gene technology or other emerging technologies that may disperse or disseminate and impact on a matter protected under the Act.

Recommended Approach to Current and Emerging Threats

6.57 Emerging issues are difficult to manage in a regulatory system as traditional regulation tends to be a trailing instrument. Nonetheless, the Act does contain a number of provisions that allow the Australian Government to extend its regulatory powers to address new threats quite quickly. Examples include the threat abatement process, emergency listings and s.25, which effectively allows new matters of NES to be created by Regulation.

6.58 The creation of a mechanism based on the concepts of foresight and scenario planning and which is capable of providing institutional advice on emerging issues would be a useful way forward.

6.59 One option the Government could pursue is the establishment of a Unit or Taskforce devoted to foresighting to identify and guide management responses to emerging threats. The Unit should be linked directly to the sections within DEWHA that deal with emerging threats and associate with other relevant Committees. They would share information and further develop professional networks and other foresighting activities. The Unit would be responsible for anticipating new issues and examining the nature and seriousness of emerging threats.

6.60 In addition to the State of the Environment reports that have to be prepared under the Act, there should be provision for mandatory 'outlook' reports that identify emerging threats to the environment and provide policy options to address these issues. The aim would be to drive management focus to the highest priority threats. The reports should be prepared and publicly released at least every three years to ensure that new emerging threats are captured.

Recommendation 23

The Review recommends that:

(1) the Council of Australian Governments (COAG) develop criteria and management protocols for the movement of potentially damaging exotic species between State and Territories, working towards a list of 'controlled' species for which cost-effective risk-mitigation measures may be implemented;

(2) the Act be amended to require periodic preparation of mandatory 'outlook' reports that identify emerging threats to the environment and provide policy options to address emerging environmental issues; and

(3) the Australian Government establish a Unit or Taskforce devoted to foresighting to identify and guide management responses to emerging threats.

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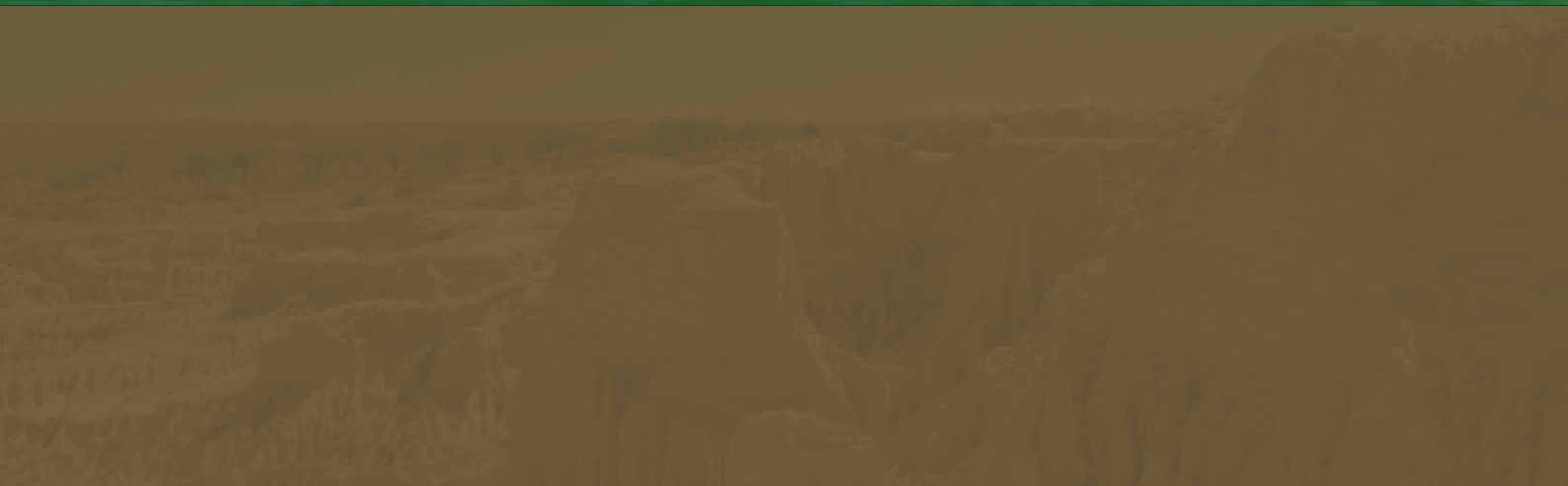
Chapter Seven

INDIVIDUAL PROJECT APPROVALS



Chapter 7: Individual Project Approvals

The Role of Project Approvals

7.1 A central tenet of the EPBC Act's operation has been the Environmental Impact Assessment (EIA) of individual projects. In the period from commencement of the Act on 16 July 2000 to 30 June 2009 the Minister received 2,696 referrals for individual actions.

7.2 The EIA regime has been one of the main vehicles for achieving environmental outcomes under the Act, and will have a prominent role in the amended Act.

7.3 The approach to project assessments will be reformed through implementation of the recommendations outlined in Chapters 1, 2, 3, 13 and 14. These include:

(a) increasing transparency and public participation;

(b) ensuring that decision-making is robust and defensible;

(c) increasing efficiency in environmental regulation, including greater harmonisation with State and Territory regimes;

(d) continuing protection for matters of National Environmental Significance (NES) and creating a new matter of NES – ecosystems of national significance;

(e) greater use of landscape approaches to biodiversity conservation through regional planning; and

(f) Commonwealth biodiversity banking.

7.4 Additional improvements to the EIA regime are recommended in this Chapter, including:

- improving the quality of information supplied by proponents;
- extending the range of environmental matters considered during project approval;
- enhancing the capacity of the Minister to vary conditions; and
- enhancing the provisions in the Act governing the consideration of alternatives to a project.

Improving Information

7.5 Many submissions to the Review expressed concern about the quality of information supplied in referral documentation and during assessments, while providing limited evidence to support these claims.

7.6 Issues raised with referral and assessment documentation included that:

- it may be inaccurate;[1]
- it is often at such a level of generality that it does not allow appropriate consideration of impacts;[2] and
- it often lacks scientific rigour – for example, claims of consultants undertaking surveys for migratory species at times of the year when species were known to be absent from that site.[3]

7.7 There is community concern that environment and planning consultants may not be suitably qualified to conduct environmental impact assessments, or that they may be financially beholden to the proponent and produce biased reports that do not reflect the extent of the environmental impacts of projects.

1 Submission 19: Mr Brendan Casey.

2 Submission 180: River Lakes and Coorong Action Group.

3 Submission 64: Bird Observation and Conservation Australia; Submission 33: Hunter Bird Observation Club; and Submission 109: Canberra Ornithologist Group.

7.8 Existing safeguards limit the use of low quality or limited information in project assessments. Safeguards include the capacity to reject referrals that are invalid due to failure to meet form and content requirements,[4] and the ability to request further information. It is also an offence to provide false or misleading information to an authorised or Departmental officer, although in practice this sanction has rarely been pursued.

7.9 DEWHA advises that it is developing survey guidelines for detecting birds, bats and frogs, and eventually all taxa listed as threatened under the Act. These survey guidelines aim to build on and complement the Policy Statement 1.1 *Significant Impact Guidelines – Matters of National Environmental Significance*, by providing guidance to consultants and proponents on the effort and survey methods for listed species that are considered adequate. The guidelines will also assist the Minister to judge whether appropriate methods and sufficient effort have been given to the flora and fauna surveys.

7.10 To address the real and perceived concerns about the quality of information supplied during the assessment process, the Review proposes that:

- a prescribed Code of Conduct be introduced for persons preparing information for a referral or approval decision;
- a system of random auditing be introduced to test the quality of assessments and whether the predicted outcomes relied on in the assessment process were achieved – this is distinct from compliance auditing discussed in Chapter 16 and the system of environmental accounts discussed in Chapter 19, but is expected to support these approaches; and
- greater use be made of inquiries as the method of environmental impact assessment.

A Prescribed Code of Conduct

7.11 The environment and planning consulting profession influences the nature of project approvals and environmental outcomes under the Act because of the profession's role in preparing referrals and environmental impact assessment documentation. The Environment Institute of Australia and New Zealand (EIANZ) advised that the profession is already developing professional standards through the creation of Codes of Conduct. The Codes include the EIANZ's *Code of Ethics*,[5] the International Association for Impact Assessment's *Profession Code of Conduct*,[6] and NSW Department of Environment and Climate Change's *BioBanking Assessor Code of Conduct*.[7]

7.12 These codes outline relevant professional standards, such as requirements to:

- provide independent, consistent and objective advice using sound scientific and ecological sustainability principles;
- provide a truthful opinion on any matter submitted to them for advice or opinion, not give false or misleading information and not conceal information;
- express opinions, make statements or give evidence with fairness and honesty, and on the basis of adequate knowledge;
- ensure the incorporation of environment protection considerations from the earliest stages of project design or policy development;
- avoid conducting professional activities in a manner involving dishonesty, fraud, deceit, misrepresentation or bias; and
- if committing to or tendering for work, have (or have access to) the resources and experience necessary to undertake the work.[8]

The Codes also promote ethical dealings by consultants.

4 As noted in the Interim Report, this provision is used extensively: DEWHA has advised that, in the period July 2008 to December 2008, 236 referrals were received and processed by DEWHA. Of these referrals only 81 (34%) contained enough information on receipt to be deemed valid without the need to request additional information from proponents.

5 Submission 87: Environment Institute of Australia and New Zealand; the EIANZ Code is available at: http://www.eianz.org/membershipinfo/eianz-code-of-ethics.

6 The IAIA Code is available at: http://www.iaia.org/publicdocuments/miscdocs/Code-of-Ethics.pdf.

7 *Arrangements for BioBanking Assessor Accreditation are* available at: http://www.environment.nsw.gov.au/resources/biobanking/08650AssessorAccreditation.pdf.

8 NSW Department of Environment and Climate Change, *Arrangements for BioBanking Assessor Accreditation* (2008) pp. 4-5.

7.13 DEWHA currently requires auditors engaged by proponents as part of a condition of an approval granted under the Act to sign an *Auditor's Declaration of Independence*. This declaration requires auditors to observe at all times any professional Code of Conduct applicable to undertaking audits.

7.14 Existing Codes help in the determination and promotion of best practice standards but do not have the capacity to enforce a minimum standard for the profession. Consultants are not obliged to abide by the Codes, and the range of sanctions associated with breaching the Codes may not be strong enough to ensure compliance.

7.15 A Code of Conduct that is designed for the specific purpose of improving information supplied to EIA regimes and is nationally consistent and enforceable should be developed in consultation with the environment and planning consulting industry. This Code should specify relevant professional and ethical standards as well as identify what would amount to misconduct. Ideally the Code should also identify a number of remedies for breach of the Code, and include dispute resolution mechanisms.

7.16 The Council of Australian Governments (COAG) may then be in a position to endorse the resultant code for use by all professionals responsible for submitting EIA documents for Commonwealth, State and Territory EIA regimes.

Compliance with the Code of Conduct

7.17 One option for encouraging compliance with an industry Code of Conduct is to prescribe the Code under the *Trade Practices Act 1974* (Cth).[9] The advantage of prescribing a Code is the access it provides to a variety of legal remedies – including enforcement by the Australian Competition and Consumer Commission (ACCC) or by private action. Breaches of a prescribed code constitute a breach of the *Trade Practices Act*.[10] Prescribed codes may be designated either as voluntary or mandatory:

- mandatory codes are binding on all industry participants;
- voluntary codes are binding on those members of an industry or profession who have formally subscribed to the code.[11] Prescribed voluntary codes could, for example, apply only to members of the industry association administering the code. The ACCC keeps a public register of companies bound by voluntary codes.

7.18 If an industry Code of Conduct for environment and planning consultants is developed for the purposes of the Act and is prescribed under the *Trade Practices Act*, it should be designated as a voluntary Code of Conduct. To encourage uptake of the Code, any company preparing information to be used for the purposes of the EIA regime under the Act should be required to subscribe to the Code.

7.19 A second option is for DEWHA to enforce the Code of Conduct by pursuing breaches itself. These breaches would primarily be identified by auditing referrals and assessments, as outlined below. This would have the advantage of applying to individuals and sole-traders, whereas a voluntary prescribed code could only bind corporations. The penalties relating to the provision of false and misleading information under s.491 could be used to enforce the Code, although given the limited use of this provision to date, a range of ancillary enforcement powers may be needed. The method of enforcement would depend on the content of the Code itself.

7.20 Lists of consultants who have subscribed to the Code could be published. These lists would be publicly available and could be used by proponents looking to engage a consultant to manage the assessment of their action.

7.21 A project with a large and detailed EIS will often have multiple consultants working on different aspects of the documentation. Where a project has sub-contracted consultants, the consultants could either have a chief consultant/s sign to the Code and be liable for breaches by sub-consultants, or all consultants working on a project could sign to the Code and be liable.

9 *Trade Practices Act 1974* (Cth) s.51AE.

10 *Trade Practices Act 1974* (Cth) s.51AD.

11 Formal subscription requires a company becoming a signatory to the code.

Accreditation

7.22 Submissions raised the possibility of a more rigid system of accreditation of environment and planning consultants.[12] Under this proposal only accredited consultants could make referrals under the Act. Accreditation is a promising method of ensuring only qualified consultants prepare referral documentation for the purposes of the Act, however, the processes for accreditation are not yet developed to a point where this is a feasible option.

7.23 The range of professions who act as consultants under the Act is very broad, including engineers, ecologists, planners, hydrologists and heritage planners. To have any meaningful accreditation, individual specialisations should be accredited separately. Currently, professional bodies only provide accreditation for generalist consultants, although specialised streams are being developed. As the sophistication of accreditation by professional bodies increases, the possibility of requiring accreditation as a prerequisite for referral or assessment purposes becomes more realistic.

7.24 An additional concern with the introduction of formal accreditation is the difficulties it would create for proponents who are individuals or small companies. These proponents often only engage with the Act once, produce their own referral documentation, and may not be able to bear the considerable expense of hiring an accredited consultant.

Audit of the Assessment and Referral Information

7.25 The Interim Report suggested further exploration of the potential for regular auditing and verification of the outcomes of EIAs and the testing of predictions relied upon in these assessments. Two forms of audit are proposed.[13]

- *Referral documentation or assessment information is randomly audited to test the veracity of the information in the document, and the predictions of modelling.*

  This audit would occur after the referral decision or approval decision has been made, and would be separate from the testing of information that occurs during the referral and assessment decision phases. A variation on this idea would be to submit the document to blind peer review. Where inconsistencies or irregularities are found in the information or modelling, consideration should be given to investigating whether the conduct is false or misleading for the purposes of s.491, or a breach of the Code of Conduct.

- *The success of the predictions relied upon in assessments is audited.*

  Project assessments rely on modelling and assumptions to make predictions of impacts – including success of mitigation and offset measures. While considerable effort is applied to auditing compliance with conditions, there is rarely any follow up to determine if the predictions upon which the conditions were based have eventuated.[14] Therefore the Minister should also have the capacity, when undertaking compliance audits, to audit the assumptions relied upon in the initial assessment. This information, the lessons it imparts about predictions and the implications for condition setting, should feed into on-going improvement of DEWHA assessment and approval practice. Where inconsistencies or irregularities are found in the audit outcomes, consideration should be given to investigating whether the original predictions were misleading for the purposes of s.491, or breach the Code of Conduct.

7.26 Auditing the information supplied for assessments and referrals would have multiple benefits. It would ensure that information is correct and modelling is verifiable. It would also improve the quality of assessments and conditions imposed as part of approvals.

12 See e.g. Submission 87: Environment Institute of Australia and New Zealand; Submission 64: Bird Observation and Conservation Australia; and Submission 132: Mr Jeremy Tager.

13 This is distinct from compliance auditing associated with monitoring compliance with conditions.

14 The one Australian study is Ralf Buckley, *Precision in Environmental Impact Prediction: First National Environmental Audit* (1989).

Public Inquiries

7.27 Chapter 2 recommends that greater use be made of assessment by public inquiry. A benefit of this form of assessment is that information provided to DEWHA during the assessment process can be subjected to public examination, including questioning of witnesses and consultants. This method of assessment would also improve the rigour of information used in assessment.

Recommendation 24

(1) The Review recommends that the Australian Government, in consultation with the environment and planning consulting industry, develop an industry Code of Conduct for consultants supplying information for the purposes of the environmental impact assessment and approval regime under the Act.

(2) The Australian Government must decide whether the Code will be enforced by:

(a) prescribing the code under the *Trade Practices Act 1974*, and allowing enforcement of breaches by the Australian Competition and Consumer Commission; or

(b) DEWHA, under a suite of new Code of Conduct audit and enforcement powers.

(3) To complement the Code of Conduct, the Review recommends that the Environment Minister:

(a) audit the information in referral documentation and/or assessment information; and

(b) audit protected matters to test if the predictions made in Environmental Impact Assessments were correct.

Cumulative Impacts

7.28 Submissions raised concerns that the EIA regime of the Act does not adequately address the cumulative impacts of multiple actions, because it only considers the impacts individually on a project-by-project basis. Mr Alan Gilpin has defined cumulative impacts as:

> effects which combine from different projects and which persist to the long-term detriment of the environment. Cumulative impacts refer to progressive environmental degradation over time, arising from a range of activities throughout an area or region, each activity considered in isolation being possibly not a significant contributor.[15]

7.29 Comments on the Interim Report provided evidence of the net environmental effect of cumulative impacts of multiple projects[16] and argued that the Act should have a clear capacity to manage cumulative impacts.[17]

7.30 In practice, consideration of cumulative impacts is best achieved through explicit consideration of landscape-scale effects in bioregional plans, strategic assessment and recognition of critical habitat in these plans and assessments, rather than through case-by-case approaches.

7.31 Consideration of the cumulative impact of an action, when deciding whether it will have a significant impact on a matter of NES, can be undertaken when examining the 'context' of a project. For example, DEWHA advises that in recent years the Minister has had regard to cumulative impacts through considering the context of developments when determining the likely significance of developments impacting on habitat for the Western Ringtail Possum in Busselton, Western Australia, and the Cassowary in Mission Beach, Queensland. The development of policy advice to guide similar judgments for other protected matters would increase the levels of certainty and transparency associated with these decisions.

15 Alan Gilpin, *Environmental Impact Assessment (EIA) : Cutting Edge for the Twenty-First Century* (1995), p.31.

16 See e.g. Interim Report Comment 21: Ms Julie Vint; Interim Report Comment 31: Mr Ed Wensing; Interim Report Comment 32: Magnetic Island Community Development Association; Interim Report Comment 37: North East Forest Alliance (NEFA) and the North Coast Environment Council (NCEC); Interim Report Comment 64: International Council on Monuments and Sites (Australia); Interim Report Comment 68: Garners Habitat Action Group; and Interim Report Comment 98: Greenpeace.

17 As was supported by: see e.g. Interim Report Comment 37: North East Forest Alliance (NEFA) and the North Coast Environment Council (NCEC); Interim Report Comment 88: WWF; and Interim Report Comment 92: Professor Lee Godden, Ms Anne Kallies and Ms Carly Godden.

Broader Environmental Considerations

7.32 The environmental impacts of a project are often assessed through a narrowed lens under the Act because of the Act's constrained focus on matters of NES.

7.33 The legislative intent behind limiting the impacts considered by the Minister when making decisions under the Act was to:

> define the environmental impacts for which the Commonwealth is responsible for assessing and taking into account when deciding whether to give approval. In this way, Commonwealth involvement in environmental matters is focused on matters of national environmental significance.[18]

7.34 The Explanatory Memorandum explicitly noted that the Commonwealth does not assess all impacts of an action unless asked to do so by a State.

7.35 Some submissions supported retention of the current scope of the Act.[19] As noted in Chapters 1 and 2, the Commonwealth has a specific role in regulating the environment. This is brought about by a combination of constitutional powers and intergovernmental agreements, and the recognition of the subsidiarity principle – 'that higher levels of government should not undertake what a lower level of government can do for itself'.[20]

7.36 Other submissions argued that the Act should be amended so that once an action falls within the scope of the Act (by having a likely significant impact on a protected matter), the Commonwealth would assess a broader range of the likely environmental impacts of the proposed action, that is, impacts on the whole environment, not just significant impacts on matters of NES.[21]

7.37 It was argued that broader consideration of environmental matters would better recognise natural processes, accounting for the connectivity of the natural environment. Broader consideration may also match the public expectation of the role of the Environment Minister, as there is often a belief that the Minister can assess all aspects of the environment when assessing a project.

7.38 These arguments were partly prompted by perceptions of State and Territory failure to provide adequate protection for aspects of the environment which are not matters of NES. In these situations, those opposed to State and Territory decisions often look to the Australian Government to redress State and Territory failings.

7.39 The current system operates on the basis that local environmental impacts are assessed by State and Territory governments. Within this context, it is noteworthy that the Act already provides for consideration of the whole environment where State and Territory assessments are not applicable, that is, for actions on or affecting Commonwealth land or the Commonwealth marine environment.

7.40 Independent of the question of the quality of State and Territory assessments, there is an argument for the Environment Minister to consider the broader environment when making approval decisions. When making an approval decision the Minister must weigh all of the social and economic matters associated with a project against only a limited set of environment matters (that is, limited to significant impacts on the matters protected under the Act). This may be perceived as running contrary to the principles of ESD, in that one of the cornerstones of ESD is the integration of all environmental, social, economic and equitable considerations.

7.41 One of the strengths of the Act has been the fact that it clearly specifies those aspects of the environment that are regulated by the Commonwealth, that is, matters of NES. In a Federal system, environmental protections are provided by a combination of Commonwealth, State, Territory and Local government regulation. If the scope of Commonwealth environmental impact assessments are to be expanded to incorporate a wider range of environmental considerations, a number of factors will need careful consideration, including:

- the risks of creating uncertainty and delay in decision-making;
- the need to specify the scope of assessment early in the process;
- the need to avoid unbounded assessments;
- the cost implications of additional Commonwealth requirements; and
- the relationship with State and Territory assessments and approval conditions.

18 Explanatory Memorandum, Environment Protection and Biodiversity Conservation Bill 1999 (Cth), para.[165].

19 See e.g. Interim Report Comment 44: Hydro Tasmania and Roaring 40s.

20 Interim Report Comment 31: Mr Ed Wensing, p.10.

21 See e.g. Submission 153: The Wilderness Society, p.10; and Interim Report Comment 15: Mr Malcolm Mars.

7.42 Without a clear process to determine what elements would be considered in a broader environmental assessment there would be additional uncertainty upon referral, as proponents could not be certain how much assessment their action would require, the likelihood of approval or the types of approval conditions to be imposed.

7.43 If a project triggers the Act, three approaches are readily identifiable as options for incorporating consideration of wider environmental matters:

- The Minister must consider the whole of the environment, that is, all environmental matters the project impacts upon;
- the Minister may call-in the impacts on the whole of the environment for assessment, if it is considered that the action is of 'national importance'; or
- the Minister may consider impacts on all protected matters affected by the project, including impacts that are not significant.

These options are not mutually exclusive.

7.44 It is important to note that the Minister's power to consider the whole of the environment (as is required in the first and second options) may be constitutionally and practically limited.

7.45 It might be a cause for concern if these changes saw the Commonwealth become involved in local environmental issues such as noise, aesthetics and local traffic issues. This concern could in part be resolved by recognising that the Commonwealth lacks clear constitutional power in regard to purely local planning issues, and that the extent of the 'environment' could be defined to avoid these issues. Limitations on the interpretation of the scope of the term 'environment' would need to be clearly expressed in the legislation.

7.46 The rationale for the first option, requiring the Minister to consider all environmental impacts for all decisions, is often predicated on the concern that environmental matters addressed by State, Territory and Local government regulation may not be adequately protected. The contrary point is that consideration of all environmental impacts should be achieved by the concurrent operation of Commonwealth, State and Local environmental assessment regimes.

7.47 To the extent that there are legitimate concerns regarding the quality of State and Territory assessments, it is questionable whether the Commonwealth Environment Minister should act as 'court of final appeal'. This may simply encourage blame shifting. The alternative is a mechanism that allows the Environment Minister to have regard to State or Territory assessments and approval conditions in ESD deliberations, which would help ensure integration of all environmental, social and economic factors relevant to the Minister's final decision. Safeguards against duplication could be created including allowing recognition of State and Territory approval conditions.

7.48 Under the second option, the current system would operate unless the Minister made a determination during the referral process that a project is of national importance. The basis for determining if a project is of national importance would need to be specified in the Regulations, but should include, at a minimum, that the Minister is satisfied that the long-term or short-term environmental, economic, social or equitable considerations of the action are nationally important.[22] The assessment of projects of national importance would consider all environmental impacts, not just impacts on matters of NES. In such cases there could be considerable value in assessing actions of national importance by the assessment panels described in Chapter 2. This approach would be consistent with COAG's desire to see 'integrated assessment and approval process encompassing all statutory assessments and approvals by the three levels of government'.[23]

7.49 The third option, requiring consideration of all protected matters, even those where the project will not have a significant impact, focuses the consideration of broader impacts on those that are currently within the purview of the Commonwealth. In practice, it would require an action to have a significant impact on only one matter of NES at the referral stage and during the assessment and approval stages all matters would be considered.

7.50 If the Minister assessed a broader set of environmental matters then there would need to be the power to apply appropriate conditions to mitigate impacts on these matters. In the interests of efficiency, the Minister should be required to ensure conditions are complementary to relevant State conditions.

22 These considerations are derived from the first listed principle of ESD – *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.3A(a).
23 Council of Australian Governments, *3 July 2008 Communiqué* (2008) http://www.coag.gov.au/coag_meeting_outcomes/2008-07-03/index.cfm.

Recommendation 25

The Review recommends that the Act be amended to confer power on the Environment Minister to weigh a wide range of environmental considerations when making an approval decision. There are three options for amendment:

If a project triggers the Act, the Minister:

(1) must consider the whole of the environment, that is, all environment matters the project impacts upon;

(2) may call in the impacts on the whole of the environment for assessment, if it is considered that the action is of 'national importance'; or

(3) may consider impacts on all protected matters affected by the project, including impacts that are not significant.

Consideration of Alternatives

7.51 As part of a referral under the Act, a proponent may include alternative options[24] within their proposed action, such as:

- the location where the action is to be taken;
- the time frames within which the action is to be taken; and
- the activities that are to be carried out in taking the action.[25]

7.52 The Minister could require the consideration of alternatives in tailored guidelines for Environmental Impact Statements and Public Environment Reports but this requirement is not specified in the Regulations. Under ss.87 and 102, the Minister must prepare tailored guidelines if the standard guidelines are not appropriate for a particular project.

7.53 Several submissions argued that there should be greater consideration of alternatives to a proposed action.[26] Submissions contended that there is no onus on a proponent to give a comprehensive analysis of alternatives, nor is there a requirement for the Minister to complete such an analysis in a consistent and transparent way. Suggestions for reform included an explicit requirement that a decision-maker consider the alternatives to a proposed action (such as alternative actions that would achieve the same result, or alternative sites for a proposed action) when deciding if a proposed action should be approved under the Act. The concept is widely promoted as part of EIA best-practice but is not always easy to implement.

7.54 One problem with a mandatory requirement for analysis of alternatives is that proponents may be limited in their capacity to undertake alternative measures. This includes circumstances where alternative sites are not owned by a proponent.

7.55 Second, the introduction of mandatory alternative considerations may cause perversities and delays in the assessment process. Insertion of variables in referral documentation may reduce the clarity of assessments, for example it may be difficult to assess the exact impacts of a project if the timeframes are not definitively specified. If referrals contain multiple detailed options for a project, and each of these must be assessed, than the timeframes for assessment may not be able to be met. Requiring consideration of alternatives when none are genuinely proposed risks creation of 'straw-men', drawing the whole process into wasteful activity.

24 The term alternatives is used in the context of EIA literature as meaning a range of options, not merely a choice between two proposals.

25 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.72(3).

26 See e.g. Submission 145: Office of the Commissioner of Sustainability and the Environment (Victoria); and Submission 129: Greater Mary Association.

7.56 There are circumstances where consideration of alternatives is appropriate, including where a project has clear and feasible lower impact options. Examples would be where there are spatial choices available such as the route of a road or where alternate process designs are genuinely available. While such alternatives can be considered as part of a conventional EIS, they may be best explored as part of a public inquiry or panel process.

7.57 One possibility would be to require proponents to consider alternatives, but recognising that there will be cases where there are no feasible alternatives, the proponent would be allowed to put a case why this is so. If not satisfied by this case, the Minister should then have a clear power to require the proponent to provide information on alternatives.

7.58 Another option is to simply empower the Minister to request that a proponent provide information on alternatives to a project, similar to the Ministerial power to request further information, in circumstances where the Minister forms an opinion that consideration of alternatives is a relevant aspect of decision-making.

Recommendation 26

The Review recommends that the Act be amended to confer power on the Environment Minister to request information on alternatives for projects referred for approval under the Act.

Clarifying the Operation of Project Approaches

7.59 The essential elements of the project-based EIA regime provide a sound method for achieving positive environmental outcomes and a suitable platform for Commonwealth engagement in environmental regulation. However, elements of the operation of the EIA regime need to be clarified to improve the functioning of the system and provide better outcomes for the public, proponents and regulators.

Significant Impact

7.60 As the threshold for the operation of the Act, the test of significant impact received considerable attention in public submissions. Criticisms of the test of significance suggest that:

- it does not capture the range of actions that should appropriately fall under the Act;
- it does not operate well in practice as it is overly subjective and engenders uncertainty;
- it does not allow for adequate consideration of cumulative impacts; and
- the gate-keeping role of the significant impact test does not result in a sufficient number of actions being referred for assessment and approval.

7.61 Submissions from industry, environmental groups and State governments agreed that the definition was too broad and required greater clarity to increase certainty in the system.[27]

7.62 'Significant impact' is not defined in the Act, however the term has been considered by the courts, which held that 'a "significant impact" is… an " *impact that is important, notable or of consequence having regard to its context or intensity*"'.[28]

7.63 The definition of 'significant impact' has been further defined by DEWHA to be:

> an impact which is important, notable, or of consequence, having regard to its context or intensity. Whether or not an action is like to have a significant impact depends upon the sensitivity, value, and quality of the environment which is impacted, and upon the intensity, duration, magnitude and geographic extent of the impacts.[29]

27 See e.g. Submission 65: BP Australia; Submission 164: Minerals Council of Australia; Submission 189: The Australian Network of Environmental Defender's Offices; Submission 139: Hydro Tasmania and Roaring 40s; Interim Report Comment 25: Professor Hugh Possingham; Submission 95: Urban Development Institute of Australia; Submission 201: Government of Western Australia; Submission 200: Government of Tasmania.

28 *Booth v Bosworth* [2001] FCA 1453 para.[99] (per Branson J).

29 DEWHA, *Glossary* (2009) http://www.environment.gov.au/epbc/about/glossary.html.

7.64 It is unlikely that a better test than that of 'significance' exists or could be developed. It is also noteworthy that none of the submissions made a serious recommendation on a revised definition. It is doubtful that adding more synonyms to the legislative definition would aid in interpretation. Accordingly, the existing definition of significant impact should remain and could be included in the Act's definitions.

7.65 However, the issues identified above do need to be addressed. The application of the significance test could be simplified and clarified through the use of additional or more effective guidelines.

7.66 Two generic significant impact guidelines have been produced *Significant impact guidelines – matters of national environmental significance* and *Significant impact guidelines – actions on, or impacting upon, Commonwealth land and actions by Commonwealth agencies*.[30]

7.67 To complement the generic guidelines, specific guidelines have also been produced, or are in draft form, including:

Industry specific guidelines for:

- offshore seismic operations;
- offshore aquaculture; and
- wind farm industry.

Nationally threatened species and ecological community specific guidelines for the:

- Grey-headed Flying Fox;
- Spectacled Flying Fox;
- Tiger Quoll;
- Spot-tailed Quoll;
- White Box – Yellow Box – Blakely's red gum grassy woodlands and derived native grasslands;
- Tasmanian Devil;
- Peppermint box grassy woodland of South Australia and iron-grass natural temperate grassland of South Australia;
- Natural temperate grassland of the Victorian volcanic plain;
- Littoral rainforest and coastal vine thickets of eastern Australia;
- Western Ringtail Possum in the southern Swan coastal plain of Western Australia;
- Spiny Rice-flower;
- Golden Sun Moth;
- Black-throated Finch (southern);
- Growling Grass Frog;
- Southern Cassowary – Wet Tropics population; and
- Green and Golden Bell Frog.

7.68 Submissions suggested methods for improving the quality of guidelines, including improvements in useability:

> Rather than complex and inflexible guidelines; unambiguous, user friendly and simple information and referral guidelines should be readily accessible to allow an initial decision to be made by a proponent on whether an action has the potential to have a 'significant impact' on a matter of national environmental significance.[31]

30 Department of Environment and Heritage, *Matters of National Environmental Significance Significant Impact Guidelines 1.1* (2006); and Department of Environment and Heritage, *Actions on, or impacting upon, Commonwealth land and Actions by Commonwealth Agencies Significant Impact Guidelines 1.2*, (2006).

31 Submission 49: The Association of Mining and Exploration Companies, p.2; See also Submission 139: Hydro Tasmania and Roaring 40s.

7.69 Other suggested improvements relate to the scientific bases for these guidelines, including better incorporation of principles of population ecology.[32] It was also suggested that the guidelines should make it clear when parties need to refer actions.[33]

7.70 These specific significance guidelines should continue to be produced,[34] following the principles of useability, clarity and scientific adequacy. Development of better guidelines can be expected to provide increased certainty and efficiency to the operation of the Act, and reduce the risk of capricious decision-making.

7.71 Proponents may refer actions not because they believe the action will have a significant impact on a matter of NES, but rather to gain the legal surety of a 'not controlled action' decision. It is reasonable to have an 'if in doubt refer it' policy. Resources allocated by DEWHA to developing a Business Entry Point, to assist in processing referrals and giving advice to potential proponents may help in this regard.

7.72 In addition to the development of guidelines, proponents have asked for further guidance from DEWHA on whether individual actions should be referred. Currently DEWHA is reluctant to advise whether a specific project is or is not likely to have a significant impact. In *Humane Society International Inc v Minister for the Environment and Heritage*[35] it was held that the production of Ministerial guidelines that specified when an action did not need to be referred was comparable to an exemption, and that the Minister did not have such a power to exclude actions from referral. Pre-referral advice may also be tantamount to making a decision and have legal implications around apprehension of bias and legitimate expectation. This understandable caution results in a public perception of unhelpfulness and bureaucracy. To the extent that this risk is real, steps should be taken to enable DEWHA to provide preliminary advice to proponents. The inability to do this is contributing to uncertainties and costs associated with the operation of the Act.

7.73 In addition to clarifying when actions will have significant impacts on a threatened species or ecological community, guidelines should also be able to identify circumstances when actions will clearly not need to be referred. This would provide additional certainty for proponents, and likely reduce the number of referrals made simply for legal certainty thereby reducing the burden on administration of the Act. This in turn will allow scarce resources to be allocated to priority activities. To achieve this, it is proposed that the Act be amended to allow the Minister to stipulate circumstances where referrals are not required because actions will not have, or are not likely to have, a significant impact on a protected matter.

7.74 Bioregional planning can also provide useful context for the determination of significance.[36] This is particularly relevant to approval of activities in the marine environment where the test is whether the action will have a significant impact on the environment.[37] Without guidance, considerable uncertainty exists in determining the extent of information necessary for such a broad matter of NES. Proponents may spend considerable time and money in undertaking unnecessary field studies. The Australian Petroleum Product and Exploration Association (APPEA) argues that Marine Bioregional Plans should be used to determine some of the context questions and help sharpen the scope of subsequent EIA work in the marine environment.[38] Better use of strategic predictive analysis work could potentially remove years from the project approval timelines for major oil and gas developments. APPEA estimates the costs associated with a one year delay in the development of an average Liquefied Natural Gas (LNG) project could be in the order of $300 million.[39]

32 Interim Report Comment 25: Professor Hugh Possingham.

33 Submission 189: The Australian Network of Environmental Defender's Offices.

34 As supported by Submission 181: WWF.

35 *Humane Society International Inc v Minister for the Environment and Heritage* [2003] FCA 64.

36 As is possible under *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.176(5).

37 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.23.

38 Interim Report Comment 24: Australian Petroleum Production and Exploration Association.

39 The Australian Petroleum Production and Exploration Association suggested a year delay for a $2.7 Billon project could cost proponents up to $300 million – Mr Mark McCallum, (pers. comm.) 29 September 2009.

Action

7.75 Sections 523–524A define 'action' for the purposes of the Act. Section 523 states that 'action' includes a project, development, undertaking, activity or series of activities and alteration of a project, development, undertaking or activity. The following activities by government bodies are not actions for the purposes of the Act:

- a decision to grant a governmental authorisation (however described) for another person to take an action; and
- provision of funding by way of a grant.

7.76 Suggestions were made to expand the definition of action, including changing the definition to capture inactions or omissions, and removing the limitation on grants or government authorisations. These ideas were explored in detail in the Interim Report.

7.77 The major concern with changing the definition of action to include omissions or government grants and authorisations is the difficulty of enforcing such provisions. Proponents would be extremely unlikely to refer when they are not undertaking an activity. Consideration of authorisation or grants could also lead to duplication, with the grant or authorisation requiring assessment and approval and then the action supported by the grant or authorisation also requiring approval. These measures should be addressed through strategic assessments of plans, policies or programs. Chapter 3 contains a recommendation to allow consideration of plans, policy and programs for the purpose of strategic assessment call-in powers. Changes to the definition of action are unlikely to provide material environmental benefits and would likely lead to duplication and delay.

Continuing Use and Prior Authorisation

7.78 The Act provides an exemption for actions that are a continuing use or have prior authorisation under ss.43A and 43B. Issues raised with the continuing use and prior authorisation provisions in the Act were discussed in detail in the Interim Report. They largely concern clarity around the circumstances when the provisions apply and the appropriateness of the exemptions.

7.79 Guidelines on the operation of these provisions should be developed to outline what constitutes a continuing use or prior authorisation. These guidelines could include clear definition of 'use', what constitutes a continuing use or prior authorisation (including examples across various sectors), and criteria for determining if an action is a continuing use. When defining 'use', clarity should be provided on the specificity of the action, for example, whether the use is 'agriculture' or 'rice farming'. Clarity around specificity would help proponents determine if changes to their use still meet the definition of continuing use.

7.80 The Act does not require approval for actions that have been authorised by previous legislation, such as the *Environment Protection (Impact of Proposals) Act 1974* (Cth). When actions with prior authorisation are expanded or altered, EPBC Act approval is required, and this may lead to imposition of a new set of conditions. This creates uncertainty for industry and may disturb ongoing monitoring of existing projects. Where prior authorisations require re-approval under the Act there should be harmonisation of conditions and the capacity to validate and incorporate earlier conditions where appropriate. This would remove any uncertainty about which Act applies to which conditions and also who is responsible for the regulation of the conditions.

Rapid Assessment

7.81 The project approvals regime relies on two key decisions – the controlled action decision and the approval decision. When a project is referred, the Minister must make a controlled action decision; that is, a decision about whether the Act applies to the action. The test for this decision is whether the action has, will have or is likely to have a significant impact on a matter of NES. When making this decision, the Minister only considers adverse environmental impacts and may not take into account social and economic matters or beneficial environmental impacts such as environmental offsets.

7.82 When making a controlled action decision, the Minister may decide that:

- the action does not, will not or is not be likely to have a significant impact on a matter of NES. The action is deemed a 'not controlled action'. These actions do not fall within the jurisdiction of the Act and do not require further assessment;
- the action does not, will not or is not be likely to have a significant impact on a matter of NES provided it is taken in a particular way. These actions are called 'not controlled actions–particular manner', and do not require further assessment under the Act provided the action is carried out in the manner specified in the referral documentation; or
- the action does have, will have or is likely to have a significant impact on a matter of NES and is deemed a 'controlled action'. These actions require further assessment and approval under the Act if they are to proceed.

7.83 In the interests of improving the efficiency and timeliness of decision-making, the Review examined a system for early consideration of the positive environmental benefits of a project. This exploration was initiated by concerns that when making a controlled action decision, the decision-maker cannot take positive environmental impacts into account.

7.84 Projects that may have a significant impact, but can match this with an offsets package that delivers environmental benefits, still require assessment despite potentially resulting in no net ecological loss. It may be clear from the outset that these projects will be approved, and so arguably there should be a means to approve these actions rapidly in place of making a controlled action decision.

7.85 Provisions allowing the rapid approval of projects where the desired conditions were clear at the outset were inserted as part of the 2006 amendments to the Act – this was termed assessment on referral information. This form of assessment requires DEWHA to complete another round of public comments following a controlled action decision, and then to prepare a recommendation report for the Minister. This process ensures transparency and public participation in line with recommendations made in Chapter 14.

7.86 Assessment on referral information remains relatively little used with only ten such assessments having occurred at the time of writing.[40] DEWHA has indicated that this assessment method has had limited use because:

- offsets are not a consideration for the controlled action decision, so details of these offsets are not usually written into the referral documentation. Consequently, further information is required to make an approval decision; and
- the Regulations are highly prescriptive as to when an assessment by referral documentation can be undertaken.

7.87 The Regulations stipulate that assessment by referral information can only occur when:

- the potential scale and nature of the relevant impacts of the action can be predicted with a high level of confidence;
- the relevant impacts are expected to be short term, easily reversible or small in scale;
- adequate information is available about relevant impacts on the matters protected;
- the action is likely to have a significant impact on only a small number of protected matters or elements of each relevant protected matter;
- if the information is available - the person proposing to take the action has a satisfactory record of responsible environmental management and compliance with environmental laws; and
- the degree of public concern about the action is, or is expected to be, moderately low.[41]

7.88 Chapter 2 proposes that assessment on referral information and preliminary documentation be combined through removal of assessment by referral information, and allowing referral information to be considered as preliminary documentation.

40 DEWHA, *EPBC Act Public Notices* (2009) http://www.environment.gov.au/epbc/notices/index.html.

41 *Environmental Protection and Biodiversity Conservation Regulations 2000* (Cth) reg.5.03A(1).

7.89 Consideration of offsets and other positive environmental impacts during the initial screening decision is not supported for two reasons. First, it may encourage proponents to self-assess the adequacy of their offsets package, leading to non-referral of projects based on an incorrect estimation of the sufficiency of an offsets package. Second, allowing early consideration of offsets would fundamentally change the nature of the controlled action decision.

7.90 The nature of the controlled action decision is a question of jurisdiction. That is, the question of whether an action has a significant impact determines whether the Act applies – whether Commonwealth assessment and approval is needed. If the Act is changed to incorporate early consideration of offsets or other matters, then a judgment is applied that is not strictly a jurisdictional one. The risk may arise that the desire to move some projects out of the full assessment process results in less stringent environmental consideration.

7.91 The limitation on considering beneficial environmental impacts, or social and economic matters only during the controlled action decision stage is an important safeguard and should remain. If there are procedural difficulties that unnecessarily limit the use of existing streamlined approval processes then these should be corrected.

Particular Manner Decisions

7.92 When making a controlled action decision, the Minister can determine that an action is not a controlled action provided it is taken in a particular manner:

> If, in deciding whether the action is a controlled action or not, the Minister has made a decision (the component decision) that a particular provision of Part 3 is not a controlling provision for the action because the Minister believes it will be taken in a particular manner, the notice, to be provided under section 77, must set out the component decision, identifying the provision and the manner.[42]

7.93 Currently, a note to this provision in the Act states that the Minister must believe that the action will not have, and is not likely to have, an adverse impact on a matter of NES. This note should be removed, as having to avoid any adverse impact is too high a threshold and does not logically fit with the test of 'significant impact' as the jurisdictional question for the rest of the EIA regime.

Conditions of Approval

7.94 When deciding to approve an action, the Minister may attach a condition to the approval if satisfied that the condition is necessary or convenient for protecting, repairing or mitigating damage to a matter of NES that will be or is likely to be impacted upon by the controlled action. Some submissions have generally supported the conditions set to date. The Peel Harvey Catchment Council commented that:

> We are encouraged by the use of stringent conditions and we have found in most cases that conditions of approval are specific and measurable.[43]

Other submissions raised concerns over the lack of a public comment period for conditions,[44] that conditions are duplicative or contrary to State and Territory conditions of approval for the same project,[45] or were not enforceable.

7.95 It is pleasing that DEWHA has commenced monitoring the outcomes of approval decisions. In the 2008–2009 period, 100 conditions were audited, with 49 compliant, 20 non-compliant and five non-conforming, six undetermined findings, and 20 'not applicable at the time of audit' findings. This process, and an improvement in the setting of binding conditions, should see a tangible improvement in Act practice. Additionally, dialogue between the proponent, the assessment officers setting conditions and the compliance officers who enforce them, has increased. These changes should ensure that conditions will be enforceable. Compliance issues are discussed further in Chapter 16.

42 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.77A.
43 Submission 127: Peel Harvey Catchment Council, p.4.
44 Submission 076: Sunshine Coast Environment Council.
45 Submission 205: Government of NSW.

Environmental Management Plans

7.96 Environmental management plans are often stipulated as a condition of approval for a project. These plans establish strategies and management actions that are designed to avoid or minimise the impacts of a project on protected matters. Management plans often provide for the monitoring and auditing of environmental impacts. It has been suggested that the investigation of significant environmental issues has been left inappropriately until after the approval has been given, with the environmental management plan applied as a condition of project approval to discover, rather than to mitigate, adverse impacts.

7.97 Environmental management plans can be used as a sophisticated condition of approval to manage residual impacts. These plans are often intended to put in place adaptive management strategies, where management prescriptions will change if it appears that the consequences of the approved actions are different from what was originally predicted. The results of complex human-ecosystem interactions are hard to predict, and so best practice will incorporate risk management and scenario planning. It is necessary therefore to engage in post approval monitoring of the environment to determine what the impacts are, and whether changes to the management regime are required.

7.98 Although ongoing monitoring and information gathering is necessary, environmental management plans should not be used to gather information that was actually needed before the approval decision was made. Chapter 13 recommends that the Minister must make approval decisions using the best available information and act consistently with the principles of ESD, including the precautionary principle. This change should significantly reduce the capacity for potential abuse of environmental management plans as conditions of approval.

Variation of Conditions

7.99 The Minister may revoke, vary or add to any conditions of approval if either:

- any condition attached to the approval has been contravened;
- the action has had a significant impact on a matter of NES that was not identified when assessing the action and the Minister believes it is necessary to revoke, vary or add a condition to protect the matter from the impact; or
- the action has had a significant impact on a matter of NES, or the Minister believes the action will have such an impact; the Minister is satisfied that the impact is substantially greater than the impact that was identified when assessing the action; and the Minister believes it is necessary to revoke, vary or add a condition to protect the matter from the impact.

7.100 In argument in the *Gunn's Pulp Mill Case* it was suggested that that Minister's capacity to vary conditions of approval under section 143(1)(ba)(i) may be limited to circumstances where the action has already occurred.[46] This is an unintended constraint, and may result in environmental impacts and delay. This provision should be changed to clarify that the action does not need to have been commenced for the Minister to vary conditions.

7.101 It is also important to ensure that when variations occur during the assessment process, the impacts arising from the variation are fully assessed before approvals are granted.

46 Transcript of Proceedings, *Lawyers for Forests v Minister for the Environment* (Federal Court of Australia, Tracey J, 19 June 2008), p.114.

Recommendation 27

The Review recommends that the operation of the environmental impact assessment (EIA) regime be clarified by:

(1) amending the Act -

(a) to ensure that the provisions governing project EIA are as efficient as possible while retaining transparency of decision-making;

(b) to allow the Minister to stipulate when actions will not have a significant impact;

(c) to allow consideration of previously authorised conditions of approval when a prior authorisation requires reapproval under the Act;

(d) to ensure that the controlled action decision remains strictly a jurisdiction question;

(e) to clarify the threshold for making a particular manner decision;

(f) to ensure that compliance and audit functions are available in respect of monitoring particular manner decisions; and

(g) to improve the capacity of the Minister to vary conditions attached to an approval decision made under the Act.

(2) DEWHA developing -

(a) policy advice to help increase clarity in determining what would constitute a significant impact against each matter of national environmental significance, including particular threatened species and ecological communities;

(b) policy guidelines to ensure that where relevant, bioregional plans provide context for the test of 'significant impact'; and

(c) guidelines on continuing use and prior authorisation.

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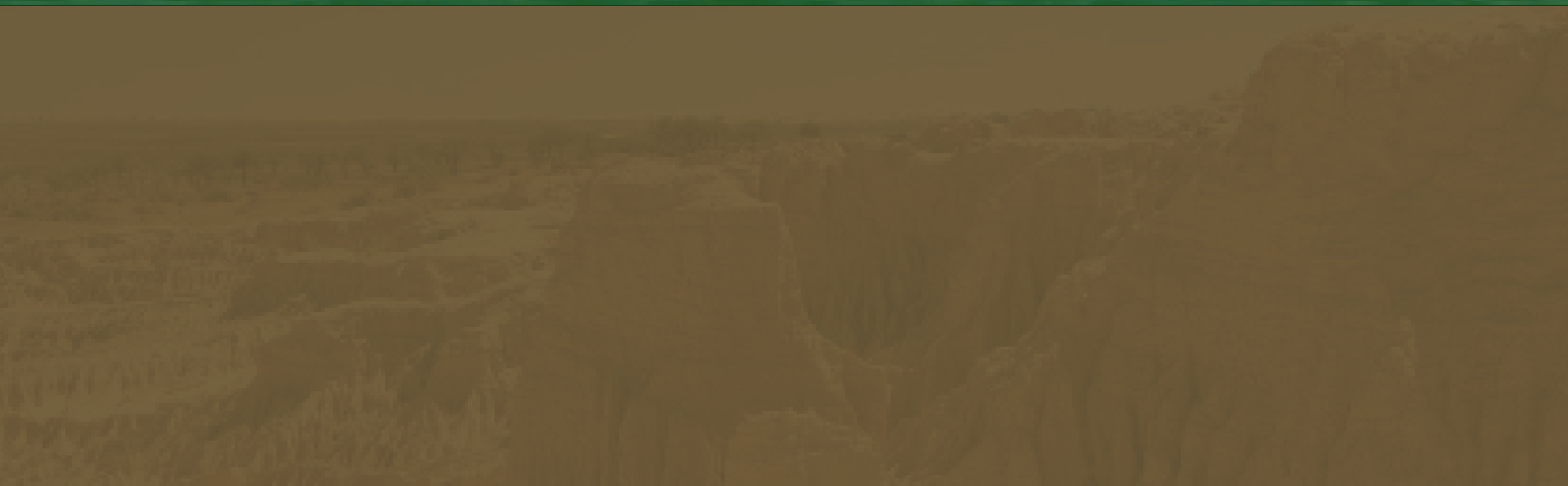
Chapter Eight HERITAGE



Chapter 8: Heritage

8.1 Prior to 2004, heritage at the Commonwealth level was managed under the *Australian Heritage Commission Act 1975*. This Act established an independent Australian Heritage Commission and created a Register of the National Estate (RNE) for which the Commission was responsible. The RNE was a landmark list of heritage places, natural or cultural and; of aesthetic, historic, scientific, social or other special value to the community and future generations. The Commission entered more than 13,000 places on the RNE, including places of historic, natural and Indigenous value and of varying levels of heritage significance.

8.2 The Australian Heritage Commission provided advice on matters relating to the RNE including proposals that potentially had an adverse impact on places included on the RNE; however, its advice was not binding. The conservation obligations under the Australian Heritage Commission Act were also limited to Commonwealth actions and rested with the action agencies.

8.3 In 2004, the Commission was replaced by the Australian Heritage Council (AHC). The AHC is the current advisory body for the Environment Minister on heritage matters. The role and functions of the AHC are discussed in more detail in Chapter 20.

8.4 In 2004, the Act was amended to give heritage a new status. For the first time at the national level, actions adversely affecting heritage places were subject to a formal statutory approval process. In addition, the scope of protection for heritage was greatly expanded.

8.5 The heritage provisions in the Act provide for protection of the heritage values of Australian places included on the World Heritage List (WHL) or the National Heritage List (NHL) as matters of national environmental significance (NES) under the Act. Proposed actions that have, will have or are likely to have a significant impact on the heritage values of a place listed on the WHL or NHL require the Minister's approval under the Act. The Act also regulates actions taken by the Commonwealth or actions taken on Commonwealth land.

8.6 A number of submissions criticised the impact assessment and approval process under the Act, suggesting that the previous heritage legislation captured a broader range of actions and provided more effective protection for heritage.[1]

8.7 While some submissions expressed concerns about particular decisions that have been made under the Act, or issues with DEWHA's administration of the Act, the current regime is nonetheless an advance for heritage protection and management at the national level. There is no compelling argument to return to the old system.

8.8 The 2004 amendments to the Act established the Commonwealth Heritage List (CHL). The CHL includes heritage places that are within a Commonwealth area or are outside the Australian jurisdiction and are owned or leased by the Commonwealth (for example, Australian Embassy buildings in foreign countries could be eligible for inclusion on the CHL). The Act places an obligation on Commonwealth agencies to identify, protect, conserve, present and transmit the Commonwealth Heritage values of places included on the CHL.

8.9 Issues about the complexity and length of the Act were raised often across the course of the Review. Suggestions were made that there should be a separate Commonwealth Heritage Act or that the EPBC Act should be amended to co-locate the heritage provisions and make them more intelligible.

8.10 Separating heritage from the Act would be a retrograde step. Heritage should not be seen as a marginal activity. It needs to affirm its place as an integral part of the environment that is protected, conserved and managed under the Act. There is, however, scope for redrafting the current heritage provisions to make them clearer.

1 See e.g. Submission 39: Australian Council of National Trusts.

Recommendation 28

The Review recommends that:

(1) regulation of World, National and Commonwealth Heritage matters be retained in the Act; and

(2) DEWHA develop a guide to the heritage provisions of the Act to assist those with specific interest in heritage matters in applying and understanding the relevant provisions.

The Heritage Listing Process

8.11 The WHL is the list kept under the *Convention Concerning the Protection of World Cultural and Natural Heritage*[2]. Division 1 of Part 15 of the Act provides the legal framework for the Minister when nominating a place for inclusion on the WHL, including the power to make emergency declarations, and for managing places on the WHL.

8.12 Division 1A of Part 15 of the Act establishes the NHL, which is a list of places considered to be of outstanding value to the nation. The listing process for the NHL is prescribed under the Act. Under the Act the Minister must also make plans to protect and manage the values of places on the NHL that are in a Commonwealth area.

8.13 Division 3A of Part 15 of the Act establishes the CHL, which is a list of places either in a Commonwealth area or owned or leased by the Commonwealth or a Commonwealth agency, and which are of significance to the Commonwealth. The listing process for the CHL is prescribed under the Act and the responsible Commonwealth agency must make plans to protect and manage the values of places on the CHL.

8.14 In submissions to the Review, the listing processes prescribed under the Act were regarded as lengthy and complex.[3] It was suggested they be simplified.

8.15 The Minister makes all key heritage listing decisions under the Act. This includes decisions to nominate a place for listing on the WHL, determine heritage themes, call for NHL and CHL nominations, finalise the priority assessment list (PAL), and add places to, or remove them from, the NHL and CHL.

8.16 The AHC advises the Minister which nominations it thinks should be assessed, invites public comment on the Minister's PAL, assesses the places on the priority list and provides advice to the Minister following these assessments.

8.17 Some submissions called for the AHC to be the heritage listing authority, rather than the Minister.[4] This happens in a number of States and Territories, where an independent heritage body makes heritage listing decisions rather than the relevant State or Territory Minister.

8.18 However, other submissions, including the AHC,[5] recognised or accepted that because listing attracts obligations under the Act, the Minister should be responsible for the listing decisions. The approach should be the same as for listed threatened species and ecological communities.

8.19 It is expected that in most circumstances the Minister would follow the advice of the AHC. The requirement that, in making assessments, the AHC only consider matters relating to the significance criteria is consistent with the concept that assessment should be based on the heritage significance of the place[6] and not management and conservation policy matters. The Minister should not have regard to social and economic factors when making listing decisions. However, as discussed in Chapters 5 and 13[7], if the required

2 The *Convention Concerning the Protection of World Cultural and Natural Heritage* done at Paris on 23 November 1972 (World Heritage Convention).

3 See e.g. Interim Report Comment 18: Dr Jane Lennon; Submission 39: Australian Council of National Trusts; and Submission 117: International Council on Monuments and Sites.

4 Interim Report Comment 18: Dr Jane Lennon; Submission 39: Australian Council of National Trusts; and Submission 117: International Council on Monuments and Sites.

5 Mr Tom Harley, Chair – Australian Heritage Council, (pers. comm.), 28 August 2009.

6 International Council on Monument and Sites, *The Burra Charter: The Australia ICOMOS Charter for Places of Cultural Significance, 1999*, 2000. The *Burra Charter* is recognised as the Australian industry standard for best practice for the conservation of cultural heritage places.

7 Chapters 5 and 13 of this Report.

considerations for listing decisions are broadened to include social and economic considerations, a decision not to list a heritage place on social or economic grounds should be constrained to exceptional situations where the social or economic costs of listing are overwhelming and the heritage benefits are known to be slight.

8.20 While the Minister should retain responsibility for listing decisions, it may be appropriate for the AHC to control the call for nominations and determine its own work plan subject to the Minister being able to add places to the work plan.

8.21 The current consultation process undertaken by the AHC during heritage assessments is quite restricted, some would say even secretive. This has developed as a safeguard against lobbying during the assessment process. Currently, public comment is sought when the final PAL is published and before possible heritage values have been identified. More meaningful public consultation and informed responses would be achieved if consultation were also to occur after possible heritage values have been identified.

8.22 The Act should be amended to require additional public consultation after the heritage values have been identified. The Act should also require that the owners of places nominated for listing be notified if the place is included in the PAL and advised that consultation will occur in due course if heritage values are found. These amendments should create greater transparency about the nomination and assessment process.

8.23 The establishment and growth of the NHL in recent years was noted in submissions and questions were raised about the purpose and future direction of the list.[8] A former member of the AHC[9] noted that in the AHC's periodic report:

> National heritage defines the critical moments in our development as a nation and reflects achievements, joys and sorrows in the lives of Australians. It also encompasses those places that reveal the richness of Australia's extraordinarily diverse natural heritage.[10]

While the AHC has been busy building the NHL since its creation in 2004, greater public engagement would be encouraged by a 'broad reaching national conversation'[11] that would raise awareness of our national heritage and its relevance to local communities.

8.24 A strategic approach to nominations could be established through the AHC to encourage targeted nominations which accord with this purpose.

8.25 The Australian Government and the AHC should play a more active role in promoting heritage conservation generally, aiming to raise its profile in the nation's consciousness. However, care should be taken that in becoming more active in promoting the importance of heritage, the AHC and DEWHA do not lose sight of their statutory roles. That is, the community may quickly lose faith in the objectivity of the recommendations of a 'campaigning' AHC.

Heritage Nominations

8.26 The Minister calls for nominations to the NHL and CHL each year. Nominations can be made by any person using prescribed forms. Preparation of a nomination can be time-consuming and expensive (particularly if heritage expertise is formally engaged). Submissions to the Review were critical of the provisions in the Act that allow a nomination to lapse after two years if it is not included in an AHC work plan.

8.27 The Act should explicitly encourage the AHC to make strategic nominations while still inviting general nominations from the public. This would allow the AHC to focus on priorities and better manage expectations. A more transparent approach to the nomination process would help public understanding and acceptance of why places are included in an assessment period.

8 See e.g. Interim Report Comment 64: International Council on Monuments and Sites (Australia) and Australian Council of National Trusts Workshop Report; and Submission 39: Australian Council of National Trusts.

9 Interim Report Comment 18: Dr Jane Lennon.

10 Australian Heritage Council, *Periodic Report* (2007), p.14.

11 Interim Report Comment 18: Dr Jane Lennon.

8.28 Similar to threatened species nominations, improved guidelines that clearly specify the nomination requirements for heritage listings are required. These guidelines should explain the nomination, prioritisation, assessment and listing processes and identify the information needed to make a nomination. It is hoped that these guidelines would ensure that nominators do not go to unreasonable efforts to prepare a nomination.

Heritage Assessments

8.29 The heritage assessment process is undertaken in accordance with the priorities and timeframes established by the AHC and the Minister. While the Minister has the option of determining a theme for an assessment period, this has only been used once to date. A better approach may be for the AHC to set an assessment theme based on a strategic multi-year work plan. The Minister could advise the AHC if there were particular areas of focus that Government would like to see considered.

8.30 As for threatened species listings, some heritage submissions expressed concerns that heritage listing decisions were not consistent with the technical advice provided by the AHC. Some went so far as to call for listing decisions to be only made by heritage experts. The reasons for the Review's decision that the Minister should remain the decision-maker for heritage listings are provided above. In response to concerns about whether the Minister is following the advice provided, the AHC should be required to publish its assessment advice and recommendations at the time of the Minister's decision on whether or not to list the relevant place. This approach is consistent with the general recommendations made in Chapter 14 to improve transparency for decision-making under the Act.

Heritage Listings

8.31 Places may be included in the NHL or the CHL if the Minister determines that they meet one or more of the National or Commonwealth Heritage criteria set out in the Act.

8.32 There was much discussion about the merit of listing and protecting heritage values as opposed to listing and protecting places for their heritage values. This issue was raised mainly for National and Commonwealth Heritage, though it was also implied with regard to World Heritage.

8.33 It was noted that confusion about the management of heritage values, rather than place, risks 'the loss of place by separating values from place in management decisions, notionally protecting values – which in fact may not be able to survive without the place'.[12]

8.34 The solution is not about including place in values, but understanding that values are inherent in the fabric of a place. The objective is to manage places to retain their values. Separating values from place in a policy sense creates conflict and poor decision-making.

8.35 It is the place and its values which are listed and the place to which the management plan and its policies and strategies must relate. Management plan objectives and processes should focus on conserving and interpreting places in a manner which retains identified values (see Chapter 9 for further discussion about management planning).

8.36 From time to time, modifications to listings or minor variations to boundaries may be required as a result of new information about heritage values. This new information could arise through the management planning process or through Commonwealth agency heritage registers (discussed below). A streamlined approach to amend or modify heritage listings is required. The power to vary a listing should however be restricted to minor changes that do not substantially change the area or values protected.

12 Interim Report Comment 64: International Council on Monuments and Sites (Australia) and Australian Council of National Trusts Workshop Report, p.10.

Recommendation 29

The Review recommends that the Act be amended to:

(1) simplify the nomination, prioritisation, assessment and listing processes for National and Commonwealth Heritage; and

(2) provide for greater transparency, which should be achieved by –

(a) the Australian Heritage Council (AHC) making strategic nominations and determining its work plan;

(b) producing guidelines on the documentation requirements for heritage nominations;

(c) notifying owners of places if a heritage nomination relating to that place is to be assessed;

(d) inviting public comments when places are added to the Priority Assessment List and when the potential heritage values of those places are identified; and

(e) publishing AHC advice and recommendations at the time of the Minister's listing decision.

Heritage Protection

8.37 The Act is triggered if an action has, will have or is likely to have a significant impact on the heritage values of a place. Such actions require referral under the Act. As noted above, this includes places on the WHL, NHL, actions taken by the Commonwealth or a Commonwealth agency and actions significantly impacting on the environment of Commonwealth land (s.12, s.15B, s.26, s.27B, s.28).

8.38 The Act also prohibits Commonwealth agencies from taking actions that are likely to have an adverse impact on the National or Commonwealth Heritage values of a listed place unless there is no feasible and prudent alternative than to take the action and all measures that can reasonably be taken to mitigate the impact on those values are taken.[13]

8.39 The issue of 'cumulative impacts' concerns heritage protection as much as other aspects of the environment. This issue is further discussed in Chapter 7. The workshop held by Australia International Council on Monuments and Sites (ICOMOS) and the Australian Council of National Trusts (ACNT) on 20 July 2009 agreed that the significant impact test does not address the risk of cumulative impacts and can lead to irreparable damage or loss of values to a place over time. It was suggested that management plans may have the capacity to anticipate and advise on mitigating cumulative impacts.[14]

8.40 Concepts of authenticity and integrity may be useful to help address cumulative impacts. Consistent with the approach to assessing values used in World Heritage,[15] the ability to test proposals against change to the tangible attributes, including the degree to which original fabric and intactness of the site (and values) are impacted, would have merit.

8.41 Like other matters of NES, better policy guidance should be developed about the significance of impacts on heritage values and places. Policy advice should be developed for each World and National Heritage listed place setting out implications for management, addressing opportunities and constraints arising from the values, and indicating what types of impacts and developments are likely to be significant. This policy guidance should consider the qualities of each listed place in determining the appropriate test for each place and should be developed as part of the management planning for that place. This is discussed further in Chapter 9.

13 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.341ZC.

14 Interim Report Comment 64: International Council on Monuments and Sites (Australia) and Australian Council of National Trusts Workshop Report.

15 UNESCO, *Operational Guidelines for the Implementation of the World Heritage Convention*, (2008).

Commonwealth Heritage

8.42 In preparing the 2004 amendments which moved the statutory regime for heritage protection and management into the EPBC Act,[16] there was a strong focus on the Commonwealth leading by example in its treatment of heritage. This was in response to an earlier review which was critical of the Commonwealth's management of heritage places.[17]

8.43 The EPBC Act requires Commonwealth agencies to:

- prepare heritage strategies;
- prepare heritage assessments and heritage registers;
- prepare management plans for listed places;
- avoid or minimise adverse impacts on heritage values; and
- protect heritage values of places when sold or leased.

This is in addition to protective provisions relating to Commonwealth land and actions, noted above.

8.44 The Commonwealth agency heritage strategy is pivotal in that it provides the framework for heritage identification and assessment, the agency heritage register and management plans.

8.45 The degree to which the Commonwealth has complied with these provisions is variable and has been the subject of criticism. The Commonwealth Ombudsman noted that there has been unsatisfactory compliance by Commonwealth agencies in the preparation of agency heritage strategies.[18]

8.46 The Ombudsman noted, however, that agencies had difficulty in understanding the detailed requirements for preparing a heritage strategy, including the meaning of 'Commonwealth Heritage values'. The Ombudsman also concluded that agencies found it difficult to provide the resources needed to complete the task.

8.47 The Ombudsman was critical of DEWHA's administration of these heritage provisions of the Act, suggesting that inadequate and unclear advice provided by DEWHA was a prime reason for the lack of compliance by agencies. It was also suggested that the lack of compliance mechanisms for failures to comply with the heritage provisions also contributed to the delays.

8.48 In response to the Ombudsman's report, DEWHA recommended that the Review consider:

- clarifying the scope of the obligations and definitions used in the Act;
- whether these matters are a symptom of the complexity of the Act; and
- the capacity of DEWHA to provide ongoing support to Commonwealth agencies and to monitor compliance.

8.49 The obligation placed on Commonwealth agencies under the Act to develop an agency heritage strategy is an obligation on individual agencies, not DEWHA. While DEWHA has done much to advise agencies of their responsibilities, the Act should be clearer in identifying the obligations of Commonwealth agencies.

8.50 Agencies must survey and assess the properties they own or control for potential Commonwealth Heritage values in accordance with a process defined in their heritage strategy. Such places are reported to the Environment Minister and may then be nominated for the CHL. Once nominated, these places must undergo another full assessment through the PAL process.

8.51 The requirement for places nominated by Commonwealth agencies for listing on the CHL to undergo two assessments – the first by the agency responsible for the place and the second by the AHC under the Act would appear to involve unnecessary duplication. An alternative streamlined process could achieve the same outcome for less effort.

8.52 The process for updating CHL listings is cumbersome. Given the work being done by some agencies, a streamlined process to make changes to the listing citations should be possible. For example, information from an Act compliant management plan or from a credible survey process might be adopted through a simplified mechanism. This would assist in ensuring that the identified heritage information is up-to-date and accurate and included in the Commonwealth Heritage citation in a timely fashion.

16 *Environment and Heritage Legislation Amendment Act 2003* (Cth).

17 *A presence for the past: a report by the Committee of Review – Commonwealth Owned Heritage Properties*, (1996) (the Schofield report).

18 Commonwealth Ombudsman, *Delays in preparation of Heritage Strategies by Australian Government agencies*, (2009).

8.53 As part of the 2006 amendments to the Act, the RNE was frozen until 2012. From 2012 the RNE will become a research inventory rather than a statutory list. In 2004, transitional provisions, subject to a sunset provision, allowed for about 340 Commonwealth owned or leased places on the RNE to be directly entered on the CHL. However, some Commonwealth places registered on the RNE were not transferred onto the CHL due to insufficient resources at the time to review and upgrade the data held on those places. At the time of the 2006 amendments to the Act, it was anticipated that five years would be sufficient to allow important Commonwealth-owned or controlled places on the RNE to be assessed and included on the CHL. However, it is understood that the additional resources required for this task have not been provided and little or no progress has been made.

8.54 The 2006 transitional provisions should be revived so that eligible places can be included on the CHL, provided the Minister is satisfied these places are eligible for listing.

8.55 Comments arising from the Australia ICOMOS and ACNT Heritage Workshop were strongly in favour of retaining the RNE in some form. They also recommended that 'until alternative statutory protection is provided for RNE places, the RNE should not lapse'.[19] The AHC in its submission also supported the importance and role of the RNE and recommended it be retained 'as a statutory list until all places can be assessed for possible inclusion in an appropriate heritage list or appropriately protected in another statutory way'.[20]

8.56 The Commonwealth and the States and Territories have the opportunity to ensure that RNE places within their jurisdictions are assessed and entered (if they meet the criteria) into their respective statutory lists and registers by 2012. Progress by all jurisdictions has been slow to date and appears unlikely to be completed by 2012.

8.57 The RNE is an acknowledged comprehensive resource which encompasses Commonwealth, State, Territory and local heritage and should, for the time being, be retained by the AHC as a public archive of Australian places with heritage values.

8.58 Instead of the RNE lapsing in 2012, consideration should be given to extending the transition period for phasing out the RNE as a statutory list to enable more places to be transferred to State and Territory heritage lists where appropriate. The RNE should eventually be kept as a research tool and important archive available to the public.

Designated Areas in the Australian Capital Territory (ACT)

8.59 The Commonwealth manages part of the land in the ACT, including 'designated areas'. 'Designated areas' are identified through the National Capital Plan,[21] which is administered by the National Capital Authority (NCA). An Inquiry into the NCA, undertaken in 2008 by the Joint Standing Committee on the National Capital and External Territories, noted:

> Canberra's status as the national capital places an extremely high priority on heritage protection in all areas of Canberra, but perhaps nowhere more so than areas identified as having national significance. Ironically, it is these areas that the processes and guidelines are at best unclear and, at worst, lacking completely.[22]

8.60 Heritage places in the ACT on Territory Land that are in 'designated areas' fall in a gap between the ACT and the Commonwealth jurisdictions. The usual Commonwealth Heritage listing mechanisms and referral triggers under the Act do not apply, nor does the ACT Government have full heritage and planning approval authority. As this land has been identified as being of national significance under a Commonwealth planning mechanism (the National Capital Plan), comprehensive heritage protection should be provided by allowing those places in the 'designated areas' to be treated as Commonwealth areas for the purposes of the Act.

19 Interim Report Comment 64: International Council on Monuments and Sites (Australia) and Australian Council of National Trusts Workshop Report, p.7.

20 Submission 208: Australian Heritage Council.

21 The *Australian Capital Territory (Planning and Land Management) Act 1988* (Cth) established the National Capital Planning Authority as a Commonwealth Government agency, with a number of functions including to prepare and implement a National Capital Plan. As required under this legislation, the object of this National Capital Plan is to ensure that Canberra and the Australian Capital Territory are planned and developed in accordance with their national significance.

22 Joint Standing Committee on the National Capital and External Territories, *The Way Forward: Inquiry into the role of the National Capital Authority* (2008), p75.

Airports Land

8.61 Actions on airports that might affect heritage values are largely dealt with under the *Airports Act 1996* (Airports Act) and not the EPBC Act. Under the Airports Act, airport owners/managers are required to prepare an environment strategy that identifies areas that are environmentally significant and, under certain circumstances, prepare a master plan and a major development plan. Airport owners/managers are also required to take account of the Environment Minister's advice on the adoption of a major development plan.[23]

8.62 In practice, it appears that heritage protection obligations are often not sufficiently observed by all airport owners/managers. The standard applied to the protection and management of heritage at some airports falls short of the standard required under the EPBC Act. To assist the Australian Government in the identification of possible Commonwealth Heritage values, airports environment strategies should include an assessment of heritage values on the airport against the Commonwealth Heritage criteria.

A Cooperative Approach

8.63 As discussed in Chapter 2, the 1997 Heads of Agreement[24] supports a subsidiarity approach to Commonwealth and State and Territory relationships. It assigns matters of World, National and Commonwealth Heritage regulation to the Commonwealth and matters related to State or Territory and local heritage regulation to the States and Territories. This parallels the federal system and is further articulated in the National Heritage Protocol.[25]

8.64 However, Australia's heritage places do not neatly fall into National, State and Territory and local categories and the richness of their values can vary in significance across the range of categories. In addition, places in the NHL are, in many cases, also listed on State or Territory heritage lists or protected as part of State or Territory reserves.

8.65 Australia ICOMOS suggests that the concept of subsidiarity, while theoretically appealing, does not recognise the practical reality of Australia's heritage. They argue that a more cooperative approach is needed.[26] Submissions also called for greater leadership by the Commonwealth in taking on a shared responsibility for National Heritage.[27] In practice, the best examples of current heritage management already embrace a shared approach. There is scope for more cooperative arrangements to be used.

Recommendation 30

The Review recommends that:

(1) the Australian Government provide greater leadership for heritage protection and management by engaging with the Australian Heritage Council and actively promoting a national approach to heritage; and

(2) the Act should be amended to -

(a) clarify the requirements for Commonwealth agency heritage strategies;

(b) require airport environment strategies to include a heritage assessment against the Commonwealth heritage criteria; and

(c) institute comprehensive heritage protection in the 'designated areas' of the Australian Capital Territory.

23 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.160. The operation of s.160 in relation to the Airports Act is also discussed in Chapter 18.

24 Council of Australian Governments, *Heads of agreement on Commonwealth and State roles and responsibilities for the Environment* (1997) http://www.environment.gov.au/epbc/publications/coag-agreement/index.html.

25 The 1997 COAG Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment provides for rationalisation of existing Commonwealth/State arrangements for the protection of places of heritage significance through the development of a co-operative national heritage places strategy. The National Heritage Protocol, signed in 2004, outlines the arrangements whereby the Commonwealth, State and Territory systems for the protection of cultural, natural and Indigenous heritage will be co-ordinated.

26 Interim Report Comment 64: International Council on Monuments and Sites (Australia) and Australian Council of National Trusts Workshop Report.

27 Interim Report Comment 64: International Council on Monuments and Sites (Australia) and Australian Council of National Trusts *Workshop Report*; Interim Report Comment 18: Dr Jane Lennon; and Submission 39: Australian Council of National Trusts.

Management Plans

8.66 The primary mechanism for managing the values of heritage places is through a management plan (also known as a conservation or heritage management plan).

8.67 The Act requires written management plans to be established for places on the NHL and CHL. The requirements for these plans are specified in the Act and the EPBC Regulations and are quite prescriptive in nature. The process of establishing a management plan also includes a complicated process for comment and review.

8.68 A recurring theme in the submissions was the call for:

- greater flexibility in the form and content of management plans, while still achieving good conservation outcomes;
- a focus on heritage outcomes rather than processes; and
- a reduction in duplication with State and Territory or other reputable management planning processes.[28]

8.69 The AHC has raised similar concerns that the current requirements for management plans are overly prescriptive and do not result in well-targeted, outcomes focussed management plans.

8.70 As part of the Review process, an independent expert report was commissioned to assist in the consideration of these arguments.[29]

8.71 The requirement to develop a management plan, by Commonwealth agencies in particular, is often seen as onerous, resource-intensive and not user-friendly. The Act should focus on good heritage outcomes rather than simply prescribing a planning process.[30]

8.72 At present, the Act does not provide sufficient flexibility to recognise alternative management arrangements that achieve equivalent or superior heritage outcomes. For example, statutory plans made under State or Territory laws may achieve or contribute to the outcomes desired for World, National or Commonwealth Heritage places.

8.73 The independent expert report found that heritage place management could be improved by a Commonwealth-led process which engages more directly with the issues that affect heritage listed places and the needs and resources of the people who manage them.

8.74 The Act should recognise a variety of management arrangements (including statutory and non-statutory plans) where these are agreed by the Environment Minister as achieving equivalent outcomes to management plans required under the Act.

8.75 Some places on the WHL or NHL are also in the CHL. Under the Act, Commonwealth agencies must prepare CHL plans, while World and National Heritage plans must be made by the Minister when the heritage place is in a Commonwealth area. Such places should require only one plan and that plan should be prepared by the agency with ownership of the place as it is responsible for ongoing management of the values of the place. The AHC would need to retain a role in ensuring such plans are directed at achieving good heritage outcomes.

8.76 The independent expert report also noted that management planning must become more flexible and responsive to circumstances, with a clear focus on the outcomes to be achieved. This reinforces the need for more focus on outcomes and a practical management approach. A current member of the AHC also supports a more effective yet pragmatic management regime that is tailored to specific circumstances.[31] See Chapter 9 for further discussion on management planning requirements.

28 See e.g. Interim Report Comment 64: International Council on Monuments and Sites (Australia) and Australian Council of National Trusts Workshop Report; Submission 117: International Council on Monuments and Sites (Australia); Submission 80: Dr Jane Lennon; and Mr Tom Harley, Chair – Australian Heritage Council, (pers. comm.), 28 August 2009.

29 Godden Mackay Logan Heritage Consultants, *Management Plan Requirements Review Final Report*, unpublished report (August 2009). The Review commissioned this report to provide expert consideration and advice regarding the complexity of management requirements in the Act and better ways in which owners and managers of places in the CHL and NHL can be assisted in managing and maintaining their heritage assets.

30 Interim Report Comment 64: International Council on Monuments and Sites (Australia) and Australian Council of National Trusts Workshop Report.

31 Mr Howard Tanner – Tanner Architects, (pers. comm.), 24 September 2009.

Monitoring, Evaluation and Reporting

8.77 A range of heritage-related review and reporting requirements are set out in the Act. [32] Reporting periods vary between three, five and seven years; and the obligations to undertake reviews, that is, the time periods between reviews, are probably more burdensome than may be necessary.

8.78 Greater flexibility is required to ensure review and reporting activity corresponds to need. The review periods for Commonwealth management plans and arrangements, Commonwealth heritage strategies and WHL, NHL and CHL planning and reporting should be agreed between DEWHA and the relevant place manager prior to approval of the management arrangement. The review period should be consistent with other Commonwealth management plans, for example, National Parks plans.

Recommendation 31

The Review recommends that the Act be amended to:

(1) recognise a range of management arrangements, including management plans, that are required to be outcome focussed; and

(2) allow for flexible format and content requirements for management arrangements to provide for efficiency in planning and management without compromising good heritage outcomes.

32 See e.g. *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss.319, 324W, 324ZC, 341X, 341ZA and 341ZH.

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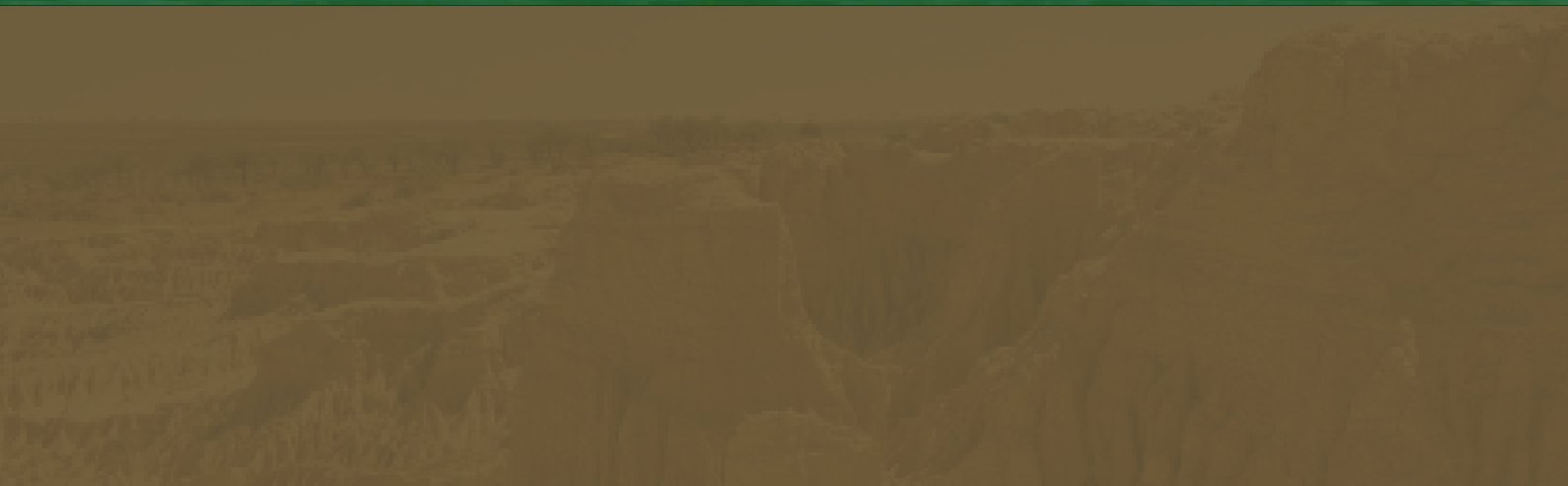
Chapter Nine

PROTECTED AREAS AND MANAGEMENT PLANNING



Chapter 9: Protected Areas and Management Planning

9.1 The Australian Government is responsible, either solely or in collaboration with the States and Territories, for managing a number of places that are protected for their heritage or ecological significance. Protected areas under the EPBC Act are:

- World Heritage properties;
- National Heritage places;
- Commonwealth Heritage places;
- Wetlands of international importance (Ramsar wetlands);[1]
- Biosphere reserves; and
- Commonwealth reserves and conservation zones.

9.2 World Heritage properties, National Heritage places and Ramsar wetlands are also matters of national environmental significance (NES) under the Act. This means that actions both on and outside them that have, will have or are likely to have a significant impact on these matters require approval under the Act.

9.3 Management planning for protected areas and the proposed listing of 'ecosystems of national significance' (discussed in Chapter 4) are key components of the proposed national approach to protecting biodiversity and heritage under the Act (discussed in Chapter 2). These measures provide a framework for conserving landscapes, ecosystems and species.

Current Provisions

Heritage and Ramsar Wetlands

9.4 To promote the on-going protection of World and National Heritage values and the ecological character of Ramsar wetlands, the Act provides for the preparation of management plans that describe the values or ecological character of the place and set out how they will be protected or conserved. Management plans for heritage places and Ramsar wetlands must address relevant management principles prescribed in the EPBC Regulations.

9.5 Under the Act, the Environment Minister must prepare management plans for World Heritage properties, National Heritage places and Ramsar wetlands that are entirely within one or more Commonwealth areas. Commonwealth agencies must also make management plans for Commonwealth Heritage places on land they own or control. An exception to these requirements is where the place is within a Commonwealth reserve and is included in another plan required under the Act. This avoids having multiple management plans for the one place.

9.6 Where a World Heritage property, National Heritage place or Ramsar wetland is within a State or Territory and not entirely within a Commonwealth area, the Commonwealth must use its *best endeavours* to ensure that a management plan consistent with relevant management principles or international obligations is prepared and implemented. The current approach under the Act relies on a co-operative approach with relevant owners and managers to make and implement management plans for places outside Commonwealth areas.

9.7 In the event that there is no management plan, Australian Government agencies must take all reasonable steps to ensure that their actions are consistent with the relevant 'management principles' and with Australia's obligations under the World Heritage Convention and the Ramsar Convention.

9.8 Heritage is further discussed in Chapter 8.

1 *Convention on Wetlands of International Importance, especially as Waterfowl Habitat.*

Commonwealth Reserves

9.9 Responsibility for Commonwealth reserves (including marine protected areas) and conservation zones lies with the Director of National Parks, a corporation established under the Act. Currently 35 Commonwealth reserves have been established under the Act – six national parks, two botanic gardens and 27 marine reserves.

9.10 The Act requires management plans to be prepared for each Commonwealth reserve. Each reserve is managed according to a specific set of management objectives that relate to the area and its values. Each reserve is also assigned to an *International Union for Conservation of Nature* (IUCN) category and managed according to the Australian IUCN Reserve Management Principles, outlined in the EPBC Regulations.

9.11 The Act prohibits certain actions being taken in a Commonwealth reserve unless they are in accordance with a management plan in operation under the Act for that reserve. These actions are:

- killing, injuring, taking, trading, keeping or moving a member of a native species;
- damaging heritage;
- carrying on an excavation;
- erecting a building or other structure;
- carrying out works;
- taking an action for commercial purposes; or
- mining operations.[2]

9.12 Provisions of the Act and Regulations dealing with activities in Commonwealth reserves do not prevent Indigenous people from continuing their traditional use of an area in a reserve for hunting or gathering (except for purposes of sale) or for ceremonial and religious purposes.[3] The Act also states that it does not affect the operation of s.211 of the *Native Title Act 1993* (Cth), which provides that holders of native title rights covering certain activities do not need authorisation required by other laws to engage in those activities.[4]

The National Reserve System

9.13 The National Reserve System (NRS) is Australia's system of terrestrial protected areas. It is made up of Commonwealth reserves declared under the Act, State and Territory national parks and other reserves, Indigenous lands and private land managed for conservation purposes.

9.14 The System represents the outcome of the collective efforts of the Australian Government, State and Territory governments, conservation groups and Indigenous and non-Indigenous landholders. The NRS priorities are:

- properties in high priority bioregions, with intact and viable samples of native ecosystems and habitats;
- properties that are managed as part of a larger network of protected areas, in bioregions where large areas of intact native ecosystems no longer exist but where the long-term viability of plants and animals native to that bioregion need wider protection; and
- properties with ecosystems and habitats of national State or Territory importance, with poor levels of protection in other bioregions.

9.15 The NRS areas are not a 'protected area' under the Act. Rather, the NRS is an Australian Government program that plays an important role in building the conservation estate.

2 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss.354-355A.
3 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.359A.
4 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.8.

9.16 The NRS was established by the Australian Government to assist with the establishment and maintenance of a Comprehensive, Adequate and Representative (CAR) system of terrestrial reserves in Australia. By establishing a well managed CAR reserve system, the NRS meets an important international obligation for Australia under the Convention on Biological Diversity.

Indigenous Protected Areas

9.17 Indigenous Protected Areas (IPAs) are Indigenous owned or controlled lands that have been declared as protected areas in perpetuity. Although not established or managed under the Act, many IPAs give effect to the management of species listed under the Act, National Heritage sites and areas with rich biodiversity.

9.18 The IPA element of the Caring for our Country initiative helps Indigenous communities to manage their land as IPAs, contributing to the NRS.

9.19 Before Indigenous landowners can declare their land to be an IPA, they must prepare a plan to manage their country and its cultural values as an IPA.

Recommended Approach for Management Planning

9.20 The EPBC Regulations for protected area management provide an inflexible prescriptive set of requirements for the content of plans and do not acknowledge that adequate management plans could exist in other formats. The International Council on Monuments and Sites (ICOMOS) noted that:

> There could be greater flexibility with the focus on effective conservation outcomes rather than prescriptive processes or documents. Where existing agency asset management systems work well for heritage, these could be accepted as the basis for heritage management […]'.[5]

9.21 For example, the obligation for the Director of National Parks to prepare a heritage management strategy is unnecessary given the protection provided for heritage by the Commonwealth reserve provisions of the Act. Statutory plans made under the State and Territory laws may also achieve the outcomes desired for areas protected under the Act.

9.22 Further, the Regulations should recognise that not all elements of a plan are applicable to all areas. They currently require a level of detail describing the 'place' that is not necessary to achieve good management outcomes.

9.23 The focus of management plans for protected areas needs a shift in emphasis from content and processes to outcomes.[6] Management plans are a useful tool but the Regulations are often inflexible. Simplified guidelines that are consistent with relevant international obligations are needed. Alternatively, a set of questions could be provided to assist in establishing whether a management plan (or management arrangements) is likely to achieve outcomes that help to conserve the values, function or ecological character of an area.

9.24 A modified version of guidelines promulgated by the International Centre for the Study of the Preservation and Restoration of Cultural Property (ICCROM) for World Heritage Cultural sites may be an appropriate alternative to provide more focus on principles and outcomes rather than process.

9.25 Such an approach could involve asking:

- has the 'place' and its values, function or ecological character been adequately identified?
- have threats to the values, function or ecological character of the 'place' been clearly and adequately assessed?
- have relevant current management issues been identified and analysed?
- does the plan include adequate management triggers, monitoring and response mechanisms to ensure limits of acceptable change are not exceeded?
- have relevant managers and other interested stakeholders been involved throughout the management planning process?

5 Interim Report Comment 64: Australian ICOMOS, p.11.

6 Godden Mackay Logan Heritage Consultants, *Management Plan Requirements Review Final Report*, unpublished report (August 2009).

- if implemented, would the policies adequately provide for conservation of the 'place' and retention of its identified values, functions or its ecological character?
- does the plan include an appropriate interpretation strategy?
- have the relevant management principles and the related statement of 'implications for management' been incorporated?
- does the plan identify desired outcomes and strategies and actions which if implemented would deliver these outcomes?
- does the management plan identify those responsible for implementation?
- for Ramsar sites, does the plan sit within a context that adequately recognises the need for integrated catchment management?

9.26 A national standard is needed for the preparation of plans. The requirements for management plans for all protected areas should be clearly specified and publicly available. These guidelines should also be sufficiently flexible to recognise that effective plans may vary in form and content. For example, there should be capacity for management plans to adopt subsidiary documents or other adequate management arrangements.

9.27 An appropriate monitoring program to evaluate compliance with management plans should complement this approach. Plans should specify the measurement endpoints that would serve to verify adequate outcomes (discussed further in Chapter 3).

Recommendation 32

The Review recommends that, as for heritage management plans, the Act and Regulations be amended so that:

(1) management plans focus on outcomes rather than content and processes;

(2) the format, requirements and process for developing management plans is flexible – guidelines for the preparation of management plans should be revised to reflect this flexibility; and

(3) a single management plan can satisfy numerous planning requirements.

Values, Functions and Ecological Character

9.28 There was much discussion in submissions on the merit of listing and protecting heritage values, as opposed to listing and protecting places for their heritage values.[7]

9.29 The objective of listing is to ensure heritage places are managed to retain their values. Hence management plan objectives and processes should focus on conserving and interpreting places in a manner that retains identified values. This is discussed further in Chapter 8.

9.30 Similarly, Ramsar wetlands should be managed so as to retain their ecological character. Management principles should be amended where appropriate, to clarify that it is the 'places' that are to be conserved and the values, function or ecological character that are to be retained.

9.31 Greater clarity in the definition of 'ecological character' and the explanation of 'appropriate activities' could strengthen protection for Ramsar wetlands. The Act's definition of 'ecological character' follows that of the Ramsar Convention. The international scientific community is working to better articulate the meaning of the term 'ecological character' through the technical advisory processes of the Convention. Within Australia, the need for a clearer definition of ecological character has been addressed through development of the *National Framework and Guidance for Describing the Ecological Character of Australia's Ramsar Wetlands*[8] and investment in ecological character descriptions (ECD) for Ramsar sites.

7 See e.g. Interim Report Comment 64: Australia ICOMOS and Australian Council of National Trusts Workshop Report.

8 DEWHA, *National framework and guidance for describing the ecological character of Australian Ramsar wetlands* (2008) http://www.environment.gov.au/water/publications/environmental/wetlands/pubs/module-2-framework.pdf.

9.32 The ECD of a wetland provides a baseline description at a given point in time, which can then be used to assess change in the ecological character of a site. While important in protecting Ramsar wetlands, the production of ECDs for Ramsar wetlands has been slow until recently. A 2007 study into Ramsar wetlands in Australia, the 'Ramsar Snapshot Study', found that:

> 12% of Ramsar sites had a finalised Ecological Character Description, with 20% and 15% of sites having Ecological Character Descriptions in draft and in preparation stages respectively. Over half the Ramsar sites did not have an Ecological Character Description at time of reporting.[9]

9.33 Since that study, resources dedicated to preparation of ECDs have significantly increased. DEWHA has advised that a phased approach is being taken, with ECDs prepared or underway for 90% of sites. The Australian Government is also implementing the 'Ramsar Rolling Review' to report on the status of the ecological character of Ramsar sites. The Ramsar Review will provide a national overview of the status of Australia's Ramsar sites every three years and inform management decisions. Notwithstanding these measures, it is clear that significant effort is required to ensure the current decline in the environmental quality of Ramsar wetlands is reversed.

Wise Use

9.34 The Ramsar Convention does not preclude human use of listed wetlands, but aims to avoid fundamental adverse changes to ecological character. The Convention's aim is to have appropriate 'wise use' management regimes in place that, at the least, maintain the ecological character that was recorded for each wetland at the time of designation.

9.35 A 'wise use' is one that does not diminish the ecological character of a place – therefore one that is not likely to have a significant impact. The 'wise use' concept has been recently updated by the Ramsar Convention Conference of the Parties to mean:

> the maintenance of their ecological character, achieved through the implementation of ecosystem approaches,[10] within the context of sustainable development.[11]

9.36 DEWHA should provide administrative guidelines on 'wise use' for all Ramsar wetlands. This would assist land managers to create appropriate management plans, and would assist application of the 'wise use' concept in the Environmental Impact Assessment process.

9.37 Ramsar guidelines[12] recognise that site-based planning should be one element of a multi-scale approach to wise use planning and management. These guidelines promote the establishment and implementation of a management plan for a Ramsar site as part of an integrated management planning process. This means management plans should be linked to broad-scale landscape and ecosystem planning.

9.38 Harmonising the Act with local government planning, broader landscape planning and State and Territory legislation should assist in better managing Ramsar wetlands.

Significant Impact on Protected Areas

9.39 Improved guidance and policy advice about significant impacts on protected areas would increase certainty for managers and other users of areas protected by the Act. The context of a particular place (i.e. its values, its ecological character, etc) would help determine what activities are likely to have a significant impact. The intention of any management plan should be to maintain the integrity of the values, function or ecological character and authenticity of the area. Where management achieves this, activities undertaken in accordance with the plan should not require further assessment and approval for the purposes of Part 3 of the Act. This would greatly simplify regulation of activity in and around protected areas and create a significant incentive to prepare sound management plans. Approvals bilateral agreements could be used to grant this accreditation.

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9 BMT WBM, *Ramsar Snapshot Study – Final Report* (2007), p.5-2.

10 Including *inter alia* the Convention on Biological Diversity's "Ecosystem Approach" (CBD COP5 Decision V/6) and that applied by HELCOM and OSPAR (Declaration of the First Joint Ministerial Meeting of the Helsinki and OSPAR Commissions, Bremen 25-26 June 2003).

11 Ramsar Convention, 9th Meeting of the Conference of the Parties, Resolution IX.1 Annex A *A Conceptual Framework for the wise use of wetlands and the maintenance of their ecological character*, p.6 http://www.ramsar.org/pdf/res/key_res_ix_01_annexa_e.pdf.

12 Ramsar Convention in Resolution VIII.14: *New Guidelines for management planning for Ramsar sites and other wetlands*.

Recommendation 33

The Review recommends that the Act be amended to:

(1) require management plans to identify and provide guidance on what is likely to have a significant impact on areas protected by the Act; and

(2) allow accreditation of management plans that meet the requirements of the Act and Regulations – accreditation would be subject to performance auditing.

Role of the Commonwealth

9.40 Under the Act, management plans must be made for protected areas located in a Commonwealth area. Management plans must address management principles prescribed in the EPBC Regulations.

9.41 Implementation of plans for protected areas that include a State or Territory area is primarily a matter for the relevant owners and managers but is facilitated by partnering arrangements with the Commonwealth.

9.42 In general, effective management planning needs to engender support from responsible agencies and local communities to cover the full spectrum of actions and responses needed to manage protected areas. Voluntary conservation agreements, schemes for biodiversity reserves, State and Territory wetland policies and protective legislation, natural resource management programs and water recovery partnerships can all potentially contribute to wetlands management.

9.43 As suggested by some submissions, management plans should be mandatory and enforceable for all protected areas. WWF stated that: 'the Commonwealth should have the power, and should take responsibility to ensure management plans are in place […].'[13]

9.44 The Ramsar Snapshot Study Final Report[14] sets out some ecological and management issues and challenges regarding the administration of Australia's Ramsar sites. The report suggests a number of areas where implementation of the Ramsar Convention in Australia can be improved. In particular, it indicates that a number of Australian Ramsar sites have no management plan or planning document of any kind completed or being developed.

9.45 In June 2006 DEWHA commissioned an independent review of management plans for Australia's World Heritage properties and National Heritage places. The review noted that of the 31 places included in the National Heritage List at that time, only two met the formal requirements of the Act and another eight had generally adequate management plans in place.

9.46 The Commonwealth Ombudsman also noted unsatisfactory compliance in the preparation of agency heritage strategies under the Act.[15] This is discussed further in Chapter 8.

9.47 The appropriate roles of the Commonwealth and land managers needs to be carefully considered. The land managers should be involved in preparing a management plan because without their cooperation it would be difficult to achieve the goals of site management. However, where protected areas on State and Territory land have inadequate or no management plans, the Commonwealth should be able to prepare plans for the purposes of the Act – that is, plans that manage significant impacts on nationally important protected matters. This would allow the Environment Minister to make plans rather than using 'best endeavours'. In these circumstances, the Environment Minister should consult with the owner and/or manager of the protected area.

9.48 Allowing the Minister to prepare a management plan where no plan is in place would shift responsibility for plan preparation and costs from the State and/or Territory to the Commonwealth. Further resources would likely be required for the Commonwealth to undertake this new role, but, jurisdictional-specific issues would still have to be managed by the relevant State or Territory.

13 Interim Report Comment 88: WWF.

14 BMT WBM, *Ramsar Snapshot Study – Final Report* (2007).

15 Commonwealth Ombudsman, *Delays in preparation of Heritage Strategies by Australian Government agencies* (2009).

Recommendation 34

The Review recommends that the Act be amended to:

(1) enable the Environment Minister to initiate preparation of management plans for World Heritage properties, National Heritage places and Ramsar wetlands where the collaborative processes have not produced effective plans; and

(2) require the Minister to consult with the owner and/or manager of the protected area when preparing these plans.

Commonwealth Reserves

9.49 The reserve provisions of the EPBC Act are essentially based on the former *National Parks and Biodiversity Conservation Act 1975* (Cth), which were enacted at a time when the focus of Commonwealth reserves was primarily terrestrial. Commonwealth marine reserves were initially restricted to a small number of relatively small, iconic sites. The exception was the Great Barrier Reef which was established and managed under separate legislation.

9.50 The number of Commonwealth marine reserves established under the Act has increased significantly and now comprise an area of nearly 50 million hectares. It is likely that the number of marine reserves will increase significantly in coming years as the marine bioregional planning program rolls out for Commonwealth waters and Australia moves towards establishing a Nationally Representative System of Marine Protected Areas by 2012. Commonwealth marine reserves will also be increasingly managed as networks of reserves rather than as single sites.

9.51 The Act's Commonwealth reserve provisions should be reviewed to ensure they meet the needs of managing Commonwealth marine reserves and ensure best practice regulation.

9.52 Modern marine protected areas legislation includes provision for:

- the declaration of reserves and networks of reserves with the primary purpose of protecting biodiversity – where compatible with the objectives of the reserve, these reserves should be multiple use;
- establishment of zones within reserves;
- definition of the nature and content of management plans for reserves with sufficient flexibility for management plans to apply to networks of reserves;
- procedures for making or amending management plans for reserves;
- preparation of operational plans for reserves;
- temporary prohibition or restriction of activities in reserves;
- general duty of care not to undertake actions that would cause harm to reserves; and
- regular review and performance assessment.

9.53 As a general principle the provisions of the Act and Regulations should be constructed so as to be able to apply to all reserves and protected areas. Proliferation of special provisions only serves to make the legislation overly complex. Management of Commonwealth terrestrial and marine reserves should be consistent – the Commonwealth reserves provisions of the Act should be rationalised to ensure they are capable of managing both.

Recommendation 35

The Review recommends that the Act be amended to streamline and rationalise the provisions governing management plans and permitting activities in Commonwealth reserves so that the provisions apply to both terrestrial and marine reserves.

Conservation Zones

9.54 Under the Act, a Commonwealth area outside a Commonwealth reserve can be proclaimed a 'conservation zone.' The purpose of proclaiming a conservation zone is to provide interim protection for biodiversity, other natural features and heritage in the area while it is being assessed for possible inclusion in a Commonwealth reserve.

9.55 Submissions questioned whether the Act or Regulations provide for an appropriate range of activities to be regulated in a conservation zone, and whether they provide adequate protection for an area while it is being assessed for inclusion in a Commonwealth reserve. For example, commercial fishing in conservation zones is regulated by regulation 12.34 of the EPBC Regulations, however, this does not override a statutory fishing concession granted under the *Fisheries Management Act 1991* (Cth). Further, there are no provisions regulating mining operations in conservation zones.

9.56 Provisions are needed to ensure appropriate protection of biodiversity in conservation zones. Conservation zones do not need management plans, but the Director of National Parks should have the flexibility to manage certain activities that may represent an unacceptable risk. This is particularly important in the marine environment where the number of Commonwealth marine reserves being established is increasing substantially.

9.57 An approvals regime should be established for those activities that should be managed while a conservation zone is being assessed for possible inclusion in a Commonwealth reserve. Consultation with relevant stakeholders would be important to minimise conflict as much as possible.

Recommendation 36

The Review recommends that the Act and Regulations be reviewed and amended to ensure that biodiversity in conservation zones is adequately protected while the conservation zones are being assessed for inclusion in a Commonwealth reserve.

The National Reserve System

9.58 The NRS, which currently includes more than 9,000 areas, is not an identified category of 'protected area' under the EPBC Act. Nonetheless it is an Australian Government program that plays an important role in protecting Australia's biodiversity.

9.59 The NRS aims to protect a CAR system of reserves in Australia rather than areas or species with significant values, *per se*. However, not all bioregions in Australia are represented because of resource and funding restraints.

9.60 The establishment of a CAR reserve system is clearly a significant element in meeting the Act's biodiversity conservation objectives. However, a stronger link between landscape planning approaches and the NRS program is needed.

9.61 As outlined in Chapter 3, bioregional planning allows the Australian Government to create an integrated framework for managing Commonwealth interests, including development of the NRS at a regional scale. Landscape planning could be used to identify locally unrepresented areas that would then be prioritised for acquisition by the NRS or characterisation as a protected matter. It could also assist in determining new representative areas.

9.62 The NRS priorities could also be used in the process for listing ecosystems of national significance, by prioritising ecosystems that:

- currently receive little legal protection;
- offer refuge or are centres of native species richness; or
- play a key role in habitat connectivity, to allow corridors for species movement.

9.63 In this context, areas established under the NRS and captured as part of an ecosystem of national significance would be afforded protection under the Act.

Private Conservation and Covenanting Schemes

9.64 Healthy examples of the Australian environment and the biota they support are maintained through a CAR NRS. However, not all identified occurrences of important biodiversity can be placed in reserves, and substantial occurrences of highly valued biodiversity occur on private land.

9.65 In the last ten years private (not-for-profit) land acquisition for biodiversity conservation has grown. Private bodies active in this field are now playing an important role in building a broader platform for biodiversity conservation.

9.66 These private conservation schemes may require the Environment Minister's approval for landholder's to gain access to tax incentives.[16] The key characteristics required for tax concessions are that covenants are perpetual, registered on title and protect and manage areas of high conservation value. Requirements are set out in the *Guidelines for Approval of a Conservation Covenanting Program*[17] which were initially developed to assist landholders access to income tax incentives provided under the *Income Tax Assessment Act 1997*. Further examination of tax incentives for private conservation schemes that conserve biodiversity should be considered in Australia's Future Tax System Review (the Henry Tax Review)[18] which aims to position Australia to deal with future demographic, social, economic and environmental challenges.

9.67 The application of covenanting programs and other mechanisms designed to integrate public and private conservation should be integrated with the operation of the biobanking scheme recommended in Chapter 3.

Biosphere Reserves

9.68 Biosphere reserves are sites comprised of one or more protected areas and surrounding lands that are managed for both conservation and sustainable use of natural resources. They are designated by the United Nations Educational, Scientific and Cultural Organization (UNESCO) on the basis of nominations submitted by countries participating in the Man and the Biosphere Program. Participation in the Program does not give rise to any obligations on a participating country. Nomination and management of a biosphere reserve involves cooperation between the different managers of the land within the reserve area.

9.69 Australia currently has 14 Biosphere reserves within the World Network. The biosphere provisions of the Act establish a framework under which the Australian Government may co-operate with State and Territory governments to manage biosphere reserves through the preparation and implementation of management plans. Beyond this, biosphere reserve status does not attract any specific legislative protection or regulatory controls, other than the normal State, Territory and Commonwealth laws that apply to underlying land tenures.

16 The *Taxation Laws Amendment Act (No. 2) 2001* (Cth) provides concessional tax treatment for land owners entering into certain types of conservation covenants.

17 DEWHA, *Conservation covenanting programs and the Income Tax Assessment Act 1997* (2009) http://www.environment.gov.au/biodiversity/incentives/covenants-guidelines.html.

18 Australia's future tax system http://taxreview.treasury.gov.au/content/Content.aspx?doc=html/home.htm.

9.70 In the majority of cases, the core protected areas of Australia's biosphere reserves are protected under the Act (as a Ramsar wetland or on the World or National Heritage List) or are conservation areas managed by State or Territory governments. Given this, a Commonwealth-mandated biosphere management plan may only duplicate existing plans.

9.71 While designation of a biosphere reserve does not give rise to any additional protection for the environment within the area, the presence of provisions in the Act creates the impression of regulation and uncertainty about the role of the Australian Government in relation to management of these areas.

9.72 Removal of the biosphere reserve provisions would not inhibit the Man and the Biosphere Program. The Program does not depend on domestic legislation. The existing biosphere reserves would not lose their designation and communities wishing to participate in the program would still be able to pursue designation.

Recommendation 37

The Review recommends that the Act be amended to repeal the biosphere reserve provisions, recognising that the Man and the Biosphere Program does not depend on domestic legislation.

Permits for Activities in Commonwealth Reserves

9.73 Certain activities conducted in Commonwealth reserves require a permit under the Act. These activities must be consistent with the management plan for the park or reserve in which they are to be conducted. Activities include research, any commercial activity, and certain recreational or other activities.

9.74 Arts Freedom Australia (AFA) suggested that Government Departments at the Commonwealth, State and Territory level place unnecessary restrictions on image creation in national parks and other wild areas:

> The stated object of the Act is to protect the environment, and to conserve biodiversity. However, the Act impacts severely on the rights and practices of photographers within Australia.[19]

9.75 Management of commercial filming and photography in protected areas and other public places is commonplace in Australia and internationally. For example, in Canada a permit and fee is required to carry out commercial filming or photography in national parks.[20] Commercial image capture is regulated and subject to fees at many locations around Australia, including by every State and Territory park management agency.

9.76 AFA's concerns in regards to image creation in parks and reserves primarily focus on the Uluṟu-Kata Tjuṯa National Park and its cultural heritage value:

> While no one would object to the government being able to launch criminal proceedings against those who have significantly impacted on the *tangible* World Heritage values of a property, the fact that a large component of the cultural heritage values of places such as Uluru-Kata Tjuta National Park are reliant on *intangible* World Heritage values remains a great concern.[21]

9.77 Managing this issue at Uluṟu-Kata Tjuṯa National Park involves unique elements – a World Heritage cultural landscape leased by the Government from its Traditional Owners that includes a dominant feature that has cultural significance and is regarded nationally and internationally as one of Australia's iconic places. Park management has to try to balance the expectations of the Traditional Owners, industry, and the broader community, while meeting its legal obligations under the Park lease and Australia's international obligations under the World Heritage Convention, both of which oblige the government to protect the Aṉangu culture – the custodians of the Park.

19 Interim Report Comment 50: Arts Freedom Australia, p.4.

20 Parks Canada http://www.pc.gc.ca/eng/docs/pc/guide/media/index.aspx.

21 Interim Report Comment 50: Arts Freedom Australia, p.3.

9.78 DEWHA advises that the Anangu want commercial image capture and use to be controlled and actively managed because they are concerned:

- that wide dissemination of images through commercial use may lead to images of sacred sites being seen by people who in accordance with Anangu custom should not view them; and
- images of their country may be used in ways that are culturally insensitive.

9.79 Regulations 12.24 (capturing images or recording sound) and 12.38 (deriving commercial gain from images captured) were considered extremely important by the Anangu traditional owners of Uluru-Kata Tjuta National Park when the EPBC Regulations were being drafted. These Regulations, which apply to film-making and photography, are in accordance with guidelines approved by the Park Board of Management and were prepared in collaboration with Traditional Owners and representatives from the tourism, film and photographic industries between 2003 and 2005.

9.80 The guidelines are a compromise between protection of Anangu culture and the requirements of visitors and industry. The guidelines include:

- no requirement for Park staff to see text prior to publication;
- no requirement for Park staff to see images and provide distribution advice before publishing – subject to exceptions in relation to sensitive sites; and
- no need to obtain further permits if an image is used for an already approved purpose.

9.81 AFA suggested that the Act contradicts the *Copyright Act 1968* (Cth) in terms of using environment protection legislation to restrict dealing in photographs.[22]

9.82 That Act creates exclusive economic rights to use works. It does not create an unfettered right regarding the capture and use of photographic images. Information provided by the Australian Copyright Council states that:

> Photographers also need to be aware of provisions in other legislation which restrict commercial photography of Indigenous, environmental and heritage sites. These provisions are not related to copyright law.[23]

9.83 The Australian Copyright Council further states that to take photographs in a Commonwealth reserve for commercial purposes, a photographer should contact the Commonwealth reserve and obtain a permit to take photographs for commercial purposes and abide by the conditions imposed upon commercial photographers in the reserve by the Director of National Parks.[24]

9.84 Taking photographs and filming in Commonwealth reserves should be encouraged as a passive recreational activity. Such activity helps to promote community awareness, understanding and support for nature conservation. However, with commercial filming it is important to ensure that the final image portrays the area in an appropriate way, and does not compromise any conservation, cultural or environmental management objectives. While this would not be common practice, potential misuse of film or images highlights the importance of regulating access and use where appropriate. Similarly, a fee that may accompany permits for commercial activities recognises the financial cost of maintaining and managing valuable resources.

22 Interim Report Comment 50: Arts Freedom Australia.

23 Australian Copyright Council Information Sheet G11 *Photographers and Copyright*, January 2006, p.4.

24 Australian Copyright Council Information Sheet G11 *Photographers and Copyright*, January 2006.

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Chapter Ten

REGIONAL FOREST AGREEMENTS

Chapter 10: Regional Forest Agreements

10.1 The operation of Regional Forest Agreements (RFAs) is a highly contentious issue and opinion about the outcomes and successes of these agreements is polarised. The Interim Report examined these issues in detail.

10.2 Like the debate itself, responses to the Interim Report fell into two camps – those who oppose any changes to RFA forestry arrangements[1] and those who will only accept full application of the EPBC Act under all circumstances.[2] There was, however, agreement from the forest industry and environmental NGOs that the failure to complete reviews of the RFAs needs to be rectified.[3]

10.3 RFAs are intended to be a means of managing forest resources to deliver environmental outcomes as well as economic and resource security to the forest sector. Environmental protection under the RFAs relies on the implementation of commitments to establish a Comprehensive, Adequate and Representative (CAR) reserve system together with ecologically sustainable forest management systems that deliver continuous improvement.

10.4 RFAs have provided considerable certainty for forest industries through reduced Commonwealth regulation and the establishment of long-term frameworks for forest management. As well, they have increased reserves and conservation outcomes. RFAs have reduced community conflict over native forest harvesting but have been implemented in a way that has not realised the envisaged benefits in transparency and public accountability. If this issue is not addressed it could form the basis for renewed conflict, undermining public support for continuation of the current RFA arrangements into the future.

10.5 Notwithstanding arguments about the benefits of RFAs, there is significant community concern that the environmental outcomes from RFAs are not being delivered. Public submissions to this Review were critical of the content and administration of the RFAs, as well as the limited mechanisms for ensuring that RFA forestry operations are compliant and best practice. Submissions also raised concerns about the impacts of RFA forestry operations on protected matters and argued for increased transparency of their operation.

10.6 The re-involvement of the Commonwealth in coupe-by-coupe assessment of forest practices that would follow from winding back the RFAs would not represent best practice regulation and would cause unnecessary duplication and delay without necessarily providing increased conservation benefits.

10.7 Submissions from forest industry groups highlighted that RFAs have resulted in the reservation of large tracts of forests, providing substantial protection for biodiversity. The National Association of Forest Industries describes the extent of the reserve system as follows:

> To ensure adequate protection of forest biodiversity, the RFAs established a CAR reserve system. Overall, the aim was to place in nature conservation reserves 15% of the pre 1750 distribution of each forest type, 60% of the existing distribution of each forest type if vulnerable, 60% of existing old growth forest, 90% or more of high quality wilderness forests, and all remaining occurrences of rare and endangered forest ecosystems. In most regions these targets were exceeded. For example in Tasmania, 79% of old growth forests are protected in the reserve system, while in Western Australia 100% of old growth forests are protected.[4]

10.8 As a consequence of the Tasmanian RFA, 79 per cent of old growth forest and 97 per cent of high quality wilderness is in reservation.[5] This exceeds the global target of effective conservation of 10 per cent each of the world's ecological regions, set out under the *Convention for Biological Diversity*.[6] These achievements, which often go overlooked or unremarked in debate, deserve greater public recognition.

1 See e.g. Interim Report Comment 9: Timber Communities Australia (Derwent Valley Branch); Interim Report Comment 10: Timber Communities Australia (Huon Resource Development Group); Interim Report Comment 11: Timber Communities Australia (Meander Resource Management Group); Interim Report Comment 16: Timber Communities Australia (Southern Tasmanian Branch); Interim Report Comment 17: Timber Communities Australia (Bruny Island Primary Industries Branch); Interim Report Comment 20: Timber Communities Australia (Hellyer Branch); Interim Report Comment 27: Timber Communities Australia (East Coast Tasmania Branch); and Interim Report Comment 28: Timber Communities Australia (West Coast Tasmania Branch).

2 See e.g. Interim Report Comment 97: Mr Tom Baxter; Interim Report Comment 92: Professor Lee Godden, Ms Anne Kallies and Ms Carly Godden; Interim Report Comment 36: The Green Institute.

3 See e.g. Interim Report Comment 106: National Association of Forest Industries (NAFI), p.4; and Interim Report Comment 77: National Parks Association of NSW.

4 Submission 133: National Association of Forest Industries.

5 Interim Report Comment 112: Tasmanian Government, p.6.

6 *Convention on Biological Diversity* Conference of the Parties (COP) Decision VII/30, Target 1.1.

10.9 Notwithstanding this, concerns remain among environmental groups, for example the Wilderness Society stated that:

> Large scale clear felling and burning of forests continues, most notably in Tasmania and Victoria with significant impacts on resident forest species.[7]

10.10 The interaction between the EPBC Act and forestry operations is often referred to as an 'exemption'. This term does not, however, accurately reflect the relationship. The rationale for the RFA provisions in the Act recognises 'that in each RFA region a comprehensive assessment has been undertaken to address the environmental, economic and social impacts of forestry operations'.[8] Rather than being an exemption from the Act, the establishment of RFAs (through comprehensive regional assessments) actually constitutes a form of assessment and approval for the purposes of the Act.

10.11 Correspondingly, like other activities assessed and approved under the Act, RFAs should be regularly monitored and audited to ensure they continue to meet the agreed conditions of that approval. The weakness in this area needs to be rectified.

10.12 The RFA exemption terminology is problematic. Although the RFA provisions of the Act read like an exemption, they operate akin to a licence. The problem has been that the approval has continued to operate irrespective of the extent to which the commitments contained within the agreements have been implemented, particularly in relation to environmental outcomes. The absence of transparent mechanisms to test non-compliance with RFAs and assess governments' performance on RFA obligations causes community concern and mistrust. The lack of transparency also limits the ability of parties to verify whether core environmental commitments or 'license conditions' of the RFAs are being met. In the absence of such verification, the credibility and sustainability of RFAs is at risk.

10.13 The Commonwealth Forestry Minister and the Commonwealth Environment Minister both have a significant interest in the performance of the RFAs. While joint decision-making by the two Ministers is one possibility in relation to the RFAs, it would be more appropriate for each Minister to be given primary responsibility for different aspects of them. Consistent with this, the recommendations of this Review rest on the basis that the Commonwealth and State Forestry Ministers should continue to be primarily responsible for completing adequate RFA reviews but questions about whether the provisions of the EPBC Act should apply to any RFA are a matter for the Environment Minister.

10.14 The proposals in this Chapter aim to transform the interaction between the Act and RFA forestry operations so that they better reflect an ongoing arrangement akin to a licence. The approval, which has been issued on certain terms (as outlined in the RFAs themselves) allows forestry operations to occur without being subject to Part 3 of the Act. If the terms of the approval are not complied with, or if there is insufficient reporting information to verify that compliance, then the approval should be terminated.

10.15 The existing approval granted by s.38 should continue, subject to improvements in Commonwealth oversight, public input mechanisms and performance assessment, to ensure that the precise terms of the RFA are being followed and best practice outcomes are being achieved as envisaged.

10.16 To the extent that governments, as RFA signatories, are properly implementing the agreements and regularly presenting the data and evidence to verify this, these changes would not alter existing regulatory arrangements for RFA forestry activities.

Demonstration of Environmental Outcomes

10.17 The reserve system delivered by the RFAs has generated significant environmental benefits. However, where the reserve system is not of itself sufficient to deliver security for biodiversity, the biodiversity outcomes of RFAs are also determined by the forest management practices applied to harvest strategies.

10.18 Reporting on the biodiversity outcomes of RFAs, particularly the on-ground performance of RFAs and adaptive management capacity of forest management practices, has been patchy and has not been delivered according to agreed RFA timeframes. Failure to complete timely reviews and inadequate processes for public complaints has fuelled public mistrust in the management of RFA forests and does not engender the level of confidence needed to continue the current treatment of RFA forestry operations under the Act.

7 Submission 153: The Wilderness Society, p.13.

8 Explanatory Memorandum, Environment Protection and Biodiversity Conservation Bill 1999 (Cth), para.[113].

RFA Reviews

10.19 Each RFA requires a review of its operation every five years. Completion of these reviews is a joint responsibility of the Commonwealth and the relevant State. Tasmania is the only State to have completed RFA reviews on time. Reviews have not been completed for the other RFA regions, and while some review processes have begun, all mainland State reviews are now well behind schedule. This is clearly unacceptable.

10.20 A range of submissions agreed that the RFA reviews needed to be completed. The Australian National Office of Timber Communities Australia submitted that:

> Provided the RFA's are properly reviewed and any changed social, environmental and economic factors considered as appropriate through those reviews TCA considers that there is no justification to alter the current interactions between the EPBC Act and the RFA's.

10.21 In order to demonstrate that environment protection outcomes are being achieved in RFA forests, the RFA reviews need to focus on the performance of RFAs in achieving their objectives, including protecting biodiversity, and not just report on processes under the agreements. Reviews should specifically address relevant matters of national environmental significance (NES) and report on verifiable information.

10.22 The Act should be amended so that the special treatment of RFAs under the EPBC Act continues only if the conduct and reporting of agreed RFA obligations and commitments, particularly through RFA five yearly reviews, is satisfactory. The performance requirements for continuation of the approval under s.38 of the Act should be set out in legislation. These should be linked to the original commitments contained in the RFAs themselves, and should be conducted by the Commonwealth Forestry Minister in consultation with the Commonwealth Environment Minister.

10.23 Each RFA agreement provided for accreditation of ecologically sustainable forest management systems, with an emphasis on continuous improvement and adaptive management. RFA reviews should therefore focus on the performance of a state's Ecologically Sustainable Forest Management (ESFM) framework in delivering sustainable forest ecosystems.

10.24 This could give rise to opportunities for streamlining forest reporting. The result of the RFA reviews could be re-accreditation of the State's ESFM framework for the purposes of the Act. This could also help increase the credibility of state forest management. The reviews should include a consideration of performance within the CAR Reserve System as well as on lands where RFA forestry operations take place (public and private).

10.25 Key matters to consider when undertaking a review should be whether the following have been demonstrated:

- the state's ESFM framework is capable of adapting to new information in a timely manner – this could include systems to ensure harvesting plans are consistent with recovery plans, conservation advice and action statements;
- matters of NES are consistently and uniformly incorporated into the state's ESFM framework and given appropriate consideration (consistent with information provided under the Act, such as listing advice);
- there is an ongoing commitment to regular, comprehensive and statistically powerful assessment, monitoring and analysis against relevant indicators;
- data collection records attributes of both the Reserve System and the RFA production forest;
- data collection is carried out at appropriate spatial scales and frequencies;
- analysis of data is robust, transparent, consistent with best practice scientific methods and available for peer review;
- feedback received through research and compliance and audit processes is incorporated into forest practice systems;
- ongoing performance is reported and such reports are publicly available;
- forest-based staff are provided with regular training and development opportunities in site assessment, survey and monitoring methods; and

- public access to data, planning and reporting information is provided wherever possible.

These reviews should provide clear evidence of:

- a transparent, systematic and credible process for investigating alleged breaches of forest practice systems and the RFAs;
- a regular, independent performance auditing program that is applied to forest plans and their environmental outcomes and is capable of demonstrating compliance with management arrangements and of providing a public feedback loop for best practice management;
- an ESFM framework that is sufficiently flexible to adapt to emerging threats to forest values and changes in public values; and
- a CAR reserve system that is being adequately maintained and managed.

10.26 The internationally agreed criteria for measuring sustainable management of temperate and boreal forests, the *Montreal Process Criteria and Indicators on the Conservation and Sustainable Management of Temperate and Boreal Forests* (the Montreal Process Criteria and Indicators) and the complementary *Framework of Regional (Sub-National) Level Criteria and Indicators of Sustainable Forest Management*, should be used where appropriate to report against RFA commitments. The Montreal Criteria include seven criteria relating to:

(1) conservation of biological diversity;

(2) maintenance of productive capacity of forest ecosystems;

(3) maintenance of forest ecosystem health and vitality;

(4) conservation and maintenance of soil and water resources;

(5) maintenance of forest contribution to global carbon cycles;

(6) maintenance and enhancement of long-term multiple socio-economic benefits to meet the needs of society; and

(7) legal, institutional, and economic framework for forest conservation and sustainable management.[9]

10.27 Underneath these seven criteria are 64 indicators designed to assess current conditions and monitor change over time.[10] The Montreal Criteria and Indicators are widely used for forest reporting in Australia – for example in Australia's *State of the Forest Reports* (SOFR) and forest reporting in Victoria[11] – and, if consistently and comprehensively applied, would form a reasonable basis for more effective performance auditing of RFAs.

10.28 All RFAs contain provisions for the State to develop sustainability indicators consistent with the Montreal Process Criteria and then to implement and monitor them, subject to them being practical, measurable, cost-effective and capable of being implemented at the regional level. To the extent that some Australian states have not settled these indicators they should be finalised as a priority, by no later than the end of 2010.

10.29 These indicators are likely to form the basis for performance monitoring, and by extension, retention of the s.38 approval. Accordingly, the Commonwealth Environment Minister should have a role in their final approval.

10.30 Assessments of the performance of RFAs would be more meaningful, transparent and robust if a nationally consistent and independent system of auditing was implemented on a regular basis during the periods between the scheduled five yearly reviews. This would ensure that RFA systems were maintained, improvements agreed in five yearly reviews were implemented and forestry operations continuously improved.

10.31 Systems which could be audited include codes of forest practice; management plans for CAR reserves; implementation of recovery plans for threatened species; the completeness of threatened species lists; compliance systems; the abundance, condition and extent of listed communities, species and critical habitat; and any other major systems agreed in the RFAs. These performance audits would be at a strategic level, that is, not coupe-by-coupe. The results of these systems audits should be publicly available.

9 Further information on the Montreal Criteria and Indicators can be found at: http://www.daff.gov.au/forestry/international/fora/montreal.

10 It may be reasonable to not use all 64 criteria, as occurs in Victoria, if the criteria cannot be measured against or the measurement would not be meaningful.

11 Interim Report Comment 111: Victorian Association of Forest Industries.

10.32 Comments received in response to the Interim Report noted the range of reporting on forestry that currently occurs through the SOFR.[12]

10.33 These reports are not suitable substitutes for RFA reviews as they do not provide sufficiently targeted information. The sustainability indicators for the RFA reviews are based on the Montreal Process Indicators which make up parts of the indicators for the SOFR. Hence the SOFR and the RFA reviews could be completed concurrently. The benefit of this would be that RFA reviews would then use the most up to date sustainability information for this part of the review.

Mechanism to Ensure Completion of Adequate Reviews

10.34 Effective and timely completion of robust scheduled reviews is critical to monitoring the performance of RFAs. A process should be established through amendment of the RFA and EPBC Acts whereby the full provisions of the EPBC Act can be applied to RFA forestry operations where adequate reviews have not taken place or serious non-performance is identified.

10.35 The Commonwealth Forestry Minister should be responsible for ensuring that RFA reviews are completed in a timely fashion and their recommendations implemented. The Forestry Minister should also be responsible for providing advice to the Environment Minister on the performance of the RFA.

10.36 After consulting with the Forestry Minister, the Environment Minister would then determine whether or not to suspend s.38, in full or in part, and apply the protections of the EPBC Act. The tests for this decision should be based on the extent to which:

- the RFA reviews are not completed;
- the RFA reviews indicate serious non-performance, including: failure to implement and maintain forestry codes of practice, failure to commit to and implement recovery plans for threatened species in RFA areas, failure to establish management plans for CAR reserves, failure of the ESFM framework to protect species and failure to investigate alleged breaches of the RFA and correct any proven breaches; or
- the RFA reviews are deemed to be inadequate to judge performance against the Agreement.

10.37 As with other key decisions, the Act should specify that, before making this decision, the Commonwealth Environment Minister must consult with other relevant Commonwealth Ministers. In cases where the RFA review does not contain the information specified in the Agreements or the Regulations, or when the information provided is inadequate for the Minister to assess the impact of forest operations on matters of NES, the Environment Minister should have the power to request further information.

10.38 The power to suspend s.38 and apply the provisions of the Act to individual forestry operations would have significant consequences and should not be taken lightly. Given the potential significance of this sanction it would be necessary to precisely specify the 'termination events' identified above and thresholds representing a material breach.

10.39 As a natural justice provision, the Environment Minister would initially issue a warning notice that highlights the failure to complete a required review, where the outcomes of previous reviews have not been implemented to previously agreed standards, or where performance under an RFA is assessed as inadequate in a scheduled review. The notice would specify a period within which this non-compliance can be remedied before it is decided whether to issue the suspension notice. In general, this suspension would apply 90 days after notification. This mechanism is intended to provide a strong incentive to undertake the reviews and implement their recommendations, to report on the performance of the RFA and to ensure good forest practice, and to do so in a timely fashion.

10.40 Provided the reviews were satisfactorily completed, and the results of monitoring and audit demonstrated that forest management practices have delivered environmental outcomes that are part of the agreement, the current RFA arrangements would remain. It would only be where the Environment Minister was not satisfied that the review was adequate for judging performance, or the Minister deemed the review outcomes unsatisfactory, that alternative regulation should be applied.

12 Interim Report Comment 10: Timber Communities Australia (Huon Resource Development Group), p.4. See also Interim Report Comment 59: Mr Alan Ashbarry; and Interim Report Comment 112: Government of Tasmania.

10.41 As the RFA reviews for mainland States are all in arrears, a transitional period of two years could be set to allow these reviews to be completed before deciding whether a warning notice should be issued. At the end of this two year period, s.38 of the Act would be suspended and the protections of the Act would apply to the RFAs unless the Commonwealth Environment Minister certified that the reviews had been completed satisfactorily.

Ability for the Environment Minister to Direct Compliance Investigations

10.42 A recurring issue has been the ability of the Environment Minister to be satisfied that operations in RFA forest regions with potential impacts on matters of NES are actually consistent with the RFA, and therefore satisfy s.38 of the Act. If implemented, the systemic mechanisms for performance assessment and review discussed above should be the mechanism for ensuring compliance with RFAs.

10.43 If systemic reforms are not implemented, then the Environment Minister should be able to undertake compliance audits and investigations of forest operations, where the Minister has reasonable belief or suspicion that forestry operations are not being undertaken in accordance with the RFA and are having a significant impact on matters of NES. Amendments to the Act would be required to extend the current compliance powers to forests.

Memorandum of Understanding for RFAs

10.44 DEWHA and the Australian Government Department of Agriculture, Fisheries and Forestry (DAFF) currently have a Memorandum of Understanding (MOU) in relation to the ongoing RFA obligations, compliance and monitoring. Under the MOU, DEWHA has limited capacity to request information from forestry operators relating to compliance with RFAs and must refer all third party notifications of suspected non-compliance to DAFF for follow-up.

10.45 The MOU between DAFF and DEWHA should be re-negotiated to strengthen DEWHA's capacity and role in the investigation of suspected non-compliance with RFAs and provide for greater regulatory oversight, efficiency and opportunities for increased inter-agency cooperation.

Public Notification of RFA Breaches

10.46 Submissions raised concerns about the inadequacy of mechanisms for members of the public to bring forward complaints about RFA forestry operations having significant environmental impacts. They argued that these were not as good as those available under the compliance and reporting provisions of the EPBC Act. It should be noted that some cases of RFA non-compliance should be managed by State agencies, rather than intervention by Commonwealth Ministers.

10.47 While complaint procedures do exist for allegations of RFA or forest practice code breaches, submissions suggest that they are poorly understood, and their standards and requirements are unclear. There were also concerns regarding independence. This affects the credibility and proper governance of the RFAs.

10.48 The current concerns would be addressed if the parties to the RFAs compiled information about the number and nature of complaints made and the actions taken to address any identified problems, and released this information to the public on an annual basis. The Commonwealth and States should develop processes for regular public reporting of all complaints received and the outcomes of investigations. Independence of the complaints investigation system should be one of the performance criteria for continued operation of s.38.

Senate Inquiry into the Operation of the Act

10.49 The Senate Inquiry into the operation of the Act recommended that this Review:

> recommend proposals for reform that would ensure that RFAs, in respect of matters within the scope of Part 3 of the EPBC Act, deliver environmental protection outcomes, appeal rights, and enforcement mechanisms no weaker than if the EPBC Act directly applied.[13]

10.50 The Review proposes that the full mechanisms of the Act should be applied to RFA forestry operations if there is demonstrated non-compliance with an RFA, and there should be greater compliance monitoring and performance auditing. The aim is to improve the landscape based system of environmental management provided by RFAs rather than add on elements of the case-by-case system of approvals.

10.51 Overall, RFAs provide a solid and effective structure for environmental protection, however, significant gaps exist in implementation, monitoring and compliance auditing, and it is these gaps that present ongoing risks. The aim is to strengthen RFA implementation, reporting and compliance, and to provide for alternative assessment and regulation only where this does not occur.

Rolling Renewal of RFAs

10.52 The concept of rolling renewal of RFAs was raised during a consultation with Timber Communities Australia.[14] The idea was that good performance could be rewarded with extension of the existing RFAs. Currently RFAs are to remain in force for 20 years, with the parties jointly determining the process for extending the agreement as part of the third five yearly review.

10.53 One approach could be that if a State is meeting its obligations under an RFA to an acceptable standard the RFA could be extended for a further ten years at the completion of the 15 year review (that is, the RFA would run for another 15 years from the 15th anniversary of the RFA's commencement), with five yearly reviews continuing at 20 and 25 years from commencement.

10.54 In theory the rolling renewals could operate so that:

- if a State meets the performance requirements specified above and the outcome of the 15 year review is satisfactory, the Commonwealth could offer the State a ten year extension of the RFA;
- States that do not meet these performance requirements should not be offered an extension of the RFA until they demonstrate that these requirements are being met; and
- States that do not wish to extend an RFA may allow that Agreement to lapse at the end of its 20th year.

10.55 If a system of rolling renewals were to be implemented it would need to provide a forward looking mechanism for incorporating emerging threats and policy issues such as changing community values, climate change adaptation, carbon values and projections of resource availability.

10.56 The reforms proposed in this section of the Report are significant and introduction of a system of rolling renewals could be an important catalyst for change.

13 The Senate Standing Committee on Environment, Communication and the Arts, *The operation of the Environment Protection and Biodiversity Conservation Act 1999: First Report* (2009) para.[1.106] http://www.aph.gov.au/senate/committee/eca_ctte/epbc_act/final_report/index.htm.

14 Mr Jim Adams, Timber Communities Australia (pers. comm.), 10 September 2009; Mr Allan Hansard, National Association of Forest Industries (pers. comm.), 6 October 2009.

Recommendation 38

The Review recommends that the current mechanisms contained in the Act for Regional Forest Agreement (RFA) forest management be retained, but be subject to rigorous independent performance auditing, reporting and sanctions for serious non-compliance.

The Commonwealth and States should agree on sustainability indicators by the end of 2010. Subject to the concurrence of the Environment Minister, these indicators would provide a basis for performance auditing.

The RFA reviews undertaken by the Commonwealth Forestry Minister (Forestry Minister) and the relevant State party, in consultation with the Environment Minister, should and be expanded to focus on the performance of RFAs in meeting their agreed outcomes, including protecting biodiversity and continuous improvement of a State's Ecologically Sustainable Forest Management (ESFM) framework.

The Act should be amended so that the Environment Minister may apply the full protections of the Act, if, after consulting with the Forestry Minister, the Environment Minister is satisfied that the review:

(1) has not occurred within the timeframe specified in the RFA;

(2) indicates serious non-performance, including -

  (a) failure to implement and maintain forestry codes of practice;

  (b) failure to commit to and implement recovery plans for listed threatened species in RFA areas;

  (c) failure to establish management plans for Comprehensive, Adequate and Representative (CAR) reserves;

  (d) failure of the ESFM framework to protect species;

  (e) failure to investigate alleged breaches of the RFA and correct any proven breaches; or

  (f) the audit outcomes are not implemented to agreed standards; or

(3) does not provide enough information to judge if there are serious non-performance issues.

The Review notes that a number of RFA reviews are outstanding and recommends a transitional period for the conduct of these reviews. Section 38 will continue to apply to RFA forestry operations if the Environment Minister certifies that the review process has been satisfactorily conducted within two years of the commencement of the amendments.

Recommendation 39

The Review recommends that the Australian Government work with the States to:

(1) improve the independence of compliance monitoring; and

(2) develop processes to make publicly available information about the number and nature of complaints about Regional Forest Agreement operations and the results of any investigations.

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Chapter Eleven MARINE AND FISHERIES

Chapter 11: Marine and Fisheries

11.1 The Act has made a major contribution to shifting fisheries management from a target species-based management approach towards ecologically sustainable practices. This view is generally supported by the fishing industry,[1] State governments[2] and non-government organisations.[3]

Interaction Between the EPBC Act and the *Fisheries Management Act 1991* (FMA)

11.2 Following application of the Act, the environmental performance of Commonwealth-managed fisheries improved significantly. The following initiatives have also contributed to this improvement:

- introduction of rules-based decision-making under the Commonwealth Fisheries Harvest Strategy Policy (HSP) with clear targets and limits for depletion and fishing mortality of target stocks;
- the Commonwealth Bycatch Policy;
- the application of an Environmental Risk Assessment approach for managing non-target species and habitats; and
- an evolving Environmental Risk Management process.

11.3 Despite these improvements, it has been argued that the Act and fisheries management legislation such as the FMA duplicate regulation and that this creates uncertainty and financial costs for industry.[4] In particular, the fishing industry contended that despite meeting the sustainability objectives of the FMA, the industry is being further assessed under the Act, which they argue effectively creates a 'double jeopardy' situation.[5] Similar issues were raised by State/Territory fishery management agencies.

11.4 The Senate Committee Report noted ongoing concern among fishery managers about conflict and overlap between the FMA and the Act. It recommended that the government review the interaction between the two Acts in relation to the conservation of fish species and the relevant assessment processes.[6] This Review has examined that proposition.

11.5 The HSP attempts to provide a degree of policy alignment between the criteria used to set catch levels under the FMA and those used to determine the protected status of threatened species under the Act. The value in reviewing the two to ensure that they operate in harmony is discussed later in this Chapter.

11.6 The concerns about regulatory duplication have legitimacy, as do the concerns about the rate at which fishery and ecosystem management is improving. It would be highly desirable to reduce regulatory duplication and costs for industry, but in the absence of clear evidence that outcomes are improving it is difficult to make a case for this.

11.7 The Review agrees with the Humane Society International's proposal that 'if there is to be any streamlining and harmonising of FMA and EPBC [Act] provisions then it should not be at the expense of the EPBC standards'.[7] The Australian Conservation Foundation suggested that:

> the EPBC Act should be given primacy over the FMA where the ecological sustainability assessment of fisheries is concerned. It is critical that the conservation of marine life and their ecological needs are given consideration before the needs of production and exploitation […].[8]

1 See e.g. Mr Jeff Moore, Commonwealth Fisheries Association, Committee Hansard, 9 December 2008, cited in The Senate Standing Committee on Environment, Communications and the Arts, *The operation of the Environment Protection and Biodiversity Conservation Act 1999: First report* (2009) para.[3.50] http://www.aph.gov.au/senate/committee/eca_ctte/epbc_act (Senate Committee Report).

2 See e.g. Submission 201: Government of Western Australia.

3 See e.g. Interim Report Comment 96: Humane Society International.

4 Interim Report Comment 51: Commonwealth Fisheries Association.

5 Submission 79: Commonwealth Fisheries Association.

6 Senate Committee Report para.[4.33].

7 Interim Report Comment 96: Humane Society International, p.9.

8 Interim Report Comment 69: Australian Conservation Foundation, p.3.

11.8 The Review commends fishery management agencies and industry for their progressive shift from the target species-based approach that was the focus of fisheries management ten years ago to an ecological sustainability approach and notes that Commonwealth fisheries operate on a cost recovery basis.

11.9 Investment of resources in the fisheries assessment process has realised significant gains in the sustainable management of fisheries, but more needs to be done to ensure that Australian fisheries remain viable in the long term. This is particularly important in light of the mounting pressures on fisheries including the yet unquantifiable impact of climate change on fisheries and the marine ecosystem, public concern about the sustainability of commercial fish species, the interaction of fisheries with threatened marine species and ecological communities and the decline in some fish stocks in Australia and around the world.

11.10 The Environment Minister should continue to have a strong role in promoting continuous environmental improvement in fisheries management through assessment of whether management arrangements are ecologically sustainable, including in terms of fishing impacts on bycatch, protected species and ecosystems generally.

11.11 The Act and its administration can be improved so as to reduce inefficiencies and further harmonise its interaction with the FMA. An obvious place to start would be to rationalise the differing fishery assessment provisions under the Act into one streamlined process. This is discussed further in the next section.

11.12 Dr Keith Sainsbury offered some suggestions for improving and harmonising the Act and the FMA:

- clearer performance measures for fisheries' ecologically sustainable development (ESD) through a revision of the current EPBC guidelines to include outcomes as well as principles;
- greater use of the HSP for target species (with reference points based on the biology of the species);
- greater use of risk based ecological assessment/ecological risk management for non-target species; and
- development of default reporting templates that address the ESD performance measures, HSP and risk-based tools necessary for both the FMA and the Act.[9]

11.13 While revised guidelines for assessing fisheries under the Act were introduced in 2007 to streamline reporting requirements, DEWHA should continue to work with fishing agencies to ensure efficiencies are realised in the fishery assessment process.

11.14 Streamlining and reducing regulatory burden between the Act and other Commonwealth legislation is discussed further in Chapter 18.

Fishery Assessments under the EPBC Act

11.15 Fishery assessments under the Act have made a major contribution to shifting fisheries management towards ecologically sustainable practices. Dr Sainsbury suggested:

> The EPBC Strategic Assessments have been valuable in focusing attention on ESD performance, including non-target species and habitats, and without doubt their existence has accelerated progress.[10]

11.16 By contrast, the Australian Conservation Foundation has said that:

> no Australian fishery has failed to pass a fishery assessment under the EPBC Act and the associated guidelines. This highlights the low-level benchmarks used by the EPBC Act fisheries assessments and the need for substantive reform to ensure their credibility and integrity in the public arena.[11]

The Review notes that accreditation of a Joint Authority Northern Shark Fishery was revoked in 2008 because conditions of the accreditation were not being met.

11.17 The assessment process is designed to incorporate a flow of communication between fishery managers and DEWHA in order to facilitate the best outcome for a fishery. Each fishery is unique, and assessment is based on the merits of the combination of management measures in place and fishery specific issues. The accreditation process allows the government to continuously improve management arrangements.

9 Interim Report Comment 8: Dr Keith Sainsbury.
10 Interim Report Comment 8: Dr Keith Sainsbury, p.5.
11 Interim Report Comment 69: Australian Conservation Foundation, p.3.

11.18 Fishery assessments under the Act should continue to be conducted independently from the fishery management agencies. However, with the knowledge gained from several rounds of fishery assessments, improvements could be made to streamline and refine the assessment process without compromising environmental outcomes.

11.19 Currently, a fishery may require assessment under up to three different Parts of the Act, depending on whether the fishery is managed by the Commonwealth or a State/Territory, operates in Commonwealth waters, and/or wishes to get export approval. These are Part 10 (strategic assessments)[12], Part 13 (protected species in Commonwealth waters) and Part 13A (wildlife trade), each with their own separate requirements and criteria. While the requirements of these Parts are addressed in a single assessment process, the need to adhere to provisions spread over the Act makes the process overly complicated.

11.20 There is considerable overlap between the requirements of the Parts, even to the extent that in amending the List of Exempt Native Specimens under Part 13A the Environment Minister must rely primarily on the outcomes of any fishery assessment carried out for the purposes of Part 10.

11.21 Accreditation under Parts 10 and 13 both require the Minister to be satisfied that fishing will not have unacceptable or unsustainable impacts on a listed threatened species (a matter of national environmental significance); and the Part 13A requirement for a fishery to be managed in an ecologically sustainable way effectively mimics the requirements of Part 10.

11.22 One option for simplifying these arrangements and streamlining reporting requirements would be to incorporate the fishery provisions into a single assessment framework covering both Commonwealth and State/Territory-managed fisheries. This would be consistent with the regional landscape approaches to strategic assessments recommended in Chapter 3. The aim would be to ensure that all elements currently in the Act relating to fisheries are consolidated into a single Part of the Act and addressed in a single assessment against a single set of criteria.

11.23 A second option would be to conduct a higher order strategic assessment and accredit the overarching legislative and policy framework under which management arrangements for individual fisheries are made, subject to EPBC Act objects being met. This approach would accredit a 'system' rather than fishery-specific management arrangements. This accreditation model could be adopted if the Environment Minister was confident that equivalent outcomes would be delivered under accredited fishery management regimes and that reporting would be sufficient to provide ongoing assurance. This would be consistent with the approval bilateral agreement approach to terrestrial issues.

11.24 A number of States raised the potential to establish bilateral agreements that accredit State fishery assessment processes as a cost-effective way of capitalising on the strength of fisheries management and reducing legislative duplication.[13] Whether or not this approach is pursued, it would be essential that fishery assessments continue to be conducted by an agency other than a fishery management agency so that the 'independent audit' nature of the assessment is preserved. Moreover, it appears that no State or Territory has an equivalent formal environmental assessment framework that could assess the performance of fisheries. One of the strengths of the assessment process is the creative tension resulting from the Environment Minister making the final decision after a cooperative assessment process.

11.25 A third option could be based on incorporating fishery assessments into the marine bioregional plans. If the Environment Minister is satisfied that a bioregional plan will deliver acceptable environmental outcomes, then operations in accordance with the plan would not require further approval under the Act.

11.26 At the completion of the assessment process, the Environment Minister usually makes a decision relating to the export of products from a fishery. The decision may be to:

- prohibit export, where the fishery has unacceptable environmental impacts;
- declare a Wildlife Trade Operation, where the fishery is consistent with the objects in the Act but there are uncertainties and further action is required; or
- exempt product from the export provisions of the Act where the fishery is being managed in an ecologically sustainable way.

12 The current Part 10 strategic assessments under the Act are only conducted for Commonwealth-managed fisheries with a plan of management under the *Fisheries Management Act 1991* (Cth).

13 See e.g. Interim Report Comment 81: Fisheries Victoria.

11.27 The Act stipulates a maximum period of three years for an accredited fishery Wildlife Trade Operation. Exempt fisheries are re-assessed every five years (based on a policy decision, not a legislative one). To streamline provisions further, greater flexibility is needed to set timeframes for re-assessment. However, a maximum period between assessments should be stipulated to ensure compliance. Options to reduce the administrative processes involved in regular assessments of well managed fisheries should be pursued, including the flexibility of granting an exemption with less regular reviews or simplifying the way in which declarations are made.

11.28 The current administrative arrangements associated with the wildlife trade provisions of the Act (Part 13A) are cumbersome. Chapter 12 proposes some reforms to these arrangements. Simplification of the administrative arrangements for fisheries should be consistent with these reforms.

Recommendation 40

The Review recommends that the Act be amended so that the fishery provisions under Parts 10, 13 and 13A are streamlined into a single strategic assessment framework for Commonwealth and State and Territory-managed fisheries to deliver a single assessment and approval process.

Fishery Assessments and Seafood Labelling

11.29 The Commonwealth Fisheries Association (CFA) believes that more benefits could be derived from the strategic assessment process.[14] They suggested that:

> an environmental "tick", similar to the heart foundation "tick" for heart friendly products, could be introduced for fish species which have received EPBC Act accreditation. This would be a cheap but effective form of promotion.[15]

11.30 The potential benefits to the Australian seafood industry from using 'sustainability accreditations' as a market-access tool for domestic and overseas trading partners warrants further consideration, particularly given the industry costs involved in the continuous improvement of fishing practices.

11.31 The Guidelines against which commercial fisheries are assessed under the Act were not designed to serve as a labelling program.

11.32 The Australian Conservation Foundation has suggested that the Act's fisheries assessment process should be reformed using the Australian Sustainable Seafood Assessment Criteria process as a guide to an approach and standards.[16] These criteria were developed by the Australian Conservation Foundation and supporting scientists. They aim to allow consumers to make informed choices about what they are buying and enable them to support responsible food production.

11.33 While the Australian Conservation Foundation's interest in supporting sustainably managed fisheries is welcomed, the Environment Minister's role is to administer the Act as an environmental auditor to ensure that, over time, fisheries are both productive and ecologically sustainable. It would not be appropriate to amend the Act's fishery assessments to address restaurant and consumer needs on sustainable seafood choices.

11.34 The Review notes that the Queensland Department of Primary Industries and Fisheries runs a program using the Act's fishery accreditation process as a marketing tool for their commercial fisheries. Queensland vessels operating in an accredited fishery now display a sticker advertising that the fishery has been assessed as ecologically sustainable. Fishery assessment reports and accreditations are publicly available so provided accreditation is not misrepresented, States and Territories could adopt similar programs to assist in promoting their fisheries.

11.35 The Australian Government should explore further the feasibility of capitalising on the work undertaken by fishery managers to ensure that their fisheries are sustainable and accredited under the Act.

11.36 Seafood Services Australia intends to combine the 'Australian-Made' branding and the Act's accreditation process to produce a new branding 'Australian Seafood (environmentally responsible)'. They believe that the Act's accreditation process is sufficient to demonstrate 'environmental responsibility'.

14 Interim Report Comment 51: Commonwealth Fisheries Association.
15 Interim Report Comment 51: Commonwealth Fisheries Association, p.5.
16 Interim Report Comment 69: Australian Conservation Foundation.

Domestic and Imported Seafood

11.37 Part 13A of the Act regulates the import of live plants and animals that (if they became established in Australia) could adversely affect native species or their habitats.

11.38 Seafood imported into Australia (both live and dead) must comply with Australia's customs and quarantine laws. Once all quarantine requirements have been addressed under the *Quarantine Act 1908* (Cth), food must also comply with Australia's imported food laws in the *Imported Food Control Act 1992* (Cth) (Imported Food Control Act). However, the Imported Food Control Act primarily ensures that imported food complies with Australian public health and food standards, not necessarily environmental standards and regulations.

11.39 Of concern to the CFA is the absence of any reference within the EPBC Act to imported seafood and its requirement to meet the same sustainability standards as Australian fisheries. While the CFA applauds the principle of sustainable management of our fisheries resources, they have suggested that Australia's processes are:

> significantly undermined where Government continues to allow importation of similar (or, in some cases, the same) fisheries products from countries which have not been required to meet the same stringent environmental standards as those applied to Australian industry.[17]

11.40 The CFA argued that imported product taken from fisheries with lower environmental standards and regulations, and significantly lower costs as a result, can be freely sold in Australian markets in direct competition with Australian fisheries products.[18]

11.41 In order to evaluate the operations of the Imported Food Control Act and administration under the EPBC Act, it is necessary to consider the impact of market forces as well as the national and international regulatory framework. Internationally, the World Trade Organisation (WTO) Codex Alimentarius Commission (Codex) and special arrangements with New Zealand place limits on Australian regulations for imported food safety. The National Competition Policy Review of the Imported Food Control Act stated that:

> Given that Australia exports more than four times as much food as it imports, it is clearly in Australia's interests to ensure that food safety policies and procedures are not used as a device to protect industries from import competition. The SPS Agreement covers such matters as the application of food safety and animal and plant health regulations for animals, plants and food-related products moving in international trade. The Agreement also serves to maintain the sovereign right of any government to provide the level of health protection deemed appropriate, as long as these measures are based on a scientific risk assessment process. It requires that sanitary and phytosanitary measures be applied only to ensure food safety and animal and plant health. The Agreement clarifies factors that should be considered in assessing the risks and requires that measures to ensure food safety and to protect the health of animals and plants should be based (as far as possible) on the analysis and assessment of objective and accurate scientific data.[19]

11.42 The Codex Committee on Import and Export and Food Inspection and Certification Systems has developed Principles for Food Import and Export Inspection and Certification.[20] Australia is under an obligation to recognise other countries' inspection/certification systems if those systems deliver outcomes that are equivalent to those delivered by Australian systems. Under the current legislation, the Australian Quarantine and Inspection Service (AQIS) can enter into certification agreements with specified foreign government agencies allowing those agencies to certify that the subject goods met Australian food standards at the time of their production.

11.43 Auditing of supplier countries' export control systems is routine for many importing countries, and Australia's export controls are, for example, regularly assessed by the European Commission, the United States Department of Agriculture and the United States Food and Drug Administration. However, the present certification system appears to have an over-reliance on the accompanying certificate of analysis, rather than relying on the equivalence of outcomes certified by the overseas authority.

17 Interim Report Comment 51: Commonwealth Fisheries Association, p.6.

18 Interim Report Comment 51: Commonwealth Fisheries Association.

19 Carolyn Tanner, Tony Beaver, Andy Carroll and Elizabeth Flynn, *Imported Food: National Competition Policy Review of the Imported Food Control Act 1992* (1998), pp.22-23.

20 Carolyn Tanner, Tony Beaver, Andy Carroll and Elizabeth Flynn, *Imported Food: National Competition Policy Review of the Imported Food Control Act 1992* (1998).

11.44 In the interest of encouraging sustainable practices in countries exporting to Australia, there is merit in investigating equivalent arrangements that promote environmental standards. If countries are now requiring 'sustainability' certification for imports, Australia should revise its position and replicate similar certification processes. Because of the trade-related nature of this issue, the Department of Foreign Affairs and Trade is probably the appropriate agency to consider these arrangements further. However any examination of trade arrangements would need to consider Australia's international biodiversity obligations under the *World Trade Organisation Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement).

11.45 It should also be noted that the Australian Government has agreed in principle to develop a single biosecurity system for human health, plant and animal health and the environment. The Review has recommended that the live import functions currently under the Act (excluding species listed on the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)) should shift to the new Biosecurity Authority, subject to environmental biosecurity being given equal priority alongside human health and primary production. This is discussed further in Chapter 12 and Appendix 6.

IUCN Listing Criteria and Marine Fish

11.46 The categories of threatened species are defined in the EPBC Regulations in terms of their risk of extinction. The approach to identifying species at risk under the Act is broadly based on the International Union for Conservation of Nature (IUCN) Red List criteria, which were initially developed for terrestrial organisms. The IUCN Red List Categories and Criteria have several specific aims including:

- to provide a system that can be applied consistently by different people;
- to improve objectivity by providing users with clear guidance on how to evaluate different factors which affect the risk of extinction;
- to provide a system which will facilitate comparisons across widely different taxa; and
- to give people using threatened species lists a better understanding of how individual species were classified.[21]

11.47 The IUCN criteria are designed to provide a flexible platform that can be applied to any taxon, and to evaluate threat levels in populations in different geographic regions.

11.48 However, it has been suggested that the IUCN criteria may not be appropriate for many harvested fish species[22] as they may over-estimate the risk of extinction:

> […] the fisheries experience does demonstrate that reduction of fish populations by 50- 80% does not result in the extinction probabilities that match those intended in the EPBC Act for vulnerable, endangered or critically endangered.[23]

11.49 A similar concern about extinction risk criteria for marine fish species has been raised through CITES. This resulted in modifications to the CITES criteria for fish species.[24]

11.50 The fishing industry criticised application of the threatened species listing criteria to marine fish species, primarily because the criteria were developed with a focus on terrestrial species. The major criticism of the fishing industry and fishery managers is that most nominations for marine species listing are a consequence of one of the prescribed criteria in regulation 7.01 of the EPBC Regulations, namely, '[the species] has undergone, is suspected to have undergone or likely to undergo in the immediate future: a [level of severity] reduction in numbers.'

11.51 It is suggested that commercial fish species can automatically be nominated based on this criterion, because of the inherent nature of fishing and population size reduction thresholds.[25] Those arguing in favour of developing specific criteria for marine fish claim it would provide confidence that nominations would be assessed objectively on a scientifically rigorous and biologically relevant basis.

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21 IUCN Red List *2001 Categories and Criteria (version 3.1)* http://www.iucnredlist.org/static/categories_criteria_3_1#preamble.

22 See e.g. Interim Report Comment 51: Commonwealth Fisheries Association; and Submission 201: Government of Western Australia.

23 Interim Report Comment 8: Dr Keith Sainsbury, p.3.

24 CITES, *Conference of the Parties Resolution 9.25, Criteria for Amendment of Appendices I and II. Fort Lauderdale, USA* (1994) http://www.cites.org/eng/res/all/09/E09-24R14.pdf.

25 Submission 79: Commonwealth Fisheries Association.

11.52 It should be noted that IUCN guidelines stipulate a time frame within which declines should be assessed.[26] For instance, the criteria state that a species should be considered critically endangered if decline in population abundance is greater than 80% within ten years (for a short lived species). Such rapid declines should be considered precipitous, even in harvested populations, and the IUCN criteria encourage more cautious management. Thus, reductions of 50-80% result in listing only if the decline is rapid and unexpected.

11.53 It is important to note that several provisions in the IUCN criteria accommodate the special circumstances of commercial fishing. Specifically, a species should be considered critically endangered if there is:

> 1. An observed, estimated, inferred or suspected population size reduction of ≥ 90% over the last 10 years or three generations, whichever is the longer, where the causes of the reduction are clearly reversible AND understood AND ceased, based on […] actual or potential levels of exploitation […].
>
> 2. An observed, estimated, inferred or suspected population size reduction of ≥ 80% over the last 10 years or three generations, whichever is the longer, where the reduction or its causes may not have ceased OR may not be understood OR may not be reversible […].[27]

11.54 The cautious approach embodied in the IUCN criteria is a valuable antidote to the culture of technical control and overconfidence that pervades many management contexts, where 'surprises' result in significant environmental costs, despite the best intentions of experienced managers. For example, the Western Rock Lobster Fishery has previously been considered one of the best managed fisheries in the world, the first to be accredited by the Marine Stewardship Council. Despite the relatively rigorous standards of scientific management, recruitment in the lobster population between 2006 and 2009 has been disturbingly low.[28]

11.55 National jurisdictions are free to interpret the IUCN criteria appropriately and to adapt them to local circumstances. If a credible scientific case can be made for an interpretation that deviates from a strict interpretation of the IUCN criteria (or any other criteria), and it serves the public interest and either enhances or does not compromise conservation objectives, the listing process should tolerate it.

11.56 Dr Keith Sainsbury suggested that thresholds other than risk of extinction may be worth considering when deciding whether to list fish species, for example, issues related to the maintenance of population processes, ecological process and function.[29]

11.57 There are numerous fundamental ecological, social and economic reasons to avoid severe depletion of any population not only to minimise impacts on the population itself, but also impacts on ecosystem function. Hence, when considering nominations for listing, particularly threatened fish nominations, the thresholds should be adequate to protect ecological function. The Threatened Species Scientific Committee (TSSC) should take this into account in providing advice for consideration by the Environment Minister when deciding whether to list a harvested population.

11.58 If, as is recommended in Chapter 2, a single national list of threatened species and communities is to be developed, a consistent national approach to interpretation of the IUCN categories of threat will have to be developed during harmonisation of the various jurisdictions' listing processes.

11.59 The Commonwealth is the only jurisdiction that has published guidelines on how listing criteria must be met in order to satisfy each listing category under the Act. This includes thresholds for each listing criterion for both species and ecological communities, the latter of which does not have IUCN listing criteria.

11.60 DEWHA and the TSSC have a process underway to refine the listing criteria thresholds and other guidelines to account for the future listing of marine ecological communities (none are listed under the Act to date) and for a wider variety of aquatic ecological communities.

11.61 Section 180 of the Act contemplates regulations prescribing criteria for the listing of threatened native species of marine fish, but these have not been created. To date, the listing of native species of marine fish has been progressed using the general listing guidelines.

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26 The definitions are available at the IUCN website: http://www.iucnredlist.org/static/categories_criteria_3_1#preamble.

27 IUCN Red List *2001 Categories and Criteria (version 3.1)* http://www.iucnredlist.org/static/categories_criteria_3_1#preamble.

28 Western Australian Department of Fisheries, *Summary of information provided to RLIAC for the 2009-10 West Coast Rock Lobster Managed Fishery season* (2009) http://www.rocklobsterwa.com/docs/DOF-RLSummary.pdf.

29 Interim Report Comment 8: Dr Keith Sainsbury.

11.62 The definitions underpinning the IUCN criteria play an important role in interpreting how to apply the criteria for each species.[30] As a result, the criteria are capable of being flexibly applied and can take account of different biological characteristics of the species under consideration.

11.63 The TSSC's publicly available guidelines for interpreting indicative listing thresholds make it clear that the biology and ecology of individual species should be taken into account in applying the thresholds. These guidelines should continue to be publicly available to provide clarity to nominators, industry and other stakeholders.

11.64 Expert sub-groups with specific expertise in certain fields, such as marine fish biology, may need to be established to provide advice to the TSSC. To this end, the Review notes that the TSSC recently convened a workshop on issues associated with listing threatened fish species. While separate criteria for listing marine fish species are not warranted, the TSSC guidelines could be expanded to provide interpretative guidance incorporating ecological function for threatened fish species listings.

Interaction between the Commonwealth Fisheries Harvest Strategy Policy and the Threatened Species Listing Process

11.65 The HSP provides a framework for the development of harvest strategies for key commercial species taken in Commonwealth fisheries. The HSP sets boundaries for managing harvest levels by setting agreed target and limit reference points and clear decision rules for each species. Target reference points (BTARG) express the desired status of stocks while limit reference points (BLIM) express situations where the risk to the stock is unacceptably high.

11.66 The HSP attempts to provide a degree of policy alignment between the criteria used to set catch levels under the FMA and those used to determine the protected status of threatened species under the EPBC Act. For example, where a stock falls below BLIM, the species is eligible for consideration for listing in the conservation dependent category of the EPBC Act threatened species list, provided that an adequate stock rebuilding strategy is in place.

11.67 If the rebuilding strategy proves unsuccessful in meeting the interim targets and the biomass falls further below BLIM, (where there is an increased risk of irreversible impacts) then the species would likely be considered for listing under a higher threatened species category under the EPBC Act (that is, vulnerable, endangered or critically endangered). There is therefore value in integrating the HSP with the fish listing process to reduce uncertainty and regulatory burden while still delivering sustainable environmental outcomes.

11.68 To ensure a complementary link between the HSP and the Act, the biological reference points established under the HSP framework need to reflect the biology of the species, rather than standard default settings such as reduction of population. For example, the current default limit reference point of 20% of the un-fished biomass (BLIM) as outlined in the HSP may not be appropriate for all fish species, particularly long-lived species. The impacts of depletion of the species on the ecological function of the ecosystem should also be considered when setting scientifically-based biological reference points.

11.69 Many target species in Commonwealth fisheries have sufficient data to establish robust stock models. As a result, these target species are not set at the default target or limit reference point under the HSP but at a more reliable point determined by modelling. For those target species which remain on the default reference points, there is a need to move towards biometric models to accurately determine stock levels as data continues to grow.

11.70 While the HSP is only applicable to the subset of key commercial species with robust stock assessments, the States and Territories should adopt similar policies to ensure stocks are managed in an ecologically sustainable manner. This would also assist in streamlining the fishery assessments.

30 IUCN Red List *2001 Categories and Criteria (version 3.1)* http://www.iucnredlist.org/static/categories_criteria_3_1#preamble.

Recommendation 41

The Review recommends that the Australian Government:

(1) integrate the Commonwealth Fisheries Harvest Strategy Policy (HSP) framework with the threatened species listing process for marine fish; and

(2) ensure the HSP biological reference points reflect the biology of the species and its role in ecosystem function rather than standard default settings such as reduction of population.

Interaction between the Threatened Species Listing Process and Fishery Assessments

11.71 It has been argued that under current practice a fishery's management arrangements can be accredited as sustainable under the fishery assessment provisions, but species taken in the fishery may then have to undergo a different process for listing threatened species.[31] It was suggested that fishery assessments and nominations for listing marine fish species be integrated fully under the EPBC Act.

11.72 The fishery assessment and species listing processes under the Act have separate legislative requirements. DEWHA undertakes the fishery assessments to determine whether the management arrangements for a fishery operation are appropriate to ensure the long-term ecological sustainability of the fishery as a whole. For listing purposes, the TSSC assesses the conservation status of a particular species.

11.73 If a species is listed as threatened, a fishery may still secure export approval through the fishery assessment process, provided the management arrangements are adequate to manage that species in accordance with its listing status.

11.74 Listing decisions should continue to be separate from fishery assessment decisions, but the two processes should be mutually informative.

11.75 However, there is scope to improve the administrative arrangements and information sharing between the listing process and the fishery assessments. The alignment of the listing process and the HSP should adequately capture most cases where a species in an accredited fishery falls below a biological limit reference point. In this case, the species would be eligible for listing as conservation dependent in accordance with a rebuilding strategy. Should that strategy fail, then the species would automatically be listed as vulnerable, endangered or critically endangered.[32]

11.76 For species not captured by the HSP, the listing process and the fishery assessments should continue to operate separately, yet still inform each other. The separate listing process provides a safety net for species conservation and is good public policy. A listed species provides a driver for environmental improvement and should continue to inform management arrangements assessed through the fishery assessment process.

Integrated Marine Management and Bioregional Planning

11.77 Introduction of *Australia's Oceans Policy* in 1998 was a major development aimed at implementing an integrated and ecosystems-based oceans planning and management system for all Australian marine jurisdictions.

11.78 The marine environment is affected by land-based, coastal and offshore activity. However, the jurisdictional allocation of responsibilities under the Australian Constitution and the *Offshore Constitutional Settlement* do not readily facilitate effective management of the marine environment. Indeed, they make effective implementation of a national oceans policy very complex and difficult.[33] The Australian Conservation Foundation suggested that Australia's sectoral and jurisdiction-based oceans planning and management framework precludes a successful integration of ecosystem-based and multiple-use marine management system:

> Australia's oceans start at the shoreline and extend to the edge of the EEZ, but are artificially divided by jurisdictional boundaries and non-integrated environmental laws that are failing to protect the marine ecosystems.[34]

31 Australian Fisheries Management Authority, *Submission to the Senate Inquiry into the operation of the EPBC Act* (2009) http://www.aph.gov.au/senate/committee/eca_ctte/epbc_act/submissions/sub59.pdf.

32 Interim Report Comment 105: Threatened Species Scientific Committee.

33 TFG International, *Review of the Implementation of Oceans Policy – Final Report* (2002).

34 Interim Report Comment 69: Australian Conservation Foundation, p.1.

11.79 Commonwealth and State/Territory co-operation is essential for an effective oceans policy, particularly in the coastal zone – anything less than a national approach would significantly limit long-term effectiveness. Indeed, the 2002 review of the Oceans Policy widely acknowledged this as being the biggest impediment to achieving the broad objectives of the Policy.[35]

11.80 The Australian Conservation Foundation and National Environmental Law Association proposed an Australian Oceans Act, which could enable the coordination of existing legislation within a nationally consistent legislative framework to provide certainty, equity and security for all stakeholders.[36] This proposal reflects 'Out of the Blue', a discussion paper prepared by the Australian Conservation Foundation and National Environmental Law Association on an Act for Australia's oceans. The paper concludes that regional marine planning will highlight the natural values and limits of an area, but will not provide a framework for integrated ecosystem-based regional marine planning.[37]

11.81 While a specific Oceans Act may allow for a harmonised approach to improve provisions for marine protection, it would be inadvisable to remove the marine provisions from the EPBC Act before development of a marine bioregional planning program and clarification of assessment and information requirements. Further, the main challenges to the marine environment relate to the relationship between coastal land uses, near shore developments and the wider ocean ecosystems. To be effective, an Oceans Act would need to extend regulatory control into the coastal zone – this would create significant duplication with State and Territory legislation and the operation of the EPBC Act, and could create regulatory inefficiency.

11.82 Nonetheless, past problems associated with coastal planning and management need to be identified and the Commonwealth's role in regulating development in coastal zones determined. This should be in the context of impacts of coastal development on matters of NES (including the Commonwealth marine environment). This debate could be influenced by the recommendations from the current House of Representatives Inquiry into climate change and environmental impacts on coastal communities.[38]

11.83 Management at the landscape or regional ecosystem level is needed to address cumulative impacts and cross sectoral (that is, multiple use) impacts of development, to provide strategic regional planning for development, and to provide mechanisms for dispute resolution. Integrated planning and management of coastal development is an area that requires attention, but is a task requiring cooperation between the Australian Government and the States and Territories. National approaches are discussed further in Chapter 2 and regional approaches in Chapter 3.

Marine Protected Areas (MPAs)

11.84 In general, MPAs have been proposed throughout the world as an effective way to protect marine ecosystems. The CFA suggests that:

> MPA's have the potential to make a substantial contribution to conserving Australia's marine ecology and biodiversity. They also have the potential to complement efforts by Government and industry to promote a more ecologically sustainable and commercially viable fishing industry.[39]

11.85 The CFA cautions that development and implementation of MPAs needs to be undertaken in an informed and consultative manner, suggesting the following broad principles:

- MPA objectives need to be clearly developed, enunciated and justified;
- impacts on the fishing industry as well as allied industries and communities need to be identified and minimised;
- fishing activity should be permitted in MPAs where it does not jeopardise the key ecological values that the MPA seeks to preserve or restore;
- industry and communities should be adequately and fairly compensated for those impacts that are unavoidable;

35 TFG International, *Review of the Implementation of Oceans Policy – Final Report* (2002).

36 Interim Report Comment 69: Australian Conservation Foundation.

37 Australian Conservation Foundation, *Out of the Blue: a discussion paper on an Act for Australia's oceans* (2006) http://www.acfonline.org.au/default.asp?section_id=168&c=102659.

38 House of Representatives Standing Committee on Climate Change, Water, Environment and the Arts, *Inquiry into Climate Change and Environmental Impacts on Coastal Communities*(2008) http://www.aph.gov.au/House/committee/ccwea/coastalzone/.

39 Interim Report Comment 51: Commonwealth Fisheries Association, p.3.

- agencies responsible should be resourced adequately to undertake the full range of activities associated with the management of MPAs; and
- the operations of the MPA network should be subject to periodic review, evaluation and re-assessment.[40]

11.86 Some of these principles are appropriate for ensuring a robust and complementary process for establishing MPAs and a number of them already exist or are being developed.

11.87 The system of MPAs is designed to protect representative areas of important ecosystems. Hence the creation of new MPAs can lead to the displacement of activities (such as commercial and recreational fishers) from areas previously used. Certain activities (including specific fishing methods) should be excluded where those activities represent an unacceptable risk to the protected area, as informed by a comprehensive and transparent risk assessment process. DEWHA has advised that a Displaced Activities Policy for the Commonwealth marine jurisdiction is currently being developed.

11.88 DEWHA has also advised that the current administrative arrangements require consultation with affected interests and aim to avoid impacts on activities such as fishing operations as much as possible. The principle that the process is fair and transparent should be maintained.

11.89 The protected area provisions of the Act have a terrestrial focus that does not always meet the needs of the marine environment. A review of the current provisions or the development of specific marine protected areas provisions in the Act could provide greater clarity and more effective protection of the marine environment. However, as a general principle the Act and the Regulations should be constructed to apply to all protected areas. Proliferation of special provisions only serves to make the legislation overly complex. Protected areas are discussed further in Chapter 9.

11.90 There is often a lack of continuity between State and Territory and Commonwealth regulations for fishing in marine parks.[41] DEWHA has advised that Regulations 12.18 (use of firearms, nets and other devices) and 12.35 (fishing other than commercial fishing) were recently amended, taking effect in May 2009. These amendments go some way in removing the discontinuity by allowing transition from State or Territory waters to Commonwealth waters. In particular, the amendments provide the flexibility required for efficient management of recreational fishing.

11.91 The Director of National Parks can now make a determination relating to methods and equipment for taking fish so that the regulation of recreational fishing in a particular Commonwealth reserve or conservation zone can correspond with relevant regulations in adjacent State or Territory jurisdictions. The ability to make these declarations allows the Director the flexibility to provide for efficient arrangements for recreational fishing while protecting against unacceptable impacts on biodiversity in Commonwealth reserves and conservation zones.

11.92 More generally, regulations for managing MPAs in State and/or Territory and Commonwealth waters should be complementary to the extent possible to ensure that both the commercial and recreational fishing industry are not subject to undue regulatory burden or confusion.

11.93 While harmonising State and/or Territory and Commonwealth regulations in MPAs is good in principle, there will be some circumstances where harmonisation may not be practical; for example where the Commonwealth has more stringent requirements than the State or Territory, such as in the Great Barrier Reef Marine Park. However, when similar threats are identified and management objectives of an MPA can be met by the management arrangements in State/Territory waters, the Regulations should allow the management plan rules to be adapted to ensure consistency.

40 Interim Report Comment 51: Commonwealth Fisheries Association.

41 See e.g. Submission 112: Australian Recreational and Sportfishing Industry Confederation (Recfish Australia).

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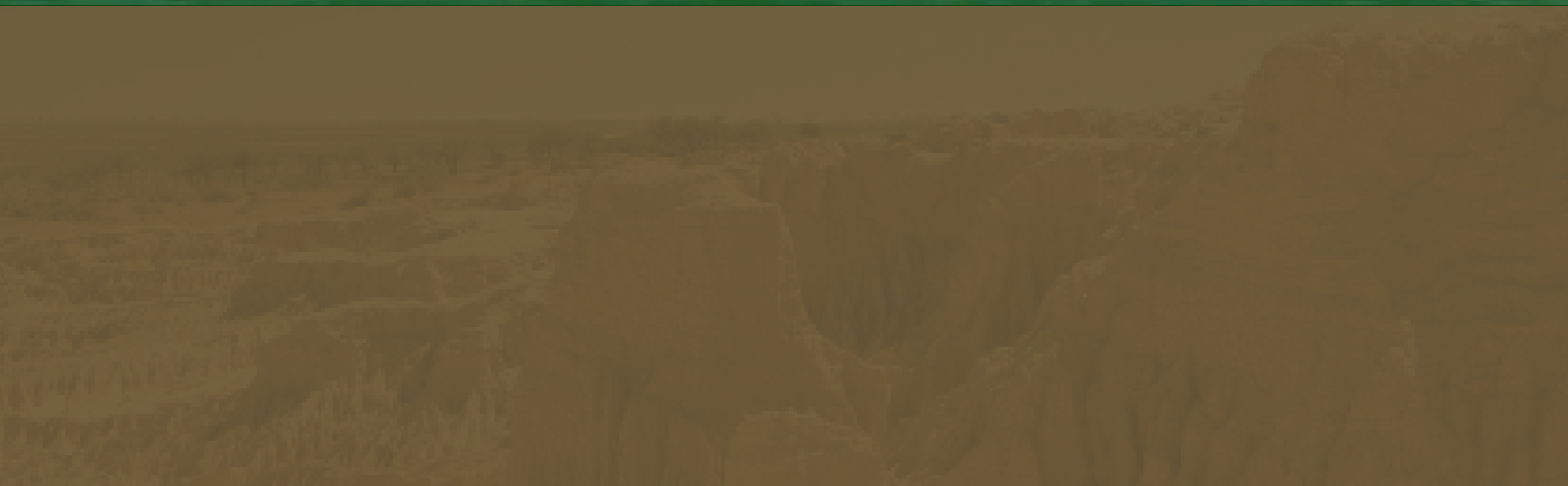
Chapter Twelve WILDLIFE TRADE



Chapter 12: Wildlife Trade

12.1 In order to provide the Act with a clearer sense of direction, Chapter 1 proposes that the *Australian Environment Act* have just one primary object – that is, to protect the environment through the conservation of ecological integrity and nationally important biological diversity and heritage. Subsequent provisions elaborate on how this primary object is to be achieved.

12.2 The part of the Act dealing with international movement of wildlife specimens (Part 13A) currently has its own objects:

- to ensure that Australia complies with its international obligations under the *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) and the *Convention on Biological Diversity* (Biodiversity Convention);
- to protect wildlife that may be adversely affected by trade;
- to promote the conservation of biodiversity in Australia and other countries;
- to ensure that any commercial utilisation of Australian native wildlife for the purpose of export is managed in an ecologically sustainable way;
- to promote the humane treatment of wildlife;
- to ensure ethical conduct during any research associated with the utilisation of wildlife; and
- to ensure that the precautionary principle is taken into account in making decisions relating to the utilisation of wildlife.[1]

12.3 These objects were modified from the objects of the former *Wildlife Protection (Regulation of Exports and Imports) Act 1982* (Cth) that was repealed and integrated into the Act in 2001.[2]

12.4 The Part 13A objects largely duplicate both the current objects of the Act and the objects recommended for the *Australian Environment Act*. For example, the first object of Part 13A reflects object (e) in s.3(1) of the Act 'to assist in the co-operative implementation of Australia's international environmental responsibilities'. The last object of Part 13A similarly reflects a provision recommended for inclusion in the *Australian Environment Act*; 'the primary object is to be achieved by applying the principles of ecologically sustainable development as enunciated in the Act.'

12.5 Chapter 1 also recommends streamlining and simplifying the Act. Hence the Part 13A objects should, where practical, be removed and incorporated into the objects of the *Australian Environment Act*.

12.6 A substantive provision could still remain under Part 13A to retain the trade-specific objects, for example, 'to promote the humane treatment of wildlife and ensure ethical conduct.' This provision should be restricted to live import and export of animals. State and Territory and other Australian Government agencies have lead responsibilities and more appropriate powers for animal welfare generally. Animal welfare is discussed further below.

Biosecurity and Live Imports

12.7 In February 2008, the Australian Minister for Agriculture, Fisheries and Forestry announced an independent review of Australia's quarantine and biosecurity arrangements. The review was undertaken by an independent panel of experts chaired by Mr Roger Beale AO (Beale Review).

12.8 The Beale Review report – *One Biosecurity* – was released in December 2008. A key recommendation of this review is the development of a single biosecurity system for human health, plant and animal health and the environment that involves all the appropriate players pre-, at and post-border.

1 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.303BA.

2 *Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act 2001* (Cth).

12.9 In response to the development of a single biosecurity system, the Environment Minister requested input from this Review on integrating environmental biosecurity functions under the new Biosecurity Act. The Review's advice was provided to the Environment Minister and reported in the Interim Report.[3] The Review's response to the Environment Minister's request is at Appendix 6.

12.10 In summary, the live import functions currently under the Act (excluding species covered by CITES) should be accommodated in the new biosecurity legislation. This change would be conditional on environmental biosecurity being given equal priority and consideration in assessments and decision-making alongside human health, primary production (economic considerations) and social considerations. Further, the National Biosecurity Commission, which will prioritise and undertake Biosecurity Import Risk Analyses, would have to include environmental criteria in its assessment of consequences to ensure that environmental outcomes are not compromised.

12.11 The National Biosecurity Authority will support the Commission, undertake Biosecurity Import Risk Analyses and make decisions on import proposals. The Biosecurity Authority should engage and utilise relevant environmental expertise to support its risk assessment processes and decisions to ensure that environmental outcomes are not compromised.

12.12 If the live import provisions are not moved to the new Biosecurity Authority, a number of improvements should be made to the provisions of the Act and the administration of the live import list and live import permits.

12.13 All species allowed to be imported live into Australia are included on the list of specimens suitable for live import (the live import list), which is established under the Act. Species not identified on this list cannot be legally imported into Australia. Any person or institution can apply to the Environment Minister to amend the live import list to include a species for either commercial or non-commercial purposes. To amend the live import list to include a species, an environmental risk assessment report is prepared, in practice by the applicant/proponent, to assess the potential impact that import of the species may have on the Australian environment.

12.14 Currently, a specimen that may pose an unacceptable level of risk to the Australian environment if imported into Australia is required to go through a full environmental risk assessment. Full assessment requires significant resources. A streamlined process for screening of applications, with the option of a 'quick no' to listing proposals, should be pursued. Species that are considered to have an unacceptable level of risk could be refused for import without having to undergo a full risk assessment. This would minimise costs to applicants whose proposals are unlikely to be approved.

12.15 This 'quick no' decision would only be available in limited circumstances where strict criteria are met. These criteria should include the following:

- application and information requirements are not met;
- risks are well known (for example, similar applications have been rejected or species are listed as noxious in States or Territories); or
- no cost effective or practical mitigation measures are available.

12.16 A 'quick yes' decision could also be considered. This would allow import approval without full assessment in limited circumstances where there is:

- a specified and approved purpose, such as educational display or research;
- short term import/re-export; or
- where potential risks are well understood and mitigation is practical and manageable.

Quarantine and other biosecurity measures would need to be met separately.

3 *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 – Interim Report* (2009) pp.276-281.

12.17 There is also a need to review the live import list in regards to variants or hybrids. The Invasive Animals Cooperative Research Centre noted that the current situation is that 'animals can be freely imported if they are five generations away from the original wild animal'.[4] The Invasive Species Council suggested that:

> The import of genetically distinct varieties of existing permitted species is a major source of pest and weed risk for Australia as new variants may have new features that significantly increase their pest risk or turn existing non-pest species into invasive risks.[5]

12.18 Once a species is assessed in terms of environmental risks and included on the live import list, new variants have generally been granted entry. As suggested by the Invasive Species Council, a more systematic approach is needed for assessing proposed new imports to respond to the potential invasive risks of new variants of currently listed species.

12.19 The live import list should be reviewed to make it clear that specimens listed do not include variants or hybrids unless otherwise specified.

12.20 The Australian Quarantine and Inspection Service currently administer the procedures for the import of new species of live plants under EPBC Act provisions. Under the new biosecurity legislation and with environmental representation on the Commission, the environmental risk of importing live plants (including reproductive material such as viable seeds) should be given equal weight to human health, social and primary production risks.

12.21 Invasive species are discussed further in Chapter 6.

Streamlining Export Provisions

12.22 The export of native wildlife and wildlife products is also regulated under Part 13A of the Act. The export provisions of Part 13A are complex and, in some cases, inconsistently applied.

12.23 Specimens on the List of Exempt Native Specimens (LENS) are not regulated and so are exempt from the requirement for export permits.[6] The current arrangement of using the LENS as a means of exempting managed wildlife industries from the individual permit requirements of the Act is administratively inefficient. A more efficient system is needed.

12.24 The current permit arrangements are neither effective nor efficient in regulating overall harvest pressure. They should be amended so that there is a clear process for assessing the harvest arrangements for wildlife and approving export without having to issue permits for each wildlife consignment. This would significantly reduce the regulatory burden without reducing environmental safeguards.

12.25 Under the Act, commercial export of regulated wildlife may occur only where the specimens have been derived from an approved source. The Act specifies an approved source as being a captive breeding program, an artificial propagation program, a cultivation program, an aquaculture program, a wildlife trade operation, or a wildlife management plan.

12.26 The harvest management arrangements of an approved source must be assessed for sustainability and non-detriment to the traded species before export can be approved. Similar approved sources are also required for export of species listed on Appendices II and III of CITES. For terrestrial wildlife not on the LENS, permits have always been required. This is the result of administrative practice.

12.27 In comparison, fishery management arrangements are also assessed for ecological sustainability under the Act. Product from fisheries assessed as having appropriate management arrangements in place may be added to the LENS and exempted from export permit requirements. This is also an administrative arrangement rather than a requirement of the Act.

4 Submission 46: Invasive Animals Cooperative Research Centre, p.1.

5 Submission 166: Invasive Species Council (Australia), p.24.

6 The Environment Minister's ability to establish the LENS is provided for under s.303DB of the EPBC Act.

12.28 While submissions generally supported the permitting process under Part 13A of the Act,[7] the current approach is complicated. For example, there are too many approved source categories, resulting in administrative complexity and uncertainty for industry and government alike. Categories should be streamlined and the focus shifted to accrediting whole industries rather than individual operators. This would allow the option of export without the need for individual permits or adding species to the LENS. This approach would need to be complemented by appropriate record keeping by participants and monitoring by DEWHA to ensure that harvesting is sustainable and humane and in accordance with the approved plan. The permit system would still be available and required for one-off exports and where auditing and monitoring indicated stricter controls were necessary.

12.29 The Act provides for accredited wildlife trade management plans.[8] The intention behind establishing these plans was to enable the Australian Government to accredit the States and Territories to manage the wildlife trade process. The provision is not being used because it requires the State or Territory to control the export of all of the accredited species (thereby increasing the regulatory burden on the State or Territory). Given that the States and Territories do not control the border points it is almost impossible for the management plans to be used effectively. The Act should be amended so that, in keeping with the concept of bilateral approval agreements (discussed in Chapter 2), there is an effective mechanism for the Commonwealth to accredit State and Territory management arrangements.

12.30 In regards to Australia's international obligations, CITES has established a worldwide system of controls on international trade in threatened wildlife and wildlife products by stipulating that government permits are required for such trade. Therefore, while an accreditation mechanism may streamline the process in applying for CITES permits, an exporter would still require a permit when exporting a CITES species.

Animal Welfare

12.31 One of the objects of Part 13A of the Act is to promote the humane treatment of wildlife. This provision was specifically included in the Act because of concerns that animal welfare was not adequately addressed in previous legislation.

12.32 The Act stipulates that it is an offence if a person exports or imports a live CITES or regulated native specimen in a manner that subjects the animal to cruel treatment.[9] The EPBC Regulations specify requirements for shipments of live animal specimens and for the person receiving the specimens to be suitably equipped to manage, house appropriately and care for them.[10]

12.33 Legislative responsibility for animal welfare within Australia rests primarily with State and Territory governments. The States and Territories are better placed to apply, monitor and ensure compliance with welfare conditions. Hence the object of promoting humane treatment of wildlife should be clarified. It should apply only to international shipment of specimens being imported or exported under the Act. It should not apply to the ongoing care of individual species and their progeny, neither in Australia nor overseas.

12.34 It should be noted that the Department of Agriculture, Fisheries and Forestry (DAFF)-led Australian Animal Welfare Strategy has been developed to provide both national and international communities with an appreciation of animal welfare arrangements in Australia.[11] This Strategy also outlines the future direction of, and improvements to, animal welfare in Australia and highlights the need for domestic and international benchmarking of animal welfare outcomes.

12.35 The development and implementation of the Strategy is a positive development and builds on existing animal welfare arrangements in Australia. The Australasian Regional Association of Zoological Parks and Aquaria (ARAZPA) suggested that:

> The coordination and co-management of these standards by Federal and state/territory governments will, for the zoo industry, ensure that our animal welfare obligations are properly documented, transparent and consistent.[12]

7 See e.g. Submission 42: Australasian Regional Association of Zoological Parks and Aquaria.
8 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.303FP.
9 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.303GP.
10 *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) 9A.05.
11 Further information on the *Australian Animal Welfare Strategy* is available at: http://www.daff.gov.au/animal-plant-health/welfare/aaws.
12 Interim Report Comment 84: Australasian Regional Association of Zoological Parks and Aquaria, p.3.

12.36 Animal welfare matters should primarily rest with DAFF, recognising that currently State and Territory agencies have responsibility for enforcing welfare regulations.

12.37 A whole of government approach to animal welfare assessments should be adopted, and animal welfare systems and the responsibilities of other agencies at the Commonwealth and State and Territory level identified. DEWHA should focus on conservation aspects and the specific obligations under CITES.

CITES-Listed Species

12.38 As explained earlier, CITES is an international agreement between governments. Its aim is to ensure that international trade in specimens of wild animals and plants does not threaten their survival. The species covered by CITES are listed in three Appendices, according to the degree of protection they need. This, in turn, determines the controls that apply to international wildlife trade.

12.39 Part 13A of the Act regulates the export and import of species included in the Appendices to CITES. The issue is not whether the CITES permitting process should continue, but whether the process can be improved and still meet international obligations.

12.40 Currently the non-commercial export or import of a specimen may be approved for exhibition if, among other requirements, the live animal does not belong to a CITES Appendix I species. The import and export of CITES Appendix I listed species to zoos or wildlife parks must be for the purpose of conservation breeding. Section 303FF of the Act states that a conservation breeding permit cannot be issued unless the species is going into an approved co-operative conservation program. It is the view of ARAZPA that the Act:

> should be amended to include a separate non-commercial import category specifically related to zoological parks and aquaria. Such a category would better recognise that zoos are involved in a range of positive conservation activities beyond just exhibition or breeding.[13]

12.41 However, the Humane Society International argued that:

> public consultation is required in the assessment of Co-operative Conservation Programs for CITES Appendix I species. The Department does not always have the animal welfare and conservation expertise that is specific to the exotic species proposed for importation, breeding and life in captivity and would benefit from wider consultation with other stakeholders and independent experts.[14]

12.42 The Act's prohibition on importation of CITES Appendix I animals for exhibition purposes is stricter than CITES requirements. This policy should be reviewed unless it can be shown to have conservation benefits. Future proposals for importation of CITES Appendix I animals should, however, be subject to consultation with relevant stakeholders and expert advice.

Stricter Domestic Measures

12.43 CITES allows member parties to adopt a stronger position on listed species than is required under the Convention. The Environment Minister is able to make declarations for 'stricter domestic measures' relating to the trade of CITES species. Such declarations have been made under the Act for cetaceans (whales, porpoises, and dolphins) and the African Elephant.

12.44 Stricter domestic measures mean that species or products are regulated more strictly within Australia than the CITES classification requires. For example, a declaration may have the effect of treating a specimen listed on Appendix II of CITES as if it were covered by Appendix I, thereby placing further restrictions on trade.

12.45 The application of these stricter domestic measures can create impediments to what, under 'standard' CITES conditions, would be considered acceptable and non-detrimental trade. ARAZPA argues that many overseas zoos are reluctant to exchange animals with Australian zoos because of the extra information, workload and bureaucracy in the Australian permitting system. This includes the prescriptive requirements for the approval of a cooperative conservation plan for Appendix I species.[15] ARAZPA suggested that 'Australia should apply the normal CITES standards and requirements unless a clear and specific conservation outcome can be achieved through a stricter domestic measure'.[16]

13 Interim Report Comment 84: Australasian Regional Association of Zoological Parks and Aquaria, p.4.
14 Submission 182: Humane Society International, p.35.
15 Interim Report Comment 84: Australasian Regional Association of Zoological Parks and Aquaria.
16 Interim Report Comment 84: Australasian Regional Association of Zoological Parks and Aquaria, p.2.

12.46 Stricter domestic measures are a legitimate way to place further restrictions on those species Australia believes require extra protection. Nonetheless, there is value in refining the Commonwealth's domestic policy to focus on the outcomes it wishes to achieve. Consistent policy should be applied across species groups listed on CITES and stricter domestic measures reviewed to ensure that they can be justified. The conservation benefits and intent of applying stricter domestic measures for CITES species should be examined in a fair and transparent manner.

Transparency and Accountability

12.47 The International Fund for Animal Welfare suggests that a Wildlife Trade Task Force (consisting of government officials, NGO representatives and other key stakeholders) should be established to ensure that Australia complies with its obligations under the CITES.[17]

12.48 Australia has been one of the most active participants in CITES and, on the whole, the mechanisms under the Act are working well. The establishment of a Taskforce would add an extra layer of regulation and potential delays for industry. The establishment of such a Taskforce in parallel with DEWHA's current arrangements for administering CITES obligations under Part 13A would not be cost effective.

12.49 CITES parties comply with the Convention's obligations through a variety of mechanisms. Each party or member country is obliged to designate Management Authorities. The Management Authority for CITES in Australia is the Environment Minister, who is responsible for:

- authorising and issuing permits and certificates of approval;
- communicating information to other parties and the secretariat; and
- reporting on compliance matters and contributing to CITES Annual Reports.

12.50 In addition to DEWHA officers administering CITES permits, Australian Customs and Border Security officers enforce CITES regulations under the Act at the border. Governments are also required to submit reports, including trade records, to the CITES Secretariat in Switzerland. To ensure effective enforcement at the international level, the CITES Secretariat acts as a clearing house for the exchange of information and liaison between the parties and with other authorities and organisations. Australia has not been subject to any corrective measures or sanctions under CITES.

12.51 The Invasive Animals Cooperative Research Centre and State and Territory representatives suggested that a suitably qualified independent person be appointed to prepare and assess the environmental risks associated with importation, rather than the proponent.[18] They claim that the proponent preparing risk assessment documentation could be perceived to be inherently biased and flawed.

12.52 Requirements for proponents preparing assessment materials for processes under the Act are not limited to wildlife trade. For example, it is also an issue for referrals and impact assessments (discussed further in Chapter 7). The issue has been raised in some submissions that suggested the approach potentially impacts on the quality and impartiality of materials before decision-makers generally. It is important that the processes ensure transparency and accountability under the Act. This includes opportunities for the public to rigorously examine data and evaluate reasoning, which should contribute to enhancing the quality of information before decision-makers. Transparency, accountability and public participation are discussed further in Chapter 14.

17 Submission 179: International Fund for Animal Welfare.

18 Interim Report Comment 2: Invasive Animals Cooperative Research Centre.

Possession of Exotic Animals

12.53 The Act regulates international trade to comply with international obligations, to ensure trade does not lead to over exploitation of threatened wildlife internationally and to protect the Australian environment from illegally imported species.

12.54 Under the Act, persons or organisations that possess exotic specimens may be required to prove the lawful import of a specimen.[19] Bird keepers are generally critical of the 'reverse onus of proof' provisions and expressed concerns about proving the lawful import of birds and progeny and the ambiguity of record keeping requirements. They argue that some have never held any paperwork or import papers for their birds since some species were imported long before there were any legal restrictions on importation. This has been a long running vexed issue and parts of the debate could be construed as serving the interests of those who may have benefited from illegal importation of birds and other wildlife.

12.55 For bird keepers, this is a particular concern because of the six year period during which they were required to keep their own records (between the cessation of the National Exotic Bird Registration Scheme that operated from 1996 to 2002 and the introduction of the Exotic Bird Record Keeping Scheme in December 2007). Some maintain that there was no clear communication to bird keepers on the need to continue record keeping when the old regulations were changed.[20] DEWHA does not agree with this proposition.

12.56 The 'reverse onus of proof' provision is an acceptable and common approach for enforcement activities. However, there seems little to be gained from continuing the dispute over the legality or otherwise of species listed on the 2007 *Inventory of Exotic (non-native) Bird Species known to be in Australia*. The 2007 Inventory could be used to develop an approach to ensure that persons and organisations clearly understand which exotic species they may keep in Australia. Such an approach could apply more broadly than just exotic birds. For example, it could be applied to the assessment and control of noxious ornamental fish known to be in Australia.

12.57 A definitive nationally agreed list of exotic species for controlled private keeping in Australia should be created. This list should initially be limited to vertebrates known to be held in Australia that do not appear on the live import list or State and Territory controlled noxious species lists. The list should:

- help manage potential pest and disease risks by more easily identifying illegally imported specimens (that is, those not on the national list);
- set a baseline to prevent species not previously known to be in Australia from being kept or imported;
- assist the States and Territories to monitor the movement and keeping of exotic specimens; and
- provide more certainty for traders, breeders and the public on what specimens may be kept in Australia, the requirements associated with keeping them and the keepers' obligations.

12.58 Exotic specimens subject to controlled private keeping should only be allowed if securely contained (e.g. in a cage, aviary or aquarium) and it should be an offence to release such specimens into the environment. Unlawful import and keeping would still be an offence.

12.59 Establishment of a national list of exotic species for controlled private keeping should provide improved guidance for compliance activities. A permit would still be required for any new species imported into Australia, unless it was listed on Part 1 of the Live Import List. Any species not on the national list could be seized and disposed of immediately if the owner could not prove lawful import.

19 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.303GN.

20 See e.g. Submission 178: United Bird Societies of South Australia.

Recommendation 42

The Review recommends that the wildlife trade provisions in the Act be amended to:

(1) remove duplication between the objects of Part 13A and the objects and subsequent provisions recommended by the Review for the *Australian Environment Act*;

(2) shift focus from the individual permitting system to assessment and accreditation of management arrangements for whole sectors, complemented by appropriate record keeping and monitoring activities – an accredited operation would be permitted to export without the need for permits (excluding specimens listed on CITES); and

(3) streamline the different categories of approved sources for trading wildlife and wildlife products.

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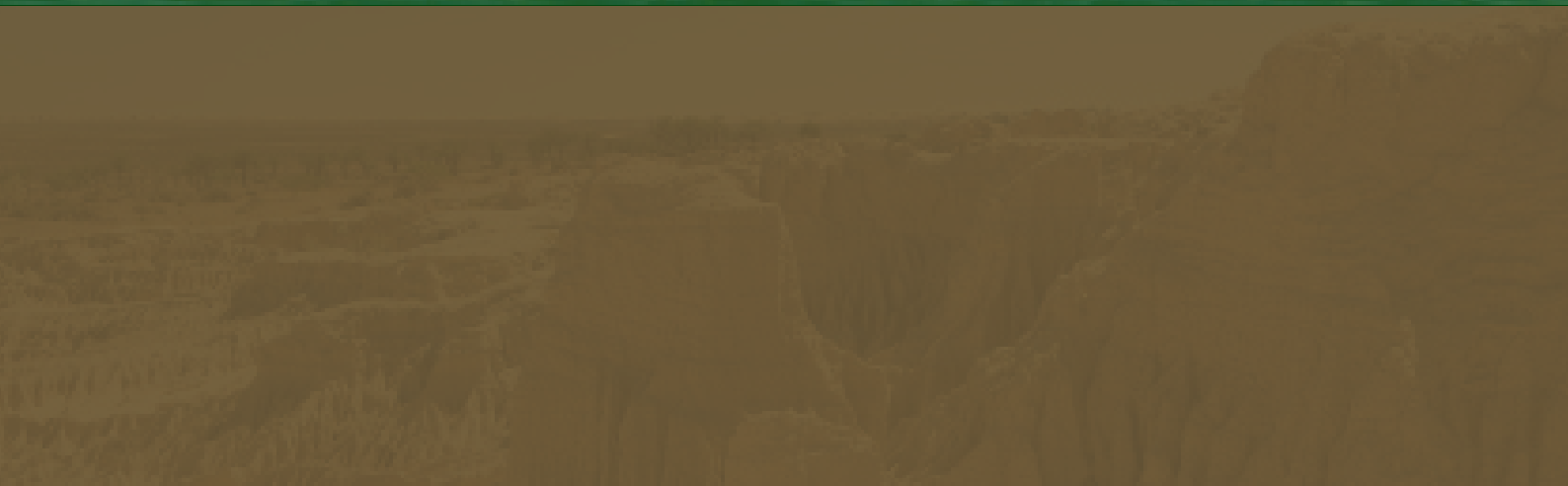
Chapter Thirteen DECISION-MAKING UNDER THE ACT



Chapter 13: Decision-Making under the Act

13.1 Submissions from individuals, environmental non-government organisations and members of industry raised concerns with the current decision-making processes under the Act.[1] Many of the criticisms related to the extent of Ministerial discretion and the transparency of the decision-making process. Several submissions called for the scope of Ministerial discretion to be narrowed because of a perception that granting the Minister a broad degree of discretion could lead to misuse.

Ministerial Discretion in Decision-Making

13.2 Decisions under the Act must reconcile complex and often competing environmental, social and economic considerations. A broad discretion allows decision-makers to weigh these considerations appropriately depending on the circumstances of a particular case. Although able to exercise discretion, the Minister is accountable for decisions, either through judicial review in the Federal Court or public opinion.

13.3 While it is important to maintain discretion in decision-making, retaining a broad discretion without some guiding criteria could continue to fuel the perception that the Minister makes decisions without appropriately balancing environmental, social and economic considerations. The provision of these criteria would also reduce uncertainty among users of the Act. A recommendation to prescribe decision-making criteria under the Act is outlined later in this Chapter.

Transparency of Processes

13.4 A key concern raised in public submissions was a perceived lack of transparency in decision-making processes under the Act.[2] In particular, concerns were raised about how public comments are considered when decisions are made, the time limits for making public comments and whether the Minister adequately considers public comments when making decisions.

13.5 The Act should be amended to address these concerns better and to improve transparency of decision-making. These amendments are outlined in Chapter 14.

The Minister as Primary Decision-Maker

13.6 As the primary decision-maker under the Act,[3] key decisions made by the Environment Minister include:

- decisions relating to the assessment and approval of controlled actions;
- decisions relating to approval of strategic assessments and management plans;
- appointing members of advisory bodies established under the Act;
- listing threatened species and ecological communities;
- listing National Heritage and Commonwealth Heritage places; and
- approval of wildlife exports and associated management arrangements.

13.7 The Director of National Parks, a corporation established under the Act, also has powers to make decisions relating to Commonwealth Reserves and conservation zones.

13.8 Several public comments called for a party other than the Minister to have decision-making powers under the Act. Some argued that the Threatened Species Scientific Committee (TSSC) and the Australian Heritage Council (AHC), as experts in the field, should be the statutory decision-makers for decisions to list threatened species and ecological communities, and heritage places respectively, instead of the Minister.

1 See e.g. Interim Report Comment 96: Humane Society International; Submission 49: Association of Mining and Exploration Companies; Submission 65: BP Australia; and Submission 92: Friends of Grasslands.

2 See e.g. Submission 105: Noosa Integrated Catchment Association; Submission 172: Victorian Department of Sustainability and the Environment, p.9; Submission 193: Australian Human Rights Commission; and Submission 176: Property Council of Australia.

3 By virtue of the Administrative Arrangements Orders made by the Governor-General.

13.9 The Minister should remain the primary decision-maker under the Act for several reasons. As noted in Chapters 1, 5 and 8, decision-making involves the challenging task of balancing competing environmental, social and economic considerations. It is appropriate that these decisions continue to be made by an elected representative of the people. In the vast majority of cases, it is expected that the Minister will follow expert advice. Retaining the Minister as the primary decision-maker under the Act also means that the Minister can be held publicly accountable for those decisions and it creates a context that motivates experts to ensure their reasoning is careful, well supported and convincing.

13.10 However, the process through which the Minister makes decisions can be improved and made more transparent and hence more accountable. Several improvements to the transparency of processes are discussed in Chapters 5, 8 and 14. Other recommendations to improve the decision-making process and the quality of decisions made are outlined below.

Principles and Criteria for Decision-Makers

13.11 While there are some matters that the Minister must take into account (such as social and economic matters when making an approval decision under s.136), no consistent principles or criteria apply to all decisions made under the Act. This Chapter recommends that decision-makers under the Act be subject to general principles and criteria where appropriate.

Consideration of the Ecologically Sustainable Development (ESD) Principles

The Precautionary Principle

13.12 Use of the precautionary principle requires decision-makers to take a risk-based approach to decision-making. Decision-makers will rarely have all the information necessary to determine the precise short- and long-term impacts of a decision. Decisions, however, must still be made in these situations. The precautionary principle:

> provides a framework for governments to set preventative policies where existing science is incomplete or where no consensus exists regarding a particular threat.[4]

13.13 Some submissions specifically raised the issue of how and when the precautionary principle is to be applied when making decisions. Section 391 prescribes the decisions in which the precautionary principle must be considered.

13.14 Five principles of ESD are enunciated in the Act:

(a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;

(b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;

(c) the principle of inter-generational equity – that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;

(d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making; and

(e) improved valuation, pricing and incentive mechanisms should be promoted.[5]

13.15 It is unclear from the Explanatory Memorandum to the Act as to why the precautionary principle was the only principle of ESD to be raised to the status of a mandatory consideration in making particular decisions. It is likely that at least part of the reason was that the precautionary principle was one of the best defined and most discussed of the principles of ESD at an international level.[6]

4 David Hunter, James Salzman and Durwood Zaelke, *International Environmental Law and Policy* (Second ed, 2002) p.406.

5 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.3A.

6 See e.g. Phillippe Sands, *Principles of International Environmental Law* (Second ed, 2003) pp.266-267 for references on the use and interpretation of the precautionary principle.

13.16 One key question concerns the formulation of the precautionary principle in s.391 of the Act: 'that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage'.

13.17 This formulation, which derives substantially from Principle 15 of the Rio Declaration[7] – an international instrument not binding on Australia – was embraced in the *Intergovernmental Agreement on the Environment in 1992* and has been widely adopted in Australian legislation. However, as noted by Associate Professor Jacqueline Peel, it is a "relatively 'weak'" formulation, which directs 'only what shall not be done, rather than specifying the positive actions to be taken'.[8]

13.18 An issue that warrants further attention is whether the Act should be amended to redefine the precautionary principle to make it clearer, stronger and easier to apply in practice. Ideally such a redefinition would be worked out nationally so that there would be a uniform definition of the precautionary principle throughout Australia.

13.19 Another key question concerns when and how the precautionary principle is operationalised.

13.20 Specialist environmental courts and tribunals in Australia have made considerable steps towards operationalising the precautionary principle – and continue to use the principle as the basis for some of their decision-making. Local councils, inquiry panels and State governments have also increasingly begun to apply the precautionary principle.

13.21 The leading Australian reference point is the decision of Preston CJ of the New South Wales Land and Environment Court in *Telstra v Hornsby Shire Council*.[9] Key aspects of this decision include:

> 'The application of the precautionary principle and the concomitant need to take precautionary measures is triggered by the satisfaction of two conditions precedent or thresholds: a threat of serious or irreversible damage and scientific uncertainty as to the environmental damage. These conditions or thresholds are cumulative. Once both of these conditions or thresholds are satisfied, a precautionary measure may be taken to avert the anticipated threat of environmental damage, but it should be proportionate.'[10]
>
> 'If each of the two conditions precedent or thresholds are satisfied – that is, there is a threat of serious or irreversible environmental damage and there is the requisite degree of scientific uncertainty – the precautionary principle will be activated. At this point, there is a shifting of an evidentiary burden of proof. A decision-maker must assume that the threat of serious or irreversible environmental damage is no longer uncertain but a reality. The burden of showing that this threat does not in fact exist or is negligible effectively refers to the proponent of the economic or other development plan, programme or project.'[11]
>
> 'The shifting of the evidentiary burden of proof operates in relation to only one input of the decision-making process – the question of environmental damage. If a proponent of a plan, programme or project fails to discharge the burden to prove that there is no threat of serious or irreversible environmental damage, this does not necessarily mean that the plan, programme or project must be refused. It simply means that, in making the final decision, the decision maker must assume that there will be serious or irreversible damage'.[12]

13.22 This judgment is by far the most important recent judicial statement of the precautionary principle in Australia and, in the absence of further legal developments, should be applied to by the Minister and DEWHA when applying the precautionary principle.

The Other Principles of ESD

13.23 It should be remembered that, while the precautionary principle is crucial to decision-making on environmental matters, where there is rarely scientific certainty, the precautionary principle is not the only principle of ESD. If the principles of ESD are the guiding principles for the Act, they should be considered as a whole. Decision-makers should therefore be required to consider and act consistently with *all* of the principles of ESD defined in the Act.

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7 *Rio Declaration on Environment and Development*, done at Rio de Janeiro on 14 June 1992.

8 Jacqueline Peel, *The Precautionary Principle in Practice: Environmental Decision-Making and Scientific Uncertainty* (2005), p.17.

9 For discussion of this judgment, see Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (2007), pp.155-58; Jacqueline Peel, 'When (Scientific) Rationality Rules: (Mis)Application of the Precautionary Principle in Australian Mobile Phone Tower Cases' (2007) 19 *Journal of Environmental Law* 103.

10 *Telstra v Hornsby Shire Council* [2006] NSWLEC 133 [128].

11 *Telstra v Hornsby Shire Council* [2006] NSWLEC 133 [150].

12 *Telstra v Hornsby Shire Council* [2006] NSWLEC 133 [154].

General Consideration of ESD

13.24 If the ESD principles are the cornerstone of the Act, there is no reason why considerations of the principles should be limited to a prescribed list of decisions – the Minister should be required to consider and act consistently with these principles except where these principles are not properly applicable.

13.25 However, one decision where it would not be appropriate to act consistently with the principles of ESD is the decision under s.75 of the Act as to whether an action is a controlled action. The current provision requires the Minister to consider all adverse impacts the action has, will have or is likely to have on the relevant protected matter and must not consider any beneficial impacts the action has or is likely to have on the protected matter.[13]

13.26 Requiring the Minister to act consistently with the principles of ESD when deciding whether an action is a controlled action could potentially result in significant changes to the matters considered by the Minister, as the Minister would then be required to consider beneficial social and economic factors when determining if the action requires approval. This could potentially allow the Minister to decide that an action that will have or is likely to have significant social and economic benefits, but that also has, will have, or is likely to have significant environmental costs, is not a controlled action. This would be inconsistent with the primary object of the Act, that is, the protection of the environment through the conservation of ecological integrity and nationally important biological diversity and heritage through the requirement to seek Ministerial approval for actions that have, will have, or are likely to have a significant impact on a protected matter.

13.27 In order to maintain the current safeguard contained in s.75 that limits consideration to adverse impacts on the protected matter, the key principles of ESD as enunciated in the Act should not be a mandatory consideration when making this decision.

13.28 There are likely to be other decisions where it would not be appropriate for the Minister to consider the principles of ESD. If the Australian Government accepts the primary recommendation in this Chapter, each type of decision made under the Act would need to be considered to determine if there are circumstances where it would be inappropriate for that decision to consider the principles of ESD.

13.29 In cases such as *Blue Wedges Inc v Minister for the Environment* [2008] FCA 399, para.65-89,*Lansen v Minister for the Environment* [2008] FCA 903 para.180-187 and *Lawyers for Forests v Minister for the Environment* [2009] FCA 330 para.29-44 the existing general provisions relating to ESD and the precautionary principle in sections ss.3A, 136 and 391 of the Act have been interpreted by the courts to amount to a fairly minimal obligation.

13.30 The Act should therefore be amended to elevate the ESD principles to a more substantive obligation, such that the Minister is required to act consistently with the principles of ESD when making decisions under the Act, except for the specified circumstances where these principles are inappropriate.

Obligations with which the Minister must act Consistently

13.31 Sections 137-140 relate to the requirements for decisions about matters of NES. These sections are – or at least should be – among the most important in the Act. However, these provisions currently do not provide substantive directions for decision-makers, for reasons discussed below.

Use of Double Negatives

13.32 In the current Act, ss.137 to 140 have been drafted with double negatives. For example, s.137 dealing with the 'Requirements for decisions about World Heritage' provides:

> In deciding whether or not to approve, for the purposes of section 12 or 15A, the taking of an action and what conditions to attach to such an approval, the Minister must not act inconsistently with:
>
> (a) Australia's obligations under the World Heritage Convention; or
>
> (b) the Australian World Heritage management principles; or
>
> (c) a plan that has been prepared for the management of a declared World Heritage property under section 316 or as described in section 321.

13 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.75(2).

13.33 The use of double negatives weakens the provision significantly. To be in breach of this obligation the Minister would have to make a decision that is blatantly inconsistent with the relevant international obligations and principles. Given the inherently ambiguous language used in most international conventions, it would be very difficult to prove a contravention of this provision.

13.34 The use of the double negative runs counter to the *Plain English Manual* of the Office of Parliamentary Counsel which has an injunction to avoid using them while noting 'that sometimes a double negative doesn't equal a positive'.[14]

13.35 As a starting point, ss.137-140 should be amended to create a positive duty to 'act consistently' with Australia's international obligations, relevant management principles or approved management plans

13.36 As well as being plain English, this wording may in certain circumstances require more of the Minister, as requiring the Minister to act consistently with an obligation, principle or plan demands greater observance of the relevant obligation than a requirement not to act inconsistently with that obligation. This elevated duty is appropriate as the Minister should be expected to act consistently with Australia's international obligations and to make every attempt to comply with a management plan that the Minister has previously approved.

An Illusory Stricture – Strengthening the Criteria for Decision-Makers

13.37 In addition to the use of double negatives in provisions relating to decision-making, a closer examination of the 'requirements' in ss.137-140 – particularly the numerous references to international conventions – reveals that, in large part, these provisions are so vague as to perhaps be unenforceable.

13.38 Part of this problem is attributable to the fact that international conventions are, of their very nature, usually vague if not platitudinous. An obligation to act consistently with them therefore can amount to little in practice. For example, the key obligation under Article 5 of the World Heritage Convention is 'to take appropriate legal, scientific, technical, administrative and financial measures necessary for the identification, protection, conservation, presentation and rehabilitation of this heritage'. It would only be in extreme cases that the Federal Court might find a breach of this Article.

13.39 The Act should be amended to require more so that the Minister acts consistently with:

- the principles of ESD;
- Australia's obligations under relevant international agreements[15];
- management principles prescribed under the regulations; and
- a plan prepared under the Act.

13.40 The existing decision-making criteria in ss.137-140 apply only to World Heritage, National Heritage, Ramsar wetlands, threatened species, endangered communities and migratory species. The Act contains no decision-making criteria for decisions relating to impacts on the other protected matters – namely, the Commonwealth marine environment, nuclear actions or actions involving the Commonwealth or Commonwealth land.

13.41 The decision-making criteria outlined in the recommendation below are intended to apply to all decisions made under the Act except for a limited number of specified exceptions. This could simplify the administration of the Act as decision-makers would need to refer to fewer sections in the Act when determining which matters must be considered when making decisions. The criteria should also affirm the fundamental importance of ESD to the administration of the Act by requiring the Minister to act consistently with the principles of ESD when making the vast majority of decisions under the Act. Requiring decision-makers to act consistently with all the principles of ESD would also remove any confusion about why the precautionary principle need only be applied when making certain decisions.

14 Office of Parliamentary Counsel, *Plain English Manual* [52] http://www.opc.gov.au/about/html_docs/pem/chap_3.htm at 31 August 2009.

15 These international agreements could be defined in a similar manner to the definition of 'relevant international agreements' under s.4 of the *Water Act 2007* (Cth) to include the Biodiversity Convention, World Heritage Convention, Ramsar Convention, Bonn Convention, CITES, Climate Change Convention, International Whaling Convention, Apia Convention, CAMBA, JAMBA, ROKAMBA and any other international convention to which Australia is a party that is relevant to the protection of the environment and prescribed by regulation for the purposes of this definition.

Ability for the Protected Matter to Respond to Current and Emerging Threats

13.42 Chapter 6 discusses how the Act can be amended to manage better emerging threats to biodiversity. Decisions made under the Act potentially have an important impact on the ability of, for example, a threatened species to adapt to current and emerging threats. The Minister should be required to consider the reasonably foreseeable impacts of the decision on the ability of the protected matter to respond to current and emerging threats.

Information in Decision-Making

13.43 The considerations discussed above should create a decision-making framework that meaningfully uses the guiding principles for the Act – the principles of ESD – and allows the Minister to consider the long-term ability for protected matters to adapt to current and emerging threats. However, requiring decision-makers to consider these factors means little if the information relied upon is inadequate.

Information Required by Decision-Makers

13.44 Much of the information relied on by the Minister when making a decision is supplied by the permit applicant, proponent or nominator. These parties should therefore be required to provide sufficient information for the Minister to be able to make an informed decision.

13.45 The Act should contain requirements relating to information provided, for example in referrals and nominations for listing. However, these requirements should not be overly prescriptive, as it would be almost impossible to specify the nature or length of documents that would be appropriate in every circumstance. For example, a few pages may provide sufficient information for one referral, but another referral may require a hundred pages of documentation to describe predicted impacts on protected matters adequately. Information requirements for species and ecological communities listing are discussed further in Chapter 5, and minimum information requirements for strategic assessments are discussed in Chapter 3.

13.46 The quality of information on which a decision is based could also be improved by expanding the role of advisory bodies such as the TSSC, Indigenous Advisory Committee (IAC) and AHC. The role of advisory bodies is discussed in detail in Chapter 20.

13.47 Currently the Act does not provide for a body to give routine expert opinions on actions referred under the Act. Chapter 20 discusses in detail a recommendation to establish an independent Environment Commissioner to, among other things, provide advice to the Minister for the purposes of decision-making for the environmental impact assessments and approvals processes under the Act.

Information Used in Decision-Making

13.48 Some submissions expressed the view that decisions made under the Act did not appropriately take into account available scientific information.

13.49 Without a requirement to publish reasons for decisions, it is difficult for a member of the public to determine whether the Minister has made the right decision on the information available, or whether the best information on the relevant matters was made available to the Minister to consider.

13.50 A recommendation to require publication of statements of reasons for decisions made under the Act is outlined in Chapter 14. This will go some way to addressing concerns about the information and reasoning underlying decisions.

13.51 Judicial review of decisions can also test the information used by the Minister when making a decision under the Act. For example, failure to take into account a relevant and important piece of scientific research could arguably amount to a failure to take into account a relevant consideration for the purposes of judicial review. In such cases, the Court may order the Minister to reconsider the decision to take into account relevant considerations.

13.52 Increasing the transparency of decision-making, in tandem with the accountability of decision-makers through the judicial review process, would contribute significantly to ensuring that the Minister uses the best available information and accords appropriate weighting to the information used in making decisions under the Act.

13.53 However, both of these mechanisms only indirectly regulate information considered by the Minister as they depend on interested parties making applications for judicial review or being actively engaged in the decision-making process. The Act should therefore include a provision that expressly requires the Minister to consider the best available information when making decisions under the Act.

13.54 This is similar to a provision in the *Water Act 2007* (Cth), which requires the Murray-Darling Basin Authority and the Minister to 'act on the basis of the best available scientific knowledge and socio-economic analysis', when exercising their powers and performing their functions relating to the development of the Basin Plan.[16]

13.55 Requiring the Minister to have regard to the best available information in making a decision does not create an obligation on the Minister to conduct an exhaustive search of all material available – this would be an unreasonable expectation. This obligation would require the Minister to consider the advice of statutory bodies constituted under the Act, documentation received from the proponent and through the public comment process, and relevant information from, for example, peer-reviewed scientific journals.

Uncertainty in Decision-Making

13.56 Uncertainty in the scientific research on impacts on biodiversity is well recognised,[17] even when that research is the best information available. There is no way of determining the precise impacts of a decision on a protected matter with absolute certainty, as species, ecological communities and ecosystems react to pressures in unpredictable ways. The levels of uncertainty can vary, depending on the information available about both the impacts of a particular kind of action and the protected matter concerned.

13.57 Application of the precautionary principle and consideration of inter-generational equity issues create an obligation on decision-makers to demonstrate caution when deciding whether to approve an action, particularly where there is a high degree of uncertainty as to the likely impacts of the action on a protected matter. Uncertainty about the extent of current and emerging threats to protected matters should be considered when making decisions about the type of recovery or management actions planned for the protected matter. Decision-makers should be required to consider the level of uncertainty in the information available.

16 *Water Act 2007* (Cth) s.21(4)(b). This section relates to the powers and functions performed by the Authority and the Minister in Part 2, Division 1 of the *Water Act 2007* (Cth). Other examples of legislation that uses the concept of 'best available information' include Schedules 5B and 7B of the EPBC Regulations, which set out National and Commonwealth Heritage Management Principles, respectively; and s.18(2)(a) of the *Food Standards Australia New Zealand Act 1991* (Cth), which requires Food Standards Australia New Zealand to have regard to the 'need for standards to be based on risk analysis using the best available scientific evidence' when developing, reviewing or varying food regulatory measures.

17 See e.g. Biodiversity and Climate Change Expert Advisory Group, *Australia's Biodiversity and Climate Change: a strategic assessment of the vulnerability of Australia's biodiversity to climate change – Technical Synthesis (2009) pp.33–41.*

Recommendation 43

The Review recommends that the Act be amended to prescribe mandatory criteria that must be considered when making decisions under the Act, which should include:

(1) a requirement that the Minister have regard to the best available information sufficient for making that decision;

(2) where appropriate, the decision must be consistent with –

  (a) the principles of ecologically sustainable development (ESD);

  (b) Australia's obligations under relevant international agreements;

  (c) management principles prescribed under the Regulations; and

  (d) a plan prepared under the Act; and

(3) a requirement that the Minister should consider, where relevant –

  (a) the ability of the protected matter to respond to current and emerging threats and the reasonably foreseeable impacts of the decision on that ability; and

  (b) the level of uncertainty in scientific information provided.

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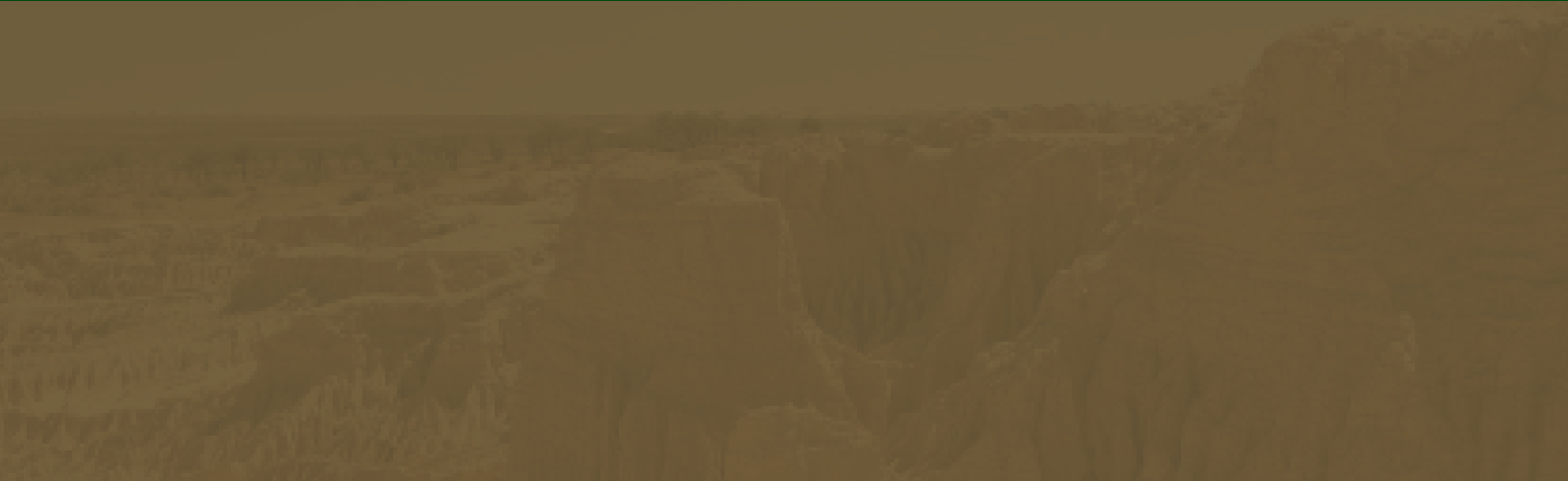
Chapter Fourteen

TRANSPARENCY OF PROCESSES UNDER THE ACT, INCLUDING PUBLIC PARTICIPATION



Chapter 14: Transparency of Processes under the Act, including Public Participation

14.1 In Chapter 1 the Review recommends that the Act be amended to include public participation as an object of the Act.

14.2 Increasing awareness of environmental issues has meant that the public is more interested in environmental decision-making and in having a say in protecting the environment. Environmental decisions generally affect the community in some way and therefore, including the public in the decision-making process makes good sense and good governance.

14.3 The level at which the public is and should be involved will vary depending on the particular issues and the likely level of community interest. Public participation may be sought to gather information, resolve differing opinions or competing objectives among stakeholders, identify satisfactory trade-offs, or enhance public understanding, trust or support for decisions. The modes of public participation include public comment periods, public meetings, stakeholder workshops, deliberative meetings and advisory committees, opportunities to appear before public inquiries, and publication of details underlying decisions.

14.4 A number of submissions expressed concern that the discretion associated with decision-making provides the opportunity for erroneous decisions to be made. In addition to the recommendations made in Chapter 13 about decision-making, improving transparency in the decision-making process will help address this concern.

14.5 A number of key processes under the Act require proponents to prepare assessment materials for consideration by decision-makers when they make decisions under the Act. Some submissions identified that having assessment materials prepared by proponents may affect the quality and impartiality of materials before decision-makers. This issue is addressed in Chapter 7, and is further assisted by processes for public participation under the Act which enhance the quality of information before decision-makers and the accountability and transparency of decision-making.

14.6 This Chapter considers opportunities to increase transparency under the Act through enhanced publication and dissemination of information and improved consultation processes.

Publication of Information

14.7 DEWHA currently publishes information about decisions and other matters arising under the Act. This practice is aimed at keeping the public informed of environmental decision-making processes and outcomes, and evolving policy directions.

14.8 Increasing the scope of documentation and information required to be published under the Act would:

- facilitate increased public awareness of and confidence in environmental decision-making processes; and
- facilitate more effective public participation in these processes.

14.9 Accordingly, the Act should be amended to require publication of advice provided by the Threatened Species Scientific Committee (TSSC) for consideration by the Minister when making decisions about listing of threatened species and ecological communities. This advice should be published at the time of the Minister's decision to allow the community to review the information underpinning the Minister's decision.

14.10 Similarly, advice provided by the Australian Heritage Council (AHC) for consideration by the Minister when making heritage listing decisions should also be published at the time of the Minister's decision.

14.11 Statements of reasons are a means of informing the community about materials considered by a decision-maker, the decision-maker's key findings in relation to that material and the reasons for the decision. Currently, statements of reasons are only required to be published following an application for review of the relevant decision under the *Administrative Decisions (Judicial Review) Act 1977* (Cth). The Australian Network of Environmental Defender's Offices (ANEDO) argued that the level of transparency and accountability

of decision-making would be enhanced by automatic publication of statements of reasons for all decisions made by the Minister or a delegate under the Act, at the time the decision is made.[1] Other submissions[2] also supported this recommendation.

14.12 The Act should be amended to require automatic publication of statements of reasons for all decisions made by the Minister or a delegate under the Act, at the time the decision is made.

14.13 While it is common practice for DEWHA to publish submissions and public comments made during a decision-making process, this is not a legislative requirement. The Act should be amended to require the publication of all submissions about controlled action, assessment approach and approval decisions, by the party in receipt of those submissions. This would increase the transparency and public awareness of the issues raised in submissions and considered by the decision-maker.

14.14 A range of reports and audits are undertaken by DEWHA under the Act. Expert reports are often commissioned for consideration by the Minister or delegate when making decisions under the Act. In the interests of transparency, these publications should also be made publicly available.

14.15 During assessment processes, the Minister regularly requests further information from proponents to inform decision-making. While time considerations mean it is not desirable to subject each piece of additional information to public scrutiny during the assessment process, the Review considers that all further information provided to support the decision-making process should be made publicly available at the time of the decision.

14.16 Environmental management plans are significant as they set out the mechanisms by which conditions of approvals will be met. Currently, proponents do not routinely publish these plans. Publication of these documents would enhance public understanding and awareness of management processes implemented under the Act. The Review proposes that there be a statutory requirement to make these plans publicly available.

14.17 Transparency and public awareness of the compliance regime under the Act should be increased. Some submissions argued that resourcing constraints have limited comprehensive compliance monitoring under the Act and that where compliance action has been taken there has been limited will to pursue the more severe penalties under the Act.[3] This raises concerns that the combination of a perceived low risk of being subject to compliance monitoring, and the minor consequences where non-compliance is found, is undermining the development of a strong compliance culture. This is discussed further in Chapter 16, which recommends enhancing public education and understanding of compliance activity undertaken under the Act by establishing and maintaining a public register of compliance, monitoring and audit activity.

14.18 Public comments revealed that sometimes information open to public comment is only available in hardcopies on display in limited locations (e.g. Local Council offices). The ANEDO's submission highlighted this issue and called for increased public access to documentation[4]. To the extent it is technologically feasible and appropriate, all documentation that is required to be published should be made available online by the proponent (with links from the DEWHA website), as well as in hardcopy. The proponent should bear the costs associated with this. Online publication of all documents would enhance the public's ability to participate, particularly in processes involving relatively short consultation periods.

14.19 The Review has identified some instances where publication of documents is required under the Act even though no additional public benefit appears to result. This is the case in s.95B(4), s.99(4) and s.104(4) where proponents are required to republish documentation even when no public comments have been received and the proponent has advised DEWHA that no amendment to the original documentation is required. These requirements cause proponents unnecessary expense for no public benefit and should be replaced by a requirement that DEWHA state on its website that no comments have been received and the proponent has advised no changes are to be made to the original documentation.

1 Interim Report Comment 94: The Australian Network of Environmental Defender's Offices, p.11.
2 See e.g. Interim Report Comment 88: WWF, p.8; and Submission 55: Conservation Council (ACT Region), p.5.
3 Submission 189: The Australian Network of Environmental Defender's Offices, p.80; Submission 181: WWF, p.32.
4 Submission 189: The Australian Network of Environmental Defender's Offices, p.31.

Recommendation 44

The Review recommends that in order to increase public participation and transparency of processes under the Act, that it be amended to:

(1) require publication of a greater range of information, including but not limited to the following -

(a) advice provided to the Environment Minister by the Threatened Species Scientific Committee for consideration in making a listing decision under the Act – to be released at the time of the Minister's decision;

(b) advice provided to the Minister by the Australian Heritage Council for consideration in making a listing decision under the Act – to be released at the time of the Minister's decision;

(c) statements of reasons for all decisions made by the Minister and delegates under the Act – to be released at the time of the decision;

(d) reports and outcomes from audits undertaken under the Act;

(e) expert reports considered by the Minister or a delegate when making decisions under the Act – to be released at the time of the decision, or when provided to the proponent;

(f) all additional information requested from proponents to support decision-making under the Act;

(g) environmental management plans made in accordance with an approval under the Act; and

(h) all submissions received in accordance with the Act;

(2) ensure that, to the extent it is technologically feasible, all documentation and information required to be published is made available in electronic form; and

(3) remove the requirement on proponents under ss.95B(4), 99(4) and 104(4) to republish documentation where public comments have not been received and the proponent has advised that no amendment to the original documentation is required, and replace it with a requirement that DEWHA publish a notice on its website stating that no comments were received and no changes are required to be made to the original documentation.

Public Participation Processes

14.20 Public participation is a critical process needed to inform high-quality decision-making. It provides a form of review of material put before the decision-maker and contributes further evidence on environmental, social and economic impacts of proposed developments. The Act provides for public participation across the range of administered processes.

14.21 The Act needs to clarify the periods of public consultation in relation to bioregional assessments, a matter on which the Act is currently silent. Steps to improve transparency and public participation in bioregional assessments are discussed further in Chapter 3.

14.22 Currently, public consultation is not required on environmental management plans made in accordance with an approval under the Act. Such plans should be published, given their significance in ensuring that the environmental management objectives set out in conditions of approval are met. Some submissions called for public consultation on environmental management plans prior to their approval. As large numbers of plans are prepared and approved each year, and further delay would result from an additional public comment period at this step of the process, public consultation should not be required for all environmental management plans. However, the Act should be amended to give the Minister a discretion to release plans for public comment where it is considered to be in the public interest.

14.23 As discussed in Chapter 8, the current consultation mechanisms for heritage listing are opaque and do not provide for meaningful public participation. At present, public comment is sought when the names of places to be assessed for listing are announced. It would be more useful to seek public comment on places under assessment once possible heritage values have been identified by the AHC. This would improve public understanding of the heritage significance of the place being considered and improve the quality of public comment that could be contributed to the process.

14.24 A number of submissions, received both by the Review and the Senate Standing Committee on Environment, Communications and the Arts Inquiry into the operation of the Act, called for increases in the minimum number of business days for consultation periods[5]. The need for adequate time for preparation of public input is acknowledged, but the difficulty is balancing this with the need for efficient and timely decision-making under the Act. The public's ability to input effectively into processes under the Act should be enhanced by adoption of the recommendations about publication of documents outlined above, and the recommendation about enhanced information delivery outlined below.

14.25 Some smaller changes are also proposed to improve the community's opportunity to provide considered input into processes under the Act. The first is that where the minimum required consultation period is currently ten business days under the Act, this should be increased to 11 business days. This would ensure that the consultation period would always stretch over a minimum of two weekends, allowing time-limited volunteer submitters greater opportunity to draft submissions.

14.26 The ANEDO's submission[6] highlighted the difficulty in preparing submissions when the consultation period stretches over the Christmas and New Year period. While the current definition of 'business day' does not include weekends and public holidays, potentially up to six days of a consultation period pass between 24 December and 1 January. This substantially reduces the public's opportunity to input, particularly in the shorter (currently ten day) minimum consultation periods.

14.27 It was suggested that some proponents deliberately refer projects just before the Christmas and New Year period in order to reduce the ability of the public to participate effectively in the process. The truth of this allegation would be difficult to prove. However, it is clear that allowing the public comment period to run over the Christmas period reduces the ability of the community to be involved in the decision-making process and discourages public participation. In accordance with the recommended object of the Act to 'encourage public participation', 'business day' should be defined to exclude any day falling between 24 December and 1 January inclusive.

14.28 Concerns were raised that in some processes under the Act, public submissions are provided to the proponent, rather than the Minister. The online publication of all submissions by proponents (as recommended above) supported by links from the DEWHA website should enhance public awareness and access to these submissions and address this concern.

14.29 Chapter 2 recommends greater use of public environmental inquiries as a means of undertaking Environmental Impact Assessments. This would also increase effective public consultation in decision-making under the Act, providing the community with the opportunity to attend inquiries and provide input to inform decision-making processes.

5 See, for e.g. Submission 189: The Australian Network of Environmental Defender's Offices, p.88; Submission 181: WWF, p.34.

6 Submission 189: The Australian Network of Environmental Defender's Offices, p.88.

Indigenous Consultation and Involvement in Decision-Making under the Act

14.30 It has been estimated that during the past 30 years over 20 per cent of the Australian land mass has been returned to Indigenous Australians via land claims, native title and land acquisitions. The Indigenous estate is growing, along with the role that Indigenous peoples play in conserving biodiversity and maintaining essential ecological systems and processes in the national interest.[7]

14.31 The Indigenous estate contains a rich diversity of ecosystems that Indigenous Australians have managed for thousands of years. The significance of the Indigenous estate for conservation is expected to become more pronounced in the future, with continuing land use pressures, water scarcity and the potential impacts of climate change on biodiversity.

14.32 The important role and long history Indigenous peoples have had, and continue to have, in managing Australia's landscapes and seascapes is recognised in *Australia's Biodiversity Conservation Strategy 2010–2020: Consultation Draft*.[8] Indigenous peoples have developed a special knowledge of Australia's biodiversity and have a particular interest in the conservation and sustainable use of native species and natural environments.

14.33 The importance of Indigenous knowledge was also acknowledged at the 2020 Summit, with one of the outcomes being the idea of establishing an Indigenous Knowledge Centre. The Indigenous Knowledge Centre would build on the current role of the Australian Institute for Aboriginal and Torres Strait Islander Studies and make an important contribution to research to harness traditional knowledge in support of sustainable management of country.

14.34 Numerous policy and statutory documents at an international, Commonwealth and State and Territory level highlight the need for Indigenous peoples to be involved in environmental management.[9] This involvement is also recognised under the Act, in particular objects 3(f) and 3(g).

14.35 The Act provides for the involvement of Indigenous peoples in conserving Australia's biodiversity, including by protecting the traditional use of land and water by Indigenous peoples, protecting Indigenous heritage and providing for Indigenous involvement in managing Commonwealth Reserves.

14.36 Australia's Indigenous peoples have a complex cultural, spiritual, social and economic relationship with the natural environment through their special relationship with their traditional lands and waters. Indigenous peoples place different values on land and resources from those of western societies and the cultural significance of this relationship should be acknowledged.

14.37 At the same time, many Indigenous people have a keen interest in developing and exploiting these resources. As the Tiwi Land Council noted, development opportunities in remote Indigenous communities are scarce. The Council expressed the view that the provisions of the Act that deal with Indigenous involvement do not deal with the critical issue at stake – namely, whether resources can be used effectively for Indigenous economic and social development.[10]

Indigenous Consultation under the Act

14.38 Submissions argued that while the Act specifies the requirement for Indigenous consultation in certain circumstances, many processes do not expressly require consultation with Indigenous peoples. This restricts opportunities for Indigenous peoples to engage in processes that may impact on their lands and waters.[11] Further, where having regard to the role and interests of Indigenous peoples is required, such as in recovery and threat abatement planning, consultation was considered inadequate or cursory.

7 Jon Altman, Sean Kerins, Emilie Ens, Geoff Buchanan and Katherine May, *Submission to the Review of the National Biodiversity Strategy: Indigenous people's involvement in conserving Australia's biodiversity*, CAEPR Topical Issue No. 08/2009, p.2.

8 DEWHA, *Australia's Biodiversity Conservation Strategy 2010–2020: Consultation Draft* http://www.environment.gov.au/biodiversity/strategy/pubs/biodiversity-conservation-strategy2010-2020.pdf.

9 For example, the International Convention on Biological Diversity and the Australian Government's Biodiversity Strategy.

10 Submission 107; Tiwi Land Council.

11 Submission 210: Indigenous Advisory Committee.

14.39 The key message from submissions was the need to ensure processes for consultation with Indigenous peoples are meaningful.[12] As Mr Pittock, Dr Saunders and Ms Stagoll noted:

> The processes under the Act do not adequately facilitate the involvement and cooperation of Indigenous people. The Ministerial Indigenous Advisory Committee needs to be supported to consult with Indigenous communities and develop a suitable framework and mechanism for effective consultation with Indigenous communities in order to achieve the Indigenous involvement objectives of the Act.[13]

14.40 The Australian Government has made some progress in facilitating Indigenous consultation in biodiversity conservation planning. The strategic assessment of the Kimberley Gas Precinct in Western Australia is considered to be a positive step in achieving more effective Indigenous engagement.[14] However, more work is needed to ensure that consultation processes are flexible and transferable to all decision-making under the Act where Indigenous interests may be affected.[15]

14.41 Professor Altman noted that tensions arise in consultations between Indigenous land owners and other interest groups because Indigenous decision-making is often informed by customary social norms. Prior to European settlement, Indigenous political organisations can be described as somewhat 'acephalous' and 'atomistic'; there was limited hierarchical political power and small groups were relatively autonomous and made their own decisions.[16] Today, even with the use of both Western and customary legal norms, ensuring effective consultation in contexts that are regulated by Western law, often in time-critical settings, can be extremely challenging.[17]

14.42 A number of community-based Indigenous groups are currently involved in natural resource management and cultural and heritage conservation activities. These groups are generally remote and often lack a mechanism through which to coordinate input into decision-making that potentially impacts on Indigenous peoples.

14.43 One way to improve Indigenous consultation could be to strengthen existing representative bodies and infrastructure. Key among these are the Land Councils. The existing Indigenous Protected Area (IPA) network could also provide a basis on which to develop governance arrangements for some Indigenous consultation. Other groups that could serve this purpose include Indigenous arts organisations and the Northern Australian Indigenous Land and Sea Management Alliance. In deciding whether to establish the newly proposed Aboriginal and Torres Strait Islander representative body, the Government might also wish to consider how the new body should be consulted on environmental matters.[18]

14.44 Regardless of the governance arrangements, care needs to be taken to ensure that constituent membership is at the appropriate level and that the approach adopted is appropriate for the physical and cultural circumstances at hand.

14.45 The recommendations made elsewhere in this Chapter for web-based alerts would help Indigenous communities (subject to adequate internet access) to be aware of projects in their areas. The Indigenous Advisory Committee could also play a role in this outward communication.

14.46 Strategic assessments and regional planning both present good opportunities to build Indigenous consultation strategies that are more meaningful and capable of facilitating Indigenous interests in long-term decision-making.

12 Submission 210: Indigenous Advisory Committee.

13 Submission 101: Mr Jamie Pittock, Dr Debra Saunders and Ms Karen Stagoll, p.10.

14 Submission 210: Indigenous Advisory Committee.

15 Professor Jon C Altman, Director of the Centre for Aboriginal Economic Policy Research (pers. comm.), 10 September 2009.

16 Professor Jon C Altman, Director of the Centre for Aboriginal Economic Policy Research (pers. comm.), 10 September 2009.

17 For further discussion see J Hunt, D Smith, S Garling and W Sanders (eds) *Contested Governance: Culture, Power and Institutions in Indigenous Australia,* ANU E Press, Canberra (2008) http://epress.anu.edu.au/caepr_series/no_29/pdf_instructions.html.

18 *"Our future in our hands" – Creating a sustainable National Representative Body for Aboriginal and Torres Strait Islander peoples*, Report of the Steering Committee for the creation of a new National Representative Body (2009): http://www.hreoc.gov.au/Social_Justice/repbody/report2009/index.html. Aboriginal and Torres Strait Islander Social Justice Commissioner, Mr Tom Calma, delivered the Final Report of the Steering Committee for the Creation of a New National Representative Body for Aboriginal and Torres Strait Islander peoples to the Australian Government on 27 August 2009. The Report outlines a proposed model for a new national representative body for Aboriginal and Torres Strait Islander peoples, which was designed and developed from 12 months of intensive consultations with Indigenous peoples.

Guidelines for Indigenous Consultation

14.47 The new public consultation provisions recommended in Chapter 1 should include principles and guidelines specific to Indigenous consultation, particularly in planning approaches.

14.48 The development of these principles and guidelines should underpin the Australian Government's efforts to close the gap on Indigenous disadvantage.

14.49 The principles and guidelines for Indigenous consultation should acknowledge the unique values that Indigenous peoples place on the natural environment, take into account their unique economic circumstances, and follow the core principles which underpin effective community engagement:

- Respectful:
  - respect and trust the knowledge and views of Aboriginal and Torres Strait Islander peoples;
  - engage through the community's preferred and/or nominated channels;
  - be factual;
  - be informed;
  - know as much as possible before proceeding with engagement;
  - understand the broad physical, social, historical, cultural and political context in which engagement is to occur; and
  - take into account the preferences of all parties involved in how they wish to engage, while building on existing strengths and assets.
- Ethical:
  - be transparent and honest; and
  - be clear about why government is engaging and what it hopes to achieve so that expectations are aligned with what can reasonably be expected as an outcome.
- Meaningful:
  - allow adequate time for genuine engagement;
  - encourage genuine partnerships between the Government and Aboriginal and Torres Strait Islander peoples, including sharing decision-making and having provisions for well-defined roles and responsibilities;
  - ensure engagement activity is outcome focussed;
  - be able to demonstrate how the relationship has been improved through the engagement; and
  - work for 'win-win' outcomes.
- Sustainable:
  - maximise local participation, implementation and handling;
  - ensure that adequate support is provided so that people are able to participate and contribute to the engagement process; and
  - be clear about why participation is being sought and how people's participation will affect the process.[19]

19 Ministry of Sustainable Resource Management (British Columbia), Provincial Policy for Consultation with First Nations (2002). http://www.gov.bc.ca/clrg/alrb/cabinet/ConsultationPolicyFN.pdf.

14.50 The Canadian Government has similar protocols for consultation with First Nations.[20] Foremost of these is a commitment to ensure that good faith attempts have been made to address and/or accommodate First Nations' interests raised in respect of decisions. However, consultation is a 'two-way street' requiring First Nations to participate in consultation processes in good faith and recognise that consultation is not open-ended. Similar concepts should be incorporated in guidelines adopted for Indigenous consultation under the Act.

14.51 Once the principles and guidelines for Indigenous consultation are developed, they could be adopted for use more broadly in heritage management planning, Indigenous Protected Area planning and policy, and program initiatives that involve Indigenous communities and individuals.

Recommendation 45

The Review recommends that public participation under the Act be improved by:

(1) the Act being amended to –

(a) clarify periods and processes for public participation under bioregional assessments;

(b) give the Minister the discretion to seek and consider public comment on environmental management plans;

(c) ensure no public consultation process can be shorter than 11 business days; and

(d) define 'business day' to exclude any day from 24 December to 1 January (inclusive).

(2) DEWHA –

(a) developing principles and guidelines for best practice public consultation; and

(b) strengthening involvement of Indigenous peoples in the workings of the Act by:

(i) developing guidelines based on reciprocal responsibilities;

(ii) working through established representative bodies such as Land Councils; and

(iii) strengthening processes for early engagement with Indigenous groups in strategic assessment and regional planning.

Information Delivery and Provision

14.52 Both the public at large and proponents planning to undertake activities subject to the Act need a high level of awareness of their rights and responsibilities to ensure effective public participation and to foster a compliance culture.

14.53 Effective achievement of the proposed public participation object of the Act will require DEWHA to take proactive steps to ensure key information is disseminated to the community in timely and effective ways. The current notification practice for referrals, for example, is to list a referral on the web and place advertisements in national newspapers. According to DEWHA, a number of areas also send email alerts to interested people when key steps in assessment processes are being undertaken.

14.54 A user-friendly and cost-effective system of email alerts should be established, to which interested people can subscribe and receive information free of charge. Alerts should be sent out for (but not limited to) the following:

- new referrals, including those received in response to compliance activities;
- key steps in assessment processes;
- new listings of threatened species, ecological communities, ecosystems of national significance, Ramsar wetlands and World, National and Commonwealth heritage;

20 Provincial Policy for Consultation with First Nations, 2002, http://faculty.law.ubc.ca/mccue/pdf/2002%20consultation_policy_fn.pdf.

- updates to, and new information on, threatened species and ecological communities and the values of heritage places;
- finalised plans – this would include environmental management plans, Ramsar management plans and heritage management plans;
- draft and finalised strategic assessments, including fisheries strategic assessments; and
- applications to amend the live imports list.

14.55 Further to this, DEWHA's website should be improved to enhance accessibility of information. DEWHA should implement processes that ensure new technological media are identified and employed where these can assist the public to engage effectively in processes under the Act. This would particularly help remote communities (subject to adequate internet access) keep abreast of developments under the Act.

14.56 Coupled with the recommendations above relating to publication of information and enhanced public consultation processes, these changes should enhance effective and timely engagement of the public in key processes under the Act.

14.57 Another concern is the awareness of key sectors of their obligations under the Act. The National Farmers' Federation noted[21] the assistance provided by DEWHA to the agricultural sector in the form of an out-placed officer with their organisation. DEWHA has also placed field officers in Perth and Hobart to assist with identified areas of increased workload under the Act.

14.58 The proactive role taken by DEWHA's compliance and enforcement areas in informing key sectors of their responsibilities under the Act was also noted. Targeted engagement with key sectors is critical to increasing awareness and compliance. DEWHA should focus on increasing its specialist industry knowledge to ensure effective engagement with stakeholders through a range of mediums.

14.59 DEWHA has advised that it is currently undertaking several communications activities aimed at raising awareness of the Act with key stakeholders, particularly in relation to legislative amendments intended to make the Great Barrier Reef Marine Park a matter of NES under the Act, effective from November 2009, and around specific provisions of the Act such as strategic assessments.

14.60 Current activity is being targeted at high priority areas. However, significantly increased funding is warranted to ensure broader awareness and engagement in the Act across the community.

14.61 The Australian Government should consider the merits of requiring DEWHA to report against a set of key performance indicators for public awareness of the Act and effective engagement in the processes under the Act, as part of the Department's annual reporting obligations under the Act.

14.62 The Australian Government's response to this Review could involve a broad range of changes to processes under the Act. To facilitate smooth introduction of the proposed changes, the Environment Minister should oversee a comprehensive communications campaign to promote awareness and understanding of these reforms. Consideration should also be given to establishing a community advisory service, similar to the EPBC Unit that was formed when the Act commenced.

21 See e.g. Interim Report Comment 95: National Farmers' Federation, p.15.

Recommendation 46

The Review recommends that in order to improve transparency under the Act:

(1) the Act be amended to require establishment of a user friendly and cost effective system of email alerts, which interested parties can subscribe to, to receive information about the Act and processes under the Act;

(2) the Australian Government consider the merits of including a requirement that DEWHA report against a set of key performance indicators for public awareness of the Act and effective engagement in the processes under the Act, as part of the Department's annual reporting obligations under the Act; and

(3) that DEWHA –

  (a) improve and maintain its website to enhance accessibility to information;

  (b) focus on increasing its specialist industry knowledge to ensure effective engagement with stakeholders through a range of mediums; and

  (c) implement a comprehensive communications campaign featuring the Environment Minister, to promote awareness and understanding of reforms undertaken in response to this Review.

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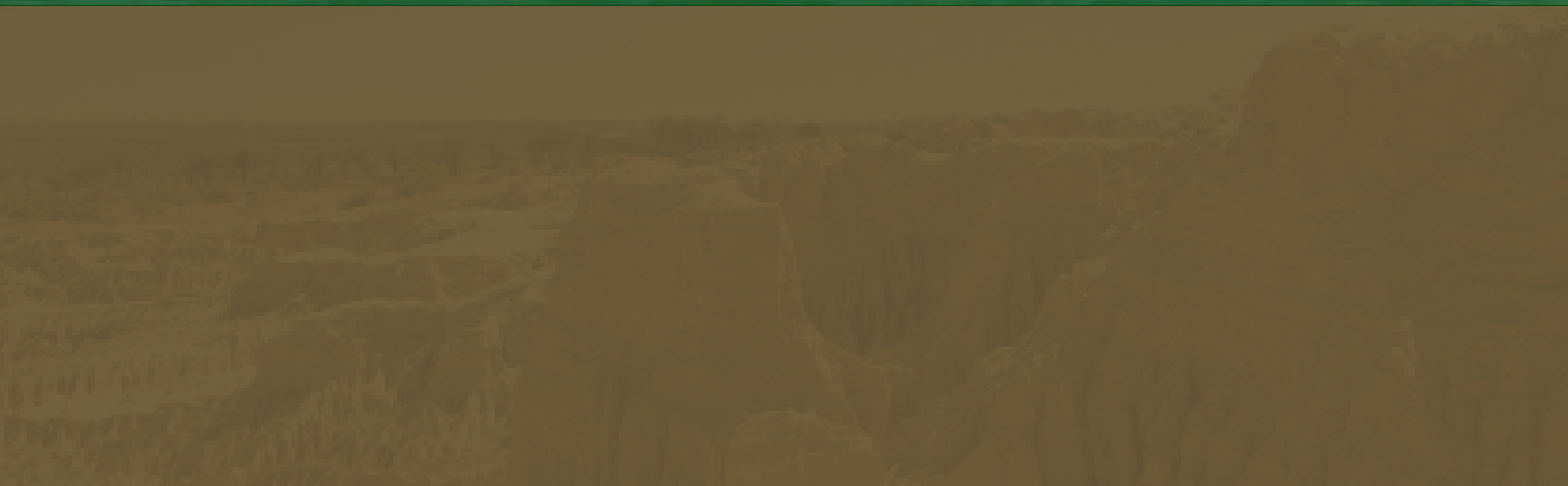
Chapter Fifteen

REVIEW MECHANISMS AND ACCESS TO COURTS



Chapter 15: Review Mechanisms and Access to Courts

15.1 The EPBC Act provides three ways in which a person can seek a review or a reconsideration of an administrative decision, however not all avenues are available in all cases. These avenues are:

- request for reconsideration;
- merits review; and
- judicial review.

15.2 Both reconsideration and merits review of decisions enable all aspects of a decision to be reconsidered on their merits, and a new decision to be substituted in place of the original decision. Judicial review, in contrast, is concerned with whether the decision-maker acted in accordance with the law when making their decision. If the Court decides, on a judicial review application, that a decision was made unlawfully, the powers of the Court are essentially limited to setting the decision aside or sending it back to the decision-maker for reconsideration – the Court cannot substitute its own decision for that of the primary decision-maker.

15.3 This Chapter considers the current options for review of decisions made under the Act as well as proposals for reform or extension of these options. In particular it considers:

- whether there should be time-limits on the reconsideration of decisions;
- whether the provision for merits review of decisions made under the Act should be extended; and
- issues concerning possible financial impediments to public interest litigation.

15.4 The recommendations put forward in this Chapter should be read in light of the recommendation put forward in Chapter 14 for increased transparency of decisions and decision-making processes under the Act generally.

Reconsideration of Decisions

Clearly Unacceptable Decisions

15.5 Under s.74B of the Act, the Minister can decide, based on a referral, that a proposed action is 'clearly unacceptable'. In such cases, an internal review process is available to the proponent in the form of a reconsideration of the decision.

15.6 Section 74C enables the proponent to request reconsideration of a clearly unacceptable decision. If reconsideration is requested, s.74D specifies the procedure for reconsideration, in particular the time limits within which:

- notice of the request for reconsideration must be published on the DEWHA website (within 10 business days of receiving the request);[1]
- the public can submit comments (within 10 business days of the request being published on the DEWHA website. However, as recommended in Chapter 14, this period should be extended to 11 business days);[2]
- the Secretary of the Department must prepare a written report (within 10 business days of the end of the comment period);[3] and
- the Minister must reconsider the decision (within 20 business days of receiving the Secretary's report).[4]

15.7 However, the Act does not specify time limits within which a request for reconsideration can be made following the clearly unacceptable decision. In the interests of certainty, the Act should be amended to insert a time limit on when such a request can be made.

1 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.74D(1).
2 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.74D(2).
3 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.74D(3).
4 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.74D(4).

15.8 Having reference to similar regimes already in place under the Act, requests for reconsideration of a clearly unacceptable decision under s.74C(3) should be required to be made within 11 business days of the decision. This is consistent with the approach for requests for reconsiderations of controlled action decisions under s.79 of the Act. Issues concerning reconsideration of controlled action decisions are discussed separately below.

15.9 If reconsideration of a clearly unacceptable decision is requested, the Minister can decide:

- to refuse to approve the action; or
- that the proposed action be considered to determine whether it is a controlled action.[5]

15.10 In line with recommendations 44 and 46,[6] that transparency of decision-making under the Act be increased, the Secretary's report, the Minister's reconsideration decision and reasons for that reconsideration decision should all be made public.

Controlled Action Decisions

15.11 Under s.75 of the Act, the Minister can decide, based on a referral, that a proposed action is a 'controlled action'. Controlled actions require assessment and approval under the Act before they can proceed.

15.12 As with clearly unacceptable decisions, the Act provides for reconsideration of controlled action decisions. Section 78 confers this power on the Minister. However, this power is available only in certain circumstances:

- substantial new information has become available, or there is a substantial change in circumstances not foreseen at the time the first controlled action decision was made, and which relate to the impact the action has, will have or is likely to have on a protected matter; or
- the Minister believed the action would be taken in a manner specified under a notice pursuant to s.77 of the Act and is satisfied that the action is not being taken in the manner identified in the notice; or
- the first controlled action decision was made because of a provision in a bilateral agreement and a management arrangement, or an accredited management arrangement or authorisation process, that no longer operates in relation to the action; or
- the first decision was that the action was not a controlled action because of a Ministerial declaration under s.33 or s.37 of the Act and the declaration no longer operates in relation to the action; or
- a State or Territory Minister has requested reconsideration of the decision under s.79 of the Act.[7]

15.13 A controlled action decision cannot be reconsidered after the action has been taken or the Minister has granted or refused approval for the taking of the action.[8]

15.14 Following reconsideration of a controlled action decision, the Minister can revoke the original decision and make a new decision.[9]

15.15 Section 79 of the Act allows a State or Territory Minister to request reconsideration of a controlled action decision where the proposed action is to be taken in the relevant State or Territory. Section 78A of the Act allows 'any person' to request reconsideration. This is in contrast with clearly unacceptable decisions where only the proponent has the ability to request reconsideration.[10]

15.16 Where a person other than a State or Territory Minister requests reconsideration of a controlled action decision, the Environment Minister's discretion to undertake the reconsideration only becomes available if one of the preconditions in s.78 is satisfied. In contrast, if the request for reconsideration is made by a State or Territory Minister, the Minister has a general discretion to undertake the reconsideration (that is, there is no requirement that one of the preconditions in s.78 be met).

5 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.74D(4).
6 Chapter 14 of this Report.
7 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.78.
8 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.78(3).
9 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.78.
10 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.74D.

15.17 The issue of the period within which reconsideration of a controlled action decision can be requested was raised during consultations. In particular, there were concerns about the absence of a time period within which reconsideration can be requested by 'any person' under s.78A, which is different to the approach taken in s.79 where State and Territory Ministers are subject to are time limit of 10 business days within which to make their request for reconsideration.

15.18 In one example that was brought to the attention of the Review, a reconsideration decision following a request under s.78A was made 21 months after the original controlled action decision. This resulted in substantial delay to the proposed development and has also given rise to some concern about the level of certainty that can be attached to controlled action decisions generally.

15.19 As Babcock and Brown argued:

> If Requests for Reconsideration from Private Individuals were maintained, the Act needs to be changed so that such Requests for Reconsideration have the same deadline as those from a State Government. Requests for Reconsideration must be submitted within 10 business days to be considered.[11]

15.20 Other submissions endorsed this concern,[12] suggesting that it was 'unrealistic' not to have timeframes.[13]

15.21 In the interests of certainty and for reasons of consistency, the Act should be amended to impose a time limit on the ability to request reconsideration of controlled action decisions under s.78A. For consistency with the earlier proposal to impose a timeframe on requests for reconsiderations of clearly unacceptable decisions, this time limit should be 11 business days from the date of the initial decision. However, this time limit should not extend to reconsiderations based on substantial new information or a substantial change in circumstances not foreseen at the time the initial controlled action decision was made, and which relate to the likely impact that the action has, will have or is likely to have on a protected matter.

15.22 There may also be value in prescribing the form and content requirements for requests for reconsiderations in the EPBC Regulations. This could mitigate, to some extent, the risk of unsubstantiated, insufficient or vexatious requests for reconsideration.

15.23 In line with recommendations 44 and 46[14] that transparency of decision-making under the Act be increased, requests for reconsideration, comments on a reconsideration request, the Minister's reconsideration decision and reasons for that reconsideration decision should also be made public. This approach is consistent with an argument put by Bat Advocacy NSW that:

> any material submitted by the proponent to DEWHA in a request for reconsideration must be made public regardless of whether the public comment period has ended or not. … provided it is received within a suitable time period. This should encourage proponents to include all relevant material at the time of submission rather than delaying until the public comment period has concluded in the knowledge that that additional material may be excluded from public review.[15]

Recommendation 47

The Review recommends that the Act be amended to require that requests for reconsideration of a controlled action decision be required to be made within 11 business days of the decision, unless the request for reconsideration is based on substantial new information or a substantial change in circumstances not foreseen at the time the first controlled action decision was made, and this new information or change of circumstances relates to the likely impact that the action has, will have or is likely to have on a protected matter.

11 Submission 215: Babcock & Brown, p.2.
12 Interim Report Comment 44: Hydro Tasmania and Roaring 40s, pp.6-7.
13 Interim Report Comment 95: National Farmers' Federation, p.27.
14 Chapter 14 of this Report.
15 Interim Report Comment 7: Bat Advocacy NSW, p.4.

Merits Review

15.24 Merits review is a form of external review which, at the federal level, is undertaken by the Administrative Appeals Tribunal (AAT). It involves a rehearing of the matter in which the Tribunal can hear new evidence and can substitute its own decision for that of the primary decision-maker.

15.25 The Act provides for merits review for specified types of decisions in specified circumstances.

15.26 The Act originally allowed for merits review for a small range of decisions that were generally recognised as marginal to the Act. These were decisions made by the Minister or a delegate about:

- permits for activities affecting protected species;
- permits for the international movement of wildlife; and
- advice about whether an action would contravene a conservation order.

15.27 In 2006, the Act was amended to remove the ability to seek merits review of decisions made by the Minister. As a result, review of these decisions is now only available if the decision was made by a delegate.

15.28 Since the amendments came into effect at the start of 2007, merits review cases under the Act have almost stopped as the majority of potentially controversial decisions have been made by the Minister. Just two decisions made by a delegate have gone to the AAT for review – both involving challenges to the refusal of permission for the export of pet native birds (in one case a rainbow lorikeet, and in the other 14 galahs and six rosellas).[16]

15.29 The justification given for the 2006 amendments was that where decisions 'are sufficiently important to be taken by the Minister as an elected representative, those judgment calls should not be able to be overturned by an unelected tribunal such as the AAT.'[17]

15.30 The issue is contentious. This was evidenced in the arguments put forward in submissions both for and against extending merits review to Ministerial decisions.

15.31 One view is that it is appropriate for major decisions impacting on the community at large to be made by the elected government representative (that is, the Minister), who is ultimately accountable to Parliament and to the electorate for the decisions that have been made. These decisions generally do not involve personal rights and so there is no erosion of the common law and legislative protections afforded by merits review.

15.32 Another view is that merits review is a key means of achieving better decision-making regardless of the identity of the original decision-maker. As explained by the Administrative Review Council (ARC):

> The principal objective of merits review is to ensure that those administrative decisions in relation to which review is provided 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.
>
> This objective is directed to ensuring fair treatment of all persons affected by a decision.
>
> Merits review also has a broader, long-term objective of improving the quality and consistency of the decisions of primary decision-makers. Further, merits review ensures that the openness and accountability of decisions made by government are enhanced.[18]

16 *Hand and Minister for the Environment, Heritage and the Arts* [2008] AATA 893; *Zapirain and Minister for the Environment, Heritage and the Arts* [2008] AATA 1047.

17 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006 (Cth).

18 Commonwealth of Australia Administrative Review Council, *What decisions should be subject to merits review?* (1999) http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_What_decisions_should_be_subject_to_merit_review#dec7.

15.33 More generally, principle 10 of the *Rio Declaration on Environment and Development* provides that:

> Environmental issues are best handled with participation of all concerned citizens, at the relevant level. At the national level, each individual shall have appropriate access to information concerning the environment that is held by public authorities, including information on hazardous materials and activities in their communities, and the opportunity to participate in decision-making processes. States shall facilitate and encourage public awareness and participation by making information widely available. Effective access to judicial and administrative proceedings, including redress and remedy, shall be provided.[19]

15.34 With respect to the 2006 amendments, the issue is more properly one about the nature of the decision being made, rather than whether the decision-maker is a Minister or a delegate. The Review agrees with the observation of the ARC that 'the fact that the decision-maker is a Minister … is not, of itself, relevant to the question of review. Rather, it is the character of the decision-making power … that is relevant'.[20] Indeed other administrative decisions made by Ministers are subject to merits review, for example, decisions made by the Minister for Immigration and Citizenship under the *Migration Act 1958* (Cth).

15.35 There is no evidence that the merits review powers of the AAT were abused prior to the 2006 amendments. The number of cases brought to the AAT was small and typically, involved significant issues.

15.36 It is therefore recommended that the 2006 amendments concerning merits review be reversed. This would mean that Ministerial decisions about whether to grant permits for activities affecting protected species and the international movement of wildlife, and advice about whether an action would contravene a conservation order, would again be subject to merits review.

Recommendation 48

The Review recommends that subsection 303GJ(2) of the Act be repealed so that Ministerial decisions of the type specified in subsection 303GJ(1), that is, decisions about whether to grant permits for activities affecting protected species and the international movement of wildlife, and advice about whether an action would contravene a conservation order, are subject to merits review.

Options for Expanding the Types of Decisions that could be Subject to Merits Review

15.37 A key concern raised in public submissions and outlined in the Interim Report was the limited number of decisions made under the Act that can be subject to merits review.

15.38 Merits review is not available for any of the key decisions about environmental impact assessment and project approval. This position has been the subject of substantial criticism, particularly because the provision for judicial review is rarely a substitute for merits review. As Dr Chris McGrath has observed:

> Judicial review is typically of little use for environmental litigation where it is the poor nature of an administrative decision that needs to be redressed. If the Minister or their delegate has 'ticked all the right boxes' and been careful in writing their reasons for a decision under the EPBC Act, then what is essentially a very poor decision allowing highly damaging development may not be challenged. This leaves enormous room for political decision-making about a project, resulting in short-term economic decision-making rather than the promotion of sustainable development. Decision-making subject to merits review would be expected to be less influenced by short-term, political considerations and more strongly based upon the evidence supporting or opposing a proposed development. Simply the existence of a right of merits review (as opposed to its exercise) can have a positive effect on the integrity of administrative decision-making, as decision-makers will act knowing of the potential that they may be required to justify their decision based on evidence in an independent court or tribunal.[21]

19 The *Rio Declaration on Environment and Development* adopted at the United Nations Conference on Environment and Development (1992).

20 Commonwealth of Australia Administrative Review Council, *What decisions should be subject to merits review?* (1999), para [5.21] http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_What_decisions_should_be_subject_to_merit_review#dec7.

21 Chris McGrath, 'Flying Foxes, Dam and Whales: using Federal Environmental Laws in the Public Interest' (2008) 25 *Environmental and Planning Law Journal* 324, p.353.

15.39 In its First Report from its Inquiry into the operation of the EPBC Act, the Senate Standing Committee on Environment, Communications and the Arts recommended that:

> …consideration be given to expanding the scope for merits review in relations to ministerial decisions under the Act, particularly in relation to:
>
> - whether an action is a controlled action;
> - assessment decisions; and
> - decisions on whether a species or ecological community is to be listed under the Act.[22]

15.40 The Senate Committee deferred consideration of the above options to this Review:

> The committee recommends that the independent review examine this possibility in the first instance, and that the process of considerations should include consultation with the Administrative Appeals Tribunal.[23]

15.41 The weight of submissions received by this Review was in favour of an expansion in the scope of merits review to all decisions, or at the very least, key decisions under the Act. In response to this, the Interim Report set out several options relating to merits review. These included:

- the development of substantive criteria for decision-making as a way of increasing public confidence in the decisions that are made;
- the removal of certain discretionary powers under the Act;
- an increase in public engagement in the decision-making process to increase transparency; and
- limited merits review, for example, at certain stages throughout the Environmental Impact Assessment process (e.g. controlled action and approval decisions, including conditions).

The Interim Report also acknowledged that other options could warrant exploration.

15.42 Comments received in response to the Interim Report were also generally in favour of making merits review available for more of the decisions made under the Act.

15.43 It was suggested that:

> …restoring a proper merits review process 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.
>
> Seen in this context, the costs and delays it would incur would be outweighed by the better decision making and greater protection of environmental values.[24]

15.44 However, others commented that, in considering the scope and nature of appeal rights under the Act, this Review should:

> …recognise that these are a measure of process transparency and accountability. Other mechanisms to achieve these goals, for example, improved publishing of reasons for decisions or better targeting of opportunities for public involvement, could be explored.[25]

15.45 Recommendations for improved transparency and opportunities for public participation under the Act are made in Chapter 14 of this Report.

15.46 In the submissions and comments received, opinion was divided as to which decisions should be reviewable on their merits.

15.47 A significant number of comments were in favour of introducing merits review for approval decisions[26] and other 'significant' decisions made under the Act such as controlled action decisions and listing decisions.[27]

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22 The Senate Standing Committee of Environment, Communication and the Arts, *The operation of the Environment Protection and Biodiversity Conservation Act 1999: First Report* (2009) Recommendation 10, para.[6.76] (Senate Committee Report) http://www.aph.gov.au/senate/committee/eca_ctte/epbc_act/report/index.htm

23 Senate Committee Report, Recommendation 10, para.[6.76].

24 Interim Report Comment 77: National Parks Association of NSW, p.50.

25 Interim Report Comment 117: Western Australia Government, p.19.

26 See e.g. Interim Report Comment 44: Hydro Tasmania and Roaring 40s, p.7.

27 See e.g. Interim Report Comment 63: Public Interest Law Clearing House, p.9, Interim Report Comment 15: Mr Malcolm Mars, p.4.

15.48 An alternative view was that the final decisions in these matters should rest with the Minister because these decisions involve the weighing of complex and potentially competing considerations, including environmental, social and economic considerations. The Act also emphasises the national significance of these decisions. On this basis, this Review considers that project approval decisions made under s.133 of the Act should not be open to merits review. It is important to note that the approval decision will remain open to judicial review – a valuable accountability measure through which the lawfulness of the decision, and questions about whether relevant considerations have been taken into account and procedural fairness applied, can be tested.

15.49 Instead, the focus should be on those decisions that are preliminary to the project approval decision under s.133 – namely, the controlled action decision and the assessment approach decision.

15.50 These decisions are vital to the workings of the Act in terms of proper environmental scrutiny and public participation in the project assessment and approval regime. They are also less value-laden than the approval decision as the controlled action decision does not involve social and economic considerations, and the assessment approach decision only involves social considerations insofar as it takes account of public interest in a project.[28]

15.51 While no evidence was presented to this Review that incorrect controlled action or assessment approach decisions have been made, it was argued that the Government has 'adopted a high threshold for significance, ensuring that a relatively low number of referrals are made controlled actions'.[29] The assessment approach decisions made by the Minister have occasionally been highly contentious.

15.52 The argument for opening the controlled action and assessment approach decisions to merits review is that to do so would provide greater transparency and accountability for these decisions. This increased transparency and accountability should also improve the rigour of the decision-making process. As noted by the ARC, the 'central purpose of the system of merits review is improving agencies' decision-making generally by correcting errors and modelling good administrative practice'.[30]

15.53 If the controlled action decision and/or the assessment approach decision were made subject to merits review, the Act would need to be amended to specify the criteria on which each of those decisions are to be made. Currently elaborate non-statutory guidelines set out what is likely to constitute a significant impact on a matter of NES and hence be a controlled action.[31] In keeping with these guidelines, it would be sufficient for the Act to specify that "a 'significant impact' is an impact which is important, notable, or of consequence, having regard to its context or intensity." Chapter 2 recommends that the Regulations should prescribe criteria for different levels of environmental assessment (rather than just for assessment based on referral information, as is the case at the moment).[32]

15.54 If controlled action and assessment approach decisions were both open to merits review, there may be concerns that a single project could be the subject of two separate merits review applications and processes. For example, the Minister could decide that a project is not a controlled action but this decision is successfully challenged on merits appeal. The Minister would then make an assessment approach decision, which could also be subject to merits review. While the number of these cases is likely to be very small, if this potential is regarded as a major concern, the Act could be amended to provide that where there has been a merits review of the controlled action decision, there cannot be merits review of the assessment approach decision.

15.55 One problem with opening the controlled action decision to merits review is that the current system is predicated on proponents being able to get a quick answer as to whether their project falls under the Act. Merits review could slow down this part of the process.

28 *Intergovernmental Agreement on the Environment* (1992) Schedule 3, clause 3(vii).

29 Andrew Macintosh, 'The *Environment Protection and Biodiversity Conservation Act 1999* (Cth): An Evaluation of its Cost-Effectiveness' (2009) 26 *Environmental and Planning Law Journal*, 337 at p.360.

30 Administrative Review Council, *Decision Making: Accountability 'Best Practice Guide 5'* (2007) p.11 http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_ARC_Best_Practice_Guide_5_-_Accountability.

31 See DEWHA, *EPBC Act Policy Statement 1.1 Significant Impact Guidelines: Matters of National Environmental Significance* (2006) http://www.environment.gov.au/epbc/publications/pubs/nes-guidelines.pdf.

32 Recommendation 4.

15.56 Another issue is that controlled action decisions turn on an evaluation of the likelihood of a significant impact on a matter of NES. As noted in Chapter 7 of this Report, there was a large amount of commentary on the difficulty in determining 'significant impact'. It is not unusual to have experts in the same field differ markedly on questions of significance – this is one of the reasons given by DEWHA for the slow pace in developing Significant Impact Guidelines. As a consequence, it is questionable whether the nature of the controlled action decision makes it suitable for merits review.

15.57 If merits review were to be extended to just one of the decisions that form part of the assessment and approval regime under the Act, it should be the assessment approach decision. One common feature of all of the types of decisions that are currently open to merits review under the Act is that the decisions-making processes for these decisions do not include any opportunity for public comment. The assessment approach decision is also a decision which is not open to public comment under the Act.

15.58 Allowing the assessment approach decision to be subject to merits review would increase the decision-maker's accountability and could create a further incentive for the decision-maker to get the level of assessment 'right'. It should also promote consistency in decision-making.

15.59 It should be noted that, relative to the proposals put forward in many submissions and comments to the Review, extending merits review to the controlled action and/or assessment approach decisions would be a modest change. The great bulk of decisions made under the Act would continue to not be open to merits review.

15.60 Consistent with Recommendation 48, if controlled action and assessment approach decisions are to be subject to merits review, this should apply to decisions made by the Minister as well as decisions made by a delegate. Questions about whether it is appropriate for a decision to be open to merits review should turn on the nature of the decision-making power, not on the identity of the person in whom the power is vested.

15.61 The Act should also specify the period within which applications for merits review can be made.

Recommendation 49

The Review recommends that the Australian Government consider amending the Act so that the controlled action and/or assessment approach decisions are open to merits review.

Standing for Merits Review

15.62 Where merits review by the AAT is available for a decision, s.27 of the *Administrative Appeals Tribunal Act 1975* (Cth) (AAT Act) provides that an application for review can be brought by:

- persons whose interests are affected by a decision; or
- organisations or associations of persons (whether incorporated or not) if the decision relates to a matter included in the objects or purposes of the organisation or association.

15.63 The standing conferred on organisations and associations by s.27 of the AAT Act is similar to the extended standing provided by s.487 of the EPBC Act for judicial review of decisions made under the EPBC Act.

15.64 The rationale behind merits review is to provide a mechanism by which a person who is aggrieved by a decision can have that decision reviewed by an independent arbiter.

15.65 This notion of 'a person aggrieved' by a decision, or a person who has a 'legitimate interest' in a decision under s.27 of the AAT Act covers members of the public who, because of a *direct* interest they have in the matter, have been invited to engage with decisions affecting the community at large.

15.66 A number of submitters suggested that persons who have made a submission during the public comment phase of a decision-making process under the Act should have the right to challenge those decisions, whether or not they meet the standing requirements in s.27 of the AAT Act. The Review endorses this proposition, which would apply, for example, to members of the public who have exercised their right to comment on the controlled action decision under s.74(3) of the Act.

15.67 Accordingly, if the scope of merits review is to be expanded to the controlled action and/or assessment approach decisions, standing for merits review of decisions made under the Act should be extended to include persons who lodged public submissions during the comment period. Adoption of this recommendation has the potential to increase the number of cases brought before the Tribunal, which would in turn increase the workload of the Tribunal.

Recommendation 50

The Review recommends that the Act be amended to prescribe an extended definition of legal standing for the purpose of merits review applications for decisions made under the Act to include those persons who made a formal public comment during the relevant decision-making process.

Review Body

15.68 In considering whether to expand the types of decisions that can be subject to merits review, issues about whether the AAT is the body that is most appropriate to hear and determine merits review applications should also be considered. Many submissions addressed this issue. The AAT was also consulted as part of this Review.

15.69 As noted in the Interim Report, some submissions considered that the AAT was the appropriate review body and had demonstrated its ability in deciding a number of significant environmental cases. Others regarded the AAT as too generalist and advocated instead for the creation of a specialist environmental tribunal.

15.70 On the whole, a specialist tribunal is likely to make better decisions than a generalist one where cases are decided, for example, on the basis of complex scientific information or involve the application of specialised decision-making criteria such as the precautionary principle. However, even if the types of decisions open to merits review were to be expanded, the number of merits review applications would likely be too small to warrant the creation of a specialist environmental tribunal.

15.71 The AAT has long-standing and acknowledged expertise in reviewing a wide range of administrative decisions. It also has the capacity to bring subject matter expertise to the review of particular decisions. One of its strengths is its practice of appointing members with expertise in areas relevant to the decisions of the Tribunal. If additional functions were to be conferred on the AAT requiring particular expertise, it would be necessary to ensure that members were appointed to the Tribunal with that expertise.

15.72 It should also be remembered that, as explained by the AAT's President, the Hon Garry Downes J AM:

> … good administration involves consistency. One of the purposes of the Australian Government establishing the Administrative Appeals Tribunal was to improve the quality of administrative decision-making by the Australian Government. This aim of the Government has been substantially realised. This is because the availability of review of Government decisions has caused the relevant departments of state to introduce procedures and systems which lead to more acceptable and justifiable decision-making to reduce the incidence of applications for review.[33]

15.73 In carrying out its functions, the AAT is required to pursue its statutory objective of providing a mechanism of review that is fair, just, economical, informal and quick.[34] The AAT has a diverse jurisdiction and employs different procedures for different types of cases. In particular, the AAT employs a variety of alternative dispute resolution processes which assist in achieving its statutory objective. The AAT advised that around 80% of applications lodged with the Tribunal are resolved without proceeding to a full hearing and determination on the merits.

33 The Hon Justice Garry Downes AM, 'The Implementation of the Administrative Courts' Decisions', (Speech delivered at the International Association of Supreme Administrative Jurisdictions VIIIth Congress, Madrid, Spain, 26-28 April 2004).

34 *Administrative Appeals Tribunal Act 1975* (Cth) s.2A.

Judicial Review and Access to Courts

Judicial Review

15.74 In conducting judicial review of an administrative decision made under the Act, the Court has a limited role – it can only decide whether or not the administrative decision was lawfully, fairly and rationally made. The Court can set aside a decision but cannot substitute a new decision for that of the primary decision-maker.

15.75 The existing regime for judicial review of decisions made under the Act is adequate in ensuring procedural fairness. Applications for judicial review can be made under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) and the *Judiciary Act 1903* (Cth).

15.76 The main area of contention concerns public interest litigation. Such litigation involves members of the public commencing legal proceedings that will determine an important right or obligation affecting the community as a whole, or a significant part of the community.

15.77 Public interest litigation is one of the most significant means of enforcing environmental law and in enhancing the transparency, integrity and rigour of government decision-making about activities which impact on the environment. Often the cases are 'test cases', concerning questions of law that have not previously been considered judicially. Because public interest litigation plays this role, it is important that the law facilitate it.

Standing

15.78 The Act contains expanded legal standing for third party applications which goes beyond that which is provided under many other Acts.

15.79 In particular, access to judicial review through the extended standing arrangements under s.487(2) of the Act allows individuals and organisations who engage in environmental protection and/or conservation activities to commence judicial review applications. In the absence of s.487, some individuals and organisations may not have otherwise had standing to bring an application for judicial review under the general rules.

15.80 Subsections 475(6) and (7) of the Act similarly enable individuals and organisations who are involved in environmental protection or conservation activities to bring applications as an 'interested person', as well as those who may be personally affected by the conduct or proposed conduct.

15.81 These provisions have created no difficulties and should be maintained. The question is whether these provisions should be expanded further.

15.82 Some commentators suggested that standing should be further extended to all persons, or at the very least to those who made submissions during the decision-making process.[35] The argument for increased standing was put forward as providing a greater level of scrutiny by the public in decision-making affecting environmental matters.

15.83 Some pieces of legislation, both at the Commonwealth and State or Territory level, contain 'open standing' provisions that confer standing on all members of the public for all actions. The *Trade Practices Act 1974* (Cth) is one example, as is most NSW environmental legislation such as the *Environmental Planning and Assessment Act 1979* (NSW).[36]

15.84 Despite all the fears that the above types of provisions would engender a 'flood' of litigation, they have been unproblematic. There is no evidence of them being abused and the number of cases to date has been modest.

15.85 There is equally little or no evidence that the current standing provisions of the Act have stymied public interest litigation.

35 See e.g. Submission 161: National Parks Australia Council.

36 See *Environmental Planning and Assessment Act 1979* (NSW) s.123.

Cost of Litigation

15.86 The key issue relating to access to courts is the cost of litigation. As the Hon John Toohey famously put it:

> …there is little point in opening the door to the courts if litigants cannot afford to come in. The general rule in litigation that "costs follow the event" is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action must inhibit the taking of cases to court. In any event, it will be a factor that looms large in any consideration to initiate litigation.[37]

15.87 Environmental actions have a tendency to engender a high level of interest and can involve complex issues of law. The opposing parties to these actions are usually polarised in their beliefs and entrenched in their views. These factors, in addition to the public nature of the litigation, do not readily lend these types of actions to settlement by assisted dispute resolution methods, such as mediation. Instead they can lead to protracted litigation, taking an extended period of time to be disposed of by the courts, and involve substantial costs.

15.88 During the course of public consultations, the Review noted the argument put to it that the primary barrier to parties bringing public interest litigation under the Act involves the rules relating to costs and undertakings as to damages. The Review agrees that costs can present a significant barrier for applicants wishing to bring an action for review of a decision made under the Act.

Undertakings as to Damages

15.89 As a general rule, a person wishing to restrain the activities of another by way of an interim or interlocutory injunction must provide an undertaking as to damages. This means that the person seeking the injunction agrees to submit, at the conclusion of the proceedings, to any order the court may make for the payment of compensation to persons who may have been adversely affected by the operation of the interim injunction.

15.90 A notable exception is in NSW where the general practice of the courts has been not to require undertakings for damages in environmental cases. The courts have done so out of recognition of the importance of public interest litigation and how the ordering of undertakings for damages can stymie such litigation.

15.91 Previously, the general rule was expressly excluded from applications for judicial review of decisions made under the Act. Section 478 of the Act provided that:

> The Federal Court is not to require an applicant for an injunction to give an undertaking as to damages as a condition of granting an interim injunction.

15.92 This provision was repealed by amendment to the Act in 2006, meaning that potential applicants may now be required to give an undertaking as to damages consequent upon the granting of an interim injunction.

15.93 The Explanatory Memorandum, which outlined the reasoning behind the repeal of s.478, stated that:

> This amendment brings the Act into line with other Commonwealth legislation where the Federal Court has the discretion whether or not to require an application for an injunction to give an undertaking as to damages as a condition of granting an interim injunction.[38]

15.94 The reasoning is unconvincing. The fact that only one Commonwealth Act contains a certain type of legislative provision is no reason for it to be repealed if the provision is a useful one.

15.95 Dr Chris McGrath has also identified the argument for the repeal of s.478 as disingenuous. He observed that:

> While it is true that the Federal Court has a discretion not to require an undertaking as to damages from an applicant for interlocutory relief, in practice that discretion is illusory as the Court will invariably require such an undertaking.[39]

15.96 The repeal of s.478 produced a strong response from submissions that commented on issues concerning access to courts. The general call was for this provision to be reinstated in the Act.

37 The Hon John Toohey, 'Address to the NELA Conference' (1989) quoted in Paul Stein. 'The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest Environmental Law' (1996) 13 *Environmental Planning Law Journal*, 179 at p.181.

38 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006 (Cth), para.[763].

39 Chris McGrath 'Flying Foxes, Dam and Whales: using Federal Environmental Laws in the Public Interest' (2008) 25 *Environmental and Planning Law Journal* 324, p.352.

15.97 As s.478 helps to promote enforcement of the Act,[40] and was not abused before its repeal, that provision should be reinstated.

Recommendation 51

The Review recommends that a provision be inserted in the *Australian Environment Act* like the repealed s.478, to the effect that the Federal Court is not to require an applicant to give an undertaking as to damages as a condition of granting an interim injunction.

Security for Costs

15.98 Like undertakings for damages, the potential for orders for security for costs is another major obstacle to public interest litigation. This is particularly so when the party instituting the proceedings has limited funds (which is often the case in public interest litigation).

15.99 The potential for a security for costs application was seen as an impediment to individual litigants and community organisations that have limited resources to fund their actions without the added obstacle of having to find funds to secure the costs of opposing parties. This is notwithstanding the high burden required to be satisfied by applicants seeking a security for costs order.

15.100 A major concern was the potential for applications for security for costs to be used as a part of a litigation strategy of attrition to wear down public interest litigants. Submissions called for public interest litigants to be afforded legislative protection from applications for security for costs.[41]

15.101 While the law provides some existing protections against this form of abuse, as noted by the Australian Network of Environmental Defender's Offices (ANEDO), the *Federal Court Rules* and judicial precedent are not effective in preventing the inappropriate use of security for costs applications.[42] Even the existence of the possibility of having to resist a security for costs order is an added burden on public interest litigants.

15.102 For these reasons, the Review recommends that the Act should prevent a court from ordering security for costs for public interest proceedings.

Recommendation 52

The Review recommends that the Act be amended to prohibit the ordering of security for costs in public interest proceedings.

Costs Orders

15.103 In legal proceedings, costs usually 'follow the event'. This means that as a general principle, a successful party is entitled to an order that the unsuccessful party will pay the legal costs incurred by the successful party in running or resisting the court proceedings.

15.104 At present, this general rule of costs following the event applies in relation to the Act. While the High Court has held that it is appropriate for the courts to make 'no order' as to costs in some public interest cases,[43] the courts have rarely done so. In the few cases where a 'no order' as to costs has been made following challenge of a decision made under the Act, the courts have been inconsistent. This was noted by the ANEDO:

> For example *Blue Wedges Inc v Minister for Environment Heritage and the Arts, Wilderness Society v the Hon Malcolm Turnbull, Minister for Environment and Water Resources* and *Lawyers for Forests Inc v Minister for Environment, Heritage and the Arts* each raised novel questions of the construction of the EPBC Act … Yet in *Blue Wedges* no order for costs was made; in *Wilderness Society*, a reduced costs order was made in and in *Lawyers for Forests*, an ordinary costs order was made. This lack of consistency has been exacerbated by such orders being made at the end of trials, by which time substantial costs have been incurred.[44]

40 Chris McGrath 'Flying Foxes, Dam and Whales: using Federal Environmental Laws in the Public Interest' (2008) 25 *Environmental and Planning Law Journal* 324, p.352.

41 Submission 202: Lawyers for Forests.

42 Interim Report Comment 94: The Australian Network of Environmental Defender's Offices, p.13.

43 *Oshlack v Richmond River Council* [1998] HCA 11.

44 Interim Report Comment 94: The Australian Network of Environmental Defender's Offices, p.16.

15.105 The threat of a costs order is one of the most significant barriers to public interest litigation. As Preston CJ recently put it in *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and the Minister for Mineral Resources*:

> The fear of exposure to significant legal costs to which an unsuccessful party may be subjected may deter a party from asserting, or continuing to assert, its rights in litigation. Access to the courts is thereby placed beyond the party's reach and it is denied access to justice.[45]

15.106 Preston CJ went on to observe:

> Typically, plaintiffs bringing public interest litigation stand to gain no or little financial benefit if the litigation is successful. The possibility of a potentially ruinous costs order may act as a deterrent to a litigant seeking to bring or continue litigation in the public interest. The object of making a maximum costs order is to ensure that access to justice is not impeded in these circumstances. [46]

15.107 The legal costs in public interest litigation may be significant, reflecting the fact that the subject matter of the litigation may be important, complex and of high value. A fundamental weakness under the current Act is that parties do not know until the end of the proceedings what costs they will have to pay. Because of the important role played by public interest litigation, this situation should be changed.

15.108 The Interim Report canvassed a number of options for providing costs protection for public interest litigants. These included establishing a litigation fund for environmental actions and imposing a limit or cap on the costs that public interest litigants would have to pay in the event that they were unsuccessful.

15.109 After further deliberation, the Review recommends that the Act be amended to confer power on the Federal Court of Australia to decide, as a preliminary point, whether a case is a 'public interest proceeding' and what costs order is appropriate.

15.110 'Public interest proceeding' should be defined to mean a proceeding concerning a matter within the jurisdiction of the Court that:

- raises issues of general public importance;
- has prospects of success (in other words, rests on an arguable case);[47] and
- is instituted by a person or persons whose predominant purpose is to advance or protect a perceived interest, including a non-financial interest, of members of the public generally or a significant segment of the public.

15.111 A case would not fail to be a public interest case simply because the applicant or applicants, or some of them, share the public interest benefit in greater or lesser degree.

15.112 If the Court determines that a case is a public interest proceeding, the Court would have to determine whether a costs order would cause financial hardship to the other party.[48]

15.113 Provided there would be no financial hardship, the Court would not only be prohibited from making a security for costs order (recommended above),[49] but would also be required to make some form of a 'public interest costs order'. The nature of the 'public interest costs order' would be determined by the Court according to the circumstances of the particular case but should include, for example, the option to make a 'no costs' order, a capped costs order, a one-way cost shifting order or indemnity.

15.114 As the decision about whether a case is a public interest case is to be a preliminary one, it should provide the parties with certainty as to how costs will be awarded in the proceedings. It would also allow the parties to make an informed decision about whether they wish to proceed with the case before each party incurs substantial costs in preparing arguments. The Court would of course retain its discretion to revisit a 'public interest costs order' if conduct by one party during the proceedings warrants a reconsideration of the order, for example, in cases of deliberate delay or objection.

45 *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources* [2009] NSWLEC 165, per Preston CJ at 21.
46 *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Minister for Mineral Resources* [2009] NSWLEC 165, per Preston CJ at 55-58.
47 See *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150 per Pain J at 27, 49 and 57.
48 *Blue Mountains Conservation Society Inc v Delta Electricity* [2009] NSWLEC 150 per Pain J at 68.
49 Recommendation 52, Chapter 15 (above).

15.115 If the Court determines that the case is not a public interest case, the normal rules as to costs would apply (that is, the Court would retain its discretion with respect to orders as to costs). Any application for a costs order would need to be made in the ordinary manner.

Recommendation 53

The Review recommends that the Act be amended to empower the Federal Court to decide, as a preliminary matter, whether a case is a 'public interest proceeding' and, if so, to determine the appropriate form of 'public interest costs order'.

Notice of Proceedings

15.116 On a procedural matter, the Act should also be amended to insert a requirement on third parties who bring judicial review proceedings under the Act to inform the Minister of those proceedings as soon as they are commenced. There are similar notification requirements under other Commonwealth legislation.

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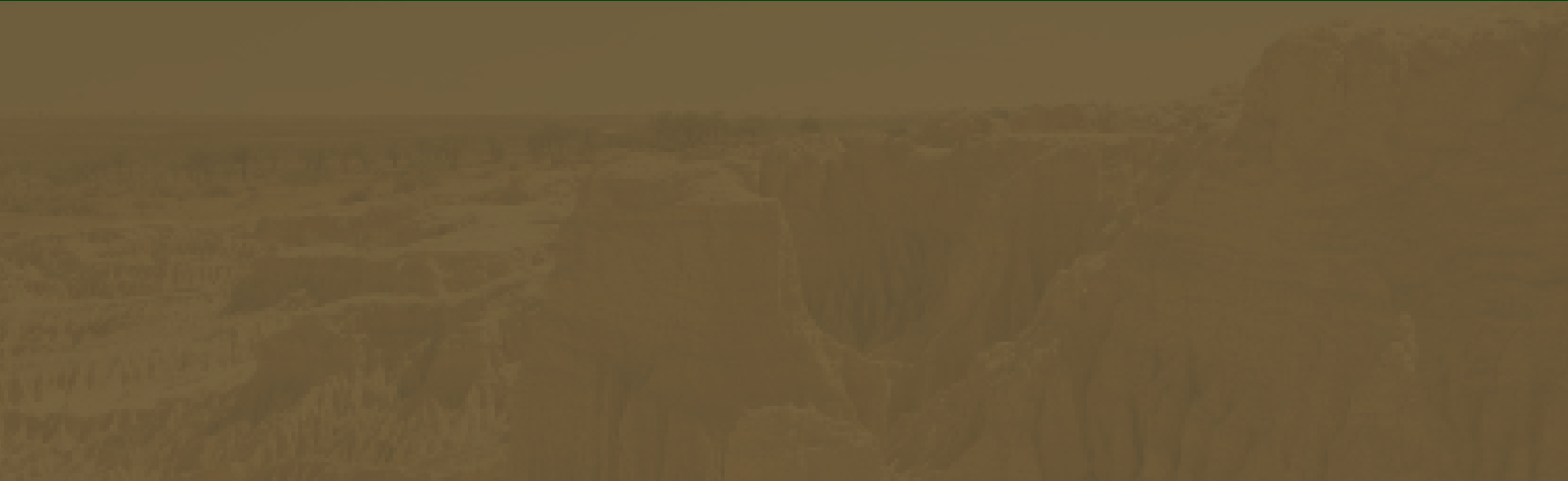
Chapter Sixteen

COMPLIANCE AND ENFORCEMENT, MONITORING AND AUDIT



Chapter 16: Compliance and Enforcement, Monitoring and Audit

Compliance and Enforcement

16.1 The Act provides a regulatory framework which includes a suite of provisions for criminal and civil penalties and other administrative remedies. A range of compliance and enforcement options are necessary to provide an effective and flexible regulatory system.

16.2 The civil and criminal penalty provisions are generally considered to be adequate and are high in comparison with other environmental protection legislation. For example, an individual who takes an action that has a significant impact on a listed threatened species may incur a civil penalty of a maximum of 5,000 penalty units (equivalent to $550,000). The maximum penalty for a body corporate for the same offence is 50,000 penalty units (equivalent to $5.5 million).

16.3 The adequacy of the provisions for penalties contained in the Regulations is more contentious. Section 520(2) of the Act provides that a penalty prescribed by Regulations must not be more than 50 penalty units (equivalent to $5,500).[1] Submissions were critical of the lack of deterrent value that this provided, particularly in relation to non-compliance with the provisions relating to access to biological resources.[2] This issue is discussed further in Chapter 5.

16.4 Submissions also argued that the Environment Minister should take a proactive approach to compliance and enforcement activities. They suggested increased on-ground activities, greater cooperation with States and Territories and wider use of the range of compliance and enforcement options available under the Act.

16.5 As highlighted by the Australian National Audit Office (ANAO), there were significant shortfalls in the enforcement of the Act in its early years of operation. When the ANAO conducted its first audit of the Act in 2002, there had been no prosecutions under the Act. When the ANAO conducted its second audit in 2006, there had only been one successful prosecution.[3]

16.6 The ANAO made recommendations to improve the Act's compliance and enforcement regime, including establishment of appropriate mechanisms for enhanced communication and education, increased capacity to enforce provisions and strengthened monitoring and review arrangements.

16.7 In response to the ANAO findings, the Australian Government allocated substantially more resources to compliance and enforcement activities, and in 2007 established a dedicated Compliance and Enforcement Branch within DEWHA to undertake a range of monitoring, audit, compliance and investigative functions.

16.8 DEWHA has recently achieved a number of successful investigative outcomes, namely, the first criminal prosecution for a breach of s.74AA and several civil prosecutions, including the contravention of s.18(3) where a pecuniary penalty of $220,000 was imposed. Use of administrative remedies has also increased. Examples include:

- an enforceable undertaking for agricultural development works that affected the population of a listed vulnerable species;
- an enforceable undertaking for maintenance works that impacted on a listed critically endangered species;
- a remediation determination for unauthorised clearing potentially impacting the Great Barrier Reef World Heritage Area; and
- the suspension of an approval and imposition of a directed environmental audit for a resort proposal in Northern Queensland.

16.9 The Act is an amalgamation of earlier legislation and although Part 17 contains the bulk of the compliance and enforcement provisions, others are scattered throughout the Act. This makes it unnecessarily difficult and time consuming for the community to access information and potentially creates barriers to compliance.

1 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.520(2).

2 Interim Report Comment 42: Dr Sarah Holcombe, Dr Matthew Rimmer and Terri Janke, p.16.

3 Australian National Audit Office Audit Report No.38 of 2002–03, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999.*

16.10 The terrestrial and marine environments need to have a consistent approach to compliance and enforcement under the Act. Hence the Act should be redrafted to streamline, simplify and ensure more consistent treatment in regulation of actions that are likely to impact on matters protected under the Act. The range of compliance and enforcement powers and responses available to regulate actions likely to impact on any of the matters protected under the Act should be grouped together within the Act.

16.11 Adoption of the recommendations in this Chapter will provide for greater efficiencies across a range of regulatory functions. Nonetheless, compliance, enforcement and audit activities will probably increase as a result of other amendments recommended by the Review. DEWHA, as a proactive environmental regulator, will need to be resourced adequately to respond to the additional workload and to provide for additional training requirements.

16.12 On 15 September 2009, the Attorney-General and Minister for Home Affairs announced the reform of maritime enforcement legislation to provide a unified and comprehensive suite of maritime enforcement powers in a single Act. DEWHA should work in close consultation with the Attorney-General's Department on development of the proposed Maritime Powers Bill, to ensure that the powers in the Bill allow for effective enforcement of the Australian Government's environmental laws.

Recommendation 54

The Review recommends that the Act be amended to bring together and rationalise the range of compliance and enforcement powers and responses available to regulate actions likely to impact on matters protected under the Act.

16.13 Submissions were critical of the perceived focus on 'lower level' compliance and enforcement remedies under the Act. The Australian Network of Environmental Defender's Offices noted:

> The full scope of the penalty provisions must be utilised by the Department, as opposed to the historical trend whereby responses to potential breaches of the Act have focussed on (implementing) the 'less robust' options. Deterrence is greatly undermined if decision-makers continue to consistently implement the 'softer' penalty provisions of the Act.[4]

16.14 While prosecution is a key sanction for breaches of environmental legislation, it is not always the most appropriate response. The New South Wales Environment Protection Authority (EPA) states that the decision whether or not to prosecute is the most important step in the prosecution process.[5] Prosecution is used as part of the EPA's overall strategy for achieving its objectives and is used as a strategic response where it is in the public interest to do so. The EPA provides publicly available guidelines to aid decision-making in determining whether to prosecute[6] and this is standard practice among many environmental regulators.

16.15 DEWHA employs a range of compliance responses that escalate according to the severity of contravention or if non-compliant activities continue. The Compliance and Enforcement Policy includes a set of criteria to be considered when determining appropriate responses to suspected contraventions of Australian Government environment and heritage legislation.[7] These criteria include:

- the sufficiency of evidence that has been collected;
- the cost to the Australian Government or general community of the contravention;
- the likely public perception of the breach and the manner with which it is dealt;
- the likelihood of a successful prosecution;
- the most appropriate response to ensure an effective deterrent against continuing contravention or contravention by others; and
- the seriousness of the harm caused by the alleged contravention, both to other people and to the environment or cultural heritage.

4 Submission 189: The Australian Network of Environmental Defender's Offices.

5 Department of the Environment and Climate Change, *EPA Guidelines* (2008) Section B http://www.environment.nsw.gov.au/legislation/prosguide/prosecutionguidelines_sectionB.htm.

6 Ibid.

7 A copy of DEWHA's Compliance and Enforcement Policy can be obtained at: http://www.environment.gov.au/about/publications/compliancepolicy.html.

16.16 Where legislation provides for parallel civil and criminal penalty provisions, DEWHA determines the most appropriate legal path based on the particular circumstances of the case. In determining the most appropriate course of action, consideration is given to whether legal action is being pursued under other legislation or by another person or jurisdiction and whether there is potential for multiple punishments for the same conduct.

16.17 If, as is proposed below, the use of the administrative, civil and criminal remedies available for breaches under the Act are to be expanded, the criteria in DEWHA's Compliance and Enforcement Policy for determining appropriate compliance and enforcement responses must be taken into account. The Policy should also remain publicly available.

Amalgamation of Existing Enforcement Provisions under the Act

16.18 The Act fails to make consistent provision for civil, criminal and administrative remedies for contraventions of the Act. For example, civil penalties, generally considered to be an important tool in modern regulatory practice, are not available for contraventions of Chapter 5 (which provides for the protection of threatened species and ecological communities, migratory and marine species, cetaceans, protected areas and heritage places). This limits the use of compliance and enforcement responses, including the use of enforceable undertakings under s.486DA of the Act.[8]

16.19 To enhance administration and enforce the Act as efficiently, effectively and transparently as possible, the compliance and enforcement provisions need to be harmonised to ensure they are uniform throughout the Act.

16.20 A structure that makes available the full suite of administrative, civil and criminal remedies, regardless of the matter to which the contravention relates, would provide for a more flexible and strategic approach to compliance and enforcement and assist in streamlining the legislation.

Expansion of Penalties for Part 3 Contraventions

16.21 Under Part 3 of the Act, actions that are likely to have a significant impact on a protected matter must be referred to the Environment Minister for approval under Part 9 of the Act. Failure to do so is an offence under the Act. Under Part 3, decisions approving controlled actions may include constraints, such as the attachment of conditions to protect, repair or mitigate damage to a matter protected under the Act. A person who has received approval under Part 9 of the Act must not contravene a condition attached to an approval.[9]

16.22 However, if a proposal has been approved under Part 9 of the Act, civil and offence provisions under Part 3 (significant impact on protected matters) are not available by virtue of 'exemption'. Many of the administrative remedies under the Act, for example enforceable undertakings and remediation determinations, are predicated on there being a reasonable belief that a breach has occurred under Part 3. This means that such mechanisms are not available for approved projects.

16.23 The ability to use administrative mechanisms for Part 3 offences, such as conservation agreements, enforceable undertakings and remediation determinations, would increase the opportunities for achieving positive environmental outcomes consistent with the objects of the Act.

Recommendation 55

The Review recommends that the Act be amended to allow for the full suite of administrative, civil and criminal remedies to be applied to any contravention or suspected contravention of the Act.

8 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.486DA.

9 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.142.

Language Used in the Act in Applying Administrative Remedies

16.24 Before triggering the use of administrative remedies under the Act, the Environment Minister must 'consider' or 'believe' that a contravention of the Act is likely to have occurred. Currently, inconsistent terminology is used in the Act to describe the 'test' required for the use of these remedies. This may create difficulties in applying these remedies in a uniform way and may impose unnecessary legal risks if such decisions are challenged. For example:

- an enforceable undertaking (s.486DA) and remediation determination (s.480D) requires the Minister to *consider* that a Part 3 contravention has occurred;
- a directed audit (s.458) requires the Minister to *believe or suspect on reasonable grounds* that a contravention has occurred;
- the suspension of an approval (s.144) requires the Minister to *believe on reasonable grounds* that a contravention has occurred; and
- the revocation of an approval (s.145) requires the Minister to *believe* that a contravention has occurred.

16.25 As part of the broader process for streamlining and simplifying the compliance and enforcement provisions under the Act, the terminology used in the administrative remedy provisions should be reviewed to ensure a consistent approach.

Schedule 1 Detention Powers

16.26 The Act enables prosecution of offending non-Australian citizens through detention powers in Schedule 1, which were introduced to:

- provide for the detention of non-Australian citizens who are reasonably suspected by an authorised officer of having committed an offence under the Act;
- provide for persons in environment detention to be searched, screened and given access to legal advice; and
- facilitate the transition of persons from environment detention to immigration detention.[10]

16.27 To clarify the role each Australian Government agency plays in relation to apprehension, investigation, prosecution and repatriation of foreign nationals under Schedule 1, the Australian Customs Service (ACS), the Department of Immigration and Citizenship (DIaC) and the Australian Fisheries Management Authority (AFMA) agreed to work with DEWHA to develop a Memorandum of Understanding (MOU).

16.28 To date, the MOU pertaining to Schedule 1 of the Act has not progressed, limiting DEWHA's ability to prosecute foreign offenders breaching the Act.

16.29 Initiating the processes required to operationalise Schedule 1 powers through development of the MOU with Customs, AFMA and DIaC will provide for better protection of matters under the Act and opportunities to increase interagency cooperation with States and Territories. A deadline of 1 December 2010 should be imposed to achieve the required MOU.

Regulation of Regional Forest Agreements (RFAs)

16.30 The operation of RFAs is a highly contentious issue and there is significant community concern that the environmental outcomes from RFA's are not being delivered. It is clear that increased Australian Government oversight is required to ensure that adequate biodiversity protections are being delivered and that reviews are completed according to specified requirements and in a timely manner. Chapter 10 provides extensive discussion on issues, including compliance, relating to RFAs.

10 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) Schedule 1.

Seizure of Specimens

16.31 The Act provides for authorised officers to seize wildlife specimens if there are reasonable grounds to suspect that a breach of Part 13A of the Act has occurred (Part 13A deals with the international movement of wildlife specimens). In some circumstances, the seized specimens may be removed and transferred elsewhere, for example to quarantine, State or Territory agencies or a zoo. However, this is not appropriate in all situations and the specimens often remain with the holder or owner.

16.32 Under s.449BA(b), the seized specimens may be returned to the owner or holder on such conditions as the DEWHA Secretary thinks fit. The Act does not specify any penalties for failing to adhere to any conditions that may be prescribed by the DEWHA Secretary. It appears to rely on the penalty for failing to deliver up specimens, should forfeiture take place, as sufficient to enforce adherence to conditions specified in seizure notices. This gap has resulted in owners or holders continuing to breed, sell and/or transfer the seized specimens and their progeny with little or no consequence.

16.33 In order to clarify this situation, the Act should be amended to specify an offence provision for not complying with the conditions set out by the DEWHA Secretary when specimens are released to the holder or owner.

Recommendation 56

The Review recommends that the Act be amended to provide for:

(1) the publication of documents relating to regulatory activities under the Act;

(2) the issue of Warning Notices, including specification of the circumstances when they can be issued;

(3) the sharing of information (obtained both voluntarily and through the use of compulsory or coercive processes) with State and Territory agencies; and

(4) offence provisions specific to non-compliance with s.449BA(b) conditions set by the DEWHA Secretary when specimens are released to the holder or owner.

Compliance with the Regulations for Whale Watching

16.34 Whale and dolphin watching is a growing industry in Australia. It is regulated in the Australian Whale Sanctuary[11] by the Australian Government. Regulation of these activities in State and Territory waters is the responsibility of the States and Territories. Part 8.2 of the EPBC Regulations applies to all people interacting with whales and dolphins, including commercial operators (tourist or otherwise) and people conducting recreational activities. The Regulations specify how vessels, aircraft and people must behave around these animals.[12] Part 8 of the Regulations specifies the strict liability offences and each has a maximum penalty of 50 penalty units (equivalent to $5,500).

16.35 Whale and dolphin watching activities in the Australian Whale Sanctuary do not require a permit provided the activity is operating in accordance with the EPBC Regulations. A whale and dolphin watching permit is only required for actions described in the *Australian National Guidelines for Whale and Dolphin Watching* as Tier 2 actions where additional management considerations may be needed.[13]

16.36 The Interim Report raised issues with whale and dolphin watching in the Australian Whale Sanctuary area, primarily relating to:

- the lack of clarity in the definitions and terminology in the EPBC Regulations relating to cetacean watching activities;
- the lack of consistency in the cetacean watching regulations between State, Territory and Australian governments;

11 The Australian Whale Sanctuary includes the Commonwealth marine area, beyond the coastal waters of each state and the Northern Territory. It includes all of Australia's Exclusive Economic Zone. More information can be found at: http://www.environment.gov.au/coasts/species/cetaceans/sanctuary.html.

12 *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth) regs. 8.1 and 8.2.

13 DEWHA, *Australian National Guidelines for Whale and Dolphin Watching* (2005) http://www.environment.gov.au/coasts/publications/whale-watching-guidelines-2005.html.

- the need for harmonisation with the National Whale Watching Guidelines to provide streamlined and consistent national legislation and greater clarity for the whale watching industry; and
- the ability of existing penalties provided for under the EPBC Regulations to deter offenders.

16.37 Whales Alive argued for greater regulation of these activities:

> There is currently no strict enforcement in either state or Australian Government waters to ensure cetacean watching operations are being undertaken in accordance with the guidelines. It is essential that the federal government provides sufficient resources to monitor and enforce the cetacean watching industry which is currently being left unchecked.[14]

16.38 As part of the broader streamlining of the compliance and enforcement provisions of the Act recommended above, the provisions for whale and dolphin watching, including the penalty provisions, should be reviewed.

16.39 This review should consider, but not be limited to:

- implementing a permit regime for all commercial whale watching activities occurring in Commonwealth waters;
- delegating authority to monitor and enforce whale watching in Commonwealth waters to States and Territories and other agencies;
- transferring the provisions for whale and dolphin watching offences to the new compliance and enforcement Part of the Act;
- reviewing the penalty provisions to provide a meaningful deterrent for offenders;
- reviewing the Regulations to provide clarity in definitions and ensure consistency with other guidelines and legislation; and
- including all offences under Part 8 of the Regulations in Schedule 10 of the Act (Infringement Notice Offences).

Recommendation 57

The Review recommends that the provisions of the Act relating to the whale and dolphin watching industry be amended to streamline and ensure consistency of legislation across all jurisdictions, and provide greater certainty for the industry and appropriate protection for cetaceans.

Compliance with Record Keeping for Exotic Animals

16.40 Section 303GN of the Act requires that persons or organisations that possess exotic animals prove the lawful import of that species (reverse onus of proof provisions). The issues relating to s.303GN are addressed in Chapter 12.

14 Submission 62: Whales Alive, p.6.

Particular Manner Decisions

16.41 Under s.77A(1) of the Act the Environment Minister may decide that a provision of Part 3 is not a controlling provision for an action because the action will be taken in a particular manner that will ensure that the action will not have (or is not likely to have) a significant impact on the matter protected by that provision. Under s.77A(2), civil penalties of up to 1,000 penalty units (equivalent to $110,000) for an individual and 10,000 penalty units (equivalent to $1.1 million) may apply if a person takes an action that is 'inconsistent' with the particular manner specified decision.

16.42 Particular manner decisions are a useful tool in the Environmental Impact Assessment (EIA) regime, allowing for quick decision-making for projects that have been designed to avoid or adequately mitigate significant impacts. However, particular manner decisions are problematic in terms of compliance and enforcement. This is due to:

- potential difficulties in interpreting 'inconsistent' in order to sustain a penalty;
- particular manner requirements being written in such a way that they are difficult to monitor and enforce; and/or
- the penalties being relatively severe and not necessarily appropriate for more minor or technical breaches.

16.43 In order to provide for more effective use and regulation of this provision and to ensure that positive environmental outcomes are achieved, the circumstances under which the particular manner provisions can be used should be clarified and made more explicit to encourage appropriate use by DEWHA. Efforts should also be made to ensure that the measures described in particular manner notices clearly and precisely obviate or avoid significant impacts on protected matters and are auditable and enforceable. Further, the use of 'inconsistent' in s.77A(2) should be amended to reduce uncertainty and make more explicit the basis on which a person may be in breach. For example, use of the terminology 'not in accordance with' may be more precise for compliance and enforcement purposes.

Environment Protection Orders

16.44 The Act provides few mechanisms to assist where an immediate threat to a matter of NES has been identified by an officer in the field or reported by the public.

16.45 Section 475(5) allows the Federal Court to grant an interim injunction to stop or prevent an action or require a person to undertake an action. However, an injunction may not be the most appropriate tool in circumstances where there is an initial suspicion of significant impact or the suspected breach is relatively minor, but further time is required to gather information and collect evidence.

16.46 The Act should be amended to allow an Environment Protection Order (EPO) to be made by the DEWHA Secretary. This tool is widely available in other jurisdictions and has proven to be a useful mechanism in responding to potential breaches of legislation.

16.47 EPOs could be modelled on State, Territory or Local Government approaches and provide for a time limitation, possibly 14 days, after which an extension would be required. For example, an EPO could be used to:

- ensure that a certain action (such as clearing) or impact is ceased to avoid harm;
- ensure that a listed ecological community or threatened species is not adversely affected;
- ensure that the heritage values of a place are not adversely affected; or
- require that a person must take action, such as develop a management plan, to avoid an impact.

16.48 The EPO should only be made if the DEWHA Secretary is satisfied, on reasonable grounds, that:

- the EPO is in accordance with any applicable guidelines (such as a recovery plan, listed threatening process etc) and/or the DEWHA Secretary is satisfied, on reasonable grounds, that there is a credible risk of a contravention occurring under the Act if the action continues; and
- urgent and/or immediate protection for a matter protected under the Act, is necessary.

16.49 Consideration should be given to who should have the power to issue an EPO. It could be restricted to the DEWHA Secretary or, in certain circumstances, extended to any officer authorised under the Act.

Extension and Reviews of EPOs

16.50 On application by the DEWHA Secretary, the Federal Court would have the power to extend the period for which an EPO is in force if satisfied that there is a serious and imminent threat to a matter protected under the Act and extension of the EPO is necessary. A person on whom an order has been imposed would also have a right to challenge the EPO in the Federal Court.

Contraventions of EPOs

16.51 A provision should be made in the Act that it is an offence if a person contravenes a requirement of an EPO. The penalty should be appropriate to the level of non-compliance and consistent with other penalties under the Act.

Recommendation 58

The Review recommends that the Act be amended to give the DEWHA Secretary power to issue Environment Protection Orders (EPOs), which should specify –

(1) the circumstances in which an EPO can be issued;

(2) the content of an EPO;

(3) the circumstances for extensions and review of an EPO; and

(4) the penalties for contravention of an EPO.

Establishment of a Public Register

16.52 Section 498 of the Act provides for the Environment Minister to publicise a contravention of the Act or Regulations where a person has been convicted or ordered to pay a pecuniary penalty.[15] The Act does not contain specific provisions that allow for the publication of information relating to other compliance, enforcement, post approval and audit activities which fall outside the scope of s.498.

16.53 The public seems to be unaware of DEWHA's day-to-day compliance, enforcement, post approval and audit activities, as evidenced by comments in public submissions. WWF noted:

> Public reporting against imposed conditions and mitigation requirements, and audits of compliance, would be valuable in giving us confidence that conditions will be adhered to into the future.[16]

16.54 The ability to make certain information available to the public would increase transparency, enhance the community's capacity to protect the environment through self-regulation and raise public awareness of DEWHA's regulatory activities.

16.55 A public register, available on DEWHA's web site, would allow administrative remedies and related documentation, enforceable undertakings, conservation agreements, remediation determinations and other compliance and enforcement related decisions to be made public. The public register could also be used to establish the environmental history of a proponent and for publication of compliance audit findings.

15 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.498.

16 Interim Report Comment 88: WWF, p.10.

Warning Notices

16.56 Currently few mechanisms are available under the Act to address lower order compliance matters, such as minor technical breaches of particular manner decisions and conditions of approval.

16.57 A new provision in the Act could provide for the DEWHA Secretary to issue warning notices in circumstances where there are reasonable grounds to believe a breach has occurred. Examples of possible uses include:

- wildlife trade activities where a minor breach is suspected but needs further investigation;
- breach of EPBC Regulations relating to whale and dolphin watching activities; or
- offshore seismic operators who may have breached the requirements of a particular manner decision.

16.58 Warning notices could be taken into account when considering a person's environmental history for the purposes of deciding whether to give project approvals under s.136(4).

16.59 The use of warning notices would inform proponents, the public and other stakeholders of the need to ensure compliance with the Act.

State and Territory Cooperation

16.60 Submissions were supportive of greater cooperation and strengthening of compliance networks with State and Territory agencies.

16.61 DEWHA works with partner agencies and co-regulators to ensure an appropriate whole of government approach to compliance and enforcement matters and to increase efficiencies through the use of local resources and knowledge. Where monitoring responsibilities overlap with those of other agencies, strategic partnerships are established and information is shared where required or permitted by law.

16.62 DEWHA is a member of the Australasian Environmental Law Enforcement Resource and Regulators Network (AELERT) which, through its network of Australian, State and Local Government environmental enforcement agencies, encourages the promotion of inter-agency cooperation and sharing of compliance and enforcement expertise.[17] This network should continue to be used to assist DEWHA in promoting cooperation and sharing of compliance and enforcement expertise.

16.63 Cooperation with State and Territory agencies on compliance and enforcement activities is facilitated through the appointment of *ex officio* wardens and inspectors (s.397) and other inspectors (s.398) under the Act. Currently, all officers from the Australian Federal Police and Customs are *ex officio* inspectors and wardens under the Act and certain Great Barrier Reef Marine Park Authority and Australian Quarantine and Inspection Service officers are appointed as inspectors. The Act does not provide for similar arrangements to enable officers from the Department of Defence and Australian Fisheries Management Authority to function as *ex officio* officers. Remedying this gap would increase efficiencies, particularly in relation to compliance and enforcement activities in areas where there is often no DEWHA presence.

16.64 While the Act provides for a range of activities to be undertaken during joint investigations and provides that items seized under a search warrant may be made available to other agencies[18], the Act is silent on the sharing of information collected using the Act's other powers, such as monitoring warrants and 'notices to produce'. This is in contrast to many Memorandum of Understanding (MOU) arrangements between law enforcement agencies that include specific information sharing powers.

16.65 Amendment of the provisions relating to information sharing during joint investigations would facilitate more efficient joint investigations and greater cooperation with other regulatory agencies.

17 Interim Report Comment 22: The Australasian Environmental Law Enforcement Resource and Regulators Network, p.2.

18 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.417(5).

Use of Independent Expert Witnesses

16.66 It is accepted practice in some Australian court systems for the court to provide guidance to parties on the handling of expert opinion evidence and use of expert witnesses. For example, the practice in the New South Wales Land and Environment Court is to:

- encourage the use of a single expert, or
- require parties to confer prior to a hearing to produce a joint report in which they set out the matters agreed, the matters on which they disagree and the reason for the disagreement; and
- require experts in the same discipline to give their evidence concurrently.[19]

16.67 This cost and time effective process has streamlined court processes.

16.68 The Federal Court of Australia also provides Practice Guidelines to facilitate the admission of expert opinion evidence and to assist experts to understand what the Court expects of them. The guidelines are also intended to assist individual expert witnesses avoid the criticism that expert witnesses lack objectivity, or have coloured their evidence in favour of the party calling them.[20]

16.69 Prior to commencing court action for an offence under the Act, the Australian Government may be required to seek independent expert opinion. Other parties are also likely to engage separate independent experts to provide opinion on the nature and likely significance of the impact of the action on the matter protected under the Act.

16.70 To create greater efficiencies in the use of expert witnesses and the handling of expert opinion by DEWHA and other parties, the Act should be amended to specify how expert opinion evidence and expert witnesses should be managed in relation to court proceedings.

Recommendation 59

The Review recommends that the Act be amended to confer on the Federal Court power to specify processes for the management of expert opinion evidence and expert witnesses, including to:

(1) encourage the use of a single expert, and

(2) require parties to confer before the hearing to produce a joint report in which they set out the matters agreed, the matters on which they cannot agree and the reason for the disagreement.

Environment Reparation Fund

16.71 DEWHA administers a range of functions under the Act that in certain circumstances require a monetary payment. These payments may be as a component of conditions of approval or conservation agreements, payment as part of remediation settlements or penalties for offences under the Act.

16.72 DEWHA has the facility to administer bonds, guarantees and small cash deposits, but has no administrative arrangements for the management of other payments. As a result, the types of payments discussed above have to be managed by other agencies or stakeholders, with penalties generally going to consolidated revenue. This situation is unsatisfactory, as it limits how the funds can be spent and provides insufficient oversight to ensure that the funds are dispersed as negotiated.

16.73 Other legislation allows for the collection and administration of payments. For example, the *Proceeds of Crime Act 2002* provides for confiscation of the proceeds of crime against Commonwealth Law and allows confiscated funds to be given back to the Australian community. The Australian Government may also approve equitable sharing payments to be made to States, Territories and foreign countries to allow confiscated funds to be shared with other jurisdictions, in recognition of the effort involved in joint investigations or prosecutions.

19 New South Wales Land and Environment Court, *Practice Direction: Court Appointed Experts* (2005) http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_pd_caes.

20 Federal Court of Australia, *Guidelines for Expert Witnesses in Proceedings in the Federal Court of Australia: Practice Direction* (2007) http://www.fedcourt.gov.au/how/prac_direction.html#current.

16.74 The South Australian *Environment Protection Act* 1993 (SA) provides for the establishment of an Environment Protection Fund. This fund administers, among other things, penalties recovered in respect of offences against this Act and amounts recovered as a result of civil proceedings.[21]

16.75 In Canada, a statutorily established Environment Damages Fund is financed through a court awarded penalty system or through agreement, similar to conservation agreements under the EPBC Act. The fund gives courts a way to guarantee that money from pollution penalties and settlements is invested to repair damage done by the pollution. To remove any possible conflict of interest, Environment Canada is prohibited from using the funds itself so it administers the fund by contracting others to carry out work related to the Fund in accordance with conditions imposed by the Court.[22]

16.76 A similar model, set up and administered under the Act, should improve efficiency by allowing DEWHA to collect and direct funds to research, environmental rehabilitation, reparation or other projects.

16.77 The Act should be amended to provide for the establishment and administration of an Environment Reparation Fund. Chapter 3 recommends the establishment of a biobanking system. The Government should consider linking biobanking payment arrangements with the Environment Reparation Fund.

Recommendation 60

The Review recommends that the Act be amended to establish an Environment Reparation Fund and specify:

(1) the establishment of the fund;

(2) the structure and function of the fund; and

(3) the ongoing administration of the fund.

Post Approvals Monitoring and Audit

16.78 The importance of post-approval monitoring and compliance auditing of projects approved under the Act has been highlighted by the ANAO.[23] Such monitoring and audit is an important tool in evaluating the activities of the regulated community and ensuring the provisions of legislation are met.

16.79 Before the ANAO completed its second report in 2006, just one audit of controlled actions had been undertaken. Since then, DEWHA has established a dedicated post-approvals Monitoring and Audit Section that undertakes random and strategic audits and other compliance activities relating to conditions of approval.

16.80 DEWHA recognises that carrying out regular compliance audits demonstrates to the community that a system is in place for measuring and improving compliance and increasing confidence in the regulatory system. Early intervention in the form of a compliance audit also reduces the risk of serious non-compliance arising inadvertently.

16.81 Several options are available to monitor compliance with conditions attached to an approval. The option selected reflects the complexity of the action, the number of matters to be audited and a risk assessment of the impacts on matters protected under the Act. These options can include one or a combination of the following:

- desktop audit/review of documents supplied by the proponent;
- site inspections;
- inspections under monitoring warrant;
- audit by DEWHA officers;
- joint audit with another agency;
- external environmental audit; and/or
- directed audit.

21 *Environment Protection Act 1993* (SA) s.24.

22 Environment Canada, *Environment Damages Fund* (2004) http://www.ec.gc.ca/edf-fde/default.asp?lang=En&n=C5BAD261-1.

23 Australian National Audit Office Audit Report No.38 of 2002–03, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999.*

16.82 Projects are selected for audit based on individual factors or a combination of risk assessment, geographic location, controlling provisions and industry sector.

16.83 DEWHA's internal project auditing strategy and post-approvals monitoring program determines whether projects are being implemented in accordance with approval conditions and particular manner decisions. In 2008-09, nine projects were audited as part of the random audit program. Eight strategic audits and nine monitoring site inspections were also completed.

16.84 DEWHA's audit program aims, on an annual basis, to randomly audit ten per cent of all particular manner and conditioned projects under the Act. This approach was established in 2007 at the commencement of the compliance audit program. More efficient strategies may be possible. As the number of projects in the post approval phase eligible for audit increases, DEWHA will need to reassess the number of audits that should be undertaken in order to meet the audit program's objectives.

16.85 An alternative approach could be to develop a strategy in which the rate of audits depends on the expected rate at which failures will occur. That is, it would be more cost-effective to target inspection resources towards those areas where the risks are greatest. One way to do this would be to specify a 'prevalence' or expected failure rate in the projects being inspected. Inspection should then occur with a frequency that ensures an acceptable probability of detecting failures. This strategy would result in different inspection rates for different projects, with more frequent inspections in riskier projects for the same overall effort.

16.86 This approach has merit and should be critically reviewed with consideration given to establishing a more efficient and cost-effective audit strategy which meets the objectives of DEWHA's audit program.

Audit Powers under the Act

16.87 Section 458 of the Act allows the Environment Minister to direct the holder of an environmental authority to carry out a directed environmental audit. This is the only provision that provides for audits under the Act. The Act should be amended to explicitly empower the Environment Minister to undertake audits of compliance with approval decisions as well as permits and other conditioned decisions currently not audited under the Act. Such a provision would provide a clear legal foundation for DEWHA's audit programs and provide a positive incentive for proponents to comply with conditions of approval.

16.88 The approach could be modelled on other legislation that sets out the function of an authorised officer to inspect and audit places, systems and procedures. The option to undertake audits without notice should also be considered.

16.89 DEWHA's existing compliance auditing program is based on comprehensive criteria. These criteria should be incorporated into the new provisions to provide transparency and clarity to authority holders but should also allow reasonable flexibility to accommodate the range of audit functions proposed.

Performance Auditing

16.90 The need to report on the outcomes of activities undertaken in implementing the Act is discussed in greater detail in Chapters 2 and 3. One method for doing this is to collect information relating to operational and administrative performance through the use of performance based audits. The performance auditing power should cover:

- plans, policy and programs endorsed under strategic assessments;
- approved bioregional plans;
- assessment and approval bilateral agreements;
- RFAs (discussed in Chapter 10); and
- accredited Commonwealth agency environmental management programs.

16.91 Provisions to allow the Environment Minister to undertake discretionary performance audits should be incorporated into the new consolidated compliance and enforcement Part of the Act.

16.92 Chapter 20 recommends establishing a National Environment Commissioner to take on responsibility for providing advice to the Environment Minister for the purposes of making decisions about environmental impact assessment and approval processes under the Act. Other functions could also be transferred to the National Environment Commissioner, including the responsibility for monitoring, audit, compliance and enforcement activities under the Act.

Recommendation 61

The Review recommends that the Act be amended to give the Minister the discretion to undertake compliance and performance audits.

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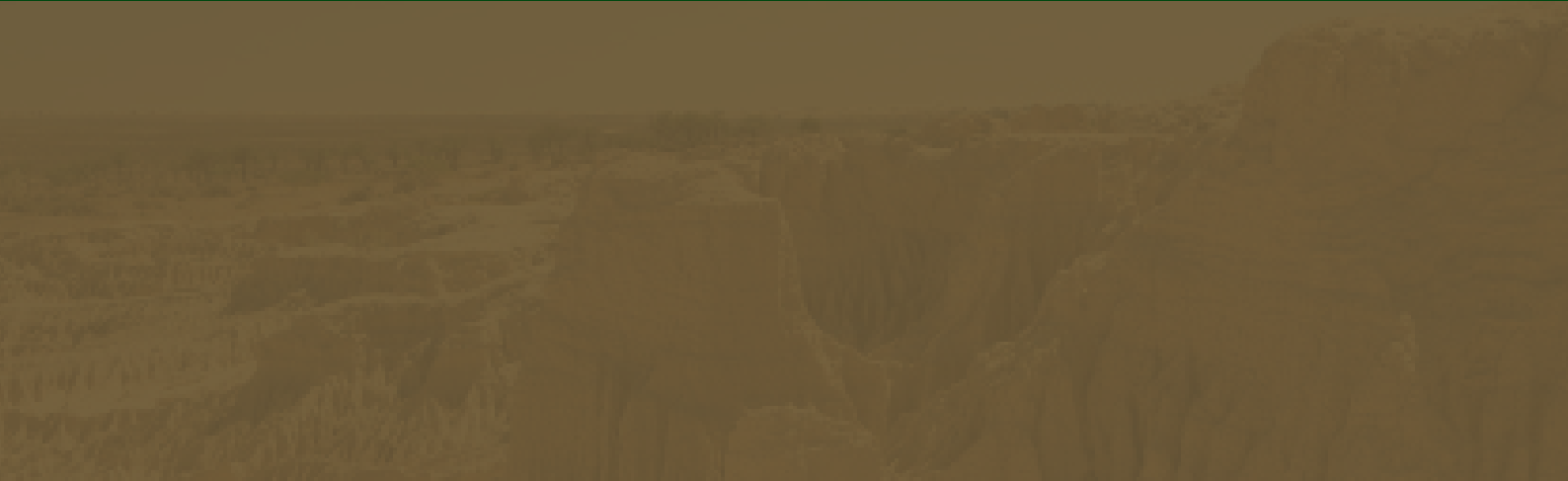
Chapter Seventeen

COST RECOVERY



Chapter 17: Cost Recovery

17.1 Australian Government policy requires agencies to recover the costs of their activities, where appropriate. *The Australian Government Cost Recovery Guidelines* (2005)[1] (the Guidelines) provide guidance for agencies to determine when cost recovery will be appropriate, defining cost recovery as:

> the recovery of some or all of the costs of a particular activity. Australian Government cost recovery charges fall into two broad categories:
>
> - fees for goods and services; and
> - 'cost recovery' taxes (primarily levies, but also some excises and customs duties).[2]

17.2 Cost recovery is different from general taxation, due to the direct link between the revenue and the funding of a specific activity (that is, product/s or service/s) in a cost recovery process. The Guidelines note that:

> Some levies or taxes are used to raise cost recovery revenues, but the direct link — or 'earmarking' — between the revenue and the funding of a specific activity distinguishes such cost recovery taxes from general taxation. General taxation, on the other hand, is a compulsory exaction of money by a public authority for public purposes, enforceable by law, and which is not a payment for services rendered. [3]

17.3 The Guidelines set out 14 key principles to be used by Australian Government agencies when considering whether cost recovery is appropriate for a particular activity. [4] These principles state, for example, that agencies must consider whether cost recovery would be efficient, cost-effective and reflect the costs of providing the product or service either as a fee-for-service or, where efficient, as a levy.

17.4 The underlying policy principle is that entities should set charges to recover all the costs of products or services where:

- it is efficient and cost effective to do so;
- the beneficiaries of the products or services are a narrow and identifiable group; and
- charging is consistent with Australian Government policy objectives.

17.5 The Guidelines prohibit agencies from cost recovering budget (that is, taxpayer) funded activities. This is to prevent agencies 'double dipping', that is, recovering the costs of an activity on top of funding received through the budget process.

17.6 The Guidelines state that activities that meet the following criteria should remain budget funded (and not cost recovered):

- they have 'public good' characteristics (as defined in the Guidelines); and/or
- they generate significant spillover benefits to the broader community; or
- there are other policy reasons for taxpayer funding.[5]

17.7 Any changes to the funding arrangements for activities under the EPBC Act that are currently budget funded would require the approval of Cabinet or the Finance Minister.

17.8 One of the considerations specified in the Guidelines, which is relevant in the context of considering whether activities administered under the EPBC Act are appropriate for cost recovery, is that cost recovery is generally not appropriate for activities in which the public good characteristics outweigh the private good characteristics. Where there is both a public and a private benefit, only the marginal costs attributable to the private benefit gained from the activity should be recovered.

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1 A copy of the Guidelines can be obtained from the Department of Finance and Deregulation website: http://www.finance.gov.au/publications/finance-circulars/2005/docs/Cost_Recovery_Guidelines.pdf.

2 Department of Finance and Deregulation, *Australian Government Cost Recovery Guidelines* (2005) p.10 http://www.finance.gov.au/publications/finance-circulars/2005/docs/Cost_Recovery_Guidelines.pdf.

3 Department of Finance and Deregulation, *Australian Government Cost Recovery Guidelines* (2005) pp.10-11 http://www.finance.gov.au/publications/finance-circulars/2005/docs/Cost_Recovery_Guidelines.pdf.

4 Department of Finance and Deregulation, *Australian Government Cost Recovery Guidelines* (2005) pp.2-3 http://www.finance.gov.au/publications/finance-circulars/2005/docs/Cost_Recovery_Guidelines.pdf.

5 Department of Finance and Deregulation, *Australian Government Cost Recovery Guidelines* (2005) p.30 http://www.finance.gov.au/publications/finance-circulars/2005/docs/Cost_Recovery_Guidelines.pdf.

17.9 The Guidelines also relevantly state that where possible the costs recovered should be the full costs of the activity. Partial cost recovery can only be used

> 'where new arrangements are phased in, where there are government endorsed community service obligations, or for explicit government policy purposes.'[6]

17.10 In considering whether to introduce cost recovery for particular activities under the Act, another issue that the Guidelines require to be considered is whether the costs of administering a cost recovery program outweigh the anticipated benefits of recovering the costs of administering the activity. Cost recovery measures should only be implemented where it is efficient and effective to do so.

Cost Recovery Actions vs. Fees

17.11 It is important to distinguish between cost recovery programs and fees imposed under primary and secondary legislation. Cost recovery actions are imposed to recover the costs of particular activities; fees can simply be imposed under Acts of Parliament or Regulations and may not necessarily be directed at cost recovery.

17.12 Fees imposed by legislation are not required to be calculated by having reference to the total costs incurred in administering the activity. Rather, they can be imposed on the basis that the Parliament has decided, by passing legislation or enacting Regulations, that it is appropriate for a fee to be charged in the particular circumstances, and at a level the Parliament believes appropriate.

17.13 Charges that are payable for undertaking activities in Commonwealth reserves are a good example of 'fees' imposed by legislation, not directed at full cost recovery. This arrangement should not be changed. A key reason for not pursuing full cost recovery is that the benefit to the broader community of managing Commonwealth reserves to conserve biodiversity is the primary benefit of the reserve, rather than personal individual benefits that might be derived from the reserves. That is, the private benefit of being able to undertake certain activities in Commonwealth reserves is of secondary importance to the public benefit of conserving biodiversity.

Cost Recovery under the EPBC Act

17.14 The Act provides for a certain degree of cost recovery for activities carried out under the Act. Currently some of the administration costs that are cost recovered are:

- permits to import and export *Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES) listed species;[7]
- permits to export regulated native specimens;[8]
- permits to import regulated live specimens;[9]
- tags required under CITES;[10]
- exceptional circumstances permits for exemptions from sections of Part 13A;[11] and
- testing permits to assist with s.303EE impact assessments.[12]

17.15 Partial cost recovery mechanisms are also currently in place for environmental impact assessments undertaken by the Great Barrier Reef Marine Park Authority. These are considered to be helpful in that they help finance the administration of assessments and therefore can result in improved environmental outcomes.

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6 Department of Finance and Deregulation, *Australian Government Cost Recovery Guidelines* (2005) p.2 http://www.finance.gov.au/publications/finance-circulars/2005/docs/Cost_Recovery_Guidelines.pdf.

7 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.303CE.

8 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.303DE.

9 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.303EL.

10 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss.303EU-EW.

11 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.303GB.

12 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.303GD.

17.16 However, when considering further options for cost recovery of activities administered under the EPBC Act, that is switching to cost recovery as the method of financing administration rather than budget funding, there will be a need to ensure that the amounts cost recovered are sufficient to support administration of the Act, even in times of an economic downturn (when development slows).

17.17 The current cost recovery arrangements for permits under the Act should be retained, but should be reviewed to determine whether the charges imposed are an accurate reflection of the costs involved in assessing the permit applications. In this context, the Australian Government may wish to consider creating a cost recovery system on a whole of government basis where the charges payable are revised on an annual basis to take into account adjustments in the Consumer Price Index or other factors that may affect the costs of the activity to government. These types of considerations might be usefully included in the Cost Recovery Impact Statement should cost recovery options be further explored by the Australian Government.

17.18 Other activities not currently subject to cost recovery or a fee but for which costs could be recovered under the Act include:

- permits for migratory and marine species interactions;
- transfers of permits granted under the Act;
- approvals of certain programs or plans under Part 13A;
- applications to amend the list of specimens suitable for live import; and
- referrals under Part 7 of the Act.

17.19 If cost recovery is considered for the above activities, it will be important to define clear points at which the cost recovery will be imposed ('charging points'). The person to be charged (the 'payee') must also be easily identifiable.

17.20 The Guidelines require that cost recovery only be imposed if the imposition of the charge would be consistent with Australian Government policy objectives. The potential for the introduction of cost recovery for Part 7 referrals to create disincentives for compliance with the Act must therefore also be considered. For example, proponents may choose not to incur the expense (imposed through cost recovery) of referring an action under the Act if they believed they might avoid detection and any associated penalties for non-compliance under the Act. Any cost recovery imposed with respect to Part 7 of the Act would therefore need to occur in conjunction with an increase in monitoring and compliance activities, to ensure that cost recovery does not lead to fewer referrals and potentially less desirable environmental outcomes.

17.21 Proponents already bear a significant portion of the costs of the referral process as they are responsible, for example, for producing the referral information. Similarly, permit applicants bear the costs of preparing some of the information relied on when the decision-maker is determining whether or not to grant the permit.

17.22 Rather than impose cost recovery for referrals and permit applications, it may be worth considering the imposition of a fee (under the Act or Regulations) for these activities. An analogy could be drawn between these EPBC Act activities and applications made to a court – that is, a fee could be imposed at the time of lodging a referral or permit application, similar to how a filing fee is imposed when documents pertaining to an application made to a court are filed with the court.

Project Approvals

17.23 The environmental impact assessment and approval process under the Act is potentially a candidate for cost recovery. The granting of an approval for an action that has, will have or is likely to have a significant impact on a protected matter is usually a clear example of the private benefit of the approval outweighing any benefits to the broader community. Individual project approvals also tend to have clearly identifiable beneficiaries, that is, the proponent.

17.24 One of the issues associated with deciding whether to impose cost recovery on the assessment and approval process under the Act is the timing of when the charge should be imposed. For example, the charge could be imposed:

- when the action is determined to be a controlled action ('controlled action decision');
- when the assessment approach is decided ('assessment method decision'); and/or
- when the approval decision is made, regardless of whether the action is approved.

17.25 Cost recovery should only be imposed once, to avoid any possibility of double charging. The exception to this general preference, discussed below, is where the proponent has failed to provide the Minister with sufficient information for making a decision and further information is requested. For reasons outlined below, the preferred charging point in the Environmental Impacts Assessment (EIA) process is at the assessment method decision.

17.26 Cost recovery should not be imposed for the controlled action decision, because of the potential disincentive for compliance with the requirement on proponents to refer actions under the Act. In addition, there is no clear demarcation between private and public benefits arising from the requirement to refer. At the time that an action is determined to be a controlled action, benefit to the proponent is minimal – controlled actions must still be assessed for approval under the Act. However, it may be possible to impose a set fee at the time a referral is lodged with DEWHA, similar to fees charged by Local Councils when development applications are lodged for approval.

17.27 While the private benefit clearly outweighs the benefit to the broader community for actions that receive approval under the Act, cost recovery on project approval decisions is not recommended. Apart from issues that may arise in determining the 'cost' of obtaining an approval decision under the Act, imposing cost recovery for project approvals could create a perception that proponents were 'buying' their approval.

17.28 If cost recovery is to be introduced for the project assessment and approval process under the Act, it is therefore preferable for the charge to be imposed at the time of the assessment method decision. If this approach is taken, cost recovery would not be imposed on actions unless they have, will have or are likely to have a significant impact on a protected matter.

17.29 The cost recovery amount to be charged could be calculated based on the average amount of time spent by DEWHA when undertaking an assessment under the relevant assessment method. It would be expected, for example, that the costs of assessing an action based on preliminary documentation would be less than the costs of an assessment under the Environmental Impact Statement method.

17.30 However, any cost recovery mechanisms introduced would need to be transparent with respect to the basis on which the sum of costs recovered is calculated. In considering whether to introduce cost recovery mechanisms, the Australian Government could refer to the practices in place in other agencies using cost recovery mechanisms.[13]

17.31 As noted earlier, the cost recovery regime should also have the scope to allow DEWHA to recover costs associated with commissioning additional information for the purposes of making an approval decision under the Act, should the information supplied by the proponent prove inadequate.

17.32 If cost recovery is imposed at the assessment method decision stage, some equity issues may also need to be considered – while large companies referring large projects may be able to afford to pay the significant costs arising from the assessment, an individual referring an action, for example to alter a heritage-listed house, may not be as well placed. The possibility of introducing differential or scaled cost recovery charges in relation to relevant aspects of the activity or the payee should therefore also be considered.

17.33 If recovering the full costs of the assessment could give rise to an unacceptable level of risk that proponents would choose not to refer actions under the Act, partial cost recovery for the assessment process may be more appropriate. In accordance with the Guidelines, partial cost recovery can only be imposed if it serves Australian Government policy objectives.

13 See for example, the Australian Quarantine and Inspection Service, Great Barrier Reef Marine Park Authority and IP Australia, which operate on a full or partial cost recovery basis.

17.34 An alternative way of achieving cost recovery would be to adopt a system similar to that which is in place in Canada. Under the Canadian system, proponents can elect to pay the full cost of the EIA process themselves, including the cost of hiring environmental consultants and project managers to prepare advice, but the consultants and project managers are commissioned by the Government (not the proponent).[14] A similar approach could be taken as an option under the EPBC Act. That is, proponents could exempt themselves from the normal cost recovery regime by electing to self-fund the EIA process, but with the Government choosing who will undertake the assessment and how the assessment will be conducted.

17.35 The Act contains strict time limits for decision-making. There are nevertheless circumstances where proponents wish the Australian Government to fast-track their projects by applying additional resources to the assessment than would normally be the case. In these circumstances proponents should be able to 'opt in' to a cost recovery arrangement to cover these additional costs.

17.36 If the Australian Government decides to introduce cost recovery for environmental impact assessments under the Act, proponents should be charged at the assessment approach decision point and a tiered payment structure, according to the assessment method and the proponent's ability to pay, applied.

Strategic Assessments

17.37 The Guidelines outline a process that relies on administrators calculating the private benefits stemming from a particular activity and directly relating that to the costs incurred by the Government. This is more challenging when considering the application of cost recovery mechanisms for strategic assessments.

17.38 As an administrative exercise, it is relatively simple to identify the person from whom costs can be recovered for project-by-project assessments, as the proponent is clearly the party receiving the private benefit. It is more challenging to identify the beneficiaries of a strategic assessment, as these assessments apply to actions that will occur sometime in the future and may be carried out by as-yet-unknown proponents.

17.39 While it is possible to charge State, Territory or Local governments for the assessments of plans, there is a real chance that introducing cost recovery would be a disincentive to undertaking strategic assessments. If the Australian Government decides that encouraging strategic assessments is a policy objective, cost recovery may not be appropriate at this stage.

Recommendation 62

The Review recommends that the cost recovery mechanisms under the Act be improved by:

(1) introducing a fee for referring an action or applying for a permit;

(2) introducing cost recovery for the environmental impact assessment of proposed actions levied on a sliding scale and charged at the time the method of assessment is set;

(3) amending the Act to allow the Australian Government to recover costs associated with commissioning additional information required because of inadequacies in the information supplied by a proponent;

(4) developing options for allowing proponents to 'opt in' to a full cost recovery system for management of large, time-critical projects that require additional government resources to assess; and

(5) reviewing and modernising fees and charges under the Act so they are adjusted according to movements in the Consumer Price Index and other relevant factors.

14 For more detail information on the cost recovery process for review panels in Canada, see Canadian Environmental Assessment Agency, *Public Consultation Document Cost Recovery for Review Panel Management* (2008) http://www.ceaa.gc.ca/013/011/recovery_e.htm.

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Chapter Eighteen

RELATIONSHIP WITH OTHER COMMONWEALTH LEGISLATION

Chapter 18: Relationship with Other Commonwealth Legislation

General Considerations

18.1 The EPBC Act is a sizeable Act, in terms of both its physical size and the number of issues with which it deals.

18.2 The Act was in part enacted to 'to assist in the co-operative implementation of Australia's international environmental responsibilities'.[1] Key among these responsibilities are the obligations arising under the *Convention on Biological Diversity* (Biodiversity Convention), as these create broad obligations to protect biodiversity.

18.3 Prior to the ratification of the Convention, Australia's international obligations relating to biodiversity conservation and heritage protection were more focussed in their subject matter, stemming from conventions that regulate the trade of cultural property[2] and protect World Heritage areas.[3] These obligations were implemented through the enactment of specific legislation.

18.4 The Act does not operate in isolation. Other pieces of legislation that relate to the protection of the environment, such as the *Fisheries Management Act 1991* (Cth), were enacted on the basis of other Constitutional powers.[4]

18.5 While these Acts deal with subject matter similar to that of the EPBC Act, they continue to operate, for the most part, independently of the EPBC Act. One of the goals of the Review is to place all Commonwealth legislative provisions relating to biodiversity conservation and heritage protection in a single Act, where possible, to make it simpler for users of the legislation. This goal is consistent with the Terms of Reference for this Review, particularly 3(d) and (e), which require the Review to be guided by 'key Australian Government policy objectives', including:

- the Australian Government's deregulation agenda to reduce and simplify the regulatory burden on people, businesses and organisations, while maintaining appropriate and efficient environmental standards; and
- to ensure activities under the Act represent the most appropriate, efficient and effective ways of achieving the Government's outcomes and objectives in accordance with the Expenditure Review Principles.[5]

18.6 This Chapter is divided into two sections:

- Commonwealth legislation that could be incorporated into the new Act; and
- Commonwealth legislation that interacts with the EPBC Act and how this interaction could be streamlined.

18.7 The EPBC Act has significant interactions with several pieces of Commonwealth legislation which are referenced elsewhere in this Report. These Acts are the:

- *Australian Heritage Council Act 2003* (Cth) – discussed in Chapter 8;
- *Fisheries Management Act 1991* (Cth) – discussed in Chapter 11;
- *Gene Technology Act 2000* (Cth) – discussed in Chapter 6;
- *Quarantine Act 1908* (Cth) and its recommended successor, the Biosecurity Act – discussed in Chapter 6;
- *Regional Forest Agreements Act 2002* (Cth) – discussed in Chapter 10; and
- *Water Act 2007* (Cth) – discussed in this Chapter and in Chapter 4.

18.8 The Carbon Pollution Reduction Scheme (CPRS) is a proposed legislative scheme that, if passed, will have a significant interaction with the EPBC Act. The relation between the CPRS and the EPBC Act is discussed further in Chapters 4 and 6.

1 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.3(e).
2 The *Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property* done at Paris 14 November 1970.
3 The *Convention Concerning the Protection of the World Cultural and Natural Heritage* (World Heritage Convention) done at Paris on 23 November 1972.
4 Relying in part on s.51(x) of the Australian Constitution.
5 Terms of Reference, for the EPBC Act Review 3(d) and (e).

Legislation That Could Be Incorporated Into The Act

18.9 These Acts for the most part fall into the category of legislation designed to implement Australia's international obligations that predate Australia's ratification of the Biodiversity Convention[6] and the signing of the 1997 COAG Heads of Agreement. As noted in Chapter 1, the ratification of the Biodiversity Convention and the signing of the Heads of Agreement created an holistic framework for Commonwealth regulation of matters that are considered to be of national environmental significance.

18.10 While the EPBC Act establishes the framework for Commonwealth regulation of environmental matters, some smaller pieces of legislation also regulate aspects of environment (including heritage) protection, actions in the marine environment and uranium mining. These Acts are the:

- *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) (ATSIHP Act);
- *Environment Protection (Alligator Rivers Region) Act 1978* (Cth);
- *Environment Protection (Sea Dumping) Act 1981* (Cth) (Sea Dumping Act);
- *Historic Shipwrecks Act 1976* (Cth);
- *Protection of Movable Cultural Heritage Act 1986* (Cth) (PMCH Act); and
- *Sea Installations Act 1987* (Cth) (SIA).

18.11 Similar to the EPBC Act, these pieces of legislation aim to protect the environment by prohibiting certain actions and limiting actions that may have an impact on the environment (for example, by requiring a permit before an action can proceed).

18.12 There is a certain degree of regulatory overlap between the processes under these Acts and the assessment and approvals regime under the EPBC Act.

18.13 In the past, there has been a reluctance to incorporate these Acts into the EPBC Act because the Act is already large (this would only make the EPBC Act even longer) and it would inconvenience users of the smaller Acts as they would be required to search through the EPBC Act to find the few provisions of relevance to them. However, if the recommendations of this Review are accepted, the amended Act will be far more streamlined and easier to navigate than the current Act.

18.14 Moving all of the heritage protection and biodiversity conservation legislation into the one Act would create a 'one-stop shop' for members of the public, industry, non-government organisations and administrators with an interest in Commonwealth regulation of the environment.

18.15 This move could also raise the profile of obligations under these smaller Acts, which may increase compliance with regimes aimed at regulating, for example, sea dumping or Indigenous heritage protection.

18.16 These Acts, which also have similar purposes to the EPBC Act, namely protection of the environment, including heritage, should be incorporated into the Act.

Aboriginal and Torres Strait Islander Heritage Protection Act

18.17 The EPBC Act, ATSIHP Act and the PMCH Act all play a significant role in the protection of traditional Indigenous areas and objects.

18.18 The ATSIHP Act creates a legislative regime to preserve and protect areas and objects of particular significance to Indigenous heritage.[7] The Act enables the Australian Government to respond to requests to protect important Indigenous areas and objects that are under threat, if it appears that State or Territory laws have not provided effective protection.

6 The current *Sea Dumping Act* is an exception. It is substantially different to the original Act, and was enacted after Australia ratified the Biodiversity Convention.

7 *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) s.4.

18.19 Under the ATSIHP Act, the Australian Government can make declarations to protect from threats of injury or desecration, traditional areas and objects of particular significance to Aboriginals in accordance with Aboriginal tradition, where an Indigenous person (or a person representing an Indigenous person) makes a request for protection. The power to make declarations is meant to be used as a last resort, after the relevant processes of the State or Territory have been exhausted.[8]

18.20 Applications under the ATSIHP Act can be made at any stage in the development process, regardless of whether the Commonwealth has already assessed the action causing the threat of injury or desecration under the EPBC Act. This can lead to a significant and unnecessary duplication of effort by the Commonwealth, proponents and any State or Territory agencies involved in the decision-making processes, as each valid application under the ATSIHP Act must be assessed on its merits. The Discussion Paper proposing reforms to the ATSIHP Act – *Reform of Indigenous heritage protection laws* – notes that:

> The ATSIHP Act has not proven to be an effective means of protecting traditional areas and objects. Few declarations have been made: 93 per cent of approximately 320 valid applications received since the Act commenced in 1984 have not resulted in declarations. Also Federal Court decisions overturned two of the five long term declarations that have been made for areas.[9]

18.21 The fact that so few applications have resulted in declarations being made under the ATSIHP Act suggests that this Act is not working efficiently or effectively. The *Reform of Indigenous heritage protection laws* proposes major reforms to the Act 'with the aim of improving the protection of the traditional heritage of Indigenous Australians in all States and Territories.'[10] These proposals aim to clarify responsibilities, improve procedures and ensure that the protective aims of the legislation are achieved.

18.22 The *Reform of Indigenous heritage protection laws* also raises the possibility that any reforms to the ATSIHP Act could be incorporated into the proposed *Australian Environment Act*.[11] This is in line with this Review's goal of placing all Commonwealth legislation relating to biodiversity conservation and heritage protection in one Act where possible. The outcomes of the proposed reforms to the Commonwealth Indigenous heritage protection laws should be considered in tandem with the outcomes of this Review, and its recommendation for the ATSIHP Act to be incorporated into the *Australian Environment Act*.

Environment Protection (Alligator Rivers Region) Act

18.23 The *Environment Protection (Alligator Rivers Region) Act 1978* (Cth) establishes the position of the Supervising Scientist with the following functions:

- devise, develop, coordinate the implementation of, and assess programs for, research into the environmental effects of uranium mining in the Alligator Rivers Region;
- devise, develop and promote standards and practices in relation to uranium mining operations and rehabilitation in the Alligator Rivers Region;
- coordinate and supervise the implementation of legal requirements, under any relevant legislation, associated with environmental aspects of uranium mining in the Alligator Rivers Region; and
- advise the Environment Minister on environmental matters within and beyond the Alligator Rivers Region.[12]

18.24 The Act also establishes a number of committees and a research institute:

- the Alligator Rivers Region Advisory Committee – a formal forum for consultation on matters relating to the environmental effects of uranium mining in the Alligator Rivers Region and matters relating to environmental research conducted in the Region that are referred to it by the Technical Committee;

8 DEWHA, *Indigenous Heritage* (2009) http://www.environment.gov.au/heritage/about/indigenous/index.html.
9 DEWHA, *Reform of Indigenous heritage protection laws* (2009) p.4 http://www.environment.gov.au/heritage/laws/indigenous/lawreform/index.html.
10 DEWHA, *Indigenous Heritage* (2009) http://www.environment.gov.au/heritage/about/indigenous/index.html.
11 See DEWHA, *Reform of Indigenous heritage protection laws* (2009) p.4 http://www.environment.gov.au/heritage/laws/indigenous/lawreform/index.html.
12 DEWHA, *Supervising Scientist Division: Legislation* http://www.environment.gov.au/ssd/about/legislation/index.html.

- the Alligator Rivers Region Technical Committee which considers and reviews research programs on the effects of uranium mining in the Alligator Rivers Region; and
- the Environmental Research Institute of the Supervising Scientist which undertakes research into the environmental effects of uranium mining in the Alligator Rivers Region.

18.25 The Supervising Scientist plays an important role in monitoring the environmental effects of uranium mines in the Alligator River Region (in the Northern Territory). However, other uranium mines operate outside this region (such as the Olympic Dam mine), and, if further expansions of uranium mines are approved, these mines should be subject to the same supervision as uranium mines in the Alligator River Region. As noted in Mr Jamie Pittock's comments:

> it is incongruous that the operations of uranium mines in the Northern Territory are subject to relatively thorough and transparent scrutiny whereas those in other jurisdictions are not.[13]

18.26 The Australian Government should consider extending the role of the Supervising Scientist to all uranium mining activities in Australia. The Supervising Scientist could participate in the EIA process by developing environmental requirements for each new and/or expanded uranium mining operation. This would allow the relevant State or Territory authority to be the on-ground, day-to-day regulator of the mine, and the Australian Government would maintain a supervisory role through the Supervising Scientist, who would assess performance against the environmental requirements.

18.27 The provisions of the Environment Protection (Alligator Rivers Region) Act should be incorporated into the *Australian Environment Act*. Additionally, if the Australian Government accepts the proposal to expand the Supervising Scientist's role, such an expansion should occur under the *Australian Environment Act*. This would streamline the provisions relevant to EIA and monitoring and audit processes under the Act.

Recommendation 63

The Review recommends that the provisions of the *Environment Protection (Alligator Rivers Region) Act 1978* (Cth) be incorporated into the Act and that the role of the Supervising Scientist be expanded to include all uranium mining activities in Australia.

Environment Protection (Sea Dumping) Act

18.28 The Sea Dumping Act plays an important role in Australia fulfilling its international responsibilities under the 1972 *Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* (the London Convention) and the 1996 Protocol to the London Convention (the London Protocol), which Australia ratified in 2000.

18.29 Under the London Protocol, Contracting Parties are required to:

> …protect and preserve the marine environment from all sources of pollution and take effective measures, according to their scientific, technical and economic capabilities, to prevent, reduce and where practicable eliminate pollution caused by dumping or incineration at sea of wastes or other matter...[14]

18.30 The Sea Dumping Act applies in all Australian waters from 0-200 nautical miles (nm) and the extended continental shelf, apart from waters within the limits of a State or the Northern Territory (which are not easily discernable). Provisions are also included within the Sea Dumping Act in relation to waters that are subject to the *Torres Strait Treaty* and the *Australia-Indonesia Delimitation Treaty*. The operation of the Act in the Joint Petroleum Development Area (JPDA) is, however, unclear.

18.31 The Sea Dumping Act enables the Commonwealth to declare that the Act will not apply in coastal waters (0-3 nm) of a State or the Northern Territory in certain circumstances, except in relation to seriously harmful material. There is no such declaration in force.

13 Interim Report Comment 40: Mr Jamie Pittock, p.3.

14 *Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter,* done at London on November 17 1996, art 2.

18.32 In accordance with the London Protocol, the Sea Dumping Act requires permits to be obtained to authorise the deliberate loading of wastes and other matter for the purposes of dumping or incineration at sea, and the dumping or incineration of wastes and other matter at sea. The Act applies to all vessels, aircraft or platforms in Australian waters and to all Australian vessels or aircraft in any part of the sea. Failure to obtain a permit is an offence.

18.33 Although the London Protocol allows for the placement of material at sea if for a purpose beyond mere disposal, the Sea Dumping Act goes beyond the Protocol and also regulates the placement of material for the purpose of creating an artificial reef. However, in accordance with the London Protocol, the Sea Dumping Act does not apply to wastes (other than vessels, aircraft and platforms) arising directly or indirectly from the exploration, exploitation and associated off-shore processing of seabed mineral resources.

18.34 Overlap currently exists between the Sea Dumping Act and the EPBC Act in situations where:

- sea dumping permits are required under the Sea Dumping Act for activities that are also controlled actions under the EPBC Act; and
- where advice under s.160 of the EPBC Act is required (for certain sea dumping actions proposed by Commonwealth agencies that have, will have or are likely to have a significant impact on the environment).

18.35 In these situations, an Environmental Impact Assessment (EIA) is required under both the Sea Dumping Act and Chapter 4 of the EPBC Act.

18.36 To remove this overlap, the necessary elements of the Sea Dumping Act should be incorporated into the *Australian Environment Act*. This would allow for the repeal of the Sea Dumping Act; and would mean that activities that require regulation under the London Protocol only undergo one assessment and approval process.

18.37 However, in proposing this change it is important to note a key difference in the assessments under the two Acts. Applications for permits under the Sea Dumping Act require an assessment of all impacts on the whole of the environment.

18.38 In the case of Commonwealth waters (3-200 nm), the two Acts are consistent because the EPBC Act assessment must consider impacts on the whole of the Commonwealth marine environment. However, for coastal waters (0-3 nm), the EPBC Act assessment can only include impacts on matters of NES, such as listed threatened and migratory species, World Heritage places and Ramsar listed wetlands (that is, not the whole of the environment). Fees are also charged for the issuing of permits under the Sea Dumping Act.

18.39 In order to incorporate the London Protocol requirements, the *Australian Environment Act* should include a new subdivision, located in the Permits Part of the Act, which regulates the issuing of sea dumping permits. The EIA processes provisions should also be amended to allow for whole of environment assessment against London Protocol requirements for proposed sea dumping activities that are also controlled actions.

18.40 There are particular reasons why the permits provisions should be transferred into the *Australian Environment Act* in addition to amending to the EIA processes provisions. These are because:

- a range of activities that require regulation under the London Protocol will not be controlled actions; and
- timeframes and processes for referrals cannot manage the quick administration required to deal with matters such as sea burials.

18.41 As noted above, the operation of the Sea Dumping Act in the JPDA is unclear. To ensure certainty for all users of the Act, a similar provision to that relating to waters subject to the *Torres Strait Treaty* and the *Australia-Indonesia Delimitation Treaty* should be included in the Act to clarify the operation of the Act in relation to waters in the JPDA.

Historic Shipwrecks Act

18.42 The *Historic Shipwrecks Act 1976* (Cth) commenced operation on 15 December 1976. It codified that historic shipwrecks and their associated relics are of value to all Australians and are not to be treated as commercial salvage, either by governments or private individuals.

18.43 The Historic Shipwrecks Act enables historic shipwrecks and associated relics around Australia to be managed according to the best cultural heritage management practices of the day. The Act is retrospective and applies to all shipwrecks and relics located in 'Australian waters' (defined as the territorial sea and internal waters landward of the baseline) and the continental shelf, with the exception of waters within State limits.

18.44 The Historic Shipwrecks Act protects shipwrecks that are at least 75 years old, whether their location is known or unknown, and associated relics. It also enables the Minister to protect shipwrecks that have been sunk for less than 75 years if they are of historic significance, such as ships wrecked during World War II. All relics associated with historic shipwrecks are protected both while associated with the shipwreck and after their removal, provided that they went down with the ship and were not removed prior to the wrecking event.

18.45 The Historic Shipwrecks Act also enables the Minister to declare protected zones around historic shipwrecks. A permit is required to carry out prescribed activities, such as trawling, diving or mooring or using ships in a protected zone.[15]

18.46 Shipwrecks protected by the Historic Shipwrecks Act are clearly of historic significance to Australia's maritime heritage. However, many of these historic shipwrecks are unlikely to meet the criteria for National Heritage Listing and would be unable to be included in the Commonwealth Heritage List because they are not in a Commonwealth area.

18.47 In keeping with this Chapter's key premise – that where possible Commonwealth legislation relating to biodiversity conservation and heritage protection should be found in one Act – the Historic Shipwrecks Act should be incorporated into the *Australian Environment Act*.

18.48 The protective provisions of the EPBC Act are triggered by actions that will have or are likely to have a significant impact on a protected matter. As the Historic Shipwrecks Act protects shipwrecks from all actions, bringing shipwrecks into the National or Commonwealth Heritage Lists would provide a lesser degree of protection than the current terms of the Historic Shipwrecks Act.

18.49 It is therefore proposed that a new subdivision, relating to historic shipwrecks, be included in the amended Act instead of attempting to amend the current heritage provisions of the Act. The subdivision should also include the matters dealt with in the Historic Shipwrecks Act that have no equivalent in the EPBC Act, such as the system of notification of discoveries, performance of functions by State and Territory authorities, and the declaration of ownership of a shipwreck or relic.

18.50 While it is proposed that the Historic Shipwrecks Act be incorporated into the amended Act, it is relevant to note that the Historic Shipwrecks Act is also under separate review. The discussion paper for the review of the Historic Shipwrecks Act raises several issues, including whether:

- the Act continues to protect only shipwrecks and associated relics or whether its protection should extend to include other underwater historical archaeological sites and relics such as sunken aircraft in line with the requirements of the *UNESCO Convention on the Protection of Underwater Cultural Heritage*;
- there should be criteria for the Minister when declaring a site to be an underwater site of historical significance if they are less than 75 years old;
- human remains should be specifically protected;
- current permit requirements of the Act meet best practice; and
- compliance and enforcement provisions in the Act are adequate.

15 *Historic Shipwrecks Regulations 1978* (Cth), reg. 4.

18.51 The Australian Government also recently announced a review of Australia's maritime enforcement legislation.[16] It is likely that enforcement provisions of the Historic Shipwrecks Act and the EPBC Act will be affected by proposals emerging from this review.

18.52 The outcomes of the review of the Historic Shipwrecks Act should therefore be considered in tandem with the outcomes of this Review and the review of Australia's maritime enforcement legislation.

Protection of Movable Cultural Heritage Act

18.53 The PMCH Act commenced operation on 1 July 1987. It gives effect to the United Nations Educational, Scientific and Cultural Organisation (UNESCO) *Convention on the Means of Prohibiting and Preventing the Illicit Import, Export and Transfer of Ownership of Cultural Property* 1970 (the UNESCO Convention), which entered into force for Australia on 30 January 1990.

18.54 As a Party to the UNESCO Convention, Australia has a responsibility to preserve and protect objects that are culturally important and whose loss would diminish Australia's heritage. The PMCH Act provides the legal framework to support this mandate to protect Australia's most significant movable objects and supports foreign countries' right to protect their heritage of movable cultural objects.

18.55 The PMCH Act establishes the National Cultural Heritage Control List, which consists of categories of objects specified in the PMCH Regulations. The Control List was developed taking into account categories of objects referenced in the UNESCO Convention and the Canadian *Cultural Property Export and Import Act* (R.S., 1985, c. C-51).

18.56 The criteria (which define the categories) include historical association, cultural significance to Australia, representation in an Australian public collection, age and financial thresholds. The Control List includes a specific list of Class A objects regarded as having such significance to Australia that they may not be exported. This list includes prescribed Victoria Cross medals, listed pieces of the suit of metal armour worn by Ned Kelly at the siege of Glenrowan in Victoria in 1880, and some Aboriginal and Torres Strait Islander objects (such as human remains and rock art).

18.57 The list also includes Class B objects, which require a permit to be exported and fall within the following nine categories:

- objects of Aboriginal and Torres Strait Islander heritage;
- archaeological objects;
- natural science objects;
- objects of applied science or technology;
- objects of fine or decorative art;
- objects of documentary heritage;
- numismatic objects (coins and medals);
- philatelic objects (stamps); and
- objects of historical significance.

18.58 The Act does not affect an individual's right to own and sell within Australia.[17]

18.59 The PMCH Act also creates the National Cultural Heritage Account, which 'facilitates the acquisition of Australian protected objects for display or safe-keeping'[18] and the National Cultural Heritage Committee, which advises the Minister on the operation of the PMCH Act and on which objects should be listed as controlled objects under the Act.

18.60 The PMCH Act aims to protect Australia's movable cultural heritage, an aim similar to the object of the

16 Attorney-General, the Hon Robert McClelland MP, 'Reform of Maritime Enforcement Legislation', Media Release (15 September 2009): http://www.attorneygeneral.gov.au/www/ministers/robertmc.nsf/Page/MediaReleases_2009_ThirdQuarter_15September2009-ReformofMaritimeEnforcementLegislation.

17 For a further summary of the operation of this Act see DEWHA, *Review of the Protection of Movable Cultural Heritage Act 1986 and Regulations Discussion Paper* (2009) http://www.arts.gov.au/__data/assets/pdf_file/0006/86289/pmch-discussion-jan09.pdf.

18 *Protection of Movable Cultural Heritage Act 1986* (Cth) s.25B.

EPBC Act, which aims to protect the environment (of which natural and cultural heritage is a part). While these purposes are similar, the mechanisms used to protect heritage are very different – the PMCH Act is focused on whether objects of heritage significance to Australia can be taken out of the country, while the EPBC Act has an ESD focus which assesses whether proposed actions have an unacceptable impact on nationally and internationally significant heritage places.

18.61 However, the differences in approach between the two Acts are reconcilable. The permitting regime under the PMCH Act operates similarly to the process for obtaining wildlife trade permits under Part 13A of the EPBC Act. Permits or certificates for the import or export of listed objects could be incorporated in the *Australian Environment Act*.

18.62 As well as the general considerations outlined above, there could be significant benefits in applying the range of compliance and enforcement mechanisms in the EPBC Act to breaches of the permitting regime in the PMCH Act, as the mechanisms available under the EPBC Act are far broader than those in the PMCH Act. The possibility of applying similar enforcement mechanisms to those in the EPBC Act was explicitly considered by the review of the PMCH Act, which is currently underway.[19]

18.63 The processes for applying for a permit and making permit decisions, including the criteria on decisions whether to grant an export permit or exemption certificate are made, should not need to be changed. The provisions should be able to be directly carried into the *Australian Environment Act*. However, these decisions may need to be exempted from the general requirement to act consistently with the principles of ESD (Recommendation 43).[20]

18.64 The provisions in the PMCH Act that establish the National Cultural Heritage Account and the National Cultural Heritage Committee could similarly be carried into the *Australian Environment Act*, subject to any changes made in response to the review of the PMCH Act.

18.65 As noted earlier, the PMCH Act is currently being reviewed. It is therefore recommended that the Australian Government consider the outcomes of this Review and the PMCH Act Review in tandem in order to achieve the most effective and efficient regime for protecting movable cultural heritage. If in the final analysis it is decided that there are insufficient policy linkages between the two Acts, there would still be benefit in integrating the compliance and enforcement capacities.

Sea Installations Act

18.66 The SIA was enacted to establish a scheme for issuing permits for the construction and operation of sea installations in the adjacent area of Australian territorial waters and the Great Barrier Reef Marine Park. Under the SIA, owners and operators of sea installations must acquire a permit for installation and operation. The SIA provides for permits to be issued with a broad range of environmental conditions relating to, among others things, the design, construction and monitoring of sea installations.

18.67 The operation of the EPBC Act and the *Great Barrier Reef Marine Park Act 1975* (Cth) (GBRMP Act) have made the SIA permit regime functionally redundant. Sea installations in Australian territorial waters are now assessed for environmental approval under the EPBC Act, and sea installations in the Great Barrier Reef Marine Park are authorised by permits issued by the Great Barrier Reef Marine Park Authority under the GBRMP Act. As a result, exemptions have routinely been issued under the SIA, in lieu of permits, since 2002.

18.68 The SIA also contains provisions regarding the safety of permitted sea installations. However, as permits are no longer issued under the SIA, these provisions have fallen into disuse.

18.69 The *Sea Installations Levy Act 1987* (Cth) (the SILA) relates only to the SIA and was enacted to impose fees relating to sea installations. Given that exemptions are now issued under the SIA these fees are no longer collected.

18.70 The provisions of the SIA and the SILA that regulate the sea installations permit regime should therefore be repealed as the regime has been subsumed by the operation of the EPBC Act and the GBRMP Act, and the issuing of exemptions under the SIA is an unnecessary regulatory burden.

19 For further details on the differences between the enforcement regimes under the two Acts, see DEWHA, *Review of the Protection of Movable Cultural Heritage Act 1986 and Regulations Discussion Paper* (2009) pp.18-19 http://www.arts.gov.au/__data/assets/pdf_file/0006/86289/pmch-discussion-jan09.pdf.

20 For further information about this requirement, refer to Chapter 13.

18.71 Part V of the SIA, however, provides for the application of Commonwealth, State or Territory legislation on sea installations or areas adjacent to sea installations. These provisions may need to be retained in the amended SIA, as they stipulate that Acts such as the *Crimes Act 1914* (Cth), *Dental Benefits Act 2008* (Cth), *Marriage Act 1961* (Cth) and *Racial Discrimination Act 1975* (Cth) apply to sea installations and adjacent areas. The Australian Government should consider how these provisions will continue to remain in force after amendments to the SIA occur.

Recommendation 64

The Review recommends that the Act be amended to incorporate the requirements of the following pieces of Commonwealth legislation to remove overlaps and duplication in assessment and authorisation processes:

- *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth);
- *Environment Protection (Alligator Rivers Region) Act 1978* (Cth);
- *Environment Protection (Sea Dumping) Act 1981* (Cth);
- *Historic Shipwrecks Act 1976* (Cth); and
- *Protection of Movable Cultural Heritage Act 1986* (Cth).

The Review further recommends that Part V of the *Sea Installations Act 1987* (Cth) be retained but the rest of the Act, and the *Sea Installations Levy Act 1987* (Cth), be repealed.

The Review also recommends that the Australian Government consider the reviews of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth), *Historic Shipwrecks Act 1976* (Cth), *Protection of Movable Cultural Heritage Act 1986* (Cth) and Commonwealth maritime enforcement legislation in tandem with this Report.

Opportunities to Streamline Interactions with Other Commonwealth Legislation

18.72 The EPBC Act has significant interactions with other legislation that will appropriately continue to stand alone. The following Acts are discussed below:

- *Antarctic Marine Living Resources Conservation Act 1981* (Cth) and the *Antarctic Treaty (Environment Protection) Act 1980* (Cth) (the Antarctic Acts);
- *Airports Act 1996* (Cth);
- *Great Barrier Reef Marine Park Act 1975* (Cth);
- *Native Title Act 1993* (Cth);
- *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) and the *Petroleum (Submerged Lands) (Management of Environment Regulations) 1999* (Cth);
- *Telecommunications Act 1997* (Cth); and
- *Water Act 2007* (Cth).

Environment Legislation Applicable in the Australian Antarctic Territory, Antarctic and the Sub-Antarctic

18.73 Australia's activities in the Antarctic and sub-Antarctic are governed by instruments within the Antarctic Treaty system – specifically the *Antarctic Treaty* and *Protocol on Environmental Protection to the Antarctic Treaty* (the Madrid Protocol), and annexes and measures to the Protocol; and the *Convention on the Conservation for Antarctic Marine Living Resources* (CCAMLR) and associated conservation measures.

18.74 The *Antarctic Treaty (Environment Protection) Act 1980* (Cth) (ATEP Act), the *Antarctic Marine Living Resources Conservation Act 1981* (Cth) (AMLRC Act) and the Regulations made under those Acts regulate activities in the area south of 60 degrees South (ATEP Act) and the living marine resources in the area of the Antarctic Convergence (AMLRC Act).

18.75 While there may be occasions where assessments under the EPBC Act and Antarctic-specific legislation may both be required, a number of mechanisms exist within these pieces of legislation to avoid duplication.

Antarctic Marine Living Resources Conservation Act

18.76 The AMLRC Act implements Australia's obligations under CCAMLR. It regulates harvesting of, and research into all living organisms that are found in the marine environment within the Convention Area. The Act defines the 'Convention Area' as the area south of the Antarctic Convergence. It is an area south of a series of coordinates which approximate the 'Antarctic Convergence', and includes the Heard and McDonald Islands.

18.77 The Act operates by requiring permits for prescribed activities in the Convention Area, including:

- harvesting living marine organisms of a specified kind or kinds; and
- carrying out research with respect to living marine organisms of a specified kind or kinds.

18.78 Section 7 of the AMLRC Act provides that a permit is not required under the Act if a permit, licence or other authority under a law of the Commonwealth, or an authority of another Contracting Party to CCAMLR, is in force. This provision therefore avoids a dual permitting requirement that would otherwise occur due to the operation of various laws of the Commonwealth, including the EPBC Act.[21]

18.79 If marine research involves near-shore activities, including collecting non marine living resources, the proposed activity is likely to require assessment under the *Antarctic Treaty (Environment Protection) Act 1980* (Cth) to identify the impact the activity is likely to have on the environment.

Antarctic Treaty (Environment Protection) Act

18.80 The ATEP Act implements Australia's obligations under the Madrid Protocol. In order for any person to conduct an activity in the Australian Antarctic Territory, an EIA must be submitted and authorised. This also applies to any Australian anywhere in Antarctica (that is, both inside and outside the Australian Antarctic Territory). The ATEP Act requires permits for various activities including interference with fauna and flora; collecting rocks and meteorites; and access to protected areas.

18.81 The ATEP Act requires assessment of proposed activities in the Antarctic to identify the impact that they are likely to have on the environment and regulates activities that are likely to have an adverse impact on the environment.

18.82 A person or an organisation proposing to carry on an activity in the Antarctic is required to submit a Preliminary Assessment (PA) to assess the likely impacts. Proposed activities are assessed at one of the following levels depending on the scale of the likely impacts:

- a Preliminary Assessment (if the likely impacts of the activity will be less than minor or transitory);[22]
- an Initial Environmental Evaluation (IEE) (where a PA has determined that the likely impacts of an activity are minor or transitory); or
- a Comprehensive Environmental Evaluation (where a PA or an IEE determines that an activity will have impacts that are greater than minor or transitory).

21 Permits are also issued under the *Fisheries Management Act 1991* (Cth) for harvesting activities in the CCAMLR Convention Area.

22 If the impacts are no more than negligible the activity must be authorised: see *Antarctic Treaty (Environment Protection) Act 1980* (Cth) s.12F.

18.83 The decision to authorise an activity is made after consideration of the EIA by the Environment Minister or his or her delegate.

18.84 All Australian Antarctic activities must also comply with the EPBC Act. Actions that will have or are likely to have a significant impact in the Australian Antarctic Territory, on the Commonwealth marine environment or on a listed species may require approval under the EPBC Act (in addition to approval required under the ATEP Act).

18.85 The EPBC Act grants exemptions to the requirement to obtain a permit for killing, injuring, taking or trading a listed threatened species,[23] migratory species[24] or a listed marine species.[25] The exemptions do not apply to whales and other cetaceans. However, there are currently no specific provisions in either Act that operate to streamline the EIA process for actions requiring assessment under both Acts (although adoption of the recommended changes to the EPBC Act EIA process in Chapter 7 may better align the processes in these Acts).

18.86 The ATEP Act prohibits mining in the Australian Antarctic Territory, on any part of the continental shelf of the Australian Antarctic Territory or the continental shelf of the Heard and McDonald Islands that is within the Antarctic (areas south of 60 degrees South).[26]

18.87 If there were to be activities in the Antarctic that would have a significant impact on a matter protected under the EPBC Act, a referral would be made under the EPBC Act. Public comments did not highlight any particular inefficiency in the relationship between the ATEP Act and EPBC Act. The Review therefore does not propose any changes to the operation of the EPBC Act to increase the effectiveness of the Australian Government's protection of the Antarctic environment. However there may be scope for DEWHA to review the ATEP Act and its relationship with the EPBC Act to better align the assessment processes under the two Acts, provided Australia's obligations under the Madrid Protocol are adequately implemented.

Airports Act

18.88 Part 6 of the *Airports Act 1996* (Cth) regulates the environmental management of airports. Under this Part, each airport is required to have an environment strategy, which is intended to:

- ensure that all operations at the airport are undertaken in accordance with relevant environmental legislation and standards;
- establish a framework for assessing compliance at the airport with relevant environmental legislation and standards; and
- promote the continual improvement of environmental management at the airport.[27]

18.89 Section 126(3) of the Airports Act sets out matters the Minister administering the Airports Act (the Airports Minister) must consider when deciding whether to approve an environment strategy:

(aa) the extent to which the strategy achieves the purposes of a final environment strategy;

(a) the effect that carrying out the strategy would be likely to have on the standard of air quality, water quality and soil quality;

(b) the effect that the carrying out of the strategy would be likely to have on:

(i) biota or habitat;

(ii) natural or heritage values; or

(iii) sites of significance to Aboriginal or Torres Strait Islander people;

(c) the effect that carrying out the strategy would be likely to have on noise exposure levels; and

(d) details of the consultations undertaken in preparing the strategy (including the outcome of the consultations).

23 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.197(p).
24 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.212(p).
25 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s255(p)
26 *Antarctic Treaty (Environment Protection) Act 1980* (Cth) ss.19A and 19B.
27 *Airports Act 1996* (Cth) s.115(2). See also s.116 of the Airports Act, which prescribes the content requirements for these strategies.

18.90 The environment strategies must also address DEWHA's recommendations regarding 'biota, habitat, heritage or kindred matters' in areas the airport lessee has identified as environmentally significant on the airport land.[28]

18.91 The Act creates offences for conduct that directly or indirectly results in environmental pollution affecting an airport site if the pollution harms, or has the potential to harm, the environment.[29] The *Airports (Environment Protection) Regulations 1997* (Cth) also imposes general duties to preserve and protect the environment.[30]

18.92 The Airports Act defines a 'major airport development' to include:

- a development of a kind that is likely to have significant environmental or ecological impact; and
- if a final environment strategy is in force for the airport – a development which affects an area identified as environmentally significant in the environment strategy.[31]

18.93 These developments can only be carried out if there is an approved major development plan.[32] This plan must set out several matters, including the environmental impacts that can reasonably be expected and the proponent company's plan for dealing with those impacts.[33] Prior to approving the plan, the Airports Minister must seek the advice of the Environment Minister.[34]

18.94 Submissions on the relationship between the Airports Act and the EPBC Act were divided in their opinions as to the effectiveness of this relationship in producing positive environmental outcomes. For example, one argued that there is a 'complete lack of protection' of Commonwealth Heritage values under the airports management regime,[35] while another argued that the existing regulation provided a 'comprehensive and effective regulatory regime.'[36]

18.95 The Airports Minister should continue to be required to consult the Environment Minister on draft major development plans. However, as a minimum, this obligation should be extended to require the Airports Minister to consult with the Environment Minister when considering whether to approve a draft environment strategy under the Airports Act. This elevates the consultation requirements currently in the Airports Regulations and the EPBC Act.

18.96 As stated in Chapter 1, one of the fundamental improvements wrought by the EPBC Act was that it allowed the Environment Minister to make decisions regarding matters protected under the Act, rather than simply providing advice on proposed actions or plans that would impact on a protected matter. In the vast majority of cases, the Environment Minister is the appropriate decision-maker for proposed actions or plans that have, will have or are likely to have a significant impact on the environment. A problem with this general position, however, arises when considering environmental matters relating to the operation and management of airports and airport land, as the key environmental issue for many airports is noise. While the Environment Minister should be the decision-maker for noise issues that will have, will have or are likely to have a significant impact on matters protected under the EPBC Act, the same noise issues are often a fundamental aspect of the operation of airports (which is the purview of the Airports Minister).

18.97 As explained above, issues concerning noise generated on airport land will often be the concern of both the Environment Minister (under the EPBC Act) and the Airports Minister (under the Airports Act). The current relationship between the two Ministers and the two Acts makes the Airports Minister the primary decision-maker, while the Environment Minister is relegated to the role of advisor. While this Report recommends that the Environment Minister have an extended role in providing advice to the Airports Minister, the Australian Government should consider whether there is scope to give the Environment Minister a more substantive decision-making role in matters relating to the protection of the environment on areas managed under the Airports Act.

28 *Airports (Environment Protection) Regulations 1997* (Cth), reg. 3.07
29 *Airports Act 1996* (Cth) ss.131B-131C.
30 See e.g. *Airports (Environment Protection) Regulations 1997* (Cth), reg. 4.04.
31 *Airports Act 1996* (Cth) ss.89(m) and (n).
32 *Airports Act 1996* (Cth) s.90.
33 *Airports Act 1996* (Cth) s.91.
34 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.160(2)(c).
35 Submission 80: Dr Jane Lennon, p.10.
36 Interim Report Comment 39: Sydney Airport Corporation, p.8.

Recommendation 65

The Review recommends that s.160 of the Act be amended to require the Airports Minister to consult with the Environment Minister when considering whether to approve a draft environment strategy under the *Airports Act 1996* (Cth).

Great Barrier Reef Marine Park Act

18.98 The GBRMP Act is the primary Act for the establishment and management of the Great Barrier Reef Marine Park (the Marine Park). The Act establishes the Marine Park and the Great Barrier Reef Marine Park Authority (GBRMPA). GBRMPA is the authority with primary responsibility for management of the Marine Park.

18.99 The Act also provides for planning and management of the Marine Park, including through zoning plans, the regulation and assessment of prescribed activities in the Marine Park and prohibitions of other activities, such as the recovery of minerals.

18.100 The Great Barrier Reef is a World Heritage property, having been inscribed on the World Heritage List in 1981. It provides habitat for many listed threatened species and migratory species. Most of the Marine Park (the part of the Marine Park seaward of three nautical miles from the Queensland coastline) is also a Commonwealth marine area. The Marine Park was also recently added as a matter of NES in its own right under the EPBC Act.

18.101 This means that there is a significant degree of interaction and overlap between the GBRMP Act and the EPBC Act. The overlap is dealt with, in the most part, by s.43 of the EPBC Act which reduces the number of circumstances where approvals for a proposed action are required under both Acts. This section provides that actions that have, will have or are likely to have a significant impact on a protected matter do not require approval under the EPBC Act if:

- the action is taken in the Marine Park; and
- the action is authorised by:
  - a zoning plan;
  - a plan of management;
  - a permission;
  - an authority;
  - an approval; or
  - a permit

made or issued under the GBRMP Act.

18.102 However, despite the operation of s.43 of the EPBC Act, the Final Report of the 2006 Review into the Operation of the GBRMP Act noted:

> The application of the EPBC Act to areas of the Great Barrier Reef is somewhat complicated as some of its provisions apply only to areas that fall within the jurisdiction of the Australian Government (Commonwealth Areas), whereas other provisions regulate issues regardless of where, geographically, they occur. The EPBC Act can thus apply to activities that occur within the Marine Park or to those that transcend Park boundaries. The *Great Barrier Reef Marine Park Act 1975* predates the EPBC Act and there are both gaps and overlaps in their approach and coverage, particularly due to boundary definitions. This has resulted in some inconsistencies, duplicate processes and a lack of clarity of responsibilities in some areas.[37]

37 Review Panel Report, Review of the *Great Barrier Reef Marine Park Act 1975* (2006), p.50 http://www.environment.gov.au/coasts/gbr/publications/pubs/gbr-marine-park-act.pdf.

18.103 The 2006 GBRMP Act Review proposed several significant changes to the GBRMP Act. These amendments were passed in two amending Acts in 2007 and 2008.[38] The first amending Act introduced:

- a five-yearly, peer-reviewed 'Outlook Report' to be tabled in Parliament and published, documenting the overall condition of the Marine Park, effectiveness of management, and risks and pressures on the ecosystem;
- an enhanced process and requirements for engaging stakeholders in the development of zoning plans for the Marine Park;
- zoning plans to be 'locked down' for a minimum of seven years from the date they come into force to provide stability for business, communities and biological systems;
- the GBRMPA to be subject to the financial management framework of the *Financial Management and Accountability Act 1997* (Cth) instead of the *Commonwealth Authorities and Companies Act 1997* (Cth); and
- the Great Barrier Reef Consultative Committee to cease operation.[39]

18.104 The second set of amendments included changes to:

- the objects of the Act, to include concepts such as ecological sustainability;
- the membership and processes of the GBRMP Authority;
- the process for declaring areas to be part of the Marine Park and matters that must be considered when preparing zoning and management plans;
- the EPBC Act, by including the Marine Park as a matter of NES;
- compliance and enforcement procedures, so that there is greater consistency between the GBRMP and EPBC Acts; and
- establish new emergency management powers.[40]

18.105 The Final Report of the 2006 GBRMP Act Review discussed the possibility of combining the two Acts, but did not ultimately recommend that the provisions GBRMP Act be incorporated into the EPBC Act:

> A key difference between the two Acts is their coverage within the Great Barrier Reef Region. The *Great Barrier Reef Marine Park Act 1975* applies uniformly to both Queensland coastal waters and Commonwealth waters within the entire Great Barrier Reef Region and to the management of environmental impacts within the Region. The EPBC Act, on the other hand, applies predominantly to Commonwealth land and waters, although some provisions …regulate issues having a significant impact on 'matters of national environmental significance' (which include the world heritage values of World Heritage Areas).
>
> Another key difference is that the *Great Barrier Reef Marine Park Act 1975* reflects and implements a cooperative approach to management between the Australian and Queensland governments that is underpinned by an intergovernmental agreement (the Emerald Agreement).[41]

18.106 However, the fact that the two Acts have slightly different scopes does not of itself provide a significant barrier to incorporating the GBRMP Act into the EPBC Act. The GBRMP Act and the EPBC Act are both products of intergovernmental agreements – the matters of NES regulated under the EPBC Act and the roles of the Australian, State, Territory and Local governments are underpinned by the IGAE and the 1997 Heads of Agreement, and are both directed at environmental protection and management.

18.107 An Intergovernmental Agreement was recently signed between the Queensland Government and the Australian Government to set up an administrative framework that is intended to effectively manage the Marine Park to produce the best possible environmental outcomes.[42]

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38 *Great Barrier Reef Marine Park Amendment Act 2007 (Cth)* and *Great Barrier Reef Marine Park and Other Legislation Amendment Act 2008 (Cth)*.

39 DEWHA, *Great Barrier Reef Marine Park Authority Act 1975* (2009) http://www.environment.gov.au/coasts/gbr/review/index.html.

40 For more information, see Explanatory Memorandum, Great Barrier Reef Marine Park and Other Legislation Amendment Bill 2008 (Cth).

41 Review Panel Report, Review of the *Great Barrier Reef Marine Park Act 1975* (2006) p.173 http://www.environment.gov.au/coasts/gbr/publications/pubs/gbr-marine-park-act.pdf.

42 For more information, see DEWHA, *Great Barrier Reef Intergovernmental Agreement* (2009) http://www.environment.gov.au/coasts/gbr/agreement.html.

18.108 While this agreement and the recent amendments following the Report of the 2006 GBRMP Act Review are likely to go some way in streamlining the operation of the GBRMP and EPBC Acts, two recent cases involving a seaplane known as the 'Red Baron' based at Horseshoe Bay, Magnetic Island, revealed that there are ongoing problems in determining the jurisdiction and scope of the two Acts and the overlaps in the separate approvals processes under each Act.[43]

18.109 In addition, since the enactment of the GBRMP Act, several other marine protected areas in Commonwealth waters have been created[44] – while these areas may be managed by agencies other than the Director of National Parks, protection of those areas is largely under the EPBC Act and not separate pieces of legislation for each area. In this context, it could be argued that there is less of an impetus for the Marine Park to have its own legislation.

18.110 However, while the GBRMP Act has a significant degree of overlap with the EPBC Act and there are arguments for merging the GBRMP Act provisions into the EPBC Act, it is important to recognise and appreciate the role of the GBRMP Authority, which acts as a significant manager in its own right. There are sound arguments for the GBRMP Authority to be retained even if the provisions of the GBRMP Act are merged into the EPBC Act.

18.111 The Australian Government should consider whether the Marine Park should continue to be governed by separate legislation (namely the GBRMP Act), or whether the provisions of the GBRMP Act should be incorporated into the EPBC Act. This issue should be explored in the context of a new marine policy, which is discussed in Chapter 11.

Telecommunications Act and Telecommunications Infrastructure

18.112 The primary object of the *Telecommunications Act 1997* (Cth) is 'to provide a regulatory framework that promotes:

- the long-term interests of end-users of carriage services or of services provided by means of carriage services; and
- the efficiency and international competitiveness of the Australian telecommunications industry.[45]

18.113 This Telecommunications Act contains several references to the EPBC Act, however these are largely because the Act picks up some of the terminology and definitions used in the EPBC Act.

18.114 The EPBC Act also applies to actions such as construction of telecommunications infrastructure where the action has, will have or is likely to have a significant impact on a protected matter under the EPBC Act.

18.115 However, Clause 28 of Schedule 3 of the Telecommunications Act excludes the operation of the EIA provisions and key offence provisions of the EPBC Act to actions authorised by a telecommunication facility installation permit issued under the Telecommunications Act. While under this clause, the DEWHA Secretary must be consulted, the Australian Communications and Media Authority is the decision-maker. DEWHA has advised that this clause has never been used.

18.116 The interaction and relationship between the Telecommunications Act and the EPBC Act is generally considered to be adequate. However, this is likely to be tested in the near future – the Australian Government recently announced that it will establish a new company that will invest up to $43 billion over eight years to build and operate a National Broadband Network to deliver 'superfast' broadband to Australian homes and workplaces.[46] The creation of the National Broadband Network is likely to include proposed infrastructure projects that have, will have or are likely to have a significant impact on one or more of the matters protected under the EPBC Act, and will therefore require the Environment Minister's approval before they can proceed. In order to assess the environmental impacts of actions proposed as part of constructing and operating the National Broadband Network efficiently and effectively, the Australian Government could consider strategically assessing the program under the EPBC Act.

43 *Connolly and Great Barrier Reef Marine Park Authority and Far North Queensland Airwork Pty Ltd (Party Joined)* [2007] AATA 1883 (19 October 2007) and *Connolly and Great Barrier Reef Marine Park Authority and Far North Queensland Airwork Pty Ltd (party joined)* [2007] AATA 2098 (18 December 2007).

44 For a map and description of current Commonwealth marine protected areas, see DEWHA, *Marine Protected Areas* (2008) http://www.environment.gov.au/coasts/mpa/index.html.

45 *Telecommunications Act 1997* (Cth) s.3(1).

46 Department of Broadband, Communications and the Digital Economy, *National Broadband Network: 21st century broadband* (2009) http://www.dbcde.gov.au/communications/national_broadband_network.

Water Act

18.117 The *Water Act 2007* (Cth) significantly changed the role of the Commonwealth in the management of water resources in the Murray-Darling Basin (MDB), by giving the Commonwealth (through the MDB Authority) a central role in the management of water resources in the MDB.[47] As the Water Act mainly applies to the catchments of the MDB, the scope for interactions between the Water Act and the EPBC Act are limited to regulated activities in the MDB.

18.118 The Basin Plan for the MDB, required under the Water Act, is due to come into operation in 2011. Under the Water Act, State and Territory water management plans must fully comply with the requirements of the Basin Plan – however this obligation will only take effect after the current water management plans expire (which spans between 2012 and 2019 depending on the plan).

18.119 As the Basin Plan has not yet been drafted (and it will define many of the regulatory impacts arising because of the Water Act), it is difficult to determine mechanisms that could improve the effectiveness of the relationship between these the Water Act and the EPBC Act. However, the Basin Plan, or the catchment management plans prepared in accordance with the Basin Plan, may be a suitable candidate for strategic assessment under the EPBC Act. The Australian Government should explore this possibility as a way of efficiently negotiating the relationship between these Acts.

Native Title Act

18.120 The *Native Title Act 1993* (Cth) establishes a statutory regime for the recognition and protection of native title rights. The protection of Native Title rights is linked to provisions in the EPBC Act which seek:

- to recognise the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and
- to promote the use of Indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge to protect Indigenous heritage.[48]

18.121 Recognition of Native Title rights under the Native Title Act has led to increased opportunities for 'recognition of Indigenous peoples' rights and interests in the management of protected areas.'[49]

18.122 Substantive issues relating to the use and protection of Indigenous knowledge are discussed in Chapter 5, while Indigenous involvement in the processes for decisions under the Act is discussed in Chapter 15.

18.123 Several submissions called for better integration of the provisions of the EPBC Act and Native Title Act.[50] However, the Review considers the current relationship between these two pieces of legislation satisfactory and no changes need to be made to the EPBC Act to increase the effectiveness of this relationship.

Offshore Petroleum and Greenhouse Gas Storage Act and the Petroleum (Submerged Lands) (Management of Environment) Regulations

18.124 The *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) (the OPGGSA) is intended to provide an effective regulatory framework for petroleum exploration and recovery and the injection and storage of greenhouse gas substances in offshore areas.[51]

18.125 Part 6.4 of the OPGGSA is of particular relevance to the operation of the EPBC Act and the protection of the environment. Part 6.4 allows the relevant Designated Authority (which is the relevant Commonwealth, State or Territory Minister) to give 'remedial directions' to current or former petroleum titleholders for several matters. These include directions for 'the conservation and protection of natural resources'[52] and 'the making good of damage to the seabed or subsoil'.[53]

47 For a further discussion of Commonwealth involvement in water matters, see Chapter 4.

48 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ss.3(1)(f) and (g).

49 Submission 88: Australian Institute of Aboriginal and Torres Strait Islander Studies, p.19.

50 See e.g. Submission 210: Indigenous Advisory Committee, p.11; Submission 193: Australian Human Rights Commission, p.24; and Interim Report Comment 42: Dr Sarah Holcombe, Dr Matthew Rimmer and Ms Terri Janke, p.3.

51 *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) s.3.

52 This is defined under s.7 of the OPGGSA to have the same meaning as in paragraph 4 of Article 77 of the *United Nations Convention on the Law of the Sea*, done at Montego Bay on 10 December 1982: 'the mineral and other non-living resources of the seabed and subsoil together with living organisms belonging to sedentary species, that is to say, organisms which, at the harvestable stage, either are immobile on or under the seabed or are unable to move except in constant physical contact with the seabed or the subsoil.'

53 *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth) ss.585(c) and (d).

18.126 The OPGGSA also provides for the enactment of Regulations for several purposes. The *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (Cth) (Petroleum Regulations) are enacted pursuant to the OPGSSA. The object of the Petroleum Regulations is:

> to ensure that any petroleum activity in an adjacent area is carried out in a way that is consistent with the principles of ecologically sustainable development, in accordance with an environment plan that has appropriate environmental performance objectives and standards as well as measurement criteria for determining whether the objectives and standards are met.[54]

18.127 The Petroleum Regulations:

> allow for a risk-based approach for managing the environmental performance of the Australian offshore petroleum industry through EPs [environment plans]. The EP regime promotes and enforces the reduction of environmental risks and impacts of petroleum activities, to a level which is 'as low as reasonably practicable' (ALARP). It is important to note that what is considered practical will evolve over time as technology and expertise improve. Operators should have a mechanism in place to monitor improvements in technology and practice. [55]

18.128 Under the OPGGSA and Petroleum Regulations, the operator of a petroleum activity in Commonwealth waters must prepare and implement an environment plan for the period of the activity. An environment plan must have undergone formal assessment and been accepted by the relevant designated authority before being implemented.

18.129 An environment plan must include the following matters:

- a description of the activity;
- a description of the environment that may be affected by the activity, including any relevant cultural, social and economic aspects of the environment that may be affected;
- a description of environmental impacts and risks and an evaluation of those impacts and risks (including any potential emergency conditions);
- environmental performance objectives and standards that address legislative and other controls that manage environmental features of the activity and include measurement criteria for determining whether the objectives and standards have been met;
- a list of all legal, environmental and other requirements that apply to the activity;
- an implementation strategy for the environment plan which must address several matters, including processes for the monitoring, audit, management of non-conformance and review of the operator's environmental performance and the implementation strategy;
- arrangements for recording, monitoring and reporting information about the activity (including information required to be recorded under the Act, the regulations and any other environmental legislation applying to the activity) sufficient to enable the Designated Authority to determine whether the environmental performance objectives and standards in the environment plan are met;
- a statement of the operator's corporate environmental policy;
- a report on all consultations between the operator and relevant authorities, interested persons and organisations in the course of developing the environment plan; and
- details of all reportable incidents in relation to the proposed activity.[56]

18.130 The environment plan, when accepted, becomes a legally binding agreement, setting out environmental performance objectives, standards and criteria which the operator will be assessed against.

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54 *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (Cth), Regulation 3.

55 Department of Resources, Energy and Tourism, *Guidelines for the Preparation and Submission of an Environment Plan: Under the Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (2005), p.5 http://www.ret.gov.au/resources/Documents/Offshore%20Petroleum%20Environment/Guidelines%20for%20the%20Preparation%20and%20Submission%20of%20an%20Environment%20Plan-%20October%202008.pdf.

56 *Petroleum (Submerged Lands) (Management of Environment Regulations) 1999* (Cth), Regulations 12-16. A reportable incident for the purposes of the Regulations is defined in Regulation 4 to mean 'an incident mentioned in the environment plan for the activity that has caused, or has the potential to result in, moderate to catastrophic environmental consequences as categorised by the risk assessment process undertaken as part of the preparation of the environment plan.'

18.131 Guidelines issued by the Department of Resources, Energy and Tourism about preparing an Environment Plan under the Petroleum Regulations provide that:

> The intent of the EP regime is to ensure that the EP functions as a regulatory approval document and as a practical implementation and management tool to be used by the operators and their contractors when conducting the activity. …
>
> It should be noted that the requirements of the Regulations do not replace obligations under the EPBC Act or *Sea Dumping Act*. An EP produced under petroleum legislation should be consistent with any conditions set under the EPBC Act.[57]

18.132 The recent Productivity Commission report, the *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector,* highlighted areas of potential duplication between the OPGGSA, the Petroleum Regulations and the EPBC Act.[58]

18.133 The Productivity Commission Report noted that petroleum activities often require approval under the EPBC Act and the OPGGSA and that, despite efforts to reduce the duplication of processes, 'there may be further scope, albeit limited, to further enhance the efficiency of the OPGGSA and its administration'.[59] However, the report also noted that:

> Many environmental and heritage issues associated with upstream petroleum projects will invariably be complex and sensitive. While effectively consolidating environmental and heritage approval processes would streamline those approval processes, *there would also appear to be merit in retaining an independent decision maker of last resort, particularly in relation to matters of potential national environmental significance.* This is consistent with the underlying rationale of the Commonwealth's *Environment Protection and Biodiversity Conservation Act 1999* (Cth) and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).[60] [emphasis added]

18.134 The Department of Resources, Energy and Tourism has advised that, as part of the process of repealing the *Petroleum (Submerged Lands) Act 1967* (Cth), the Regulations made under that Act are being reviewed 'with the aim of consolidation into a lesser number of regulations, removal of any inconsistencies and to streamline approvals processes.'[61]

18.135 The potentially significant adverse impacts of mining activities in offshore areas create a need for the Environment Minister to retain a role in the ecologically sustainable management of offshore petroleum activities. However, it is also important to note that the regulatory burden imposed on offshore petroleum activities is not unnecessarily high.

18.136 It is appropriate that the EPBC Act continue to apply to petroleum activities. However, the approvals processes under the OPGGSA and the EPBC Act should be streamlined. The ideal arrangement would be to require the Environment Minister's approval for the environment management plan required for a petroleum activity (as defined under the Petroleum Regulations).

18.137 The Environment Minister could be the Designated Authority for approving an environment management plan under the Petroleum Regulations, and the *Australian Environment Act* could provide that an action covered by an environment management plan approved by the Environment Minister does not require further assessment and approval under the Act. Breaches of the plan would be deemed to be a breach of the *Australian Environment Act*, thereby opening up the compliance and enforcement provisions of the Act for use in such cases.

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57 Department of Resources, Energy and Tourism, *Guidelines for the Preparation and Submission of an Environment Plan: Under the Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (2005), p.6 http://www.ret.gov.au/resources/Documents/Offshore%20Petroleum%20Environment/Guidelines%20for%20the%20Preparation%20and%20Submission%20of%20an%20Environment%20Plan-%20October%202008.pdf.

58 Productivity Commission, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector* (2009), pp.139-146 http://www.pc.gov.au/__data/assets/pdf_file/0011/87923/upstream-petroleum.pdf.

59 Productivity Commission, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector* (2009), p.146 http://www.pc.gov.au/__data/assets/pdf_file/0011/87923/upstream-petroleum.pdf.

60 Productivity Commission, *Review of Regulatory Burden on the Upstream Petroleum (Oil and Gas) Sector* (2009), p.145 http://www.pc.gov.au/__data/assets/pdf_file/0011/87923/upstream-petroleum.pdf.

61 Department of Resources, Energy and Tourism, *Amendments to Offshore Petroleum Legislation to Provide for Greenhouse Gas Transport, Injection and Storage in Commonwealth Waters: Regulation Impact Statement,* (2008) p.10 http://www.ret.gov.au/resources/Documents/ccs/Regulation_Impact_Statement.pdf.

18.138 This approach would be consistent with the findings of the Productivity Commission Report.

18.139 However, if this approach were taken, the Australian Government would need to examine the requirements for approving an environment management plan so that environmental outcomes are not adversely affected by this change.

18.140 Alternatively, approvals bilateral agreements could be negotiated to cover the development and approval of petroleum activities, including management planning, with the Environment Minister undertaking performance auditing.

Recommendation 66

The Review recommends that the Australian Government consider streamlining the relationship between the *Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth), the *Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (Cth), and the EPBC Act with a view to maximising regulatory efficiency while retaining strong environmental safeguards.

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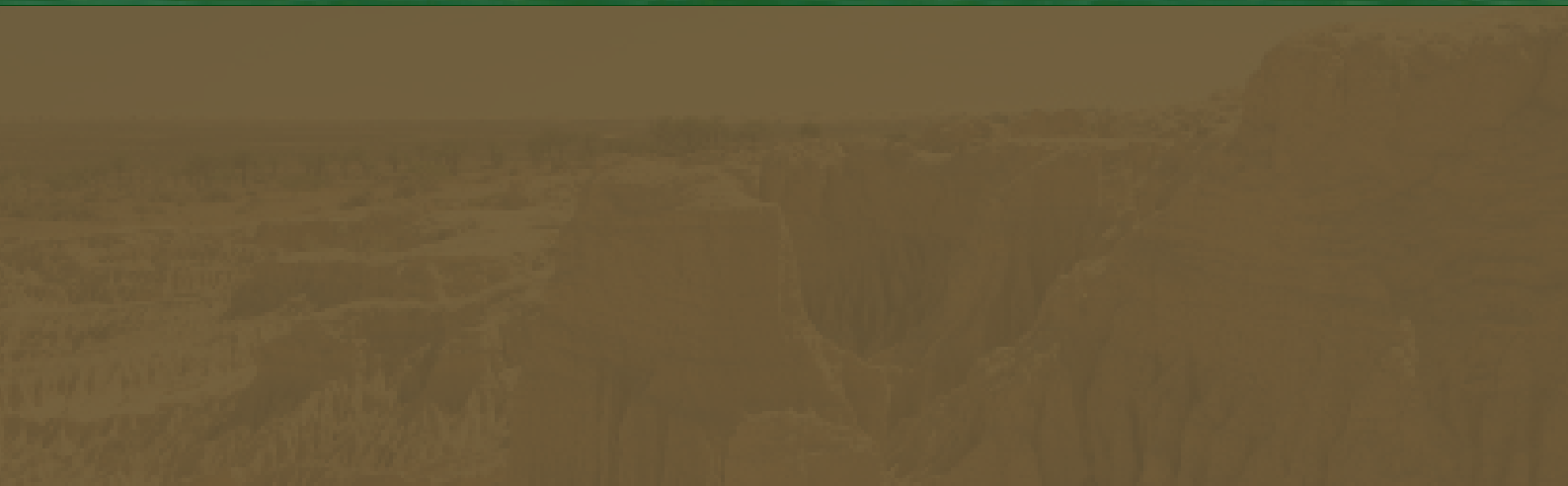
Chapter Nineteen

NATIONAL ENVIRONMENTAL ACCOUNTS



Chapter 19: National Environmental Accounts

19.1 The Australian Government makes a significant investment in natural resource management through delivery of a range of programs and initiatives. It is also required to report on the effectiveness of these programs and initiatives, and on various aspects of the operation and administration of the EPBC Act.

19.2 Comprehensive, accurate and consistent environmental information is needed to support decision-making and inform policy development, particularly in facing the risk of climate change, other emerging threats to the environment and growing demands on existing resources.

19.3 The benefits of comprehensive environmental information are considerable and its collection and management should become core business of the Australian Government.

Annual Reports

19.4 Section 516 of the Act requires the DEWHA Secretary to prepare an annual report on the operation of the Act, which is then provided to the Environment Minister who must table it in both Houses of Parliament.[1]

19.5 Section 516A requires all Commonwealth agencies, authorities and companies to report on ecologically sustainable development (ESD) activities and outcomes in their annual reports. These reports must:

- where relevant, include a report on how the activities and administration of legislation by the agency accorded with the principles of ESD;
- where relevant, identify how the outcomes for the agency specified in an Appropriations Act contributed to ESD;
- document the effect of the agency's activities on the environment;
- identify any measures the agency is taking to minimise the impact of its activities on the environment; and
- identify the mechanisms (if any) for reviewing and increasing the effectiveness of those measures.[2]

19.6 Submissions viewed the requirements of s.516A as a positive step in terms of reporting on how an agency's activities contribute to the state of the environment. However, there were concerns about the level of compliance with the requirement, the primary one being that some agencies were taking a 'box-ticking' approach to reporting. The Environmental Defender's Office (EDO) New South Wales argued:

> ESD is not meant simply to be a process. It is meant to ensure that the outcome of an activity fully integrates economic, social and environmental considerations. For example, a decision to approve a development should demonstrate that in addition to having economic benefits, the development approval incorporates appropriate environmental conditions, including buffer zones and the requirement for rehabilitation and monitoring. This level of analysis is not apparent in s.516A reports.[3]

19.7 In 2003, the Australian National Audit Office (ANAO) conducted an audit of the first two years of annual reporting on ESD under s.516A. The ANAO concluded that 'there was considerable scope for improvement in relation to the quality of agencies' annual reports, especially to compliance with the EPBC Act and articulating agencies' contributions to broader ESD outcomes'.[4] The ANAO viewed the lack of compliance as understandable given the reporting requirements were new and that no reporting frameworks had been finalised. An examination of agency annual reports for the five reporting periods since the ANAO report indicates that the standard of s.516A reporting has not improved.

1 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.516.
2 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.516A(6).
3 Submission 212: The Environmental Defender's Office New South Wales.
4 Australian National Audit Office Audit Report No.41 2003, *Annual reporting on Ecologically Sustainable Development.*

19.8 In this regard, the Senate Standing Committee on Finance and Public Administration conducted a review of annual reports in 2008. This report also included reference to s.516A reporting and recommended that:

- all agencies review the level of detail provided in their annual reports in order to fully comply with the reporting requirements under s.516A of the EPBC Act; and
- agencies, where appropriate, adopt the practice of reporting on environmental impacts and mitigation measures as outlined in the 2006-2007 annual reports of the Department of Parliamentary Services and the Department of Health and Ageing.

19.9 DEWHA's website contains comprehensive materials to assist agencies in complying with their s.516A reporting requirements. However, these are merely guidelines and do not have the legislative force they would have if they were included in the Act or Regulations.

19.10 The requirements of s.516A are not being reported to the degree necessary for the Government, or the public, to gauge how ESD is being integrated into decision-making. Nor is there sufficient information to assess the success of assimilation in terms of its effect on outcomes or, indeed, the state of the environment.

19.11 The Senate Standing Committee on Environment, Communications and the Arts noted that the Australian Government is not always able to determine what effect decision-making under the Act is having on the environment in the longer term and recommended regular evaluation of the long-term environmental outcomes of decisions made under the Act.[5]

19.12 EDO NSW's thorough submission highlighted the deficiencies in s.516A reporting by all agencies, noting that they had observed little discussion in s.516A reports on how agency outcomes, including DEWHA's, contribute to ESD.[6] The EDO NSW commented that reporting focussed on operational processes engaged in during the reporting year, rather than on the environmental impact of broader agency activities, arguing:

> This level of reporting is insufficient. Indeed, simply demonstrating that an agency policy or activity has economic, social or environmental ramifications is not of itself evidence that the policy or program accords with ESD. ESD requires the integration of all three considerations into decision-making. It must be evident that an agency's programs and decision-making frameworks seek to reconcile economic gains and environmental sustainability. A 'balance' must be apparent.[7]

19.13 More incisive reporting is required to provide a more accurate indication of an agency's performance in terms of ESD.

19.14 Although s.516A reporting may be regarded by some agencies as an administrative burden, it is part of the Government's underlying philosophy and needs to be integrated more fully into the culture of Commonwealth agencies. The only way for the effectiveness of ESD at a whole of government level to be measured will be if s.516A reporting is meaningful.

19.15 The annual reporting requirements for ESD in s.516A should be retained, but the Act should be amended to allow the Minister to specify the requirements for this reporting in the EPBC Regulations. This should provide clarity for agencies about the level of detail and type of information to be reported, and give the reporting requirements greater force.

5 The Senate Standing Committee on Environment, Communications and the Arts, *The Operation of the Environment Protection and Biodiversity Conservation Act 1999: First report* (2009) 5.34, http://www.aph.gov.au/senate/committee/eca_ctte/epbc_act/report/report.pdf.

6 Submission 212: The Environmental Defender's Office New South Wales.

7 Submission 212: The Environmental Defender's Office New South Wales, p.3.

State of the Environment Reports

19.16 Section 516B of the Act requires that every five years a national State of the Environment (SoE) report must be prepared and laid before each House of Parliament.[8] The purpose and objectives of SoE reporting are to provide accurate, up-to-date and accessible information about environmental and heritage conditions, trends and pressures on the Australian continent, surrounding seas and Australia's external territories. SoE reporting is used to:

- report on major causal factors that are influencing Australia's environment and heritage;
- report on the effectiveness of responses designed to address change;
- identify the issues most relevant to the sustainability of Australia's environment and heritage;
- contribute to public understanding of the state of Australia's environment and heritage;
- identify relevant gaps in information;
- further develop and improve the SoE reporting process; and
- facilitate policy development at all levels of government.[9]

19.17 The national SoE report is the major mechanism through which resource management and environment and heritage issues are comprehensively reported and analysed on scales that transcend State and Territory boundaries. SoE reporting uses indicators to measure the state of the environment, the pressures on the environment and society's responses to those pressures. The SoE reporting frameworks were developed by the OECD and are widely used for environmental reporting around the world.

19.18 To date, each SoE report has been compiled by an independent committee appointed by the Environment Minister. A common issue each committee has faced has been the lack of accurate, nationally consistent environmental data on which to base their assessment. This has limited the scope of the SoE reports to a compilation and interpretation of available information. The SoE reports produced under the Act to date have thus fallen short of their intended goal.

19.19 The Senate Committee's recommendation referred to above acknowledges the good reporting practices by some agencies and recommends their adoption by other agencies. However, submissions criticised the SoE reports' focus on operational processes, and the lack of reporting on the outcomes of investment in environmental initiatives. Mr Jeremy Tager has identified what he sees as some of the deficiencies in the SoE reports:

> SoE fails currently on numerous counts – inconsistency of data collected, inconsistent reporting methods, inconsistent indicators, poor indicators, lack of independence in reporting, failure to act on reports, failure to integrate trigger-response thresholds into the Report and a need for real time reporting not a state of despair every 5 years.[10]

National Environmental Information: Past Initiatives and the Current Situation

19.20 Australia does not have a comprehensive national environmental information system for mapping, monitoring, forecasting and reporting on the condition of the environment. Governments have invested significantly to improve the quality and coverage of Australia's environmental information base, including initiatives for greenhouse gas and energy reporting and water data collection. However, many other areas of environmental information, such as terrestrial and marine biodiversity, soils and water quality have not been well supported.

19.21 The 1992 *Intergovernmental Agreement on the Environment*[11] attempted to facilitate mechanisms for national data collection and handling, but little progress has been made, primarily due to the lack of operational capacity, resources and commitment to outcomes.

8 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.516B.
9 DEWHA, About State of the Environment Reporting http://www.environment.gov.au/soe/about.html#data.
10 Submission 132: Mr Jeremy Tager, p.5.
11 *Intergovernmental Agreement on the Environment* http://www.environment.gov.au/esd/national/igae/index.html.

19.22 The *National Land and Water Resources Audit*[12] was established in 1997 under the Natural Heritage Trust to develop information to support the assessment of change in natural resources that resulted from government programs. The program, which concluded in 2008, achieved some agreement on suitable indicators for a number of natural resource management issues, but without ongoing funding and a commitment to ensure ongoing information collection, it was unable to develop an enduring system.

19.23 The *Australia State of the Environment 2006* report found that it is still impossible to give a clear national picture of the state of Australia's environment because of the lack of accurate, nationally consistent environmental data. This has serious consequences for identification and management of Australia's biodiversity, coasts and oceans, and natural and cultural heritage. Better time-series and spatial data are needed across almost every environmental sector.[13]

19.24 The 2007 *OECD Environmental Performance Review* of Australia found that aggregation of environmental information collected by the various levels of government is hindered by inconsistencies in data collection, lack of standard indicators and lack of co-ordination. The OECD Review recommended that Australia harmonise the collection and reporting of key environmental information and statistics at the State and Territory level to facilitate national level aggregation and reporting.[14]

19.25 The Wentworth Group identified the need for an effective national environmental information management system, arguing that:

> The lack of an environmental accounting framework is considered to be a fundamental weakness of Australian environmental policy. It cannot be fixed by simply restructuring the delivery of existing programs. It can only be fixed by building a national but regionally based monitoring, data collection, evaluation and reporting system.[15]

National Environmental Accounts

19.26 The ineffectiveness of the current system of environmental information management is a consequence of a number of factors, including inadequate or incomplete institutional arrangements and the lack of drivers for investment in environmental information. The Australian Government has an opportunity to initiate reform by providing an enduring mandate and an institutional home for a set of baseline national environmental accounts.

19.27 This idea was suggested at the National 2020 Summit of May 2008 as a way to facilitate regular reporting on the condition of our natural capital.[16]

19.28 The Australian Government should take the lead role in establishing a set of national environmental accounts which provide for a consistent, standardised approach to data collection, evaluation and reporting to track and record trends in selected key national environmental assets. Processes for accessing and sharing environmental data should also be established. This information would sit within a common framework to allow comparison between different regions and across different time scales to assess environmental trends.

19.29 Currently there are institutional arrangements for the acquisition and management of some national data sets, including the management of statistical information by the Australian Bureau of Statistics and biophysical data by the Bureau of Meteorology. Either of these agencies, as the custodians of statistical information relating to the economy, environment, industry and people, would be well placed to manage national environmental accounts.

19.30 Establishing this information base, or set of national environmental accounts, should:

- provide measurable ways of comparing and assessing environmental assets over time;
- provide a practical base for investing in future actions for environmental assets;
- provide information to underpin evidence based decision-making;
- better target private and public investment at the program and project level;

12 The *National Land and Water Resources Audit* is available at http://www.nlwra.gov.au/.

13 Robert JS Beeton, Kristal I Buckley, Gary J Jones, Denise Morgan, Russell E Reichelt, Dennis Trewin, *Australia State of the Environment 2006* (2006): http://www.environment.gov.au/soe/2006/publications/report/land-1.html.

14 OECD Environmental Performance Review, Australia (2007): http://www.oecd.org/dataoecd/29/54/40287648.pdf.

15 Wentworth Group of Concerned Scientists *Accounting for Nature: a Model for Building the National Environmental Accounts for Australia*, (2008).

16 Australian Government, *National 2020 Summit Report*, p.58, http://www.australia2020.gov.au/docs/final_report/2020_summit_report_full.pdf.

- provide for measurement and understanding of the impacts and effectiveness of policies and investments;
- allow for better identification and management of risks;
- provide greater community visibility on environmental outcomes;
- guide environmental and land-use planning, including through environmental impact assessments and regional planning; and
- identify and address gaps in reporting requirements and inform the SoE reporting process.

19.31 The Wentworth Group's *Accounting for Nature* provides a possible model.[17] This model proposes an asset based approach to environmental accounts using the key environmental assets of land, water, atmosphere, marine and coastal resources and towns and cities. The United Nations *Handbook of National Accounting: Integrated Environmental and Economic Accounts* is also based on an asset-accounting framework and provides another model.[18]

19.32 National environmental accounts should:

- be based on scientifically robust measurements of specific indicators;
- involve a standardised approach to data collection, management, monitoring and reporting;
- involve collection, coordination and reporting at a regional scale; and
- be established and maintained under enduring institutional arrangements with clearly defined roles and responsibilities for all levels of government.

Data Collection and Reporting

19.33 Data for environmental accounts should be collected at the regional level and aggregated into a standardised national environmental account framework. Each region should report annually on the status of its environmental assets and this data should be aggregated into the national accounts.

19.34 The annual regional environmental account reports should also feed into the s.516A Commonwealth agency annual reports discussed above, adding significantly to the material available for analysis.

19.35 Creating a role for Local Government in this process, at least at a regional level, would have a secondary benefit of improving the environmental monitoring skills and information base that supports local land-use planning.

19.36 A regionally based framework for data collection, coordination and reporting would build on current capacities and existing data sets and provide a geographically appropriate scale for managing landscapes. This approach would also result in significant cost benefits by reducing duplication of data collection.

19.37 The most appropriate institution to collect and report on regional environmental information should be identified and resourced. The Wentworth Group views Natural Resource Management bodies as possible institutions to collect and report on regional environmental data.[19] This approach has merit and should be considered. A single national institution will also be needed to manage the system and accounts as a whole.

19.38 Regardless of the institutions chosen, they must be at the appropriate scale, be durable over the long-term and have the capacity to collect and report on environmental information on a consistent basis. The Australian Government should take the lead in identifying appropriate arrangements and providing institutional support.

17 Wentworth Group of Concerned Scientists *Accounting for Nature: a Model for Building the National Environmental Accounts for Australia*, (2008).

18 United Nations, *Handbook of National Accounting: Integrated Environmental and Economic Accounts* (2003) http://unstats.un.org/unsd/envaccounting/seea2003.pdf.

19 Wentworth Group of Concerned Scientists *Accounting for Nature: a Model for Building the National Environmental Accounts for Australia*, (2008).

19.39 At an Infrastructure workshop held by the Review on 10 September 2009, the absence of national environmental baseline information was rated as being a significant contributor to costs associated with infrastructure projects and land development. Past President of the Australian Property Institute, John Sheehan, noted that even in areas such as biodiversity, very little information and little funding is available to local governments – and these are the first port of call for EPBC Act applications.[20] Those present felt that development of an information base, similar to that developed for geological information by the Australian Geological Society, should be regarded as a 'critical nation building economic infrastructure project' in its own right. The potential for savings to project planning and approvals was considered to be significant.

19.40 Given the critical importance of environmental spatial information to the efficient operation of land-use planning systems and the associated economic benefit to be derived from more efficient development, funding to establish such an information system should be allocated from the Building Australia Fund.[21]

Reporting for National Environmental Accounts

19.41 Most States and Territories have legislation requiring SoE reports to assess the condition of the environment and evaluate trends in environmental quality. A number of jurisdictions also require an evaluation of existing policy and legislative mechanisms. For example:

- s.112(3)(c) of the *Environment Protection Act 1993* (SA) requires that the South Australian SoE report must review significant programs, activities and achievements of public authorities relating to the protection, restoration or enhancement of the environment;[22]
- s.29(1)(d) of the *State Policies and Projects Act 1993* (Tas) requires that the Tasmanian SoE report must make recommendations for action to be taken in relation to the management of the environment;[23] and
- s.19(2)(b) of the *Commissioner for the Environment Act 1993* (ACT) requires that the ACT's SoE report must include an evaluation of the adequacy and effectiveness of environmental management.[24]

19.42 The Review does not propose that the national SoE reporting include an evaluation of policy and legislative mechanisms. Rather, national SoE reporting should focus on gathering key environmental data and analysis of this data to assess environmental trends.

19.43 The provisions of s.516B of the Act should be retained to require the Environment Minister to prepare and lay a SoE report before each House of Parliament every five years. However, in addition to the SoE reporting requirements currently contained in the Act,[25] the Act should be amended to specify additional reporting requirements to:

- assess the condition of Australia's environment; and
- identify trends in environmental condition based on an analysis of indicators of environmental condition.

20 Mr John Sheehan (pers. comm.), 10 September 2009.

21 Minister for Infrastructure, Transport, Regional Development and Local Government, $20 billion for nation-building projects (media release) (2008) http://www.minister.infrastructure.gov.au/aa/releases/2008/May/budget-infra_15-2008.htm.

22 *Environment Protection Act 1999* (SA) s.112(3)(c).

23 *State Policies and Projects Act 1993* (Tas) s.29(1)(d).

24 *Commissioner for the Environment Act 1993* (ACT) s.19(2)(b).

25 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.516B.

Recommendation 67

(1) The Review recommends that the Australian Government, in the interests of promoting ecologically sustainable development, develop a system of environmental accounts to:

(a) establish baseline national environmental information;

(b) provide capacity to systematically monitor changes in the quality of the Australian environment;

(c) provide an information basis for improved regional planning and decision-making; and

(d) provide a secondary objective of strengthening the capacity of local government land-use planning decision-making.

(2) The Review recommends that the Australian Government:

(a) strengthen arrangements for continued State of the Environment (SoE) reporting; and

(b) link information requirements for SoE reporting to the development of the National Environmental Accounts.

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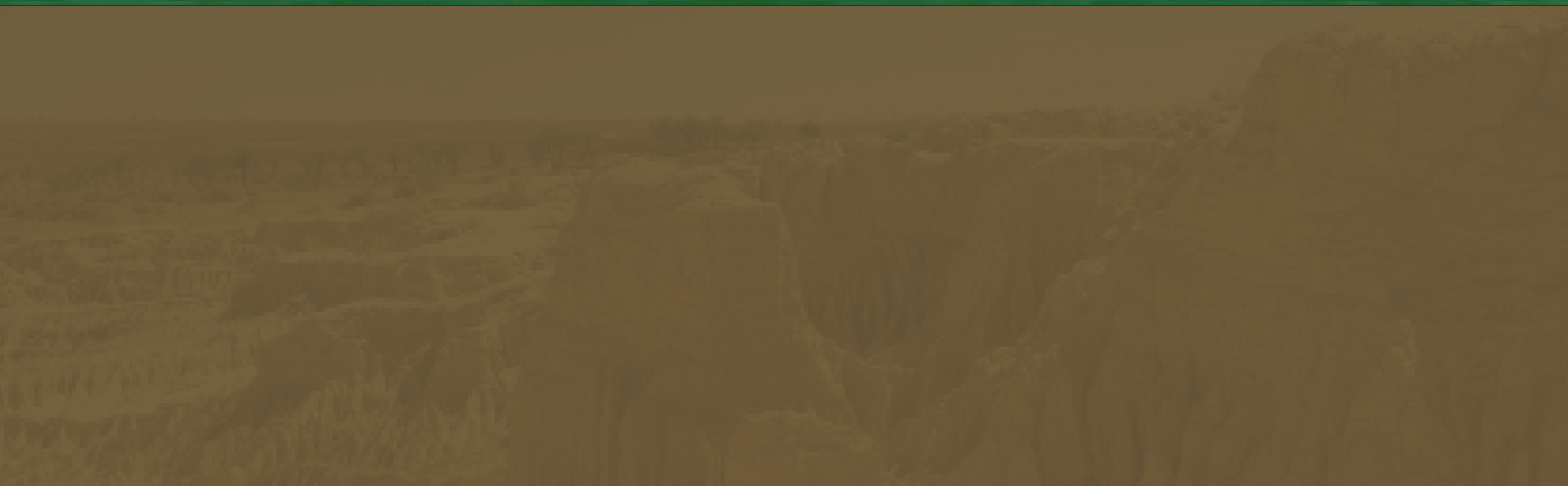
Chapter Twenty

GOVERNANCE ARRANGEMENTS FOR DECISION-MAKING



Chapter 20: Governance Arrangements for Decision-Making

Statutory Advisory Bodies

20.1 The EPBC Act provides for a number of statutory advisory committees, which report to and assist the Minister in administering the Act. The statutory advisory committees provided for under the Act are the:

- Threatened Species Scientific Committee (TSSC);
- Biological Diversity Advisory Committee (BDAC); and
- Indigenous Advisory Committee (IAC).

20.2 The Australian Heritage Council (AHC), which is established under the *Australian Heritage Council Act 2003* (Cth) (AHC Act), also has an advisory role under the EPBC Act.

20.3 The EPBC Act also confers power on the Minister to establish other advisory bodies to provide advice on specified matters relating to the administration of the Act.[1]

Role of Statutory Advisory Bodies in Decision-Making

20.4 As the key decision-maker under the Act, decisions made by the Environment Minister include:

- decisions relating to the assessment and approval of controlled actions;
- decisions relating to the approval of strategic assessments and management plans;
- listing threatened species and ecological communities;
- listing National Heritage and Commonwealth Heritage Places; and
- approval of wildlife exports and associated management arrangements.

20.5 For some decisions, such as decisions about the listing of threatened species and ecological communities, the Environment Minister must have regard to the advice of the relevant advisory body, in this case the TSSC.

20.6 As outlined in Chapter 13, submissions raised concerns about the extent of Ministerial discretion under the Act and lack of transparency of the decision-making processes under the Act.

20.7 The relationship between the Minister and statutory bodies with an advisory role under the Act was also raised. It was argued that the advisory committees, comprised of experts in their fields, were better placed to make decisions about the listing of threatened species, ecological communities and National and Commonwealth heritage, and that the Environment Minister's role should be limited to decisions about the management responses to listings. Others argued that the Minister should be retained as the primary decision-maker because Ministers can be held publicly accountable for their decisions.

20.8 There is no doubt about the ongoing need for statutory advisory bodies to support decision-making under the Act. The question is whether the autonomy, role and functions of these bodies should be expanded.

20.9 The role of the various statutory advisory bodies to provide advice to the Minister for the purposes of decision-making under the Act should be preserved, and the Minister should be retained as the primary decision-maker. However, improvements could still be made. These are discussed below.

1 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.511.

Threatened Species Scientific Committee (TSSC)

20.10 The functions of the TSSC, established under s.502 of the EPBC Act, are set out in s.503. These include providing advice to the Minister on:

- lists of threatened species, ecological communities and key threatening processes;
- recovery planning, threat abatement plans and conservation advice; and
- other matters relating to administration of the Act, when requested.[2]

20.11 Further clarification of the TSSC's functions is provided throughout the Act, for example, Part 3 of the Act, which enunciates further detail about the role of the TSSC with respect to the listing of threatened species and ecological communities.

20.12 TSSC members are appointed by the Minister under s.502 of the Act. The Committee constitutes ten members, who hold a range of expertise in different areas necessary for providing advice to the Minister about matters dealt with under the Act.[3]

20.13 Submissions generally agreed that the TSSC is vital in ensuring that decisions relating to matters of NES are based on the best possible scientific advice. However, improving the level of specialist expertise and enhancing the resources available to the TSSC is recommended. As WWF noted, a lack of adequate resources for the Committee has meant that the TSSC has not been able 'to conduct its work in a timely manner, or to ensure that the lists of threatened species, ecosystems and significant places are up to date'.[4]

20.14 The TSSC should retain its ability to engage in strategic or 'forward-thinking' activities with respect to non-threatened species and ecological communities under s.190 of the EPBC Act. Section 190 provides that, in cases where the Committee is of the opinion that a native species or ecological community is not eligible to be listed as threatened under the Act, the TSSC may provide advice to the Minister on any action that is necessary to prevent the species or ecological community from becoming threatened.

20.15 The responsibilities of the TSSC have evolved and are now broader than the provision of advice about threatened species. It is proposed that the functions currently conferred on BDAC should be transferred to the TSSC, thereby expanding the role of the TSSC to include the provision of advice to the Minister about biodiversity issues more generally. Further explanation of this proposal is provided below in the discussion of BDAC.

20.16 The skill set of the TSSC should be enhanced and its composition expanded to reflect this broader set of responsibilities. In light of the above, it is proposed that the name of the TSSC be changed to the *Biodiversity Scientific Advisory Committee* to reflect better the role and functions of the Committee under the Act.

20.17 Last, some submissions referred to a general need for greater public transparency about the advice provided by the TSSC under the Act. The recommendations put forward in Chapter 14 address this need by requiring the publication of TSSC advice at the time the Minister makes listing decisions for threatened species, ecological communities or key threatening processes. Consistent with this Chapter's recommendation to expand the role of the TSSC, other advice provided by the Committee to the Minister should also be published.

Biological Diversity Advisory Committee (BDAC)

20.18 Established under s.504 of the EPBC Act, BDAC's functions are set out in s.505. These include providing advice to the Minister, upon request, on matters relating to the conservation and ecologically sustainable use of biological diversity. In the past this has included advice about:

- the performance of Australian Government programs in promoting biodiversity conservation;
- the 2004–2007 National Biodiversity and Climate Change Action Plan; and
- previous reviews of the National Strategy for the Conservation of Australia's Biological Diversity, the National Weeds Strategy, and the National Framework for the Management and Monitoring of Australia's Native vegetation.

2 *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s.503.

3 A list of the members is available at http://www.environment.gov.au/biodiversity/threatened/committee-members.html.

4 Submission 181: WWF, p.34.

20.19 BDAC members are appointed by the Minister under s.504 of the Act. Submissions noted that BDAC membership lapsed in February 2007 and has not been reconstituted since.[5]

20.20 BDAC was a source of advice for the Minister for several years, but lack of a statutory role meant that its effectiveness depended on the enthusiasm of participants and the needs of the incumbent Minister. The question for consideration is whether BDAC is necessary for the fulfilment of the Minister's responsibilities under the Act. There are three options:

- the first option, which was also identified in the Interim Report, would be to preserve the role of BDAC in providing advice to the Minister under the Act but amend the Act to define the role and functions of BDAC more clearly;
- the second option, which is foreshadowed above in discussion of the TSSC, would be to amalgamate the TSSC and BDAC into a single advisory committee to provide expert advice to the Minister about biodiversity issues as they arise under the Act; and
- the third option is, in light of the primary recommendation put forward later in this Chapter that an Independent National Environment Commissioner be established under the Act, that BDAC be formally disbanded and its roles and functions absorbed by the Commissioner to the extent that the roles and functions of BDAC remain necessary.

20.21 The second option is preferred primarily because, as noted by the TSSC in its submission, the TSSC is already 'effectively operating as a Biodiversity Management Scientific Advisory Committee'.[6]

20.22 If this recommendation is adopted and BDAC's functions are transferred to the TSSC and coupled with a renaming of the TSSC, this should be supported by additional funding to support the formal adoption of these additional functions, and expanding the skill base of the Committee to ensure it will be effective in this new role.

Recommendation 68

The Review recommends that the Biological Diversity Advisory Committee (BDAC) be disbanded and its functions be transferred to the Threatened Species Scientific Committee (TSSC).

The Review further recommends that the name of the TSSC be changed to the 'Biodiversity Scientific Advisory Committee' to reflect the new role and functions of the Committee under the Act better.

Indigenous Advisory Committee (IAC)

20.23 Established under s.505A of the EPBC Act, the IAC's function, set out in s.505B, is 'to advise the Minister on the operation of the Act, taking into account the significance of Indigenous peoples' knowledge of the management of land and the conservation and sustainable use of biodiversity.' The IAC also has a broader function of providing advice to DEWHA on the development and implementation of policies and programs that may impact upon Indigenous people, and on appropriate methodologies for engaging and consulting with Indigenous people.

20.24 IAC members are appointed by the Minister under s.505A of the Act. The Committee constitutes 12 members with a range of expertise in Indigenous land management, conservation and cultural heritage management.[7]

20.25 In those submissions that commented on the IAC, the role of the Committee in advising the Minister on the operation of the Act, taking into account the significance of Indigenous peoples' knowledge of the management of land and the conservation and sustainable use of biodiversity, was generally welcomed.

5 Submission 91: Applied Environmental Decision Analysis.

6 Submission 211: Threatened Species Scientific Committee para [20].

7 A list of the IAC members is available at http://www.environment.gov.au/indigenous/committees/iac.html

20.26 However, a number of submissions argued that the Act does not adequately support Indigenous engagement and called for an expansion of the role and functions of the IAC so that the Committee is better placed to provide representation on issues relevant to Indigenous peoples, their lands and waters. For example, WWF stated that:

> Traditional and ecological knowledge by Indigenous peoples has not been fully utilized in the delivery of this Act. To date the only Indigenous involvement at a governmental level of this Act has been through the Indigenous Advisory Committee whose terms of reference restrict its ability to actively engage the broader Indigenous community. As mentioned … traditional knowledge should be recognised and protected by the Act.[8]

20.27 Similarly, the Australian Human Rights Commission (AHRC) noted that:

> The position of the IAC and its capacity to effectively reflect the concerns of Indigenous peoples about their rights and interests is limited by the fact that this platform is to inform the government only, rather than to have a direct role in decisions which affect Indigenous people.[9]

20.28 It was argued that the role of IAC should be strengthened so that it can be more directive in nature. However, as the AHRC argued:

> Whilst engagement with the IAC should be encouraged, it should never be capable of acting as a substitute for direct and comprehensive engagement with the Indigenous peoples of the relevant lands.[10]

20.29 Concerns were also expressed about the lack of transparency in relation to the advice provided to the Minister by the IAC.[11] The recommendations put forward in Chapter 14 address this need by requiring publication of IAC advice.

20.30 There is scope for greater Indigenous consultation and involvement under the Act. This consultation role should not be left solely to the IAC. Further work needs to be done to ensure that Indigenous groups are engaged and their values recognised during administration of the processes under the Act. In this respect, proper processes for consultation and negotiation with Indigenous peoples need to be developed. In reviewing the engagement of Indigenous peoples under the Act and the role of the IAC, the review recommended, in Chapter 14 of this Report, that specific guidelines be developed for consulting and engaging with Indigenous peoples on matters arising under the EPBC Act.

20.31 Last, with regard to consultation between the statutory committees established under the EPBC Act, in its submission the IAC noted that the Act provides a direct link between the TSSC and the AHC, and called for the same type of linkage to be provided for the IAC.[12]

20.32 The IAC should be retained with its current role and functions. The Act should be amended to establish a link between the IAC and the new Biodiversity Scientific Advisory Committee (the expanded TSSC recommended above) and AHC. This link would enable consultation between the IAC, the Biodiversity Scientific Advisory Committee, and AHC and allow for information sharing between the statutory committees.

Recommendation 69

The Review recommends that the Act be amended to establish a formal link between:

- the Indigenous Advisory Committee (IAC) and the new Biodiversity Scientific Advisory Committee; and
- the IAC and the Australian Heritage Council.

8 Submission 181: WWF, p.31.
9 Submission 193: Australian Human Rights Commission, p.27.
10 Submission 193: Australian Human Rights Commission, p.28.
11 Submission 193: Australian Human Rights Commission, p.28.
12 Submission 210: Indigenous Advisory Committee, para [55].

Australian Heritage Council (AHC)

20.33 Established under s.4 of the AHC Act, the AHC has a range of functions under the EPBC Act and also has functions conferred on it under the AHC Act.[13] By way of example, some of the functions are:

- undertaking assessments under Divisions 1A and 3A of Part 15 of the EPBC Act, which deal with National Heritage and Commonwealth Heritage places;
- providing advice to the Minister on conserving and protecting places included, or being considered for inclusion, in the National Heritage List or the Commonwealth Heritage List;
- nominating places for inclusion in the National Heritage List or Commonwealth Heritage List;
- following a request from the Minister under s.390P of the EPBC Act, providing advice to the Minister about the inclusion and removal of places from the List of Overseas Places of Historic Significance to Australia;
- promoting the identification, assessment, conservation and monitoring of heritage;
- maintaining the Register of the National Estate; and
- providing advice to the Minister on other matters relating to heritage, including promotional, research, training or other educational activities and monitoring of the condition of places included on the National Heritage List or Commonwealth Heritage List.

20.34 AHC members are appointed by the Minister under s.7 of the AHC Act.

20.35 Consistent with the call for increased clarity about the Commonwealth's role with respect to heritage,[14] it would be appropriate to consolidate the AHC's functions within a single piece of legislation.

20.36 The provisions in the AHC Act should be incorporated into the *Australian Environment Act*. However, in doing so, there should be no diminution of the role, functions and degree of independence of the AHC. The AHC would remain the independent expert advisory body for the Minister on heritage matters. Incorporating the AHC Act provisions into the *Australian Environment Act* would mean that the AHC and users of the heritage legislation would be able to refer to a single Act when determining the role and functions of the AHC. It would also bring the AHC in line with the other statutory advisory bodies under the Act.

20.37 Under the Act, the Minister makes decisions about listing of National and Commonwealth heritage. As discussed in Chapter 8 of this Report, this approach should be retained.

20.38 However, there is a need for greater transparency about the advice provided by the AHC to the Minister under the Act. As argued by Australia International Council on Monuments and Sites (ICOMOS), 'the public transparency of the process from AHC assessments to Ministerial decisions needs to be improved'.[15] The recommendations in Chapters 8 and 14 address this need for greater transparency by requiring publication of AHC advice, including the AHC's proposal that the Council publish a list of all of its recommendations provided to the Minister about heritage listings.[16]

20.39 Some submissions recommended that the Act be amended to require formal reporting by the AHC. The Australian Council of National Trusts (ACNT) supported this approach:

> We believe this lack of a formal reporting process is a major deficiency that needs to be remedied. We are also of the view that the arms-length AHC should be mandated to report on the overall state of the conservation of the nation's cultural and natural heritage, without fear or favour, and recognising this will probably generate observations and even criticisms of State and Territory government performance and that of the non-government sector. Consideration should be given to a provision similar to section 43 of the former *Australian Heritage Commission Act 1975* which required the Commission to report each year to the Minister on the 'condition of the national estate.[17]

13 See, for example, *Australian Heritage Council Act 2003* (Cth) s.5.
14 Submission 39: Australian Council of National Trusts.
15 Interim Report Comment 64: International Council on Monuments and Sites, p.6 of the cover letter.
16 Submission 208: Australian Heritage Council, Recommendation 6.
17 Submission 39: Australian Council of National Trusts, p.24.

20.40 The Review accepts that benefits could be realised from the AHC reporting on its activities and the state of Australia's heritage. These reports could be useful input for the environmental assets reporting recommended in Chapter 19, and would aid in the preparation of the State of the Environment Reports.

Recommendation 70

The Review recommends that the provisions of the EPBC Act and the *Australian Heritage Council Act 2003* (Cth) be merged, and incorporated into the *Australian Environment Act*, so that the functions of the Australian Heritage Council are conferred under a single Act.

National Environment Commissioner

20.41 Some submissions commented on the current arrangements regarding the roles of the Minister and the statutory committees established under the Act.[18] Comments were also received in response to the Interim Report which suggested potential for an independent Commissioner to take on advisory and audit and compliance functions under the Act.[19]

20.42 An independent National Environment Commissioner should be established under the *Australian Environment Act*. The Commissioner should be supported by a National Environment Commission.

20.43 The Commissioner would be a statutory officer holder, appointed by the Minister under the Act. The Commissioner should be supported by two Deputy-Commissioners, who would also be appointed by the Minister under the Act. The three statutory office holders together would comprise the Commission.

20.44 The aim of introducing new governance arrangements to support the creation of an independent National Environment Commissioner is to improve transparency in administration of the Act and the quality of decision-making under the Act.

20.45 The proposed roles and functions of the Commissioner and Commission are explained below.

The Current Arrangements

20.46 Under the Administrative Arrangements Orders,[20] the Environment Minister is responsible for administering the EPBC Act. DEWHA supports the Minister in fulfilling this responsibility by providing advice to the Minister on matters arising under the Act, and for the purposes of decision-making under the Act. The statutory committees discussed earlier in this Chapter, namely the Biodiversity Scientific Advisory Committee (that is, the expanded TSSC), IAC and AHC, also provide advice to the Minister for the purposes of decision-making under the Act.

20.47 As discussed earlier in this Report, EIA is a predictive tool that should be applied early in the planning and design stages of development proposals and planning schemes. Early application allows government and the community to form a view about the environmental acceptability of the proposed development and consider what amendments to the project design or conditions, if any, could be applied to avoid, mitigate and manage the risk of adverse impact on the environment from the outset.

20.48 However, because EIA is a predictive tool, it deals in uncertainty and risk. The environmental impacts of proposed developments are often difficult to predict. Questions about the environmental values that may be at risk from a proposed development; the nature, extent and duration of risks to those environmental values; and opportunities to avoid and/or mitigate those risks are questions that often require expert advice and assistance to answer. These questions are at the heart of the environmental impact assessment and approval processes under the Act.

18 See for example, Submission 55: Conservation Council (ACT Region); Submission 80: Dr Jane Lennon; Submission 140: Mr Duncan Marshall; Submission 153: The Wilderness Society; Submission 184: Australian Hydroponic and Greenhouse Association; Submission 193: Australian Human Rights Commission.

19 Ideas about a Sustainability Commissioner were discussed in Chapter 19 and Chapter 22 of the Interim Report, see para. [19.73-19.74]; and para. [22.42-22.43 and 22.51].

20 Commonwealth of Australia, *Administrative Arrangements Orders*, made on 25 January 2008, amended 1 May 2008 and updated 1 July 2008 (2008) http://www.pmc.gov.au/parliamentary/docs/aao_july_2008.pdf.

20.49 The Minister, and the public at large, needs to have confidence in the information provided about these potential risks and impacts when making decisions whether to approve a proposed development under the Act. The key is that this advice should come from a body that is both expert and independent, and is recognised as such. While it is important to note that the Review has received no information that would support any inference that there has been political interference in the provision of advice by DEWHA to the Minister, there is a case for greater separation between the Minister and the body responsible for providing this type of advice.

20.50 It is recommended that a National Environment Commissioner be established, and that the Commissioner take on responsibility for the provision of advice to the Minister for the purposes of making decisions about the environmental impact assessment and approval process under the Act. There may also be scope for other functions to be transferred to the National Environment Commissioner, as discussed below.

Examples of Environment Commissioners in Other Jurisdictions

20.51 One of the 2020 Summit ideas was that a national sustainability reform agenda be pursued. This would involve:

- creation of a framework policy, namely a 'National Sustainability and Climate Change Policy';
- establishment of a Sustainability Commission, that would have 'teeth' similar to the Australian Competition and Consumer Commission; and
- an implementation process similar to the implementation of a National Competition Policy.[21]

20.52 The 2020 Summit Final Report established that:

> The Sustainability Commission would be an independent sustainability institution equivalent to the Reserve Bank, the Australian Stock Exchange, the Productivity Commission or the ACCC, to give effect to the new regulatory environment and provide imperatives to achieve action on sustainability.[22]

20.53 The Australian Government's response to the 2020 Summit Final Report advised that:

> The Government is currently considering options for a Sustainability Council/Commission for aspects of environmental sustainability that are influenced by Commonwealth legislation, policy or programs.[23]

20.54 Other Australian jurisdictions have already established statutory positions similar to the Sustainability Commissioner idea put forward in the 2020 Summit Final Report. One example is the Victorian Commissioner for Environmental Sustainability, established under the *Commissioner for Environmental Sustainability Act 2003* (Vic). The objectives of the Victorian Commissioner are to:

- report on matters relating to the condition of the natural environment of Victoria;
- encourage decision-making that facilitates ecologically sustainable development;
- enhance knowledge and understanding of issues relating to ecologically sustainable development and the environment; and
- encourage sound environmental practices and procedures to be adopted by the Government of Victoria and Local Government as a basis for ecologically sustainable development.[24]

20.55 Another example is the Australian Capital Territory's Commissioner for Sustainability and the Environment, established under the *Commissioner for the Environment Act 1993* (ACT). The ACT Commissioner has the following functions:

- produce State of the Environment reports for the ACT;
- investigate complaints from the community regarding the management of the Territory's environment by the ACT Government or its agencies;

21 Australian Government, *Australia 2020 Summit Final Report* (2009), pp.61-62, 78 and 84-85 http://www.australia2020.gov.au/docs/final_report/2020_summit_report_full.pdf.

22 Australian Government, *Australia 2020 Summit Final Report* (2009), p.62 http://www.australia2020.gov.au/docs/final_report/2020_summit_report_full.pdf.

23 Australian Government, *Responding to the Australia 2020 Summit* (2009), p.77 http://www.australia2020.gov.au/docs/government_response/2020_summit_response_full.pdf.

24 *Commissioner for Environmental Sustainability Act 2003* (Vic) s.7.

- conduct investigations directed by the Minister;
- initiate investigations into actions of the ACT Government or its agencies, where those actions have a substantial adverse impact on the Territory's environment; and
- make recommendations for consideration by the ACT Government, and report on the outcomes in the Commission's Annual Report.[25]

20.56 Under the Victorian and ACT models, the Sustainability Commissioners adopt primarily a reporting, monitoring and audit role.

20.57 A different model worthy of discussion, is in Western Australia (WA), where the WA Environmental Protection Authority (EPA) manages the WA environmental impact assessment process. The primary role of the WA EPA is to provide advice to the WA Minister about environmental impact assessments. The EPA can also issue policy guidance. The WA Minister ultimately makes the final decisions pursuant to the legislation.

20.58 The WA EPA is created under the *Environmental Protection Act 1986* (WA) and has a broad objective of protecting the Western Australian environment. It is independent of the WA Department of State (however it receives some administrative support from the Department of the Environmental Conservation).

20.59 In undertaking its functions, the EPA is also largely independent from Ministerial direction. This approach has worked well for over 20 years and has been widely lauded.[26] The EPA's role in relation to the provision of advice about the environment, and the level of independence of the Authority, could be a useful model to adopt for the similar functions of providing advice on project and strategic assessments under the EPBC Act. The independent National Environment Commissioner should take on a similar role.

20.60 It is clear from the above examples that the level of independence conferred on each relevant organisation is necessary to encourage confidence in the organisation and the way it carries out its activities.

20.61 In addition to these local examples, examples of independent Environment and Sustainability Commissioners are also found in other countries. For example, the Canadian Commissioner of the Environment and Sustainable Development, established under the Canadian *Auditor-General Act*, is responsible for leading a group of auditors specialised in environment and sustainable development.[27]

20.62 The Canadian Commissioner of the Environment and Sustainable Development's functions, which are conferred by legislation, are to:

- provide the Canadian Parliament with objective independent analysis and recommendations on the Canadian Federal Government's efforts to protect the environment and foster sustainable development;
- conduct performance audits;
- assess whether Canada's Federal Government Departments are meeting sustainable development objectives; and
- oversee an environmental petitions process, a process by which the people of Canada can obtain answers from Federal Ministers on specific environmental and sustainable development issues that involve Federal jurisdiction.[28]

20.63 With the above examples in mind, together with the need for greater efficiency and transparency in the administration of the EPBC Act, the Review has considered various options for managing the administration of the Act into the future.

25 *Commissioner for the Environment Act 1993* (ACT) pts 3 and 4.

26 Christopher Wood, Evaluating Impact Assessment Systems, Integrated Environmental Management (1994), pp.10-13; Nick Harvey, *Environmental Impact Assessment: Procedures, Practice, and Prospects in Australia* (1998), pp.36-37.

27 *Auditor-General Act,* R.S.C. 1985, c. A-17, s.15(1) (Canada).

28 *Auditor-General Act,* R.S.C. 1985, c. A-17, ss.21-23 (Canada).

20.64 The roles and functions of the Biodiversity Scientific Advisory Committee (that is, the expanded TSSC), the AHC and the IAC in providing expert advice to the Minister for the purposes of decisions made under the Act were discussed earlier in this Chapter. The question for consideration here is whether there would benefit in implementing a similar arrangement here whereby the Minister could call on and receive independent expert advice about other matters arising under the Act, in particular, in the area of environmental impact assessment.

20.65 The monitoring, audit, compliance and enforcement functions under the Act may also be better administered by an independent body.

Functions of the National Environment Commissioner

20.66 Three possible models for the roles and functions could be adopted for the National Environment Commissioner, as set out below.

Option A: An Information Focus

20.67 Option A is directed at addressing the need identified in Chapter 19 for more environmental data and information, available in a more accessible form, for the purposes of providing advice and making decisions under the Act.

20.68 Option A is focused on the provision of data and information to support decision-making under the Act. The types of functions that might be conferred on the National Environment Commission (or a similar body) could include responsibility for:

- the development of a national environment information management system (Chapter 19);
- preparation of an annual set of national environmental accounts (Chapter 19);
- State of the Environment Reporting and ESD reporting; and
- the foresighting unit and preparation of foresight reports (Chapter 6).

20.69 Under this model, the Commissioner would not have a policy development or policy advice function, and would not make decisions under the Act.

20.70 The power to make government policy and issue policy guidance is one that properly rests with the Minister. DEWHA would retain responsibility for the production of policy guidelines issued by or under the auspices of the Minister under the Act.

Option B: A Quality Assurance and Advice Focus

20.71 Option B is focused on the provision of advice to support decision-making under the Act and for quality assurance.

20.72 The types of functions that might be transferred to the National Environment Commissioner under this model could include:

- providing independent expert advice to the Minister for the purposes of decision-making on:
  - environmental impact project assessments and approvals;
  - strategic assessments and regional plans; and
  - management plans;
- monitoring and audit, adopting a role similar to that of the Auditor-General, to assess and report on:
  - compliance with conditions of approval;
  - implementation of bilateral agreements; and
  - actions taken under a strategic assessment or bioregional plan;

- undertaking and reporting on performance audits, for example, to assess the level of compliance with the Act by a particular industry sector or region;
- reporting to the Minister on the effectiveness of environmental and natural resource management programs when requested; and
- reporting to the Minister on other aspects of the operation of the EPBC Act when requested.

20.73 Under Option B, the Biodiversity Scientific Advisory Committee (that is, the expanded TSSC), IAC and AHC would retain their advisory functions under the Act. That is, the National Environment Commissioner would not provide advice on matters that fall within the areas of responsibility of the existing statutory committees.

Option C: Policy Development and Decision-Maker

20.74 Option C focuses on policy development and the decision-making functions for the environmental impact assessment and approvals process under the Act.

20.75 The types of functions that might be transferred to the National Environment Commissioner under this model could include:

- setting environmental benchmarks and policies;
- conducting environmental impact assessments;
- making controlled action and assessment approach decisions;
- making project approval decisions; and
- negotiating and concluding strategic assessments and bioregional plans.

Proposed Functions of the National Environment Commissioner

20.76 The primary objective of the Commissioner should be to promote the adoption of environmentally sustainable practices by providing independent scrutiny, reporting and advice. As such, the preferred and proposed model for the role and functions of the National Environment Commissioner is a combination of Options A and B. In summary, the National Environment Commissioner would be responsible for:

- providing independent expert advice to the Minister for the purposes of evidence-based decision-making for environmental impact assessment and approvals processes under the Act, including decision-making on project assessments, strategic assessments and bioregional plans;
- monitoring, audit, compliance and enforcement activities under the Act;
- undertaking and reporting on performance audits, for example, to assess the level of compliance with the Act by a particular industry sector or region;
- preparing other reports and providing other advice to the Minister when requested – this could include advice about policies and programs; and
- responsibility for managing the provision of environmental data and information and reporting on that information.

20.77 Transferring decision-making and policy functions away from the Minister is not supported.

20.78 Under the proposed approach, the role and functions of the Biodiversity Scientific Advisory Committee (that is, the expanded TSSC), IAC and AHC would also be preserved.

20.79 While a large part of the Commissioner's role would stem from the environmental impact assessment process, it would not be the only means through which the Commission could assist the Minister under the Act. For example, the Commission could also have a role in assessing and providing advice on the acceptability of landscape and regional planning schemes.

20.80 The Commissioner would need to be provided with sufficient time in which to consider relevant information and prepare advice for the Minister. The Act should specify the timeframes for the Commissioner to provide advice to the Minister, and for the Minister to make a decision following receipt of the Commissioner's advice. In line with the recommendations in Chapter 14, the advice provided by the Commissioner should be published at the time the Minister makes the relevant decision.

20.81 The Commissioner would also need to have sufficient confidence in the information at hand to make sensible judgments and provide high-quality advice to the Minister on the likely environmental impacts of the proposed development. The establishment of a national environment information management systems, and Outlook reporting (discussed in Chapters 6 and 19) should go some way to ensuring that, over time, this information is more readily available.

20.82 The Commissioner would also function as an environmental auditor and would take on a role similar to that of the Auditor-General for financial statement and performance audits.[29] The Commissioner would be responsible for auditing compliance with conditions of approval and policies, plans or programs that have been the subject of a strategic assessment as well as compliance with bilateral agreements and performance auditing of management plans concluded under the Act. The Commissioner would be required to prepare reports on the outcomes of these audits. These audit reports would be provided to the Minister and would be published soon thereafter.

20.83 As noted earlier in this Report, the effectiveness of the EPBC Act relies heavily on the audit, compliance and enforcement actions taken under the Act. Similar to the powers conferred on the Auditor-General under the *Auditor-General Act 1997*,[30] the Commissioner would also have the power to initiate and undertake performance audits.

20.84 The Commissioner's power to undertake performance audits would be limited to persons who have obtained an approval or are party to an agreement or plan concluded under the Act. These audits could evaluate and report on, for example, things like the level of compliance with the Act by a particular industry, the accuracy of EIA assumptions and predictions, the effectiveness of recovery plans and their implementation or the appropriateness and effectiveness of conditions imposed on approvals granted under the Act.

20.85 The Commission should also undertake performance audits of conditions imposed as part of approvals given under the Act to assess whether the conditions achieved the outcomes (including, for example, mitigation, offsets or management outcomes) for which they were imposed. These performance audits should inform future condition-setting.

20.86 The Minister would also be able to request that the Commissioner inquire into the effectiveness of natural resource management programs and undertake assessments of broader environmental policies. In this sense, the role of the Commission is analogous to that of the Productivity Commission.[31]

20.87 It would also be reasonable to allow the Minister to seek advice from the Commissioner on other matters arising under the Act, where the Minister so requests.

29 The role and powers of the Auditor-General are conferred under the *Auditor-General Act 1997* (Cth).

30 *Auditor-General Act 1997*, pt 4, div 2.

31 The Productivity Commission is the Australian Government's independent research and advisory body on a range of economic, social and environmental issues affecting the welfare of Australians. It is an advisory body; it does not administer government programs or exercise executive power. Its contribution hinges on the value of the independent advice and information it provides to governments, and on the educative functions of its public processes. See, Australian Government Productivity Commission, *A Quick Guide to the Productivity Commission* (2009) p.1-2 http://www.pc.gov.au/__data/assets/pdf_file/0005/64679/quick-guide-2009.pdf.

Governance arrangements for the National Environment Commissioner

20.88 The National Environment Commissioner should be created under legislation, preferably the *Australian Environment Act*, and supported by a National Environment Commission. The legislation should clearly set out the roles and functions of the Commissioner and the Commission.

20.89 A number of potential governance arrangements could be employed. These are explained in the Department of Finance and Administration's publication (as it then was), *Financial Management Reference Material No.2, 'Governance Arrangements for Australian Government Bodies'* (the Governance Policy).[32] However, the key characteristic is that the Commissioner and the Commission must be independent from the Minister and DEWHA.

20.90 The Commissioner should be a statutory officer holder, appointed by the Minister under the Act. The Act should also provide for two Deputy-Commissioners who would also be appointed by the Minister.

20.91 The Commissioner should be appointed for a renewable term of five years. The Deputy-Commissioners should be appointed for a renewable term of three years, but the two should be staggered so the appointments do not expire at the same time.

20.92 A statutory authority – the National Environment Commission – should also be established under legislation.[33] The three statutory office holders, namely the Commissioner and the two Deputy-Commissioners, together would comprise the Commission.[34] The National Environment Commissioner would be the head of the Commission.

20.93 Adopting a statutory authority governance structure for the Commission is consistent with the views expressed in 1976 by the Coombs Royal Commission, and quoted in the Governance Policy, that "some degree of independence from Ministerial and Departmental control should be intended if there is to be a statutory body".[35] The issue then is how much independence is required.

20.94 As the primary source of independent advice on environmental impact assessment and approval under the EPBC Act, it would be necessary to ensure that the Commission is able to provide its advice to the Minister free of political interference. It is considered important that the independence of the Commissioner and the Commission be reflected in the legislation.

20.95 It is also important that the Minister should not be able to direct the Commissioner as to the nature of the advice the Commission provides, the audit program it undertakes nor the findings and recommendations it may make in the reports that flow from those audits. However, the Minister should be able to request advice be provided on a particular matter or that a certain audit-inquiry be undertaken. This approach is similar to the arrangements in place for the Auditor-General under the *Auditor-General Act 1997* (Cth).

20.96 In fulfilling its functions, the Commission should be supported by staff from within DEWHA. Because the staff will be drawn from DEWHA, establishment costs should be low.

20.97 The governance arrangements proposed for the independent National Environment Commissioner and the supporting Commission (outlined above) should be the same as those currently in place for the Productivity Commission, the Australian Competition and Consumer Commission, the Office of the Privacy Commissioner and the Australian Taxation Office.[36]

32 Australian Government Department of Finance and Administration, *Governance Arrangements for Australian Government Bodies* (August 2005) http://www.finance.gov.au/financial-framework/governance/docs/Governance-Arrangements-for-Australian-Government-Bodies.pdf.

33 'Statutory authority' is a generic term used to describe a body established under legislation for a public purpose.

34 Statutory authorities can be bodies headed by, or comprised of, a statutory officer holder, a commission or a governing board. See, Australian Government Department of Finance and Administration, *Governance Arrangements for Australian Government Bodies* (August 2005) p.4 at para [8] http://www.finance.gov.au/financial-framework/governance/docs/Governance-Arrangements-for-Australian-Government-Bodies.pdf.

35 Australian Government Department of Finance and Administration, *Governance Arrangements for Australian Government Bodies* (August 2005) p.15 at para [48] http://www.finance.gov.au/financial-framework/governance/docs/Governance-Arrangements-for-Australian-Government-Bodies.pdf.

36 These are all prescribed agencies under the *Financial Management and Accountability Act 1997* (Cth) and statutory agencies under the *Public Service Act 1999* (Cth).

20.98 Different governance arrangements are in place for other statutory office holders within the Environment, Water, Heritage and the Arts Portfolio. For example:

- the Director of National Parks is a corporation established under the EPBC Act; and
- the Supervising Scientist is a statutory office holder created under the *Environment Protection (Alligator Rivers Region) Act 1978* (Cth),

however, both are supported by DEWHA staff.

20.99 While it would be possible to provide for different governance arrangements in establishing the National Environment Commissioner and the Commission, the proposed model is preferred.

How Would the Commissioner Interact with DEWHA?

20.100 Good governance arrangements should help ensure that the independent National Environment Commissioner's relationships with the Minister, DEWHA and stakeholders are well managed.

20.101 Under the proposed approach, DEWHA would retain the role of providing policy advice and producing guidance notes on the operation and interpretation of the Act. DEWHA would also retain the delegation from the Minister for controlled action, assessment approach and approval decisions under the EIA regime under the Act, should the Minister continue to delegate those functions in the future.

20.102 The role of the independent National Environment Commissioner would be to provide expert advice on the likely impacts of a proposed development on matters protected under the Act. This advice would be provided to the Minister, or a delegate, depending on the decision-maker in the particular case. The Commissioner would not have a decision-making power.

20.103 DEWHA and the Minister would be able to request advice from the Commissioner. All advice provided by the Commissioner would be publicly available.

20.104 While the Commissioner should be independent of DEWHA, and should provide publicly available independent expert advice to the Minister, there should be a Memorandum of Understanding between the Commissioner and the Secretary of DEWHA to facilitate the sharing of information.

How Would the Commission Interact with the Advisory Bodies?

20.105 Similar to the approach recommended above, the Commissioner should negotiate Memoranda of Understanding with each of the advisory bodies under the Act to facilitate the sharing of information.

Recommendation 71

The Review recommends that an independent National Environmental Commissioner and National Environment Commission be established under the Act and supported by DEWHA.

20.106 If the recommendations to establish an independent National Environment Commissioner and a National Environment Commission are adopted, the other recommendations of this Report should be considered in the context of the role and functions of the Commissioner. References to the Commissioner have been deliberately avoided throughout the rest of the report to facilitate ease of understanding of the other recommendations and proposals for amendment.

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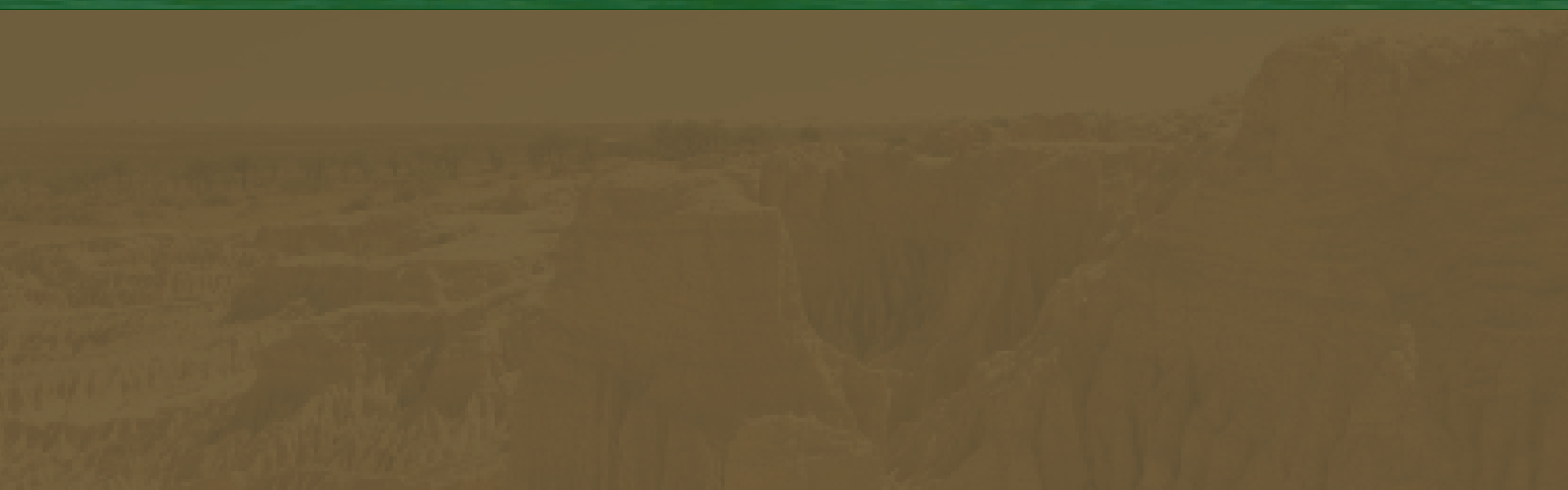
APPENDICES



Appendix 1: Terms of Reference

1. A review of the operation of the *Environment Protection and Biodiversity Conservation Act 1999* (the 'EPBC Act') will be carried out in accordance with section 522A of the Act.
2. In particular the review will examine:
   (a) the operation of the EPBC Act generally;
   (b) the extent to which the objects of the EPBC Act have been achieved;
   (c) the appropriateness of current matters of National Environmental Significance; and
   (d) the effectiveness of the biodiversity and wildlife conservation arrangements.
3. The review will be guided by key Australian Government policy objectives:
   (a) to promote the sustainability of Australia's economic development to enhance individual and community well-being while protecting biological diversity and maintaining essential ecological processes and systems;
   (b) to work in partnership with the states and territories within an effective federal arrangement;
   (c) to facilitate delivery of Australia's international obligations;
   (d) the Australian Government's deregulation agenda to reduce and simplify the regulatory burden on people, businesses and organisations, while maintaining appropriate and efficient environmental standards; and
   (e) to ensure activities under the Act represent the most appropriate, efficient and effective ways of achieving the Government's outcomes and objectives in accordance with the Expenditure Review Principles.
4. The review will seek input from state and territory governments, members of the community and industry.
5. The review will be commenced as soon as possible and completed by 31 October 2009.

Appendix 2(A): List of Submitters

Written Submissions Received		
#	Submitter Name	Acronym
001	Mr John Leonard	
002	Climate Action Coogee	
003	Mr David Milledge	
004	Confidential (name withheld)	
005	Wildlife Protection Association of Australia	
006	Unimin Australia (confidential)	
007	Ms Helen Pedel	
008	Climate Action Network Australia	CANA
009	Mr Ralph Cooper	
010	Heritage Management Consultants	
011	Dr Charles Lawson	
012	Nexus Energy	
013	Tasmanian Community Resource Auditors	
014	Ms Julie Vint	
015	Ms Estelle Ross	
016	Mr John Haywood	
017	Dr Chris McGrath	
018	Ipswich City Council	
019	Mr Brendan Casey	
020	Environment Tasmania	
021	Magnetic Island Nature Care Association	MINCA
022	Mr Graham Bowrey and Dr Ciorstan Smark	
023	Nature Conservation Society of South Australia	
024	Water Corporation	
025	Finch Society of Australia	
026	Ms Mary Chandler	
027	Associate Professor Paul Adam	
028	National Trust of Australia (New South Wales)	
029	Centralwest Environment Council	
030	North East Bioregional Network	

Written Submissions Received		
#	Submitter Name	Acronym
031	Ms Tracy Norman	
032	Ms Kellie Gee	
033	Hunter Bird Observers Club	HBOC
034	LAWROC (confidential)	
035	Shoalhaven City Council	
036	Mr Malcolm Mars	
037	Coalition Against Duck Shooting	
038	Australian Forest Growers	AFG
039	Australian Council of National Trusts	
040	Mr Mal Anderson	
041	Mr Stephen Burgess and Ms Elaine Bradley	
042	Australasian Regional Association for Zoological Parks and Aquaria	ARAZPA
043	Mr Derek Fenton	
044	Mr Jason Cabarrus (confidential)	
045	Mary River Catchment Coordinating Committee	MRCCC
046	Invasive Animals Cooperative Research Centre	
047	Landcom	
048	Ms Ann Jelinek	
049	The Association of Mining and Exploration Companies	AMEC
050	Adelaide Meeting of the Religious Society of Friends	
051	Healesville Environment Watch	
052	Save the Mary River	
053	Mr Graeme Steinbeck	
054	Save Ralphs Bay	
055	Conservation Council (ACT Region)	
056	Central Local Region of Government South Australia	
057	Bat Advocacy New South Wales	
058	Eastern Hills and Murray Plains Catchment Group	
059	Confidential (name withheld)	
060	Manly Council	
061	Delfin Lend Lease (confidential)	
062	Whales Alive	
063	Mineral Council (New South Wales)	

Appendix 2(A): List of Submitters

Written Submissions Received		
#	Submitter Name	Acronym
064	Bird Observation and Conservation Australia	BOCA
065	BP Australia	
066	Birds Australia	
067	Santos	
068	I F Turnbull	
069	Greater Blue Mountains Advisory Committee	
070	Cumberland Bird Observers Club	
071	Botanicus Australia (confidential)	
072	Lyndon De vantier	
073	Australian Petroleum Production and Exploration Association	APPEA
074	New South Wales Young Lawyers Environmental Law Committee	
075	Eurobodalla Shire Council	
076	Sunshine Coast Environment Council	
077	Local Government and Shires Association of New South Wales	LGSA
078	Confidential (name withheld)	
079	Commonwealth Fisheries Association	CFA
080	Dr Jane Lennon	
081	Ms Catherine Cheung	
082	Confidential (name withheld)	
083	Magnificus Avaries (confidential)	
084	New South Wales Wader Study Group	
085	Confidential (name withheld)	
086	Greenpeace	
087	Environment Institute of Australia and New Zealand	EIANZ
088	Australian Institute of Aboriginal and Torres Strait Islander Studies	AIATSIS
089	Western Australian Recreational and Sportfishing Council	Recfishwest
090	AgForce	
091	Applied Environmental Decision Analysis	AEDA
092	Friends of Grasslands	FoG
093	ALP Members Opposed to Duck Shooting	MoDS
094	South East Water	SE Water
095	Urban Development Institute of Australia	UDIA
096	Mr Brett Odgers	

Written Submissions Received		
#	Submitter Name	Acronym
097	Mr Peter Hemphill and Mr Tom Kaveney	
098	Office of the Commissioner of Sustainability and the Environment (Australian Capital Territory)	
099	Fraser Island Defenders Organisation	FIDO
100	National Parks Association of Queensland	NPAQ
101	Mr Jamie Pittock, Dr Debra Saunders, Ms Karen Stagoll	
102	Healthy Cities Illawarra	
103	Ku-ring-gai Bat Conservation Society	
104	Professor David Farrier	
105	Noosa Integrated Catchment Association	
106	Confidential (name withheld)	
107	Confidential (name withheld)	
108	National Finch and Softbill Association	NFSA
109	Canberra Ornithologist Group	COG
110	The Blue Gum High Forest Group	
111	South Australian Chamber of Mines and Energy	SACOME
112	Australian Recreational and Sportfishing Industry Confederation	Recfish Australia
113	Confidential (name withheld)	
114	Mr David White	
115	Still Wild Still Threatened	
116	Mackay Conservation Group	
117	International Council on Monuments and Sites	ICOMOS
118	Moreland Energy Foundation	
119	Colong Foundation for Wilderness	
120	Woodside Energy	Woodside
121	Sunshine Coast Regional Council	
122	National Generators Forum	NGF
123	Recreational Fishing Alliance of New South Wales	Recfish (NSW)
124	Magnetic Island Community Development Association	MICDA
125	Save the Mary River Coordinating Group	
126	Hamilton Field Naturalist Club	HNFC
127	Peel Harvey Catchment Council	

Appendix 2(A): List of Submitters

Written Submissions Received		
#	Submitter Name	Acronym
128	Confidential (name withheld)	
129	The Greater Mary Association	GMA
130	Centre for Aboriginal Economic Policy Research	CAEPR
131	Garner Beach Habitat Action Group	GHAG
132	Mr Jeremy Tager	
133	National Association of Forest Industries	NAFI
134	Wet Tropics Management Authority	
135	The Australian Commonwealth Scientific and Research Organisation	CSIRO
136	National Farmers' Federation	NFF
137	Dr Matthew Rimmer	
138	Mr Kerin Booth	
139	Hydro Tasmania / Roaring 40s	
140	Mr Duncan Marshall	
141	Confidential (name withheld)	
142	Powerlink (Queensland)	Powerlink
143	Department of Industry and Resources (Western Australia)	DoIR
144	Ms Maria Riedl	
145	Office of the Commissioner of Sustainability and the Environment (Victoria)	
146	City of Wanneroo	
147	Ourimbah Precinct Committee	
148	Australian Property Institute	API
149	Urban Taskforce Australia	
150	New South Wales Scientific Committee	
151	Southern Rivers Catchment Management Authority	SRCMA
152	North Queensland Conservation Council	
153	The Wilderness Society	TWS
154	Department of Natural Resources, Environment, the Arts and Sport (Northern Territory)	
155	The Australasian Native Orchid Society	ANOS
156	The Australian Orchid Council	
157	Australian Nuclear Science and Technology Organisation	ANSTO
158	P A Elkin	
159	Southern Councils Group	
160	Associate Professor Geoff Wescott	

Written Submissions Received		
#	Submitter Name	Acronym
161	National Parks Australia Council	NPAC
162	The Green Institute	
163	Country Fire Authority (Victoria)	CFA
164	Minerals Council of Australia	MCA
165	Stradbroke Island Management Organisation	SIMO
166	Invasive Species Council (Australia)	ISC
167	Friends of the Earth (Adelaide)	
168	Species Management Specialists	
169	Dr Ian Wright	
170	Museums Australia	
171	Mr Henry and Ms Gloria Jones	
172	Department of Sustainability and Environment (Victoria)	DSE
173	Conservation Council (Western Australia)	CCWA
174	Ourimbah Community	
175	Green Cape Wildlife Films (confidential)	
176	Property Council of Australia	
177	Goolwa to Wellington Local Action Planning Association	GWLAP
178	United Bird Societies of South Australia	UBSSA
179	International Fund for Animal Welfare	IFAW
180	River Lakes and Coorong Action Group	RLCAG
181	WWF	WWF
182	Humane Society International	HSI
183	Government of Norfolk Island	
184	Australian Hydroponic and Greenhouse Association	AHGA
185	Practical Hydroponics and Greenhouses Magazine	
186	Ms Anne Hartnett	
187	Avicultural Federation of Australia	AFA
188	National Conservation Council of New South Wales	
189	The Australian Network of Environmental Defender's Offices	ANEDO
190	Friends of the Earth (Australia)	
191	Conservation Council of South Australia	
192	Mr Tom Baxter	
193	Australian Human Rights Commission	

Appendix 2(A): List of Submitters

Written Submissions Received		
#	Submitter Name	Acronym
194	Australian Conservation Foundation	ACF
195	Western Australian Southern Coalition	
196	Government of Queensland	
197	Walter Burley Griffin Society	
198	Environment groups	
199	Government of South Australia	
200	Government of Tasmania	
201	Government of Western Australia	
202	Lawyers for Forests	LFF
203	Australian Southern Bluefin Tuna Industry Association	ASBTIA
204	Mr Ivan Jeray	
205	Government of New South Wales	
206	Mr Ian Lee	
207	Invasive Animals Cooperative Research Centre	
208	Australian Heritage Council	AHC
209	Public Interest Law Clearing House	PILCH
210	Indigenous Advisory Committee	IAC
211	Threatened Species Scientific Committee	TSSC
212	Environmental Defender's Office (New South Wales)	EDO (NSW)
213	Dr Kirsten Parris	
214	Australian Fisheries Management Forum	AFMF
215	Babcock and Brown	
216	Australian Forest Growers (supplementary)	AFG
217	Australasian Regional Association for Zoological Parks and Aquaria (supplementary)	ARAZPA
218	Minerals Council of Australia (supplementary)	MCA
219	Wetlands Research Association	WRA
220	Ms Lynda Newman	

Appendix 2(B): List of Commentators on Interim Report

#	Commentator	Acronym
001	Mr Martin Taylor	
002	Invasive Animals Cooperative Research Centre	
003	Mr Matthew Dickie	
004	Ms Sherryl Broderick	
005	Invasive Species Council (Australia)	ISC
006	The Australasian Native Orchid Society	
007	Bat Advocacy NSW	
008	Dr Keith Sainsbury	
009	Timber Communities Australia (Derwent Valley Branch)	
010	Timber Communities Australia (Huon Resource Development Group)	
011	Timber Communities Australia (Meander Resource Management Group)	
012	Colong Foundation for Wilderness	
013	Mr Mick Welsh	
014	Clarence Environment Centre	CEC
015	Mr Malcolm Mars	
016	Timber Communities Australia (Southern Tasmania Branch)	
017	Timber Communities Australia (Bruny Island Primary Industry Branch)	
018	Dr Jane Lennon	
019	Mr Tim Cadman	
020	Timber Communities Australia (Hellyer Branch)	
021	Ms Julie Vint	
022	Australasian Environmental Law Enforcement and Regulators Network	AELERT
023	Australian Plantation Products and Paper Industry Council	A3P
024	Australian Petroleum Production and Exploration Association	APPEA
025	Professor Hugh Possingham	
026	Healesville Environment Watch	
027	Timber Communities Australia (East Coast Tasmania Branch)	
028	Timber Communities Australia (West Coast Tasmania Branch)	
029	Timber Communities Australia (Liffey District Resource Management Group)	
030	Dr Gerry Bates	
031	Mr Ed Wensing	
032	Magnetic Island Community Development Association	MICDA

Appendix 2(B): List of Commentators on Interim Report

#	Commentator	Acronym
033	Timber Communities Australia (Circular Head Branch)	
034	Australian Forest Growers	AFG
035	Timber Communities Australia (Tasmanian State Office)	
036	The Green Institute	
037	North East Forest Alliance AND North Coast Environment Council	NEFA NCEC
038	ALP Members Opposed to Duck Shooting	
039	Sydney Airport Corporation	
040	Mr Jamie Pittock	
041	Otway Ranges Environment Network AND Melbourne Water Catchment Network	
042	Dr Sarah Holcombe, Dr Matthew Rimmer and Ms Terri Janke.	
043	Friends of the Five Forests	
044	Hydro Tasmania and Roaring 40s	
045	New South Wales Scientific Committee	
046	Save Ralphs Bay	
047	Mr Jim Walker	
048	Powerlink (Queensland)	
049	CSIRO	CSIRO
050	Arts Freedom Australia	AFA
051	Commonwealth Fisheries Association	CFA
052	Ms Jane Stabb	
053	Mr Duncan Gardner	
054	Ms Irene Fullarton	
055	The National Trust of Australia (New South Wales)	
056	Mr Ed Hill	
057	Dr Kirsten Parris and colleagues – University of Melbourne, RMIT University and La Trobe University	
058	New South Wales Young Lawyers Environmental Law Committee	
059	Mr Alan Ashbarry	
060	Still Wild Still Threatened	
061	Coalition Against Duck Shooting	
062	Confidential (name withheld)	
063	Public Interest Law Clearing House	PILCH
064	International Council on Monuments and Sites (Australia)	ICOMOS

#	Commentator	Acronym
065	Mr Stephen Goodwin and Ms Marilyn Steiner	
066	Ms Kellie Gee	
067	Mr Giles Hardy	
068	Garners Beach Habitat Action Group	GHAG
069	Australian Conservation Foundation	ACF
070	Ku-ring-gai Council	
071	Confidential (name withheld)	
072	Ms Maria Riedl	
073	Mr Alan Hill	
074	Associate Professor Paul Adam	
075	Ms Barbara Churchward	
076	The Institute of Foresters of Australia	IFA
077	National Parks Association of New South Wales	
078	Australian Koala Foundation	
079	Australian Property Institute	API
080	Australian Industry Greenhouse Network	AIGN
081	Fisheries Victoria	
082	Ms Joy Llewellyn-Smith	
083	Bird Observation and Conservation Australia	BOCA
084	Australasian Regional Association of Zoological Parks and Aquaria	ARAZPA
085	Environment Institute of Australia and New Zealand	EIANZ
086	Ms Anne Hartnett	
087	Timber Communities Australia (National Office)	
088	WWF Australia	WWF
089	Timber Communities Australia (South East Region)	
090	Victorian Recreational Fishing Peak Body	VR Fish
091	Ms Margaret Christian	
092	Professor Lee Godden, Ms Anne Kallies and Ms Carly Godden	
093	Country Fire Authority (Victoria)	CFA (Vic)
094	The Australian Network of Environmental Defender's Offices	ANEDO
095	National Farmers' Federation	NFF
096	Humane Society International	HSI
097	Mr Tom Baxter	
098	Greenpeace Australia Pacific	Greenpeace

Appendix 2(B): List of Commentators on Interim Report

#	Commentator	Acronym
099	VicForests	
100	Council for the Australian Federation (confidential)	CAF
101	Ms Caroline Copley	
102	Invasive Species Council (Australia)	ISC
103	River Lakes Coorong Action Group	RLCAG
104	South East Forest Rescue	
105	Threatened Species Scientific Committee	TSSC
106	National Association of Forest Industries	NAFI
107	Mrs Betty Thatcher	
108	Our Future is the Natural World	
109	Ms Lynda Newnam	
110	Clifton Finch Aviaries	
111	Victorian Association of Forest Industries	VAFI
112	Tasmanian Government	
113	Forestry Tasmania	
114	Minerals Council of Australia	MCA
115	Dr Sarah Holcombe	
116	New South Wales Government	
117	Western Australian Government	
118	Mr Jeremy Tager	
119	Queensland Government	

Appendix 3(A): List of Persons and Organisations Met with as Part of the Formal Public Consultations for the Independent Review of the EPBC Act

Agforce
Alinytjara Wilurara Natural Resources Management Board
Association of Mining and Exploration Corporation
Austral Fisheries
Australasian Regional Association of Zoological Parks and Aquaria
Australian Conservation Foundation
Australian Council of National Trusts
Australian Forest Growers
Australian Heritage Council
Australian Institute of Aboriginal and Torres Strait Islander Studies
Australian National University
Australian Network of Environmental Defender's Office
Australian Petroleum Production & Exploration Association
Australian Property Group
Australian Property Institute
Australian Uranium Association
Babcock and Brown
Ben Boer
Birds Australia
Brett Odgers Heritage
Canberra Orthnilogical Group
Centre for Aboriginal Economic Policy Research
Chief Justice Brian Preston
Chris McGrath
City of Wanneroo
Clean Energy Council (Wind Energy)
Climate Action Network Australia
Colong Foundation for Wilderness
Commonwealth Fisheries Association
Commonwealth Scientific and Industrial Research Organisation
Conservation Council of South Australia

Appendix 3(A): List of Persons and Organisations Formally Consulted

Conservation Council of Western Australia
Conservation Council, Australian Capital Territory Region
Department of Fisheries Western Australia
Department of Territory and Municipal Services Western Australia
Dr Andrew Burbridge - Western Australia Threatened Species Scientific Committee
Dr Ciorstan Smark & Dr Graham Bowrey
Dr Keith Sainsbury
Dr Paul Adams
Duncan Marshall - Heritage Consultant
Energy Australia
Environment Centre Northern Territory
Environment Institute of Australia and New Zealand
Environment Tasmania
Environmental Defender's Office - Northern Territory
Environmental Resource Management
Federation of Australian Historical Societies
Forestry Tasmania
Friends of Earth Australia
Friends of the Earth Adelaide
Greater Mary Association
Green Institute
Green Institute - Margaret Blakers
Griffith University
Humane Society International
Hydro Tasmania
Infrastructure Australia
International Council of Monuments and Sites
Justice Murray Wilcox
Ken Duncan
Kimberley Land Council
Landvision
Lawyers of the Forest
Mary River Catchment Co-ordination Council
Minerals Council of Australia
Murray-Darling Basin Authority

Museums Australia
National Association of Forest Industries
National Farmers' Federation
National Parks Australia Council
Nature Conservation Council of New South Wales
New South Wales Farmers Association
New South Wales Government
New South Wales Recreational Fishing Alliance
New South Wales Scientific Committee
Nexus Energy
Northern Territory Environment Protection Agency
Pacific Hydro
Peel-Harvey Catchment Council
Peter Conron
Peter Hemphill - senior consultant for Eco Logical Australia Pty Ltd
Planning Institute of Australia
Ports Australia
Powerlink
Public Interest Law Clearing House
Queensland Environmental Protection Agency
Queensland Government
Queensland Resources Council
Australian Recreational and Sportfishing Industry Confederation
Western Australian Recreational and Sportfishing Council Inc.
Richard Mackay
Rob Fowler
Roger Beale
Save the Mary River Co-ordination Group
SIDA Spatial Industries Business Association (Australia)
South Australian Chamber of Mines and Energy Incorporated
South Australian Government
Stradbroke Island Management Organisation
Sunshine Coast Environment Council
Sydney Catchment Authority
Tasmanian Government

Appendix 3(A): List of Persons and Organisations Formally Consulted

Tasmanian Conservation Trust
Tasmanian Farmers & Graziers Association
Tasmanian Seafood Industry Council
Telephone conference - Lake Eyre Basin Community Advisory Committee
The Australian Native Orchid Society Incorporated
The Chamber of Minerals and Energy of Western Australia
The Invasive Species Council
The River, Lakes and Coorong Action Group Inc & Finniss Catchment Group Incorporated
The Wilderness Society
The Wilderness Society/ Western Australian Forest Alliance
Threatened Species Network
Threatened Species Scientific Committee
Timber Communities Australia
Tiwi Land Council
Tom Baxter
Tourism & Transport Forum
TruEnergy
University of Queensland
University of Western Australia
University of Wollongong
Urban Development Institute of Australia
Urban Taskforce
Vestas Wind Systems
Victoria Government
Water Corporation
Wentworth Group
Western Australian Government
Western Australian Southern Coalition
Wetland Research Association
Woodside
WWF Australia

Appendix 3(B): List of Attendees of Workshops held for the Independent Review of the EPBC Act

Attendees	Organisation
Biodiversity Workshop – 1 April 2009	
Professor David Lindenmayer	Australian National University – Fenner School of Environment and Society
Professor Hugh Possingham	University of Queensland – Director of the Applied Environmental Decision Analysis CERF Hub
Dr Mark Stafford-Smith	CSIRO – Science Director, Climate Adaptation Flagship CSIRO
Dr Michael Dunlop	CSIRO Sustainable Ecosystems and CSIRO Adaptation Flagship
Mr Angas Hopkins	Department of Climate Change
Mr Peter Burnett	Department of Environment, Water, Heritage and the Arts – First Assistant Secretary, Approvals and Wildlife Division
Dr Simon Ferrier	CSIRO
Dr Charlie Zammit	Department of Environment, Water, Heritage and the Arts – Biodiversity Conservation Branch
Assoc Prof Darryl Low Choy	Associate Professor, Griffith University
Professor Brendan Mackey	Australian National University
Professor David Farrier	University of Wollongong
Ms Kerry Smith	Department of Environment, Water, Heritage and the Arts – Assistant Secretary, Wildlife Branch
Ms Rosemary Purdie	Member – Threatened Species Scientific Committee
International Council on Monuments and Sites (Australia) Heritage Workshop – 20 July 2009	
Mr John Armes	ACT Historic Houses
Mr Geoff Ashley	Godden Mackay Logan
Dr Sandy Blair	Australian National University
Ms Berlinda Bowler	Donald Horne Institute for Cultural Heritage
Ms Anne Claoue-Long	ACT Heritage Council
Ms Joan Domicelj AM	Heritage Council of New South Wales
Dr Peter Dowling	National Trust of Australia ACT
Ms Elysah Dunlop	Department of Defence, Estate Policy & Environment
Mr Jono Everett	Department of Parliamentary Services
Mr John Greenwood	Donald Horne Institute for Cultural Heritage
Mr Colin Griffiths	Australian Council of National Trusts

Attendees	Organisation
International Council on Monuments and Sites (Australia) Heritage Workshop – 20 July 2009 (continued)	
Ms Amy Guthrie	Godden Mackay Logan
Ms Karen Hansen	Department of Defence, Estate Policy & Environment
Dr Tracy Ireland	Donald Horne Institute for Cultural Heritage, Australia ICOMOS Executive
Ms Rachel Jackson	Godden Mackay Logan
Dr Jane Lennon AM	Heritage Consultant
Mr Richard Mackay AM	Godden Mackay Logan
Mr Duncan Marshall	Heritage Consultant
Mr Eric Martin AM	Chair, National Trust of Australia, Australian Capital Territory
Dr Susan McIntyre-Tamwoy	President, Australia ICOMOS
Mr Paul Meiklejohn	Australian Council of National Trusts
Ms Lisa Newell	Archaeological and Heritage Management Solutions
Mr Mark Nizette	ACT Heritage Council
Dr Mike Pearson	ACT Heritage Council
Mr Paul Rappoport	ACT Heritage Council
Mr Sam Simpson	Department of Defence, Estate Policy & Environment
Ms Cathy Skippington	A/g First Assistant Secretary, Heritage Division, Department of Environment, Water, Heritage and the Arts
Dr Andrew Sneddon	Uni of QLD - Social Sciences
Ms Sharon Sullivan	Australian Heritage Council
Ms Maree Treadwell	Australian Council of National Trusts
Ms Marilyn Truscott	Australian Council of National Trusts
Mr Jim Wheeler	Archaeological & Heritage Management Solutions
Mr Alan Williams	Archaeological & Heritage Management Solutions
Mr Gerhard Zatschler	ACT Heritage

Attendees	Organisation
Environmental NGO Workshop – 13 August 2009	
Mr Charles Berger	Australian Conservation Foundation
Ms Amy Hankinson	Australian Conservation Foundation
Ms Nicola Beynon	Humane Society International
Ms Felicity Wade	The Wilderness Society
Mr Jeff Smith	Australian Network of Environmental Defender's Offices
Mr Tom Holden	Australian Network of Environmental Defender's Offices
Mr Graeme Hamilton	Birds Australia
Dr Carol Booth	Invasive Species Council (Australia)
Australian National University Workshop – 27 August 2009	
Dr Tom Hatton	CSIRO
Professor Richard Norris	University of Canberra – Institute for Applied Ecology
Professor Stephen Dovers	Australian National University – The Fenner School of Environment and Society
Professor Brendan Mackey	Australian National University
Ms Judith Jones	Australian National University – Law School
Dr Sarah Holcombe	Australian National University – Centre for Aboriginal Economic Policy Research
Dr Simon Ferrier	CSIRO - Entomology
Dr Michael Dunlop	CSIRO – Sustainable Ecosystems
Dr Mark Stafford-Smith	CSIRO – Climate Adaptation Flagship
Mr Dan Walker	Australian National University – National Centre for Indigenous Studies
Dr Judith Adjani	Australian National University – The Fenner School of Environment and Society
Professor David Lindenmayer	Australian National University - Forest Wildlife Management and Nature Conservation
Mr Andrew Macintosh	Australian National University – Law School
Professor Peter Kanowski	Australian National University - The Fenner School of Environment and Society
Dr Matthew Rimmer	Australian National University – Law School
Mr Achmad Gusman Catur Siswandi	Australian National University – Law School
Dr James Prest	Australian National University – Centre for Climate Law and Policy

Appendix 3(B): List of Attendees of Workshops

Attendees	Organisation
Infrastructure Workshop – 10 September 2009	
Mr John Sheehan	Australian Property Institute
Mr David Hocking	Spatial Industries Business Association
Mr David Snashall	Environmental Resource Management
Mr Graham Dowers	TruEnergy
Dr Rich Morton	Ports Australia - Port of Brisbane
Mr Bob Brunner	Ports Australia – North Queensland Bulk Ports
Mr Lyle Banks	Ports Australia – Fremantle Ports
Ms Susan Fryda-Blackwell	Ports Australia
Mr Craig Wilson	Ports Australia – Port Hedland
Mr Wayne Young	Ports Australia - Dampier
Mr Jason Cummings	Minerals Council of Australia

Appendix 4: International Agreements

Key international agreements currently in force to which Australia is a party that relate to the protection of the environment

Year agreement opened for signature	Name of Agreement
1946	*International Convention for the Regulation of Whaling*
1952	*International Plant Protection Convention*
1956	*Plant Protection Agreement for the South East Asia and Pacific Regi*on
1956	*Statute of the International Atomic Energy Agency*
1959	*Agreement between the Governments of Australia, Argentina, Chile, the French Republic, Japan, New Zealand, Norway, the Union of South Africa, the Union of the Soviet Socialist Republics, the United Kingdom of Great Britain and Northern Ireland and the United States of America concerning the Peaceful Uses of Antarctica* (The Antarctic Treaty)
1959	*Agreement on the Privileges and Immunities of the International Atomic Energy Agency*
1969	*International Convention relating to Intervention on the High Seas in Cases of Oil Pollution Casualties*
1969	*Protocol to the International Convention on Civil Liability for Oil Pollution Damage*
1970	*UNESCO Convention on the Means of Prohibiting the Illicit Import, Export and Transfer of Ownership of Cultural Property*
1971	*Convention on Wetlands of International Importance especially as Waterfowl Habitat* (Ramsar Convention)
1972	*Convention for the Conservation of Antarctic Seals*
1972	*Convention on the Prevention of Marine Pollution by Dumping of Wastes and Other Matter* (the London Convention)
1973	*International Convention for the Prevention of Pollution from Ships* (MARPOL 73/78)
1973	*Convention on International Trade in Endangered Species of Wild Fauna and Flora* (CITES)
1974	*Agreement between the Government of Australia and the Government of Japan for the Protection of Migratory Birds in Danger of Extinction and their Environment* (JAMBA)
1975	*Convention Concerning the Protection of the World Cultural and Natural Heritage* (World Heritage Convention)
1976	*Convention on Conservation of Nature in the South Pacific* (Apia Convention)
1976	*Protocol to the International Convention on the Establishment of an International Fund for Compensation for Oil Pollution Damage of 18 December 1971*
1977	*Convention on the prohibition of military or any other hostile use of environmental modification techniques*
1978	*Protocol of 1978 relating to the International Convention for the Prevention of Pollution from Ships of 2 November 1973, as amended*
1979	*Convention on the Conservation of Migratory Species of Wild Animals* (CMS/Bonn Convention)

Year agreement opened for signature	Name of Agreement
1980	*Convention on the Conservation of Antarctic Marine Living Resources*
1980	*Convention on the Physical Protection of Nuclear Material*
1982	*United Nations Convention on the Law of the Sea* (UNCLOS)
1985	*Vienna Convention for the Protection of the Ozone Layer*
1986	*Protocol for the Prevention of Pollution of the South Pacific Region by Dumping*
1986	*Convention for the Protection of the Natural Resources and Environment of the South Pacific* (SPREP)
1987	*Montreal Protocol on Substances that Deplete the Ozone Layer*
1986	*Convention on Early Notification of Nuclear Accident*
1986	*Convention on Assistance the Case of a Nuclear Accident or Radiological Emergency*
1986	*Agreement between the Government of Australia and the Government of the People's Republic of China for the Protection of Migratory Birds and their Environment* (CAMBA)
1989	*Basel Convention for the Control of Transboundary Movements of Hazardous Wastes and their Disposal* (Basel Convention)
1990	*Protocol concerning Cooperation in combating Pollution Emergencies in the South Pacific Region*
1990	*Agreement with the Union of the Soviet Socialist Republics on Cooperation the Field of Protection and the Enhancement of the Environment*
1991	*Protocol on Environmental Protection to the Antarctic Treaty* (Madrid Protocol)
1992	*Rio Declaration on Environment and Development*
1992	*Convention on Biological Diversity* (CBD/Biodiversity Convention)
1992	*United Nations Framework Convention on Climate Change* (UNFCCC)
1993	*Agreement establishing the South Pacific Regional Environment Programme*
1993	*Agreement for the Establishment of the Indian Ocean Tuna Commission*
1993	*Convention for the Conservation of Southern Bluefin Tuna* (CCSBT)
1994	*United Nations Convention to Combat Desertification in those Countries Experiencing Serious Drought and/or Desertification, particularly in Africa*
1994	*Convention on Nuclear Safety*
1995	The World Trade Organisation *Agreement on the Application of Sanitary and Phytosanitary Measures* (SPS Agreement)
1995	*Convention to Ban the Importation into Forum Island Countries of Hazardous and Radio Active Waste and to Control the Transboundary Movement and Management of Hazardous Waste within the Pacific Region*
1996	*Protocol to the Convention on the Prevention of Marine Pollution by Dumping of Wastes* (London Protocol)
1997	*Joint Convention on the Safety of Spent Fuel Management and on the Safety of Nuclear Waste Management*
1997	*Kyoto Protocol to the United Nations Framework Convention on Climate Change*

Year agreement opened for signature	Name of Agreement
1998	*Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade*
1999	*International Plan of Action for the Conservation and Management of Sharks*
1999	*International Plan of Action for the Management of Fishing Capacity*
1999	*International Plan of Action for Reducing Incidental Catch of Seabirds in Longline Fisheries*
2000	*Convention on the Conservation and Management of Highly Migratory Fish Stocks in the Western and Central Pacific Ocean*
2001	*Agreement on the Conservation of Albatrosses and Petrels*
2001	*International Convention on the Control of Harmful Anti-Fouling Systems on Ships*
2001	*Indian Ocean–Southeast Asian Marine Turtle Memorandum of Understanding*
2004	*Convention for the Control and Management of Ships' Ballast Water and Sediments*
2006	*The Partnership for the Conservation of Migratory Waterbirds and the Sustainable Use of their Habitats in the East Asian–Australasian Flyway* (Flyway Partnership)
2006	*Agreement between the Government of Australia and the Government of the Republic of Korea on the Protection of Migratory Birds, and Exchange of Notes* (ROKAMBA)
2008	*Headquarters Agreement between the Government of Australia and the Secretariat to the Agreement on the Conservation of Albatrosses and Petrels*

In addition to the agreements in the table above, there are several bilateral international agreements that relate to the transfer of nuclear material and use of nuclear energy. This table also excludes information about Australia's accession to amendments to the documents listed above. For a full list of international agreements to which Australia is a party that are relevant to the environment, go to the Department of Foreign Affairs and Trade's Treaty Database, at

➘ **http://www.dfat.gov.au/treaties/index.html**

Appendix 5: Acronyms and Abbreviations Used in this Report

The Act	*Environment Protection and Biodiversity Conservation Act 1999* (Cth), also referred to as the EPBC Act
AAT	Administrative Appeals Tribunal
AAT Act	*Administrative Appeals Tribunal Act 1975* (Cth)
ACCC	Australian Competition and Consumer Commission
ACNT	Australian Council of National Trusts
ADJR Act	*Administrative Decisions (Judicial Review) Act 1977* (Cth)
AELERT	Australasian Environmental Law Enforcers and Regulators Network
AFMA	Australian Fisheries Management Authority
AHC	Australian Heritage Council
Airports Act	*Airports Act 1996* (Cth)
AMLRC Act	*Antarctic Marine Living Resources Conservation Act 1981* (Cth)
ANAO	Australian National Audit Office
ANEDO	Australian Network of Environmental Defender's Offices
ANU	Australian National University
ANZECC	Australian and New Zealand Environment Conservation Council
AQIS	Australian Quarantine and Inspection Service
ARC	Administrative Review Council
ATEP Act	*Antarctic Treaty Environment Protection Act 1980* (Cth)
ATSIHP Act	*Aboriginal and Torres Strait Islanders Heritage Protection Act 1984* (Cth)
BDAC	Biological Diversity Advisory Committee
Beale Review	Independent Review of Australia's Quarantine and Biosecurity Arrangements
Biodiversity Convention	*Convention on Biological Diversity*
Bonn Convention	*Convention on the Conservation of Migratory Species of Wild Animals*
BRCWG	Business Regulation and Competition Working Group
CAEPR	Centre for Aboriginal Economic Policy Research
CAMBA	China–Australia Migratory Bird Agreement
CAR	Comprehensive, Adequate and Representative
CEO	Chief Executive Officer
CHL	Commonwealth Heritage List
CITES	*Convention on International Trade in Endangered Species of Wild Fauna and Flora*
CCAMLR	*Convention on the Conservation of Antarctic Marine Living Resources*
CSIRO	Commonwealth Scientific and Industrial Research Organisation

COAG	Council of Australian Governments
CPRS	Carbon Pollution Reduction Scheme
CRA	Comprehensive Regional Assessment
DAFF	Australian Government Department of Agriculture, Fisheries and Forestry
DECC	Department of Environment, Climate Change (NSW)
DEWHA	Australian Government Department of the Environment, Water, Heritage and the Arts
ECD	Ecological Character Descriptions
EIA	Environmental Impact Assessment
EIS	Environmental Impact Statement
EMS	Environmental Management System
EPBC Act	*Environment Protection and Biodiversity Conservation Act 1999* (Cth), also referred to as the Act where appropriate
EPBC Regulations	*Environment Protection and Biodiversity Conservation Regulations 2000* (Cth)
EPIP Act	*Environment Protection (Impact of Proposals) Act 1974* (Cth)
ESD	Ecologically Sustainable Development
ESFM	Ecologically Sustainable Forest Management
FAO	Food and Agriculture Organisation
FCA	Federal Court of Australia
FMA	*Fisheries Management Act 1991* (Cth)
FPAL	Finalised Priority Assessment List
GMO	Genetically Modified Organism
GBRMP	Great Barrier Reef Marine Park
GBRMPA	Great Barrier Reef Marine Park Authority
GBRMP Act	*Great Barrier Reef Marine Park Act 1975* (Cth)
HCA	High Court of Australia
Heads of Agreement	COAG's *Heads of agreement on Commonwealth and State roles and responsibilities for the Environment*
Historic Shipwrecks Act	*Historic Shipwrecks Act 1976* (Cth)
HSP	Commonwealth Fisheries Harvest Strategy Policy
IAC	Indigenous Advisory Committee
ICOMOS	International Council on Monuments and Sites
IGAE	Intergovernmental Agreement on the Environment
International Whaling Convention	*International Convention for the Regulation of Whaling*
IPA	Indigenous Protected Area

Appendix 5: Acronyms and Abbreviations Used in this Report

IUCN	International Union for Conservation of Nature
JAMBA	Japan–Australia Migratory Bird Agreement
JPDA	Joint Petroleum Development Area
KTP	Key Threatening Process
LENS	List of Exempt Native Specimens
LNG	Liquid Natural Gas
London Protocol	*Protocol on the Convention on the Prevention of Marine Pollution by dumping of wastes and other matter*
Madrid Protocol	*Protocol on Environmental Protection to the Antarctic Treaty*
MDB	Murray-Darling Basin
Montreal Process	Working Group on Criteria and Indicators for the Conservation and Sustainable Management of Temperate and Boreal Forests
MPA	Marine Protected Area
NCA	National Capital Authority
NES	National Environmental Significance
NGO	Non-Governmental Organisation
NHL	National Heritage List
NRM	Natural Resource Management
NRMMC	National Resource Management Ministerial Council (Australia)
NRS	National Reserve System
NSWLEC	New South Wales Land and Environment Court
NTA	*Native Title Act 1993* (Cth)
NWI	National Water Initiative
OGTR	Office of the Gene Technology Regulator
OPGGSA	*Offshore Petroleum and Greenhouse Gas Storage Act 2006* (Cth)
PA	Preliminary Assessment under the ATEP Act
PER	Public Environment Report
Petroleum Regulations	*Petroleum (Submerged Lands) (Management of Environment) Regulations 1999* (Cth)
PMCH Act	*Protection of Movable Cultural Heritage Act 1986* (Cth)
PPAL	Proposed Priority Assessment List

Protected matters	Includes: ■ World Heritage properties; ■ National Heritage places; ■ wetlands of international importance; ■ listed threatened species and ecological communities; ■ migratory species protected under international agreements; ■ the Commonwealth marine environment; ■ the Great Barrier Reef Marine Park ; ■ the environment, where the action proposed is a nuclear action (including uranium mines); ■ an action that is on, or will affect Commonwealth land; and ■ an action proposed by a Commonwealth agency.
Ramsar Convention	*Convention on Wetlands of International Importance especially as Waterfowl Habitat*
RARMP	Risk Assessment and Risk Management Plan
RFA	Regional Forest Agreement
RNE	Register of the National Estate
ROKAMBA	Republic of Korea–Australia Migratory Bird Agreement
Sea Dumping Act	*Environment Protection (Sea Dumping) Act 1981* (Cth)
Senate Committee Report	The Senate Standing Committee on the Environment, Communications and the Arts, *The Operation of the Environment Protection and Biodiversity Conservation Act 1999* (2009)
SIA	*Sea Installations Act 1987* (Cth)
SILA	*Sea Installations Levy Act 1987* (Cth)
SoE report	State of the Environment report
SOFR	Australia's State of the Forests Report
SPS Agreement	*World Trade Organisation Agreement on the Application of Sanitary and Phytosanitary Measures*
TAP	Threat Abatement Plan
Telecommunications Act	*Telecommunications Act 1997* (Cth)
ToR	Terms of Reference
TSSC	Threatened Species Scientific Committee
UNESCO	United Nations Educational, Scientific and Cultural Organisation
UNFCCC	*United Nations Framework Convention on Climate Change*
Water Act	*Water Act 2007* (Cth)
World Heritage Convention	*Convention Concerning the Protection of the World Cultural and Natural Heritage*
WHL	World Heritage List
WTO	World Trade Organisation

Appendix 6: Reviewer's Response to the Independent Review of Australia's Quarantine and Biosecurity Arrangements (Beale Review)

Australian Government

Independent review of the
ENVIRONMENT PROTECTION AND
BIODIVERSITY CONSERVATION ACT 1999

The Hon Peter Garrett AM MP
Minister for the Environment, Heritage and the Arts
Parliament House
CANBERRA ACT 2600

Dear Minister

I refer to your letter of 7 April 2009, seeking my views on integrating the current environmental biosecurity regime under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) into the new Biosecurity Act, as recommended by the Beale Review.

The expert panel assisting me in the independent review of the EPBC Act met on 20 April 2009 to discuss your request. At that meeting the expert panel heard from representatives from the Department of Agriculture, Fisheries and Forestry (DAFF) and your Department about the current live imports regime under the EPBC Act and other biosecurity functions currently administered by agencies in the DAFF portfolio. The panel was also provided with views and information about possible options for implementing the Beale Review's recommendations for a single biosecurity agency, which is to have responsibility for the environment, health and primary production aspects of biosecurity.

As you know, invasive exotic pests, pathogens and diseases present threats to Australia's biodiversity. This view has been well represented in public submissions made to my Review, sufficient enough for me to say that there is a concern that most of Australia's ecosystems and species are threatened to some extent by invasion by diseases, pests, weeds and feral animals. Of those submissions that commented on this issue, submitters believe that strong legislation and control measures are needed to save Australia from the rapidly increasing costs, both financial and environmental, of trying to control existing and new invasive species.

The Australian Government's agreement to the Beale Review's recommendations presents your Department with an opportunity to embed environmental considerations as equal to those of human health and primary production in all stages of Australia's approach to managing biosecurity, that is, pre-border, at-border and post-border.

The Attachment to this letter makes recommendations which are directed at ensuring that environmental outcomes are maintained or improved under the new biosecurity authority.

Secretariat
Independent review of the EPBC Act 1999
GPO Box 787
Canberra ACT 2601
Australia

http://www.environment.gov.au/epbc/review

Ph: 1800 003 513

An interim report on the Review of the EPBC Act will be released for public comment at the end of June 2009. This report will provide some preliminary views on wildlife trade and biosecurity issues more broadly, as well as other issues that have been raised in submissions made to the review.

Mr Mark Flanigan from the Review secretariat is available on or at if any elaboration is required.

Yours sincerely

Allan Hawke

Allan Hawke
EPBC Act Reviewer

7 May 2009

Attachment

Recommendations for integrating current environmental biosecurity functions under the EPBC Act into the new Biosecurity Act

Governance arrangements under 'One Biosecurity'

An integrated model is the preferred course for implementing the Beale recommendations, subject to ensuring that environmental outcomes are not compromised.

Environmental biosecurity issues have not traditionally received the same attention as the potential impacts of pathogens, diseases, weeds or pests on primary production. A risk of integrating environmental, health and primary production considerations under a single biosecurity regime is that environmental outcomes could be compromised if the primary focus remains on trade and primary production—a problem of 'culture'.

Effective governance arrangements that embody environmental principles will be necessary to ensure that the culture of the new Authority maintains adequate consideration of the environment. To this end, the following principles should be incorporated into the new biosecurity legislation and the operational procedures for the new Authority to ensure that environmental outcomes are not compromised:

- The new biosecurity legislation should require that the environment must be given equal consideration alongside human health and economic and social considerations, for example, the legislation should provide that an unacceptable risk to any one aspect is an unacceptable risk overall and should result in an importation ban or specific measures to mitigate the identified risks;
- The Beale Review recommended that the National Biodiversity Commission should be at arm's length from Government. The Board for the Commission should also include environmental representatives appointed by you:
  - One model would be to have six members on the Board of the Commission, with two members each appointed by the Environment Minister, Health Minister and Agriculture (Primary Production) Minister. As the Minister responsible for biosecurity, the Agriculture Minister should appoint the Chairperson of the Board after consultation with the other Ministers (that is, the Environment and Health Ministers). These governance arrangements should be prescribed in the legislation;
- You should have a deliberative role in approving the biosecurity guidelines to ensure that environmental considerations are treated adequately and with equal importance.
- The Commission should also have a role in approving any biosecurity guidelines.
- Environmental considerations should be required to be taken into account when determining Australia's Appropriate Level of Protection; and
- The activities of the new Biosecurity Authority must be consistent with Australia's international biodiversity obligations.

Subject to inclusion of these or similar safeguards in the new biosecurity legislation, the wildlife import components of the EPBC Act should transfer to the new biosecurity Authority.

The Authority will need to be adequately resourced to implement and manage its functions in a cost-effective manner, and to ensure the necessary scientific and biodiversity expertise to administer the full range of functions properly.

Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)

As CITES obligations in the EPBC Act relate solely to biodiversity protection issues rather than biosecurity per se, CITES provisions should continue under the EPBC Act. The operational aspects of the regulation of CITES specimens, including enforcement provisions, would need to be determined prior to the new arrangements coming into place.

Scope of responsibilities for the new Authority

There are two functions under the EPBC Act that appear potentially most relevant to the new biosecurity agency. These are:

1. The control of live animal and plant imports under Part 13A of the EPBC Act; and
2. Post-border control of exotic/invasive species through the use of tools such as Threat Abatement Plans (TAPS) and recovery plans made under the EPBC Act.

1. Authority to make decisions about live imports

Subject to environmental biosecurity being given equal priority along side human health, economic and social considerations the live import functions currently under the EPBC Act should shift to the new biosecurity Authority. However, this should only occur if the new legislation clearly requires that environmental considerations be taken into account when making live import decisions.

Moving the live import function to the new Authority would allow for a simplified Government approach, with the new Authority having primary responsibility for all biosecurity-related imports and exports (a 'single face' at the border). It would also reduce regulatory burden for importers and avoid administrative duplication.

There are strong efficiency reasons for the new Authority to be tasked with all pre-border and at-border biosecurity responsibilities. These responsibilities should be administered using a single regulatory framework to address biosecurity risks to the environment, human health and primary production.

The legislative framework for the new Authority should require comprehensive pre-border risk assessments, a single permitting process and appropriate compliance and enforcement arrangements. These activities should be structured so that they are easily applied in the context of each of the three pillars of biosecurity, that is, in the context of risk to the environment, human health or economic and social considerations.

Importation of a live specimen should only be approved if an import risk assessment has concluded that there is very low or negligible risk across all three pillars according to Australia's Guidelines for Acceptable Level of Protection under the Sanitary and Phytosanitary (SPS) Agreement. As suggested above, the representation of environmental experts on the Biosecurity Commission would help to ensure that decisions based on risk assessments do not favour health or production at the expense of the environment.

2. *Post-border management*

While it is clear for efficiency reasons that the live imports function should be transferred to the new Biosecurity Agency, it is less clear where the authority for decisions relating to established pests should lie.

Among the other biodiversity conservation measures provided under the EPBC Act, the Act provides for the listing of Key Threatening Processes (KTPs) for Australia's biodiversity. The Act also sets up a regime for developing Threat Abatement Plans (TAPs) which identify research, management and other actions needed to ensure the long-term survival of those native species and ecological communities affected by a KTP.

Noting the efficiency reasons referred to above as supporting the transfer of all pre-border and at-border biosecurity functions to the new Authority, the same argument might appear to apply to support the transfer of responsibility for post-border responses of eradicating, managing and controlling established pests to the new Authority. However, it is clear that the power to make and implement TAPs under the EPBC Act serves a broader biodiversity conservation function than simply the management of pre-border and at-border biosecurity risks presented by the import of exotic weeds and pests. To this end, not all KTPs listed under the EPBC Act deal with established weeds and pests—some also deal with other threats, for example, diseases which originated in Australia. It is because of the broader biodiversity conservation focus of KTPs and TAPs that I consider the KTP listing and TAP development functions should remain under the EPBC Act and continue to be administered by your Department.

Notwithstanding this position, administration of existing TAPs that deal *solely* with pre-border and at-border biosecurity issues should be transferred to the new Agency. In addiction, any new TAPs proposed to be developed in the future to deal with other pre-border and at-border biosecurity issues should be developed by your Department in consultation with the new Authority.

It is also relevant to note that the EPBC Act provides an important framework for recovery planning and action, which can also be used to eradicate, mitigate and manage adverse impacts on biodiversity arising from invasive species. Apart from emergency responses, which I discuss below, these functions should also remain under the EPBC Act and should continue to be administered by your Department in cooperation with the State and Territory Governments.

Emergency responses

There are currently arrangements in place to enable emergency responses to deal with animal and plant pests where they impact on primary production or human health.

There are no emergency arrangements, however, to deal with adverse impacts on biodiversity.

Similar treatment should be given to emergency responses for environmental issues and should be administered under the one Authority. The new Biosecurity legislation should require equal treatment, and the same arrangements, for emergency responses to animal and plant pests that present biosecurity risks to the environment, health and/or social and economic values.

International matters

A potential issue for consideration which was identified at the expert panel meeting is the possible international perception that by establishing a single Biosecurity Agency that is tasked with assessing the potential biosecurity risk of trade against the three pillars—environment, health and primary production—Australia is constructing barriers to international trade. For example, if the new Authority were to start prohibiting trade in a specimen because the trade presents an unacceptable level risk to the environment, this could be perceived as the Australian Government restricting commercial imports through biodiversity risk assessments. Alternatively, by requiring environment risks to be assessed in the same manner as health and primary production risks, Australia could potentially be perceived as reducing its level of environmental protection, and thereby its level of compliance with our international obligations with respect to the environment.

Another argument that has also been put to me regarding Australia's compliance with its international obligations is that there is some conflict between the obligations arising under different international instruments to which Australia is a signatory, namely the *World Trade Organisation Sanitary and Phytosanitary Agreement* (SPS Agreement) and the *Convention on Biological Diversity* (CBD). It has been argued that the absence of a CBD/EPBC Act-type 'precautionary approach' under the SPS Agreement means that if application of a precautionary approach is necessary for management of environmental risks, this would result in non-compliance with the SPS Agreement. I understand that your Department is seeking legal advice on this issue and that the preliminary advice is that the application of a precautionary approach would not necessarily result in a breach of the SPS Agreement. Based on this preliminary advice, there should be no conflicts in integrating production, health and environment biosecurity provisions under the one Authority.

Notwithstanding these possible perceptions and arguments that may indeed be made, integrating environmental, health and primary production biosecurity functions under the new Authority does not alter the extent of Australia's current international obligations (these will remain constant), nor does it recognise the extent to which Australia is currently implementing these obligations albeit through a range of different Australian Government agencies and legislation. In my view it would be a furphy to suggest that integrating these responsibilities under one Authority would mean that Australia would stop complying, or reduce our level of compliance, with our various international obligations.

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