



# australiannetwork of environmentaldefender's offices

## Submission on the *Environment and Heritage Legislation Amendment Bill (No. 1) 2006*

**27<sup>th</sup> October 2006**

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

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

### **Contact Us**

EDO ACT (tel. 02 6247 9420)  
[edoact@edo.org.au](mailto:edoact@edo.org.au)

EDO NSW (tel. 02 9262 6989)  
[edonsw@edo.org.au](mailto:edonsw@edo.org.au)

EDO NQ (tel. 07 4031 4766)  
[edonq@edo.org.au](mailto:edonq@edo.org.au)

EDO NT (tel. 08 8982 1182)  
[edont@edo.org.au](mailto:edont@edo.org.au)

EDO QLD (tel. 07 3210 0275)  
[edoqld@edo.org.au](mailto:edoqld@edo.org.au)

EDO SA (tel. 08 8410 3833)  
[edosa@edo.org.au](mailto:edosa@edo.org.au)

EDO TAS (tel. 03 6223 2770)  
[edotas@trump.net.au](mailto:edotas@trump.net.au)

EDOVIC (tel. 03 9328 4811)  
[edovic@edo.org.au](mailto:edovic@edo.org.au)

EDO WA (tel. 08 9221 3030)  
[edowa@edo.org.au](mailto:edowa@edo.org.au)

This submission is on behalf of the Australian Network of Environmental Defender's Offices (ANEDO).

For further information on this submission, please contact Rachel Walmsley, Policy Director EDO (NSW) on 02 9262 6989 or [rachel.walmsley@edo.org.au](mailto:rachel.walmsley@edo.org.au).

**Submitted to:**

Secretary  
Senate Environment, Communications, Information Technology and the Arts  
Committee  
Department of the Senate  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Phone: +61 2 6277 3526

Fax: +61 2 6277 5818

Email: [ecita.sen@aph.gov.au](mailto:ecita.sen@aph.gov.au)

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## Executive Summary

The Australian Network of Environmental Defender's Offices Inc (ANEDO) welcomes the opportunity to provide comment on the *Environment and Heritage Amendment Bill (No. 1) 2006*.

According to the Explanatory memorandum:

The purpose of this Bill is to amend the *Environment Protection and Biodiversity Conservation Act 1999* to make it more efficient and effective, to allow for the use of more strategic approaches and to provide greater certainty in decision-making. In particular the Bill:

- Reduces processing time and costs for development interests;
- Provides an enhanced ability to deal with large-scale projects and give priority attention to projects of national importance through the use of strategic assessment and approvals approaches and putting in place measures to enable developers to avoid impacts on the matters of national environmental significance protected by the Act;
- Enables a better focus on protecting threatened species and ecological communities and heritage places that are of real national importance; and
- Clarifies and strengthens the enforcement provisions of the Act.

These changes will be made without weakening the protection that the Act provides for Australia's important biodiversity and heritage.

ANEDO supports the efficient and effective implementation of the Act, however has a number of key concerns regarding the purposes of the Bill.

In terms of the amendments aimed at streamlining the referrals and assessment process, ANEDO submits that a lack of DEH resources and capacity to undertake statutory functions is not an excuse to streamline the assessment requirements. Where issues involve potentially significant impacts on matters of national environmental significance, it is crucial that resources are available for comprehensive, transparent and accountable environmental impact assessment to be undertaken. The attempt to cater for 'development interests' must not be at the expense of accountability, public participation and full consideration of environmental impacts.

The reference to redesigning the nominations process to focus on matters of 'real' national importance is also aimed at reducing the administrative burden. Giving the Minister greater control over the nominations process, both in relation to listing threatened species and heritage items, has the potential to undermine the independent assessment role of the Scientific Committee and Australian Heritage Council. Species, communities or heritage items that do not fit annual nomination 'themes' may not qualify for assessment, regardless of their conservation status.

ANEDO supports the clarification and strengthening of compliance and enforcement provisions for DEH to take action, but we note that there needs to be a commitment of resources and political will to use the provisions effectively. However, the Bill weakens options for third party enforcement, by removing review of Ministerial decisions by the AAT and reinserting requirements for financial undertakings for interim injunctions. This is unjustified and strongly opposed by ANEDO.

The Bill, as introduced to Parliament, still fails to address most crucial and urgent environmental matters of national significance, namely climate change and over-extraction of water.

This submission addresses:

- Review of Ministerial decisions
- Threatened Species Nominations and Listing
- Heritage Nominations and Listing
- Consideration of Impacts
- Streamlining of the referrals and assessment process
- Compliance and Enforcement, including amendments regarding: Third Party enforcement; Liability provisions; Remediation, and Powers of officers.
- Wildlife trade permits
- Status of legal instruments
- Additional amendments
- Additional Matters of National Environmental Significance

ANEDO requests the opportunity to address the Committee to discuss the concerns raised in this submission.

## 1. Review of Ministerial decisions

There are three basic types of public interest environmental litigation: merits review; judicial review; and civil enforcement. These reflect the three primary functions of environmental litigation, namely:<sup>1</sup>

- to challenge the *merits* of environmental decision-making;
- to challenge the *legality* of environmental decision-making;
- to *enforce the law* by civil action or criminal prosecution.

The *Environment and Heritage Amendment Bill (No. 1) 2006 (the Bill)*, contains amending provisions aimed to significantly limit two out of these three important processes.

The Bill reduces the ability of third parties to challenge the merits of Ministerial decisions. This is discussed below. The Bill reinstates a significant barrier to civil enforcement (regarding undertakings for damages). This is discussed below in **6.1**. ANEDO strongly opposes these amendments.

Provisions of the current Act which provide for extended standing for judicial review are not subject to amendment by the Bill. The ANEDO strongly supports the retention of these provisions. The inclusion of extended standing in the Act has not lead to a deluge of frivolous cases, and has in fact significantly contributed to the effective enforcement and implementation of the Act. It is essential for the credibility and legitimacy of the EPBC regime that avenues for review are maintained.

### *Amendments*

There are a number of amending provisions which remove the right of review by the Administrative Appeals Tribunal (AAT) of Ministerial decisions. The affected decisions are:

- Decisions to issue or refuse a permit; specify, vary or revoke a condition of a permit; impose a further condition on a permit; transfer or refuse to transfer a permit; or suspend or cancel a permit in relation to a **listed threatened species or ecological community** (section 206A);
- Decisions to issue or refuse a permit; specify, vary or revoke a condition of a permit; impose a further condition on a permit; transfer or refuse to transfer a permit; or suspend or cancel a permit in relation to a **migratory species** (section 221A);
- Decisions to issue or refuse a permit; specify, vary or revoke a condition of a permit; impose a further condition on a permit; transfer or refuse to transfer a permit; or suspend or cancel a permit in relation to **whales and other cetaceans** (section 243A)
- Decisions to issue or refuse a permit; specify, vary or revoke a condition of a permit; impose a further condition on a permit; transfer or refuse to transfer a permit; or suspend or cancel a permit in relation to **listed marine species** (section 263A);
- Decisions to issue or refuse a permit; specify, vary or revoke a condition of a permit; impose a further condition on a permit; transfer or refuse to transfer a permit; or suspend or cancel a permit; issue or refuse a certificate under section 303CC(5) or a decision of the Secretary under a determination in force under

section 303EU; make, refuse, vary or revoke a declaration under section 303FN, 303FO, 303FP in relation to **international movement of wildlife specimens** (section 303GJ);

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

Decisions of a delegate of the Minister remain reviewable.

There is no AAT review for decisions made under section 359B (regarding mining in Commonwealth reserves), however these will be able to be judicially reviewed under the *Administrative Decisions (Judicial Review) Act 1977*.

The transitional provisions provide that decisions made personally by the Minister prior to the commencement of the amendments are still subject to review by the AAT (Item 56).

#### *Comment*

The rationale for this amendment in the Explanatory Memorandum is to “leave the merits of these important decisions to the Government.” ANEDO submits that ‘important decisions’ must be subject to review if the EPBC regime is to be legitimate, credible, transparent and accountable. Merits review also enables the AAT to consider the effectiveness of conditions imposed in relation to these decisions.

The ability to appeal wildlife trade imports and exports at the AAT has existed since 1982, in the *Wildlife Protection Import and Exports Act*. This right has not led to an opening of the floodgates and an overburdening of the AAT with frivolous appeals. Indeed, under the EPBC Act, there have only been 3 reported matters.<sup>2</sup>

The amendments remove the right to appeal wildlife import and export decisions if made by the Minister (section 303GJ). This will mean that there will be no review of Ministerial decisions regarding, for example: import of CITES specimens (Asian elephants), live regulated specimens (bees and wasp imports) and export permit decisions for live native regulated specimens (koalas to Thailand), wildlife Trade Operations (for example regarding southern blue-fin tuna).

While less controversial wildlife trade decisions made by delegated officials will be reviewable, any important or controversial decision will be beyond review. For example, important decisions regarding the dwindling stocks of southern bluefin tuna will continue to be made by the Minister and therefore will not be amenable to review. This has the potential of allowing the process to be dominated by commercial interests, with no recourse for community or environment groups.

## **2. Threatened Species Nominations and Listing**

Broadly, the amendments aim to ‘streamline’ the nominations process with the purported intention of making it more strategic. Key amendments are discussed below.

### ***2.1 State and Territory lists***



### *Amendment*

The Bill repeals section 185.

### *Comment*

In effect this means that the Scientific Committee is no longer required to assess the State and Territory lists gazetted by Minister Robert Hill in 2001. This wipes the assessment of 500 threatened ecological communities from consideration by the Scientific Committee. While this may lighten the administrative burden for DEH and the Scientific Committee, and ease political pressure regarding controversial listings, it is heavy handed and arbitrary. It is contrary to the principles of ESD and good governance to deal with the back log of listings in this way.

Environment and community groups have put extensive effort into nominations under the Act which are yet to be assessed and finalised. For example, HSI alone has 23 ecological communities, 4 threatened species, 3 key threatening processes, and 7 National Heritage listings outstanding under the current assessment system. These nominations have required a significant commitment of resources in terms of time and funding. The new process provides no assurance that any of these nominations will now be assessed for protection. DEH has failed to process section 185 and many public nominations under section 191 to date, despite obligations to do so. The removal of obligations to process and assess nominations is a serious flaw in the Bill.

According to DEH, 'it will be possible for those State and Territory-listed ecological communities which were considered to be a priority to be included on the priority assessment lists either through receipt of a public nomination or by the Threatened Species Scientific Committee or the Minister specifically including them.' There is however, no guarantee that lists will be comprehensively integrated and categorised in this way.

Furthermore, DEH have indicated:

In relation to ecological communities that have already been nominated, and for which the Minister has not made a listing decision, they will be taken to be nominations for the purpose of developing the new priority assessment list under the new listing process. If under the existing process the nominations had already been given to the Committee they will be taken to have been given to the Committee under the new process. Depending on which stage of the existing listing process a nomination has reached, the Minister can determine that public comments do not need to be sought on a nomination, an assessment does not need to be undertaken, or the Minister can use advice already prepared by the Committee under the existing process.

This attempts to integrate previous listings into the new streamlined thematic assessment.

ANEDO submits that instead of addressing the backlog of nominations by simply repealing section 185, it would be more appropriate to implement and fully resource a program for DEH and the Scientific Committee to address outstanding nominations and lists. This should involve additional staff and resources for an intensive period.

Nominations are further restricted by section 194F(c), which prevents renomination of species previously rejected under section 191. This is extremely problematic where new scientific information or evidence becomes available regarding certain species, for example, southern bluefin tuna, or the koala.

## ***2.2 Annual thematic nominations process***

### *Amendment*

The current public nomination provision (section 191) is repealed by the Bill, and replaced with an annual process for thematic nominations. The first assessment period must start within 3-12 months after the commencement of these amendments. The theme for annual nominations is determined by the Minister. The Bill provides for a minimum 40 day period in which nominations may be submitted on that theme.

### *Comment*

These amendments significantly limit the public and scientific involvement in the listing of species.

In deciding upon a theme, the Minister has broad discretion (section 194D) which may relate to a particular group of species, a particular species or a particular region of Australia. This is not a definitive list of criteria and so in practical terms, this means that a range of considerations may come into play, not just the conservation status of the species. It is likely that the more controversial species (such as those currently commercially exploited) are unlikely to qualify thematically.

ANEDO submits that nomination and listing must be based on the conservation status of the species only.

The transitional provisions provide that pending nominations that have been made prior to the amendments commencing, will be taken to be made in response to the first assessment period under the new process (clause 38). However, it is unclear what happens to any other nomination of a species that is not related to a theme, once the new regime commences. It appears these may be disregarded unless the Scientific Committee recommends that they be included in the Priority Assessment List and the Minister agrees. The amendments therefore provide considerable discretion for the Minister to avoid assessment of politically difficult species.

Furthermore, the amendments are inflexible regarding the ability of the Scientific Committee to take into account new information that may become available post nomination period, and that was not included in the nomination made during the prescribed time. This means that important decisions may be made on out-dated information.

## ***2.3 Priority Assessment List***

### *Amendment*

The Bill provides that once all nominations relating to the theme for the year are received, the Scientific Committee has 40 days to give the Minister a “priority assessment list.”

### *Comment*

There are criteria to which the Scientific Committee must have regard in deciding what should be included in the proposed priority action list. These are: any conservation themes determined by the Minister; the SC's own views about what should be given priority; the SC's capacity to deal with assessments while still performing other functions; and any other matters the SC considers appropriate (section 194G). There is no explicit reference to conservation status as being a relevant consideration for inclusion on the Priority Action List. This is inconsistent with Australia's obligations under the *Convention on Biological Diversity*.

The Minister may make changes to the proposed list within 20 days, including omitting an item (section 194K), before making a finalised priority assessment list. There is no public consultation on the proposed list, and the Minister may have regard to "any matter that the Minister considers appropriate" in reaching this decision. It is therefore possible under the amendments for a nominated species to be removed from the final Priority Assessment List on commercial or economic grounds, regardless of the conservation status of that species.

The priority list is not a legislated instrument. This means that it is not disallowable by parliament (see discussion in Part 8).

Public comments on the finalised list will be invited on all the items in it for a minimum period of 30 days, which must be made by the due date and in a manner and form specified by Regulations. The SC can only consider comments that relate to eligibility for inclusion of an item on the list and the effect of including the item in the list on the survival of the species or community concerned.

## **2.4 Time frames**

### *Amendments*

- When a nomination is received the Minister has 30 days to give it to the SC instead of the current 10.
- Section 189 (4)(5) and (6) are repealed. This removes the statutory deadlines for the SC to assess public nominations within 12 months and the Minister to decide on nominations 90 days after receiving SC advice.
- Under section 194H, the completion date for assessment of an item on the proposed priority list is before or at the end of the 12 month assessment period OR the SC can suggest a longer period (with no apparent limitation).
- Under section 194P(3), the Minister may grant an extension upon request of the SC for assessment, and the total length of all the extensions must not be more than 5 years.

### *Comment*

It appears that the 5 years for extensions may be in addition to original assessment time specified for an item in the PAL, which may be for a period of longer than 12 months (section 194H(2)(b)).

As previously submitted, ANEDO recommends a tighter timeframe should be included, for example, 2 years, within which the Minister must decide whether to list threatened ecological communities. The loss of species over the last 5 years demonstrates the dangers of this approach. DEH and the SC should be provided with additional resources to enhance their capacity to complete assessments in a timely manner. This is consistent with the application of the precautionary principle as enshrined in the Act.

## ***2.5 Access to information and transparency***

### *Amendment*

The new section 189B provides that SC assessments and advice are to be confidential until a listing is made, unless the Minister gives the SC permission to disclose particular information to particular persons.

### *Comment*

The amendments prohibit the SC from disclosing any information used to make an assessment of any proposed amendments to the Act's list of threatened species until the amendment has been registered. Environment groups such as HSI have previously requested that SC advice be made public. ANEDO supports this request.

These amendments are likely to frustrate FOI applications during this period, and undermine the transparency of the legislation.

## ***2.6 Rejection of nominations and De-listing***

### *Amendment*

The Minister can reject a nomination not only if it is vexatious, frivolous and not in good faith, or not made in the manner and form specified by regulations (section 194F(3)(a) and (b)).

The Minister may de-list an ecological community where satisfied that the listing “is not contributing, or will not contribute, to the survival of the ecological community” (section 187 (3)(b)).

Similarly, in listing threatened ecological communities and species the Minister can only consider whether the ecological community is eligible and “the effect that including the ecological community in that category could have on the survival of the ecological community”.

### *Comment*

It is difficult to comment on the potential problems that this amendment will cause for nominations without the wording of the proposed ‘manner and form’ requirements of the Regulations being made available.

The limitation of considerations in listing ostensibly constrains the Minister from taking into account any irrelevant impacts, such as economic impacts. However, the criteria of which the Minister must be satisfied before de-listing are not clear. ‘Contribution to

survival' is not defined by any criteria or indicators. Without definitive specific criteria this clause is open to abuse.

## **2.7 Critical habitat**

### *Amendment*

Section 207A(1) provides that in considering whether to list habitat on the Register the Minister must take into account the potential conservation benefit of listing the habitat. Additional considerations may be added or explicitly prohibited in the regulations.

Particular material on the register may not be publicly available if “the interests of relevant landholders may be impeded or compromised” (section 207A(3)(3A)).

### *Comment*

The consideration of conservation benefit is not the definitive consideration as the amendments provide a broad discretion for other considerations, including political considerations, to be taken into account or prescribed by regulations.

“Interests” of landholders is not defined, and this discretion has the potential to undermine transparency.

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

Furthermore, ANEDO reiterates our previous recommendation that provision is made for emergency interim protection orders to be made in relation to critical habitat. An example of where such an order would be appropriate is Mission beach in North Queensland. Currently there are several proposed developments in cassowary habitat that are not being declared controlled actions (as the areas are not large). An interim protection order could allow the impacts to be more properly assessed before incremental loss significantly affects the cassowary population.<sup>3</sup>

## **2.8 Migratory species**

### *Amendment*

The Bill rewords section 209(3).

### *Comment*

Consistent with previous recommendations, ANEDO submits that the migratory species provisions should be further strengthened by including the highly migratory species listed in Annex I of United Nations *Convention on the Law of the Sea* in the list of international agreements dealing with migratory species in Section 209 (3) of the *EPBC Act*. The species in Annex I should be considered Matters of National Environmental Significance, as is the case for all the other migratory species listed on international agreements to which Australia is a signatory.

## ***2.9 Conservation dependent species***

### *Amendment*

The Bill clarifies section 179(6) to provide that a native species is eligible for the conservation dependent category if it is the focus of a specific conservation program the cessation of which would result in the species becoming vulnerable, endangered or critically endangered; or where the species is a fish it is eligible to be included in this category if it is the “focus of a management plan that provides for management actions necessary to stop the decline of, and support the recovery of, the species so that its chances of long term survival in nature are maximized.” The management plan must be in force, and the cessation of the plan would adversely affect the conservation status of the species.

### *Comment*

The phrases used such as ‘support the recovery’ and ‘maximize chances of long term survival’ are not defined. It is unclear what criteria would be used to assess these qualifications.

## ***2.10 Conservation advices and Recovery Plans***

### *Amendment*

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

Sections 267 and 269AA provide that it is no longer compulsory to have a recovery plan. The Bill provides broad Ministerial discretion regarding recovery plans.

Section 270 (2A) requires that certain issues such as the identification of critical habitat in a recovery plan, need only be addressed to the extent to which it is practicable to do so.

### *Comment*

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

plan (as provided by amendments to section 283(1)) must involve a transparent process for public comment.

Consistent with previous submissions, ANEDO recommends that provisions relating to wildlife conservation plans (sections 285-300A) should be strengthened: first, to make the preparation of wildlife conservation plans compulsory, rather than at the Minister's discretion; second, to require Commonwealth agencies to act in a manner consistent with wildlife conservation plans, rather than just taking reasonable steps to act in accordance with wildlife conservation plans (s286); and third, to require Commonwealth agencies to implement wildlife conservation plans in Commonwealth areas (as required for recovery plans – see s269). Similarly, once a key threatening process is listed, the development of a threat abatement plan for that key threatening process should be compulsory, and not at the discretion of the Environment Minister.

### ***2.11 Additional issue***

ANEDO submits that the current trigger be extended to include categories which are now dealt with by the Act. These include ecological communities that are in the categories 'vulnerable', 'near threatened' and 'conservation dependent'; and 'near threatened' species. Currently only communities in the categories of 'critically endangered' and 'endangered' are covered.<sup>4</sup>

## **3. Heritage Nominations and Listing**

Similar to the amendments in relation to nominating and listing threatened species, the nominations process for listing heritage is also amended by the Bill. The focus is on annual thematic nominations.

### **National Heritage**

The amendments have the potential to allow the delay or indefinite postponement of assessment and eventual entry of a place on the NHL. The new process constitutes a departure from the principle of having an independent listing process based on heritage significance and a separation of the listing decision from downstream management decisions.

#### ***3.1 Annual thematic nominations***

##### *Amendment*

Similar to the new process for nominations and assessment of threatened species listing in the Bill, provision for annual thematic nominations assessment also applies to heritage. The amendments repeal sections 324E to 324J, and insert a new process for including places on the National Heritage List. The new process includes:

- The Minister may determine heritage themes (section 324H);
- The Minister invites nominations for each defined assessment period (324J);
- The Minister gives nominations to the AHC;
- The AHC prepares a proposed priority assessment for the Minister (sections 324JB – D)

- The finalised priority assessment list is published for comment (sections 324JE-G);
- The places on the finalised list are then assessed by the AHC (section 324JH); and
- The Minister decides whether to list a place (section 324JJ).

Provision is also made for emergency heritage listing in Subdivision BB.

*Comment*

The current arrangements require the Minister to refer a nomination to the AHC for assessment (unless it is considered vexatious, frivolous or not made in good faith (324E (6) or additional information that is requested is not provided in a specified time (324E (4b)).

The new process will limit the opportunity for public nominations to a distinct time of year and on a particular theme. The nominations that do qualify for inclusion on the priority assessment list for that annual period, still may not be assessed in that year.

### **3.2 Assessment of nominations**

*Amendment*

Under proposed section 324JB in assessing the nominations for inclusion on the priority assessment list, the AHC considers: the heritage themes, AHC views; AHC capacity, and any other matter.

*Comment*

Similar to the assessment process for the Scientific Committee to consider listing nominations of species, the considerations relate to themes and capacity, as opposed to explicitly requiring consideration of conservation status, or in this case, heritage status.

The amendments do not require assessment of a nominated place. The AHC can reject a nomination if it believes a place does not have National Heritage Values based solely on information provided to it in the nomination (section 324JB (4). Similarly, the Minister may choose to remove any particular place from the priority assessment list (section 324JE). If a place is considered eligible for assessment it may not be placed on that year's priority assessment list. In this case an explanation must be given (324JD (1)(b).

Places that are eligible for assessment but fail to be placed on the priority list for any particular annual period, continue to be eligible and can be considered for assessment in future periods, however there is no guarantee that they will meet future Ministerial themes.

### **3.3 Timeframes**

*Amendment*



Under the new process, the AHC determines the period in which the assessment will be completed as part of the inclusion of an item in the priority assessment list (PAL). There is no limit to the completion date (section 324JC (2)(b)). If the assessment can not be completed by the nominated assessment completion time, then the AHC can make a request for a further extension of up to 5 years. If this is the case a public explanation must be given (section 324JI).

*Comment*

Currently, the AHC is compelled to assess a nomination; if this can not be done in 12 months a request for a further 24 months can be made, and then a further 24 months. Each period of extension is accompanied with a publicly available explanation (section 324G(2)(2a)(2b)(2c)). Once an assessment is completed and given to the Minister, the Minister must make a determination within 20 business day or release the assessment for public comment for no less than 40 business days. The Minister then has a further 60 business days to make a decision.

The current provisions provide clearer timeframes.

### ***3.4 Australian Heritage Committee Assessment***

*Amendment*

Under section 324JH the AHC must invite comment on places on the PAL (section 324JG(1)), and may “seek and have regard to, information and advice from any other source” in undertaking an assessment.

*Comment*

There is no trigger for public scrutiny of AHC assessments in section 324JJ.

The Minister may omit items included on the PAL by the AHC (section 324J).

### ***3.5 Emergency listings***

*Amendment*

Subdivision BB provides a process for emergency listing if the national heritage values of a place are under likely and imminent threat (section 324JL), assessment is undertaken by AHC (section 324JM; public comment is invited (section 324JN); and the Minister has 12 months to determine whether the listing should lapse or not (section 324Q).

*Comment*

The current arrangements for emergency listing compel the Minister to make a determination within 10 business days of receiving a written request. If a place is not listed an explanation must be given (section 324F)

The amendments do not require a response to a request for emergency listing. The mechanism to compel the Minister to deal with a request for emergency listing has been removed from section 324JL. The new arrangements are purely at the Minister’s

discretion if he or she considers that the national heritage values of a place are under threat (section 324JK).

### ***3.6 Register of the National Estate***

#### *Amendment*

The Bill amends the *National Heritage Council Act 2003* to repeal the Register of the National Estate. The Register of the National Estate will cease as a statutory list. The Bill repeals section 391A. It will remove the requirement for the Minister to have regard to the Register of the National Estate when making decisions. Parts 836 to 845 will remove all reference and responsibilities for the Register created under Part 5 of the *AHC Act 2003*.

#### *Comment*

ANEDO has previously submitted that all places listed on the current Register of the National Estate be listed on the national heritage list so as to benefit from the 2004 provisions.

The Register will no longer exist as a statutory register, “but will be maintained on a non-statutory basis as an important archive” (Second Reading speech). The repeal will become effective at the end of 5 years, beginning on the day of the new Act’s commencement, to allow States to adjust.<sup>5</sup> The Register has continued to exist in its statutory form since 1 January 2004, when the heritage provisions of the Act commenced. However, it seems to be an area of heritage policy to which no resources have been allocated within the Department and only one place has been added to the Register since that date.<sup>6</sup>

The Register constitutes a unique and invaluable collection of heritage data, including natural, cultural and Aboriginal places in both public and private ownership. ANEDO supports the retention of the RNE as a statutory list, and submits that resources should be directed to:

- a) maintain and update the list; and
- b) provide for the transfer of important items on the Register to the national heritage list.

The Minister should still be required to take the RNE into account when considering impacts of a proposed action.

### ***3.7 National Heritage MNES***

#### *Amendment*

The Bill amends section 75 to provide that for the purpose of deciding whether or not a relevant action requires approval for the purpose of national heritage places, the Minister may only consider those impacts of that part of the action that is taken in or on Commonwealth land, a Commonwealth marine area or a Commonwealth area.

#### *Comment*

This amendment has the potential to significantly undermine the purpose of the national heritage list.

It is inappropriate that the Minister is constrained to consider only impacts from actions on Commonwealth land or area. This proviso may relevantly apply to Commonwealth heritage, but it is inappropriate to constrain considerations on national heritage in this way.

Significant places on the Commonwealth list should be added to the National Heritage List, and attract the relevant assessment requirements. We encourage the Government to actively list more national heritage places as a priority on the National Heritage List and Commonwealth Heritage List. Both Lists should trigger comprehensive assessment under the MNES provisions.

### **World Heritage**

Consistent with previous ANEDO submissions, there are a number of amendments which should be made to strengthen the world heritage provisions of the Act. These include:

- In relation to World Heritage properties, the section should operate on both the *outstanding universal value* and preservation of the integrity of the properties listed under the Convention, rather than consideration of particular listed values as currently.
- the Act should be amended to facilitate implementation of the World Heritage Convention's Operational Guidelines.
- An additional mechanism to strengthen the trigger would be to include a schedule of designated developments which would require an environmental assessment. These could include mines, resorts and airports, adventure and joy flights in, around and over World Heritage properties if these actions impact upon the *outstanding universal value* and preservation of the integrity, rather than simply on a list of world heritage values mentioned in the listing statement for the area in question.
- A definition of World Heritage property should be inserted in the dictionary to the Act, and Section 12 be amended to ensure protection arising from the Act is comprehensively property-based, rather than solely values-based.

## **4. Consideration of Impacts**

The "Nathan Dam" decision<sup>7</sup> of the Full Federal Court on 30 July 2004 confirmed a major expansion of environmental powers for the federal Government.

In this case, the applicants<sup>8</sup> sought judicial review of decisions of the Minister in relation to the 880,000 megalitre Nathan Dam on the Dawson River in Central Queensland. The Dawson River flows via the Fitzroy River to the Great Barrier Reef World Heritage Area. The purpose of building the dam is to supply water for irrigation of 30,000 hectares of farmland, mostly cotton growing, in the Lower Dawson Valley. The case was primarily concerned with the impacts of this irrigated agriculture, and associated chemical application, on the Great Barrier Reef WHA and whether those impacts should be considered an impact of the dam for the purposes of federal environmental assessment.

The Minister's original decision that the *Environment Protection and Biodiversity Conservation Act 1999* did not require him to consider downstream pollution by irrigators when assessing the impact of the construction and operation of the dam was overturned by Justice Kiefel of the Federal Court on 19 December 2003. The decision of the Full Federal Court confirms this finding.

The case focused on the interpretation of section 75 of the *EPBC Act*, which requires the Minister to consider 'all adverse impacts' of an action. This step of the process is relevant for the Minister to then determine if those impacts were likely to be *significant* impacts on a matter of national environmental significance, hence determining controlling provisions and required environmental assessment.

The Full Court found that 'all adverse impacts' was not confined to direct physical impacts but included *indirect impacts* and effects 'which are sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be, *the consequences of the action* on the protected matter'.

The Full Court further held that the width of enquiry 'in each case will depend on its facts and on what may be inferred from the description of the "action"', and agreed with Justice Kiefel that 'the Minister can exclude from further consideration only those potential impacts "which *lie in the realm of speculation*"'. The Court went on to clarify that consequences of the actions outside the control of the proponent, but reasonably imputed as within the proponent's contemplation (such as the impacts of actions of *third parties*), *are impacts of the proponent's proposed action*.

Because the referral document provided by the proponent described the potential for cotton ginning and expansion of the existing cotton growing industry, the Full Court held it was 'inescapable' that irrigation of cotton crops was within the contemplation of the proponent of the dam.

#### **4.1 Meaning of impact**

##### *Amendment*

The Bill attempts to clarify the extent to which impacts that are indirect consequences of actions must be considered or dealt with under the Act. The amendments provide that an event or circumstance is an indirect impact of an action if the action was a substantial cause of it.

The amendments insert a definition of "impact" in section 527E:

##### **527E Meaning of impact**

- (1) For the purposes of this Act, an event or circumstance is an **impact** of an action taken by a person if:
  - (a) the event or circumstance is a direct consequence of the action; or
  - (b) for an event or circumstance that is an indirect consequence of the action—subject to subsection (2), the action is a substantial cause of that event or circumstance.
- (2) For the purposes of paragraph (1)(b), if:
  - (a) a person (the **primary person**) takes an action (the **primary action**); and
  - (b) as a consequence of the primary action, another person (the **secondary person**) takes another action (the **secondary action**); and
  - (c) the secondary action is not taken at the direction or request of the primary person; and
  - (d) an event or circumstance is a consequence of the secondary action;

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

### *Comment*

Other than the requirement to be a "substantial cause" this definition uses the language of the Nathan Dam Case and seems reasonably consistent with the principles established in that case.

It must be read with a critical amendment to the definition of "controlled action" in s67. The Bill proposes to amend s67 by inserting after "would be" the words "(or would, but for section 25AA or 28AB, be)".

The likely consequence of these amendments and the insertion of ss25AA and 28AB, is that a person will not have civil or criminal liability for third party actions, but the Minister must still consider third party "impacts" as defined under s527E, when considering "all adverse impacts" in s75(2).

There is a distinction between civil or criminal *liability* for impacts from a third party action (sections 25AA and 28AB clearly remove a proponent from liability for the actions of a second person, except where the proponent has directed or requested the second person to undertake the action), and the need for the Minister to consider those third party actions in assessing the impacts of the action - which the Bill appears to preserve.

In simple terms, this means that the Nathan Dam principles will still apply for Parts 7-9 (the referral, assessment and approval of controlled actions) of the EPBC Act, but not for the offence provisions in Part 3.

Despite the clarification, arguably, the Bill still does not enable the EPBC Act to fully consider cumulative impacts.

There is currently no assessment of the cumulative impacts of development. While amendments to the *EPBC Act* have enabled the EPBC Unit within the Department of Environment and Heritage (DEH) to consider a development as a whole rather than in stages (where approval may often be granted in stages through State laws), there is no assessment of the overall impact of a series of unrelated developments on critical habitat for certain species or World Heritage values. For example, if the impacts of several developments on migratory birds are each assessed in isolation, it is difficult to prove that any one development will have a significant impact on a particular species. However, if considered cumulatively, there may be a clear significant impact.

This approach also affects assessment of impact on World Heritage values. For example, in the context of the Great Barrier Reef World Heritage Area, which extends over 2000 km, the proponent may argue that one development will not impact significantly on the values. This conclusion would be different if cumulative development impacts were properly assessed.

## ***4.2 Adverse impacts of RFA Forestry operations***

### *Amendment*

New section 75(2B) seeks to limit the considerations that the Minister must take into account in making a decision about whether a proposed action needs approval. In particular, it states that the Minister must not consider any adverse impacts of any RFA forestry operation (as defined by section 38) or forestry operation in an RFA region (as defined by section 40).

### *Comment*

The limits on Ministerial consideration is unwarranted. It is artificial in the extreme to excise certain potential real impacts of a proposal because of an artificial (policy-derived) exemption.

## **5. Streamlining of the referrals and assessment process**

The driving force (as indicated in the Explanatory Memorandum and second reading speech) behind amendments relating to the referrals and assessment is to speed up development approvals for development proponents. While ANEDO supports an efficient process, the focus on reducing timeframes must not be at the expense of transparency, accountability and rigorous environmental impact assessment.

As noted in the Explanatory Memorandum, nearly 2000 referrals have been made since the commencement of the Act, with approval required for around 420 development proposals. This is indicative of a relatively high bar to trigger application of the EPBC Act to a proposed development. The Memorandum is silent on the low number of refusals.

The approvals that have been granted to date, include the building of a marina and subsequent clearing of coastal habitat adjoining the Great Barrier Reef World Heritage Area which affected migratory and threatened species in the area (Port Airlie), several mining operations, and two new dams (Paradise Dam in Queensland and Meander Dam in Tasmania). Environmental groups have criticised these approvals and the conditions placed upon many of the proposals, as not going far enough to protect the environment.

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

Various changes in the Bill aim to speed up decision-making. Streamlining development assessment is a key driver of reform at both Federal and State levels. This is invariably at the expense of genuine public consultation and integrated considerations (such as

regarding threatened species or heritage). ANEDO submits that the preoccupation with ‘cutting red tape’ must not be at the expense of transparency, accountability and thorough environmental impact assessment.

### ***5.1 Fast track approvals***

#### *Amendment*

The Bill provides for a new level of assessment called “assessment on referral information,” (Division 3A, section 92 and 93) and refining the processes for assessment on preliminary documentation (sections 94 – 95C).

#### *Comment*

According to the Explanatory Memorandum, the new Division 3A, which provides for assessment on referral information, establishes a process for assessing a proposed action that involves a “small number of straight forward and well-understood impacts on matters of national environmental significance.” This term is not defined, and there are no criteria to elucidate what situations qualify as “straight forward.”

Similarly, the new Division 4 streamlines and increases the transparency of assessment on preliminary documentation. According to the Explanatory Memorandum “assessment on preliminary documentation is appropriate for actions that involve more complex environmental issues than those to be assessed on referral information, but still involve relatively straight forward issues.” This statement is confusing, and where there are “complex environmental issues” there should be clear criteria.

ANEDO supports the provision to publish referral information and invite comment. The process should be strengthened by requiring the designated proponent to provide a summary of *all* comments received to ensure all views are addressed (section 95B(1)(a)(ii)).

### ***5.2 Accreditation of plans, regimes and policies***

#### *Amendment*

The Bill allows the Minister power to approve with or without conditions the taking of certain actions in accordance with a policy, plan or program that has been endorsed under a strategic assessment. These actions would then be able to be carried out without the need for separate assessment and approval.

The Bill provides for actions covered by Ministerial Declarations and accredited management arrangements and accredited authorisation processes (section 33). Section 146 has been expanded to include considerations for approving taking of action in accordance with an endorsed policy plan or program.

#### *Comment*

*Environmental Manager* summarises the amendments:

The EPBC Act currently makes it possible to conduct broader, strategic environmental assessments of policies, plans and actions, as well as project-specific ones. But these provisions

have rarely been used. Only two discretionary strategic assessments have been initiated – one for offshore petroleum exploration and one for military exercises. Neither has been completed. ...The change “will provide an incentive for developers, states and territories and local government to bring forward broad-scale development plans (such as industrial estates and coastal developments) early in the planning cycle”, ...To simplify the process of making strategic assessments, it would no longer be necessary to seek public comment on the draft terms of reference for any such assessment. The bill also provides that actions on commonwealth land could be undertaken without further assessment or approval if they are actions or part of a class of actions that have been endorsed by the minister in the context of a bioregional plan.

The Explanatory Memorandum (Item 318) provides that these amendments “facilitate a more strategic approach to the protection of matters of national environmental significance by giving the Minister capacity to approve (with or without conditions) the taking of certain actions in accordance with a policy, plan or program that has been endorsed under a section 146 strategic assessment.”

Section 303AA will now explicitly enable the Minister to place conditions on accredited plans and regimes - for example, on accredited fisheries plans and regimes. This clarifies and improves existing provisions.

However, it is important to note that acting in accordance with an accredited plan etc is a defence for threatened species offence provisions (section 212(d)(i)).

ANEDO strongly supports measures to better assess cumulative impact. However, there is no guarantee in the Bill as to the quality of the strategic assessments and the accredited plans and policies. The benefit of avoiding the need for separate approvals and the defence provisions may be abused and lead to poor environmental outcomes unless the accredited plans and policies are robust and underpinned by comprehensive environmental assessment. It is unclear whether different assessment standards are required in relation to the various instruments amenable to accreditation, including ‘conservation agreements’, ‘bioregional plans’, a ‘policy, plan or program’ and/or ‘local planning schemes.’

There is potential for this mechanism to create significant loopholes and allow large projects to avoid federal environmental impact assessment. For example, the proposed section 146M as drafted, excludes certain nuclear actions, but would allow a state or territory uranium mining policy to be endorsed, and therefore proposed uranium mines under an endorsed policy would be exempt from consideration under the EPBC Act. This is unacceptable.

Further specific detail is required regarding how schemes such as local schemes will be assessed and accredited. Clarification is needed on how long each instrument is accredited for, public participation in accreditation, and when accreditation can be revoked.

### ***5.3 Bilateral management arrangements and processes***

#### *Amendment*

Sections 33 and 46 is amended to allow a bilateral agreement to make a declaration in relation to a broader range of accredited management arrangements and processes than previously.



### *Comment*

The definitions of ‘bilaterally accredited management arrangement’ and ‘bilaterally accredited authorisation process’ are extremely broad and can include any arrangement or process in force under State or Territory law. Accreditation is subject to parliamentary scrutiny and disallowance, however there is a lack of detail regarding the criteria and specific processes for accreditation.

Furthermore, once accredited, the accreditation no longer expires after 5 years, and can continue for a period specified in the agreement. The Bill contains provision for review every 5 years.

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

The Minister must not be able to accredit a management arrangement or authorization process before the expiry of 15 sitting days after a notice of motion to oppose the accreditation is given (sections 33 and 46).

In relation to Bilateral agreements, the Bill provides that they no longer expire after 5 years, but that a review will be carried out at least once every 5 years (section 65(2)). The Bill should make it clear that there is public participation in the review process.

### ***5.4 Actions covered by Ministerial declarations or bioregional plan***

#### *Amendments*

Subdivision B, Section 37A provides for the making of declarations that actions do not need approval under Part 9. As summarised in the Explanatory Memorandum:

[The Bill] provides an enhanced ability to deal with large-scale projects and give priority attention to projects of national importance through the use of strategic assessment and approvals approaches and putting in place measures to enable developers to avoid impacts on the matters of national environmental significance protected by the Act;

...

And provides an ability to approve actions undertaken in accordance with a strategic assessment or bioregional plan, where appropriate, instead of undertaking separate assessment and approval of each action.

...

Item 122 – After Division 2 of Part 4

50. This item inserts new Division 3 of Part 4 of the Act. This amendment is to provide an incentive for those with an interest in a Commonwealth area, to have certain actions considered within the context of developing bioregional plans. If a bioregional plan provides for the taking of certain actions then under section 37A of the Act the Minister may declare that an action or class

of actions taken in accordance with a bioregional plan do not require approval under Part 9 of the Act.

The Minister may only make a declaration under section 37A if satisfied that the taking of the relevant action or actions will not have unacceptable or unsustainable impacts on a matter protected by a controlling provision in Part 3 of the Act for which the declaration has effect and if satisfied that the declaration accords with the objects of the Act and is not inconsistent with Australia's obligations under specified international treaties.

### *Comment*

The ability to approve actions undertaken in accordance with a strategic assessment or bioregional plan may be an acceptable reform in theory, but it is impossible to be certain at this stage without knowing the level of detail associated with the strategic assessment or bioregional plan.

If a strategic assessment is at a high level of generality, the impacts of particular actions under that strategic assessment may be impossible to meaningfully assess until the community is presented with the detail of a specific action. Obviously if that was the case, the prospect of not assessing that individual action would be a retrograde step.

In either case, the Minister's capacity to exempt specific actions from assessment should be limited to situations where actions such as the specific action were clearly anticipated at the time of the strategic assessment, the impacts of actions such as the specific action were specifically considered as part of the strategic assessment, and the Minister is not aware of any new information that could reasonably suggest that the assessment of the strategic proposal could now not be considered to have adequately dealt with the issues that might be associated with the specific proposal.

### *Proposed section 37A*

This appears to be inconsistent with proposed section 37. The proposed section 37 suggests that actions "in accordance with a particular bioregional plan" can be exempted from the need for specific assessment, but proposed section 37A seems broader, extending to exemptions justified "wholly or partly by reference to the fact that the taking of the action or class of actions is in accordance with a bioregional plan". There is also no definition of "unacceptable or unsustainable impacts" in relation to 37A as referred to in the Explanatory Memorandum.

### *Proposed section 37B*

Proposed subsection (1) should be deleted. While it is clear the Minister can currently and will continue to consider economic and social matters when making a final decision on a proposed action, it is highly concerning that such issues should be considered at the much earlier stage of working out whether something should be subject to assessment at all. Putting aside the issue of whether the bioregional plan adequately considered actions such as the specific action when the plan was done, the Minister should only be considering the question of whether or not the specific action is proposed in accordance with that bioregional plan. If the Minister's power to exempt was broader, and explicitly inclusive of economic and social factors, such considerations could effectively allow for particular types of (presumably high economic value) actions to avoid any form of public scrutiny.

The need to consider the principles of ecologically sustainable development and the prohibition on particular types of unacceptable or unsustainable impacts are of course supported, but the extent to which these constraints on power can be relied upon will be reduced by the Bill's other changes to third party access to the courts.

We would recommend further limitations to the Minister's power, but again the effectiveness of those limitations is questionable if third party enforcement of the Act is proposed to be further constrained.

*Proposed section 37C-37J*

Subject to the above comments about access, this proposed section is supported.

*Proposed section 37K*

This seems a potentially problematic provision in that it would appear the Minister cannot "claw back" actions that have been allowed to avoid the need for assessment if it is subsequently realised that those actions should not have been given an exemption. What if a new fishery was contemplated as part of a bioregional assessment but it is subsequently realised that impacts on threatened species will be much more problematic than first thought? It would seem that the Minister could revoke the relevant declaration under this proposed section, but that would have no effect if that fishery had already started because 'ongoing' actions such as commercial fishing can never, by definition, be "completed before the revocation."

*Proposed section 37M*

Subject to the above comments about access, the power to make the relevant declarations under section 306A seems sufficiently well constrained.

## ***5.5 Financial contributions a condition of approval***

*Amendment*

Amendments to section 134 provide that the type of conditions the Minister can attach to approvals can include financial contributions towards projects not directly related to the controlled action.

*Comment*

ANEDO supports this condition with three provisos. First, any such financial contribution must go toward remediation and conservation projects and not simply go to Consolidated Revenue. Second, there should be a nexus between the conservation project and the development project itself on equity grounds. Third, the basis for the calculation should be set down in regulations for transparency and accountability.

This condition should not constitute a formal offset policy.

## ***5.6 Effect of new listings on approved actions***

*Amendment*

The Bill inserts a new Division 3A, section 158 which provides that approval process decisions are not affected by listing events that happen after decisions are made under section 75 (ie, whether an action is controlled). Any subsequent listing of species or declarations of heritage areas or Ramsar wetlands cannot result in the approval being “revoked, varied, suspended, challenged, reviewed, set aside or called in question.” The relevant section is to have effect “despite any other provision of this Act and despite any other law.”

#### *Comment*

As noted in *Environmental Manager*, the provision means it would over-ride another change proposed in the Bill, which would allow the Minister to revoke, vary or add conditions to an approval where an action is having or is likely to have greater impacts than predicted.

This provision also has implications given the new listing process may delay certain listings substantially. For example, by the time a relevant theme for a species is declared, many developments impacting upon that species may have already been approved.

This approach is inconsistent with the principles of ESD, privileging development interests and certainty over the environment, and almost certainly ensuring the loss of species over time. A better approach would be to allow the Minister to exercise such powers in limited circumstances with the proponent being entitled to compensation, for example, for sunk costs.

### ***5.7 Referrals containing options and variations***

#### *Amendment*

The amendments expand the referral and assessment process to allow proponents to submit proposals containing several alternative locations or timeframes (section 72(3)). Alternative options may relate to: location of action, timeframe of action, or activities which will comprise the action.

#### *Comment*

As summarised by *Environmental Manager*:

The rationale for this amendment is to create flexibility and make it possible for the relative impacts of different project options to be considered. Proponents who make changes to their proposed action after referral would be able to request that the Minister accept a variation to the action, rather than having to submit a new referral. Meanwhile, the Minister would get the power to request information on whether an action is a component of a larger action, as well as information on the method and stage of assessment in the relevant State or Territory. And the Minister would be able to consult any person when making an approval decision.

This is a reasonable amendment providing that the level of information prepared in relation to each option is comprehensive and not reduced. Location is crucial to determining environmental impact and so assessment must be comprehensive for each specific option. Any such alternative location/proposal must be the subject of public scrutiny and not altered after public advertising.

Variations under the new Division 1A (sections 156A-F) must be subject to public scrutiny. Amendments relating to consideration of the history of a company (for example section 136(4)) should apply where there is a change of person proposed to take an action (section 156F).

### ***5.8 Policy statements***

#### *Amendment*

The Bill allows the Minister to make policy statements to guide operation of the amended processes.

#### *Comment*

ANEDO supports this amendment, and recommends that DEH clarify the legal status of the policy statements for users. However, if the guidelines contain operational or compliance rules then it would be more appropriate to have such detail included in regulations for greater certainty.

### ***5.9 Early refusal, combined controlled action and EIA decision***

#### *Amendment*

Proposed Division 1A, sections 74B, C and D, provide that the Minister can promptly refuse an action that would have clearly unacceptable impacts.

The current two-stage process (in section 86) of deciding a project is a controlled action and then deciding the appropriate level of assessment will be collapsed into one. The decisions would be made simultaneously on the basis of the initial referral documentation.

Maximum timeframes for decision-making on approval will range from 20 to 40 days under the proposed changes.

#### *Comment*

ANEDO supports the early refusal provision.

The repeal of section 86 removes the need for proponents to provide the Minister with preliminary information to inform the decision on the assessment approach under section 87 once an action has been determined to be a controlled action under section 75. The basis of the change is to avoid duplication.

This is a practical approach assuming that referral information is sufficient for the purpose of determining appropriate assessment requirements.

### ***5.10 Public consultation***

#### *Amendment*

The Bill establishes a requirement for the Minister to provide a proponent with an opportunity to comment on the proposed approval decision and conditions. The Minister would also be able to seek public comment on proposed approval decisions and conditions.

*Comment*

ANEDO submits that the Minister should also be required to consult with the public on proposed conditions. Additional opportunities for public involvement can only enhance the legitimacy of the proposal and further refine the conditions of approval.

*Amendment*

As summarised by the Explanatory Memorandum:

The New subsection 146(1B) of the Act amends the current requirement to seek public comment on the draft terms of reference for strategic assessment, making it now optional. A public comment process has been a requirement for both draft terms of reference and the assessment reports. The public consultation process on the draft terms of reference for a report on the impacts of a policy plan or program under a strategic assessment agreement is adding an additional process that, at times, is of little value (i.e. very rarely have comments been received). In such instances it would be more efficient, and equally effective in terms of the overall process, to use generic terms of reference as specified in the Act and maintain the requirements relating to public comment on the draft reports. The amendments apply to agreements made under section 146 of the Act after the commencement of those items.

*Comment*

Generic terms of reference may not be adequate in all cases. ANEDO submits that the public comment process in relation to draft terms of reference should be retained.

### ***5.11 Commercial in confidence information***

*Amendment*

There are a number of amendments in the Bill relating to commercial in confidence information. For example, the new section 74(3A) allows the Minister to withhold certain information when publishing a referral under section 74(3); and the new section 170BA allows a proponent to request the Minister for permission to withhold commercial-in-confidence information when publishing assessment documentation in accordance with Division 4, 5 or 6 of Part 8 of the Act. The Minister may agree to commercial-in-confidence material being withheld if satisfied of the matters in section 170BA(5) of the Act.

*Comment*

There is potential for abuse of these provisions, and the potential to undermine the transparency and accountability of the regime. Commercial-in-confidence can be used to hide from scrutiny information which undermines a proponent's case. The rationale that release of information would cause "competitive detriment" (for example, as stated in section 74(3B)(a)) should not be relevant to referral and assessment information.

### ***5.12 Surveys and Inventories***

### *Amendment*

The Bill repeals sections 172 and 173 of the Act and substitutes new sections 172 and 173. According to the Explanatory Memorandum, the new sections replace the need and timeframes to undertake an inventory of protected species and ecological communities on Commonwealth land and surveys of protected species, including cetaceans, and ecological communities in Commonwealth marine areas. These amendments focus the need for inventories and surveys on areas which are of importance for the conservation of biodiversity and do not have a management plan in force with an object of protecting the environment or promoting the conservation of biodiversity.

The Bill also repeals section 175 of the Act as a consequence of items 349 and 350 which provide for inventories on Commonwealth land and surveys in Commonwealth marine areas to be optional rather than mandatory.

### *Comment*

Identifying and monitoring biodiversity is a fundamental element of conservation. Comprehensive and accurate data is needed to underpin any credible regulatory scheme.

ANEDO submits that instead of making data gathering and collating discretionary, the Act should be strengthened by providing more information about species and communities to allow for better decision-making. For example, it is submitted that the Act require inventories for threatened species to not only identify and state the abundance of relevant species, but also to identify range, habitat, critical habitat, and corridors where known.

## ***5.13 Mining approvals in Commonwealth reserves***

### *Amendment*

The Bill purports to “simply mining approval processes in Commonwealth reserves” (section 355) and allow the Director’s approval of existing and new mining operations in Commonwealth reserves where there is no management plan (section 359B(2)). In relation to oil and gas activities, this includes approval for transition from exploration to production (section 357). Merits review to the AAT is not available for decisions under section 359B.

### *Comment*

ANEDO strongly opposes the amendments facilitating mining in Commonwealth reserves.

## **6. Compliance and Enforcement**

While statistics in relation to development assessments, approvals, listings and permits are included in the briefing on the Bill, it is relatively silent on enforcement statistics. ANEDO has previously drawn attention to the lack of compliance action taken by DEH.

This seems to be for a range of reasons including that: the thresholds for breach are unrealistic in the legislation, and there is a lack of resources, capacity and political will.

In this context, ANEDO is broadly supportive of the amendments aimed at strengthening the compliance and enforcement regime under the Act. However, we strongly oppose amendment creating barriers to third party enforcement.

## **6.1 *Third Party enforcement***

### *Amendment*

The Bill proposes to repeal section 478 of the Act, which currently prevents the Federal Court from requiring undertakings for damages as a condition of granting an interim injunction. Under the amendments, the court will retain a discretionary power not to require an undertaking.

### *Comment*

The effect of repealing section 478 is that project proponents will in future be able to seek surety for damages when environmental organisations and others seek interim injunctions against them for alleged breaches of the EPBC Act.

The purported rationale of the amendment is to “bring the Act into line with other Commonwealth legislation”. However, it establishes a significant deterrent and barrier for third parties to seek injunctions, and does not accord with other state environmental laws that enable third parties to undertake enforcement action. Given the lack of enforcement action by DEH to date, it is crucial that third parties are not prevented from bringing such actions by the costs of damages.

As noted by Chris McGrath,

Undertakings as to damages are given by an applicant for an interim or interlocutory injunction to pay the damages suffered by the respondent should the application for an injunction ultimately fail at trial.<sup>9</sup> For large development projects such damages may amount to hundreds of thousands of dollars or greater. Failure to give an undertaking as to damages is generally fatal to seeking an interim or interlocutory injunction. Given that the time taken from commencing an action to having the case fully heard in court may be 6-12 months, the inability to provide an undertaking as to damages and thereby gain an interim or interlocutory injunction can render litigation to protect the environment futile.<sup>10</sup>

Environmental law is public law and proper access to justice requires that the public is able – in appropriate circumstances – to use the court system to seek redress. The Court always has the power to strike out proceedings if they are vexatious, frivolous or constitute an abuse of process. Public interest environmental litigation is essential for correcting honest mistakes of government regulators and developing legal principles for improved environmental protection.<sup>11</sup>

ANEDO strongly opposes this amendment.

## **6.2 *Corporate Liability***

### *Amendment*



Division 22, section 498B refers to the conduct of directors, employees and agents. As summarised by *Environmental Manager*:

The Bill would make companies, directors and managers liable for actions taken on their behalf by employees and others and would remove any obligation to demonstrate management had directly ordered any offending activity. It would be a defence that the company, director or manager took reasonable precautions or exercised due diligence, and the Bill sets out detailed criteria for determining this. The defendant would need to show:

- the company or individual arranged regular professional assessments of compliance with the Act;
- the company or individual implemented any appropriate recommendations arising from these assessments;
- the company or individual had an appropriate system for managing the effects of the activities on the environment;
- the directors of the company, or the employees or agents of the company or individual, had a reasonable knowledge and understanding of the requirement to comply with the Act.

#### *Comment*

The Bill's explanatory memorandum says these provisions for companies, directors and senior managers will provide "an appropriate basis" for liability. In large corporations, the relevant decisions that can result in "significant and often irreversible impacts on matters of national environmental significance" are usually made by operational managers, "rather than by the directing minds of the body corporate", it says. "It is important to create incentives for large corporations, principals and employers to take steps to ensure that the Act is complied with when such decisions are made."

ANEDO supports the corporate liability provisions.

In addition, the amendments prevent a company from avoiding its responsibilities by requiring a contractor or other person to refer the proposed action to the minister, as the changes will make it illegal for referrals under the Act to be made by a contractor

The Bill also expands the Minister's ability to consider the environmental history of companies and company managers when making a decision.

### **6.3 Landholder liability**

#### *Amendment*

The Bill provides that landholders will be liable for the actions of other people if the landholder is: reckless or negligent as to whether a contravention would occur, in a position to influence the conduct of the other person regarding the contravention, and failed to take steps to prevent the contravention (Division 18A, sections 496B-D).

#### *Comment*

It is important to note that the offence provisions concerning liability of landholders are not strict liability and require, for example, evidence of recklessness. Furthermore, there are defences available, for example, taking reasonable steps to prevent a contravention.

This amendment, combined with amendments regarding corporate liability should assist in addressing breaches of the Act.

ANEDO supports this amendment, however submits that the offences should be strict liability offences.

## **6.4 Strict liability**

### *Amendments*

There are a number of amending provisions that make it clear that offences are strict liability offences.

The amendments provide that the prosecution does not have to show that a person knew or was reckless as to the following facts:

- That a property is a world heritage property (section 15A);
- That a heritage value is a heritage value;
- That a place is a heritage place (section 15C);
- That a wetland is a declared RAMSAR wetland (section 17B);
- That a species or ecological community is a listed threatened species or ecological community (section 18A and section 196(1)(c), 196B(1)(b) and 196D(1)(b));
- That a species is a listed migratory species (section 20A and section 211(1)(c), 211B(1)(b) and 211D(1)(b));
- That an area is a Commonwealth marine area (section 24A);
- That an area is Commonwealth land (section 27A);
- That a place is a Commonwealth Heritage Place (section 27C);
- That a cetacean is in the Australian Whale Sanctuary or waters beyond the outer limits of the sanctuary (section 229(1));
- That a species is a listed marine species (sections 254, 254B and 254D);

Strict liability offences are created where:

- A person contravenes a condition which has been attached to an approval under Part 9 of the Act (section 142B);
- A person takes an action that is prohibited in a Commonwealth reserve (section 354);
- A person conducts a mining activity prohibited under section 355(1).

### *Comment*

ANEDO strongly supports these amendments, as they should markedly improve enforcement of the Act.

It is important to note that most of the new strict liability provisions have exemptions and defences. However, it is made clear that it is not a defence to causing damage to a matter of national environmental significance that a person was ignorant that it was such a matter.

## **6.5 Liability for impacts caused by third party actions**

### *Amendment*

The new section 25AA (and 28AB) establishes a new defence to the offence provisions in Part 3 (ie, for impacts on matters of national environmental significance). The Explanatory Memorandum notes “the purpose of this amendment is to ensure that a person cannot be prosecuted (or a civil penalty imposed) for impacts caused by the third parties which are consequential to the actions of the first person but which are not directed or requested by the first person.” Third parties who take actions without approval which significantly impact on matters of national environmental significance may be prosecuted (or a civil penalty imposed) under Division 1 of Part 3.

*Comment*

The effect of the amendment will mean that proponents are only liable for their primary action. They will not be liable for secondary actions by third parties that are a consequence of their primary action if they did not instruct the third party to undertake the action. This applies to criminal and civil prosecutions. This is reasonable.

## **6.6 Exemptions**

*Comment*

As noted above, there are a range of exemptions from the need for individual approvals (for example where there is an accredited authorisation process, bioregional plan, conservation agreement etc in place). These provide new exemptions from both Part 3 (offences regarding significant impact on matters of national environmental significance) and from Part 13 (threatened, migratory, cetacean species offences).

As noted above, ANEDO is concerned about the broad-brush approach to these accredited exemptions from rigorous federal approval processes.

## **6.7 Remediation**

*Amendments*

There are three principle provisions dealing with remediation in the Bill. These are:

- Amendments to provide a power for the Federal Court to make a remediation order, but only on application by the Minister;
- the Bill confers on the Minister a power to make a remediation determination, or to accept enforceable financial undertakings, as an alternative to prosecution; and
- the Minister may make remediation determinations regarding contravention of civil penalty provisions (within 6 years) (Division 14B, section 480D)

*Comment*

ANEDO has two comments on these proposals. First, the Bill does not provide for public disclosure of any such administrative penalties. This should be rectified. In many instances, and particularly regarding corporations, public disclosure is the best means of ensuring general and specific deterrence.

Second, in relation to financial contributions for civil penalty contraventions, these should be hypothecated to conservation and remediation purposes, and not go to 'the Commonwealth' as indicated in section 486DA(2)(b).

## **6.8 Powers of officers**

### *Amendment*

There are extensive provisions in the Bill relating to the powers of officers to carry out compliance and enforcement activities.

### *Comment*

ANEDO is supportive of greater enforcement of the Act by DEH. It is of course, necessary to have sufficient resources on the ground devoted to compliance to ensure the best possible results.

## **7 Wildlife trade permits**

### **7.1 Permit conditions**

#### *Amendment*

A new section 303GE(5A) will enable the Minister to make it clear that conditions on import permits can extend beyond the time it takes to import the species.

#### *Comment*

ANEDO supports this amendment, as long term conditions may be appropriate for example for the health and welfare of live imports.

### **7.2 Removal of AAT review**

#### *Amendment*

As noted above, there are a number of amending provisions which remove the right of review by the Administrative Appeals Tribunal (AAT) of Ministerial decisions. These include:

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

#### *Comment*

ANEDO strongly opposes the removal of AAT review options for Ministerial decisions.

## 8 Status of legal instruments

There are a number of amendments clarifying the legal status of instruments under the *EPBC Act 1999*.

The instruments that have been declared **not** to be legislative instruments by the amendments are:

- Ministerial determinations stating that amended management arrangements or authorisation processes are taken to be accredited management arrangements or authorisation processes for the purpose of the Act (where the amendment is ‘minor’) (section 36A(4));
- Ministerial determinations remaking bilateral agreements where minor amendments have been made (section 56A(3));
- Ministerial directions to request additional information in relation to a referral being assessed on the basis of preliminary documentation (section 95A);
- Standard guidelines prepared for the development of assessment documentation in relation to an assessment by public environment report (section 96B(4));
- Tailored guidelines prepared for the development of assessment documentation in relation to an assessment by public environment report (section 97(6));
- Standard guidelines for environmental impact assessment (section 101B);
- Tailored guidelines for environmental impact assessment (section 102(1));
- An approval for (under section 146B(1)) by the Minister for taking an action or class of actions in accordance with an endorsed policy, plan or program (section 146B(5));
- The proposed priority assessment list (section 194G) and the finalised priority list (section 194K) are not legislative instruments;
- An approved conservation advice (for each threatened species which is required in lieu of a recovery plan) (sections 468 and 469);
- The instrument containing the decision not to have a recovery plan is not a legislative instrument (section 269AA);
- Determinations regarding minor amendments to accredited policies, plans, processes (section 487);
- Requirement to publish notice in the Gazette of CITES import permits (sections 490-495);
- The National Heritage List is not a legislative instrument (section BC of Division 1, Part 15)
- The priority assessment list for heritage nominations is not a legislative instrument;
- The Commonwealth heritage list is not a legislative instrument (section 341C(4));
- The proposed and final priority assessment lists for Commonwealth heritage nominations are not legislative instruments (sections 341JA and JD);
- Approval of actions and mining in Commonwealth reserves when a management plan is not in operation (section 359(7)) (Note – decisions made under section 359B are subject to ADJR Act);
- List of Overseas Places of Historic Significance to Australia is not a legislative instrument (section 390K);

- Remediation determinations for contraventions of civil penalty provisions are not legislative instruments (section 480D(3));
- Exemptions relating to activities which may impact upon protected species reintroduced to an area are not legislative instrument (section 517A(9));
- Ministerial guidance statements about how the Act or Regulations apply are not legislative instruments (after section 520), and are not legally binding;
- Determinations regarding heritage nominations made prior to the commencement of the amendments (section 324E and section 341E);
- Determinations regarding emergency heritage nominations made prior to the commencement of the amendments (section 324F and 341F);

Determinations and actions which **are** legislative instruments under the amendments include:

- determinations under section 194C regarding the timeframe and commencement of the assessment period for nominations to list threatened species or ecological communities (this is exempt from disallowance under section 42 of the *Legislative Instruments Act 2003*);
- Ministerial determination of conservation themes for nominations is a legislative instrument (section 194D) (this is exempt from disallowance under section 42 of the *Legislative Instruments Act 2003*).
- Listing of threatened species and migratory species is no longer by gazettal, but by legislative instrument (sections 184 and 209);
- Determinations regarding assessment period and themes for heritage nominations are legislative instruments, but are exempt from disallowance motions;
- A management plan for a national heritage place wholly within Commonwealth areas is a legislative instrument (as is an amendment, revocation or replacement of a plan) (section 324S(7));
- Ministerial determination of the assessment period for the Commonwealth heritage list is a legislative instrument but is exempt from disallowance motions;
- Management plan for a Commonwealth Heritage place is a legislative instrument (as is an amendment, revocation or replacement of a plan) (section 341S);
- Ministerial determination that amendments apply to an action referred prior to commencement, but is exempt from disallowance.

It is important to note that although these are declared to be legislative instruments, most of them are exempt from disallowance motions.

These amendments refer to the *Legislative Instruments Act 2003*. Previously, Part XII of the *Acts Interpretation Act 1901* provided for the disallowance of delegated legislation. The 2003 Act establishes a complete and authoritative electronic register of legislative instruments and compilations of instruments. Under the Act, a legislative instrument is defined as an instrument in writing that is of a legislative character and that is or was made in the exercise of a power delegated by the Parliament. An instrument is taken to be of a legislative character if:

- it determines the law or alters the content of the law, rather than applies the law in a particular case; and

- it affects a privilege or interest, imposes an obligation, creates a right, or varies or removes an obligation or right

We understand from DEH that the multiple provisions in the Bill categorizing legislative instruments are included to clarify that administrative requirements of the *Legislative Instruments Act 2003* do not apply to certain determinations etc (for example, registration requirements).

However, although easing the administrative burden for DEH, by declaring determinations not to be legislative instruments, reduces the level of parliamentary scrutiny of those determinations.

According to DEH,<sup>12</sup> the requirements applying to legislative instruments are:

Instruments described as regulations or as disallowable instruments are declared to be legislative instruments. Instruments are not legislative instruments if they are listed in the exemptions in section 7 of the Act or if the Attorney-General certifies that they are not legislative. Once an instrument is registered, it is taken to be legislative. Among other things, the Act provides that:

- as soon as practicable after making a legislative instrument, the maker must lodge the instrument and its explanatory material with the Attorney-General's Department for registration – instruments are not enforceable unless they are registered;
- the Department must arrange for the instrument to be tabled in each House within 6 sitting days of being registered;
- instruments that operate retrospectively to disadvantage any person (other than the Commonwealth) are of no effect;
- within 15 sitting days after tabling a senator or member of the House of Representatives [but in practice usually the former] may give notice of a motion to disallow the instrument (in whole or in part);
- if the motion is agreed to, the instrument is disallowed and it then ceases to have effect;
- if a notice of motion to disallow the instrument has not been resolved or withdrawn within 15 sitting days after having been given, the instrument is *deemed* to have been disallowed and it ceases to have effect;
- disallowance has the effect of repealing the instrument – if the instrument repealed all or part of an earlier instrument then disallowance also has the effect of reviving that part of the earlier instrument;
- a similar instrument cannot be made again:
  - within 7 days after tabling (or, if the instrument has not been tabled, within 7 days after the last day on which it could have been tabled) (unless both Houses approve);
  - while it is subject to an unresolved notice of disallowance;
  - within 6 months after being disallowed (without the approval of the House that disallowed the regulation);

Listing by legislative instrument replaces the gazettal process (section 184).

## **9 Additional issues**

There are key operational issues that are currently limiting the effectiveness of the Act. ANEDO submits that these issues are not adequately addressed in the Bill. These include:

### ***9.1 Access to information***

Practice to date has shown that there are real issues concerning access to relevant information. Often, access has been effectively restricted due to exhibition of relevant

documents in areas where they will not be viewed, and a failure to make information available electronically.

In the case of Radical Bay on Magnetic Island, preliminary documentation was lodged with the EPBC Unit and made available for comment in hard copy at the local Council in Townsville and the Queensland EPA office during business hours only. This technically was all that was required by the *EPBC Regulations*. Those organisations where the documents were to be viewed were instructed not to allow copies to be made of the report. This left interested parties from Magnetic Island with no choice but to travel to Townsville to view the report and also to view the hundreds of pages during office hours. The developer through their solicitor refused requests to provide the document directly to interested parties. The Minister's response was that the issue would be considered next time the Government proposed to amend the *EPBC Regulations*.<sup>13</sup>

All documents that are lodged, including preliminary documentation and Public Environment Reports, should be published on the web to ensure that all people who have an interest in commenting on a particular development have access to the information.

### ***9.2 Timing for release of reports***

Public exhibition periods do not cease during the Easter or Christmas holiday periods under the *EPBC Act*. Thirty days is provided for comment on Public Environment Reports (PER) that can be technical and lengthy (often running to over 300 pages). In the case of Reef Cove Resort at False Cape, a report was made public in early December with comments due on the PER in the first week of January 2005. The net result was that there was a limited capacity for the public to lodge submissions, and hence the full benefits of community consultation were arguably not realised. It is submitted that the approach adopted in Queensland, under the *Integrated Planning Act 1997* (Qld) Act should be followed, whereby consultation periods do not include Christmas holiday periods.<sup>14</sup>

### ***9.3 Assessment reports***

The DEH has a policy of not releasing assessment reports that are provided to the Minister until after a decision has been made on an approval. This means that parties are not able to comment on whether the Minister has adequate information before him to make a decision, until after the decision has been made. Again, this diminishes the role of the public in assisting the decision-making process, and may potentially lead to poor decisions being made.

### ***9.4 Old approvals and planning issues***

A key rationale behind the *EPBC Act* was to achieve uniform national assessment of areas affecting MNES. However, the Commonwealth has rarely used its powers to intervene and effectively attach conditions to some of these approvals. For instance, there is an apparent reluctance to utilise the section 134 powers to scale back developments and impose conditions (such as to restrict clearing and visual impact).<sup>15</sup>

### ***9.5 Amendments to improve the current MNES***

*Wetlands of international importance*<sup>16</sup>



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

#### *Listed migratory species*<sup>17</sup>

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

#### *Protection of the environment from nuclear actions*<sup>18</sup>

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

ANEDO submits that section 22(1) should be extended. A revised list should include the following:<sup>19</sup>

- nuclear actions relating to military facilities, operations and exercises,
- mining or processing of Australian fertile and fissile materials including uranium and minerals sands,
- transportation of radioactive materials and products, including spent nuclear fuel, or radioactive products arising from reprocessing, and
- irradiation of foods and other products for human use or consumption.

#### *Marine environment*<sup>20</sup>

Currently the trigger only relates to Commonwealth managed fisheries in Commonwealth marine areas, with state and territory managed fisheries being exempt.<sup>21</sup> We note that State and territory managed fisheries are still subject to provisions relating to migratory species and threatened species, and subject to state fisheries management legislation.

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

The provisions for the accreditation of fisheries management regimes (for example, bycatch action plans) need to be strengthened to include strict and comprehensive

criteria to be met prior to accreditation; extensive public consultation prior to accreditation; and 2 yearly reviews and audits of accredited management regimes.

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

### ***9.6 Additional Matters of National Environmental Significance***

While Australia has put considerable effort into implementing certain international environmental principles and obligations, such as declaring and protecting world heritage areas, there are a number of issues now dealt with by international environmental law instruments that are not currently included as MNES under the EPBC Act.

In his second reading speech on the amending Bill, the Parliamentary Secretary to the Environment Minister Greg Hunt MP said the changes “will allow the Australian Government greater flexibility and capacity to deal with the emerging environmental issues of the 21<sup>st</sup> century.”

Please refer to our submission on Possible New Matters of National Environmental Significance under the *EPBC Act 1999* - May 2005, which can be found at: <http://www.edo.org.au/edonsw/site/policy.php>.

Consistent with our previous submission ANEDO recommends additional amendments to provide for new MNES. These are in relation to:

- Add a **greenhouse gas emission trigger** that recognises any development that produces over 100,000 tonnes of CO<sub>2</sub> equivalent per year as a matter of national environmental significance. This could be supplemented by provision for all projects on a designated development list (including expansion of existing projects and significant land use change, including significant land clearing and motorway projects) to trigger the approval provisions. This would ensure the trigger was more comprehensive in capturing diffuse emissions.
- ANEDO recommends that a trigger be included in Part 3 for **abstraction of surface and ground water resources** over 10,000 megalitres which is likely to have a significant impact on aquatic or groundwater-dependent ecosystems. The focus of the trigger should be on major development projects in the Murray Darling Basin (using MDBC Agreement as the basis for power to Act). Criteria for assessing impact should be based on interference with rivers caused by major works (such as dams over a certain size); the extraction or diversion of volumes of water over a certain amount of that are likely to impact upon compliance with the MDBC cap. This is consistent with the NWI objective to have better environmental impact assessment (EIA) for large water infrastructure.
- Insert a comprehensive **land clearing** trigger would require three main alternative elements. First, a trigger for the clearing of native vegetation over 100 ha in any two year period; second, a trigger for the clearing of any area of native vegetation which provides habitat for listed threatened species or ecological communities, or listed critical habitat; and third, a schedule of activities that would trigger the Act regardless of the hectares proposed to be cleared (for example, major coastal resort developments).

We note that the bill removes the requirement for the government to review the need for new triggers every five years and publish a report on the findings. ANEDO does not support this amendment.

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<sup>1</sup> Bates G, *Environmental Law in Australia* (4<sup>th</sup> ed, Butterworths, Sydney, 1995), p 461.

<sup>2</sup> Three merits appeals cases have been reported under sections 206A, 221A, 243A, 263A, 303G], and 473 of the EPBC Act: 1. *International Fund for Animal Welfare (Australia) Pty Ltd and Minister for Environment and Heritage, Re* (2005) 41 AAR 508; [2005] AATA 1210; [2006] AATA 94 (the Asian Elephants Case); 2. *Wildlife Protection Assoc of Australia Inc and Minister for the Environment and Heritage, Re* (2003) 73 ALD 446; [2003] AATA 236; [2006] AATA 29; and 3. *Humane Society International and Minister for the Environment and Heritage* [2006] AATA 298 (the Southern Bluefin Tuna Fishery Case).

<sup>3</sup> This would be consistent with for example, the Victorian *Flora and Fauna Guarantee Act*, which provides for interim protection for threatened species and ecological communities between nomination and listing. The killing of the Grey-headed Flying Foxes in Melbourne's Botanic Gardens while the species was being considered for EPBC Act listing, is an example of the need for such an amendment.

<sup>4</sup> Similarly, species in the categories of 'conservation dependent' and 'near threatened' should be included in the Part 13 offence provisions for taking and killing species.

<sup>5</sup> This is because the register is referred to as a protective tool in various State acts (for example, NSW *Local Government Act 1993* – Sect 142, *Tasmanian Historic Cultural Heritage Act 1995*, Section 97, *Victorian National Environment Protection Council (Victoria) Act 1995* - Schedule 7, as well as the non-specific reference in other legislation to statutory heritage registers).

<sup>6</sup> Bradman's birthplace in Cootamundra.

<sup>7</sup> *Minister for the Environment and Heritage v Queensland Conservation Council Inc and WWF Australia* [2004] FCAFC 190 30 July 2004 - "Nathan Dam Case". See "EDO Queensland Wins Nathan Dam Appeal" Larissa Waters, Solicitor, EDO Queensland. *Impact* June 2004. The judgment is available online at [www.austlii.edu.au/au/cases/cth/FCAFC/2004/190.html](http://www.austlii.edu.au/au/cases/cth/FCAFC/2004/190.html).

<sup>8</sup> The Queensland Conservation Council and WWF Australia represented by EDO Queensland and barristers Stephen Keim and Chris McGrath.

<sup>9</sup> For example, see *Central Queensland Speleological Society Inc v Central Queensland Cement Pty Ltd* [1989] 2 QdR 512.

<sup>10</sup> "Flying Foxes, dams and whales: Using federal environmental laws in the public interest" September 2006, unpublished.

<sup>11</sup> *Ibid.*

<sup>12</sup> Source: <http://www.aph.gov.au/senate/pubs/guides/briefno01.htm>.

<sup>13</sup> Kirsty Ruddock, EDO North Queensland, Draft *Impact* article, 2005.

<sup>14</sup> In particular s.3.4.5 states that the notification period under the Act cannot include any business day from 20 December in a particular year to 5 January in the following year.

<sup>15</sup> This is an issue in areas of coastal development (including canal development) in Queensland approved in the 1980s without environmental assessment and conditions. There is no basis to amend the scope of the development through state legislation because the Planning Minister does not have powers to call in developments or override local approvals, once they have been approved. Reliance on the EPBC Act is critical in such circumstances (Source: EDO North Queensland).

<sup>16</sup> See sections 16-17B EPBC Act 1999.

<sup>17</sup> See sections 20 and 20A EPBC Act 1999.

<sup>18</sup> See sections 21 – 22A EPBC Act 1999.

<sup>19</sup> See also the Combined Groups' submission 2002 *op cit.*

<sup>20</sup> See sections 23 – 24A EPBC Act 1999.

<sup>21</sup> Section 23(5) EPBC Act 1999.