australian network of environmental defender's offices

Submission to the 10 year review of the *Environment Protection and Biodiversity Conservation Act 1999*

January 2009

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

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

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Executive Summary

The Australian Network of Environmental Defender's Offices Inc (ANEDO) is a network of 9 community legal centres in each state and territory, specialising in public interest environmental law and policy. ANEDO welcomes the opportunity to provide comment to the 10 year independent review of the operation of the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act).* ANEDO has commented extensively on the *EPBC Act.*[1] This submission marks ANEDO's sixth submission regarding the Act in the past 3 years. Please refer to our previous submissions when considering this response and note that ANEDO is seeking direct consultation with the committee to raise key issues, discuss essential questions, identify solutions, and recognise community debate that need to occur in order to increase the effectiveness of this critical piece of Commonwealth legislation.

The *Environment Protection and Biodiversity Act 1999* defines the Commonwealth's role in the protection of the Australian environment and provides for the fulfilment of Australia's international environmental obligations. However, to date, the extent to which the Act has achieved its objectives and facilitated positive environmental outcomes has been limited at best. ANEDO submits that substantial amendment to the Act is needed to ensure that it reflects best practice, is broad in scope, and is robust in its protection of matters of national environmental significance.

Our response to the review is structured in two discrete parts:

Part 1 is a discussion centred on the 12 key issues that underpin the Act. How the Act incorporates these issues is critical to its success and to the achievement of its objectives. However, Part 1 does not merely reiterate criticisms relating to the Act's finer details. Instead we approach these critical issues from a broader perspective. We propose solutions where possible, identify public debate that needs to occur in setting management goals, and highlight the overarching problems or gaps in the Act.

These issues are:

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

Part 2 is our response to the 44 questions contained in the Discussion Paper. We address the 8 areas below:

	participation and transparency in the assessment and approval process under the Act?	
	Q6 Does the Act operate effectively in conjunction with State and Territory planning and environmental impact legislation? Are existing bilateral agreements achieving the objects of the Act? **AND** Q7 Are there further opportunities to harmonise the Act with other State and Territory legislation, planning and approval processes?	32
	Q8 Does the use of strategic approaches, such as strategic assessments and bioregional plans, provide opportunities for streamlining Commonwealth involvement in environmental issues? Do such approaches provide an appropriate means for dealing with cumulative impacts?	34
III Biodiversity	Q9 Does the Act provide an effective regulatory framework for the conservation of Australia's biodiversity? If not, what improvements could be made?	37
	Q10 What are your views on the process for nominating threatened species, ecological communities and key threatening processes?	42
	Q11 Given the length of time required for the assessment of nominations, should the Act allow for the emergency listing of species and ecological communities which may be threatened (similar to the provisions for the emergency listing of National Heritage places)? Would the advantages of this be outweighed by the financial and administrative costs?	43
	Q12 What matters should the Minister consider when deciding whether to list a threatened species or ecological community?	45
	Q13 Are the categories of threat appropriate?	45
	Q14 Are there opportunities to reduce duplication between the Commonwealth and State and Territory listing regimes or do overlaps between the regimes provide significant protection for threatened species and ecological communities?	46
	Q15 What factors should be considered in setting priorities for recovery planning?	47
	Q16 Does the planning regime support the effective recovery of threatened species and ecological communities?	48
	Q17 Are there opportunities to improve the co-ordination between the Commonwealth and State and Territory recovery regimes? If so, what might these be?	50

	under the Act? Would the disadvantages of this process – in terms of costs and delays - be outweighed by the advantages?	
	Q43 Should a separate body be established to make certain decisions under the Act? If so, what kind of body should be established and what decisions should be entrusted to it?	89
	Q44 What is an appropriate framework for assessing the performance of the Act? Do you have particular issues that should be considered during the review?	90

PART 1 – KEY ISSUES

The *Environment Protection and Biodiversity Conservation Act 1999* cannot be considered in isolation but must be considered in the context of the Commonwealth's broader role in environmental regulation. It is clear that the environmental pressures plaguing Australia are accelerating and federal and state action is doing little to alleviate these. ANEDO submits that this failure stems from a narrow-sighted approach that tries to deal with issues discretely while ignoring the intricate interactions and relationships that exist within an environmental context. This web of interactions includes state and Commonwealth relationships and responsibilities, tensions between interests and between government departments, the interests of industry and the community and the linkages between climate change, environmental protection, natural resource management, biodiversity conservation, public participation and human rights.

ANEDO contends that the Commonwealth's failure in terms of environmental protection stems from an insular approach that does not incorporate or consider these interactions. This restriction in vision is a key barrier to achieving outcomes and turning the tide on environmental degradation. Indeed, there is also a chronic failure to recognise that protecting the environment is critical to our survival not just from an ecological perspective but also from a social and economic one.

In light of this failure, ANEDO submits that there must be a fundamental audit that examines the Commonwealth's role in protecting the environment and identifies ways of ensuring that ecologically sustainable development is not just considered and promoted, but actively *achieved*. This exposes the fundamental question that underpins this review. How do we address the environmental problems plaguing Australia in a way that ensures sustainable outcomes? There is of course no easy answer. However, a broad debate across all sectors of civil society that recognises and accommodates these interactions is an important first step.

The *EPBC Act* is a crucial link in the overall chain. Despite its important position, the Act has only been successful in introducing procedural requirements that must be followed instead of concentrating on the outcomes desired. Although the Act may lead to better environmental outcomes for specific projects compared with no regulation at all, environmental health is declining throughout Australia.[2] ANEDO believes that changes need to be made to develop an Act where positive environmental outcomes are guaranteed as opposed to procedures merely being

[2] Examples of environmental degradation please see reports such as the State of the Environment Report Western Australia 2007, available at http://www.soe.wa.gov.au/report/about.html, and the State of the Environment Report Victoria 2008 available at: http://www.ces.vic.gov.au/CES/wcmn301.nsf/childdocs/FCB9B8E076BEBA07CA2574F100040358?open.

followed. Furthermore, the *EPBC Act* is an inflexible instrument incapable of addressing or adapting to new or increased threats such as climate change.

In summary, we stress that although this submission is largely focused on the *EPBC Act*, our comments are made within the broader context of the Commonwealth's role and the interactions identified above. ANEDO submits that any attention given to the detail of the Act should not come at the expense of recognising and addressing the broader issues. It is imperative that the review panel does not get caught up in the finer details of the legislation, but uses this 10 year review to concentrate on the broader role of the Commonwealth in achieving positive environmental outcomes and substantive protections.

1. Scope of the Act

The *EPBC Act*, as the overarching piece of national environmental legislation, has a critical role to play in the protection of Australia's environment. As the highest arbiter on environmental issues it is therefore essential that the Act is comprehensive and covers the full ambit of issues threatening Australia's environment.

The Act at present does not fulfil these requirements. It is hampered and constrained in its scope to only those matters listed as matters of national environmental significance (MNES). It does not apply directly to the issues of most concern to Australia's environment – greenhouse gas emissions, clearing of land and water extraction.[3] It also does not apply to high value forestry areas covered by Regional Forest Agreements, which are based on a scientifically flawed assessment process that does not assure the protection of biodiversity. The Act must therefore dramatically increase its scope to truly regulate and protect Australia's environment. We discuss new matters of national environmental significance and the removal of the RFA exemption in **Question 1(c)** of Part 2 below.

The Act does not adequately implement the principles of ecologically sustainable development (ESD), which are accepted as the guiding principles of governance on an international level. The Act contains procedural requirements to consider ESD, but there is no substantive implementation of ESD, or a requirement for sustainable decisions (which integrate environmental, social and economic factors) to be made. A more robust approach, which consolidates the principles of ESD in the decision-making process under the Act, and ensures decisions made are ecologically sustainable, is needed. This is discussed further in **Question 1(b)** of Part 2**.**

The scope of the Act in terms of its ability to address cumulative impacts is discussed in Issue 5 below.

[3] The Act assesses such issues in an indirect manner, such as where they impact on existing MNES. For example, the clearing of native vegetation may impact on a threatened species listed under the *EPBC Act* and may therefore require assessment through the threatened species trigger.

2. Implementation of Australia's international obligations

The *EPBC Act* is the cornerstone of Australia's compliance with its environmental obligations. One of the Act's specific objects is to assist in the co-operative implementation of Australia's international environmental responsibilities.

Australia is signatory to a plethora of international environmental agreements, relating to biodiversity, climate change, specific species (such as whales), processes (such as trade in endangered species) and pollution (sea dumping) etc. However, it is not sufficient to simply ratify an agreement. International agreements must be given legislative force through domestic legislation that is robust and comprehensive.

ANEDO submits that although the *EPBC Act* does implement some of Australia's international obligations, there is insufficient application of some important treaties. There is a need to ensure that our international environmental obligations are implanted into the *EPBC Act* in a manner that will affect outcomes, rather than merely introducing procedural requirements.

Analysis of the current implementation of international obligations must form a key part of the review panel's focus in developing recommendations for how the *EPBC Act* can be improved. The panel should consider ways to enhance compliance with, and implementation of, international obligations, at the federal and state level in Australia. ANEDO is keen to engage in this process.

We discuss deficiencies in the implementation of specific treaties throughout Part 2.

3. State and Commonwealth roles and interactions

Traditionally natural resource management and land use planning has been regulated by State and Territory legislation in Australia. However, there has been a fundamental shift in the last decade towards the 'nationalisation' of environmental issues. This is based on a realisation that proper environmental protection is predicated upon a uniform and consistent approach to the environment across Australia. Indeed, a consolidated approach to environmental issues is likely to provide for better outcomes in addition to ensuring that decision-making is consistent.

As part of this trend, the *EPBC Act* was introduced in 1999 to give the Commonwealth a role in relation to matters of national environmental significance. The Act allows the Commonwealth to play a gatekeeper role and veto developments that are likely to threaten matters of national environmental significance. ANEDO submits that the *EPBC Act* must maintain this important role alongside state laws, but this role must be amended to facilitate the full extent to which the Commonwealth can regulate all key threats to the environment in

accordance with constitutional powers. This broader role must go beyond the *EPBC Act* to addressing all the interactions and linkages discussed above.

ANEDO does not support duplication of processes but we stress that streamlining of requirements between the states and the Commonwealth must not be at the expense of environmental protection and must not undermine the Commonwealth's chief role in ensuring uniform protection for the environment across Australia.

We discuss this is more detail in **Questions 6-7** of Part 2.

4. Community participation and consultation

Public participation and consultation in relation to legislative processes and administrative decision-making is a fundamental element of good governance. In addition to fostering an inclusive society, public consultation leads to better decisions by assisting decision-makers in identifying public interest concerns and the views of all stakeholders. Greater community input also helps integrate ecological and social considerations in government decisions which promote the principles of ecologically sustainable development.[4] Moreover, participation enhances the accountability, and thus acceptability, of environmental decisions.

In light of this, the *EPBC Act* needs to ensure that public participation is assured throughout the Act and is a genuine and meaningful process designed to maximise good environmental and social outcomes. The Act is deficient in this regard. ANEDO submits that there needs to be longer public consultation periods and better access to information in relation to the referral, assessment and approval processes in the Act. The priority and thematic listing process for threatened species and protected areas must be revisited to reinstate the ability for the public to nominate items or species without restriction.

We also note the important role played by the public in enforcing breaches of the Act and challenging decisions on both the merits and legality of decisions. The Act must therefore contain robust provisions that enshrine third-party rights to challenge approvals throughout the Act, whether it is in relation to an approval in relation to MNES or a permit issued for wildlife operations. However, recent amendments to the Act have introduced significant barriers that make it difficult for the public to play this important 'watchdog' role. These impediments need to be removed to ensure that the Act is underpinned by transparent, accountable and inclusive processes.

We discuss public participation processes in detail in **Questions 5, 41** and **42** of Part 2.

[4] Richardson, B. & Razzaque, J. 2006,, 'Public participation in Environmental Decision-Making' In B. Richardson & S. Wood (eds), *Environmental Law for Sustainability,* Hart Publishing, Oxford and Portland, Oregon, 165- 195.

5. Cumulative impacts and strategic assessments

Strategic assessments are the only mechanism provided in the Act to consider cumulative impacts, however they are rarely used, which is limiting the Act's effectiveness and facilitating the 'death by a thousand cuts' scenario. It is clear that an Act which is limited in scope to a site-by-site assessment process will not maximise environmental outcomes.

Strategic assessment processes (SEAs), which are predicated on a landscape scale assessment, offer the most potential for addressing cumulative impacts in the legislative framework. SEAs allow for the determination of the uses, values and protections of land at the strategic end of the planning process. This may involve identifying areas where the impacts of development are unacceptable and sites where development may proceed at an early stage in the land use and development planning process. This is preferable to an ad hoc process based on localised assessments.

However, given the consequences of SEAs, in that no further environmental assessment is required for areas, SEAs must be subject to strict criteria, comprehensive assessment tools and genuine public consultation provisions. Those conducted thus far, in relation to RFAs and the Kimberley process demonstrate that there is a long way to go to establishing a workable and effective strategic assessment process. Indeed, the SEA process at present seems implicitly focused on streamlining and reducing the regulatory burden rather then on achieving the best environmental outcomes. ANEDO submits that the establishment of robust SEAs must be a priority of the Act in order to effectively incorporate the consideration of cumulative impacts.

We discuss strategic assessments and cumulative impacts in further detail in **Question 8** of Part 2.

6. Biodiversity management

Given the significant threats faced by Australia's biodiversity coupled with the emerging threat of climate change, ANEDO submits that it is an appropriate time to evaluate the success of the current approach to biodiversity conservation in Australia. Currently we have a snapshot approach of conserving species and ecosystems as they are, and where they are. It is an approach based on identifying threatened species and focussing our efforts on managing these particular species, as well as identifying important areas and seeking to preserve them as they are.

The impacts of climate change on biodiversity are predicted to be significant, with species changing their geographic distributions and abundance, the alteration of ecosystem structures and function and significant extinctions likely to occur given the limitations of the natural adaptation of biodiversity and the range of other threats that also exist. These predictions mean that we need to reconsider the

fundamental goals of biodiversity conservation. Will it continue to be appropriate to aim to protect all species, and if so what is the best way to go about this?

The threatened species based approach has not been successful to date, and is unlikely to increase its success under climate change.[5] Many scientists have long recognised the importance of maintaining ecosystem function and resilience in the conservation of biodiversity and this may ultimately preserve the most biodiversity.[6] There may still be elements of particular value that we as a society wish to try and save – such as a particular species[7] or an area - however maintaining the function and resilience of ecosystems will facilitate adaptation by biodiversity, enabling the greatest number of species to survive. Adaptive management will also increase in its importance, given the uncertainty in responses of biodiversity to climate change, and the consideration of new policy tools (eg. translocation).

Whether we continue down the current path or aim to change our philosophical approach to biodiversity conservation is a debate that must be had with community, government, scientists and all sectors of civil society. ANEDO submits that this debate must be stimulated as a matter of urgency.

We provide an analysis of these issues and the potential directions suggested by current scientific knowledge in **Questions 9** and **19** of Part 2.

7. Indigenous engagement

Indigenous involvement and engagement on issues of national environmental significance is crucial, and is of benefit to all parties. Indeed, in addition to empowering Indigenous communities, engagement with Indigenous peoples brings with it a wealth of knowledge that may assist decision-makers in making better decisions and implementing effective management practices. As has been observed that, 'as the conservation of biodiversity becomes increasingly necessary, there is a greater acknowledgement of the innate role that Indigenous people play in land management and biodiversity conservation'.[8]

The *EPBC Act* currently fails to implement robust Indigenous engagement provisions. ANEDO submits that the Act should be amended to implement a process of "free prior and informed consent before adopting and implementing

[5] Smith, J. "How adaptable are our conservation regimes?" Paper presented to the ACEL Conference, ANU, Canberra 2008, (ACEL publication pending).

[6] Elmqvist, T., Folke, C., Nystrom, M., Peterson, G., Bengtsson, J., Walker, B. and Norberg, J. 2003 'Response diversity, ecosystem change, and resilience' *Frontiers in Ecology and Environment* 1(9): 488-494.

[7] Whether it's because it is a charismatic species, or because of the species evolutionary importance, or historical value, or scenic value.

[8] Champan, T. 2008, 'The role, use of and requirement for traditional ecological knowledge in bioprospecting and biobanking biodiversity conservation schemes', *Environmental and Planning Law Journal*, Vol. 21, No. 4, Pgs. 196-217.

legislative or administrative measures that may affect them (Indigenous peoples)"[9] as is consistent with *The Declaration of the Rights of Indigenous Peoples*. This would ensure that Indigenous engagement goes beyond being merely a consultative approach. Moreover, the Act needs to set standards on co-management practices that must be adopted by the states. This will override discretionary co-management regimes at a state level.

Furthermore, increased and targeted funding is required to support those areas of the legislation that increase the capacity to develop a collaborative and partnership based approach for both the development and implementation of biodiversity management and heritage protection. Such an approach should also be implemented in relation to the development of management plans for Commonwealth Reserves.

We discuss Indigenous involvement under the Act and propose amendments in **Questions 31-34** of Part 2**.**

8. Fettering discretion

The *EPBC Act* implements an administrative decision-making framework that is heavily reliant on ministerial discretion. It is apparent to ANEDO that since the change of government, implementation of the Act has improved, with more refusals of inappropriate projects and greater ministerial involvement. However, although positive, this highlights an inherent weakness in the structure of the Act. This weakness is that a variety of outcomes can stem from the same Act and these outcomes appear dependent on the political will of the government of the day.

ANEDO submits that decisions under the Act should be based on objective criteria, not subject to the broad discretion of a decision-maker. This leads to greater accountability and transparency because decisions have to be justified with objective and verifiable evidence, and also leads to better consistency, as the bounds within which decisions must be made are clear. Although some may not agree with the final decision made, at least the basis upon which it is made is apparent and objective.

Discretion is prevalent throughout the *EPBC Act*, including the listing process for species and protected areas, the controlled action decision, management actions, enforcement and critical habitat listing. This discretion is largely unfettered. The Act needs to move away from an approach where protection is dependent on individual decision-making to a more open process where discretion is confined and the bounds within which decisions are made are set. We submit that decision-making in the Act must be guided and confined by the objects of the Act and the principles of ecologically sustainable development.

[9] *The Declaration of the Rights of Indigenous People*, Article 19 – "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

We discuss discretion in further detail in **Question 38** and throughout Part 2.

9. Climate change and the Carbon Pollution Reduction Scheme

Climate change has emerged as the key threat to the Australian, and indeed world, environment. Australia is a signatory to *United Nations Framework Convention on Climate Change*, which requires the Commonwealth to take domestic action to mitigate our emissions.

The inordinate focus of Australia's climate change strategy at present is the forthcoming Carbon Pollution Reduction Scheme (CPRS) which will introduce an emissions trading scheme for Australia. ANEDO submits that the CPRS is not a panacea. It alone will not be sufficient to address climate change and must be complemented by supplementary measures. In this vein, the *EPBC Act* should be extended in scope to directly regulate greenhouse gas emissions and support mitigation efforts through the introduction of a climate change trigger. It is crucial that new projects, such as power plants and coal mines, are assessed against best practice technology and that only those projects that incorporate strong mitigation measures and conditions are approved. We discuss a climate change trigger in more detail in **Question 1(c)** of Part 2.

The need to adapt our biodiversity management tools and reconsider our approach to conservation in light of the projected impacts of climate change was discussed above.

A broader comment is that there is a need for a consolidated approach to climate change across Australia that deals with all sources and aspects of climate change. This ranges from a need to address, for example, transport policies, taxation, planning codes, domestic emissions, incentives for renewable energy and feed-in laws. The *EPBC Act* has a role to play, but only as part of this broader national approach that addresses climate change in a holistic manner.

10. Environmental offsets

Offsetting currently occurs on a case by case basis for controlled actions under the *EPBC Act*, usually through the imposition of conditions of consent.[10] There is no standard scientific methodology for assessing quantity, quality or location of offsets, and there is little evidence of success of offsets. ANEDO submits that the use of environmental offsets under the *EPBC Act* needs to be strictly confined due to inherent limitations in the use of offsets for ecological matters.[11]

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

[11] Gibbons, P. and Lindenmayer, D. 2007, 'Offsets for land clearing: No net loss or the tail wagging the dog?' *Ecological Management and Restoration* 8: 26-31.

ANEDO submits that the goal of offsets under the Act should be to 'enhance' environmental quality, as opposed to simply 'maintaining', recognising that the environment has been significantly degraded as a result of past human impacts, and that action is required to halt or reverse this trend. Offsets should only be used after impacts are avoided, and then mitigated.

There are many ecological limitations on the use of offsets related to the equivalence of areas impacted and areas used as the offsets, time lags between losses and gains in biodiversity values, and the difficultly in ensuring compliance.[12] Moreover, offset schemes in other jurisdictions include 'red flags' or 'no go areas' which set out specific sites, species and communities where it is not appropriate to allow any further detrimental impact, and therefore inappropriate to use offsets. There is no such process in the *EPBC Act* as offset occurs in an ad hoc manner.
ANEDO submits that if the Minister is committed to the continued use of environmental offsets, the following key principles must underpin the offsetting process:

Additionality - Offsets must be additional to current regulatory requirements and best practice on-site environmental management, and must not be funded or potentially funded in the future under another program. Moreover protecting existing habitat only provides an additional conservation outcome where the habitat is good quality and is under real threat of clearing or significant decline in quality or the habitat is not of good quality and is actively managed in perpetuity to achieve a gain in biodiversity values equivalent to the loss.

Like for like – There is a need to ensure that offset and impact site are located within the same bioregion/subregion, that the offset is improving environmental quality of the MNES impacted (e.g. same Ramsar wetland, same World Heritage Area value) and the offset is providing the same type of habitat with the same functional role for species (e.g. breeding habitat) or ecosystems (e.g. corridor) as is impacted to ensure the maintenance of ecosystem function.

Permanence – There is a need to ensure that offset sites are legally protected and managed in perpetuity and that compliance audits and monitoring is conducted to ensure that predicted gains translate into actual gains.

Ratio – There must be an offset ratio is applied that reflects the conservation significance of the matter being offset, and the uncertainty regarding whether the conservation objectives will be achieved.

ANEDO submits that offsets under the Act should use a scientifically rigorous methodology or guidelines to ensure that these principles are incorporated and applied to all offsetting undertaken under the Act. The use of offsets is discussed further at **Question 19** of Part 2.

[12] Gibbons, P. and Lindenmayer, D. 2007, 'Offsets for land clearing: No net loss or the tail wagging the dog?' *Ecological Management and Restoration* 8: 26-31.

11. Compliance and resourcing

The success of a regulatory regime like the *EPBC Act* depends to a large extent on whether the Act's provisions are complied with and whether those who breach them are appropriately penalised or prosecuted. This ensures that there is sufficient deterrence and that the integrity of the Act is protected. However it is apparent that the compliance and enforcement provisions under the *EPBC Act* are underutilised, often due to a lack of adequate resourcing and personnel. Indeed, several reports clearly demonstrate that those bodies charged with ensuring compliance with the Act are inadequately resourced.[13]

ANEDO submits that there should be an increase in the amount of funding allocated to the compliance regime, directed in such a way as to facilitate the most positive environmental outcomes. Priorities for additional resourcing include ensuring that sufficient numbers of properly trained officers are available to identify breaches, as well as more resources allocated to increasing the number of strategic post-approval audits carried out by the *EPBC Act* compliance auditing programme. Additionally in order to bring about a stronger compliance regime, the full scope of the penalty provisions must be utilised by the Department, as opposed to the historical trend whereby "responses to potential breaches of the Act have focussed on (implementing) the 'less robust options.'"[14] Deterrence is greatly undermined if decision makers continue to consistently implement the 'softer' penalty provisions of the Act.

ANEDO notes that resourcing problems are apparent throughout the Act, not just in terms of compliance. Indeed, many of the shortcomings of the Act can be attributed not necessarily to inadequacies with the Act itself, but instead to the failure to allocate appropriate resources to implement the Act's provisions. This is also apparent in the listing, biodiversity management and heritage processes. A greater allocation of resourcing is fundamental to the future success of the Act. This funding should be focussed on maximising good environmental outcomes. ANEDO submits that increased funding for the Act must be a priority for the Commonwealth.

We discuss compliance and resourcing issues in more detail in **Questions 35-38** of Part 2.

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[13] Australian National Audit Office, 'The Conservation and Protection of National Threatened Species and Ecological Communities', Audit Report No. 31, 2006-07.

[14] Australian National Audit Office, 'The Conservation and Protection of National Threatened Species and Ecological Communities', Audit Report No. 31, 2006-07.

12. Monitoring

Monitoring in relation to the *EPBC Act* must occur on two levels – micro and macro.

At the micro level, this relates to individual project approvals. There is a need to ensure that projects are monitored post-approval to assess the actual impact of projects, and to make sure that conditions of approval are complied with. This is currently a significant shortcoming of the Act. As discussed above, insufficient resources are directed towards compliance activities and, as a result, there is no systematic monitoring of projects post-approval. At present, post-approval monitoring appears to depend entirely on political will. Moreover, the ability of the public to take action to enforce conditions has been significantly eroded. ANEDO submits that the Act must introduce a robust process for the monitoring of all approvals that is supported by appropriate funding.

As the macro level, the Act as a whole must be monitored and reviewed regularly and independently to ensure that it is achieving its objectives. In light of the increasing environmental pressures on the Australian environment and the spectre of climate change, the ten year gap between reviews is insufficient. We submit that 5 yearly reviews are appropriate. Furthermore, these reviews should focus on the outcomes of decision-making under the Act and whether the Act accords with principles of ecologically sustainable development. We discuss monitoring in greater detail at **Questions 2** and **35** of Part 2.

PART 2 - RESPONSES TO QUESTIONS IN DISCUSSION PAPER

I. Scope of the Act

1(a) - Are the objects of the Act appropriate to the Commonwealth's role in environment protection and management?

ANEDO supports the retention of the objects clause found in the Act. The current list of objects remains appropriate to the Commonwealth's role in environment protection and provides a good framework to guide the *EPBC Act* in dealing with matters of national environmental significance.

However, in light of the projected impacts of climate change on biodiversity, and the potential for climate change to deleteriously effect all Matters of National Environmental Significance (MNES), ANEDO submits that there is a need for an explicit climate change object which stipulates that a key objective of the *EPBC Act* is to take steps to avoid, minimise and/or address the impacts of climate change on MNES and the environment in general. Such an object would be consistent with the Australian Government's climate change strategy, which is to mitigate greenhouse gas emissions, facilitate adaptation and participate fully in international negotiations on climate change. Indeed, the incorporation of specific climate change objectives into the Act would help Australia implement its obligations under the *United Nations Framework Convention on Climate Change.* However, a new climate change object in the *EPBC Act* must be complemented by substantive provisions in the Act that address climate change. We discuss a new climate change trigger and how the Act could provide an appropriate framework for addressing climate change in **Questions 1(f)** and **19** below.

ANEDO notes that objects clauses are usually treated as aspirational, rather than as prescribing specific action, especially where no weight is attributed to them. Although ANEDO believes that it is certainly arguable that objects clauses require action in and of themselves, objects must generally be operationalised through the substantive provisions of the Act they apply to in order to be effective. ANEDO submits that the Act could better achieve its objects if more attention is paid to implementing appropriate provisions in the Act that require the achievement or consideration of the objects of the Act. This is discussed further throughout the submission.

1(b) Are the principles of Ecological Sustainable Development (ESD) appropriate to the Commonwealth's role in environment protection and management? Does the legislation provide an adequate framework to guide ESD decisions made under the Act?

ANEDO has consistently submitted that the principles of ecologically sustainable development (ESD), which include the precautionary principle, inter-generational equity and the conservation of biodiversity, are fundamental to the effective functioning of the *EPBC Act* if it is to achieve the best environmental, social and economic outcomes.

However, at present the implementation of ESD principles in the *EPBC Act* is inadequate. Throughout the Act, ESD is regarded as just another consideration to be balanced, something that decision-makers must "have regard to". For example, s136(2)(a) requires the Minister to take ESD into account in determining whether to approve a project under Part 9 of the Act. Similarly, s391 requires the precautionary principle (a key principle of ESD) to be taken into account by the Minister when making one of the listed decisions under the Act. However, once the procedural requirement to consider or take into account ESD principles is followed, then the decision-maker is entitled to disregard significant environmental impacts and approve a project by favouring other considerations under the Act, such as economic considerations. Indeed, ANEDO has observed that decisions made under the *EPBC Act* often give weight to relatively short-term economic considerations, rather than longer-term considerations, such as the environmental impacts of proposals.[15]

The above discussion highlights that there are currently no provisions in the Act that require a decision to be made that is consistent with ESD. This is despite the fact that ESD is supposed to be reflected in substantive *outcomes* of a decision instead of just having procedural implications.[16] That is, ESD requires more than simply requiring ESD to be considered as one of many unprioritised considerations.

Therefore, ANEDO submits that what is required is a more substantive approach that consolidates the principles of ESD into the decision-making process to achieve positive environmental outcomes. The *EPBC Act* should be reviewed to ensure that wherever a ministerial discretion is present, or where any decision is made under the Act (such as when approving controlled actions, making recovery plans, heritage listing), that ESD is given *overriding weight* to ensure that sustainable decisions are made in relation to matters of national environmental significance. That is, ESD should place fetters on the discretion of decision-makers to approve

[15] For example, in relation to the proposal from Moolarben Coal Mine Pty Ltd, the Delegate made the following statement in the Statement of Reasons:15 "I noted that the action has an estimated value of $150 million, would directly employ approximately 220 construction workers and at its peak 317 permanent employees, and that when full capacity is reached (year four) the estimated tax revenue to the Australian Government would total approximately $59 million. Together with payroll tax and coal royalties the total public sector benefit is estimated at more than $10 million per annum."

[16] Marie-Claire Segger & Ashfaq Khalfan, 'Sustainable development law: principles and practices' (2004) at 368.

land uses or development proposals which may significantly threaten biodiversity and MNES.[17]

Another recommended amendment is to make ESD the overarching objective of the Act.[18] Making ESD the overarching object would mean that all decisions would have to be made within a sustainability framework. That is, all decisions must demonstrate they are sustainable or cannot proceed. However, it is important to note that such a provision would not mean that no actions that are potentially harmful to the environment could ever proceed. The principles of ESD emerged out of international negotiations commencing with the United Nations Conference on the Human Environment in Stockholm in 1972 as principles to be applied to balance the developmental and environmental needs of the world's people. Therefore it cannot be said that giving overriding effect to principles of ESD would give undue weight to environmental factors at the expense of economic factors. Instead, it would provide a sound framework for making decisions about development in a way which respects the right of future generations to a healthy and productive environment and which is consistent with Australia's international obligations. This would be a more transparent process and lead to better outcomes.

We discuss ESD further in **Question 38**.

1(c) Are the existing matters of national environmental significance (NES) appropriate?
Do you think that there should be any additional matters of NES, and if so, how should such matters be framed?

ANEDO submits that the current matters of national environmental significance are appropriate and should be retained. However, improvement could be made in the application of current triggers to better protect MNES. ANEDO recommends amendment to four current triggers:

- wetlands of international importance;
- listed migratory species;
- nuclear actions; and
- marine environment.

In terms of new matters of national environmental significance, ANEDO has consistently called for the list of MNES to be expanded.[19] We believe that the

[17] Sperling, K. 1999, 'If caution really mattered' (1999) 16 (5) *Environmental Planning & Law Journal* 425 at 425. See also Pearson, L. 1996, 'Incorporating ESD principles in Land-Use decision-making: some issues after Teoh' *Environmental Planning and Law Journal* at 47-53.

[18] This has been adopted in New Zealand under the *New Zealand Resource Management Act 1991.* Section 5 of that Act provides that: "the purpose of this Act is to promote the sustainable management of natural and physical resources."

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

limitation of Commonwealth action to current MNES is operating to prevent the Commonwealth from taking broad positive action to protect biodiversity in a holistic manner and address the most serious environmental issues facing Australia.

We recommend the addition of four new 'triggers':

- greenhouse gas emissions;
- land clearing (including removal of RFA exemption);
- invasive species; and
- water extraction.

We discuss these in turn.

1. Amendments to existing MNES

Wetlands of international importance[20]

ANEDO submits that the current trigger should be expanded beyond wetlands of international importance[21] to include wetlands of *national importance*, for example, those listed in the Directory of Important Wetlands in Australia.[22] 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[23]

The trigger should be further strengthened by including the 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 MNES, as is the case for all the other migratory species listed on international agreements to which Australia is a signatory. The trigger should also include ROKAMBA[24], not just JAMBA[25] and CAMBA.[26]

Protection of the environment from nuclear actions[27]

Whilst having a broader impact base than other triggers (i.e., 'the environment' as opposed to a particular value), this trigger is limited by the current definition in

[20] See sections 16-17B *EPBC Act 1999.*
[21] Section 334 of the *EPBC Act* merely provides that the Commonwealth government has responsibility to protect RAMSAR listed sites.
[22] See http://www.environment.gov.au/water/publications/environmental/wetlands/database/ accessed 19 January 2009.
[23] See sections 20 and 20A *EPBC Act 1999.*
[24] Republic of Korea – Australia Migratory Bird Agreement.
[25] Japan – Australia Migratory Bird Agreement.
[26] China – Australia Migratory Bird Agreement.
[27] Sections 21 – 22A *EPBC Act 1999.*

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:

- nuclear actions relating to military facilities, operations and exercises;
- mining or processing of Australian fertile and fissile materials including uranium and minerals sands including mining for the purposes of exploration rather than for commercial purposes only;
- transportation of radioactive materials and products, including spent nuclear fuel, or radioactive products arising from reprocessing;[28]
- a requirement to take into account the downstream uses of the nuclear material domestically and internationally; and
- irradiation of foods and other products for human use or consumption.

Marine environment[29]

Currently the marine environment trigger only relates to Commonwealth managed fisheries in Commonwealth marine areas, with state and territory managed fisheries being exempt.[30] ANEDO submits that 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.[31]

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, inter alia shark species such as the basking, whale and blue sharks. This would help reduce recreational shark killing in Commonwealth waters.

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[28] In this regard, radioactive materials and products currently trucked through major metropolitan areas such as Adelaide, potentially exposing thousands of residents if there is a motor vehicle accident.

[29] Sections 23 – 24A *EPBC Act 1999*.

[30] Section 23(5) *EPBC Act 1999*.

[31] 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.

2. New matters of national environmental significance

Greenhouse Gas (GHG) emissions

Undoubtedly one of the more prominent absences from the *EPBC Act* is the lack of an effective "greenhouse trigger". As ANEDO has submitted on numerous occasions, it is important that new projects and facilities that will generate significant amounts of GHG emissions are comprehensively assessed under the Act and appropriate mitigation measures considered. The current assessments of coal mining and greenhouse intensive operations are failing in addressing the impacts associated with GHG emissions.[32]

The Commonwealth Government has the opportunity in this review process to strengthen this fundamentally important piece of environmental legislation and ensure that this issue that has been so widely recognised as being of key importance, is now incorporated into the Act.[33] Although, the focus for addressing climate change in Australia is very much on the proposed Carbon Pollution Reduction Scheme (CPRS), ANEDO submits that the CPRS alone is not sufficient as a holistic solution to climate change, and that a range of other necessary measures are needed.[34] As indicated by Dr Chris McGrath in his submission, which ANEDO supports, it is important that a greenhouse trigger works in conjunction with the CPRS.[35] The CPRS addresses existing emissions but provides little comment regarding the regulation or assessment of the emissions from new facilities. It is therefore imperative that the *EPBC Act* play a role in the environmental impact assessment of new 'emitting' projects.

In light of the above, ANEDO recommends that the Act be amended to include a greenhouse gas emission trigger that recognises any action that would result in the emission of over 100,000 tonnes of CO2 equivalent per year as a matter of national environmental significance. Any project that exceeds the trigger would automatically require approval under the Act. However, ANEDO submits that simply adding a greenhouse trigger is not enough. Part 9 of the Act should also be

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[32] See ANEDO submission to the Inquiry into the operation of the *Environment Protection and Biodiversity Conservation Act 1999* – September 2008. Found at: http://www.aph.gov.au/Senate/committee/eca_ctte/epbc_act/submissions/sub90_revised.pdf.

[33] In Opposition, the ALP consistently supported the inclusion of a climate change trigger. It was documented in the Minority Report by Labor and Australian Greens Senators in response to the Environment and Heritage Legislation Amendment Bill (No.1) 2006, that "Labor and Australian Green Senators strongly support the inclusion of a climate change trigger in the *EPBC Act*." Additionally, in an address to the Sydney Institute in April 2005, the need was specifically recognised "to have a greenhouse trigger in the *EPBC Act*." Furthermore, Mr Albanese in a speech regarding the Environment and Heritage Legislation Amendment Bill (No. 1) 2006, moved that an amendment be inserted to "establish a climate change trigger to ensure that large scale greenhouse polluting projects are assessed by the Federal Government".

[34] See EDO NSW *Model Climate Law Project - Discussion Paper*, 17 April 2008, available at: http://www.edo.org.au/edonsw/site/pdf/pubs/model_climate_law_project080417.pdf.

[35] Dr Chris McGrath, *Submission to the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* – 14 December 2008.

amended to introduce criteria for assessing high emission projects.[36] These criteria should include a requirement for new plants to use best practice technology and also prescribe mitigation measures and/or appropriate conditions that must be considered before a project can be approved.

Land clearing and removal of RFA exemption

The clearing of native vegetation in Australia has a range of well recognised and serious environmental consequences. These include: destruction of biodiversity habitat, degradation of soil, degradation of water quality, increased salinity, release of greenhouse gas emissions, and adverse effects on ecosystem services and broader catchment health. The Australian Government's *State of the Environment Report (2001)* identified land clearing the single biggest threat to wildlife in Australia.[37] Five years later, the *State of Environment Report 2006* found that the 'loss of native vegetation continues to be one of the greatest threats to Australia's biodiversity'.[38]

Although most states and territories now have legislation in place that regulates land clearing, illegal clearing continues to occur across Australia and significant levels of clearing are still lawful.[39] Moreover, state laws are sometimes poorly enforced.

In light of this, we submit that an important 'gatekeeper' role must be played by the Commonwealth in requiring the assessment of significant land clearing proposals under the *EPBC Act*. The Act should be amended to include a comprehensive land clearing trigger. This will require three discrete 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).

However, a key barrier to the adequate assessment of major land clearing proposals across Australia is the exemption currently given to logging conducted in areas under Regional Forest Agreements (RFAs). ANEDO has previously called for this exemption to be removed.[40] The RFA process constituted a significant abdication

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[36] *Ibid*.
[37] Found at: http://www.environment.gov.au/soe/2001/index.html accessed 19 January 2009.
[38] Found at http://www.environment.gov.au/soe/2006/publications/report/biodiversity-2.html (21 January 2009).
[39] SLATS data release by the Queensland Government in August 2008, shows Queensland still has extensive rates of clearing with 375,000 hectares being cleared during 2005-2006: *Land Cover Change in Queensland 2005-2006. Statewide Landcover and Trees Study Report*, Department of Natural Resources and Water.
[40] For an extensive discussion of RFAs, see ANEDO submission to the Inquiry into the operation of the *Environment Protection and Biodiversity Conservation Act 1999* – September 2008. Found at: http://www.aph.gov.au/Senate/committee/eca_ctte/epbc_act/submissions/sub90_revised.pdf.

by the Commonwealth of its responsibilities for forests.[41] Under section 38 of the *EPBC Act* the Commonwealth undertakes to refrain from exercising its environmental legislative powers for the duration of the Agreement (20 years), having 'accredited' the relevant state forestry practices and laws. ANEDO submits that excluding areas or processes from the Act is only valid where the process in place for assessing those areas is equal to, or preferably better than, *EPBC Act* processes. We do not support exclusions for particular activities or areas, unless there is genuine duplication of assessment requirements, and it is guaranteed that best practice assessment will occur. This is not the case under RFAs.

The legislative exemptions that apply to RFA areas have removed two strong mechanisms available to the Commonwealth: export licences and assessment under the *EPBC Act*. ANEDO submits that it is inappropriate for the Commonwealth to remain in a position where it cannot regulate forestry activities given Australia's international obligations to protect threatened species and the widening concern about the effects of deforestation on climate change. The Commonwealth's subordinate role in relation to RFA forestry operations has been further cemented by amendments in 2006. A new section 75(2B) was inserted into the Act in order to limit the considerations that the Minister must take into account in making a decision about whether a proposed action needs approval. In particular, it stated that the Minister must not consider any adverse impacts of any RFA forestry operation (as defined by section 38) or forestry operation in an RFA region (as defined by section 40). ANEDO opposed this amendment, considering this limit on Ministerial consideration to be unwarranted.

In light of the above, ANEDO submits that RFAs have been ineffective in protecting forest species and habitats. We believe that RFAs are the result of a flawed and scientifically unsound process that privileged economic concerns over the environment. Thus, in order for forest species and habitats to be substantively protected, the *EPBC Act* must apply to RFA forestry operations either through a new land clearing trigger or using existing triggers (such as where forestry operations are likely to have significant impacts on biodiversity and threatened species). ANEDO therefore strongly supports repealing the industry specific exclusion from the *EPBC Act* for forestry operations under RFAs, as these are failing to protect biodiversity.

Invasive species

Currently, the main ways that invasive species are recognised in the *EPBC Act* is through the listing process and the assessment of proposals to import new species.

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[41] Hollander, R. 2004, 'Changing place?: Commonwealth and State Government performance and regional forest agreements.' Paper presented to the Australasian Political Studies Association Conference, University of Adelaide; Redwood, J. 2001, 'Sweet RFA', *Alternative Law Journal* , 26 at 255. Mackey, B. 1999, 'Regional forest agreements – business as usual in the Southern Region? *National Parks Journal* 43, 6, Pgs 10-12.

ANEDO submits that the risk assessment process for the importation of new species seems to work relatively well, with some loopholes[42], and is a rare example of the precautionary principle being implemented. ANEDO supports the continuation and strengthening of these controls due to the potentially serious environmental and economic consequences of invasive species. ANEDO would therefore strongly support the development of regulations to prohibit the trade in invasive plant species of national importance, combined with state and territory commitment to prohibit these same species under their respective laws.[43]

However, due to the lack of regulations on invasive species made under the Act and the deficiencies in state legislative lists of invasive species (except WA), ANEDO submits that the control of invasive species could be improved by inclusion of an invasive species trigger. Currently, graziers are planting a variety of invasive pasture plants in areas from which they may spread to natural environments and cause harm to MNES. But there is no obvious route to trigger an assessment despite potentially significant impacts – for example, tall Wheat Grass in Victoria has the potential to invade virtually all the Ramsar-listed saline and sub-saline wetlands in Victoria as well as non-listed wetlands, and is being promoted and planted as a salinity solution.[44] ANEDO therefore recommends there be consideration of appropriate threshold conditions for triggering an assessment (such as where an action involves any species from a national environmentally harmful invasive species list in sensitive locations).

ANEDO is willing to engage further with the government on the precise details and characterisation of an invasive species trigger.

Water

The Commonwealth has signalled a clear intent to become more involved in water management, especially in the Murray Darling Basin. ANEDO supports an enhanced Commonwealth role for such a vital cross-jurisdictional issue. During debate on the 2007 Water Bill, ANEDO made recommendations on including environmental protections in the Bill. The Government response at the time was that the *Water Act 2007* was resource use legislation, and environmental considerations (such as environmental flows to wetlands) were already dealt with under the *EPBC Act*.[45] However, ANEDO submits that it is essential that there are

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

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

[44] Carol Booth *pers. comm.*

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

clear links between the *Water Act* and the *EPBC Act* to ensure environmental considerations are fully considered and do not disappear down the gap between the two Acts.

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

The trigger should also focus on the use of water which significantly impacts the Great Artesian Basin such as operations by mining companies so as to ensure that the resources in the Basin remain for future generations.

In addition, serious environmental implications can result from the failure to release environmental flows of water to regions in need. The Coorong and Lower Lakes face permanent environmental damage due to the government's failure to release such environmental flows. The National Water Plan, agreed to in March 2008 by the Commonwealth Government and the State Governments, is likely to take until at least 2011 to implement. This is too late for the internationally listed site which faces permanent damage if environmental flows are not released urgently. The *EPBC Act* does not presently contain a trigger requiring a release of such flows. ANEDO proposes a more proactive approach, being a trigger enabling the Minister to release environmental flows to areas in need. The trigger should include an exemption from compliance with the MBDC cap.

1(d) Is the definition of an 'action' in the Act appropriate?

ANEDO supports a broader definition of 'action' in the *EPBC Act*. We submit that there is a need to ensure that any actions that have the potential to impact on matters of national environmental significance are captured by the Act, whether direct or indirect.

Consequently, the definition of 'action' should be extended to encompass any form of government authorisation and the granting of government financial grants. Indeed, funding decisions and other approvals may have major environmental impacts in and of themselves. For example drought assistance may encourage overstocking, resulting in land degradation, and tax breaks for company cars probably lead to increased transport emissions. A mechanism for reviewing government funding decisions (especially drought and industry assistance packages) would be welcome, to ensure that they do not provide perverse incentives for environmentally harmful practices. There is therefore a need to ensure that in cases

where significant impacts are likely to flow from funding actions the *EPBC Act* is triggered.

1(e) What kind of impacts should be considered under the Act? Does the Act adequately encompass not just direct but also indirect impacts?

ANEDO submits that to be effective, the *EPBC Act* must require the consideration of all impacts resulting from an action, whether direct, indirect or cumulative.

In 2006, ANEDO supported the amendment to s527E of the Act which made it clear that 'impact' under the Act includes indirect impacts resulting from an activity. This amendment was consistent with the Nathan Dam decision.[46] We support the retention of this provision and believe it adequately encompasses indirect impacts.

However, the Act does not currently require or have the capacity to assess the cumulative impacts of development. This will be discussed in **Question 8** below.

1(f) Does the test of significance, in the context of actions having a 'significant' impact on a matter of NES, operate effectively in practice? If you think that there should be another test, what should it be?

ANEDO is of the opinion that the test of significance is an appropriate test for determining which proposals require approval under the *EPBC Act*. However, we have observed problems with;

- the application of the test, particularly attributed to confusion about what the test requires,
- what 'significant' means, and
- a failure by some proponents to refer projects that seems to clearly require referral.

Although the Department has published administrative guidelines for proponents to assist them in determining whether an action has, will have, or is likely to have, a significant impact on a matter of national environmental significance, there is still considerable uncertainty and dissatisfaction with the test of significance. Furthermore, members of the public and community groups often disagree with the merits of a decision by the Minister as to whether a project requires approval under the Act. We discuss the referral process in further detail in **Question 2 and 3**.

We believe that these current problems in applying the test are symptomatic of the very wide discretion given to the Minister in making the controlled action decision. Indeed, the Act does not prescribe any criteria (other than a requirement to consider public submissions and all 'adverse impacts' of the action) that the

[46] *Minister for the Environment and Heritage v Queensland Conservation Council Inc and WWF Australia* [2004] FCAFC 190 30 July 2004.

Minister must consider in making the decision. ANEDO recommends that the Act be amended to incorporate a list of considerations that the Minister must take into account in determining whether an action is likely to have a significant impact on a MNES. These considerations should only relate to environmental factors, because economic and social factors are not relevant to determining whether an action will have a significant environmental impact on MNES. This approach is similar to that taken under the NSW *Environmental Planning and Assessment Act 1979*, which requires seven ecological factors to be taken into account in determining whether a development proposal is likely to have a significant impact on threatened species or endangered ecological communities. These considerations are:

> (*a) in the case of a threatened species, whether the action proposed is likely to have an adverse effect on the life cycle of the species such that a viable local population of the species is likely to be placed at risk of extinction;*
> *(b) in the case of an endangered population, whether the action proposed is likely to have an adverse effect on the life cycle of the species that constitutes the endangered population such that a viable local population of the species is likely to be placed at risk of extinction;*
> *(c) in the case of an endangered ecological community or critically endangered ecological community, whether the action proposed;*
>
> > *(i) is likely to have an adverse effect on the extent of the ecological community such that its local occurrence is likely to be placed at risk of extinction, or*
> > *(ii) is likely to substantially and adversely modify the composition of the ecological community such that its local occurrence is likely to be placed at risk of extinction;*
>
> *(d) in relation to the habitat of a threatened species, population or ecological community:*
>
> > *(i) the extent to which habitat is likely to be removed or modified as a result of the action proposed, and*
> > *(ii) whether an area of habitat is likely to become fragmented or isolated from other areas of habitat as a result of the proposed action, and*
> > *(iii) the importance of the habitat to be removed, modified, fragmented or isolated to the long-term survival of the species, population or ecological community in the locality,*
>
> *(e) whether the action proposed is likely to have an adverse effect on critical habitat (either directly or indirectly),*
> *(f) whether the action proposed is consistent with the objectives or actions of a recovery plan or threat abatement plan,*
> *(g) whether the action proposed constitutes or is part of a key threatening process or is likely to result in the operation of, or increase the impact of, a key threatening process.*

However, these considerations are confined to the assessment of impacts on threatened species and ecological communities. As the *EPBC Act* is broader, ecological factors would need to be prescribed to enable assessment of all MNES, such as specific considerations for RAMSAR wetlands and migratory species.

ANEDO believes that fettering the Minister's discretion by confining the controlled action decision to a consideration of particular matters, would lead to better decisions, provide more certainty for proponents and the community, and allow the public to make better submissions on referrals.

Summary and Recommendations – Scope of the Act

- The objects of the Act should be retained. However, a new climate change object should be added that requires steps to be taken to avoid, minimise or address the impact of climate change on MNES.
- Attention should be paid to implementing appropriate provisions that operationalise the objects of the Act.
- A more substantive approach to ESD is required in the Act to ensure that ESD is reflected in outcomes, not just procedures. ESD should be given overriding weight in decision-making or made the overarching object of the Act.
- ANEDO submits that the current triggers relating to wetlands, migratory species, nuclear actions and the marine environment be strengthened.
- ANEDO submits that the Act be amended to include new MNES:

    - *Greenhouse gas emissions* - ANEDO recommends that the Act be amended to include a greenhouse gas emission trigger that recognises any action that would result in the emission of over 100,000 tonnes of CO2 equivalent per year as a matter of national environmental significance.
    - *Land clearing* - ANEDO recommends that the Act be amended to include a comprehensive land clearing trigger which comprising three discrete elements. First, a trigger for the clearing of native vegetation over 100 ha in any two year period; second, a trigger for the clearing of any area of native vegetation which provides habitat for listed threatened species or ecological communities, or listed critical habitat; and third, a schedule of activities that would trigger the Act regardless of the hectares proposed to be cleared (for example, major coastal resort developments).
    - *Invasive species* - ANEDO recommends there be consideration of appropriate threshold conditions for triggering an assessment where an action involves any species from a national environmentally harmful invasive species list in sensitive locations.
    - *Water extraction, and environmental water flows* - ANEDO recommends that a trigger be included for abstraction of surface and ground water resources over 10,000 megalitres which is likely to have a significant impact on aquatic or groundwater-dependent ecosystems. The focus of the trigger should be on major development projects in the Murray Darling Basin and that affect the Great Artesian Basin. ANEDO also proposes a more proactive approach being a trigger enabling the Minister to release environmental flows to areas in need.
- ANEDO submits the exemption from assessment for RFAs be removed from the Act as they are based on flawed and scientifically unsound processes. The Act must apply to all forestry operations in order to

effectively protect threatened species.

- The definition of 'action' in the Act should be broadened to include any form of government authorisation or financial grant.
- ANEDO supports s527E which requires the Minister to consider indirect impacts in addition to direct impacts of an action. However, the Act must also include the consideration of cumulative impacts.
- The test of significance should be supplemented by specific considerations fettering the discretion of the Minister when determining whether an action is a controlled action.

II. Assessments and Approvals

Q2 Does the public understand their responsibilities under the Act to refer proposed actions to the Minister? **AND** *Q3 Are appropriate projects being referred for approval? Does the referral process meet the objects of the Act?*

It is difficult to accurately gauge the public's understanding of its responsibility to refer proposed actions to the Minister, or the extent to which projects that should have been referred under *EPBC Act* have actually been referred. This would require extensive research. However, in ANEDO's opinion the provisions in the Act outlining the responsibilities of proponents to refer proposed actions are quite clear. These provisions are also supplemented by government guidelines that are industry specific to assist proponents in determining whether they need to refer an action.

Despite the relatively unambiguous referral process set out in the Act, many EDO offices have observed problems with the referral process, both in relation to a failure by proponents to refer projects and the nature of the referrals themselves. In our submission to the Senate Inquiry in 2008 we highlighted several case studies of projects that would clearly have a significant impact on MNES, however were not referred by proponents and where no subsequent action was taken against proponents for the failure to do so.[47] We also regularly receive information from clients and community groups about the failure by proponents to refer particular projects. Furthermore, we have observed that proposals often get assessed under the *EPBC Act* only after complaints to the Department by members of the community or where the Minister calls in the development, rather than at the behest of proponents.

It is unclear whether the observed failure by proponents to properly refer projects stems from a genuine misunderstanding about their responsibility to refer or a sense that the Act is not being adequately enforced and therefore a failure to refer

[47] See ANEDO submission to the Inquiry into the operation of the *Environment Protection and Biodiversity Conservation Act 1999* – September 2008. Found at: http://www.aph.gov.au/Senate/committee/eca_ctte/epbc_act/submissions/sub90_revised.pdf.

might 'slip through the cracks'. Inadequate enforcement of the referral provisions may be contributing to a situation where some proponents adopt a default position of non-referral over referral. Indeed, ANEDO knows of no cases where enforcement action has been taken against a party who failed to refer a proposal even after the Department was made aware of the non-referral.

To address the problems with the referral process, ANEDO makes three suggestions. *First*, the Act should be amended to allow any member of the community to refer an action to the Minister if they believe that the action is likely to have a significant impact on MNES and has not been referred. This is already happening in an ad hoc manner and should be codified in the Act. Furthermore, this would provide an additional safety net for ensuring that all appropriate projects are captured by the Act. Some State EIA processes already allow referrals by the community such as is provided for in WA under the Environment Protection Act 1986.[48] This works well as a safeguard against proponents not referring their proposals and ensures many more significant projects are captured than would otherwise occur.

Second, there needs to be greater monitoring of projects by the Department to ensure that actions are being referred. This could involve the appointment of a departmental officer whose role would involve monitoring state and territory development applications to determine which projects and developments should be called in by the Minister and those that should be referred.

Third, the amendments proposed to the significant impact test (discussed in **Question 1(f)** above) are likely to provide better guidance to proponents as to whether they should refer their projects.

Q4 Do you think that the Act contains an effective hierarchy of environmental assessment approaches, ranging from assessment on referral information to assessment by public inquiry? Are the methods of assessment providing the required information for informed approval decisions?

ANEDO is of the opinion that the environmental assessment provisions of the *EPBC Act* need to ensure that approval decisions are informed by rigorous assessment processes and sound scientific information in order to determine the true environmental impacts, both direct and indirect, of proposed actions. The current framework, through its use of five different assessment options, appears to satisfy these requirements. ANEDO submits that it does not matter which approach is taken as long as the process is comprehensive and includes strong public consultation provisions.

[48] Section 38 of the *Environmental Protection Act 1986* (WA) provides that any person can refer a significant proposal to the EPA Referrals must be in writing and the EPA must decide within 28 days of the referral whether to assess or not.

In terms of how effective environmental assessments have been under the Act, it is difficult to provide a general comment. Much depends on the individual circumstances of each assessment. ANEDO has come across both good and bad assessments under the Act. This highlights the importance of public consultation as a means of identifying problems with assessments and identifying impacts that have been overlooked in assessments conducted by the proponent.

ANEDO notes that with the finalisation of bilateral agreements with every state and territory, the environmental assessment processes in the Act will become largely redundant. The quality and scope of assessments under the Act will depend largely on state processes. Bilateral agreements are discussed in further detail below at **Question 6.**

Q5 Does the Act provide appropriate scope for public participation and transparency in the assessment and approval process under the Act?

ANEDO believes that the *EPBC Act* has reasonably good public participation provisions in relation to the assessment and approval process under the Act. We consider public participation at the following 3 stages:

- controlled action decision;
- environmental assessment; and
- approval.

Controlled action decision

ANEDO believes that the 10 day consultation period in relation to whether an action is a controlled action is inadequate. This does not provide adequate time for members of the public and community groups to gather sufficient information on whether an action is likely to have a significant impact on MNES. Obtaining such information often requires technical and scientific input that takes time. Since the controlled action decision determines whether assessment and approval of the action is needed under the Act, it is crucial that the public is able to participate in a meaningful manner. We suggest the period be extended to 28 business days. Furthermore, ANEDO recommends that 'business day' should be defined to exclude any business day from 20 December to 5 January.[49] This is explored in further detail in **Question 41**.

ANEDO supports the requirement for the Minister to provide reasons for his or her decision as to whether an action is a controlled action. This promotes transparency in decision-making and should be replicated throughout the Act wherever a discretion is present.

[49] This definition is adopted by the Queensland *Integrated Planning Act 1997*.

Environmental assessment

The public consultation period in relation to environmental assessments under the Act is 10 days for assessments based on referral information and preliminary documentation, 20 days for Public Environment Reports and Environmental Impact Statements and 28 days for strategic assessments.

Statistics provided in the Discussion Paper show that assessments based on preliminary documentation accounts for 48% of all assessments under the Act as at 30 June 2008. In light of this, and our comments above, we believe that 10 days is insufficient for comment. Consultation should be extended to 28 business days, regardless of the method of assessment. As above, 'business day' should be defined to exclude any business day from 20 December to 5 January.

It is important to note that the public participation provisions in assessment processes do not apply where a bilateral agreement has been approved in relation to a state assessment process.[50] Therefore the breadth of public consultation depends on how good the public participation provisions are in the relevant state, which may not be comprehensive. We discuss bilateral agreements in **Question 6** below.

Approval

The Minister is required to invite comments from the public on whether to approve a controlled action and what conditions to attach. The period of consultation is 10 days. As above, we suggest that this period be extended to 28 business days.

Access to information

ANEDO notes that there is no requirement under section 170A of the Act (which prescribes the matters that must be made publicly available online on a weekly basis), that submissions made to the Minister in relation to a controlled action, assessment or approval be made public. ANEDO submits that any submissions received should be made public. This will improve the public submission process as it allows for community groups to identify common concerns and share information.

One other issue in relation to access to information that ANEDO has observed is that the assessment information published online is often incomplete or refers to assessment documents that may only be examined in person at a specified office. One example is the Hinchinbrook Resort Development where the Public Environment Report was not available online but had to be examined in person at a particular office.[51] We urge the Department to ensure that the community has

[50] Section 83, *EPBC Act*.
[51] Available at: http://www.environment.gov.au/cgibin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=1246.

access to all relevant documents in order to allow the community to participate fully in the process. Amendments should be made to require the publication of an electronic version of all assessment documents.

Summary

Although public participation in relation to the assessment and approval process is reasonably well defined, there is a need to extend consultation periods and provide better access to relevant documentation, such as public submissions and assessment documents. Moreover, the need for reasons should be extended to encompass all decisions, not just the controlled action decision.

Please note that ANEDO has significant concerns with the obstacles preventing the public from challenging decisions made under the Act, both on the merits and legality of the decision. This will be discussed in detail in **Questions 41** and **42.**

Q6 Does the Act operate effectively in conjunction with State and Territory planning and environmental impact legislation? Are existing bilateral agreements achieving the objects of the Act? **AND** *Q7 Are there further opportunities to harmonise the Act with other State and Territory legislation, planning and approval processes?*

ANEDO believes that the *EPBC Act* has an important role to play as an adjunct to state laws, as it allows the Commonwealth to play a gatekeeper role and grants the ability to veto developments that are likely to threaten MNES. This safety net ensures that MNES are not threatened by weak state laws and political considerations. Moreover, this also allows the Commonwealth to ensure that Australia's international obligations are being met, which is the Commonwealth's responsibility.

There have been concerns that the Commonwealth has not been fulfilling this role effectively, and that there are projects being approved under the Act that are clearly inappropriate. On the other hand, it is clear that since the change of government, the Act is working better, with 6 refusals being made in the last 12 months. Some projects which are obviously inappropriate are being refused by the Minister, which is a welcome development. However, ANEDO submits that the Act will work even more effectively in conjunction with state laws if the amendments we suggest throughout this submission, which include placing appropriate fetters on discretion, are adopted. Reliance on the political will of the government of the day is insufficient.

Bilateral agreements

ANEDO has significant concerns with the existing bilateral agreements approved under the Act. We highlighted problems with existing bilaterals in our submission

to the Senate Committee inquiry in some detail.[52]

ANEDO has no problems with assessment bilaterals in theory, but their practical success is contingent on the quality of the process being accredited. We submit that bilateral agreements will only be successful in achieving the objects of the Act if they accredit robust state assessment processes that allow for the impact on MNES to be fully understood and determined in a scientifically sound and principled manner and that reflect best practice assessment processes. If bad processes are endorsed then this is likely to have significant negative impacts on biodiversity, which is contrary to the objects of the Act.

In contrast, rather than implement best practice assessment standards, the bilateral agreements that currently exist between the Commonwealth and the various State and Territory planning and environmental impact legislation appear to be designed primarily to reduce duplication in the assessment process rather than institute better standards. For example, the NSW bilateral accredits the assessment process under Part 3A of the *Environmental Planning and Assessment Act 1979* which applies to major infrastructure projects even though that process grants a wide discretion on how environmental assessment are done and public participation is significantly restricted.[53] Furthermore, under the NSW bilateral agreement, the

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[52] See ANEDO submission to the Inquiry into the operation of the *Environment Protection and Biodiversity Conservation Act 1999* – September 2008. Found at: http://www.aph.gov.au/Senate/committee/eca_ctte/epbc_act/submissions/sub90_revised.pdf.

[53] A key concern is that major infrastructure projects under Part 3A treat many elements of public participation as discretionary. For example, while the environmental assessment must be exhibited:

1. there is no requirement for the Minister to have made any guidelines in the first instance: section 75F(1);
2. there is no requirement for the proponent to respond to the issues raised (except if directed): section 75H(2);
3. there is no requirement for the Director-General to require the proponent to make a preferred project report available to the public, notwithstanding that significant changes have been proposed to the project: section 75(H)(7);
4. there is no requirement for the Director General to include submissions in the report to the Minister: section 75I(2);
5. there is no requirement for the Minister to take such submissions into account in making his/her decision: section 75J(2);
6. there is no requirement for independent panels, when constituted, to hear from the community: section 75G(4);
7. there is no requirement for regulations to make provision for public exhibition, notification and registers: section 75Z; and
8. there is no requirement for any community consultations provisions to be abided by except to make the environmental assessment available to the public: section 75X(5).

state may make its decision to grant approval to the project *before* the Commonwealth has completed its assessment. It is recognised that the Commonwealth does not control the state process and cannot stop the state approving the project if it is minded to do so. However this limits the flexibility of the Commonwealth in requesting modifications to the proposal prior to approval. It is suggested that under the bilateral agreement the state should agree to wait until the Commonwealth Minister has carried out an assessment and provided a preliminary indication of terms of approval before granting state approval. This would allow any state approval to be tailored to Commonwealth requirements.

In light of the above, ANEDO submits that the currently approved bilaterals must be reviewed as soon as practicable to address the problems with state processes and to ensure that only best practice processes are endorsed. Moreover, the 5 yearly reviews must be comprehensive and measure the extent to which MNES have been adequately assessed.

Removal of the prior authorised activities exemption

The Act currently exempts activities authorised or approved under a law of a State or Territory prior to the commencement of the Act (16 July 2000) from assessment and approval.[54] Allowing an action to continue, despite the fact is has been demonstrated, or is likely, to have a significant impact on a MNES, is contrary to the principles of ESD. ANEDO therefore submits that this exemption be removed from the Act.

Further harmonisation of laws

ANEDO is not opposed to the harmonisation of state and federal laws and we support efficient legislative processes (including the removal of unnecessary duplication) but only as long as genuine environmental protections are not discarded in the quest for streamlining. Done haphazardly, harmonisation tends to instil a lowest common denominator approach. Indeed, given the problems with assessment bilaterals discussed above, ANEDO does not support further harmonisation of state and federal laws under the *EPBC Act* unless a best practice approach is demonstrated.

In this vein, we are opposed to the accreditation of state approval processes through approval bilateral agreements. It is difficult to have confidence that streamlining will function to protect MNES. Often state laws are not effective in protecting such matters, and the only ability to substantively regulate impacts occurs through the

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Furthermore, Part 3A projects are exempt from the need to obtain many of the authorisations required under other legislation (under section 75U). There is therefore no guarantee of adequate assessment of, for example, local heritage, aboriginal cultural heritage, greenhouse gas emissions, threatened species and native vegetation except potentially by exercise of discretion to impose conditions dealing with these matters. It is inappropriate to accredit a process that potentially excludes comprehensive assessment of such matters.

[54] Sections 43A & 43B, *EPBC Act.*

EPBC Act. Furthermore, if approval bilaterals are approved alongside assessment bilaterals, then the Commonwealth's role in regulating MNES would be vastly reduced, indeed would arguably be redundant, which we oppose.

We also highlight the often overlooked fact that the *EPBC Act* and state laws play concurrent, but *different* roles which makes harmonisation problematic. State laws are restricted in vision to state or regional issues, which is their primary ambit. The *EPBC Act* on the other hand ensures that nationally significant environmental matters are protected. These synchronous processes should be maintained.

Q8 Does the use of strategic approaches, such as strategic assessments and bioregional plans, provide opportunities for streamlining Commonwealth involvement in environmental issues? Do such approaches provide an appropriate means for dealing with cumulative impacts?

ANEDO has consistently highlighted that one of the more fundamental inadequacies of the Act has been the absence of a mechanism in the Act that requires decision makers to take into account the overall cumulative impacts of unrelated developments.

The assessment processes in the Act at present are predicated on a site by site approach. This means that decisions relating to actions are restricted to the subject site in question and there is very limited scope to consider the impacts of an action on a broader scale. This results in fragmentation and degradation of habitats and the reduction of species' resilience to survive. Indeed, our experience with the Act has shown that there is no assessment of the overall impact of a series of unrelated developments, for example on critical habitat for certain species or World Heritage values. For example, in the context of the Great Barrier Reef World Heritage Area, which extends over 2000 km, a development proponent may argue that one development will not impact significantly on the values. This conclusion would be different if cumulative development impacts were properly assessed. The Act also cannot effectively consider "legacy" decisions that may have been made before the Act was introduced, but that have significant cumulative impacts over time, for example, impacts on the Coorong.

A number of broader landscape scale assessment options based on strategic assessments are now being explored across Australia. ANEDO supports robust strategic assessments as the key means of addressing cumulative impacts. However, strategic assessment processes must be subject to robust and strict criteria. We caution that the extent to which strategic environmental assessments (SEA's) will provide adequate protection of biodiversity across the landscape will depend on the criteria considered and the process of assessment. There is a danger that if not done properly, strategic assessments will instil a much lower level of environmental protection than a site by site approach. This has already been observed in the RFA strategic process which has clearly failed in its protection of biodiversity. See **Question 1(c)** for discussion of the failure of RFAs.

Currently SEAs are optional which allow the Federal Minister to exempt certain actions from assessment as controlled actions if they are carried out in accordance with a plan or policy approved under s146B of the Act. However the SEA provisions do not prevent other approvals being granted which are inconsistent with the approved plan or policy, so long as they obtain separate controlled action approvals. This undermines the benefits of a strategic assessment. It is suggested that the Act should be amended to provide that once the Federal Minister decides that actions under a plan or policy are to be the subject of a strategic assessment, then a strategic assessment must be carried out and actions to which that plan or policy relates and which are controlled actions cannot be carried out unless, and until, a SEA approval is granted, and must be in accordance with the terms of any such approval. If the Federal Minister after carrying out the SEA determines not to grant approval, then the situation would revert to normal, where each individual project needs to the be subject of a controlled action approval, however the findings of the SEA should be a relevant consideration in determining whether to grant approval to individual actions.

This leads to a further point. The Act provides that a SEA approval may be subject to conditions, but does not indicate the types of conditions that may be imposed or stipulate the consequences of non-compliance. This may lead to conditions being practically unenforceable. It is suggested that the Act should distinguish between two types of conditions, firstly conditions which relate to the manner of implementing the plan or policy, which will usually be the responsibility of the relevant state government, and secondly, conditions which relate to the carrying out of individual actions, which would usually be the responsibility of the proponent. The consequence of non-compliance with the first type of condition would be that the SEA ceases to apply. Non-compliance with the second type of condition should attract criminal sanctions.

In light of the above, we submit that strategic assessments need to be genuine and scientifically sound processes rather than processes that simply reduce the regulatory burden on developers at the expense of the environment. In terms of specific recommendations, ANEDO submits that the provisions of the *EPBC Act* need to be strengthened to contain what is essentially a two stage process to address cumulative impacts in a substantive manner.

The first stage would incorporate the use of strategic assessments into the Act in a consolidated manner. Strategic environmental assessments (SEA) are the application of environmental impact assessment to policies, plans and programs.[55] SEAs should implement the use of landscape scale conservation and development plans to identify those areas where the impacts of development are unacceptable, as well as sites where the consequences of infrastructure would be least environmentally detrimental. However, as above, SEAs need to be conducted in a way that adheres to strict criteria to fetter the discretion of the Minister and restrict

[55] Marsden, S. 1999, 'Strategic Environmental Assessment in Australia – An Evaluation of Section 146 of the *Environment Protection and Biodiversity Conservation Act 1999*', *Griffith Law Review*, Vol 8, No 2.

the opportunity for subjective decision making. Additionally there needs to be clear provisions in the Act that allow for effective public participation to ensure transparency and accountability in the decision making process. Furthermore the legislation should be amended to include a provision that stipulates if the SEA is not achieving the intended environmental outcomes, an opportunity exists to suspend or revoke the declaration. This provides an ability to respond to changing circumstances or new information – this is particularly important in the context of the irreversibility of biodiversity loss and the uncertainty resulting from climate change.

The second stage of the process concerns where the Minister is deciding whether to approve a controlled action that may impact upon a MNES. A specific head of consideration should exist in the legislation requiring the Minister to consider the cumulative impacts (both past and present) of a project on a MNES.

Summary and Recommendations – Assessments and Approvals

- To improve the referral process the Act should be amended to allow any person to make a referral to the Minister rather than rely on the proponent. Moreover, the Department needs to ensure there is a systematic process of reviewing state development processes to identify projects that should be referred.
- The Act contains an appropriate range of environmental assessment tools, but the implementation of these needs to ensure that assessments are based on sound scientific information and public input.
- ANEDO supports the requirement for the Minister to provide reasons for a controlled action decision. We submit that reasons should be required under the Act in relation to all decisions.
- ANEDO submits that the public consultation period in relation to controlled actions, environmental assessment and approval should be extended to 28 business days for all actions. However, 'business day' should exclude any day from 20 December to 5 January.
- ANEDO recommends that s170A be amended to include a requirement to publish public submissions received in relation to a project online to allow for better coordination and sharing of information between groups.
- ANEDO submits that Actions with prior authorisation exemption be removed from the Act.
- ANEDO submits that the Act should be amended to require that all assessment documentation is available online.

III. Biodiversity

Q9 Does the Act provide an effective regulatory framework for the conservation of Australia's biodiversity? If not, what improvements could be made?

The response to this question is in two parts. Part 1 addresses the inadequacies of the current regulatory framework and provides suggestions for improvement. Part 2 will look at the potential benefits arising from a reformulated framework that emphasises the preservation of ecosystem functionality, as opposed to the current species based approach.

Part 1 – Inadequacies and improvements of the current system

ANEDO submits that the current regulatory framework that governs the conservation of Australia's biodiversity is failing to produce positive environmental outcomes in terms of biodiversity protection. This is primarily as a result of inadequacies in the following five areas:

a) failure to take into account cumulative impacts;
b) an ineffective listing process;
c) an inadequate recovery planning process;
d) insufficient resources; and
e) underutilisation of the Critical Habitat mechanism.

We address these in turn.

a) Failure to take into account cumulative impacts

This is an issue that ANEDO has raised in numerous submissions regarding the Act. The result of cumulative impacts is not taken into account and as a result, many actions are failing to be correctly assessed. This issue, as well as potential remedies, is addressed in more detail in **Question 8**.

b) An ineffective listing processes

The 2006 amendments brought about a number of changes that contributed to an ineffective listing process being established. We discuss these in greater detail in **Question 12**.

c) An inadequate recovery planning process

Recovery planning is failing due to the lack of resourcing, the lack of recovery plans for each threatened species, the absence of a mechanism that prioritises recovery plans and all of which are contributing to the lack of on-the-ground results in helping threatened species to survive and recover. These issues will be further addressed in **Questions 15** and **16**.

d) Insufficient resources

The lack of resources, especially in terms of the amount allocated to implementing recovery plans, is thwarting effective conservation and rehabilitation actions that are required to re-establish threatened species and maintain viable population levels. These issues are further discussed in **Questions 16, 35, 36** and **37**.

e) Underutilisation of the Critical Habitat mechanism

Critical habitat listing is an acutely under-utilised mechanism in the Act, with only 5 critical habitats currently listed on the Register of critical habitats.[56] The 2006 amendments provided that in considering whether to list habitat on the Register, the Minister must take into account the potential conservation benefit of listing the habitat[57] however this is not the overarching consideration. The Act provides a broad discretion for other considerations (including political considerations) to be taken into account or prescribed by regulations. Such considerations that must be taken into account include the "interests"[58] of landholders, which are not defined and provide further unfettered discretion to the Minister. Additionally the legislation provides that particular material on the register will not be made publicly available if "the interests of relevant land holders may be impeded or compromised."[59] Both these factors have the potential to undermine the transparency of the critical habitat listing process.

ANEDO submits that a more formal process for public nominations of critical habitat be provided in the Act that sets out clear criteria (including timeframes) for the making of nominations and the consideration of these. The Act should also be amended to provide a mechanism for the automatic listing of critical habitat identified in Recovery Plans analogous to the previous s185 'bulk listing' provisions for ecological communities. A minimum timeframe of 2 years should be established within which existing recovery plans (i.e. 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). Additionally, the Act should also be amended to require the Minister to list critical habitat for all species and communities that are listed as critically endangered.

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

[57] Section 207A(1), *EPBC Act.*

[58] Section 207A(3A), *EPBC Act.*

[59] Section 207A(1), *EPBC Act.*

Furthermore, ANEDO reiterates our previous recommendation that provision for emergency interim protection orders should 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 would allow the impacts to be more properly assessed before incremental loss significantly affects the cassowary population.[60]

Part 2 – Ecosystems Based Approach

Fostering broad debate on biodiversity conservation goals and objectives

Given the poor, or at best variable, track record of some of the mechanisms for protecting biodiversity[61] under the *EPBC Act*, ANEDO submits that there is value in promoting a wide ranging and public debate on the whole premise and approach of biodiversity conservation in Australia. This is particularly timely given that predictions of the impacts of climate change on biodiversity suggest that biodiversity management will become increasingly difficult as species and ecological communities change their geographic distributions, abundances and interactions as the climate changes. In contrast, current conservation objectives focus on maintaining the status-quo, such as maintaining specific populations and ecological communities in given locations and abundances (at levels that are viable in the long-term). For example, the *EPBC Act* aims to protect ecological communities, which are identified inter alia in relation to the current species composition of the community, often in a particular location.[62] As a result, many scientists have suggested that with the threat of climate change, current conservation objectives will be impossible to achieve, and should be re-assessed.[63] For example Dunlop and Brown (2008) argue that facilitating change, rather than trying to prevent it from happening, as is the current approach, will minimise the risk that species will become threatened or go extinct in the long-term due to climate change. This

[60] 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.

[61] Data published in the 2006 State of the Environment Report indicates that threatened species in Tasmania were more likely to have an increasing or stable population if no recovery actions were undertaken for that species, than if there were recovery actions being implemented. Available online at http://www.environment.gov.au/soe/2006/publications/drs/indicator/95/index.html. [Date accessed 12/2/09].

[62] E.g. Natural Temperate Grassland of the Southern Tablelands of NSW and the ACT. Advice to minister available online at http://www.environment.gov.au/biodiversity/threatened/communities/natural-temperate-grasslands.html and Weeping Myall Woodlands. Advice to Minister available online at http://www.environment.gov.au/biodiversity/threatened/communities/pubs/98-listing-advice.pdf.

[63] Dunlop, M. and Brown, P. 2008, 'Implications of climate change for Australia's National Reserve System: A preliminary assessment.' Report to the Department of Climate Change, February 2008. Department of Climate Change, Canberra, Australia; Hoegh-Guldburg, O., Hughes, L., McIntyre, S., Lindenmayer, D., Parmesan, C., Possingham, H. and Thomas, C. 2008, 'Assisted colonisation and rapid climate change' *Science* 321:345-346.

suggests that our current approaches may be inappropriate and ineffective, which should prompt discussion on what our conservation goals and management approaches should be. This big picture debate aimed at setting the goals of biodiversity conservation in the coming years, including what to save and how, is one that needs to happen at both Commonwealth and state levels and one which should be opened up for community input. Once this has occurred, we can look to scientists and other specialists to establish the best means of achieving those goals. We discuss the best ways to accommodate climate change in further detail at **Question 19**.

From a species based approach to an ecosystem based approach

Assuming the goal of biodiversity conservation in Australia is to conserve all biodiversity, given our international commitments to do so, we submit that the best way of facilitating natural adaptation of biodiversity (both in the face of climate change, as well as in response to the vast array of threats that are currently faced such as invasive species, habitat fragmentation and changing fire regimes) is to build the resilience of ecosystems.[64]

Therefore, even in the absence of climate change, it is appropriate to consider a changed focus of biodiversity conservation under the *EPBC Act*, from one based on the protection of individual threatened species or listed ecological communities, to one focussed on enhancing ecosystem resilience and maintaining ecosystem function, and thereby ultimately protecting the most species.[65]

Protecting key functional species and diversity within functional groups may be a method of achieving this, given their importance in maintaining ecosystem function. Scientists have long emphasised the importance of 'key functional species' or groups (a collection of species that perform a similar function).[66]

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[64] Noss, R. 2001, 'Beyond Kyoto: Forest management in a time of rapid climate change' *Conservation Biology* 15(3): 578-590; Forman, R. 1995, 'Some general principles of landscape and regional ecology' *Landscape Ecology* 10(3):133-142; Noss, R. 2001, 'Beyond Kyoto: Forest management in a time of rapid climate change' *Conservation Biology* 15(3): 578-590; Fischer, J., Lindenmayer, D. and Manning, A. 2006, 'Biodiversity, ecosystem function, and resilience: ten guiding principles for commodity production landscapes' *Frontiers in Ecology and Environment* 4(2): 80-86; Lindenmayer, D., Hobbs, R., Montague-Drake, R., Alexandra, J., Bennett, A., Burgman, M., Cale, P., Calhoun, A., Cramer, V., Cullen, P., Driscoll, D., Fahrig, L., Fischer, J., Franklin, J., Haila, Y., Hunter, M., Gibbons, P., Lake, S., Luck, G., MacGregor, C., McIntyre, S., MacNally, R., Manning, A., Miller, J., Mooney, H., Noss, R., Possingham, H., Saunders, D., Schmieglow, F., Scott, M., Simberloff, D., Sisk, T., Tabor, G., Walker, B., Wiens, J., Woinarski, J. and Zavaleta, E. 2008, 'A checklist for ecological management of landscapes for conservation' *Ecology Letters* 11: 78-91.

[65] McIntyre, S., Barrett, G., Kitching, R. and Recher, H. 1992, 'Species triage – seeing beyond wounded rhinos' *Conservation Biology* 6(4): 604-606; Walker, B. 1995, 'Conserving biodiversity through ecosystem resilience' *Conservation Biology* 9(4): 747-752.

[66] Walker, B. 1995, 'Conserving biodiversity through ecosystem resilience' *Conservation Biology* 9(4): 747-752; Noss, R. 2001, 'Beyond Kyoto: Forest management in a time of rapid climate change' *Conservation Biology* 15(3): 578-59; Fischer, J., Lindenmayer, D. and Manning, A. 2006, 'Biodiversity, ecosystem function, and resilience: ten guiding principles for commodity production landscapes' *Frontiers in Ecology and Environment* 4(2): 80-86.

Key functional species or groups (also known as keystone species) play an important role in maintaining ecological functions and processes, which keep ecosystems healthy and help systems to recover after disturbances (e.g. large predators whose abundance influences the abundances of species lower down the food chain, seed dispersers, or those species that create the structural components of an ecosystem). They are an important component of 'resilience' – the ability of a system to resist and recover from disturbances.[67] The maintenance of these species is particularly important as their loss may result in a range of cascading impacts through the ecosystem.[68]

Identifying what species play key functional roles will be vital. Some species may only play key roles in limited circumstances (called 'sleeping functional groups'). For example, scientists recently discovered that a batfish species (previously thought to only eat invertebrates) plays a key role in reef recovery.[69] However, the species is rare, is vulnerable to decline, and currently has no specific legal protection.[70]

The listing regime under the *EPBC Act* could potentially be amended so that key functional species are given protection under the Act and the functional roles played by species and their importance within ecosystems is considered when assessing the impact of a proposal.

Other principles established by scientists to build ecosystem resilience include:[71]

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[67] Bellwood, D., Hughes, T., Folke, C. and Nystrom, M. 2004, 'Confronting the coral reef crisis' *Nature* 429:827-833.

[68] Walker, B. 1995, 'Conserving biodiversity through ecosystem resilience' *Conservation Biology* 9(4): 747-752; Fischer, J., Lindenmayer, D. and Manning, A. 2006, 'Biodiversity, ecosystem function, and resilience: ten guiding principles for commodity production landscapes' *Frontiers in Ecology and Environment* 4(2): 80-86

[69] Bellwood D., Hughes, T. and Hoey, A. 2006, 'Sleeping Functional Group Drives Coral-Reef Recovery' 16 *Current Biology* at pp 2434-2439.

[70] ARC Centre of Excellence, Coral Reef Studies 2006, 'Batfish to the rescue' Available online at http://www.coralcoe.org.au/news_stories/batfish.html [Date accessed 9/1/09].

[71] Noss, R. 2001, 'Beyond Kyoto: Forest management in a time of rapid climate change' *Conservation Biology* 15(3): 578-590; Climate Change Science Program (US) 2008, : *Preliminary review of adaptation options for climate-sensitive ecosystems and resources.* A Report by the U.S. Climate Change Science Program and the Subcommittee on Global Change Research. [Julius, S.H., J.M. West (eds.), J.S. Baron, B. Griffith, L.A. Joyce, P. Kareiva, B.D. Keller, M.A. Palmer, C.H. Peterson, and J.M. Scott (Authors)]. U.S. Environmental Protection Agency, Washington, DC, USA, 873 pp; Forman, R. 1995, 'Some general principles of landscape and regional ecology' *Landscape Ecology* 10(3):133-142; Fischer, J., Lindenmayer, D. and Manning, A. 2006, 'Biodiversity, ecosystem function, and resilience: ten guiding principles for commodity production landscapes' *Frontiers in Ecology and Environment* 4(2): 80-86; Lindenmayer, D. and Burgman, M. 2005, *Practical Conservation Biology.* CSIRO Publishing, Australia; Pearson, R. and Dawson, T. 2005, 'Long-distance plant dispersal and habitat fragmentation: identifying conservation targets for spatial landscape planning under climate change' *Biological Conservation* 123: 389-401; and Peters, R. and Darling, J. 1985, 'The greenhouse effect and nature reserves' *BioScience* 35(11): 707-717; Dunlop, M. and Brown, P. 2008, 'Implications of climate change for Australia's National Reserve System: A preliminary assessment.' Report to the Department of Climate Change, February 2008 Department of Climate Change, Canberra, Australia; Mackey, B. 2007, 'Climate change, connectivity and biodiversity conservation' In: *Protected Areas: buffering nature against climate change. Proceedings of a*

- representation and replication – protecting a diversity of ecosystem types with multiple examples of each;
- protecting and creating large patches of vegetation;
- connectivity – to ensure dispersal and exchange of genetic material between populations;
- improved management of the matrix – managing those areas that are not reserved in a manner sympathetic to biodiversity conservation, including maintaining structural complexity; and
- identifying and protecting climate refugia.

ANEDO submits that the *EPBC Act*, through its strategic assessment provisions,[72] has the capacity to incorporate these scientific principles, thereby enabling landscape scale conservation planning to achieve much more for biodiversity conservation than the individual species and site based assessment approach currently preferred under the Act. ANEDO would welcome the opportunity for further input into guidelines or regulations surrounding these strategic assessment provisions, given that they have the potential to deal with cumulative impacts and shift the focus of biodiversity conservation from a site specific, species based approach to one that is able to focus on ecosystem resilience and function, with much greater benefits for biodiversity. We discuss cumulative impacts and strategic assessment in detail in **Question 8**.

Q10 What are your views on the process for nominating threatened species, ecological communities and key threatening processes?

In previous submissions, ANEDO has raised a number of concerns regarding the streamlining of the process for nominating and listing threatened species, ecological communities and key threatening processes.[73] The major problems with the current nomination process are outlined below.

WWF and IUCN World Commission on Protected Areas symposium, 18-19 June 2007, Canberra (eds Taylor and Figgis) pp 90-96. WWF-Australia, Sydney; Pressey, R., Cabeza, M., Watts, M., Cowling, R, and Wilson, K. 2007, 'Conservation planning in a changing world' *Trends in Ecology and Evolution* 22(11): 583-592; Lindenmayer, D., Hobbs, R., Montague-Drake, R., Alexandra, J., Bennett, A., Burgman, M., Cale, P., Calhoun, A., Cramer, V., Cullen, P., Driscoll, D., Fahrig, L., Fischer, J., Franklin, J., Haila, Y., Hunter, M., Gibbons, P., Lake, S., Luck, G., MacGregor, C., McIntyre, S., MacNally, R., Manning, A., Miller, J., Mooney, H., Noss, R., Possingham, H., Saunders, D., Schmieglow, F., Scott, M., Simberloff, D., Sisk, T., Tabor, G., Walker, B., Wiens, J., Woinarski, J. and Zavaleta, E. 2008, 'A checklist for ecological management of landscapes for conservation' *Ecology Letters* 11: 78-91.

[72] Part 10, *EPBC Act.*

[73] ANEDO's full submission on the 2006 amendments is available at: http://www.edo.org.au/policy/epbc_amendment_bill061027.pdf.

Development of Annual thematic nominations

The 2006 amendments significantly limit the public and scientific involvement in the listing of species. The Minister now decides on an annual them for nominations for that year. In deciding upon a theme, the Minister has broad discretion which may relate to a particular group of species, a particular species or a particular region of Australia.[74] There is no definitive list of criteria to guide the decision making process and so in practical terms, this means that a range of considerations may come into play, not just the conservation status of the species in determining an annual theme. It is likely that the more controversial species (such as those currently commercially exploited) are unlikely to qualify thematically. ANEDO reiterates our concern with this process and suggests that nomination and listing must be based only on scientific considerations. So, given the vulnerability of much of Australia's flora and fauna, the thematic approach should be abolished and provisions reinstated that require the assessment of all nominations.

Priority assessment list

The 2006 amendments also provided that once all nominations relating to the theme for the year are received, the Scientific Committee has 40 days to give the Minister a "Priority Assessment List."[75] There is no explicit reference to conservation status as being a relevant consideration for inclusion on the Priority Assessment List. This is inconsistent with Australia's obligations under the Convention on Biological Diversity. Further there is no public consultation on the proposed list, and the Minister may have regard to "any matter that the Minister considers appropriate"[76] in reaching this decision. It is therefore possible 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. We submit that priority listing process should be removed.

Timeframes for listing

The 2006 amendments also removed the statutory deadlines for the Scientific Committee to assess public nominations within 12 months and the requirement for the Minister to decide on nominations 90 days after receiving advice, and to grant extensions on assessments up to 5 years. As previously submitted, ANEDO recommends a tighter timeframe should be included, namely 2 years, within which the Minister must decide whether to list threatened ecological communities. Additionally DEWHA and the Scientific Committee should be provided with increased resources to enhance their capacity to complete assessments in a timely

[74] Sec 194D, *EPBC Act.*

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

[76] Section 194K(3), *EPBC Act.*

manner. This is consistent with the application of the precautionary principle as enshrined in the Act.

The repeal of section 185

In effect, this amendment[77] meant that the Scientific Committee is no longer required to assess the state and territory lists gazetted by Minister Robert Hill in 2001.[78] While this may have lightened the administrative burden for the Department and the Scientific Committee, and also eased political pressure regarding controversial listings, it is a heavy handed and arbitrary approach. It is contrary to the principles of ESD and good governance to deal with the back log of listings in this way. The removal of obligations to process and assess nominations amounts to a serious flaw in the Act and should immediately be reinstated.

Access to information

The amendments prohibit the Scientific Committee from disclosing any information used to make an assessment of any proposed amendments to the Act's list of threatened species until the amendment has been registered. Environment groups such as the Humane Society International have previously requested that the advice be made public. ANEDO supports this request in the interest of transparency and good governance.

Therefore, through removing the requirement of an annual conservation theme, amending the nomination and listing process to ensure decisions are based on the conservation status of a species, introducing tighter timeframes for assessment, reinstating section 185, and providing greater public access to assessments, the Act's nomination process would be greatly improved.

We discuss the nominations and listing process in further detail in **Question 38**.

Q11 Given the length of time required for the assessment of nominations, should the Act allow for the emergency listing of species and ecological communities which may be threatened (similar to the provisions for the emergency listing of National Heritage places)? Would the advantages of this be outweighed by the financial and administrative costs?

As noted above, we submit that the timeframe afforded to the Minister when deciding whether or not to list a nominated threatened species is far too generous, and that a reduction in the maximum time allowed from 5, to 2 years, be

[77] This removal of Section 185 "Maintaining the lists in up-to-date condition" provided that the Minister was no longer required to take all reasonable and practical steps to amend as necessary the list of ecological communities under the Act.

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

implemented. However, in addition to this, ANEDO believes that the inclusion of an emergency listing process is essential especially for critically endangered species.

The 2006 amendments provided that approval decisions are not affected by listing events that happen after decisions whether an action is controlled are made[79] such as where it is solely a proposed project that will imperil a species.[80] This approach is inconsistent with the principles of ESD, privileging development interests and certainty over the environment, and almost certainly ensuring the loss of some species over time. A better approach would be to allow the Minister to exercise emergency listing powers in certain limited circumstances.

The suggestion in the discussion paper that the emergency listing of species and communities should be similar to that of the emergency listing of the National Heritage places is supported by ANEDO. The legislation currently provides that the Minister is able to list a place without having to refer a nomination to the Australian Heritage Council for a full assessment of the area's values. The Minister is only afforded this discretion if he or she believes that:

a) a place has or may have one or more National Heritage values; and
b) any of those values is under threat of a significant adverse impact; and
c) that threat is both likely and imminent.[81]

This provides a solid basis for the emergency listing of species. Furthermore, the National Heritage listing process promotes public participation through allowing any member of the public to write a letter to request a National Heritage listing. ANEDO would support that this process be replicated for the emergency listing of threatened species and ecological communities. Note however that ANEDO submits that amendments be made to the Act to require the Minister to consider the emergency heritage nominations within 10 days and this is also recommended for emergency species listing. This is discussed further in **Question 38.**

ANEDO contacted the Heritage Information and Referrals Section of the Heritage Division in the Department of Environment, Water, Heritage and the Arts to ascertain whether the opportunity to have a National Heritage place emergency listed has excessively burdened those responsible for its application. It is worth noting that in the past five years the numbers have not by any means been large as evidenced by the table below:

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

[80] The Channel Deepening project in Port Phillip Bay in Victoria is an example where a threatened species, a unique sponge community, was only discovered during the assessment process. The threat to this community was not able to be taken into account as it was listed after the referral.

[81] Section 324JL 1(a-c), *EPBC Act.*

Year	Number of Emergency Heritage Listing Requests
2004	21
2005	11
2006	8
2007	4
2008	4

This table shows that there were only a total of 48 emergency listing requests received by the Department of Environment, Water, Heritage and the Arts in the last five years. This provides some indication that permitting the emergency listing of species and ecological communities would not open the flood gates to a plethora of requests that will lead to excessive administrative and financial costs. In any case, regardless of the administrative implications, ANEDO submits that the implementation of an emergency listing process is a crucial mechanism that should be implemented into the Act.

Q12 What matters should the Minister consider when deciding whether to list a threatened species or ecological community?

The nomination and listing process under the Act are inseparably intertwined. With the amendments to the nomination process and development by the Minister of an annual conservation theme, there has been a subsequent impact on the range of threatened species or ecological communities eligible for listing. Additionally, our discussion in **Question 10** above has demonstrated that the Act significantly limits public and scientific involvement in the listing of species. ANEDO submits that input from the community, as well as appropriate experts, is critical and should be explicitly considered when deciding whether to list or de-list a threatened species or ecological community. Currently the Minister may have regard to "any matters that the Minister considers appropriate"[82] when exercising the power to make changes to the priority assessment list of threatened species; we re-emphasise that only scientific information should be considered in determining whether to list a species. Economic considerations are not relevant to the conservation status of a species.

Specifically in regard to listing, the Act currently only provides an opportunity for species to be listed based on their status "at that time"[83]. As discussed above, public debate needs to occur to ascertain whether the present conservation status should be the only factor taken into account when deciding whether to list a threatened species or ecological community. There is some suggestion that listings should be extended to those species and ecological communities that display certain susceptibility traits[84] or that are likely to be adversely affected by the impacts of

[82] Section 194K(3), *EPBC Act.*

[83] Section 179, *EPBC Act.*

[84] For the latter, see Bradshaw C, Giam X, Tan H, Brook B and Sodhi N 2008, "Threat or invasive status in legumes is related to opposite extremes of the same ecological and life-history attributes" 96(5) *Journal of Ecology* at pp 869 – 883 (published online 10 June 2008).

climate change or some other key threatening process. Such an option would allow decision makers to proactively develop strategies to increase the survival rate of those species and ecosystems particularly susceptible to the impacts of climate change (discussed further at **Question 19**).

Q13 Are the categories of threat appropriate?

The current categories of threat in the *EPBC Act* are as follows:

- extinct;
- extinct in the wild;
- critically endangered;
- endangered;
- vulnerable; and
- conservation dependent.[85]

Additionally for ecological communities, the categories of threat are:

- critically endangered;
- endangered; and
- vulnerable.[86]

ANEDO submits that the above categories of threat are appropriate, and offer a wide ambit of classes to identify the current conservation status of a species. However, as suggested in **Question 12**, in addition to listing species based on their current conservation basis, new approaches may require that the Act be extended to provide for the listing of those species identified as being particularly susceptible to the impacts of *future* threatening processes such as climate change. Should the listing process be extended to include the potential projected status of a species or ecological community based on future key threatening processes, the Act will need to be amended to incorporate such a category, which we support.

As stated above, the categories appear to offer a wide ambit of classes (6 for threatened species and 3 for ecological communities) which assists in defining the status of the species. Once a threatened species or ecological community is placed in one of these categories, what then becomes important are the legal connotations attached, and the actions taken, as a result of that species being assigned one status over another. If a species is listed in the "critically endangered species" category, a person must not take an action that "has or will have a significant impact"[87] on the species, or is "likely to have a significant impact"[88] on the species. If a species is categorised as an "endangered community" (inferring that it is not as highly threatened as a critically endangered species) the same prohibitions exist.[89]

[85] Section 178, *EPBC Act.*
[86] Section 181, *EPBC Act.*
[87] Section 18(2)(a), *EPBC Act.*
[88] Section 18(2)(b), *EPBC Act.*
[89] That a person must not take an action that "has or will have a significant impact" 18(6)(a) or is "likely to have a significant impact" 18(6)(b) on the species in question.

Therefore the Act provides no differentiation in the restrictions placed on activities that may impact on threatened species. ANEDO submits that stronger restrictions should apply to the more critical categories to provide the best chance for the recovery of those species.

Q14 Are there opportunities to reduce duplication between the Commonwealth and State and Territory listing regimes or do overlaps between the regimes provide significant protection for threatened species and ecological communities?

Given the different scales on which assessments are done for listing under Commonwealth (conservation status throughout Australia)[90] and State (conservation status in that particular state)[91] legislation, ANEDO submits that there is unlikely to be duplication in the listing process done by the Commonwealth, as these nationwide assessments of species are often not undertaken under State legislation. If species or ecological communities are listed under the *EPBC Act* however, they should automatically be listed under appropriate state legislation throughout their geographical range, given that if they are nationally threatened, they will also be threatened within all states where they exist. This will allow a coordinated approach to be taken between the Commonwealth and the States.

Q15 What factors should be considered in setting priorities for recovery planning?

The process for prioritising the development of recovery plans for threatened species, ecological communities and key threatening processes under the *EPBC Act* is one that needs to be adjusted.

ANEDO's position in previous submissions on the *EPBC Act* has been that it is important that recovery planning is mandatory, with sufficient resources allocated to ensure that it is done effectively. However, in reality is there is a significant gap between the resources required and the actual funding provided for the development of recovery plans. Therefore a mechanism for the prioritisation of recovery plans needs to be developed to ensure that the most environmentally beneficial outcomes are achieved with the funds available.

There has been significant scientific debate on how resources allocated for the recovery of threatened species should be prioritised. Some scientists are of the opinion merely allocating funds to those species most threatened is not always the most appropriate allocation of resources:

[90] Section 179, *EPBC Act.*
[91] For example Section 10, *Threatened Species Conservation Act 1995* (NSW).

> "*Spending the most money on species with the highest extinction probabilities is not the most efficient way of promoting recovery or minimising global extinction rates, because some of the most highly ranked species require huge recovery efforts with a small chance of success, whereas other, less threatened taxa might be secured for relatively little cost*."[92]

This highlights that the best way of maximising biodiversity conserved may be through strategic and focussed funding as opposed to trying to save everything; a position based on the emotionally driven or social belief that if a species is in imminent danger of extinction, the correct response is to allocate resources to enhance its prospects of survival. Indeed, the Act's current approach in determining recovery efforts fails to take into account two crucial factors, "the cost of management and the likelihood that the management will succeed."[93] These considerations need to be incorporated into the decision making process and should take a key role prioritising resource allocation for the development and implementation of recovery plans. As has been observed:

> "*By failing to consider the cost of management, the technical capacity to manage and potential for species recovery, traditional approaches make the implicit assumptions that the conservation budget is large enough to fund all projects and each project has the likelihood of succeeding*."[94]

In light of the above, ANEDO submits that the Government should also engage with the community and scientists to determine whether resources should be allocated towards maintaining functional ecosystems managing individual species. For more discussion on this subject, please see **Questions 9, 16** and **19**.

Q16 Does the planning regime support the effective recovery of threatened species and ecological communities?

There are a number of inadequacies that exist within the recovery planning regime that are impeding the effective recovery of threatened species and ecological communities. There are currently over 1600 threatened species listed, and in January 2008 there were only 384 recovery plans in action. There is therefore an enormous backlog of species requiring the development, adoption and implementation of recovery plans. With only 11 recovery plans developed in 2007[95], there is no indication that this backlog will be addressed in the near future.

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[92] Possingham, H.P., Andelman, S.J., Burgman M.A., Rodrigo, A.M., Master, L.L., Keith, D.A. 2002, 'Limits to the use of threatened species lists', *Trends in Ecology & Evolution*, Vol. 17, No. 11, Pgs. 503-507.

[93] Joseph, L.N., Maloney, R.F., Possingham, H.P., 'Optimal Allocation of Resources among Threatened Species: a Project Prioritization Protocol', (in press *Conservation Biology*).

[94] Joseph, L.N., Moloney, R.F., O'Connor, S.M., Cromarty, P., Jansen, P., Stephens, T., & Possingham, H. (under review) *'Improving methods for allocating resources among threatened species: the case for a new national approach in New Zealand.'*

[95] Australian Bureau of Statistics:

Individual EDO offices have observed a trend of downgrading recovery planning in response to resourcing issues in a number of jurisdictions.[96] This has been done by removing mandatory planning requirements with sections 267 and 269AA of the *EPBC Act* now providing that it is no longer compulsory to make recovery plans for all threatened species. Furthermore, section 270(2A) requires that certain issues such as the identification of critical habitat in a recovery plan, need only be addressed to the extent to which it is practicable to do so.

In addition to becoming discretionary in some jurisdictions, rather than mandatory, recovery planning is often hampered by a lack of resources, time delays, and also the consideration of socio-economic interests rather than focusing on the science.[97]

Studies Conducted

The 2007 Audit Report - The Conservation and Protection of National Threatened Species and Ecological Communities[98] (2007 Audit Office Report) demonstrated that current actions are failing to stem the decline of biodiversity levels in Australia and threatened species rarely, if ever, are taken off these lists due to successful recovery.

The key findings of the 2007 Audit Report included:

- the requirement of the Act to review all recovery plans and TAPs every five years was not met and of the 56 recovery plans due for review only one was completed and that "further progress could reasonably have been expected" (para 31).
- in addition to the requirements of the Act, Commonwealth, Sate and Territory Ministers also committed in 2000 to have recovery plans in place for all critically endangered and endangered species by 2004". This was not met with only 126 (22%) of the 583 species having plans completed by 2004 (para 29); and
- statutory timeframes in Commonwealth areas were generally not met (para 30).

Other inadequacies were identified earlier in the Australian Terrestrial Biodiversity Assessment 2002, which found:

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http://www.abs.gov.au/ausstats/ABS@.nsf/7d12b0f6763c78caca257061001cc588/890B6E334AA8B6EFCA2573C600104881?opendocument.

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

[97] For an example of this, please see the recovery plan for the Giant Freshwater Crayfish (Tasmania) in ANEDO's previous submission. Available at: www.edo.org.au/edonsw/site/policy.php.

[98] 2008 Audit Report "The Conservation and protection of National Threatened Species and Ecological Communities" The Auditor General, 2008 Audit Report "The Conservation and protection of National Threatened Species and Ecological Communities", 2006-7 Performance Audit, Australian National Audit Office, 2007.

> "*only 338 Commonwealth, State and Territory recovery plans exist (approximately 20% of Commonwealth listed species) and the implementation of many of these is not funded. Given the size of the task in redressing this situation, threatened species recovery across Australia requires a more strategic approach that goes beyond planning and addresses implementation... Overall, successful recovery outcomes for threatened species and ecosystems and identified community capacity to be involved in recovery planning is identified in only 20% of subregions*."[99]

A recent study carried out by the Tasmanian Department of Primary Industry; Water and Environment further highlighted the uncertainty of outcomes once a recovery plan is put in place:

> "*The Tasmanian information highlights the difficulty in successfully implementing recovery plans as some species have responded positively while others have not... (and some) species have increasing population where there has been no recovery action underway*."[100]

The findings of the above studies demonstrate that as a result of a number of factors, the current recovery planning regime is failing. Few species are yet to be successfully removed from the threatened species list as a result of a recovery plan. As mentioned above, public and scientific debate needs to occur in order to decide whether the concept of individual species based recovery plans should continue to be pursued as a priority. As has been observed:

> "*It is naive and counterproductive from all points of view to use threatened species lists alone to allocate resources for recovery, to guide reserve planning, or to constrain the use of the natural environment. Other tools are necessary for these tasks...* "[101]

ANEDO submits that decision makers should begin to shift the focus away from implementing individual species based recovery plans towards the utilisation of those conservation tools in the Act that place an emphasis on broader protection mechanisms. These broader protection mechanisms include the identification of key threatening processes[102] and the implementation of threat abatement plans.[103] ANEDO submits that increasing the implementation of such mechanisms will create a system more focussed on conserve and enhancing ecosystem functionality

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[99] Available at: http://www.anra.gov.au/topics/vegetation/pubs/biodiversity/bio_assess_contents.html.

[100] Source: Department of Primary Industry, Water and Environment (Unpublished Data) 2005, Unpublished, Contact:Lvl 5 Marine Board Building, 1 Franklin Wharf HobartBrooke.Craven@dpiwe.tas.gov.au.Phone 03 6233 2263, Fax 03 6236 9744, Brooke.Craven@dpiwe.tas.gov.au.

[101] Possingham, H.P, Andelman, S.J., Burgman, M.A., Medellin, R.A., Master, L.L., and Keith, D.A. 2002, 'Limits to the use of threatened species lists', *Trends in Ecology and Evolution*, Vol. 17, Pgs 503-07.

[102] Section 183, *EPBC Act.*

[103] Section 270A, *EPBC Act.*

which may in turn provide benefits for biodiversity including increasing resilience to climate change (discussed further in **Question 19** below).

Q17 Are there opportunities to improve the co-ordination between the Commonwealth and State and Territory recovery regimes? If so, what might these be?

ANEDO supports the coordination of recovery regimes between the Commonwealth and the States. Where a species is listed federally and on a State list, there should be a collaborative approach involving the sharing of resources and responsibilities.

Q18 Are the provisions of the Act for the protection and recovery of threatened species and ecological communities, migratory species, listed marine species and cetaceans effective? What alternative approaches might be available?

The Act provides for the development of Wildlife Conservation Plans "for the purposes of protection, conservation and management" of listed migratory species, listed marine species, a species of cetacean, and a conservation dependent species.[104] These Wildlife Conservation Plans are currently being underutilised, with only one having ever been developed.[105] Alternatives for the protection and recovery of threatened species and ecological communities have been addressed in more detail in **Questions 9, 10, 11, 12, 15 and 16.**

Q19 Does the Act provide an appropriate legislative framework for addressing climate change and other emerging pressures in the context of environmental protection and biodiversity conservation? If not, how can such matters be considered when making decisions under the Act?

With climate change, it is now recognised that species will change in their distribution and abundance, ecosystem structures and functions will be altered, significant extinctions are likely to occur and that adaptation of species and communities may be ineffective in some cases.[106] Current climate change is

[104] Section 285(1), *EPBC Act.*

[105] The Wildlife Conservation Plan (WCP) for Migratory Shorebirds, released in 2006, sets out the research and management actions necessary to support survival of migratory species listed under the *Environment Protection and Biodiversity Conservation Act 1999* (the Act). The Plan and background paper can be found at: www.environment.gov.au/biodiversity/migratory/waterbirds/shorebird-plan/index.html.

[106] See generally the Intergovernmental Panel on Climate Change (2007) *Synthesis Report Working Group II 11.4, Summary for Policy Makers* at p 65 and also Adger WN, Agrawala S, Mirza MMQ, Conde C, O'Brien K, Pulhin J, Pulwarty R, Smit B and Takahashi K 2007, 'Assessment of adaptation practices, options, constraints and capacity' in Parry ML, Canziani OF, Palutikof JP, van

predicted to cause a greater problem for species than previous climatic changes due to a combination of the predicted rapid pace of change (faster than most previous changes during the last 1.8 million years)[107] and the extent of existing threatening processes (such as habitat loss, invasive species, etc) currently affecting species. These projections will pose significant additional problems for biodiversity conservation in Australia.

It is arguable, in light of the projected impacts of climate change on biodiversity, that the current goals of biodiversity conservation, protecting all species as and where they are, require rethinking. Many scientists have suggested that current conservation goals will be impossible to achieve, and should be re-assessed.[108] For example, Dunlop and Brown (2008) have argued that the task is one of managing change to minimise loss and that facilitating change, rather than trying to prevent it from happening, will minimise the risk that species will become threatened or go extinct in the long-term.

Community debate is required to set the aims for biodiversity conservation given the enormous challenges faced. This debate will be difficult and problematic as the legal framework and philosophical approach to biodiversity conservation that we have in Australia has been hard fought. Indeed, the recognition of the inherent right of species to exist, and for people to do everything they can to ensure this, has been institutionally recognised not only in Australia but internationally.

Once we have established what we are aiming to achieve, we will be better able to ensure that we are informed by science as to how to go about achieving our goals. For example if we decide that the overarching goal for biodiversity conservation should be to protect everything so that ecosystems will continue to function and provide the ecosystem services human society depends on, then we may decide, based on scientific evidence, that a threatened species based approach is not the best way to achieve this, and may instead decide to pursue an approach whose objectives are to enhance ecosystem resilience and thereby protect biodiversity.

The following discussion is in this context, aimed at presenting what the science is telling us we should do to give biodiversity the best chance under climate change, and examining whether the *EPBC Act* currently incorporates these principles. A few ideas as to how they could be incorporated are provided to stimulate this debate on what we are trying to achieve with biodiversity conservation and how we go about achieving it at a federal level.

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der Linden PJ and Hanson CE (eds) *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change*, Cambridge University Press, Cambridge, UK, 717-743 at p 719.

[107] Noss, R. 2001, 'Beyond Kyoto: Forest management in a time of rapid climate change' *Conservation Biology* 15(3): 578-590.

[108] Dunlop, M. and Brown, P. 2008, 'Implications of climate change for Australia's National Reserve System: A preliminary assessment.' Report to the Department of Climate Change, February 2008. Department of Climate Change, Canberra, Australia; Hoegh-Guldburg, O., Hughes, L., McIntyre, S., Lindenmayer, D., Parmesan, C., Possingham, H. and Thomas, C. (2008) 'Assisted colonisation and rapid climate change' *Science* 321:345-346.

Predicted impacts of climate change on biodiversity

The impacts of climate change on biodiversity are likely to be significant, however there are still varied predictions of actual responses of individual species and therefore even wider ranging predictions of specific responses of ecological communities.

In summary, the predicted impacts of climate change on biodiversity are;

- range shifts and species movements towards higher latitudes and altitudes. Some species may not be able to migrate through fragmented landscapes;
- extinctions of local populations at range boundaries at lower latitudes or elevations;
- geographic distributions of most species are likely to contract and become increasingly fragmented[109];
- increasing threats to ecosystems as extreme events become more frequent or severe;
- increasing invasion by opportunistic, weedy or highly mobile species, especially to sites where local populations of existing species are declining;
- progressive decoupling of species interactions e.g. plants and pollinators, as a result of phonological changes and changes in geographic distribution; and
- changes in community composition and structure.[110]

Biodiversity adaptation mechanisms

In the past, species have adapted to climate change through a combination of the following adaptation mechanisms.[111]

1. Acclimatisation – changes in behaviour or life history strategies[112]
2. Evolutionary adaptation – development of new, more suitable attributes[113]
3. Migration/dispersal - Migration is the primary way that species have responded to past climatic changes. [114]

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[109] Hughes, L. 2003, 'Climate change and Australia: Trends, projections and impacts' *Austral Ecology* 28: 423-44.

[110] Hughes, L. 2000, 'Biological consequences of global warming: is the signal already' *Trends in Ecology and Evolution* 15(2) 56-61; DECC (2007) '2007-2008: Department of Environment and Climate Change NSW, Adaptation Strategy for Climate Change, Impacts of Biodiversity' DECC. Available online at http://www.environment.nsw.gov.au/biodiversity/climatechange.htm [Date accessed 9/1/09].

[111] Noss, R. 2001, 'Beyond Kyoto: Forest management in a time of rapid climate change' *Conservation Biology* 15(3): 578-590; Mackey, B. (2007) 'Climate change, connectivity and biodiversity conservation' In: *Protected Areas: buffering nature against climate change. Proceedings of a WWF and IUCN World Commission on Protected Areas symposium, 18-19 June 2007, Canberra.* (eds Taylor and Figgis) pp 90-96. WWF-Australia, Sydney.

[112] Bawa, K. and Dayanandan, S. 1998, 'Global climate change and tropical forest genetic resources' *Climatic Change* 39: 473-485.

[113] Noss, R. 2001, 'Beyond Kyoto: Forest management in a time of rapid climate change' *Conservation Biology* 15(3): 578-590.

It follows that to minimise the impacts we need to facilitate adaptation of biodiversity by minimising disruption to the adaptation mechanisms of species as much as possible.[115]

Biodiversity conservation goals under climate change – facilitate natural adaptation

As identified, climate change is predicted to have significant impacts on biodiversity, including causing major changes in species distributions and abundances. However, current conservation goals focus on maintaining the status-quo, such as maintaining specific populations and ecological communities in given locations and abundances (at levels that are viable in the long-term). For example the *EPBC Act* aims to protect ecological communities, which are identified (amongst other ways) in terms of the current species composition of the community, often in a particular location.[116]

The best way to facilitate adaptation of natural systems is to enhance their resilience, as well as management regimes incorporating a few other key principles such as recognising and managing for uncertainty, prioritising protection and considering triage and exploring assisted migration/translocation.[117]

Resilience

Adaptation can be facilitated by enhancing the 'resilience' and 'resistance' of ecosystems to climate change. Indeed, the goal of adaptation can be seen as reducing the risk of significant impacts by increasing the resilience of ecosystems.[118] 'Resilience' refers to the ability of a system to 'bounce back' after a disturbance, or more specifically, the amount of change that a system can absorb before it undergoes a fundamental shift to a new system.[119]

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[114] Noss, R. 2001, 'Beyond Kyoto: Forest management in a time of rapid climate change' *Conservation Biology* 15(3): 578-590.

[115] Mackey, B. 2007, 'Climate change, connectivity and biodiversity conservation' In: *Protected Areas: buffering nature against climate change. Proceedings of a WWF and IUCN World Commission on Protected Areas symposium, 18-19 June 2007, Canberra.* (eds Taylor and Figgis) pp 90-96. WWF-Australia, Sydney.

[116] E.g. Natural Temperate Grassland of the Southern Tablelands of NSW and the ACT. Advice to minister available online at http://www.environment.gov.au/biodiversity/threatened/communities/natural-temperate-grasslands.html and Weeping Myall Woodlands. Advice to Minister available online at http://www.environment.gov.au/biodiversity/threatened/communities/pubs/98-listing-advice.pdf.

[117] Further detail on these principles can be found in the upcoming EDO (NSW) discussion paper on Climate Change and Biodiversity.

[118] Climate Change Science Program (US) 2008: *Preliminary review of adaptation options for climate-sensitive ecosystems and resources.* A Report by the U.S. Climate Change Science Program and the Subcommittee on Global Change Research. [Julius, S.H., J.M. West (eds.), J.S. Baron, B. Griffith, L.A. Joyce, P. Kareiva, B.D. Keller, M.A. Palmer, C.H. Peterson, and J.M. Scott (Authors)]. U.S. Environmental Protection Agency, Washington, DC, USA, 873 pp.

[119] Climate Change Science Program (US) 2008: *Preliminary review of adaptation options for climate-sensitive ecosystems and resources.* A Report by the U.S. Climate Change Science Program and the Subcommittee on Global Change Research. [Julius, S.H., J.M. West (eds.), J.S. Baron, B. Griffith,

A number of authors have identified broad principles that can be applied to enhance the resilience of ecosystems[120] and the application of these principles is likely to facilitate adaptation to climate change.[121] The principles are outlined in further detail below.

Representation and replication

Protecting a diversity of ecosystem types (representation) and multiple examples of all ecosystem types (replication) is a key principle in building resilience. As we do not know precisely how ecosystems will respond to climate change, by protecting several varying types of ecosystems (representation), or slightly different types of the same ecosystem (replication) there is a greater chance that there will be one or more that are suited to the new climate.[122]

Protect and create large patches of vegetation

Large patches of habitat are critical for their ecological value in maintaining populations of interior dwelling species, providing core habitat with less influence of edge effects and supporting a greater number of species than smaller patches.[123] Large patches are also integral to supporting large, genetically diverse populations[124] which will be essential for climate change adaptation.

L.A. Joyce, P. Kareiva, B.D. Keller, M.A. Palmer, C.H. Peterson, and J.M. Scott (Authors)]. U.S. Environmental Protection Agency, Washington, DC, USA, 873 pp.

[120] Forman, R. 1995, 'Some general principles of landscape and regional ecology' *Landscape Ecology* 10(3):133-142; Noss, R. 2001, 'Beyond Kyoto: Forest management in a time of rapid climate change' *Conservation Biology* 15(3): 578-590; Fischer, J., Lindenmayer, D. and Manning, A. 2006, 'Biodiversity, ecosystem function, and resilience: ten guiding principles for commodity production landscapes' *Frontiers in Ecology and Environment* 4(2): 80-86; Lindenmayer, D., Hobbs, R., Montague-Drake, R., Alexandra, J., Bennett, A., Burgman, M., Cale, P., Calhoun, A., Cramer, V., Cullen, P., Driscoll, D., Fahrig, L., Fischer, J., Franklin, J., Haila, Y., Hunter, M., Gibbons, P., Lake, S., Luck, G., MacGregor, C., McIntyre, S., MacNally, R., Manning, A., Miller, J., Mooney, H., Noss, R., Possingham, H., Saunders, D., Schmieglow, F., Scott, M., Simberloff, D., Sisk, T., Tabor, G., Walker, B., Wiens, J., Woinarski, J. and Zavaleta, E. 2008, 'A checklist for ecological management of landscapes for conservation' *Ecology Letters* 11: 78-91.

[121] Noss, R. 2001, 'Beyond Kyoto: Forest management in a time of rapid climate change' *Conservation Biology* 15(3): 578-590.

[122] Noss, R. 2001, 'Beyond Kyoto: Forest management in a time of rapid climate change' *Conservation Biology* 15(3): 578-590; Climate Change Science Program (US) 2008: *Preliminary review of adaptation options for climate-sensitive ecosystems and resources.* A Report by the U.S. Climate Change Science Program and the Subcommittee on Global Change Research. [Julius, S.H., J.M. West (eds.), J.S. Baron, B. Griffith, L.A. Joyce, P. Kareiva, B.D. Keller, M.A. Palmer, C.H. Peterson, and J.M. Scott (Authors)]. U.S. Environmental Protection Agency, Washington, DC, USA, 873 pp.

[123] Forman, R. 1995, 'Some general principles of landscape and regional ecology' *Landscape Ecology* 10(3):133-142; Fischer, J., Lindenmayer, D. and Manning, A. 2006, 'Biodiversity, ecosystem function, and resilience: ten guiding principles for commodity production landscapes' *Frontiers in Ecology and Environment* 4(2): 80-86.

[124] Lindenmayer, D. and Burgman, M. 2005, *Practical Conservation Biology.* CSIRO Publishing, Australia.

Connectivity

Connectivity between populations, whether through corridors or patches of vegetation close enough to enable dispersal, is essential for the maintenance of genetic diversity, to allow access to different habitat resources and buffering the impacts of disturbance, which will allow species and ecosystems to survive and adapt in a changing climate.[125] However there have been some suggestions that the rate of climate change may exceed the dispersal rate of most species, which suggests corridors may be less effective in protecting many species than perhaps generally thought.

Improve management of off-reserve lands – managing the matrix

Reserves alone are not sufficient to protect biodiversity as they are too few, too isolated and not always adequately protected.[126] This makes the management of the matrix (those areas that are not reserved) particularly important as a structurally complex matrix has the ability to provide habitat for some native species, enhance landscape connectivity and reduce edge effects.[127] The increased connectivity provided by a structurally complex matrix will be important for species as they alter their geographic ranges in response to climate change.

Identify and protect refugia

Refugia are those areas where species are able to persist during periods of climatic stress and from which they can then recolonise over the long term when conditions favourable for their survival and reproduction return.[128] Past climatic refugia should be identified and protected where possible so that they may again function as refugia under present climate change. Other characteristics of potential climate refugia include topographical diversity, areas across climatic gradients and heterogeneity of landforms, soils and microclimates which enable species persistence.[129]

Adjust focus to protecting ecosystem function and processes

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[125] Dunlop, M. and Brown, P. 2008, 'Implications of climate change for Australia's National Reserve System: A preliminary assessment.' Report to the Department of Climate Change, February 2008. Department of Climate Change, Canberra, Australia.

[126] Fischer, J., Lindenmayer, D. and Manning, A. 2006, 'Biodiversity, ecosystem function, and resilience: ten guiding principles for commodity production landscapes' *Frontiers in Ecology and Environment* 4(2): 80-86.

[127] Fischer, J., Lindenmayer, D. and Manning, A. 2006 'Biodiversity, ecosystem function, and resilience: ten guiding principles for commodity production landscapes' *Frontiers in Ecology and Environment* 4(2): 80-86.

[128] Noss, R. 2001, 'Beyond Kyoto: Forest management in a time of rapid climate change' *Conservation Biology* 15(3): 578-590; Dunlop, M. and Brown, P. 2008, 'Implications of climate change for Australia's National Reserve System: A preliminary assessment.' Report to the Department of Climate Change, February 2008. Department of Climate Change, Canberra, Australia.

[129] Noss, R. 2001, 'Beyond Kyoto: Forest management in a time of rapid climate change' *Conservation Biology* 15(3): 578-590.

Much money and effort is spent on threatened species as a means of protecting biodiversity[130] however scientists have long been advocating an approach based less on individual species and more on maintaining ecosystem structure and function, and therefore ultimately protecting more species.[131]

Protecting key functional species and diversity within functional groups is a key way to do this thereby enhancing ecosystem resilience, so that they are able to maintain their functions and processes.

Protect key functional species

Scientists have emphasised the importance of 'key functional species' or groups (a collection of species that perform a similar function) for many years.[132]

Key functional species or groups (also known as keystone species) play an important role in maintaining ecological functions and processes, which keep ecosystems healthy and help systems to recover after disturbances e.g. large predators whose abundance influences the abundances of species lower down the food chain, seed dispersers, or those species that create the structural components of an ecosystem. They are an important component of 'resilience' – the ability of a system to resist and recover from disturbances.[133] The maintenance of these species is particularly important as their loss may result in a range of cascading impacts through the ecosystem.[134]

Identifying what species play key functional roles will be vital. Scientists argue that an approach that focuses on maintaining key functional species or groups and on understanding and protecting ecological processes that support resilience is particularly important in the face of uncertainty under climate change.[135]

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[130] McIntyre, S., Barrett, G., Kitching, R. and Recher, H. 1992, 'Species triage – seeing beyond wounded rhinos' *Conservation Biology* 6(4): 604-606.

[131] McIntyre, S., Barrett, G., Kitching, R. and Recher, H. 1992, 'Species triage – seeing beyond wounded rhinos' *Conservation Biology* 6(4): 604-606; Walker, B. 1995, 'Conserving biodiversity through ecosystem resilience' *Conservation Biology* 9(4): 747-752.

[132] Walker, B. 1995, 'Conserving biodiversity through ecosystem resilience' *Conservation Biology* 9(4): 747-752; Noss, R. 2001, 'Beyond Kyoto: Forest management in a time of rapid climate change' *Conservation Biology* 15(3): 578-59; Fischer, J., Lindenmayer, D. and Manning, A. 2006, 'Biodiversity, ecosystem function, and resilience: ten guiding principles for commodity production landscapes' *Frontiers in Ecology and Environment* 4(2): 80-86.

[133] Bellwood, D., Hughes, T., Folke, C. and Nystrom, M. 2004, 'Confronting the coral reef crisis' *Nature* 429:827-833.

[134] Walker, B. 1995, 'Conserving biodiversity through ecosystem resilience' *Conservation Biology* 9(4): 747-752; Fischer, J., Lindenmayer, D. and Manning, A. 2006, 'Biodiversity, ecosystem function, and resilience: ten guiding principles for commodity production landscapes' *Frontiers in Ecology and Environment* 4(2): 80-86.

[135] Walker, B. 1995, 'Conserving biodiversity through ecosystem resilience' *Conservation Biology* 9(4): 747-752; Noss, R. 2001, 'Beyond Kyoto: Forest management in a time of rapid climate change' *Conservation Biology* 15(3): 578-590; Elmqvist, T., Folke, C., Nystrom, M., Peterson, G., Bengtsson, J., Walker, B. and Norberg, J. 2003, 'Response diversity, ecosystem change, and resilience' *Frontiers in Ecology and Environment* 1(9): 488-49; Bellwood, D., Hughes, T., Folke, C. and Nystrom, M.

Recognise and manage for uncertainty

The impacts of climate change on various elements of biodiversity are uncertain and management regimes will need to adapt to changing conditions.[136] Climate change predictions for biodiversity are complex and often have high levels of uncertainty,[137] meaning that management options for biodiversity management will need to diversify. Adaptive management will be essential in this highly uncertain environment, to determine which management actions are able to achieve the specified objectives.[138]

Adaptive management is an iterative natural resource management process that seeks to improve management by testing hypotheses, learning from the results, and incorporating lessons learnt into future management actions.[139] It is well suited to managing in the face of uncertainty provided by climate change, given that adaptive management is particularly useful in situations where there is high uncertainty regarding ecological responses.[140]

2004, 'Confronting the coral reef crisis' *Nature* 429:827-833; Fischer, J., Lindenmayer, D. and Manning, A. 2006, 'Biodiversity, ecosystem function, and resilience: ten guiding principles for commodity production landscapes' *Frontiers in Ecology and Environment* 4(2): 80-86.

[136] Dunlop, M. and Brown, P. 2008, 'Implications of climate change for Australia's National Reserve System: A preliminary assessment.' Report to the Department of Climate Change, February 2008. Department of Climate Change, Canberra, Australia.

[137] Walther, G., Post, E., Convey, P., Menzel, A., Parmesan, C., Beebee, T., Fromentin, J., Hoegh-Guldberg, O. and Bairlein, F. 2002, 'Ecological responses to recent climate change' *Nature* 416: 389-395; Hennesy, K., Fitzharris, B., Bates, B., Harvey, N., Howden, S., Hughes, L., Salinger, J. and Warrick, R. (2007) Australia and New Zealand. *Climate Change 2007: Impacts, Adaptation and Vulnerability. Contribution of Working Group II to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change,* Cambridge University Press, Cambridge, UK.

[138] Walters, C. 1986, *Adaptive Management of Renewable Resources* McGraw-Hill, New York; Halpin, P. 1997, 'Global climate change and natural-area protection: management responses and research directions' *Ecological Applications* 7(3): 828-843; Bormann, B., Haynes, R. and Martin, J. 2007, 'Adaptive management of forest ecosystems: did some rubber hit the road?' *BioScience* 57(2): 186-190; Millar, C., Stephenson, N. and Stephens, S. (2007) 'Climate change and forests of the future: managing in the face of uncertainty' *Ecological Applications* 17(8): 2145-2151; CCSP, 2008, *Preliminary review of adaptation options for climate-sensitive ecosystems and resources.* A Report by the U.S. Climate Change Science Program and the Subcommittee on Global Change Research. [Julius, S.H., J.M. West (eds.), J.S. Baron, B. Griffith, L.A. Joyce, P. Kareiva, B.D. Keller, M.A. Palmer, C.H. Peterson, and J.M. Scott (Authors)]. U.S. Environmental Protection Agency, Washington, DC, USA, 873 pp.

[139] Holling, C.S., 1978: *Adaptive Environmental Assessment and Management.* Blackburn Press, Caldwell, NJ.; Walters, C., 1986: *Adaptive Management of Renewable Resources*. McGraw Hill, New York; Climate Change Science Program (US) 2008: *Preliminary review of adaptation options for climate-sensitive ecosystems and resources.* A Report by the U.S. Climate Change Science Program and the Subcommittee on Global Change Research. [Julius, S.H., J.M. West (eds.), J.S. Baron, B. Griffith, L.A. Joyce, P. Kareiva, B.D. Keller, M.A. Palmer, C.H. Peterson, and J.M. Scott (Authors)]. U.S. Environmental Protection Agency, Washington, DC, USA, 873 pp.

[140] Climate Change Science Program (US) 2008: *Preliminary review of adaptation options for climate-sensitive ecosystems and resources.* A Report by the U.S. Climate Change Science Program and the Subcommittee on Global Change Research. [Julius, S.H., J.M. West (eds.), J.S. Baron, B. Griffith, L.A. Joyce, P. Kareiva, B.D. Keller, M.A. Palmer, C.H. Peterson, and J.M. Scott (Authors)]. U.S. Environmental Protection Agency, Washington, DC, USA, 873 pp.

Need to prioritise protection and consider triage

It has long been recognised that resources for the protection of biodiversity are limited, and this has lead to the concept of triage.[141] Implicit in this prioritisation is the acknowledgement that while it may be our goal to save all species, achieving this is unlikely, therefore we have to allocate scarce resources in the way that can be expected to produce the best overall outcomes.

McIntyre[142] points out that due to various factors, such as cultural and other biases, and lack of knowledge of certain taxa such as invertebrates and lower plants, we are already practising a distorted form of triage, which in practice permits extinction to continue in certain groups of taxa, regardless of intentions to preserve all species.

There has been recent work on establishing tools to assist the prioritisation process which incorporate the level of threat, the need for management and the probability of species persistence[143] or species uniqueness, costs and benefits of management actions and the likelihood of management success.[144] Climate change is likely to increase the need to prioritise protection and consider triage, because impacts may be severe enough to make management efforts ineffective.

However, while climate change poses a challenge, it should not be used as an excuse to lower our expectations or reduce our conservation targets. The threat of climate change highlights the need and presents an opportunity for a renewed commitment to the conservation of biodiversity

Assisted migration

As climate change is predicted to occur much faster than many species are able to migrate or adapt, assisted migration (translocation) of species may be the only option for their continued survival.[145] This should only be an option if they are unable to adapt or migrate with the assistance of other conservation measures e.g. enhancing connectivity, and where it is socially and economically acceptable to do so.[146]

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[141] McIntyre, S., Barrett, G., Kitching, R. and Recher, H. 1992, 'Species triage – seeing beyond wounded rhinos' *Conservation Biology* 6(4): 604-606; Hobbs, R. and Kristjanson, L. (2003) 'Triage: How do we prioritize health care for landscapes?' *Ecological Management and Restoration* 4: S39-S4.

[142] McIntyre, S., Barrett, G., Kitching, R. and Recher, H. 1992, 'Species triage – seeing beyond wounded rhinos' *Conservation Biology* 6(4): 604-606.

[143] Hobbs, R. and Kristjanson, L. 2003, 'Triage: How do we prioritize health care for landscapes?' *Ecological Management and Restoration* 4: S39-S4.

[144] Joseph, L.N., Maloney, R.F., Possingham, H.P., 'Optimal Allocation of Resources among Threatened Species: a Project Prioritization Protocol', (in press *Conservation Biology*).

[145] Hoegh-Guldburg, O., Hughes, L., McIntyre, S., Lindenmayer, D., Parmesan, C., Possingham, H. and Thomas, C. 2008, 'Assisted colonisation and rapid climate change' *Science* 321:345-346.

[146] Hoegh-Guldburg, O., Hughes, L., McIntyre, S., Lindenmayer, D., Parmesan, C., Possingham, H. and Thomas, C. 2008, 'Assisted colonisation and rapid climate change' *Science* 321:345-346.

Careful introduction of low latitude or altitude species may help to preserve it at higher latitudes as the climate changes. Assisted migration should however be limited to moving species within the same broad biogeographic region.[147]

How to translate these principles into the *EPBC Act*

Broad ranging discussion and debate needs to occur about how best to incorporate these principles, and any others identified by the scientific community, into the EPBC Act to ensure that the Commonwealth biodiversity protection and conservation regime is able to facilitate adaptation by biodiversity. Some suggestions as to how to incorporate some of these principles are provided below to stimulate discussion, recognising that much work needs to be done and community debate had on these topics.

Listing of species

The current listing processes under the *EPBC Act* only allow species to be listed if they are currently under threat of extinction.[148] An alternative approach could be to enable listings on the basis of a climate change vulnerability assessment (an emerging scientific tool) or "susceptibility traits".[149] These approaches would still be consistent with a scientific approach to listings. It could be done by either using a test that assesses the likelihood of a threat, or the precautionary principle could be extended to listings.

There is also the potential for the categories for listing to be expanded to include key functional species as a separate category, which would then be protected under the *EPBC Act*. Protecting the most functionally important species is increasingly seen as a key means of increasing the resilience of ecosystems and thereby protecting the greatest number of threatened species (also discussed under **Question 9b**).[150] Other approaches which focus on "uniqueness" or, declining status rather than on species with the highest extinction probabilities may also signal another options.[151]

Management of particular species or reserves

The importance of adaptive management, given that it is particularly well suited to natural resource management where ecological responses are uncertain, (as with

[147] Hoegh-Guldburg, O., Hughes, L., McIntyre, S., Lindenmayer, D., Parmesan, C., Possingham, H. and Thomas, C. 2008, 'Assisted colonisation and rapid climate change' *Science* 321:345-346.
[148] Part 13 *EPBC Act 1999*.
[149] For the latter, see Bradshaw C, Giam X, Tan H, Brook B and Sodhi N (2008) "Threat or invasive status in legumes is related to opposite extremes of the same ecological and life-history attributes" 96(5) *Journal of Ecology* at pp 869 – 883 (published online 10 June 2008).
[150] See, for example, Bellwood D, Hughes T, Folke C and Nystrom M 2004, "Confronting the coral reef crisis" 429 *Nature* at 827-83 and Bellwood D, Hughes T and Hoey A 2006, "Sleeping Functional Group Drives Coral-Reef Recovery" 16 *Current Biology* at pp 2434-2439.
[151] Caughley, G. 1994, "Directions in conservation biology" 63 *Journal of Animal Ecology* at pp 215-244; Possingham HP, Andelman SJ, Burgman MA, Medellin RA, Master LL and Keith DA 2002, "Limits to the use of threatened species lists" *Trends in Ecology and Evolution* 17(11) 503 at p 503.

biodiversity under climate change) was highlighted above. Adaptive management enables future management to be refined through learning from ecosystem responses to management actions in earlier cycles, however lack of institutional support for adaptive management weakens the process significantly.[152] One option to encourage its uptake is to include reference to adaptive management either in statutory management plans or a legislative instrument, which may help to assist its adoption and ensure that resource managers are endorsed to use these approaches.

Site based assessment

Despite the drawbacks of the single species and site based assessment (discussed in **Question 9**), there is the potential for other factors to be considered in the site assessment process, which are able to incorporate these scientific principles identified. These include consideration of the importance of the site for the adaptation of biodiversity under climate change such as;

- its role as a climate refugia area;
- its role as a regional or important corridor; or
- its role as a corridor along a climatic and altitudinal gradient.

Biodiversity offsets used under the Act

If biodiversity offsets are deemed appropriate to be used under the *EPBC Act* (see further discussion in Part 1), they should be implemented according to offset rules that ensure that resilience and functionality of ecosystems is not compromised. Done properly, offsets may provide an opportunity to protect identified areas that are particularly important for ecosystem resilience their capacity to adapt to climate change, such as corridors across an altitudinal gradient or climate refugia.

Summary and Recommendations – Biodiversity

- That the recovery planning process be improved through establishing set priorities, increasing consistency, and improved resourcing;
- That the critical habitat mechanism be used in a robust manner to list more critical habitats. Additionally provision should be made available for interim emergency protection orders in relation to critical habitat;
- Consideration should be given to changing the focus of biodiversity conservation to enhancing ecosystem resilience and maintaining ecosystem function. This may potentially be achieved through identifying and protecting key functional species or groups, and better implementing the strategic

[152] Bormann, B., Haynes, R. and Martin, J. 2007, 'Adaptive management of forest ecosystems: did some rubber hit the road' *BioScience* 57(2):186-191; Climate Change Science Program (US) 2008: *Preliminary review of adaptation options for climate-sensitive ecosystems and resources.* A Report by the U.S. Climate Change Science Program and the Subcommittee on Global Change Research. [Julius, S.H., J.M. West (eds.), J.S. Baron, B. Griffith, L.A. Joyce, P. Kareiva, B.D. Keller, M.A. Palmer, C.H. Peterson, and J.M. Scott (Authors)]. U.S. Environmental Protection Agency, Washington, DC, USA, 873 pp.

assessment provisions of the Act;

- The nomination process should be amended through removing annual conservation themes, ensuring nominations and listing are based on the conservation status of the species, introducing tighter timeframes for assessment, reinstating Section 185, and providing greater public access to assessments;
- The Act should be amended to introduce an emergency listing process;
- Only scientific information should be considered when deciding whether to list a species, and a listing category should be considered for those species particularly susceptible to the impacts of climate change;
- Species listed under the Act should be automatically listed under the corresponding State legislation;
- Mechanisms of the Act that focus on broader protection methods, such as threat abatement plans, Wildlife Conservation Plans and the listing of key threatening processes, should be more readily implemented; and
- Conservation efforts should be focussed on facilitating adaptation of natural systems through enhancing their resilience, managing for uncertainty, prioritising protection and triage, and exploring assisted migration/translocation.

IV. International Movement of Wildlife

Q20 Does the Act currently provide appropriate regulation for the sustainable use of wildlife and international wildlife trade?

ANEDO submits that Part 13A of the Act does not currently provide appropriate regulation for the sustainable use of wildlife and international wildlife trade. The Act allows the Minister to approve the unsustainable use of wildlife through wildlife trade operations, even in circumstances where operations will contribute to the decline of a listed threatened species.

There have been three reported legal appeals under Part 13A, all heard in the Administrative Appeals Tribunal[153]. These cases highlight many of the practical flaws of the regulation of wildlife under the Act. The case of *Humane Society International and Minister for the Environment and Heritage* [2006] AATA 298;

[153] *Humane Society International and Minister for the Environment and Heritage* [2006] AATA 298 (Southern Bluefin Tuna Case); *Nature Conservation Council Of NSW Inc. V Minister for Environment and Water Resources and Ors* 2007 AATA 1876 (Grey Nurse Sharks case); *Re International Fund for Animal Welfare (Australia) Pty Ltd and Ors and Minister for Environment and Heritage and Ors* [2005] AATA 1210 (Asian Elephants).

('Southern Bluefin Tuna case') underlines one of the ways in which the Act does not adequately protect wildlife or promote its sustainable use.[154]

The effect of the case is that a species that has been assessed as meeting the criteria for protection as an endangered species can be harvested in a way that is unsustainable and does not assist the recovery of the species. The case demonstrates that the Act is currently failing to ensure sustainable practices are upheld and is also failing to sufficiently implement Australia's international obligations (discussed in more detail at **Question 24**).

Since this case was decided, the 2006 amendments to s303GJ of the Act have removed the right of appeal to the AAT for Ministerial decisions on wildlife trade operations which greatly reduces the transparency of decision-making. We discuss the removal of merits appeal rights in more detail at **Question 42**.

ANEDO submits that section 194Q should be amended to require the Minister to list any item that the Scientific Committee has assessed as meeting the criteria for inclusion on the threatened species or ecological community lists (discussed further under **Question 38**).

Q21 Do you think that current assessment and decision-making processes for the listing of specimens suitable for live import could be refined and simplified?

The current process for the listing of species provides that any person can apply to have the Live Import List (LIL) amended to include a new species. The LIL can be amended for both commercial and non-commercial reasons. The Discussion Paper sets out the eight steps required under the legislation for the alteration of the LIL, which may be seen by some to be an overly bureaucratic process. However ANEDO submits that such a system is necessary to ensure appropriate

[154] In 2006 the NSW EDO represented the Humane Society International (HSI) in the Administrative Appeals Tribunal (AAT) in a case challenging a decision of the Minister for Environment and Heritage regarding the fishing operations of Southern Bluefin Tuna to be an approved wildlife trade operation. HSI argued that the preconditions to the approval of the Southern Bluefin Tuna fishery as a 'wildlife trade operation' contained in s303FN were not met. These included a requirement that the operation of the fishery would not be detrimental to the survival of the species.
HSI had strong evidence that the fishery would be detrimental to the survival of the species. Indeed, the Commission for the Convention on Southern Bluefin Tuna considers Southern Bluefin Tuna to be overfished with spawning stock severely depleted. Its opinion is that continuation of fishing at current levels severely limits the probability of fish stock returning to target levels. Despite this, the AAT held that the preconditions were met and affirmed the Minister's decision to declare the fishery as a wildlife trade operation. As the case was being heard, the Threatened Species Scientific Committee advised the Minister that Southern Bluefin Tuna met the criteria for protection as an endangered species, and made a recommendation for listing. However the Minister declined to list the species. Listing of the species would have prevented the species from being part of a wildlife trade operation and therefore prevented it from being exported.

consideration is given to each request to alter the LIL. Indeed, extreme caution should be taken to ensure that any attempt to "refine" or "simplify" this methodology, does not lead to a loss of transparency and due diligence in the decision making process; two areas that are often the first to be sidelined in the pursuit of streamlining.

Q22 What are your views on the effectiveness and utility of wildlife trade management practices under the Act? Do you have any suggestions about how the system could be improved?

The effectiveness and utility of wildlife trade management practices are inadequate. Indeed, in some circumstances, despite evidence that an activity will have a significant impact on a nationally listed critically endangered species, such an activity can continue to operate. The case of *Nature Conservation Council of NSW Inc. V Minister for Environment and Water Resources and Ors* 2007 AATA 1876 ('Grey Nurse Sharks case') demonstrates this aptly.[155]

The effect of this decision is that wildlife trade operations that directly contribute to the decline of a listed threatened species can be approved under the Act. This is inconsistent with the objects of the Act, the principle of ecologically sustainable development and the international obligations which the Act was designed to implement.

This judgement demonstrates that decisions are continuing to be made by courts that fail to emphasise the need that the Act be interpreted in such a way as to promote the survival of endangered species. The AAT was under a duty to consider the principles of ESD, in particular the precautionary principle and the conservation of biological diversity. However, despite this, the Tribunal determined that it was open to it to interpret the Act in such a way as to allow an activity that negatively impacted on the survival of a threatened species.

ANEDO submits that the Act should be amended to strengthen the role that ESD principles have in the decision-making process under Part 13A, and in the Act in general. We believe that the Act should be amended to require that a decision-

[155] In that case, EDO NSW represented the NSW Nature Conservation Council (NCC) in proceedings brought in the Administrative Appeals Tribunal (AAT) against the Commonwealth Minister for the Environment and Heritage. NCC presented evidence to the Tribunal that the NSW Ocean Trap and Line Fishery (OTLF), was having a significant impact on the nationally listed critically endangered east coast population of the Grey nurse shark. The OTLF is a multi-species targeted fishery that operates within the habitat areas of the Grey nurse shark and a number of other threatened species. The NCC was seeking the implementation of fishery closures of specific key shark aggregation areas and the banning of the use of wire traces in deeper waters.
In a judgment handed down on 18 October 2007, the AAT upheld the Minister's approval of the OTLF as a wildlife trade operation on the basis that the fishery, operated in accordance with the conditions imposed by the Minister, will not be detrimental to the survival of the Grey nurse shark. The AAT found that the OTLF did have an adverse impact upon the Grey nurse shark, however it decided that in light of the other impacts on the shark the OTLF would not be detrimental to its survival.

maker not simply "consider" ESD principles but instead substantively incorporate ESD principles into every decision. We discuss the incorporation of ESD in detail in **Question 1(b)** above.

Q23 Are the arrangements between the Commonwealth and the States and Territories for managing the domestic movement of exotic and native wildlife effective and appropriate?

ANEDO has no comment.

Q24 Does the Act provide appropriate provisions to ensure that Australia complies with its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)?

ANEDO submits that the Act does not appropriately ensure compliance with Australia's obligations under CITES. Australia is currently failing to implement it's obligations under the CITES agreement to regulate the flow of endangered species across national borders.

The provisions of the Act that purport to implement CITES are found in Part 13A along with provisions in the *EPBC Regulations*. Under the Act, it is an offence to import a live CITES specimen into Australia without a permit. The Act provides the Minister with discretion to issue a permit to a person allowing them to import a live CITES specimen[156], however the legislation fails to provide sufficient guidance as to how the Minister is to exercise this discretion. This is demonstrated by the case of *Re International Fund for Animal Welfare (Australia) Pty Ltd and Ors and Minister for Environment and Heritage and Ors* [2005] AATA 1210 ('Asian Elephants case').[157]

This case demonstrates a number of failures to implement the CITES obligations found in the Act. It highlights the fact that the Act can be has been be interpreted in a way which is inconsistent with the objects of CITES. Indeed, while the Act purports to puts limits on the purpose for which a specimen can be imported, it is only concerned with the act of importation. There is no regulation of the actual conduct of persons after the specimen is imported even if the person uses the

[156]Sec 303CG, *EPBC Act*.

[157] The applicants in that case, International Fund for Animal Welfare (Australia) brought a case to the Administrative Appeals Tribunal (AAT) arguing that the AAT should refuse to issue permits for the importation of eight Asian elephants into Australia. The elephants were being imported for the purpose of exhibition at Taronga and Melbourne zoos. Importation for exhibition in a zoo is clearly prohibited under the Act as the Asian Elephant is listed as an endangered species under Appendix I of CITES. The zoos argued that they were applying for permits not for exhibition but instead for the purposes of conservation breeding or propagation.[157] The AAT confirmed the decision of the Minister to issue permits to the zoos but increased the conditions attached to the permits.

specimen for a different purpose, unless specific conditions are imposed to restrict that conduct. Therefore unless the Minister imposes conditions that the specimen only be used for a specific purpose, the importer is not bound to use the specimen for the purpose that it was imported. There is no requirement on the Minister to impose any conditions on a permit, and therefore it is likely that the importer's conduct will not be regulated in many cases.[158] In addition, the Act does not prevent a person from using a specimen for a prohibited purpose provided that the import is also for at least one other approved purpose. For example as the Asian elephants case shows, while one intention of CITES is to prevent imports of Appendix I endangered species for exhibition, the operation of the *EPBC Act* allows importation of specimens for exhibition provided that the import is also for conservation breeding.

ANEDO submits that the Act should be amended to require applicants to provide information on all intended purposes for the specimen at the time of application. The decision-maker can then consider which purpose or purposes are the most substantial.

The factors the decision-maker must consider in assessing the permit should then be the ones applicable to the substantial purpose, not just the purpose that the applicant chooses to base their application on. This will also allow the decision-maker to consider whether conditions should be imposed to regulate the other intended purposes, not just the nominated purpose. In addition, the Act should be amended to make it an offence to use the specimen for a purpose other than those which were disclosed and approved at the time of the application.

As with decisions in relation to wildlife trade operations, the 2006 amendments to the Act removed the ability to seek review in the AAT of a decision by the Minister to issue a permit to import wildlife under s303CG. Section 303GJ should be amended to remove this restriction (discussed in more detail at **Question 42**).

Summary and Recommendations – International Movement of Wildlife

- Part 13A of the Act does not provide appropriate regulation for the sustainable use and movement of wildlife.
- ANEDO supports the retention of the 8 step process for alteration to the Live Import List.
- The effectiveness and utility of wildlife trade and management practices is inadequate. The Act allows activities to continue even where there is evidence that an activity will have a significant impact on threatened species. The Act should be strengthened to more substantively incorporate ESD and require decisions to be made in accordance with the precautionary principle.
- ANEDO submits that the Act should be amended to require applicants to

[158] Allars, M. 2007, To Breed or to Exhibit?: The *Asian Elephants Case* an Reasons for Regulatory Failure, Beyond Environmental Law – Conference of Environmental Defenders Office and Australian Centre for Environmental Law Sydney and University of Sydney, 16-17 Feb, Sydney.

provide information on all intended purposes for the importation of CITES species at the time of application. The factors the Minister should consider when assessing the permit should then be the ones applicable to the substantial purpose.

- The Act should be amended to make it an offence to use an imported CITES specimen for a purpose other than those which were disclosed and approved at the time of the application.

V. Protected Areas

Q25 What factors should the Minister have regard to when making a decision on heritage listing?

ANEDO submits that only heritage considerations should inform the Minister's decision whether or not to list an item or place as an item of national heritage or Commonwealth heritage. The paramount consideration must be whether a place has any national heritage or Commonwealth heritage values.

Under s324JJ (and s341HI for Commonwealth heritage), in making a decision whether or not to include a place on the National Heritage List (or Commonwealth heritage list) the Minister must determine whether the place has one or more National Heritage Values. However, the Minister must also have regard to the Australian Heritage Council's assessment of the place and may 'seek, and have regard to, information or advice from any source'.[159] ANEDO submits that the Minister's broad discretion to consider advice from any source opens up the listing process to abuse. This provision allows the Minister to consider factors (such as the economic impacts of a listing) unrelated to the heritage values of a place in deciding whether to list a place. This may lead to places of genuine heritage value being left off the list.

ANEDO submits that s324JJ be amended to remove the Minister's ability to seek advice from any source in determining whether to list a place on the national or Commonwealth heritage lists.

Q26 What are your views on the process for nominating and listing Commonwealth Heritage and National Heritage places?

The nomination and listing process for the National Heritage List is analogous to the listing process for threatened species, ecological communities and key threatening processes discussed in **Question 10** above.

As noted in previous submissions, ANEDO is opposed to the priority assessment listing process for national and Commonwealth heritage. The process is not transparent and is highly dependent on ministerial discretion, which makes it open

[159] Section 324JJ (5)(b), *EPBC Act.*

to influence from factors not relevant to the heritage significance of a place (such as economic considerations).

In relation to National Heritage, the Minister may determine an annual heritage theme which significantly limits the scope of heritage listings for any one year. Indeed, the Act does not confine the Minister's ability to determine a theme. The Act states that the Minister may determine one or more national heritage themes for a year based on what the Minister considers should be given priority.[160] This introduces an incredibly broad discretion, which is open to political influence. Furthermore, a thematic approach limits the opportunity for public nominations to a distinct time and to particular theme. Important places not within the theme, or not on the priority assessment list, may not be given the appropriate consideration.
In preparing a priority assessment list for a particular year, the Australian Heritage Council (AHC) is expressly required to take into account the annual theme and capacity issues. However, there is no requirement to consider the heritage status of a place.[161] Indeed, the Act does not even require the assessment of a nominated place in every case. 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.[162] Similarly, the Minister may choose to remove any particular place from the priority assessment list. In exercising the power to omit places, the Minister may have regard to any matters that the Minister considers appropriate.[163] This makes heritage protection contingent on the whims of the Minister. Furthermore, the public is not able to discern the basis upon which an omission is made as the discretion is not confined in any way. Finally, even if a place is considered eligible for assessment as it is consistent with the annual theme, it may not be placed on that year's priority assessment list. In that case an explanation must be given.[164]

The above clearly demonstrates that the nomination and listing process for national and Commonwealth heritage places is unaccountable, limits public participation and is dependent almost entirely on the subjective opinion of the Minister. ANEDO submits that the thematic and priority listing provisions in the *EPBC Act* should be removed. In line with the former heritage provisions prior to 2006, all nominations of heritage places should be assessed and considered by the AHC, regardless of the theme of the nomination. A provision allowing vexatious, frivolous or bad faith nominations to be disregarded should also be reinstated.

ANEDO notes that the use of a priority list could be useful in identifying deficiencies in listings from certain places or types of heritage. However, a better approach would be a systematic process of review (potentially through the employment of a specific person) to identify areas where listings could be increased

[160] Section 324H, *EPBC Act.*
[161] Section 324JB, *EPBC Act.*
[162] Section 324JB(4), *EPBC Act.*
[163] Section 324JE, *EPBC Act.*
[164] Section 324JD(1)(b), *EPBC Act*.

and invite specific nominations from those areas. This system could work alongside the pre-2006 provisions.

A discussion of emergency listing processes can be found in **Question 38**.

Q27 What are your views on the effectiveness and utility of Commonwealth heritage strategies and management plans for protecting World, National and Commonwealth Heritage values?

ANEDO notes that the effectiveness of management plans for heritage areas is dependent on the specific provisions and protections contained within individual management plans. It is therefore difficult to make a general comment. However, we make the following observations.

ANEDO notes that management plans for areas of National heritage are only compulsory where the national heritage place is located entirely within a Commonwealth area.[165] Where a national heritage area is located within a state or territory, then the Commonwealth must simply 'use its best endeavours to ensure a plan for managing the place is prepared and implemented' in co-operation with the state or territory.[166] This would apply to a significant number of heritage places. ANEDO submits that management plans for national heritage areas must be mandatory no matter whether they are on Commonwealth land or otherwise. It is essential that a plan of management is in place to ensure the protection of these areas. As these areas or places are identified as being of national heritage significance, then there are no constitutional obstacles present and require mandatory plans of management for all national heritage places.

ANEDO also submits that the regulations providing details on the content of management plans for national and Commonwealth heritage places are not prescriptive enough. For example, Schedule 5A of the *EPBC Regulations* provides the mandatory elements of a management plan for national heritage areas. However, this list does not include a requirement for management plans to provide for provisions protecting heritage places. The list merely requires a management plan to 'have policies to manage the National Heritage values of a place'.[167] ANEDO submits that the Act should be amended to provide a specific requirement for management plans to *protect* the heritage values of listed places. Furthermore, there should be a specific requirement to demonstrate the application of the precautionary principle, not simply showing it has been taken into account. These amendments will ensure there is more robust protection of heritage areas instead of making protection reliant on aspirational statements in management plans.

[165] Section 324S, *EPBC Act.*
[166] Section 324X, *EPBC Act.*
[167] Schedule 5A(h), *EPBC Act*.

Q28 Given that the protection and conservation of Australia's heritage is shared between the different levels of government, are there any improvements in the current legislative arrangements that would be of benefit?

It is important to note at the outset that the various heritage processes across Australia relate to different but related processes. The *EPBC Act* is focused on nationally significant and world heritage, state processes are focused on state significant heritage while local authorities are usually charged with ensuring protection of regional and local heritage. ANEDO supports the maintenance of these important separate processes. However, we make some suggestions on how to improve the interaction between these processes and to facilitate a consistent best practice approach to heritage protection across Australia.

First, we believe that there should be a requirement for state lists to be updated to include all federally listed matters of heritage found in each state. This will ensure protection on a state level, which often offers better protection than the *EPBC Act* as it can more effectively mandate on the ground action and introduce strong protections. Similarly, the Department should more effectively cross-reference with state lists to identify state heritage items that are also significant on a national level.

Second, we believe that Part 15 of the *EPBC Act* should be amended to introduce stronger protections for heritage items in line with some state heritage schemes. Substantive protection of heritage under the *EPBC Act* is dependent on the provisions of management plans and the discretion of the Minister. This means that if management plans are not robust or if the Minister does not have the political will to protect heritage, that protection is not assured. ANEDO recommends that the Act be amended to require the refusal of developments (with very limited exceptions) that will lead to the destruction of a listed heritage item or that will significantly affect a listed place. This is the approach taken in NSW. Section 63 of the *Heritage Act 1977* (NSW) requires an approval body to refuse approval to an application that is made to demolish the whole of a building or work that is listed on the state heritage register. Approval may only be granted where the building constitutes a danger to occupiers or the public or if it is a condition of approval that the building or work is relocated to other land.[168] Approvals under the *EPBC Act* which affect or harm national or Commonwealth Heritage should be significantly restricted to ensure the maintenance and integrity of these important areas.

[168] Section 62, *Heritage Act 1977* (NSW).

Q29 What are your views on the effectiveness of the operation of the provisions for Ramsar wetlands and the utility of management plans for those wetlands?

The Convention on Wetlands of International Importance especially as Waterfowl Habitat was signed in Ramsar, Iran in 1971 and came into force in 1975. Australia was an original signatory and named the first Ramsar site in the world on 8 May 1974[169].

Australia currently has 65 Wetlands of International Importance listed under the Ramsar Convention covering approximately 7.5 million hectares.[170] However, the degree to which the *EPBC Act* implements the Ramsar obligations is variable. The mechanisms employed by the Act to achieve the objectives of the Convention are:

- including declared Ramsar wetlands as a "matter of national environmental significance"[171];
- requiring the Minister to declare an action a 'controlled action' where the development will have or is likely to have a significant impact on the ecological character of a declared Ramsar wetland;
- if appropriate, imposing conditions on development and policies and plans consistently with Australia's obligations under the Ramsar Convention[172]; and
- making and encouraging the making of management plans for listed Ramsar wetlands[173] and requiring those management plans to accord with the Australian Ramsar management principles[174].

These mechanisms are deficient as set out below.

Declared Ramsar Wetlands

The Act only applies to *declared* Ramsar listed wetlands. This means that many valuable Australian wetlands remain unprotected. For example, within the Murray Darling Basin alone, there are 30,000 wetlands[175], with only 15 being declared Ramsar wetlands and only 6 of those 15 Ramsar listed wetlands have "icon status" under the Living Murray Initiative.[176] Further, there are a large number of nationally significant wetlands which meet ANZECC criteria, yet do not trigger the provisions of the *EPBC Act*.

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[169] The Coburg Peninsula Aboriginal Land and Wildlife Sanctuary in the Northern Territory.
[170] Available at: http://www.environment.gov.au/water/environmental/wetlands/ramsar/index.html.
[171] Sections 16-17B, *EPBC Act*.
[172] Sections 138 & 146J, *EPBC Act*.
[173] Sections 325-336, *EPBC Act*.
[174] r10.02 and Schedule 6 *EPBC Regulations*.
[175] Available at: http://www.mdbc.gov.au/nrm/water_issues/wetlands.
[176] Available at: http://www.environment.gov.au/water/mdb/lmi.html.

As discussed in **Question 1(c)** above, this lack of protection to unlisted wetlands, the current Ramsar trigger should be expanded beyond wetlands of international importance to include wetlands of *national* importance.

Further, we note that there is no provision in the Act or Regulations setting out the basis on which the Minister declares a wetland to be a Ramsar wetland. As a result, the Act should be amended to provide for:

- provision for the public nomination of wetlands;
- the inclusion of the guidelines for the ecological character description of a wetland into the Act or Regulations to improve transparency; and
- the reasons for the Minister's decision should be made public with provision for a merits review of such decisions.

Significant Impacts

As discussed in **Question 8** above, the Act is limited to assessment of "significant impacts" and so does not include assessment of cumulative impacts.[177] This means there is a failure to take into account cumulative impact on wetlands, and does it address the historical and continual over-allocation of water both regulated and otherwise from river systems which deprive wetlands of environmental flows. The dire state of the Ramsar listed Coorong, Lake Alexandrina and Lake Albert and the closure of the Murray Mouth in 1984 and years following, is arguably due to such over-allocation.

Management Plans

Management plans are of limited effect as they are only mandatory and enforceable with respect to Commonwealth land, leaving the majority of land unprotected. Specifically, under section 333 of the Act, the Commonwealth is only required to use its "best endeavours" to ensure a management plan consistent with the Convention is prepared and implemented.

ANEDO submits that the Act should be amended to:

- make the preparation and implementation of these plans mandatory;
- provide that the Commonwealth will prepare the plan if the State or individual is not willing to do so;
- provide for penalties for failure to sufficiently prepare and comply with plans in accordance with the "wise use" principles of the convention;
- require that the Commonwealth publish the plans on the Department's website; and
- provide for review of the plans every 5 years.

[177] See also Part 1, Item 5 of this submission.

Schedule 6 of the *EPBC Regulations* should also be amended to include a requirement that wetlands be managed to increase waterfowl populations where appropriate as envisaged under Article 4.4. Further, the Act and Regulations do not require Indigenous involvement in the preparation and implementation of management plans and this should be altered to enable such involvement.

Convention compliance

The Act should be amended to provide for the encouragement, research and exchange of data and publication regard wetlands and their flora and fauna in accordance with Article 4.3 of the convention.

Q30 What are your views on the effectiveness of the operation of the provisions for Commonwealth Reserves and the utility of management plans for those reserves?

Division 4 of Part 15 of the Act applies to areas of Commonwealth Land set aside as Commonwealth Reserves. ANEDO has some concerns with the provisions relating to management plans. We believe that the protections currently afforded to Commonwealth Reserves should be strengthened.

The Act stipulates that a management plan is required for all Commonwealth reserves. Management plans must indicate, *inter alia*, the general activities that are prohibited or regulated in the reserve, and the means of prohibiting or regulating them.[178] This makes the limitation of uses in Commonwealth reserves dependent upon the provisions of the plan of management. This means that if a plan of management is weak, then potentially damaging activities may be permissible. ANEDO submits that given the sensitivity of many Commonwealth reserves, the Act needs to provide specific guidance on permissible activities in reserves and contain specific provisions regulating park use, visitor use, tourism facilities, mining, etc. That is, the Act must actually set out acceptable activities for each IUCN category rather than leave it the plan of management. This should include the requirement for spatial prescriptions such as identifying the areas where specific activities may occur and other areas where no activities may occur to ensure the ecological integrity of the reserve.

The Act does provide that certain activities are prohibited in Commonwealth reserves. Section 354 states that a person must not, except in accordance with a management plan:

(a) kill, injure, take, trade, keep or move a member of a native species; or

(b) damage heritage; or

[178] Section 367, *EPBC Act*.

(c) carry on an excavation; or

(d) erect a building or other structure; or

(e) carry out works; or

(f) take an action for commercial purposes.

Furthermore, the *EPBC Regulations* contains a list of general offences in reserves, such as damaging heritage, dumping waste, and excavation.[179] However, all these activities may occur in Commonwealth reserves if allowed for by Plan of Management. ANEDO submits that the Act should require that management plans should be subject to these general prohibitions. This will provide better protection of areas protected as Commonwealth reserves. The circumstances where these activities may occur in Commonwealth reserves should be specifically set out in legislation, not subject to the whims of the Director or reserve board in their determination of the provisions of a management plan.

Commonwealth reserves are subject to the reserve management principles in Schedule 8 of the regulations. However, although these provisions contain important principles, such as the need for ecologically sustainable use, community participation and the precautionary principle, there are no direct provisions that operationalise these. Moreover, some of the IUCN principles are too broadly defined. For example in national parks, principle 3.04 states that "visitor use should be managed for inspirational, educational, cultural and recreational purposes at a level that will maintain the reserve or zone in a natural or near natural state" but there is no prescription on specific activities allowed or what this principle entails. ANEDO submits that the principles should be clarified to better mandate on-the-ground action and spatial and temporal restrictions in Commonwealth reserves. Moreover, the management principles should state unequivocally that the overarching principle underpinning the Commonwealth reserve system is the need to protect and conserve the integrity of reserve areas.

Summary and Recommendations – Protected Areas

- Only heritage considerations should inform the Minister's decision whether to list a place on the National or Commonwealth Heritage List. Section 324JJ(5)(b), which allows the Minister to consider advice from any sources when making a decision on heritage listing, should be removed.
- ANEDO submits that the thematic and priority listing provisions in the *EPBC Act* should be removed. All nominations of heritage places should be assessed and considered by the AHC regardless of the theme of the nomination. A provision allowing vexatious, frivolous or bad faith nominations to be disregarded should also be reinstated.
- The Department should introduce a systematic process of review to identify areas where listings could be increased and invite specific nominations from

[179] Part 12, Subdivision 12.2.2, *EPBC Regulations*.

those areas. This system could work alongside the pre-2006 provisions

- ANEDO submits that management plans for national heritage areas must be mandatory no matter whether they are on Commonwealth land or otherwise.
- The Act should be amended to provide a specific requirement for national and Commonwealth heritage management plans to *protect* the heritage values of listed places.
- ANEDO submits that state heritage lists should be required to be updated to include all federally listed matters of heritage found in each state. Similarly, the Department should more effectively cross-reference with state lists to identify state heritage items that are also significant on a national level.
- Part 15 of the *EPBC Act* should be amended to introduce stronger protections for heritage items in line with some state heritage schemes. For example, ANEDO recommends that the Act be amended to require the refusal of developments (with very limited exceptions) that will lead to the destruction of a listed heritage item or that will significantly affect a listed place.
- ANEDO submits that given the sensitivity of many Commonwealth reserves, the Act needs to provide specific guidance on permissible activities in reserves and contain specific provisions regulating park use, visitor use, tourism facilities, mining, etc. That is, the Act must actually set out acceptable activities for each IUCN category rather than leave it the plan of management.
- The Act does not appropriately regulate Ramsar wetlands. Amendments needed include provision for the public nomination of wetlands, making management plans mandatory for all Ramsar wetlands and a five yearly review of management plans.
- ANEDO submits that the reserve management principles for Commonwealth reserves should be clarified to better mandate on-the-ground action and spatial and temporal restrictions in Commonwealth reserves. The management principles should also state unequivocally that the overarching principle underpinning the Commonwealth reserve system is the need to protect and conserve the integrity of reserve areas.

VI. Indigenous Involvement

Q31 Are there opportunities to harmonise legislative provisions for the protection of Indigenous heritage values? If so, how?

ANEDO submits that in order to harmonise Indigenous heritage provisions across Australia a framework that establishes a nationally consistent set of standards for the protection of Indigenous heritage values needs to be created. What currently exists in Australia is an ad hoc and varied approach, resulting in differing levels of protection of Indigenous heritage values. In NSW the protection of Indigenous

heritage values falls under the ambit of the *National Parks and Wildlife Act 1974* (NPWA). The NPWA inadequately provides for the effective protection of Aboriginal objects and places in NSW. A recent article concerning a residential development at Sandon Point in NSW outlined some of the major flaws inherent in the current process;

> *The central fault with the NPWA*[180] *cultural heritage provisions is that an Aboriginal community cannot prevent an activity that is likely to result in the destruction of their heritage. The agency responsible for administering the NPWA retains all ownership rights, including the right to consent to destruction of their property, Aboriginal heritage. The NPWA does not protect Aboriginal heritage, it merely regulates its destruction.*[181]

The current NSW legislative scheme enables the interference, intrusion and destruction of Aboriginal objects and sites of cultural significance rather than focussing on their protection. Indeed, under Part 3A of the *Environmental Planning and Assessment Act 1979*, which deals with major projects, there is no longer even a requirement to obtain a permit before destroying Aboriginal heritage. There are therefore strong reasons for the development of a nationally consistent set of standards. Other States and Territories vary in the way they seek to protect cultural heritage. For example, in Queensland, the *Aboriginal Cultural Heritage Act 2003* establishes a "cultural heritage duty of care" which requires that a person who carries out an activity must take "all reasonable and practicable measures to ensure the activity does not harm Aboriginal cultural heritage." [182] However there is no blanket prohibition on harming Indigenous heritage.

This stark contrast and disparity in the way in which the protection of Indigenous heritage values are addressed throughout Australia, demonstrates that a harmonised national standard of protection needs to be identified and applied. ANEDO submits that the *EPBC Act* is the appropriate platform upon which to create such a standard. However, it is fundamental to ensure that a lowest common denominator approach is not introduced when setting the standard. That is, what's required is the identification of best practice approaches to guide the development of an effective national framework. Such an approach needs to incorporate substantive protections of Indigenous heritage. ANEDO recommends the following amendments to the Act to facilitate this:

- A clear definition of heritage items is needed within the scope of the *EPBC Act* and other heritage laws;
- Improved processes for nominating items, including:
    - joint referral to Heritage Councils (NSW and Australia);
    - processes for consulting with the item owner(s) and other interested parties (including Aboriginal communities);

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[180] *National Parks and Wildlife Act 1974 (NSW).*
[181] Ridge, K. & Seiver, A. 2005, 'Carriage: An Elders Journey through the Courts', *Indigenous Law Bulletin* 10.
[182] Section 23(1), *Aboriginal Cultural Heritage Act 2003.*

    - joint Ministerial decisions on State and National listing, for example through the appropriate Ministerial Council;
    - dispute resolution and negotiation provisions in cases of conflicting views on listing; and
    - the promotion of consistency between jurisdictions. If an item is listed by the Australian Heritage Council that item should automatically be included in the State's own Heritage Register or List, with the potential for it to be managed under the same management plan.
- Improved processes for developing management plans, including:
    - single management plans for items appear on both National and NSW lists – this would include repealing previous management plans;
    - referral mechanisms from the National Heritage Council to formal NSW Aboriginal heritage committees (see above);
- sharing of heritage information and resources between agencies, advisory bodies; and
- shared enforcement powers by appropriate officers – rangers in conservation reserves listed as World Heritage properties or on the National Heritage List should be able to take enforcement actions to avoid or mitigate harm to the item.[183]

Moreover, ANEDO submits that the harmonisation of Indigenous laws can be assisted through the development of bilateral agreements, however a number of concerns exist regarding the current legislative provisions that facilitate the creation of such agreements. The Act currently requires that the Minister is merely to have "considered the role and interests of Indigenous peoples"[184] before entering into such an agreement. This does not amount to a satisfactory consultation or assessment process. As the Minister must only have regard to these interests, the discretion afforded to the "role and interests of Indigenous peoples" in the decision-making process may ultimately be subverted by other considerations. The Act should be amended to require substantive consultation and collaboration with Indigenous peoples in the finalisation of bilateral agreements.

Finally, a report[185] regarding the review of the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* noted a number of recommendations that may improve the harmonisation of Indigenous heritage values. These include:

1. Greater coordination of Commonwealth laws, policies, and programmes; including a National Policy for Aboriginal cultural heritage at all levels of government.
2. Respect for customary restrictions on information; requiring State, Territory, and Commonwealth laws to meet a certain standard of protection.

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[183] Anthony Seiver assisted with this section of the response to the 10 year review of the EPBC Act.
[184] Section 49A(c), *EPBC Act.*
[185] Evatt, E. 1996, 'Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984', *Australian Indigenous Law Reporter,* Vol.2, No. 3, Pgs. 433-450.

3. Effective interaction with State and Territory laws; including reform, minimum standards and greater recognition at the State and Territory level.
4. Minimum standards for cultural heritage laws; including among other things a definition of Aboriginal cultural heritage under federal law, instant blanket protection for those areas within the definition, establishment of state level cultural heritage bodies to provide evaluation and administration services, confidentiality provisions, access to significant sites, effective sanctions for enforcement.
5. A determination of site significance should be an Aboriginal issue; Aboriginal information should form the basis of assessment, with significance determined separately from the question of site protection. A determination of significance should be binding on the Minister.
6. Encouraging agreement through the use of mediation.
7. Enhancing effectiveness of the Act through greater consistency in language, policy, and references to protection across all legislation, and improving accountability.
8. Protection for Aboriginal objects; through the enactment of uniform national laws across States to regulate sale and exhibition, the recognition of agreements regarding the protection of significant Aboriginal objects, the extension of protection to objects which record, describe or portray an aspect of Aboriginal tradition, and the repatriation of objects as a national responsibility.

ANEDO supports the above recommendations.

Q32 Does the Act adequately support Indigenous involvement in the preparation of management plans for Commonwealth reserves? If not, what improvements could be made?

ANEDO believes that the Act does not adequately support indigenous involvement in the preparation of management plans for Commonwealth reserves. The legislation currently provides the following opportunities for Indigenous engagement in the preparation of management plans:

> "In preparing a management plan for a Commonwealth reserve, the Director and the Board (if any) for the reserve must take account of:
>
> (c) the interests of:
>
> (ii) the traditional owners of any indigenous people's land in the reserve; and
>
> (iii) any other indigenous persons interested in the reserve;"[186]

[186] Section 368(3), *EPBC Act.*

Furthermore if the Commonwealth Reserve is wholly or partially on Indigenous people's land the Traditional Owners of the land must agree to the establishment and constituency of the Board of Management. ANEDO supports these provisions however believes that Indigenous engagement should be expanded to facilitate earlier engagement in the development of Commonwealth reserves. The current provisions trigger Indigenous consultation and engagement at a stage *after* the area has been declared a Commonwealth reserve. What is required is better engagement with Indigenous communities to identify those areas that should be designated as Commonwealth Reserves. Further more, the Act may provide the appropriate platform for legislative provisions to be developed regarding that allocation and distribution of fee's collected as a result of tourism activities in Commonwealth Reserves. ANEDO submits that a proportion of those funds collected in areas such as Kakadu should be assigned directly to promoting the development of Indigenous partnerships and improving the autonomy of Indigenous peoples in governing these areas.

ANEDO recognises the need for a practical framework that creates an opportunity for Indigenous peoples, who hold knowledge concerning the cultural and heritage value of an area, to engage early in the Commonwealth reserve process in a meaningful and effective manner. However, in order to engage effectively, ANEDO submits that mere consultation with Indigenous stakeholders in the development of management plans is insufficient.

Article 19 of *The Declaration of the Rights of Indigenous Peoples* now requires a State to go beyond merely consulting with the relevant Indigenous groups, to instead require "free prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."[187] Therefore what is needed is a process of substantive collaboration and empowerment of Aboriginal communities with appropriate resources and autonomy to carry out the objectives identified in a cooperatively developed management plan. One example where this has been successful is the Indigenous Protected Area (IPA) element of the Caring for our Country. This is a program which aims to support "Indigenous communities to manage their land for conservation – in line with international guidelines – so its plants, animals and cultural sites are protected for the benefit of all Australians."[188] The initiative has proven highly successful in recent years with 25 IPA's being established since 1990 and a further 10 new IPA's expected to be created in the coming years as a result of a $7 million contribution by the Indigenous Land Corporation in 2007. We recommend the Act be amended to facilitate such similar processes, or consider granting IPAs legal status to ensure their protection.

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[187] *The Declaration of the Rights of Indigenous People*, Article 19 – "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

[188] Department of the Environment, Water, Heritage and the Arts – Indigenous Communities and the Environment. Available at: http://www.environment.gov.au/indigenous/ipa/index.html.

Q33 Do the processes under the Act facilitate the involvement and cooperation of Indigenous people as owners of knowledge of biodiversity?

ANEDO submits that the Act does not adequately facilitate the involvement and cooperation of Indigenous peoples as owners of knowledge of biodiversity. It has been noted that:

> "*Indigenous people's participation is often not sought in an equitable way, and their knowledge is at best underutilised. Capacity development and resources distribution issues often preclude meaning interaction with Indigenous peoples, and where they are consulted it is often in an "ad hoc" fashion which is unsuited to Indigenous methods of communication and transmission of knowledge.*"[189]

This situation needs to be amended as the unique relationship Indigenous peoples have with the land brings with it a great wealth of knowledge, including an understanding of ecological interactions and the sustainability of natural systems. Some commentators have observed that the application of Indigenous Cultural knowledge is essential to improve ecological management and inform environmental understanding.[190] Indigenous collaboration in natural resource management and the development of biodiversity strategies, should therefore be an essential part of the development of any biodiversity strategy, not only because of the unique position occupied by Aboriginal Australians as indigenous inhabitants, but because it offers an opportunity to manage the land in a way that has proven successful for hundreds of thousands of years:

> "*The tone is clear – mutual respect for Indigenous land management practices can ensure the preservation of biodiversity, and traditional ecological knowledge has a key part to play in the continuance of Australia's biodiversity*."[191]

ANEDO recognises the establishment of the Indigenous Advisory Committee[192] and the function it serves "to advise the Minister on the operation of the Act, taking into account the significance of indigenous peoples' knowledge of the management of land and the conservation and sustainable use of biodiversity."[193] Additionally, the Australian Heritage Council serves a purpose in the "assessment,

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[189] Champan, T. 2008, 'The role, use of and requirement for traditional ecological knowledge in bioprospecting and biobanking biodiversity conservation schemes', *Environmental and Planning Law Journal*, Vol. 21, No. 4, Pgs. 196-217.

[190] Horstman, M. & Wightman, G. 2001, '*Karparti* ecology: recognition of Aboriginal ecological knowledge and its application to management in north-western Australia.', *Ecological Management & Restoration,* (2) at 99.

[191] Champan, T. 2008, 'The role, use of and requirement for traditional ecological knowledge in bioprospecting and biobanking biodiversity conservation schemes', *Environmental and Planning Law Journal*, Vol. 21, No. 4, Pgs. 196-217.

[192] Established under Div 2A., Sec 505A of the *Environment Protection and Biodiversity Conservation Act 1999.*

[193] Section 505B(1), *EPBC Act.*

advice and policy formulation and support of major heritage programs."[194] However, both these bodies only play consultative and advisory roles, in which the Minister is not bound to take into account the opinions received.

ANEDO submits that the best method through which Indigenous knowledge and skills could be incorporated into biodiversity management requires *cooperation* as opposed to mere consultation. What is therefore needed is a holistic approach to biodiversity management where Indigenous partnerships to manage biodiversity are mandatory. The current consultation process is failing to ensure partnerships are developed, and that on-the-ground implementation of Indigenous knowledge and skills takes place. It is the implementation of knowledge which ANEDO believes to be paramount to the development of effective biodiversity management. Greater funding is required to facilitate the development of partnerships for the two-way transfer of knowledge between Indigenous and non-Indigenous parties, leading to a mutually advantageous relationship with ongoing benefits for the management of biodiversity. These partnerships will also assist in overcoming the current situation in which there is often limited opportunity for Indigenous peoples to become involved in the ongoing scientific research and study required to develop and implement effective biodiversity management throughout Australia. Finally such partnerships, and the proliferation of joint management agreements, will expedite the process through which Indigenous skills and knowledge is practically implemented into biodiversity management and land governance positions.

Q34 Does the Act make adequate provision for Indigenous tradition to be taken into account in decisions made under the Act?

ANEDO believes that the Act does not make adequate provision for Indigenous tradition to be taken into account in decisions made under the Act. The body that oversees a nation's performance under the International Covenant on Civil and Political Rights, the Human Rights Committee, considers that "Indigenous people have a unique and profound relationship to their land which extends beyond economic interests to cultural and spiritual identity.[195]" It is this cultural and spiritual identity and Indigenous tradition that needs to be taken into account and preserved when decisions are being made under the Act.

The Act defines Indigenous tradition to mean, "the body of traditions, observances, customs and beliefs of indigenous persons generally or of a particular group of indigenous persons."[196] The current opportunities for the protection of Indigenous tradition are pointed out in the Discussion Paper and include section 8 of the Act which acknowledges Native Title holders the right to undertake certain activities in accordance with section 211 of the *Native Title Act 1993*. Furthermore section

[194] Australian Heritage website. Available at: http://www.environment.gov.au/heritage/ahc/about/index.html.
[195] Promoting economic and social development through native title. [online]. Land, Rights, Laws : Issues Of Native Title 2 (28) August 2004 : 1-9.
[196] Section 201(4), *EPBC Act.*

359A(1) protects, to some extent, the traditional use of an area by Indigenous persons in a Commonwealth reserve. However, this protection can be made ineffective under section 359A(2), if regulations are made relevant to this division and are either made for the purpose of conserving biodiversity in the area, or expressly affect the traditional use of the area by Indigenous persons. In addition, the Minister may grant a permit under Part 13 if "the specified action is of particular significance to Indigenous tradition and will not adversely affect the survival or recovery in nature of the listed threatened species or listed threatened ecological community concerned."[197] Finally, ANEDO notes that there is no mechanism in the Act that requires Indigenous tradition and knowledge to be taken into account in the declaration of World Heritage areas in the Act.

As the provisions above demonstrate, there is no assurance that Indigenous tradition will be taken into account when decisions are being made under the Act. The Section 8 protection applies only to Native Title holders and not Indigenous peoples in general. Protection under section 359A(1) can easily be subverted through legislative amendment. The issuing of a permit under Part 13 is heavily reliant on Ministerial discretion to grant a permit. As such, a framework needs to be developed within the legislation that ensures the concerns of Indigenous people with a traditional association to the area are engaged in accordance with the principles of "free prior and informed consent"[198] prior to any decisions being made. Additionally the legislation should clearly stipulate to proponents and decision makers that situations and circumstances in which, due to the significance of an area to a local Aboriginal community and the traditional activities associated with it, the approval of some projects, will simply not be permitted.

As mentioned above, ANEDO believes that there should be greater restrictions on the discretion currently afforded to the Minister under Section 133 of the Act. In general terms, the Act over the past 12 months has achieved more positive environmental outcomes[199] despite there being no amendments to the legislation. This indicates that the environmental outcomes being achieved are dependant upon the political will of the government of the day. The preservation of Indigenous tradition and heritage should not be dependent upon whether the Minister at the time is sympathetic to the preservation of such matters. ANEDO believes that the legislation should be amended to provide more explicit criteria to which the Minister is to adhere when implementing the powers granted under Sec 133 of the Act.

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[197] Section 201(3)(c), *EPBC Act*.

[198] *The Declaration of the Rights of Indigenous People*, Article 19 – "States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free prior and informed consent before adopting and implementing legislative or administrative measures that may affect them."

[199] In 2006 there was only one approval not granted, in 2005 there were two not granted, and in 2004 there was one. In 2008 there were 5 refusals made by the Minister, 3 of which were clearly unacceptable, i.e. deemed to be so prior to the assessment process.

Summary and Recommendations – Indigenous Involvement

ANEDO recommends that:

- A nationally consistent set of standards, and a complimentary framework, should be developed for the protection of Indigenous heritage that takes into account best practice approaches;
- If an item is listed on the National Heritage Council, it should be automatically included in the State's own Heritage Register or List;
- Indigenous involvement under the Act for the protection of Indigenous tradition, protection of heritage and development of management plans should move away from a mere consultative approach to an approach that focuses more on requiring "free prior and informed consent" in accordance with international obligations; and
- A holistic approach to biodiversity management should be introduced where Indigenous partnerships are mandatory, and Aboriginal communities are empowered with appropriate resources and autonomy.

VII. Compliance and Enforcement

Q35 Does the Act provide for the appropriate follow-up of environmental assessment and approval decisions, including the monitoring, evaluation and auditing of actions? If not, what other actions could be taken?

ANEDO is of the opinion that the *EPBC Act* does provide the capacity for the appropriate follow-up of environmental assessment and approval decisions, including the monitoring, evaluation and auditing of actions. However as a result of the discretion afforded to the Minister in deciding whether or not to take such action, coupled with the lack of resources available for the carrying out of monitoring activities, there exists a great disparity between what the Act provides and the actual amount of monitoring, evaluation and auditing proponents are being exposed to post-approval. The Australian National Audit Office Report found that a key issue with the Act was that there were "deficiencies in formal monitoring and auditing."[200]

The Act provides that the Minister may order an Environmental Audit if:

> "*the Minister believes or suspects on reasonable grounds:*
>
> *(a) that the holder has contravened, or is likely to contravene, a condition of the authority; or*
>
> *(b) the impacts that the action authorised by the authority has, has had or is likely to have on the matter dealt with by the provision for which the authority authorises the action are significantly greater than was*

[200] Australian National Audit Office, 'The Conservation and Protection of National Threatened Species and Ecological Communities', Audit Report No. 31, 2006-07.

indicated in the information available to the Minister when the authority was granted."[201]

The effectiveness of such a system is reliant on two factors. Firstly the availability and allocation of resources is a practical limiting factor to the effectiveness of the monitoring and auditing regime. In order to overcome this inadequacy there simply needs to be a greater allocation of funding to those bodies facilitating on the ground compliance measures.

Second, the Minister at the time must utilise the discretion afforded in the legislation in an appropriate manner. The Act provides no guidance beyond if "the Minister believes or suspects", therefore leaving the discretion of the Minister largely unfettered. This submission noted earlier that there has been a great deal of variance in environmental outcomes being achieved depending upon the political party in power. ANEDO submits this variance in environmental outcomes can be largely attributed to the discretion afforded to the Minister in decisions such as these. Hence what is required is a more prescriptive approach that requires the Minister to adhere to stipulated criteria or considerations, which would ensure greater consistency in the enforcement and compliance process. The current absence of guidance to the Minister also contributes to a lack of transparency and accountability in the decision-making process.

ANEDO's submission to the EPBC Senate inquiry in September last year, looked in detail at the findings of the ANAO Report[202] to analyse how these two factors are contributing to the success of the Act. In terms of compliance, ANAO found that the "implementation of the compliance and enforcement strategy has generally been slow" with the Department of the Environment, Water, Heritage and the Arts not knowing "whether conditions on the decisions are generally met or not", and finding that "there has been insufficient follow up on compliance" (para 48), and "consequently, the Department has not been well positioned to know whether or not the conditions that are being placed on actions are efficient or effective" (para 49).[203] ANEDO submits that it is essential that when approvals are granted, the conditions attached are fulfilled. If the Department itself "has not been well positioned to know whether the conditions" are "efficient or effective", major administrative and funding adjustments need to be made.

It is apparent that DEWHA recognises the benefits that arise from conducting audits, stating that "early intervention in the form of an audit reduces the risk of serious non-compliance arising inadvertently", and that the carrying out of regular audits "demonstrate(s) to the community that there is a system in place for

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[201] Section 458(1), *EPBC Act.*

[202] Australian National Audit Office, 'The Conservation and Protection of National Threatened Species and Ecological Communities', Audit Report No. 31, 2006-07.

[203] 2008 Audit Report "The Conservation and protection of National Threatened Species and Ecological Communities" The Auditor General, 2008 Audit Report "The Conservation and protection of National Threatened Species and Ecological Communities", 2006-7 Performance Audit, Australian National Audit Office, 2007.

measuring and improving compliance, and increasing community confidence in the regulatory system."[204] However, the *EPBC Act* compliance auditing programme audited only five projects[205] in 2008, which is desperately inadequate. ANEDO is aware that "a more strategic approach is being developed to operate in conjunction with the existing random selection process for selecting audits"[206], and hopes that the introduction of this new strategy will be accompanied by a more structured and regular enforcement and compliance regime.

Q36 Are the offence and civil penalty provisions appropriately framed to encourage compliance with the Act?

ANEDO submits that the offence and civil penalty provisions are framed in a manner that clearly identifies the offences and corresponding penalty provisions. This allows the public to clearly ascertain the consequences of a breach of the Act. It therefore follows that the offence and civil penalty provisions of the Act are appropriately framed to encourage compliance. However despite this, ANEDO submits that the underlying basis of the offence and civil penalty provisions are unclear. They appear to have been established without any reference to guiding principles or an organising framework. ANEDO therefore strongly supports the introduction of guiding principles into the Act to frame the administration of the offence and civil penalty provisions. This will enable the public and those involved in the administration of the Act to have a clear understanding of their rights, roles and responsibilities.

Q37 Does the Act contain a sufficiently comprehensive and appropriate range of enforcement mechanisms? Are those mechanisms capable of deterring and responding to contraventions of the Act?

The Act does provide a wide range of enforcement mechanisms, including;

- court injunctions;
- required environmental audits;
- strict civil and criminal penalties;
- remediation of environmental damage;
- enforceable undertakings;
- liability of executive officers; and
- publicising contraventions.

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[204] EPBC Act – Compliance Auditing. Available at: http://www.environment.gov.au/epbc/publications/pubs/compliance-auditing.pdf.

[205] The projects audited included the Lyons Residential Sub-Division Development, the Mt Buller Summit Nature Walk, the Coral Sea Pearls – Great Sandy Straits Oyster Aquaculture Facility, the Donnybrook Sand Extraction Operation and the Oyster Cove Residential Development. Further information available at: http://www.environment.gov.au/epbc/publications/pubs/compliance-auditing-2008.pdf.

[206] Department of the Environment, Water, Heritage and the Arts – Compliance Auditing. Available at: http://www.environment.gov.au/epbc/compliance/auditing.html.

The wide range of mechanisms provides the Department with a number of enforcement options in responding to contraventions of the Act. However, despite the array of enforcement mechanisms, it is clear that there has been minimal use of adequate enforcement actions,[207] with the ANAO Report finding that there was "a lack of prosecutions brought by the Commonwealth."[208] The ANAO Report also found that "responses to potential breaches of the Act have focussed on (implementing) the 'less robust options.'"[209] While appropriate in some circumstances, ANEDO believes that a focus on 'soft' enforcement options does not contribute to deterring future breaches of the Act. There is therefore a need to greater utilise those harsher and more targeted penalties in response to non-compliance to ensure that the consequences of breaching the Act exceed the benefits. Indeed, deterrence is greatly undermined if penalties are inadequate and there is a continuation of the trend to implement those "less robust options."[210]

ANEDO submits that those bodies responsible for undertaking compliance actions under the Act need to be more proactive in establishing a position where there is an increased likelihood of being caught and successfully prosecuted. As noted by Jacobs J of the High Court:

> "*The deterrent to an increased volume of serious crime is not so much heavier sentences, as the impression on the minds of those who are persisting in a course of crime that detection is likely and punishment will be certain. The first of these factors is not within the control of the courts; the second is. Consistency and certainty of sentence must be the aim...*"[211]

EDO offices have also been made aware of low numbers of compliance officers often in charge of vast areas, which make inspection and enforcement increasingly difficult. ANEDO therefore submits that it is essential to have a sufficient number of on-ground officers to effectively implement the enforcement provisions of the Act. This should be addressed as a matter of priority.

Additionally, ANEDO supports the fact that the framework of the Act clearly provides that corporations, employers and principals are potentially liable for the actions of their officers, agents and employees.[212] It is appropriate that corporate liability for environmental offences have received an increasing amount of attention in recent years, as corporations are able to engage in extremely large scale

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[207] For examples of poor enforcement see ANEDO's previous EPBC submission to the Senate which sets out one case study from Queensland (Paradise Dam), and three from Victoria (Superb Parrots, Leadbeaters Possum and the Striped Legless Lizard). Available at: http://www.edo.org.au/edonsw/site/policy.php#4.

[208] Australian National Audit Office, 'The Conservation and Protection of National Threatened Species and Ecological Communities', Audit Report No. 31, 2006-07.

[209] Australian National Audit Office, 'The Conservation and Protection of National Threatened Species and Ecological Communities', Audit Report No. 31, 2006-07.

[210] Australian National Audit Office, 'The Conservation and Protection of National Threatened Species and Ecological Communities', Audit Report No. 31, 2006-07.

[211] *Griffiths* (1977) 137 CLR 293, at 327.

[212] Sec 498B, *EPBC Act.*

developments which have the potential to cause equally large scale environmental damage.

In summary, a great disparity exists in terms of what the provisions of the Act provide for in terms of enforcement and compliance, and what is being implemented on the ground. Therefore there must be a greater focus on ensuring that the full ambit of penalty provisions are implemented, and that greater resources are allocated to the Department to carry out compliance and enforcement action.

Summary and Recommendations – Compliance and Enforcement

- ANEDO submits that a more prescriptive approach to compliance and enforcement should be introduced that requires the Minister to adhere to stipulated criteria and considerations, with less emphasis on ministerial discretion;
- Funding for implementation of the Act must be a priority for the Commonwealth Government in order to improve the implementation of Australia's international environmental obligations and to broaden the scope of the Act to address the major environmental challenges facing Australia;
- An increase in resources is needed to address the deficiencies noted throughout this submission relating to gaps in data, and capacity for assessing, listing and planning effectively;
- An increase in resources is vitally needed for on-ground officers working on compliance and enforcement; and
- The current focus on implementing 'less robust' enforcement mechanisms should be shifted towards utilising the harsher and more targeted penalties of the Act.

VIII. Decision-making under the Act

Q38 As the primary decision maker under the Act, is the level of discretion provided to the Minister for the Environment, Heritage and Arts appropriate?

As has been demonstrated throughout this submission, ANEDO submits that the level of discretion currently afforded to the Minister is inappropriate. Throughout the Act the Minister has a high level of discretion that is not closely tied to the objects of the Act. Moreover, this discretion is often unfettered, with no list of mandatory considerations to confine that discretion.

General recommendations regarding discretion

Ministerial discretion should be more closely tied with the objects of the Act. In particular, all decisions under the Act should require the Minister to act in accordance with the principles of ESD. For example, this may include a requirement for the Minister to demonstrate that a particular decision will lead to the protection of environment, or increase the survival of threatened species or protect heritage values of heritage places etc (as relevant). If the decision does not, the Minister should be required to provide reasons why the decision is nevertheless justified and indicate what the likely damage and impacts will be. As we mentioned in **Question 1(b)** above, this could be achieved by giving ESD overriding weight in decision-making.

Section 391 currently requires decision-makers to take into account the precautionary principle for specified decisions under the Act. As noted above, ANEDO submits that decision-makers should be required to act in accordance with ecologically sustainable development. The precautionary principle is one element of ESD (as stated in section 3A) and therefore this amendment would also require decision-makers to act in accordance with the precautionary principle for all decisions under the Act. ANEDO strongly supports this concept – it is illogical that the principal piece of environmental protection legislation in Australia does not specifically require the precautionary principle to be considered in all decision-making. Section 391 should be amended to require the Minister to act in accordance with ESD principles as stated in section 3A including the precautionary principle for *all* decisions under the Act.

Some of the specific Ministerial discretions that ANEDO considers to be inappropriate are outlined below.

Recovery plans and threat abatement plans

As a result of the 2006 amendments to the *EPBC Act*, the Minister is not required to make a recovery plan for a listed threatened species or ecological community even where the species is critically endangered. Similarly, even where the Minister's Scientific Committee recommends that a recovery plan be made the Minister must only have regard to the recommendation. Recovery plans are vital tools for protecting threatened species in Australia and must be fully supported by the Australian Government.

The 2006 amendments should be reversed making recovery plans mandatory for listed threatened species and ecological communities (subject to our comments in **Question 9, 15** and **19** above). At a minimum, section 269AA(3) should be amended to require the Minister to follow a recommendation of the Scientific Committee in relation to a decision to make a recovery plan.

Listing of threatened species

The Minister has a number of discretions in relation to the listing of threatened species, ecological communities and key threatening process (collectively known as Subdivision A Lists). The Minister has discretion under s194D whether or not to determine a conservation theme for nominations to the lists. The Minister does not have to consider the conservation status of species when determining the theme and only has to 'have regard to' the advice from the Scientific Committee. While the Minister can accept nominations of species that do not fit within the theme, the public are encouraged to comply with the chosen theme.

Once nominations have been received from the public, the Scientific Committee must prepare and give to the Minister a proposed priority assessment list under s194G. There are a number of factors the Scientific Committee must consider when determining what to include on the Subdivision A Lists, however the Committee does not have to consider conservation status of the species or community. This is inconsistent with Australia's obligations under the *Convention on Biological Diversity*. In addition there is no obligation on the Minister to accept the recommendations of the Scientific Committee – he or she has discretion to remove any item from the proposed priority list and may have regard to any matter he or she thinks appropriate when doing so. Species can therefore be removed from the list for economic or commercial grounds regardless of their conservation status.

If the Scientific Committee has assessed an item on the final priority list and determined that the item meets the criteria for listing (for example as an endangered species) the Minister has a discretion under s194Q whether to list the species or instead to reject the advice of the Committee to include an item on a list.

ANEDO submits that the thematic nomination process should be removed entirely so that the focus of nominations is on a species or community's conservation status rather than on arbitrary considerations of an appropriate yearly theme. Moreover, section 194G should be amended to require the Scientific Committee to consider the conservation status of each item when deciding whether to include it on a list. In addition section 194K(2)(b) should be deleted so that the Minister cannot remove items from the proposed priority assessment list that have been recommended for inclusion by the Scientific Committee. Ultimately ANEDO submits that the priority listing process should be removed.

Critical habitat

The Minister has considerable discretion in determining whether to list critical habitat and what to take into account when deciding whether to list. These provisions are currently vastly under-utilised with only 5 habitats currently listed, the most recent of these in 2005. Although the Minister must take into account the potential conservation benefit of listing the habitat, section 207A(1B) specifically provides that the provision does not limit the matters that the Minister may take into account. In addition the regulations may require or permit the Minister to take into account other matters.

As suggested in **Question 9** above ANEDO recommends that a more formal process for public nominations of critical habitat be provided in the Act that sets out clear criteria (including timeframes) for the making of nominations and the consideration of these. The Act should also be amended to provide a mechanism for the automatic listing of critical habitat identified in Action Plans analogous to the previous section 185 'bulk listing' provisions for ecological communities. A minimum timeframe of 2 years should be established within which existing recovery plans (i.e., 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).

The Act should also be amended to require the Minister to list critical habitat for all species and communities that are listed as critically endangered.

Wildlife conservation plans

At present the Minister has discretion as to whether to make a wildlife conservation plan for listed migratory species, marine species, cetaceans or conservation dependent species (section 285). Wildlife conservation plans outline the actions necessary to support survival of the species concerned. Once a wildlife conservation plan is made, Commonwealth agencies must take all reasonable steps to act in accordance with the plan.

The Act should be amended to require the Minister to make wildlife conservation plans for all species groups set out in section 285, and require Commonwealth agencies to act in a manner consistent with wildlife recovery plans. As indicated in **Question 18** above, only one wildlife conservation plan has been made under the Act.

Heritage listing

The 2006 amendments to the Act removed the requirement for the Minister to deal with an emergency heritage nomination. The Minister now has full discretion as to whether or not to act on an emergency heritage nomination. Even where the Minister believes that a place with national heritage values is under likely and imminent threat of a significant adverse impact, he does not have to list the place or justify his decision not to list.

Section 324JL should be amended to require the Minister to consider any written request for emergency heritage listing within 10 days (as per the previous provisions) and require that if the place fits within the criteria mentioned above, he *must* list the place on the national heritage list for 12 months while a more thorough assessment is conducted as per sections 324JM to 324JQ.

Q39 Are the roles of the various Committees established under the Act appropriate for meeting the objects of the Act?

The Scientific Committee has an advisory role, and in most cases the Minister is only required to 'have regard to' its advice, amongst a range of other considerations. As noted in Q38 above, ANEDO submits that the Minister should be required to take stronger account of the Scientific Committee's advice and recommendations. This will ensure decisions more heavily rely on scientific considerations of conservation status and environmental protection.

For example the Scientific Committee's role in determining priority lists for threatened species assessments was limited by the 2006 amendments to the Act. The Act should be amended to strengthen their role by removing the ability of the Minister to remove items from the proposed priority list that the Scientific Committee has compiled and requiring the Minister to follow a recommendation of the Scientific Committee that an item be included on the Subdivision A lists.

The Scientific Committee's role in making recovery plans should also be increased by requiring the Minister to make a recovery plan where the Committee advises the Minister to do so.

Q40 Does the Act provide sufficient guidance for decision makers in their consideration of uncertainty when making decision under the Act? If not, how should the Act deal with uncertainty?

Many decisions made under the Act necessarily involve a degree of uncertainty due to the complexities involved in predicting environmental impacts and requirements for ecosystem protection. At present, ANEDO submits that decision-makers are not provided with sufficient guidance on how to consider these uncertainties and apply environmental principles.

Section 391 of the Act states that the Minister must take account of the precautionary principle when making certain decisions under the Act (as listed in the section 391 table). In addition, the precautionary principle is a relevant consideration for any decision under the Act as the precautionary principle is one component of ecologically sustainable development, which is included in the objects of the Act in section 1(1). EDO offices have observed great variation in the use and application of the precautionary principle by DEWHA officers, Ministers, courts and tribunals. For some decisions there is no evidence that the precautionary principle has been applied at all. For other decisions there is great variation on how it has been applied. This variance in outcomes is insufficient.

As a result, decision-makers should be given more guidance on how the precautionary principle is to be applied under the Act. This should include details on what stage of the decision-making process it should be considered, how a decision-maker should judge whether there is lack of full scientific certainty and a

threat of serious or irreversible environmental damage, and what role it should take in the decision-making process.

ANEDO submits that the consideration of the precautionary principle in *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 should be used as a basis for developing precautionary principle guidance. In this case from the Land and Environment Court in NSW, the application of the precautionary principle was considered in detail. The Court held that in determining whether the precautionary principle applied the decision-maker should first determine whether there is a threat of serious or irreversible environmental damage. Only after the decision-maker has determined that there is such a threat does the decision-maker consider whether there is scientific uncertainty of the nature and scope of the threat (i.e. the impacts of the action). The Court set out what should be considered in determining the threat and scientific uncertainty. If both these are satisfied the precautionary principle has effect and precautionary measures must be taken.

The Court stated that if the precautionary principle has effect the burden of proof shifts to the proponent. *"A decision-maker must assume that the threat of serious or irreversible environmental damage is no longer uncertain but is a reality. The burden of showing that this threat does not in fact exist or is negligible effectively reverts to the proponent of the economic or other development plan, programme or project."* [213] The purpose of the shifting of the burden of proof is to ensure the proponent plans the action and acts in such as way as to prevent damage. ANEDO supports this method of applying the precautionary principle under the *EPBC Act* and submits that guidance for decision-makers should be developed based on this judgement.

Finally, as stated in **Question 38** above, ANEDO submits that section 391 should be amended to require decision-makers to *act in accordance with* (rather than just take into account) ESD principles including the precautionary principle when making *any* decision under the Act, not just those decisions that are listed. The *EPBC Act* already recognises the precautionary principle as a fundamental consideration for the majority of decisions under the Act, but should be extended to all decisions.

Q41 Does the Act provide the appropriate opportunity for external input and scrutiny of decisions made under the Act? Is there sufficient transparency? Are the periods for public consultation adequate?

External input and scrutiny

ANEDO submits that there is insufficient scope for public participation and transparency in decision-making and the assessment and approval process under the Act. The high degree of self-regulation in the referral process in particular means that transparency, accountability and a role for public participation, including the

[213] *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133 at 150.

right to challenge decisions and take enforcement action, is fundamental. As has been noted:

> *"growing public concern over environmental matters spearheaded by climate change awareness, signals a clear need for greater community engagement on environmental decisions by government and industry. At a more discretely legal level, attention needs to be turned to ensuring that public interest litigation and other forms of legal challenge to administrative decision-making are consonant with an open and free democracy."*[214]

In this vein, ANEDO submits that it is essential that the Act contain robust provisions to enshrine third party rights to challenge the referrals, assessments and approvals process as well permit decisions and international wildlife operations.[215] This is fundamentally important for transparency and accountability.

In order to improve public participation under the Act, ANEDO makes the following recommendations consistent with our previous submissions:

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

Furthermore, specific recommendations to achieve these improvements include:[216]

- the insertion of a provision into the Act that allows the court to consider granting an order that each party to a proceeding bear their own costs;
- the insertion of a provision into the Act that allows the court to consider granting a protective costs order to a party to the proceeding (or include public interest costs orders in the Federal Court Rules);

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[214] Kallies, A. and Godden, L. 2008, 'What Price Democracy? Blue Wedges and the hurdles to public interest environmental litigation', *Alternative Law Journal*, Vol 33, Pgs 194 – 199.

[215] Our recommendations are largely consistent with the Submission made by Dr Chris McGrath - Dr Chris McGrath, *Submission to the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* – 14 December 2008.

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

- the insertion of a provision into the Act allowing public interest parties to apply for a maximum costs order;
- the insertion of a provision into the Act that prevents a party from making an application for security for costs against a public interest applicant;
- reinstate the repealed section 478 into the Act in its original form;

> *478 No undertaking as to damages*
>
> *The Federal Court is not to require an applicant for an injunction to give an undertaking as to damages as a condition of granting an interim injunction.*

- the insertion of a provision into the Act that allows the court to grant the opportunity for third parties and applicants to obtain merits review on decisions regarding "controlled actions" under Parts 7-9 of the Act;
- the insertion of a provision into the Act that allows the court to grant the opportunity for third parties and applicants to obtain merits review on decisions regarding the "listing process" under section 184 of the Act.; and
- the repeal of the amendments made to the following sections as a result of the Environment and Heritage Legislation Bill (No.1) 2006 that abolish the right of appeal to the AAT: 206A, 221A, 243A, 263A, 303GJ, 472 and 473.

These amendments are essential to the integrity of the Act because the role of public participation in environmental decision-making to achieve environmental protection is paramount.

Consultation periods

As discussed in **Question 5**, we submit that consultation periods for the referrals and assessment process are inadequate and should be lengthened. Some timeframes are too short for the level of input requested under the Act. While ANEDO supports efficient processes under the Act, the public consultation periods must be long enough to elicit useful comment.

As a general rule, all statutory public comment or consultation periods should exclude the Christmas/new year period as it is a very difficult time for the public to become aware of and comment on proposals. A number of States exclude days at this time from their consultation periods. For example the Queensland *Integrated Planning Act 1997* excludes any business day from 20 December to 5 January inclusive from submission periods (section 3.4.5(b)). This should be adopted under the EPBC Act.

The invitations for public comment on a referral under section 74 and an approval decision under section 131A are currently open for 10 business days. It is difficult for members of the public to become aware of and make comment on referrals within 10 days. These periods should be lengthened to 28 business days.

Q42 Should there be more scope for merits review under the Act? Would the disadvantages of this process – in terms of costs and delays - be outweighed by the advantages?

ANEDO has consistently advocated for the introduction of a merits review into the Act. Merits review involves a tribunal making a fresh decision according to the merits of the case as if it were the original decision-maker. The tribunal is bound by the same decision-making rules and principles as an original decision-maker is.

There is only limited opportunity for merits review to the Administrative Appeals Tribunal (AAT) under the *EPBC Act*. Merits appeals are only available in regard to Parts 13, 13A and 15 for relatively minor permits, plans and conservation orders. The 2006 amendments to the Act limited these merits review opportunities even further by prohibiting merits review of Ministerial decisions.

For the majority of decisions made under the Act, including all decisions made by a Minister, the only method of review is through judicial review to the Federal Court. There is a very limited opportunity for internal review of a controlled action decision by the Minister, however this only applies where there is substantial new information or a substantial change in circumstances (section 78A). Whilst it is important that the opportunity for judicial review is retained to ensure that legal procedures are correctly followed, what is of greater importance in the environmental decision making process is the opportunity for both applicants and third parties to apply for a review of a decision based on the merits of a case; i.e. was the correct decision made on the facts presented.

The lack of a merits review effectively allows the Minister to make a decision, based on subjective criteria, with no safeguards in place to ensure accountability or transparency. Without merits review, controlled action decisions, approval decisions, listing decisions, and wildlife trade decisions are not fully accountable.[217]

The absence of an effective avenue for merits review, in particular for those decisions regarding the listing process, and those projects that amount to a "controlled action", "has greatly reduced the reach of the EAA provisions and their ability to assist conservation of biodiversity and heritage."[218]

There is no evidence that increasing the opportunity for merits review of decisions 'opens the floodgates' of litigation. Rather it improves the decision-making standards under the Act leading to more consistent decisions and providing clarity for proponents and decision-makers on their responsibilities.

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[217] McGrath, C. 2006, 'Review of the EPBC Act', paper prepared for the 2006 Australian State of the Environment Committee, Department of the Environment and Heritage, Canberra, Available at: http://www.deh.gov.au/soe/2006/emerging/epbcact/ index.htm.

[218] Macintosh, A. & Wilkinson, D. 2005, 'EPBC Act – The Case For Reform', *The Australasian Journal of Natural Resources Law and Policy*, vol 10, no. 1.

ANEDO submits that the following amendments should be made to the Act to allow merits review of key decisions under the Act:

- the insertion of a provision into the Act that allows the court to grant the opportunity for third parties and applicants to obtain merits review on decisions regarding "controlled actions" under Parts 7-9 of the Act (primarily controlled action decisions under section 75 and approval decisions and approval conditions under sections 133-134);
- the insertion of a provision into the Act that allows the court to grant the opportunity for third parties and applicants to obtain merits review on decisions regarding the "listing process" under section 184 of the Act; and
- the repeal of the amendments made to the following sections as a result of the Environment and Heritage Legislation Bill (No.1) 2006 that abolish the right of appeal to the AAT: 206A, 221A, 243A, 263A, 303GJ, 472 and 473.

Q43 Should a separate body be established to make certain decisions under the Act? If so, what kind of body should be established and what decisions should be entrusted to it?

As noted in **Question 38,** there is currently an inappropriate and disproportionate amount of discretion afforded to the Minister. This can lead to inconsistent decisions and decisions that do not accord with ESD principles and do not comply with Australia's international obligations. However ANEDO submits that these issues could be improved by providing more guidance to the primary decision-maker in how to assess and incorporate various considerations into decision-making. For example, as outlined in **Questions 38 – 40** above, by requiring greater adherence with ESD principles, providing more guidance to the Minister on how to deal with uncertainty and requiring a greater reliance on the advice of the Scientific Committee.

As noted in **Question 42** above, increasing merits review of decisions will also lead to more transparent decision-making and greater consistency of decisions.

There is no evidence to suggest that a separate body would be able to deal with these complex considerations any more effectively than a single decision-maker and may equally be influenced by various external factors.

Q44 What is an appropriate framework for assessing the performance of the Act? Do you have particular issues that should be considered during the review?

ANEDO submits that the Section 522A of the Act should be amended to require that an independent review of the Act be conducted at least every 5 years. ANEDO acknowledges the fact that the reviews are expensive in time, cost and human resources however the current 10 year gap between reviews is too protracted.

ANEDO submits that regular independent assessment will assist in identifying existing inadequacies requiring amendment, as well those processes that provide positive environmental outcomes that may be transposed in other areas of the Act.

As highlighted in **Question 19**, there are a number of new emerging pressures, such as climate change, that may require changes to the decision-making process. In order to respond to these unforeseen circumstances and the problems they may create, the Act will need to be malleable to ensure that it can adapt and respond appropriately to new and existing environmental pressures. In this context, regular reviews will need to be conducted to analyse outcomes and to incorporate improvements in scientific understanding (such as scientific information of the impacts of climate change on natural systems).

Additionally ANEDO submits that these 5 year reviews should place a greater emphasis on analysing outcomes and on-the-ground results. The focus on outcomes is important as it provides both decision makers and the public a resource that sets out both the quality and quantity of environmental achievements occurring under the Act. Without such a focus on outcomes, effective comparisons that analyse the operation of the Act between years are unable to be drawn.

Summary and Recommendations – Decision-making under the Act

- Ministerial discretion should be more closely tied with the objects of the Act. In particular, section 391 should be amended to require the Minister to act in accordance with ESD principles including the precautionary principle for *all* decisions under the Act.
- Recovery plans should be mandatory for listed threatened species and ecological communities. At a minimum, section 269AA(3) should be amended to require the Minister to follow a recommendation of the Scientific Committee in relation to a decision to make a recovery plan.
- The thematic nomination process and priority assessment listing provisions should be removed from the Act so that the focus of nominations is on a species or community's conservation status rather than on arbitrary considerations of an appropriate yearly theme.
- The Act should be amended to provide a mechanism for the automatic listing of critical habitat identified in Action Plans analogous to the previous section 185 'bulk listing' provisions for ecological communities.
- The Act should require the Minister to list critical habitat for all species and communities that are listed as critically endangered.
- The Act should require the Minister to make wildlife conservation plans for all listed migratory species, marine species, cetaceans and conservation dependent species.
- Section 324JL should be amended to require the Minister to consider any written request for emergency heritage listing within 10 days (and require that if the place fits within the criteria, the Minister *must* list the place on the national heritage list for 12 months while a more thorough assessment is

conducted.

- The Minister should be required to take stronger account of and/or give effect to, the Scientific Committee's advice and recommendations. This should include removing the Minister's ability to remove items from the priority assessment list for threatened species and requiring the Minister to make a recovery plan where the Committee has advised it.
- Decision-makers should be given more guidance on how the precautionary principle is to be applied under the Act. This should include details on what stage of the decision-making process it should be considered, how a decision-maker should judge whether there is lack of full scientific certainty and a threat of serious or irreversible environmental damage, and what role it should take in the decision-making process.
- Strengthen 3rd party enforcement provisions by:

  - The insertion of a provision into the Act that allows the court to consider granting an order that each party to a proceeding bear their own costs.
  - The insertion of a provision into the Act that allows the court to consider granting a protective costs order to a party to the proceeding (or include public interest costs orders in the *Federal Court Rules*).
  - The insertion of a provision into the Act allowing public interest parties to apply for a maximum costs order.
  - The insertion of a provision into the Act that prevents a party from making an application for security for costs against a public interest applicant.
  - Reinstate the repealed section 478 into the Act removing the requirement for an applicant for an injunction to give an undertaking as to damages.
  -The insertion of a provision into the Act that allows the court to grant the opportunity for third parties and applicants to obtain merits review on decisions regarding "controlled actions" under Parts 7-9 of the Act.
  -The insertion of a provision into the Act that allows the court to grant the opportunity for third parties and applicants to obtain merits review on decisions regarding the "listing process" under section 184 of the Act.
  -The repeal of the amendments made to the following sections as a result of the *Environment and Heritage Legislation Bill (No.1) 2006* that abolish the right of appeal to the AAT: 206A, 221A, 243A, 263A, 303GJ, 472 and 473.

- ANEDO submits that the Act be amended to include the ability for third parties to obtain merits review on decisions regarding "controlled actions" under Parts 7-9 of the Act (primarily controlled action decisions under section 75 and approval decisions and approval conditions under sections 133-134) . This should also be extended to the 'listing process' under s184 of

the Act.

- ANEDO recommends the repeal of the amendments made to the following sections as a result of the Environment and Heritage Legislation Bill (No.1) 2006 that abolish the right of appeal to the AAT: 206A, 221A, 243A, 263A, 303GJ, 472 and 473
- ANEDO submits that section 522A should be amended to require that an independent review of the Act be conducted at least every 5 years