



environmental defender's office new south wales

Submission on the proposed Sydney Growth Centres Strategic Assessment

25th June 2010

The EDO Mission Statement

The EDO's mission is to empower the community to protect the environment through laws, recognising:

- *the importance of public participation in environmental decision making in achieving environmental protection*
- *the importance of fostering close links with the community*
- *the fundamental role of early engagement in achieving good environmental outcomes*
- *the importance of indigenous involvement in protection of the environment*
- *the importance of providing equitable access to EDO services across NSW.*

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Introduction

The Environmental Defender's Office of NSW (EDO) welcomes the opportunity to provide comment on the *Draft EPBC Act Strategic Assessment Report for the Sydney Growth Centres Program* ('Draft Strategic Assessment Report') and the *Sydney Growth Centres Strategic Assessment Draft Program Report* ('Draft Program Report'). The EDO is an independent community legal centre specializing in public interest environmental law and policy. There is an EDO office in each state and territory, and through our national network (ANEDO), we have engaged extensively on *EPBC Act* implementation and reform, including in relation to strategic assessments, and at a state level the EDO has engaged with the NSW Government on the issue of biocertification since 2005.¹

We recognize that current threatened species legislation (at both the state and federal level) being applied on an individual site by site basis, is failing to adequately protect Australia's most threatened biodiversity. It is therefore necessary to develop new tools in order to more strategically and effectively protect and manage biodiversity in the long term. A critical element of developing new tools is ensuring that appropriate criteria and safeguards apply to transparent and accountable decision-making, and that adequate time is spent ensuring the tool will actually achieve the desired environmental outcomes.

A number of broader landscape scale assessment options based on strategic assessments are now being explored across Australia. The EDO supports robust strategic assessments as the key means of addressing cumulative impacts. However, we caution that the extent to which strategic environmental assessments will provide adequate protection of biodiversity across the landscape will depend on the criteria considered and the process of assessment. There is a danger that if not done properly, strategic assessments will instil a much lower level of environmental protection than a site by site approach. This has already been observed in the Regional Forest Agreement (RFA) strategic process which has clearly failed in its protection of biodiversity. We submit that strategic assessments need to be genuine and scientifically sound processes rather than processes that simply reduce the regulatory burden on developers at the expense of the environment.

In this submission we make comment on the specific proposal for strategic assessment of the Sydney Growth Centres, but also comment on biocertification and strategic assessment more broadly. Therefore some comments may be more relevant for consideration by the Commonwealth government. As such, we submit this submission to both the NSW Department of Planning (DoP) and the Commonwealth Department of Environment, Water, heritage and the Arts (DEWHA).

Our comments relate to:

1. Potential benefits and risks of strategic assessment
2. Strategic assessment of the Sydney Growth Centres
 - a. Stage at which strategic assessment occurs
 - b. Biocertification
 - c. "Maintain or Improve" test – "like for like" offsets

¹ EDO submissions on: *Biodiversity Certification and Banking in Coastal and Growth Areas* 13 September 2005, and *Submission on the proposed biocertification of the Draft Growth Centres Conservation Plan* 18 April 2007, and *Submission on the DECC Guidelines for Biodiversity certification of environmental planning instruments* 21 December 2007, and *Submission on the Use of Environmental Offsets under the EPBC Act 1999 - Discussion Paper* 3 December 2007 are available at: <http://www.edo.org.au/edonsw/site/policy.php>.

- d. Security of conserved areas under the proposal
 - e. Information and data gaps
 - f. Monitoring and Review
3. Best practice strategic assessment processes
- a. Stronger test and decision-making criteria
 - b. Improved public participation
 - c. Mandatory conditions
 - d. Call-in and suspension/revocation powers

Part 1 - Potential benefits and risks of strategic assessment

ANEDO has consistently called for better consideration of cumulative impacts under the *EPBC Act*. From our experience in each state and territory it is clear that an Act which is limited in scope to a site-by-site assessment process does not maximise environmental outcomes. Individual development assessment processes that are predicated on a site by site approach mean that decisions relating to actions are restricted to the subject site in question and there is very limited scope to consider the impacts of an action on a broader scale. This results in fragmentation and degradation of habitats and the reduction of species' resilience to survive. Our experience with the *EPBC Act* has shown that there is currently no assessment of the overall impact of a series of unrelated developments. In this context, we welcomed amendments to the Act which now provide for strategic assessment that can consider cumulative impacts.

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

However, given the consequences of strategic assessments, in that no further environmental assessment is required for certified areas, the process must be subject to strict criteria, comprehensive assessment tools and genuine public consultation provisions. Those strategic assessments conducted to date, in relation to RFAs and the Kimberley process demonstrate that there is a long way to go to establishing a workable and effective strategic assessment process. The process at present seems implicitly focused on streamlining and reducing the regulatory burden rather than on achieving the best environmental outcomes. It was indicated at a stakeholder briefing in Sydney on 28th May that the push for strategic assessments, such as for the Growth Centres, is being driven by the Business Regulation and Competition Working Group of COAG. It is also a clear driver of the NSW DoP to reduce red tape and regulatory burdens that are perceived to delay development approvals.

We submit that the establishment of robust strategic assessment processes must be a priority of the *EPBC Act* and DEWHA in order to effectively incorporate the consideration of cumulative impacts. This is discussed further below in part 3 in relation to future strategic assessments.

Part 2 – Strategic Assessment of the Sydney Growth Centres

a. Stage at which strategic assessment occurs

We strongly support strategic assessment being undertaken at the earliest possible stage in the development process in order to optimize environmental outcomes. We understand that strategic assessment was not undertaken at the time of biocertification of the Growth Centres SEPP as the relevant *EPBC Act* amendments providing for strategic assessments of plans or programs had not commenced at that time.

However, as noted in the Draft Reports, the development of the Growth Centres has been in train since 2004.² This means that many of the key decisions regarding land release and development have already been made, and many of the environmental “offsets” and areas for conservation have already been identified. We strongly support early identification of areas of high conservation value, however we have concerns about the interim active management of those areas, and that decisions that have already been made preclude conservation of other areas. Conducting strategic assessment at this later stage may mean, in practical terms, that the federal strategic assessment process is limited to adding some extra conditions rather than having a more active and comprehensive role in determining the preservation of the remaining remnants of ecological communities that are matters of national environmental significance.

b. Biocertification

The current NSW biocertification scheme forms the basis of the application for federal accreditation. The EDO has a long history of engaging on the issue of biocertification with the NSW Government. As noted above, we recognize the potential benefits of developing strategic assessment tools, and our engagement has always focused on ensuring that best practice robust and scientifically valid tools are developed.

Apart from conferring biocertification on the NSW native vegetation regime, the Growth Centres SEPP was the first candidate for biocertification in NSW. The EDO analysed the process and the Growth Centres Conservation Plan and identified a number of flaws.³ On this basis we assisted a client group in Western Sydney to challenge the Minister’s decision to confer biocertification on the Growth Centres SEPP. The case is summarized below.

True Conservation Association v The Minister Administering the Threatened Species Conservation Act 1995

In these proceedings the TCA challenged the decision by the Minister on 14 Dec 2007 to grant biodiversity certification to *State Environmental Planning Policy (Sydney Region Growth Centres) 2006* (Growth Centres SEPP). The effect of this biodiversity certification was that species impact statements no longer need to be carried out for individual development applications in the area covered by the Growth Centres SEPP. The plan allowed for clearing of 1,867 ha of high quality native vegetation, including of 12% of the remaining high quality Cumberland Plain Woodland

² Draft Strategic Assessment Report, p1.

³ EDO submissions on: *Biodiversity Certification and Banking in Coastal and Growth Areas* 13 September 2005, and *Submission on the proposed biocertification of the Draft Growth Centres Conservation Plan* 18 April 2007, and *Submission on the DECC Guidelines for Biodiversity certification of environmental planning instruments* 21 December 2007 are available at: <http://www.edo.org.au/edonsw/site/policy.php>.

and was likely to result in a significant loss of habitat 16 threatened plant species and 22 threatened animal species.

The TCA believed that, in this case, biodiversity certification was granted prematurely and based on inadequate information. In its legal challenge, the True Conservation Association alleged that the Minister had no rational basis for concluding that the Growth Centres SEPP would result in a maintenance or improvement of biodiversity values. The Minister's interpretation of the maintain or improve test essentially compared the outcomes under the plan to what would have occurred in the plan area under a future scenario of virtually unconstrained development. Our client's argument was that maintenance or improvement of biodiversity values needed to be achieved relative to the current level of biodiversity existing on the subject land.

Six weeks before the matter was due to be heard, parliament introduced special legislation putting the biodiversity certification order beyond the reach of Court review, and the proceedings had to be discontinued. The government claimed that the uncertainty generated by the Court case was holding up \$5 billion worth of development. This suggests that the Minister may not have been optimistic about her own prospects of success. On 25 June 2008 the *Threatened Species Conservation (Special Provisions) Bill 2008* passed through both houses of the NSW Parliament. The bill conferred biodiversity certification on the area within the Growth Centres SEPP covered by the original order. This meant that the Growth Centres SEPP would have the benefit of biodiversity certification, even if the original biodiversity order was declared invalid by the Court, and without having to meet the requirements of the *Threatened Species Conservation Act*. This set an extremely poor precedent for other areas of the State which are also subject to development pressure, and for the integrity of the biocertification process.

Following the court case and the subsequent special legislation, DECCW requested that the EDO be involved in reforming the biocertification scheme in NSW and developing necessary amendments to the *Threatened Species Conservation Act 1995* to improve the process for any future biocertifications. Accordingly, the EDO has willingly engaged with the NSW Government to ensure that a robust biocertification process is established that can genuinely deliver environmental outcomes. EDO has provided written advice to DECCW, attended numerous meetings with DECCW, and recently attended a field trip to assess a proposed biocertification in Wyong-Warnervale.

We welcome the development of a clear Assessment Methodology to improve the biocertification process, and will be providing further detailed input on the Draft Assessment Methodology during the upcoming public exhibition period. We have outstanding concerns regarding protection of 'red flag' areas of high conservation value and the use of financial contributions. It is essential that the Methodology establishes an objective, transparent and scientifically robust process for biocertification assessments.

Most recently EDO provided comment on the *Threatened Species Conservation (Biodiversity Certification) Bill 2010*. This Bill was drafted to amend Part 7, Division 5⁴ of the *TSC Act* to improve the biocertification process. However the Bill was passed prior to a scheduled meeting with the Government to discuss necessary amendments. Significantly, there is a new clause that removes the right to challenge a biocertification order where the process has not been followed.⁵ This is of concern to the EDO and our clients, as it means that

⁴ Part 7, Division 5 Biodiversity Certification of environmental planning instruments.

⁵ **126ZZ Effect of failure to comply with procedural requirements**

A conferral or extension of biodiversity certification, or the modification of biodiversity certification, is not open to challenge because of a failure to comply with the procedural requirements of this Part after the order conferring, extending or modifying the biodiversity certification has been published in the Gazette.

there is no longer an option to ensure the robust and scientifically rigorous process is followed. Although the new provisions do not relate to the Growth Centres assessment, they are still important as they establish the process for future biocertifications in NSW and therefore the basis for future federal strategic assessments.

Biocertification is, therefore, a relatively new and untested tool. While it has potential to address cumulative impacts and achieve strategic landscape-scale environmental benefits, there must be a robust legislative and scientific process underpinning the biocertification. As this is a new tool, there is a significant risk for the Federal Government to accredit the plan in the absence of appropriate safeguards and review mechanisms. This is discussed further below in Part 3.

c. ‘Like for like’ offsets – the “maintain or improve” test

It was confirmed at the 28th May Sydney briefing that DEWHA currently requires “like for like” offsets when undertaking site assessments. This is expressed in principles 1, 5 and 6 of the *EPBC Act* draft offsets policy, as noted on p87 of the Draft Strategic Assessment Report (emphasis added):

1. Environmental offsets should be targeted to the matter protected by the EPBC Act that is being impacted.

...

5. Environmental offsets should, as a minimum, be commensurate with the magnitude of the impacts of the development and ideally deliver outcomes that are ‘like for like.’

6. Environmental offsets should be located within the same general area as the development activity.

This is one of the most fundamental issues for the Commonwealth Environment Minister in determining whether to accredit the Growth Centres program.

The current Growth Centres Offset program does not adhere to a “like for like” offset requirement, and instead provides for a range of offset options over a wider geographic area, with a more relaxed requirement of vegetation types being “floristically similar.” It is a very significant decision for the Minister to decide to depart from the current “like for like” requirement. It is not scientifically valid to stretch the nexus between impacted vegetation type and conserved vegetation type on the basis that the conserved type is of the same vegetation *formation* or is also a scarce vegetation type. The option of offsetting one ecological community with a different community may not meet the current obligations to protect matters of national environmental significance. Ecological communities such as Cumberland Plain woodland are federally listed due to their national significance, rarity and extreme threat. It is arguable that the *EPBC Act* does not intend such categorized communities to be amenable to ‘trade-offs’ with different vegetation types in more geographically remote areas.

The current Draft Program Report proposes a cascading range of offset options, which prioritises on-site conservation of MNES communities first. It is unclear in the current process who determines whether NSW Government has tried hard enough to identify first priority Cumberland Plain woodland, before adopting the more cost effective, but also more remote offsets further afield.

If the “maintain or improve” biodiversity outcomes test (as legislated in NSW) is to be accepted by the Commonwealth Government via strategic assessment of biocertification,

and adopted more directly (as recommended by the Hawke report 3.53)⁶, then it needs to be a clear legislative test that is backed up by a robust, objective scientific methodology. Such a methodology (as discussed above) must be gazetted and applied to a range of land use scenarios *prior* to key land release decisions being made.

d. Viability

A legacy of individual site by site state approved developments have fragmented the remaining ecological communities in the Sydney Growth Centres. The proposed plan allows further clearing of remnants on the basis that those remnants now fail a test of viability due to being degraded. It is a difficult situation – the most threatened endemic ecological communities in the Sydney Basin are under the most development pressure and are therefore the most fragmented. On the one hand this qualifies those communities to be recognized as nationally significant and in need of protection, but on the other hand, a significant percentage of these communities are considered too expensive to protect long-term as they exist in degraded fragments. We understand that given resource limitations, prioritisation of areas for protection or conservation efforts occurs, however a convenient/simplistic definition of 'viability' of patches should not be used as a way to remove legal obligations for protecting the most threatened species and communities.

The EDO has always been concerned at the use of a set spatial limit (for example, 4 ha) to determine viability. The table on page 94 of the Draft Strategic Assessment Report indicates the Commonwealth currently has lower patch size condition thresholds for Cumberland Plain Shale Woodlands and Shale Gravel Transition Forest ecological community; for example, minimum patch sizes of greater than or equal to 0.5 ha. It is of concern that a patch that may currently attract Commonwealth consideration would fail the NSW viability test due to being less than 4 ha. Where there are differences in definition, the most conservative definitions and thresholds that promote the most protection should be used. In determining viability of small vegetation patches, key factors such as connectivity, vegetation condition, connectivity and the condition of neighbouring vegetation patches should be the primary considered, as opposed to patch size.⁷

⁶ *The Australian Environment Act – Report of the Independent Review of the Environment Protection & Biodiversity Conservation Act 1999*, October 2009, Final Report, Commonwealth of Australia. 3.53 “One possibility of a test to guide approval of a class of actions under an endorsed plan, policy or program is the ‘improve or maintain’ test used in NSW...the ‘improve or maintain’ test is preferred because of its existing application in the biodiversity certification arena, its potential for exceeding the *status quo* through the concept of ‘improvement’ and its applicability to both the natural and cultural environment.. 3.54 There is, however, a case for going further and adopting a test that requires the endorsed policy, plan or program to ‘improve matters of national environmental significance’. One reason for doing so is the significant degradation of much of the Australian environment. Rather than simply trying to maintain the current quality of the environment, government should try to enhance it to compensate for the losses of the past. Another reason is to guard against implementation falling short of the ‘improve’ requirement. If this were to happen, the existing environmental quality may at least be maintained, which would seem to be a minimum standard.”

⁷ See: Rothley, K., Berger, C., Gonzalez, C., Webster, E. and Rubenstein, D. (2004) Combining strategies to select reserves in fragmented landscapes. *Conservation Biology* 18(4) 1121-1131.

e. Information and data gaps

As part of the aim to reduce the regulatory burden it is indicated that assessment occurs at the landscape scale rather than the site scale for biocertification. While this may have benefits in terms survey cost reduction, the EDO is concerned at the lack of ground-truthing to address potential data gaps. There are various instances in the Draft Reports where it is noted that site data was not available for the purpose of the assessment.⁸

The Hawke review identify data requirements for strategic assessment as set out in the box below.

*Information Requirements for Strategic Assessments*⁹

- 3.43 As a result of the range of activities potentially approved by a strategic assessment, and the long-term nature of the approval decision, the assessment process must involve a number of safeguards.
- 3.44 The Act currently specifies form and content requirements for project assessment referrals.³⁰ Referrals which do not meet these requirements are considered invalid and are not accepted. Similarly, form and content requirements for strategic assessments should be inserted into the Act. Specific requirements should be contained within the Regulations.
- 3.45 The current provisions for strategic assessments only require development of terms of reference and a draft report. To date Commonwealth strategic assessments have dealt with spatial plans, and there has been greater consideration of the minimum information required for these assessments to be credible. A strategic assessment of a spatial plan should, at minimum require:
- (a) collation of reasonably available information, and should identify and fill critical knowledge gaps:
 - information should include the spatial extent of threatened species, ecological communities or heritage areas;
 - the assessment should present maps of habitat for listed threatened species, ecological communities, heritage areas and other important environmental components; and
 - the process should include a call for relevant, existing data from researchers, consultants and others;
 - (b) identification of matters of NES and establishment of outcome objectives for the plan, policy or program;
 - the assessment should state the minimum acceptable conservation outcomes for each of the environment and heritage values that the plan considers;
 - (c) examination of development and land-use options with the aim of minimising impacts on protected matters and retaining ecological integrity;
 - (d) an analysis of the consequences of the different options including:
 - estimates of impacts;
 - how the plan avoids, offsets and mitigates impacts on protected matters; and
 - a measure of the uncertainty associated with the analysis;
 - (e) a description of mitigation measures, and quantification of expected benefits including:
 - how future conservation ‘gains’ will be funded, measured and enforced; and
 - analysis of the adequacy of the extent of habitat that will exist following the implementation of the plan, policy or program; and
 - (f) a description of adaptive management approaches in the plan, policy or program – these should:

⁸ For example, Draft Strategic Assessment Report, pxvi states: “Comprehensive site by site survey information for threatened species within the Growth Centres is not available.”

⁹ Hawke review Final Report, *op cit.*

- indicate what actions will follow, should planned conservation actions not be implemented, or should expected outcomes from conservation actions not be achieved (that is, contingency plans should be clearly documented to account for environmental uncertainties); and
- allow for the unexpected, including new discoveries of species, habitats and/or communities of conservation concern in areas to be impacted by the proposed development.

As strategic assessment practice develops for the assessment of policies and programs, different minimum information requirements may be appropriate for these assessments.

3.46 Legislating for a test of 'adequacy' in terms of data quality is extremely difficult. A preferable approach would be to establish guidelines that describe the requisite standard for information.

3.47 Formal guidelines should be established to guide the conduct of strategic assessments. These should build on the established 'Strategic Assessment Endorsement Criteria', which have been a common feature of the terms of reference of all strategic assessments to date.³³ These criteria:

- include the extent to which a plan, policy or program:
 - protects the environment (focusing on protected matters);
 - promotes ESD;
 - promotes the conservation of biodiversity; and
 - provides for the protection of heritage;
- set out minimum standards of acceptable environmental impacts; and
- provide a set of higher level considerations.

These criteria influence development of the plan, policy or program by outlining the basic decision-making for any subsequent strategic approval.

3.48 In addition to the existing endorsement criteria, the guidelines could specify the following requirements:

- (a) the area considered for strategic assessment should make ecological sense (i.e., comprise an ecoregion or a catchment) or provide meaningful protection of heritage values;
- (b) the strategic assessment should indicate how much data and knowledge is required to make a good decision – that is, it should clearly describe and justify the minimum adequate data and knowledge set. Considerations should include the quality of data and current, remotely acquired data (especially in rapidly changing areas);
- (c) critical gaps in the data should be identified and filled with targeted field surveys at appropriate times of the year, following best-available survey guidelines, so that the conditions for the minimum adequate data set are achieved. Sufficient time should be given to arrange access to private land, where required;
- (d) wherever possible and relevant, strategic assessments should include models of species persistence (particularly those that are informed by process models and community composition models). This is because perfect information on populations and species can never be obtained and so modelling is essential for conservation planning, particularly across private land and in peri-urban areas;
- (e) the strategic assessment should employ accepted existing information and best-practice conservation planning tools and protocols to maximize the effectiveness of conservation actions;
- (f) all stages of the strategic impact assessment process should be documented in a clear and transparent manner; and
- (g) the strategic assessment should include precise recommendations for measurement endpoints that can be used in subsequent audits to verify predictions and assumptions of the effectiveness of conservation actions and the value of conservation outcomes.

Creation of published guidelines which outline these requirements would send a clear message about the requirements of a strategic assessment. It would also guide best practice by DEWHA officials.

3.49 The establishment of minimum form and content requirements for strategic assessments, as well as best practice guidelines, should ensure high quality information is available to the decision-maker, and ultimately ensure public confidence in the process.

The information contained in the Draft Reports does meet some of these important information requirements, such as: including some spatial plans, addressing uncertainty,¹⁰ discussion of promoting the principles of ESD,¹¹ and information about funding of future gains. However, the Draft Reports do not adequately include: analysis of different options, calls for further data from experts and consultants, detail precise recommendations for measurement endpoints to audit conservation assumptions, and importantly, does not adequately address how unexpected new information (for example about new habitat or species) will be addressed. More information is needed on these issues.

f. Security of environmental outcomes

The EDO welcomes the identification of high conservation areas to be conserved and protected against further development. We applaud the purchase of the 181 ha Cranebrook property and the intention that it become a new reserve and provision for secure long term conservation.

Similarly, we recognize that there are benefits of establishing biobank sites in that they are protected and managed for conservation in the long term, and importantly, the biobanking scheme provides a mechanism for funding of ongoing management actions. Again, although biodiversity offsetting is highly controversial, the EDO has engaged with the NSW Government in the process of developing a biobanking scheme in recognition of the need to test new and innovative tools for biodiversity conservation.¹²

The Draft Program Report sets out a range of other mechanisms to protect high conservation biodiversity. The EDO has serious concerns about how the NSW DoP can guarantee delivery of these outcomes.

For example, while areas of private land have been identified for future acquisition, it is apparent that these areas may not be acquired for several years,¹³ and is contingent on owners being willing to sell, which is not guaranteed. The EDO is concerned that where there are no requirements for active management of the conservation values of the land in the intervening period, that the biodiversity values may be degraded by the time the land is acquired for conservation. For example, without active weed management, an incursion of African Olive (*Olea europaea*) could seriously degrade a remnant of Cumberland Plain woodland in the time it takes to acquire the land. So what has been counted as an “offset” or asset of high biodiversity value at the time the plan is being drafted may not deliver the desired environmental outcomes.

Similarly, zoning is not 100% secure. Future spot rezonings may still be possible, and the draft plan identifies that clearing may still occur for certain purposes, even in environmental conservation zones.¹⁴ Without regular audit and review of whether this is occurring it is impossible to keep track of whether environmental values are actually being maintained or improved.

¹⁰ Chapter 8 of the Draft Strategic Assessment Report, pp223-224.

¹¹ Chapter 7 of the Draft Strategic Assessment Report, pp216-218.

¹² The EDO has been heavily involved in the development of the biobanking scheme and is a member of the Ministerial Reference Group on Biobanking. Our various submissions on biobanking are available at: <http://www.edo.org.au/edonsw/site/policy.php#2>.

¹³ At the briefing on the 28th May it was indicated by DECCW staff that the time needed to acquire desirable properties could be well in excess of 10 years.

¹⁴ See the Land Use table - Clause 12 of the *State Environmental Planning Policy (Sydney Region Growth Centres) 2006*.

g. Review of process

The NSW Government must be sure that they can deliver the commitments outlined in the Draft Program Report. As discussed above, there is currently no guarantee that relevant land can be acquired, that the land will be actively managed for conservation pre-acquisition; that zoning will be adequate protection. Biocertification is a relatively new and untested tool, and the decisions made now will have a permanent impact on the last remaining stands of certain federally listed communities. The Draft Reports propose a 4 yearly review of the program with no intended revocation option.¹⁵ The Draft Program report indicates that annual reports will “highlight the conservation outcomes achieved in the previous year”.¹⁶ There should also be comprehensive reporting of what clearing of vegetation and environmental impacts have occurred in the annual report as well as conservation outcomes. This is required in the 4 year review,¹⁷ but not annually.

The Commonwealth Minister must not endorse the Growth Centres Program unless there are clear requirements for regular and detailed auditing of biodiversity outcomes, over and above the general annual reporting requirements and 4 yearly review identified in the Draft Reports.

Part 3 - Future strategic assessment processes

As noted, the EDO supports robust strategic assessments as a key means of addressing cumulative impacts of development on biodiversity, but that strategic assessment processes must be subject to robust and strict criteria. The EDO is committed to promoting necessary law reform to establish best practice processes and objective assessment tools to achieve desired environmental outcomes. While not applicable to strategic assessment processes that have already commenced, there are a number of amendments and ways that the process could be improved. We support the Hawke Report summary and recommendations to strengthen the strategic assessment decision-making process, and recommend strengthening the strategic assessment process in a number of ways as set out below.

a) Stronger test and decision-making criteria

As noted in the Hawke Review Final Report,¹⁸ the Minister must take into account a limited number of considerations when approving the taking of actions in accordance with an endorsed policy, plan or program (ie, the Minister must consider issues relevant to the protection of matters of NES, economic and social matters, and the principles of ESD and must not act inconsistently with relevant international conventions).¹⁹ Submissions to the Hawke review supported a stronger test for deciding whether or not to approve the taking of actions in accordance with an endorsed plan, policy or program.

¹⁵ See Draft Strategic Assessment Report, p225 (para 8.2).

¹⁶ Draft Program Report, p84.

¹⁷ See *Growth Centres Biodiversity Certification Order – Relevant Biodiversity Measures*, clause 40 (a) “... the GCC must provide the following information to DECC in a timely manner: a. an estimate of the amount of existing native vegetation, specified by vegetation community type, that has been cleared within the Growth Centres, including maps of known locations, within the four year period (or adjusted period).”

¹⁸ Hawke Review Final Report, *op cit*, at 3.51.

¹⁹ *EPBC Act* s146F.

Accordingly, the current minimum legislative requirements could be augmented by a robust “maintain or improve” test, as discussed above. The Hawke Review Final Report concludes “while a strategic assessment may authorise impacts on matters of NES, it is essential that it improves or maintains biodiversity integrity in a region (60)”.

Establishing a genuine “maintain or improve test” at a federal level may involve the development of an objective and scientifically valid assessment methodology. Reliance on differing state assessment methodologies is likely to mean that the maintain and improve test would be applied differently for each strategic assessment and not have a consistent legal meaning and application. The EDO would strongly support the development of a federal methodology to ensure that strategic assessment proposals are accurately assessed against an objective “maintain or improve” test.

ANEDO has also previously recommended that the Minister must have regard to: the strategic assessment report; any report by an expert panel; any public submissions on the strategic assessment report; and any public submissions made during the assessment. Information about these documents should be provided in any report to the Minister seeking endorsement or approval of a strategic assessment. The Hawke Review Final report supported our recommendation.²⁰

b) Improved public participation

There needs to be clear provisions in the *EPBC Act* that allow for effective public participation to ensure transparency and accountability in the decision making process. The Hawke Review Final Report notes:

3.56 Public participation also needs to be considered. Under the Act, s.146(1B)(b)(ii) provides for ‘the publication of the draft terms of reference for public comment for a period of at least 28 days’. Section 146(2)(b) provides for ‘the publication of the draft report for public comment for a period of at least 28 days’. 3.57 Given the scale of strategic assessments, they will usually be much more complex than individual project assessments, and therefore the public will need more time to participate. As a result of their experience with the Melbourne strategic assessment process, environmental groups have called for further time to be allotted for consultation on the draft report. 3.58 The Review proposes that the two periods for public comment provided for in the Act remain. While 15 business days may be sufficient for public comment on the draft terms of reference, as this documentation is likely to be considerably less detailed than a draft report, the period for comment on the draft report should be extended to a minimum of 60 business days. The Review also recommends other forms of early engagement, such as community meetings and information sessions, be provided. While the period for public comment enshrines minimum standards, capacity to employ other methods of consultation should be encouraged.

The EDO supports lengthening consultation periods, especially when there are large documents for review, such as the Draft Reports for the Growth Centres. A number of our clients have also expressed concern at the short timeframe available for considering and commenting on the large documents.

The public submission process should also be clarified. Public submissions should go directly to the Commonwealth Department which will be advising the Commonwealth Minister on whether to endorse a plan or program. It is inappropriate that the land release agency or proponent controls the public submission process, as it is not in their

²⁰ Hawke Review Final Report, *op cit*, at 3.59.

interest to forward critical comments on to the Federal Department. Furthermore, it can be confusing for community groups who are trying to engage in the process where multiple departments are involved: Growth Centres, DoP, DECCW and DEWHA. For example, in relation to different submission processes and consultancies, the EDO has provided recommendations and legal advice to DoP, DECCW, DEWHA and the Hawke review on the related issues of biocertification, EPBC Act reform, biobanking, and NSW environmental planning instruments relevant to the Growth Centres. It is unclear whether the relevant recommendations are shared between agencies. The process should be coordinated by the federal Environment Department.

c) Mandatory conditions

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

d) Call-in powers and suspension/revocation powers

The EPBC Act should be amended to include a provision that stipulates if the strategic assessment is not achieving the intended environmental outcomes, an opportunity exists to suspend or revoke the declaration. This provides an ability to respond to changing circumstances or new information – this is particularly important in the context of the irreversibility of biodiversity loss and the uncertainty resulting from climate change. It is also important where strategic assessment has put faith in relatively new and untested tools such as biocertification and biobanking. As noted in the Hawke Report (at 3.41):

“as with all regulatory processes, best practice will continue to evolve. Iterative learning must occur to continually improve the quality of assessments.”

We also support the following recommendation of the Hawke Review Final report:

3.64 The Act should be amended to include a ‘call in’ power where a plan is to be made that is likely to have a significant impact on protected matters. The power could be activated ...by failure of the person or agency responsible for the plan, policy or program to engage in a collaborative strategic assessment.

While the recommendations for future reform of the EPBC Act strategic assessment process do not apply directly to the current proposal regarding the Sydney Growth Centres, it is important that best practice criteria are built into processes that are happening now as the current strategic assessments set precedent for future processes. NSW should be striving to implement a robust and best practice biocertification process and the Commonwealth Government must not accept any assessment that is minimum standard, as the decisions made now will have a permanent impact on some of Australia’s most threatened biodiversity.

For further information²¹ please contact EDO Policy Director Rachel Walmsley on 02 9262 6989 or rachel.walmsley@edo.org.au

²¹ The EDO has made a number of submissions relevant to this process. These are available at: <http://www.edo.org.au/edonsw/site/policy.php#4> and include:

- **ANEDO Submission to the 10 year review of the Environment Protection and Biodiversity Conservation Act 1999 – interim report**, 10 August 2009
- **ANEDO Submission - further comments on EPBC interim report**, 28 August 2009
- **ANEDO Submission on EPBC Act: Recommendations for Reform**, 5 March 2008
- **ANEDO EPBC Act Senate Committee Submission**, 30 September 2008.
- **Submission on the Proposed Biodiversity Banking Scheme**, 7 February 2008
- **Submission on the DECC Guidelines for Biodiversity certification of environmental planning instruments**, 21 December 2007
- **Submission on the Use of Environmental Offsets under the EPBC Act 1999 - Discussion Paper**, 3 December 2007
- **Preliminary identification of key issues relating to the biobanking assessment methodology**, 30 November 2007
- **Submission on the proposed biocertification of the Draft Growth Centres Conservation Plan**, 18 April 2007
- **Submission on "BioBanking - A Biodiversity Offsets and Banking Scheme" Working Paper**, 5 March 2006
- **Biodiversity Certification and Banking in Coastal and Growth Areas**, 3 September 2005.