EDO NETWORK SUBMISSION

On

The Consultation Paper Issued by Environment Australia:

"Regulations and Guidelines under the EPBC Act 1999"

November 1999

Summary

The Consultation Paper released by the Commonwealth on 14 October 1999 canvasses a range of topics relevant to the *Environment Protection and Biodiversity Conservation Act 1999 (C' th)* (the Act). This submission comments on those topics and a number of other closely related topics which are *not* canvassed in the Consultation Paper.

Broadly speaking, we consider that the Consultation Paper contains a range of useful proposals, and we have indicated in the submission where we think they should be retained. Particularly noteworthy are some of the Consultation Paper' s proposals for environmental impact assessment at the Commonwealth level, which at times impose more stringent standards for assessment than those currently found in most States and Territories (as is demonstrated by the chart we have attached in Appendix A to this submission). We support these proposals.

However, we have a range of significant concerns about the proposals contained in the Consultation Paper, and we have spelt these out in our submission as well. One concern which crops up time and again is the fact that the Consultation Paper often proposes standards which are either not drafted clearly enough (such as the criteria for choice of assessment approach), or are to be placed in unenforceable documents (such as the criteria for significance). A very important example of this latter problem is that the Consultation Paper appears to leave the way open for the accreditation of State EIA processes which are not in legislation or regulations, but merely in administrative guidelines. From an environmental point of view, this is not adequate.

In addition, we have significant concerns about the *content* of a number of crucial proposals in the Consultation Paper, such as the inadequate protection offered to World Heritage, and the content of the benchmarks to be applied when State accreditation is being considered. A further broad concern is the lack of adequate public consultation at various key stages of the assessment process.

Some of our concerns arise from proposals contained in the Consultation Paper. Others are inherent in the limitations of the Act. This submission makes recommendations for change to various aspects of the Consultation Paper. It also, on occasion, recommends changes to the Act itself. These latter changes are not intended to address all the amendments which we consider should be made to the Act, but to address the parts of the Act closely related to matters canvassed in the Consultation Paper.

We would welcome an opportunity to discuss these comments with you in more detail.

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7.5 Assessment of Proposed Actions *

1.Introduction

The Consultation Paper released by the Commonwealth on 14 October 1999 canvasses a range of topics relevant to the *Environment Protection and Biodiversity Conservation Act 1999 (C' th)* (the Act). This submission comments on those topics and a number of other closely related topics which are *not* canvassed in the Consultation Paper, in the following order:

- the referral and screening stages of the Commonwealth environmental impact assessment (EIA) process
- the assessment process which the Commonwealth proposes to apply to projects assessed by the Commonwealth under Part 8 of the Act, looking in particular at:
    - the choice of level of assessment
    - assessment on the preliminary documentation
    - Public Environment Reports (PERs) and Environmental Impact Statements (EISs)
    - public inquiries
    - accredited assessment processes
- the form and contents of assessment bilateral agreements
- the EIA benchmarks which the Commonwealth proposes to apply to projects assessed by the States and Territories under assessment bilateral agreements, and
- management principles for:
    - World Heritage properties, and
    - Ramsar wetlands.

The submission makes recommendations for change to various aspects of the Consultation Paper. It also, on occasion, recommends changes to the Act itself. These latter changes are not intended to address all the amendments which we consider should be made to the Act, but to address the parts of the Act closely related to matters canvassed in the Consultation Paper.

2. The Referral and Screening Stages of the Commonwealth EIA Process

While these are not the first topics dealt with in the Consultation Paper, we begin with them because they commence the EIA process under the Act and determine whether the Act will apply to a particular project.

2.1 The Referral Stage (Consultation Paper Point 3)

(a) Information to be included in a referral

The purpose of referrals made under Division 1 of Part 7 of the Act appears to be primarily to assist the Commonwealth Environment Minister (the Minister) to determine whether or not a proposed action is a controlled action (that is, whether or not the action is likely to have a significant impact on a matter of national environmental significance.)

That being the case, the information which the Consultation Paper proposes to require to be included in referrals appears largely appropriate. Particularly important are the proposed requirements (to be spelt out in regulation) for a description of the proposal, its likely impacts, and the information sources used to support the conclusions about likely impacts. Other information, such as information about alternatives, can be sought at the "Preliminary Information" stage, which occurs once the Minister has made the decision that the Act applies. However, information about the proponent's environmental record should be provided in the referral, since this is relevant to an assessment of likely impacts (for example, in terms of the proponent's ability to deliver good environmental performance).

Another specific point of concern is the requirement for the referral to identify "whether the area that may be affected by the proposed action (including any area outside the immediate site) *contains*…habitat for members of a listed threatened species…or a threatened ecological community, or a listed migratory species…"(our emphasis). This requirement should require identification of any area *likely to contain* such habitat. Threatened species and migratory species are not static, and their precise habitat may not be readily identifiable at this stage of the process. In determining the likely impacts of an action, a precautionary approach should be adopted.

Recommendation 1.

Retain the proposed content of referrals, with two changes:

- that referrals be required to include the proponent's environmental record; and
- that referrals be required to indicate not just whether the area that may be affected by the proposed action *contains* habitat of threatened species, threatened ecological communities and migratory specie but whether it is *likely to* contain such habitat.

(b) Public notification of the referral

Of greater concern than the proposed contents of the referral is the Consultation Paper's proposal for public notification of the referral.

Section 74(3) of the Act requires the Minister to publish ' the referral' on the Internet and invite comments within 10 business days.

The Consultation Paper, however, proposes to publish not the referral itself, but ' a notice' on the Internet, and indicates, amongst other things, that the referral will be required to contain ' a summary statement [of the proposed action] suitable for public notification.' In our view, this does not satisfy the requirement in Section 74(3) for the entire referral to be published.

In addition, the public should be entitled, in any event, to have access to all the information provided to Environment Australia when commenting on the proposed action, so that they can make well-informed judgements.

Recommendation 2.

Ensure that the regulations require the whole of the referral to be published on the Internet in accordance with s.74(3) – not just "a notice" of referral containing summary information.

As noted above, the way in which referrals are required to be advertised (on the Internet) and the period provided for public comment (10 business days) are quite inadequate. Many people do not have access to the Internet, and 10 business days is far too short for members of the community to find out about a referral, scrutinise the information and provide comments to Environment Australia. Section 74(3) should be amended to provide for more adequate public participation in this important stage of the process (for example, notification of referrals in national and regional newspapers as well as on the Internet, and a comment period of at least 20 business days).

Recommendation 3.

Amend s.74(3) of the Act:

- to provide that in addition to referrals being published on the Internet, notification of referrals must al be published in national and regional newspapers, and
- to provide for a public comment period on referrals of at least 20 business days.

(c)The lack of opportunity for the public to make a referral

Lastly, a significant problem with the Act is that the public does not have the ability to refer an action to the Minister for consideration as a controlled action.

Recommendation 4.

Amend Division 1 of Part 7 of the Act to enable any person to refer an action to the Minister for consideratio

as a controlled action.

2.2The Screening Stage - Determining Whether an Impact is Significant (Consultation Paper Point 2)

One of the most important decision-points in the EIA process is the decision which the Minister makes about whether an action is a "controlled action". (An action which has, will have or is likely to have a significant impact on a matter of national environmental significance identified in Part 3 is a "controlled action" (s. 67).) This decision determines whether or not the Act applies to that action.

The Act specifies various matters which must be taken into account by the Minister when he or she is making the decision about controlled actions, including:

- public comments on whether the action is a controlled action (s.75(1A)
- if it is relevant for the Minister to consider impacts of an action, the adverse impacts (if any) but not the beneficial impacts (if any) the action is likely to have on the matter protected by each provision of Part 3 of the Act (s.75(2))
- the matters (if any) prescribed by regulation (s. 524B), and
- the precautionary principle (s.391).

The Act does not contain a definition of "significant". However, the Consultation Paper proposes criteria for significance, which we comment on below.

(a)The content of the proposed criteria for significance

The Consultation Paper proposes specific criteria for each of the matters of national environmental significance listed in Part 2 of the Act. We consider this to be an appropriate way of proceeding, and address each in turn.

Cumulative impacts

As a preliminary point, however, we note that the proposed criteria do not address cumulative impacts. (Cumulative impacts are the impacts that result from the combined effect of the proposed action and other past, present and reasonably foreseeable future actions.) This is a significant problem because individually minor actions can become collectively significant over time. If the precautionary principle is to be properly applied to the decision about significance, as required by s. 391, these cumulative impacts must be considered.

Recommendation 5.

Include in the criteria for significance for each of the proposed matters of national environmental significance criterion indicating that cumulative impacts are significant.

World Heritage properties

Before it is possible to discuss the criteria for significance in relation to World Heritage, it is first necessary to discuss what aspect of World Heritage is actually protected under the Act.

Under Article 4 of the World Heritage Convention, Australia is obliged to do all it can to identify, protect, conserve, present and transmit to future generations its cultural and natural heritage. This heritage is defined in terms of the sites and features themselves, not just their values.

However, ss. 12 and 15A of the Act only afford protection for World Heritage *values*. There is nothing in the Act that prevents a person from taking an action that is likely to result in a significant impact on World Heritage *property* itself. This is a significant problem with the Act, and represents a substantial downgrading of the protection offered to World Heritage in Australia. The Act should protect both property *and* values.

Recommendation 6.

Amend ss. 12 and 15A of the Act so that a person must not take an action which has or is likely to have a significant impact on a World Heritage property or its associated values.

The criteria for significance – not surprisingly, given the current state of ss. 12 and 15A - are also directed towards the protection of values, rather than World Heritage property itself. They should be changed so that they provide protection for both the property *and* its values.

This should be done by inserting a criterion for significance directed specifically at the protection of property. In order to ensure that the level of protection is adequate, this additional criterion should be phrased in the terms found in s. 6(3) of the *World Heritage Properties Conservation Act 1983 (C' th)*, which provides protection for "…any property [that] …is being or is likely to be damaged or destroyed". It is particularly important to ensure that the additional criterion echoes the words used in s. 6(3); not only do they refer to "property", but they contain no "qualifier", such as "significant damage", and therefore provide a strong level of protection which is not available under the EPBC Act.

Recommendation 7.

Insert into the criteria for significance for World Heritage a criterion directed specifically at the protection of World Heritage property:

> An impact on World Heritage property is significant if the property is being or is likely to be damaged or destroyed.

The three criteria currently specified in the Consultation Paper all relate to the "World Heritage values" of the relevant properties, and would be very hard to apply with certainty because of the current lack of detail about what these values are. However, the Consultation Paper states that a complete list of values for all properties is under development.

This should assist the process of applying the criteria, and is a useful development. The list should ensure that the World Heritage values of each property are identified and listed in accordance with paragraphs 24 and 44 of the *Operational Guidelines for the Implementation of the World Heritage Convention* (as established and periodically revised by the UNESCO Intergovernmental Committee for the Protection of the World Cultural and Natural Heritage). In addition, it should be included in regulation, to ensure a measure of certainty for all stakeholders.

Until a complete list has been developed, the World Heritage values of Australian properties currently on the World Heritage List should include as a minimum the nomination justifications offered by Australia of the "outstanding universal values" of the property in accordance with the criteria and conditions set out the *Operational Guidelines*.

We note that the Consultation Paper states that this list will require input from State, Territories and heritage experts (Attachment One of the Consultation Paper). The public should also have a meaningful opportunity to comment on proposed heritage values for each property, since the public can bring much useful knowledge to the process.

Recommendation 8.

Develop a complete list of values for all World Heritage properties as a matter of urgency and include them i regulation. Ensure that the World Heritage values of each property are identified and listed in accordance wit paragraphs 24 and 44 of the *Operational Guidelines for the Implementation of the World Heritage Conventio*

Allow the public an adequate opportunity to comment on the values proposed.

Ramsar wetlands of international importance

A number of the proposed criteria should be made more specific. For example:

- In dot point 2, a change to the *magnitude* of hydrological flows could seriously affect the hydrology of a wetland. Add "magnitude" to the examples of major change in the natural hydrological regime of the wetland.
- In dot point 3, "seriously affected" is not defined in relation to the habitat or lifecycle of native species dependent upon the wetland. In addition, "native" should be replaced with "indigenous", and the dot point applied to ecological communities as well as species. Dot point 3 should be redrafted as follows:
- "the habitat of indigenous species or ecological communities dependent upon the wetland is seriously affected (eg, the action modifies, destroys, removes, isolates, or decreases the availability or quality of habitat)
- the lifecycle of indigenous species or ecological communities dependent upon the wetland is seriously affected (eg, the action affects reproduction, breeding, migration, resting behaviour, feeding)".
- In dot point 4, changes to sequestered carbon should be added to the list in brackets.

- In dot point 5, species not usually defined as "invasive" could affect a wetland. Therefore, after "invasive" add "or exotic species or species not naturally occurring in the wetland".

In addition, two extra criteria should be added. An impact on a Ramsar wetland should be considered significant if:

- it is likely to have major effects on other ecological characteristics listed in the Ramsar Information Sheet that accompanies the nomination and listing documentation lodged at the Ramsar Bureau
- the action is inconsistent with a management plan referred to in the Ramsar Information Sheet or any subsequent management plan endorsed by the Minister.

Recommendation 9.

Tighten up a number of the criteria for significance for Ramsar wetlands, as discussed.

In addition, add two extra criteria. An impact on a Ramsar wetland should be considered significant if:

- it is likely to have a significant impact on other ecological characteristics listed in the Ramsar Information Sheet, or
- the impact is inconsistent with a management plan referred to in the Ramsar Information Sheet or any subsequent management plan endorsed by the Minister.

Listed threatened species and ecological communities

These criteria appear largely appropriate, and should be retained. There are, however, a number of "qualifiers" relating to the vulnerable species criteria which have the potential to significantly reduce the effectiveness of those criteria, such as references to "important" populations of a species, and "substantial" interference with the recovery of a species. These should be removed.

Recommendation 10.

Retain the criteria for significance for listed threatened species and ecological communities, with one change remove the "qualifiers" relating to the criteria for significance for vulnerable species, as discussed.

Listed migratory species

These criteria appear largely appropriate, but again, there are a number of significant qualifiers which have the potential to significantly reduce the effectiveness of the criteria, such as references to "seriously disrupts" and "an ecologically meaningful proportion".

Recommendation 11.

Retain the criteria for significance for listed migratory species, with one change: remove the "qualifiers", as discussed.

Nuclear actions

The Consultation Paper states that all nuclear actions detailed in s. 22 of the Act "are considered to trigger the requirement for assessment and approval". This approach is appropriate, and should be retained.

In addition, the following nuclear actions should be specifically brought within the ambit of s. 22, and the same approach applied to them:

- establishing or significantly modifying a nuclear fuel fabrication plant
- establishing or significantly modifying a nuclear power plant
- establishing or significantly modifying an enrichment plant
- establishing or significantly modifying a reprocessing facility
- decommissioning or rehabilitating any facility or area in which one of the above activities has been undertaken.

This could be done either by regulation (s. 22(1) of the Act allows further nuclear actions to be prescribed), or by an amendment to the definition of "nuclear installation" in s. 22(1).

The reason this is necessary is that although the *Australian Radiation Protection and Nuclear Safety Act 1998 (C' th)* prohibits the *Commonwealth* from constructing or operating any of these nuclear installations, it does not appear to prohibit *others* from doing so. And while s. 140A of the EPBC Act prevents the Minister from approving the construction or operation of these nuclear installations under the EPBC Act, this is not an effective prohibition, because these facilities are not currently included in the definition of "nuclear action", and therefore do not actually trigger the Act in the first place. (That is, they do not actually *require* approval under the Act.) The exception to this would be if one of these facilities triggered the Act because of impacts on one of the *other* matters of national environmental significance.

The prohibition in s. 140A, to be effective, needs to be combined with a requirement that the Act apply to the relevant activities in the first place.

Recommendation 12.

Retain the approach to the criteria for significance for nuclear actions described in the Consultation Paper. In addition, bring a range of other specified nuclear actions within the ambit of s. 22, as discussed, and apply the same approach to them.

The marine environment

The criteria for actions which are likely to have a significant effect on the environment in a Commonwealth marine area (s. 23(2)) seem broadly appropriate, with a number of qualifications. Firstly, after "water quality" in each case, insert: "(includes temperature)", as many marine organisms are sensitive to the effects of heated water. Secondly, as with threatened and migratory species, there are a number of significant qualifiers which have the potential to significantly reduce the effectiveness of the criteria, such as references to "an important or substantial area of habitat". These should be removed.

Recommendation 13.

Retain the criteria for significance for actions which are likely to have a significant effect on the environment in a Commonwealth marine area, with the minor changes discussed.

More importantly, the Consultation Paper does not propose any criteria for actions taken in a Commonwealth marine area which are likely to have a significant effect on the environment (s.23(1)). Nor does it propose criteria for fishing actions which are likely to have a significant impact on the environment in coastal waters (s. 23(3)).

Recommendation 14.

Develop criteria for significance for actions taken in a Commonwealth marine area which are likely to have a significant effect on the environment, and for fishing actions which are likely to have a significant impact on the environment in coastal waters.

Commonwealth activities and land

The Consultation Paper does not propose any criteria for significance for:

- actions on Commonwealth land which are likely to have a significant impact on the environment (s. 26(1)),
- actions outside Commonwealth land which are likely to have a significant impact on the environment on Commonwealth land (s. 26(2)), or
- actions taken by Commonwealth agencies which are likely to have a significant impact on the environment inside or outside the Australian jurisdiction (s. 28).

Recommendation 15.

Develop criteria for significance for:

- actions on Commonwealth land which are likely to have a significant impact on the environment
- actions outside Commonwealth land which are likely to have a significant impact on the environment on Commonwealth land, and
- actions taken by Commonwealth agencies which are likely to have a significant impact on the environment inside or outside the Australian jurisdiction.

(b) The placement of the criteria in guidelines rather than regulations

A significant problem with the criteria is that the Consultation Paper proposes that they be included in Administrative Guidelines, rather than in regulation. This is despite the fact that

the Act contains a provision, s. 524B, which specifically allows the Commonwealth to make regulations for this purpose.

These Administrative Guidelines will have no statutory backing, and will not be enforceable. They can be discarded or altered easily by the executive government. They will not provide any real brake on the Minister' s discretion – and without a brake, the Minister has very broad discretion, which could be used to include, or exclude, large numbers of projects from the scope of the Act. This sort of uncertainty is not desirable.

Recommendation 16.

Place the criteria for significance within regulations, rather than unenforceable administrative guidelines.

There are other ways in which levels of certainty could be increased. For example, the Commonwealth could produce a list of types of projects which are likely to satisfy the various criteria. This list should be a non-statutory guideline intended to illustrate the application of the criteria, but not to limit their application. Even as a guideline, however, it would still provide a significantly greater level of certainty for proponents and other stakeholders than the criteria *without* such a list. There is a range of examples at the State level of lists which could provide a starting point for the list, such as the list of "environmentally relevant activities" under the *Environmental Protection Act 1994 (Qld)*, and the list of "designated development" under the *Environmental Planning and Assessment Act 1979 (NSW)*.

Recommendation 17.

In order to increase certainty for both proponents and others, develop a list of projects which are likely to satisfy the criteria for significance. This list should be a non-statutory guideline intended to illustrate the application of the criteria, but not to limit their application.

3. The EIA Process for Projects Assessed by the Commonwealth

This section of our submission comments on the Commonwealth' s proposals for the assessment of actions:

- which the Minister has determined are controlled actions, and
- which are not covered by a bilateral agreement, a s. 33 Ministerial declaration, or any of the other exemptions found in Part 4 of the Act, and
- which therefore require assessment and approval by the Commonwealth under Parts 8 and 9 of the Act.

On a broad note, we reiterate an important point made in previous submissions - that we do not consider it appropriate for the Minister to be restricted to "relevant" environmental

impacts (as defined in s. 82 of the Act) in his or her assessment and approval decisions. Environmental decision-making needs to occur on a holistic basis, which is impossible when decision-makers are prevented from taking all environmental impacts into account. Restricting the Minister to "relevant" environmental impacts is particularly inappropriate given that he or she is required to take *all* social and economic impacts into account when making approval decisions.

Recommendation 18.

Amend the Act to require the Minister to take *all* environmental impacts into account in his or her assessmen and approval decisions on matters of national environmental significance.

3.1 The Choice of Level of Assessment (Consultation Paper Point 5)

We have a number of significant concerns with this part of the Consultation Paper.

(a) The content of the proposed guidelines for selecting an assessment approach

At 5.1 and 5.2 the Consultation Paper offers various criteria for consideration by the Minister when he or she is deciding what level of assessment is appropriate.

These criteria, of themselves, are not objectionable (with one exception which we discuss in a moment). The problem with them is that they are simply a list of factors to be taken into account. The so-called "Guidelines" do not actually give any real direction to the Minister about which level of assessment he or she should choose after considering the criteria. This leads to problems of certainty for both proponents and the community.

The criteria should be redrafted so as to give a greater level of direction and certainty. One way to do this, for example, would be to indicate a range of criteria which need to be met before the Minister can choose the "lower level" assessments, such as assessment on the preliminary documentation, and then require the more comprehensive forms of assessment to be used in all other cases. Criteria for "lower level" assessments might include, for example, requirements that:

- the type and levels of environmental impacts are predictable and not large, and
- mitigation measures and management systems to be applied to the proposal are of proven effectiveness in minimising or mitigating environmental impacts.

The more comprehensive forms of assessment should always be used where environmental impacts are:

- likely to be potentially serious, unknown, unpredictable, or irreversible, or
- of significant public concern.

Another way to provide more certainty would be to indicate certain types of projects which will always require the more comprehensive forms of assessment. It would be reasonable, for example, to require a public inquiry whenever a nuclear action is proposed. Given the importance of World Heritage, it would also be reasonable to require significant impacts on World Heritage to be dealt with by way of EIS or public inquiry.

It would be possible to develop lists of actions which will trigger a public inquiry, or an EIS. There are precedents for this in a range of other jurisdictions, such as the "designated development" list in New South Wales mentioned above, and Canada's Comprehensive Study List, under the Canadian *Environmental Assessment Act*. (Canada requires a 'comprehensive study' for projects that fall within the categories on this list. The projects are those that have the potential to cause significant environmental effects or generate significant public concern (such as mines above a certain capacity)).

Recommendation 19.

Redraft the criteria for selection of an assessment approach so as to give a greater level of direction and certainty about the Minister's choice on the appropriate level of assessment. For example, develop criteria which need to be met before the Minister can choose the "lower level" assessments such as assessment on the preliminary documentation, and require the more comprehensive forms of assessment such as EISs and publi inquiries in all other circumstances. It would also be possible to develop lists of actions which will require EISs, and public inquiries.

One of the proposed criteria – the extent to which potential relevant impacts have been assessed in the State legislation – should only be taken into account to the extent that the relevant impacts have been *specifically* assessed at the State level.

A general assessment of impacts at the State level should not be able to count as a substitute for Commonwealth assessment of impacts on matters of national environmental significance.

Recommendation 20.

One of the criteria for selection of an assessment approach – the extent to which potential relevant impacts have been assessed under State legislation – should only be taken into account to the extent that the relevant impacts have been *specifically* assessed at the State level.

(b) The placement of the criteria in guidelines rather than regulations

As with the criteria for significance, the Consultation Paper is proposing that the criteria for the selection of an assessment approach should be contained in the guidelines. On this occasion the guidelines are statutory, rather than purely administrative (s.87(6)) – but nevertheless they are only guidelines. In this context, headings such as "Mandatory Criteria" at 5.1 are of limited (if any) relevance.

The criteria, and lists of projects which will require EISs and public inquiries, should be in clearly enforceable regulations (as are both the NSW and Canadian lists referred to above.) Such regulations could be made under s. 520 of the Act, probably notwithstanding the existence of s. 87(6) (which does not *require* the Minister to publish guidelines, it merely enables him to do so).

Recommendation 21.

Include the criteria for the selection of an assessment approach, and lists of projects which will require EISs and public inquiries, in regulations, rather than unenforceable guidelines.

(c)Public involvement in the choice of assessment approach

One of the most significant flaws in this part of the Commonwealth EIA process is that there is no provision in the Act for the public to be involved in the choice of assessment approach - a key part of the scoping process for Commonwealth EIA. This is against a background of the proponent being able to indicate, in the proposed referral documentation, what level of assessment he or she thinks is appropriate, and the Minister being *required* to consult with the States about the level of assessment before he or she can make a decision (s. 87(2)).

The public should be given an opportunity to comment on the choice of assessment approach. This might be able to be done by way of regulation, for example under s. 87(3)(d), which requires the Minister to consider ' the matters (if any) prescribed by the regulations.' If such an approach is not possible, the Act should be changed to explicitly provide an opportunity for public comment, and to require the Minister to take public comments into account. The public comment period could either be within the 20 business days allocated to the Minister for his decision under s. 88(1), or (and probably more sensibly) could take place at the same time as the public is invited to comment on whether an action is a controlled action.

Recommendation 22.

Allow the public an opportunity to comment on the choice of assessment approach, and require public comments to be taken into account by the Minister. This should happen either by way of regulation, or by wa of amendment to the Act.

3.2 Assessment on the Preliminary Documentation (Consultation Paper Point 4)

(a)Content of preliminary information

The Consultation Paper' s proposals for the content of information to be provided under s.86 (assessment on the preliminary documentation) appear, on the whole, to be reasonable. In particular, in addition to the information required in the referral documentation, proponents will be required to canvass alternatives to the proposed action, mitigation techniques, information sources and the proponent' s environmental record. These are all valuable requirements.

However, there are a number of areas which need improvement.

Firstly, the requirement for discussion of alternatives does not make it clear that the alternative of ' no action' should be discussed (as, for example, the relevant requirement for PERs/ EISs does). This should be made explicit.

Recommendation 23.

Retain the proposed content of the preliminary information required under s. 86. However, make it clear in th requirement for a discussion of alternatives in the preliminary documentation that the ‘ no action’ alternativ is required to be discussed.

Secondly, the Consultation Paper proposes that where the proponent believes that the action should be assessed by a PER, EIS or public inquiry, and says so, the proponent will have the option of providing less detailed preliminary information. The problem with this is that there is no guarantee that the Minister will actually *choose* a PER, EIS or public inquiry.

The proponent could end up being able to submit less comprehensive preliminary information, and potentially being assessed on that alone, or on some form of accredited assessment process which is less stringent than a PER, EIS or public inquiry. For this reason there should be only one standard of documentation required for the preliminary documentation.

Recommendation 24.

Delete the proposal to allow the proponent to provide less detailed preliminary information where the proponent considers that the action should be assessed by PER, EIS or public inquiry, since the proponent ca not pre-empt the Minister’ s decision and the Minister may decide that a less stringent form of assessment is appropriate.

(b) Public participation in assessment on the preliminary information

Division 4 of the Act provides for public comment on the preliminary information, but does not actually specify any minimum timeframe for that comment. The regulations should specify a minimum timeframe of at least 20 business days.

Recommendation 25.

Include in the regulations a minimum time frame of at least 20 business days for public comment on the preliminary information.

Section 93 states that the Minister must give a written direction to the proponent to publish "specified information" included in the documentation provided to the Minister by way of referral and preliminary information (amongst other things). It is important that the community have access to *all* the information provided to the Minister, so that it can make well-informed judgements about the proposal.

Recommendation 26.

Amend s. 93 of the Act to require the proponent to make *all* the information provided to the Minister by way referral and preliminary information available to the public during the public comment period.

(c) The assessment report

There is no detail in Chapter 4 of the Act about what an assessment report on preliminary documentation should contain. This should be spelt out in regulation, and should include all documents supporting the referral and preliminary information, and copies of all public comments. That would ensure, amongst other things, that the Minister is actually required to take public comments on the preliminary documentation into account when making his or her decision. At present, under the Act, this is not required. (The Minister is, however, required to take assessment reports into account.)

The assessment report should also include:

- a description of the proposal
- a summary of the likely impacts, however identified, and the methodologies used to predict them
- a description of proposed mitigation measures
- a description of alternatives, and
- conditions which should be placed on an approval to address identified impacts on matters of national environmental significance, including conditions relating to post-approval monitoring of the proposed action.

Recommendation 27.

Spell out in the regulations what an assessment report on preliminary documentation should contain. It should include, in addition to the matters listed above, all documents supporting the referral and preliminary information, and copies of all public comments.

3.3 Assessment by PER or EIS (Consultation Paper Point 7)

The Consultation Paper proposes the same standards for both PERs and EISs, with EISs to require consideration of more complex issues. This is appropriate.

(a) Contents of PERs and EISs

In general, the Consultation Paper' s proposals for the contents of PERs and EISs are good. In particular, the requirements for descriptions of safeguards and mitigation measures, information sources, alternatives, any consultation undertaken, and affected groups, are useful. Again, however, there are a number of areas which need improvement.

First, the Consultation Paper requires PERs and EISs to include ' information and technical data adequate to permit a detailed evaluation of the relevant impacts'. It also requires PERs

and EISs to ‘ identify the source of all information used in the report or statement’, and the degree of confidence in any predictions indicated.

There is widespread community cynicism with the EIA process because, among other things, of the nature of the consultant/client relationship between the proponent and the person preparing the PER/EIS. For this reason, PER/EIS documentation should be required to include full expert reports (not just summaries) so that summary reports can be compared directly with the original expert analyses. These expert reports should then be made available to the public with the rest of the EIA documentation. This would build public confidence in the EIA process.

Recommendation 28.

Require PER/EIS documentation to include full expert reports (not just summaries) so that summary reports can be compared directly with the original expert analyses, and make these expert reports available to the public.

The provisions for monitoring and audit should also be tightened up. For example, they require "an outline of an environmental management plan which provides a framework for the ongoing management and monitoring of potential impacts." The requirements should make it clear that sufficient detail is required to demonstrate an effective ongoing management and monitoring regime. The regulations should also require the proponent to make monitoring results publicly available.

Recommendation 29.

In the description of safeguards in PERs and EISs, require "an outline of an environmental management plan which contains sufficient detail to demonstrate an effective ongoing management and monitoring regime". Also require the proponent to make monitoring results publicly available.

In addition, it is not clear why "the proponent’s environmental record" has not been included in the requirements for PERs/EISs. It will always be a relevant factor, and should be required.

Recommendation 30.

Require the proponent’s environmental record to be included in PERs and EISs (as well as in the preliminar documentation).

(b)Public involvement in assessment by PER/EIS

A significant problem with this part of the Act is that it contains no mandatory requirement for public involvement in the scoping of the PER/EIS documentation – a crucial stage aimed at ensuring all relevant impacts are addressed.

Sections 97(5) and 102(5) allow the Minister to invite public comment on a draft of the guidelines he or she is required to prepare for the contents of each PER and EIS – but the Minister is not *required* to invite such comment, or to consider it. The Act should be amended to make public involvement in the scoping of PERs/EISs mandatory, and to provide for a period of at least 15 business days for public comment.

Recommendation 31.

Sections 97(5) and 102(5) should be amended to make public involvement in the scoping of PERs and EISs mandatory, and to provide for a period of at least 15 business days for public comment.

The Act does contain a requirement for draft PERs and EISs to be published and for there to be a public comment period of at least 20 business days. However it is silent as to the manner of publication of the draft, other than to say it must be in accordance with the regulations (ss. 98(1)(c), 103(1)(c)). The regulations should specify the manner of publication, which should include the publication of a notice and invitation in national and regional newspapers.

Recommendation 32.

Include in the regulations requirements for the publication of draft PERs and EISs, including a requirement that a notice and invitation be published in national and regional newspapers.

Sections 98 and 103 state that the proponent must publish the draft PER or EIS in accordance with the regulations. As with the preliminary documentation, it is important that the community have access to all the information provided to the Minister, so that it can make well-informed judgements about the action.

Recommendation 33.

Ensure, either in the Act or the regulations, that a copy of all supporting documentation relating to PERs and EISs is available to the community during the comment period.

(c) The assessment report

There is no detail in Chapter 4 of the Act about what assessment reports on PERs and EISs should contain. This should be spelt out in regulation, and should include all documents supporting the PERs and EISs, and copies of all public comments. That would ensure, amongst other things, that the Minister is actually required to take public comments on PERs and EISs into account when making his or her decision. At present, under the Act, this is not required. (The Minister is, however, required to take assessment reports into account.)

The assessment report should also include:

- a description of the proposal
- a summary of the likely impacts of the proposal set out in the proponent's final documentation, however identified, and the methodologies used to predict them
- a description of proposed mitigation measures
- a description of alternatives, and
- conditions which should be placed on an approval to address identified impacts on matters of national environmental significance, including conditions relating to post-approval monitoring of the proposed action.

Recommendation 34.

Spell out in the regulations what assessment reports on PERs and EISs should contain. They should include, i addition to the matters listed above, all documents supporting the PERs and EISs, and copies of all public comments.

(d) The standards of EIA consultants

As mentioned above, there is widespread community cynicism with the EIA process. One of the main reasons for this is a belief that insufficient standards are applied to the consultants who perform environmental impact assessment work, particularly EISs.

One way to remedy this would be to introduce a government-run, statutorily-based accreditation scheme for EIA consultants. (There are a number of examples of such schemes, such as the accredited contaminated site auditor schemes in Victoria and NSW.) It could either be mandatory, or discretionary, to use accredited consultants for Commonwealth EIA work. Provided that it was run according to stringent standards, even a discretionary scheme would be useful, because it would build the credibility of those consultants who gain accreditation under it, and slowly build a new norm in EIA consulting standards across the industry.

Such a scheme, to have credibility in the wider community, would need to include the following features:

- minimum standards for qualifications, experience and knowledge
- compulsory insurance
- conflict of interest rules
- annual renewal of accreditation
- guidelines for accredited consultants covering a code of ethics and substantive operating standards
- a range of sanctions for inappropriate behaviour. One of these should be that repeated failure to comply with the guidelines should be grounds for revocation of accreditation
- a formal, credible complaint mechanism, and
- an effective system of random audits of accredited consultants= work (checking, for example, the adequacy of the assessments carried out by the consultants).

Recommendation 35.

Introduce a government-run, statutorily-based accreditation scheme for EIA consultants, with a range of standards applicable to all accredited consultants, as discussed.

3.4Assessment by Public Inquiry

Curiously, the Consultation Paper does not canvass this method of assessment at all.

There are various matters which require regulations in order for assessment by public inquiry to take place (such as the manner of advertising the inquiry and the inquiry's report). Regulations should be made to address these requirements, to ensure that when the Act comes into force, this method of assessment is available.

Recommendation 36.

Introduce regulations to meet the Act's public notification requirements in relation to public inquiries.

A significant flaw in the Act is that there is no public involvement in the scoping of public inquiries (that is, in the Minister's determination of the terms of reference of an inquiry). The Act should be amended to make this possible.

Recommendation 37.

Amend the Act to allow the public to comment on the proposed terms of reference for a public inquiry before the terms of reference are finalised.

Lastly, there is no detail in Chapter 4 of the Act about what inquiry reports should contain. This should be spelt out in regulation, and should include a summary of public comments on the proposal. That would ensure, amongst other things, that the Minister is actually required to take public comments at public inquiries into account when making his or her decision. At present, under the Act, this is not required. (The Minister is, however, required to take inquiry reports into account.)

The assessment report should also include:

- a description of the proposal
- a summary of the likely impacts of the proposal, however identified, and the methodologies used to predict them
- a description of proposed mitigation measures
- a description of alternatives, and

- conditions which should be placed on an approval to address identified impacts on matters of national environmental significance, including conditions relating to post-approval monitoring of the proposed action.

Recommendation 38.

Spell out in the regulations what inquiry reports should contain. They should include, in addition to the matte listed above, a summary of all public comments to the inquiry on the proposal.

3.5 Assessment by Accredited Assessment Process

The Consultation Paper states that the standards to be applied to the accredited assessment process under s. 87(4) of the Act will be the same as the benchmarks applied to assessment bilateral agreements and discussed at Point 1.4 of the Consultation Paper. The comments made below about assessment bilateral agreement benchmarks apply here.

4. The Form and Content of Assessment Bilateral Agreements
(Consultation Paper Point 1.5)

This part of our response looks at the form and content of assessment bilateral agreements, and related issues of enforcement, amendment, suspension and cancellation, and independent review of bilateral agreements. Part 5 of our response considers the benchmarks which the Commonwealth proposes to apply to the States before accrediting them.

Most of the proposed provisions look reasonable. We have particular concerns about the State processes to be specified in the Schedule to each bilateral agreement. However, since we return to these concerns in Point 5 of our submission, below, we do not deal with them here.

4.1 Enforceability of Bilateral Agreements

Of very significant concern to us is the fact that it appears that bilateral agreements are not directly enforceable documents. (While this is nowhere stated in the Act or the Consultation Paper, it is clear from a range of legal opinions on the topic.)

This means that a clause included in the bilateral agreement will be unenforceable – by the parties or anyone else – unless it enforceable by virtue of some other instrument, such as the Act or regulations.

For example, the Act states that if actions which are likely to have a significant impact on a matter of national environmental significance are to gain the benefit of an assessment bilateral agreement (that is, are to gain an exemption from the need for assessment under Part 8 of the Act), they must be assessed in a manner specified in the bilateral agreement (s.47). Consequently, it would be possible to challenge an approval issued in a manner which was not the manner specified in the bilateral agreement. This means, in effect, that the proposed Schedule to each bilateral agreement identifying the specific process that is to be accredited will be indirectly enforceable, by third parties as well as the parties to the agreement.

However there will be other provisions of bilateral agreements which will not be enforceable in this way. For example, the following provisions are two of the provisions which the Consultation Paper proposes to include in all assessment bilateral agreements:

- a provision containing a requirement for an undertaking by the State that environmental impacts (other than the impacts on matters of national environmental significance) will be assessed to the greatest extent practicable; and

- a provision requiring monitoring of compliance with the bilateral agreement and reporting of its operation.

These provisions will not be enforceable even by the parties to the bilateral agreement.

Recommendation 39.

Ensure that all provisions which need to be enforceable in order to provide reasonable environmental standar are contained in the Act or regulations, rather than unenforceable bilateral agreements. For example, include the regulations a provision requiring compliance monitoring of bilateral agreements - regardless of whether o not there is a similar provision in each bilateral agreement.

4.2 Amendment of Bilateral Agreements

Both the Act and the Consultation Paper are silent as to whether, and if so, how bilateral agreements may be amended. However, a proposal for an amendment mechanism is contained in a Draft Discussion Paper on assessment bilateral agreements which we understand was provided by the Commonwealth to the States and Territories early this year. This Discussion Paper proposes that assessment bilateral agreements will provide that changes to an agreement will be able to be made "by exchange of letters between Ministers", such changes to be published (presumably once they have been made) in accordance with the regulations.

There are a number of key flaws with this proposal. Firstly, there is no mention of the environmental pre-requisites and other standards (if any) which would apply to such amendments. It is crucial to ensure that the same environmental standards which apply to the *making* of bilateral agreements apply to their *amendment*.

In addition, public consultation is a key part of the bilateral process, as the provisions relating to the making of bilateral agreements demonstrate. It would be quite unacceptable for bilateral agreements to be able to be amended without the same level of public consultation.

Recommendation 40.

Ensure, either by way of amendment to the Act or regulation, that the same environmental standards and requirements for public consultation which apply to the *making* of bilateral agreements apply to their *amendment*.

4.3Suspension and Cancellation of Bilateral Agreements

It is also worth noting that it is important for provisions in bilateral agreements to be worded clearly. A particular reason for this is that the Commonwealth has fairly strong suspension

and cancellation powers in the Act in relation to bilateral agreements. However, in order to use these powers the Minister must be satisfied (amongst other things) that a State or Territory has not or will not comply with the relevant bilateral agreement. It is therefore important to ensure that obligations in bilateral agreements are worded precisely, so that it is easy to determine whether or not there has been compliance with those obligations.

Recommendation 41.

Ensure that obligations in bilateral agreements are worded precisely, so that it is easy to determine, for the purpose of using the Commonwealth's suspension and cancellation powers under the Act, whether or not there has been State/Territory compliance with those obligations.

4.4 Independent Review of Bilateral Agreements

In addition, it is worth noting our concern, expressed in previous submissions on the EPBC Bill, that there should be an independent Commissioner for the Environment charged (amongst other things) with the task of:

- reviewing bilateral agreements to assess their consistency with the accreditation criteria to be spelt out in the regulations, and
- monitoring and reviewing both State and Commonwealth compliance with bilateral agreements.

While the Auditor-General is able, under the *Auditor-General Act 1997 (C'th)*, to take certain steps to review Commonwealth performance under bilateral agreements, he or she is not required to take such steps. In addition, while the Auditor-General can review *Commonwealth* compliance with a bilateral agreement, he or she is not able to review *State* compliance with the agreement. These are crucial failings.

Recommendation 42.

Amend the Act to provide for the establishment of an independent Commissioner for the Environment charge with the task of:

- reviewing bilateral agreements to assess their consistency with the accreditation criteria to be spelt ou in the regulations, and

- monitoring and reviewing both State and Commonwealth compliance with bilateral agreements.

5. The EIA Benchmarks which the Commonwealth Proposes to Apply to Projects Assessed Under Bilateral Agreements

This is a crucial area of the Consultation Paper and one which we have very significant concerns about.

The Commonwealth's ability under the Act to delegate its EIA assessment and approval powers to the States has been extremely controversial. We consider that the delegation of approval powers is not appropriate in any circumstance – but since the Consultation Paper does not discuss this issue directly, we do not canvass it any further here. The delegation of assessment powers, on the other hand, may be appropriate if it is subjected to sufficiently stringent standards, given that such delegation occurs already, in practice, for the vast majority of projects caught by the *Environmental Protection (Impact of Proposals) Act 1974 (C' th)*. The question is therefore whether the standards proposed in the Consultation Paper are sufficiently stringent.

In our view, they are not. We say this for two principal reasons: the Consultation Paper does not ensure that the State processes to be accredited will be contained in legislation or regulations; and the content of the proposed benchmarks is not stringent enough. We discuss each of these below in more detail.

5.1 Ensuring that Accredited State Processes are Contained in Legislation or Regulation

The Consultation Paper does not make it clear that the processes accredited under the assessment bilateral agreements will be included in legislation or regulations. Indeed, it appears to leave the way open for these accredited processes to be purely administrative ones (albeit within a statutory framework) and we understand that this is, in effect, what a number of States are lobbying for. If this occurs, it means that a crucial opportunity to lift State legislative standards for EIA will have been missed and the only real environmental benefit from the bilateral process passed up. If the States do not amend their legislation or (as a minimum) their regulations, it is highly unlikely that the benefits of the Commonwealth standards will flow onto other State EIA processes in any permanent fashion. Administrative processes are far too easy to change. It is therefore absolutely *crucial* to the bilateral process that the State processes accredited by the Commonwealth are confined to legislative and regulatory processes.

Recommendation 43.

Only State EIA processes that are contained in legislation or regulations should be accredited by the Commonwealth. Administrative processes, even within a statutory framework, are not sufficiently stringent t deliver lasting environmental benefits.

5.2 Ensuring Stringent Benchmarks for Accreditation

The Consultation Paper proposes benchmarks, to be set out in regulations under the Act, which must be met if Commonwealth accreditation is to take place.

We do not propose to make detailed comments on each of the benchmarks (with one exception – see below). As a general comment, however, they appear useful and should be retained. Particularly important benchmarks include those requiring:

- transparency of documentation
- the concurrence of the Commonwealth where a State selects assessment on the preliminary documentation as its form of assessment

- assessment guidelines for PERs and EISs, and an opportunity for public comment on the draft assessment guidelines
- an opportunity for public comment on draft assessment documentation, and
- assessment reports, with specified contents, prepared by the relevant State agency.

Many States do not currently have legislation meeting these benchmarks.

However, the benchmarks do not go far enough.

As noted above, this is a key opportunity for State EIA standards to be lifted. The Commonwealth should use the opportunity to insist on a broad range of best practice public interest environmental benchmarks which will deliver real improvements to State EIA systems (and there can be no doubt that most State EIA systems are in serious need of improvement). While initially these improvements would only apply to the assessment of matters of national environmental significance, their application, in effect, as national standards, would undoubtedly have a flow-on effect, particularly if the new standards were enshrined in legislation or regulations (as opposed to administrative guidelines).

The following list provides an example of the sorts of benchmarks which the Commonwealth should be aiming for if it is genuinely interested in lifting State EIA standards to meet best practice public interest environmental criteria. The list takes a much more comprehensive approach than the benchmarks proposed in the Consultation Paper, considering triggering, assessment, approval, monitoring and enforcement aspects of the EIA process, and public participation in the EIA process.

State EIA legislation should:

- cover the activities of State Government, local government and the private sector
- ensure that all development likely to have a significant impact on the environment triggers the legislation
- define, or provide criteria for, "significance"
- not allow EIA to be avoided through the exercise of a discretion unrelated to EIA
- ensure that all forms of assessment which can be accredited are rigorous ones (PERs, EISs and public inquiries are generally the best forms of assessment), and that as a minimum, EISs and public inquiries are available
- ensure that where a choice of form of assessment exists, there are clear criteria guiding the decision-maker' s choice, and an opportunity for public comment on that choice before the choice is made

- ensure that where the form of assessment is equivalent to a PER, EIS or public inquiry, there is an opportunity for public comment on the scope of the assessment
- provide for mandatory public notification of the draft assessment once it has been completed, and a minimum of 28 days for public comments on the draft assessment
- ensure that public notification takes place through national and relevant local newspapers as well as the Internet
- ensure that all relevant EIA documents are made available to the public

- provide for standard assessment requirements for all proposals
- provide for a government-run, statutorily-based accreditation scheme for EIA consultants

- require alternatives, including the "no go" alternative, to be assessed
- specifically require impacts on threatened species to be assessed
- require an assessment report to be prepared by the relevant Department or local government body, considered by the final decision-maker and made public
- ensure that where the final decision is made at the Ministerial level, it is made by the Environment or Planning Minister (and not "the Action Minister", such as the Minister for Resources, or some other person without a planning/environmental portfolio, such as the Governor)
- require public comments received within the comment period to be taken into account when making the decision
- require the principles of ESD to be taken into account when making the decision
- require cumulative impacts to be taken into account when making the decision
- require the decision and any conditions attached to it to be publicly available
- require post-consent monitoring, and require the results of that monitoring to be publicly available
- allow "any person" to appeal on the merits against EIA decisions
- allow "any person" to apply for judicial review of administrative decisions made in relation to the EIA process
- allow "any person" to bring an action to enforce EIA legislation
- make it an offence to breach EIA legislation, and

- allow revocation of approvals where impacts were not accurately predicted.

Recommendation 44.

Introduce a comprehensive list of best practice public interest environmental EIA benchmarks for State accreditation, as discussed.

As a minimum, the Commonwealth should ensure that State EIA systems meet the various key benchmarks currently proposed in the Consultation Paper and identified above, and the standards which the Commonwealth has imposed on itself in the Act, and which it proposes, in the Consultation Paper, to impose on itself by way of regulation. At present, it appears that the Commonwealth is not proposing to do this in all circumstances. For example, the Consultation Paper contains no requirements for the content of assessment on the preliminary documentation where this is carried out under a *State* process – even though the Consultation Paper devotes some 2 pages to what should be contained in the preliminary documentation where this level of assessment is carried out under the *Commonwealth* process.

The EDO Network has compiled a chart comparing current State EIA legislative systems with the standards to be applied to the Commonwealth EIA process. (This chart is different to the one forwarded to Environment Australia in October.) While it focuses specifically on the assessment stage of the EIA process, it also, for the sake of completeness, looks at the related issues of approval and enforcement. (Note also that while we have listed in the chart the standards which the Commonwealth is *currently* proposing to apply to itself, we consider that there are inadequacies with these standards, and that they should be amended as detailed in the earlier parts of this submission and in our earlier submissions on the EPBC Bill.)

A copy of the chart is attached as Appendix A.

As is immediately apparent from the chart, most of the State systems fall well short of the EPBC standards proposed for Commonwealth EIA.

Recommendation 45.

As a minimum, the Commonwealth should ensure that State EIA systems meet the various key benchmarks currently proposed in the Consultation Paper and identified above, and the standards which the Commonweal has imposed on itself in the Act, and which it proposes, in the Consultation Paper, to impose on itself by way of regulation.

It is also worth commenting specifically on one of the issues raised in the Consultation Paper; the issue of what levels of assessment should be available at the State level. The Consultation Paper says that it will not be necessary for a State to offer all four levels of assessment available at the Commonwealth level (preliminary documentation, PERs, EISs and public inquiries), apparently on the basis that if a State process does not allow for a particular approach, then actions requiring that approach will be dealt with under Part 8 of the Act.

It is unrealistic, in our view, to expect that a State which does not have a particular level of assessment will decide that an action requires that level of assessment (with the result that the State loses control of the assessment process). It is far more likely that the State will decide to choose a level of assessment which it *does* have.

In addition, it is important to ensure, for environmental reasons, that each State has rigorous assessment options available. Each State should be required by the Commonwealth to have at least EISs and public inquiries (or their equivalent) as forms of assessment. It is certainly the case at present that a substantial number of States do not have public inquiries.

Recommendation 46.

Ensure that each State has rigorous assessment options available, and as a minimum, EISs and public inquirie or their equivalent.

5.3 Accredited Assessment Processes as a Substitute for Accreditation under Bilateral Agreements

Lastly, the Consultation Paper mentions that it may be necessary to use an accredited assessment process to address transitional issues in the development of arrangements for dealing with accredited processes. This seems to imply that the Commonwealth could use accredited assessment processes (under s. 87(4) of the Act) as a temporary substitute for accreditation under bilateral agreements. It is not clear from the Consultation Paper what standards will apply to accredited assessment processes in these transitional arrangements.

It will be important to ensure that any transitional arrangements do not result in the application of less stringent standards, and that they have clear timelines attached to them in the regulations.

Recommendation 47.

Ensure that any transitional arrangements for dealing with accredited processes do not result in the applicatio of less stringent standards than those to be applied under assessment bilateral agreements, and that any transitional arrangements have clear timelines attached to them in the regulations.

6. World Heritage Management Principles

(Consultation Paper Point 8.1)

One of the most important messages to emerge in recent years from the World Heritage Committee is that the work of implementing the World Heritage Convention needs to be re-focused on effective site management, as opposed to mere listing of World Heritage properties.

In a general sense, the Act picks up on this message. Under s 323 of the Act, the Commonwealth must establish, by regulation, the Australian World Heritage Management Principles (AWH Principles). These principles must be in accordance with Australia's obligations under the World Heritage Convention.

The Act then goes on to state that any bilateral agreement, Ministerial declaration, Commonwealth management plan, management plan prepared and implemented in cooperation with the States, and management plan accredited under ss. 33 or 46 of the Act, must all be consistent with the Australian World Heritage Principles.

We welcome these general features of the EPBC Act. However, there are a number of problems with the AWH Principles contained in the Consultation Paper. We consider them below under the topics allocated to each Principle.

6.1The Purpose of Management Plans

As discussed above, under Article 4 of the World Heritage Convention, Australia is obliged to do all it can to identify, protect, conserve, present and transmit to future generations its cultural and natural heritage. This heritage is defined in terms of the sites and features themselves, not just their values.

However, sections 12 and 15A of the Act only afford protection for World Heritage *values*. There is nothing in the Act that prevents a person from taking an action that is likely to result in a significant impact on World Heritage *property* itself. (Recommendation 6, above, recommends amending the Act so that it provides protection for World Heritage property *and* values.) This emphasis on World Heritage values is carried over into the Consultation Paper's proposals for AWH Principles. One of the primary focuses of the AWH Principles is management plans. Principle One states that the purpose of management plans is to take various actions in relation to the "World Heritage values" of a property.

The distinction between World Heritage *property* and World Heritage *values* is an important one. It is the property identified as World Heritage that gives rise to its World Heritage values, not the other way around. Under Articles 1 and 2 of the Convention, the Australia's obligation to identify, protect, conserve, present and transmit to future generations its cultural and natural heritage relates to specific property, and its character, found within its territory (eg, monuments, groups of buildings, sites, natural features, geological and physiographical formations, certain habitat of threatened species, natural sites and certain natural areas). Indeed, the Convention does not contain even a single reference to World Heritage values.

It is therefore important to ensure that the primary purpose of the proposed AWH Principles is to identify, protect, conserve, present and, where appropriate, rehabilitate the *area, property and physical components comprising World Heritage*. Of course, World Heritage values should also receive protection, especially where a proposed action is to occur outside the property.

Recommendation 48.

Amend Principle 1 of the proposed AWH Principles to read:

> A management plan (or plans) should be prepared for each world heritage property. The primary purpose of the plan should be to identify, protect, conserve, present, and where appropriate, rehabilitate *the area, property and physical components comprising World Heritage and its associated values*.

6.2 The Content of Management Plans

World Heritage property v World Heritage values

Continuing with the theme of the need to protect World Heritage property as well as its values, similar amendments are also necessary to Principle 2.

Recommendation 49.

Amend dot points 2, 3 and 5 of Principle 2 of the proposed AWH Principles as follows:

- Identify specific actions and strategies to ensure the identification, conservation, protection and presentation of *the area, property and physical components comprising World Heritage and its associated values*.
- Establish or identify mechanisms to address the impacts of actions which individually or cumulatively present a risk to *the area, property or physical components comprising World Heritage or its associated values*.
- Provide for ongoing monitoring and reporting on the state of *the area, property and physical components comprising World Heritage and its associated values*.

World Heritage management resources and personnel

The front-line defence in the protection and conservation of World Heritage properties are the site management staff. Without a trained, professional and dedicated staff, many of the World Heritage areas and the values we celebrate in them would be under even greater threat, from both human and natural forces. For this reason that it is important that the AWH Principles provide for arrangements with respect to management personnel. This is even more important now because the consequential amendments relating to the Act have abolished the National Parks and Wildlife Service.

Recommendation 50.

Amend the fifth dot point of Principle 2 of the proposed AWH Principles:

- *Provide designated resources and personnel* for ongoing *management, wardening*, monitoring and reporting on the state of World Heritage property, including its associated values.

Buffer zones

The proposed AWH Principles fail to provide for the establishment of buffer areas for World Heritage properties. This is a serious omission. UNESCO's Division of Ecological Sciences has recognised that buffer areas for World Heritage properties must be delineated and have protected status under the legislation of the country concerned in order to ensure their longer-term protection.

Recommendation 51.

Add the following dot point to Principle 2 of the proposed AWH Principles:

- *Establish buffer zones for World Heritage properties and identify specific actions and strategies to ensure they contribute to the conservation, protection and presentation of the area, property and physical components comprising World Heritage and its associated values*

6.3 Preparing Management Plans

Principle 3 recognises that the preparation of a plan must include adequate provisions for public consultation on proposed elements of the plan. However, the Consultation Paper fails to detail what these provisions will include. The Consultation Paper also fails to provide the time within which management plans must be prepared. As a minimum, the AWH Principles should spell out notice provisions and time periods for public comment on plans. They should also provide the maximum time within which a plan must be prepared.

Recommendation 52.

Amend Principle 3 of the proposed AWH Principles as follows:

> *As soon as a draft management plan is developed, the Director of National Parks must publish notice of the proposed management plan and an invitation for submissions on the plan in newspapers with national and State-wide circulation. The comment period on the proposed management plan must be no less than 45 days after the publication of notice.*
>
> *Management plans for properties already inscribed on the World Heritage List must be prepared within three years from the time the AWH Principles come into force. Management plans for a property successfully nominated for future inscription on the World Heritage List must be prepared within one year of inscription.*

6.4Review of Management Plans

The Consultation Paper indicates that the review of management plans can take place as far apart as seven year intervals. Without a method to trigger an earlier mandatory review when necessary, this maximum interval in reviews is too great.

Recommendation 53.

Amend Principle 5 of the proposed AWH Principles to provide that reviews of management plans must take place at intervals of no more than 5 years.

6.5 Assessment of Proposed Actions

Mandatory environmental impact and assessment process

Principle 6 of the proposed AWH Principles refers to a statutory environmental impact and assessment process for World Heritage. Unfortunately, Principle 6 and the content of the impact and assessment process it outlines in dot points are couched in discretionary language, when indeed they need to be mandatory.

Recommendation 54.

Substitute the word "*must*" for the word "*should*" in every instance it appears in Principle 6.

World Heritage property v World Heritage values

The distinction between World Heritage property and values is vitally important in the assessment process. If all one is concerned about are disassembled *values* of a World Heritage property, then it becomes quite possible for an assessment to conclude a particular proposal will allow the retention of all identified values to some degree even though the

property itself may suffer considerable damage. Accordingly, the management principles need to provide for assessment of likely significant impacts on World Heritage property and its associated values.

Recommendation 55.

Amend the first paragraph of Principle 6 of the proposed AWH Principles as follows:

> All proposed actions that, if implemented, would be likely have a significant impact on *an area, property or physical components comprising World Heritage or its associated values must* be subject to a statutory environmental impact assessment process (whether or not the actions are proposed to occur inside *or outside* the property).

Amend the first dot point of Principle 6 as follows:

> The assessment process *must* specifically examine the potential for impacts on *the area, property and physical components comprising World Heritage and its associated values.*

Criteria for significant impact

As can be seen, Principle 6 states that the trigger for impact and assessment processes for World Heritage under the AWH Principles is whether a proposed action "would be likely to have a significant impact". It is important that the criteria for significance are directed both towards the protection of World Heritage property and its values. It is also important that the level of protection currently found in s. 6(3) of the *World Heritage Properties Conservation Act 1983 (C' th)* is not lost. Section 6(3) provides protection for "…any property [that] …is being or is likely to be damaged or destroyed". These matters are dealt with above at Recommendation 7.

Aesthetic qualities, natural beauty, conservation and scientific impacts

Article 2 of the World Heritage Convention highlights that the "outstanding universal value" of natural heritage depends on the importance attached to its aesthetic quality, natural beauty, conservation value and scientific worth. Moreover, paragraph 44 of the *Operational Guidelines for the Implementation of the World Heritage Convention* make clear that exceptional natural beauty, aesthetic importance, conservation value and scientific worth must be met as a condition for inscribing a property on the World Heritage List. Because these four factors are given primary importance by the World Heritage Convention, the impact and assessment process under the AWH Principles needs to explicitly ensure they are considered.

Recommendation 56.

Insert a new dot point under Principle 6 of the proposed AWH Principles to address potential impacts on the aesthetics, natural beauty, conservation values and scientific worth of natural heritage:

- *The assessment process for natural heritage must include specific consideration of potential*

impacts on the aesthetics, natural beauty, conservation values and scientific worth of natural heritage.

Buffer zones

As stated above, in order to ensure effective protection of World Heritage property and values, it is necessary to establish a system of buffer zones. It is also important, in evaluating proposed actions likely to have significant impact on World Heritage property and values, to evaluate the likely impacts on buffer zones.

Recommendation 57.

Add the following paragraph to Principle 6 of the proposed AWH Principles:

Buffer zones surrounding World Heritage properties must be subject to environmental impact assessment processes to determine if proposed actions are likely to have a significant impact on an area, property and physical components comprising World Heritage or its associated values through impingement on the buffer zone.

Cumulative and synergistic impacts

A serious omission in the impact and assessment process outlined in Principle 6 of the AWH Principles is the failure to include a requirement to assess cumulative and synergistic impacts. (Cumulative impacts are the impacts that result from the combined effect of the proposed action and other past, present and reasonably foreseeable future actions.)

This is a significant problem because individually minor actions can become collectively significant over time. A failure to require assessment of cumulative impacts leads to the loss of World Heritage "bit by bit" because there is no need to consider the damage or destruction to a World Heritage area that may result from many projects over time. Moreover, without such comprehensive assessment, it is impossible to decide if a Management Plan needs to be revised to take account of cumulative impacts.

Recommendation 58.

Insert a new dot point under Principle 6 of the proposed AHW Principles addressing the need to assess cumulative impacts:

The assessment process must include an examination of the cumulative or synergistic impacts on an area, property and physical components comprising World Heritage an its associated values.

Whole of proposed action

It is vital to ensure that the impact and assessment process under Principle 6 of the AWH Principles includes every stage of the proposed project.

Recommendation 59.

Insert a new dot point under Principle 6 of the proposed AWH Principles addressing the need to assess the whole of proposed actions:

- *The assessment process must include an examination of the whole of the proposed action, including every stage of the proposed action.*

Conditions to be made public

The Consultation Paper indicates that if an action is approved that might impact on World Heritage, conditions should be imposed to ensure its protection, conservation and presentation. The principles also require monitoring of the conditions and, where necessary, enforcement action to be taken to ensure compliance. However, the Principles fail to require that the conditions be made public.

Under s 475 of the Act, persons and organizations with suitable standing are entitled to apply to the Federal Court for an injunction in relation to a breach of the Act or the regulations. It is therefore important to explicitly provide that the conditions imposed to protect, conserve and present World Heritage property and values are made public.

Recommendation 60.

Amend dot point 4 of Principle 6 of the proposed AWH Principles to include the following:

The Director of National Parks must keep an up to date public register of all approvals and conditions relating to World Heritage property, values and buffer zones.

7. Australian Ramsar Management Principles (Consultation Paper Point 9.1)

In recent years the parties to the Ramsar Convention have been placing increasing emphasis on the importance of developing management plans for each wetland designated for the Ramsar List.

As with World Heritage, in a general sense, the Act picks up on this message. Under s. 335 of the Act, the Commonwealth must establish, by regulation, the Australian Ramsar Management Principles (AR Principles). These principles must be in accordance with Australia' s obligations under the Ramsar Convention.

The Act then goes on to state that any bilateral agreement, Ministerial declaration, Commonwealth management plan, management plan prepared and implemented in

cooperation with the States, and management plan accredited under ss. 33 or 46 of the Act must be consistent with the Australian Ramsar Principles.

Again, these general features of the EPBC Act are a welcome development. However, it is important to ensure from the outset that the AR Principles meet the high level of protection required by the Ramsar Convention. Again, we consider the AR Principles contained in the Consultation Paper under the topics allocated to each Principle.

7.1 The Purpose of Management Plans

Under Article 3 the Ramsar Convention, Australia is obliged to do all it can to promote the conservation of Ramsar wetlands. Under Article 4(1), Australia's obligation is to promote conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether they are included in the List or not, and provide adequately for their wardening. And under Article 4(4), Australia must endeavour through management to increase waterfowl populations on appropriate wetlands.

Unfortunately, these purposes and obligations under the Ramsar Convention fail to be translated into the primary purpose of management plans developed according to the proposed AR Principles. Instead, the Consultation Paper indicates that the primary purposed of plans is merely to "describe and maintain" the ecological character of Ramsar wetlands. Clearly, this is not sufficient to meet Australia's international obligations.

Recommendation 61.

Amend Principle 1 of the proposed AR Principles to read:

> A management plan (or plans) should be prepared for each Ramsar wetland. The primary purpose of the plan should be to describe *and promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands, and increase waterfowl populations on appropriate wetlands.*

7.2 The Content of Management Plans*Promoting conservation and increasing waterfowl*

Picking up on the Ramsar obligations concerning the need to promote the conservation of wetlands and waterfowl by establishing nature reserves on wetlands, whether they are included in the List or not, and increase waterfowl populations on appropriate wetlands, the second dot point under Principle 2 of the proposed AR Principles needs amending.

Recommendation 62.

Amend dot point 2 of the Principle 2 of the proposed AR Principles as follows:

- Identify specific actions and strategies to ensure the maintenance, *conservation, and where necessary, improvement*, of the ecological character of the Ramsar wetland. In particular, the plan

should promote the conservation and wise (sustainable) utilisation of the wetland (for example, by providing for the conservation of flora and fauna and their habitats and the management of environmental flows). *The plan should also identify actions and management strategies to increase waterfowl populations on appropriate wetlands.*

Ramsar management resources and personnel

As with World Heritage, the front-line defence in the protection and conservation of Ramsar wetlands are the site management staff (wardens). Without a trained, professional and dedicated staff, Ramsar wetlands and the waterfowl they protect would be under even greater threat. Indeed, this is explicitly recognised in Article 4(1) of the Ramsar Convention in the obligation "to provide adequately for [Ramsar site] wardening".

Accordingly, it is important that the AR Principles provide for arrangements with respect to management personnel. This is even more important now because the consequential amendments relating to the Act have abolished the National Parks and Wildlife Service.

Recommendation 63.

Amend the fifth dot point to Principle 2 of the proposed AR Principles as follows:

- *Provide designated resources and personnel* for ongoing *management, wardening*, monitoring and reporting on the state of the ecological character of the Ramsar wetland and waterfowl using those wetlands.

Buffer zones

The proposed AR Principles fail to provide for the establishment of adequate buffer areas for listed Ramsar sites. This is a serious omission. As the Bureau for the Convention on Wetlands of International Importance has emphasised, "with increasing pressure on wetlands and river systems, the inclusion of buffer zones [around Ramsar wetlands] is increasingly being recommended as a management tool".

Recommendation 64.

Add the following seventh dot point to Principle 2 of the proposed AR Principles:

- *Establish buffer zones for Ramsar wetlands and identify specific actions and strategies to ensure they promote the conservation and maintenance of the ecological character of the wetlands and the waterfowl using those wetlands.*

7.3 Preparing Management Plans

Principle 3 of the proposed AR Principles recognises that the preparation of a plan must include adequate provisions for public consultation on proposed elements of the plan. However, the Consultation Paper fails to detail what these provisions will include. As a minimum, the AR Principles should spell out notice provisions and time periods for public comment on management plans. They should also spell out the maximum time within which plans must be prepared.

Recommendation 65.

Add the following paragraph to Principle 3 of the proposed AR Principles:

> *As soon as a draft management plan is developed, the Director of National Parks must publish notice of the proposed management plan and an invitation for submissions on the plan in newspapers with national and State-wide circulation. The comment period on the proposed management plan must be no less than 45 days following the publication of notice.*
>
> *Management plans for existing Ramsar wetlands must be prepared within three years from the time the AR Principles come into force. Management plans for a wetlands successfully nominated for future listing under the Ramsar Convention must be prepared within one year of listing.*

7.4 Review of Management Plans

The Consultation Paper indicates that the review of management plans can take place as far apart as seven year intervals. Without an explicit method to trigger an earlier mandatory review when necessary, this maximum interval in reviews is too great.

Recommendation 66.

Amend Principle 5 of the proposed AR Principles to provide that reviews of management plans must take place at intervals of no more than 5 years.

7.5 Assessment of Proposed Actions

Impact on waterfowl

Given that the Ramsar Convention has the dedicated purpose of promoting the conservation of wetlands, *especially as waterfowl habitat,* it is hard to understand why the environmental impact assessment processes set out in the proposed Australian Ramsar management principles fail to include an assessment of likely significant impacts on waterfowl making use of Ramsar sites. The proposed AR Principle must be amended to include assessment of

impacts on waterfowl.

Recommendation 67.

Amend the first paragraph and the first dot point of Principle 6 of the proposed AR Principles as follows:

> All proposed actions that, if implemented, would be likely to have a significant impact on the ecological character of a Ramsar wetland *and waterfowl making use of the wetland must* be subject to a statutory environmental impact assessment process (whether or not the actions are proposed to occur inside the wetland).
>
> - The assessment process should specifically examine the potential for impacts on the ecological character of the wetland *and waterfowl making use of the wetland (whether present at the time of assessment or not).*

Buffer zones

As stated above, in order to ensure effective conservation of Ramsar wetlands, their associated values, and waterfowl, it is necessary to establish a system of buffer zones, and to ensure that actions likely to have significant impact on Ramsar wetlands are evaluated in terms of their impacts on values, waterfowl, and buffer zones.

Recommendation 68.

Add the following paragraph to Principle 6 of the proposed AR Principles:

Buffer zones established around Ramsar wetlands should be subject to environmental impact assessment processes to determine if proposed actions are likely to have a significant impact on the ecological character of the wetland, its values, or the waterfowl making use of the wetland, through impingement on the buffer zone.

Cumulative and synergistic impacts

A serious omission in the impact and assessment process outlined in Principle 6 of the AR Principles is the failure to include a requirement to assess cumulative and synergistic impacts. (Cumulative impacts are the impacts that result from the combined effect of the proposed action and other past, present and reasonably foreseeable future actions.)

This is a significant problem because individually minor actions can become collectively significant over time. A failure to require assessment of cumulative impacts leads to the loss of Ramsar wetlands "bit by bit" because there is no need to consider the likely significant impacts on the ecological character of a Ramsar wetland and waterfowl making use of the wetland that may result from many projects over time. Moreover, without such comprehensive assessment, it is impossible to decide if a Management Plan needs to be

revised to take account of cumulative impacts.

Recommendation 69.

Insert a new dot point under Principle 6 of the proposed AR Principles addressing the need to assess cumulative impacts:

> *The assessment process must include an examination of the cumulative or synergistic impacts on the ecological character of a Ramsar wetlandand waterfowl making use of the wetland.*

Whole of proposed action

It is vital to ensure that the impact and assessment process under Principle 6 of the AR Principles includes every stage of the proposed project.

Recommendation 70.

Insert a new dot point under Principle 6 of the proposed AR Principles addressing the need to assess the whol of proposed actions:

- *The assessment process must include an examination of the whole of the proposed action, including every stage of the proposed action.*

Conditions to be made public

The Consultation Paper indicates that if an action is approved that might impact on Ramsar wetlands, conditions should be imposed to ensure its maintenance. The principles also require monitoring of the conditions and, where necessary, enforcement action to be taken to ensure compliance. However, the AR Principles fail to require that the conditions be made public.

Under s 475 of the Act, persons and organizations with suitable standing are entitled to apply to the Federal Court for an injunction in relation to a breach of the Act or the regulations. It is therefore important to explicitly provide that the conditions imposed in relation to Ramsar wetlands are made public.

Recommendation 71.

Amend dot point 4 of Principle 6 of the proposed AR Principles to include the following language:

> *The Director of National Parks must keep an up to date public register of all approvals and conditions relating to Ramsar wetlands, values, waterfowl and buffer zones.*