IMPACT

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WILDLIFE PRESERVATION SOCIETY v MINISTER FOR ENVIRONMENT AND HERITAGE

EDO North Queensland Commences Climate Change Case

KIRSTY RUDDOCK
SOLICITOR
EDO NORTH QUEENSLAND

EDO North Queensland have commenced legal action in the Federal Court on behalf of the Proserpine/Whitsunday Branch of the Wildlife Preservation Society of Queensland, challenging a failure by the Commonwealth Department of Environment and Heritage to take into account the potential climate change impacts of two proposed coal mines.

The legal challenge, launched in Brisbane on 22 July 2005, concerns the failure of the Department to consider carbon emissions resulting from the burning of coal from two large coal mines when assessing the impacts of the mines under the *Environmental Protection and Biodiversity Conservation Act 1999*.

The mines concerned – the Isaac Plains Coal Project near Moranbah and Sonoma Coal Project near Collinsville – are expected to produce 18 million tonnes and 30 million tonnes of coal respectively. The Minister's delegate determined that these two mines were not controlled actions and did not need to be assessed by the Department under the EPBC Act.

The coal from these coal mines will largely be burnt in coal-fired power stations, producing carbon emissions, which contribute to global warming. Global warming is expected to cause severe impacts on the Australian environment, including to the iconic Great Barrier Reef and Wet Tropics Rainforests.

The directions hearing was heard before Justice Dowsett of the Federal Court on 19 August 2005. The applicants granted leave to amend their application to include not just the effects of the burning of the coal from the mines but also the effects of the mining, transport and use of the coal from the mines on the matters of national environmental significance protected under the EPBC Act.

The applicants also sought an order that the mining companies bear their own costs on the basis that their submissions would not add to those made by the Minister in defence of his decision. His Honour deferred a decision on costs until the hearing of these matters. All of the parties agreed to expedite the hearing.

The matter has been set down for hearing on 20 October 2005 in the Federal Court in Brisbane**.** EDO North Queensland will be instructing barristers Stephen Keim SC and Chris McGrath.

EDO CHALLENGES TASMANIAN PULP MILL

The Wilderness Society v Minister for Environment and Heritage and Gunns Limited

EDO Queensland and barrister Stephen Keim SC are representing the Wilderness Society (TWS) in a Federal Court challenge to a proposed pulp mill in Northern Tasmania.

The case is significant for all states which have Regional Forests Agreements (RFA), as the case challenges the federal Minister for the Environment and Heritage's interpretation of the RFA exemption from Commonwealth environmental assessment under the ***Environment Protection and Biodiversity Conservation Act 1999*** (EPBC Act).

The case will also consider the meaning of the phrase "realm of speculation", used in the Nathan Dam case to determine where the Minister should draw the line in considering "all adverse impacts" of a proposed action.

In December 2004, Tasmanian logging company giant Gunns Ltd referred to the Minister for Environment and Heritage its proposal to build and operate a pulp mill in either the Long Reach or Hampshire area. The mill is projected to operate for 30 years and will source its timber from plantation and native forests in accordance with the guidelines set out in the Tasmanian Regional Forests Agreement (TRFA), which expires in 2017.

On 24 January 2005, the Minister decided that the action was a "controlled action" and required assessment for its likely impacts on listed threatened species and communities, listed migratory species, and the Commonwealth marine environment (those matters of national environmental significance were "controlling provisions" for the environmental assessment of the impacts of the proposed action).

In setting the controlling provisions, the Minister was required to consider "all adverse impacts" that the proposal will have or is likely to have on matters of national environmental significance protected under the EPBC Act.

However, the EPBC Act exempts actions conducted in accordance with an RFA or in an RFA Region from the scope of the Act (with certain exceptions that do not apply here). In the case of the Gunns pulp mill proposal, this means that the Minister was not required to consider any adverse impacts on matters of national environmental significance from sourcing timber in accordance with the TRFA.

But the RFA exemption will not apply once the TRFA expires in 2017, and the pulp mill will operate until at least 2038 – leaving a gap of over 20 years where impacts on matters of national environmental significance (such as World Heritage Values of listed World Heritage areas) from logging to feed the mill were not considered.

The Minister's statement of reasons says the Minister did not consider those 'gap impacts' because the nature, extent and specified terms of any future TRFA or replacement regime and the consequences for protected matters under the EPBC Act were "speculative" at this stage, a reference to the test set by Justice Kiefel in the Nathan Dam case for determining where to draw the line in considering "all adverse impacts" of a proposal action.

TWS are seeking judicial review of the Minister's decision on the controlling provisions for the environmental assessment of the proposed Tasmanian Pulp Mill, because the Minister dismissed as "speculative" the likely impacts on the World Heritage Area and on threatened species of logging to feed the mill after the RFA expires in 2017.

TWS will argue that the Minister's finding that the future of the TRFA and post-2017 impacts on matters of national environmental significance were "speculative" was an irrelevant consideration, and also that he failed to take into account a relevant consideration - the adverse impacts of timber sourcing in the area after the expiry of the TRFA in 2017 but during the life of the Mill.

This case is an important test case in ascertaining the nature and scope of the nation-wide RFA exemption. The case is also a companion case to the Nathan Dam case, in which it was found that the Minister did not have to consider matters which "lie within the realms of speculation". In this case, the Minister has tried to rely on this ruling in failing to consider the impact of the mill beyond 2017 because the future of the RFA is "speculative".

EDO Queensland started acting for TWS in early June 2005, taking the file over from EDO ACT due to that office's resource constraints and EDO Queensland's expertise in EPBC Act federal court litigation.

A directions hearing was held at the Federal Court in Sydney on 16 June 2005 before Justice Gyles. The directions orders gave EDO Queensland leave to file further evidence, including evidence about World Heritage Values and public submissions raising the question of post-2017 impacts of the mill. Justice Gyles ordered that the matter be set down for hearing for 13th October 2005.

For more information about this case, please contact Jo Bragg, Principal Solicitor, EDO Queensland, on 007 3211 4466.

For more information about the campaign to stop the pulp mill, please visit www.wilderness.org.au.

PROTECTING CASSOWARY HABITAT IN THE WET TROPICS

Community for Coastal and Cassowary Conservation v Johnstone Shire Council & Cavanah

KIRSTY RUDDOCK
SOLICITOR
EDO NORTH QUEENSLAND

EDO North Queensland and barrister Chris McGrath are representing local environment group Community for Coastal and Cassowary Conservation (C4) in an appeal against a decision by Johnstone Shire Council to grant development approval for a material change of use and a development permit for a reconfiguration of a lot of land situated at Mission Beach, a significant habitat area for the endangered Southern Cassowary.

C4 will argue that the material change of use conflicts with the rural conservation zoning of the land. Rural conservation zoning allows certain limited development if the owner seeks to formally protect undeveloped areas of their property through conservation covenants.

In this case, the developer has proposed a conservation covenant over part of the land and applied for the rest of the block to be 22 lots of rural residential land. C4 will argue that the council's decision (1) conflicts with planning scheme requirements for rural conservation land, (2) compromises the desired environmental outcomes for the area and (3) conflicts with the State Planning Policy on Good Quality Agricultural Land.

C4 is seeking to ensure that Johnstone Shire Council complies with its own planning scheme by carefully managing development in the rural conservation zoning to protect the viability of cassowary habitat. Rural conservation zoning in the Johnstone Shire contains significant areas of cassowary habitat that could easily be re-vegetated to improve the viability of these areas.

Gunns Refiles Claim Against 'Gunns 20'

Tasmanian logging company Gunns Ltd has refiled its statement of claim against 17 individuals and three environment groups, this time suing for trespass, sabotage and destruction of logging property.

Victorian Supreme Court Justice Bernard Bongiorno rejected the original 360-page statement of claim for being 'ambiguous, unintelligible and in some parts embarrassing'.

It may be months before the new case is heard in the Victorian Supreme Court. In the meantime, Gunns have been ordered to pay a substantial part of the legal costs incurred by the 20 environmentalists as a result of the first statement of claim.

For full stories:

www.abc.net.au/news/australia/tas/northtas/200508/s1438260.htm and www.abc.net.au/news/australia/tas/northtas/200508/s1439466.htm.

Defendants in the Gunns 20 Case. Source: The Wilderness Society

EDO Defends Endangered Southern Bluefin Tuna

NICOLA BEYNON, WILDLIFE AND HABITATS PROGRAM MANAGER, HUMANE SOCIETY INTERNATIONAL

The Humane Society International (HSI), represented by the EDO, has commenced legal proceedings to defend the endangered southern bluefin tuna from chronic overfishing.

The Commonwealth Minister for Environment and Heritage, Senator Ian Campbell, declared Australia's Southern Bluefin Tuna (SBT) Fishery an ecologically sustainable wildlife trade operation under the ***Environment Protection and Biodiversity Conservation Act 1999***. HSI is bringing a case before the Administrative Appeals Tribunal to challenge the decision.

Southern bluefin tuna has long been considered endangered and overfished, yet the Australian Government has not reduced the quota given to the Australian southern bluefin tuna industry since 1989. The Minister did not make a reduction in quota a condition of his approval of the fishery as a wildlife trade operation.

In a ground-breaking development, the Minister's own Threatened Species Scientific Committee provided him with formal advice confirming the species meets the criteria for protection as an endangered species. Incredibly the Minister decided not to protect the species as endangered despite the recommendation.

The federal government allows the Australian southern bluefin tuna industry to catch 5,265 tonnes a year, which is approximately 70% of all the individual southern bluefin tuna caught worldwide. HSI considers the catch to be in breach of domestic legal and policy obligations for ecologically sustainable fisheries.

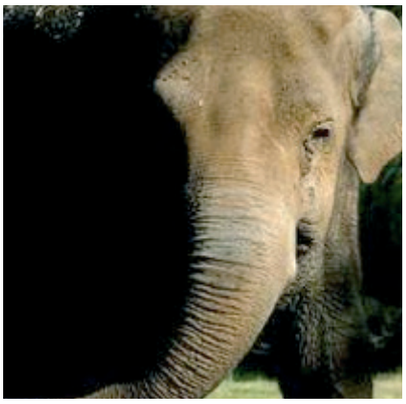
The government argues there is no point to Australia reducing its quota until other countries fishing the species also reduce their quotas through negotiations at the international Commission for the Conservation of Southern Bluefin Tuna (CCSBT). The CCSBT has consistently failed to manage southern bluefin tuna responsibly, with parental biomass reduced to 4-19% of pre-exploitation levels and the prognosis for stock recovery worsening.

HSI believes it is no longer tenable for the Government to excuse Australia's own over-fishing by pointing to the long term management failures of the CCSBT.

HSI will ask the Tribunal to overturn the Minister's decision to declare the SBT Fishery an ecologically sustainable wildlife trade operation and replace it with a decision that would give us confidence that the fish can recover.

For updates on the case, including court documents and evidence, please visit: www.hsi.org.au.

EDO Represents Animal Welfare Groups in Asian Elephant Appeal



The International Fund for Animal Welfare, the Humane Society International and RSPCA Australia, represented by EDO New South Wales, will appeal the decision made this week by the Commonwealth Minister for the Environment, Senator Ian Campbell, to allow the import of eight Asian elephants from Thailand to Taronga and Melbourne zoos. The applicants will ask the Administrative Appeals Tribunal to review the Minister's decision and are seeking an injunction to prevent the animals being transported from Thailand until the appeal is heard. For more information, please visit www.hsi.org.au, www.ifaw.org.au and www.rspca.org.au.

Government Prepares to Sweep Whyalla Red Dust Under the Carpet

Professor Rob Fowler, an internationally-renowned environmental law expert and current Chair of EDO South Australia, has called on the government of South Australia to withdraw its controversial Broken Hill Proprietary Company's Steelworks Indenture (Environmental Authorisation) Amendment Bill.

The Bill seeks to grant a new 10 year license to OneSteel to replace the existing license issued by the South Australian Environment Protection Authority (EPA) in January 2005. The Bill will remove safeguards against pollution created by the steelworks and reduce the regulatory powers of the EPA by replacing the standards imposed through an EPA licence with a requirement simply to 'take all reasonable and practicable measures'.

According to Professor Fowler, this would "sacrifice the health and comfort of the residents of East Whyalla to meet the unwarranted demands of OneSteel."

"It is hard to reconcile this action with the commitment given by the Government prior to the last State election to increase the independence and effectiveness of the EPA. In this regard, the Bill is reminiscent of the 'special deal' legislation that was common-place in Queensland in the 1970's under the Petersen government."

Aerial view of Whyalla showing Steelworks - Bottom Right

"South Australia has an effective pollution control regime under the *Environment Protection Act* and there should be no need for special laws to protect favoured industries. The message being sent to polluting industry in South Australia is that there is now a political alternative to complying with EPA standards - and that is to ask the Premier to pass special laws to avoid EPA imposed pollution requirements".

For more information about this issue, please visit: www.edo.org.au/edosa.

DEFENDING HINCHINBROOK WORLD HERITAGE VALUES

Alliance to Save Hinchinbrook Inc v Environmental Protection Agency

KIRSTY RUDDOCK
SOLICITOR
EDO NORTH QUEENSLAND

EDO North Queensland and barrister Stephen Keim SC are representing the Alliance to Save Hinchinbrook (ASH) in a judicial review action to conserve the Hinchinbrook-Cardwell area and its wilderness from inappropriate coastal developments. The Hinchinbrook channel is a listed World Heritage Area inhabited by turtle, dugong and dolphin populations.

The application seeks to review the decisions of the Queensland Environmental Protection Agency (EPA) and Queensland Parks and Wildlife Service (QPWS) to approve the construction of two rock wall breakwaters into the Hinchinbrook Channel at Oyster Point.

Hinchinbrook World Heritage Area

Approvals from the EPA and QPWS were required under the *Marine Parks Regulation 1990* and the *Integrated Planning Act 1997*, both of which require consideration of the effects on the environment.

ASH alleges that the EPA failed to adequately consider the environmental impacts of the construction of the breakwaters, including the increased boat use of the area and resultant boat strikes on dugongs and the newly identified Australian snubfin dolphins. ASH also contends that the EPA failed to take into account the precautionary principle in forming conclusions on the likely effects of proposed dredging in the area.

Additionally, ASH will argue that the EPA failed to consider that the breakwaters will not effectively reduce dredging without future extensions to the length of the breakwaters. The application requests that the EPA provide further statements of reasons setting out the basis for their decision.

Community Battle to Stop Odour Pollution in Devonport

In a continuation of their long-running battle to stop the offensive odour suffered by residents living near the North West Rendering Plant, the Quoiba Progress Association (QPA), represented by EDO Tasmania, appeared before the Resource Management and Planning Appeal Tribunal on 28 July 2005.

At this hearing, North West Rendering Pty Ltd (NWR) confirmed that the rendering plant and the land have been sold and the company no longer has any involvement in the operation of the plant. As a consequence, the Tribunal could not make any orders against NWR in relation to the ongoing operation of the rendering works.

This announcement is the latest delay in the ongoing legal battle which commenced in 1999. In October 2000, the Tribunal found that the emissions of odour to the air from the plant constituted "material environmental harm" and NWR was given 18 months to reduce emissions to an acceptable level or close down.

The residents continued to experience odour problems after 18 months and NWR advised that it would look for an alternative site. The residents agreed to give NWR a further 12 months to arrange for relocation of the rendering works. However, NWR did not relocate.

Additionally, NWR commenced a Supreme Court action challenging the original decision of the Tribunal. Earlier this year, Justice Evans ruled that while the testing regime for acceptable odour emissions as set out in the original orders was too unclear, the Tribunal's finding of material environmental harm was not challenged. The matter was sent back to the original Tribunal panel to decide what, if any, fresh orders should be made.

The matter has now been adjourned in light of the change of ownership and management of the plant. The Tribunal is expected to reconvene later in the year to consider what orders, if any, can be made against North West Rendering Pty Ltd under its new name: Brown and Grey No. 2 Pty Ltd.

Quoiba Progress Association will continue their fight and hope to work with new owners, Tasman Group Services, to address the odour problems.

For more information about this case, please contact Jessica Feehely, Principal Lawyer, EDO Tasmania, on 03 6223 2770.

EDO NORTH QUEENSLAND SECURES STRONGER CONDITIONS FOR COASTAL DEVELOPMENT

Mackay Conservation Group Inc v Mackay City Council & East Point Mackay [2005] QPEC 94

KIRSTY RUDDOCK
SOLICITOR
EDO NORTH QUEENSLAND

On 28 September 2005, the Mackay Conservation Group lost their appeal against a proposed tourism and residential development on a large beachfront site at the mouth of the Pioneer River, in North Queensland. However, the appeal has resulted in the imposition of a number of further conditions on the development.

A key argument in the appeal was that the site was zoned for tourism use and conflicted with a number of elements of the Strategic Plan relating to residential or urban use, as the primary purpose of the development was not for tourism. The Court found that there was no separation between the tourism and residential uses because although the development proposal included residential properties, those properties could be rented out. The Court also found that it was not precluded from characterising the development as a resort development merely because it had non-tourist facilities.

The Court found that as the site had been earmarked for development, rather than preservation for environmental purposes or open space, it was difficult to see how environmental issues could influence the broad planning outcomes and necessitate rejection of the development. The court also found that it was unlikely the site (with significant weeds) would re-vegetate without intervention.

In response to submissions about the risk of cyclones and storm surges, the Court conceded that the safety of the site was an important issue yet ultimately concluded that cyclone/storm risk should not be assessed to prevent development, citing a need to balance risk and economics. The Court referred to the decision of the Court in *Daikyo (North Queensland) Pty Ltd v. Cairns City Council & Ors [2003] QPEC 22 (19 June 2003).*

While the Court was not prepared to reject the development proposal, the Court indicated that a number of conditions applying to the development should be strengthened, including:

- a condition that no cats or dogs allowed to be kept in accommodation and residences;
- a condition attached to subdivision of land that landscaping accord with Environmental Management Plan restrict use of herbicides and fertilisers;
- conditions requiring non-erodible bund on 3 sides of development to maximum of 6.5 metres and requirement 100 metres back from shoreline;
- a condition preventing use of groundwater by spear pumps;
- a condition attaching to residential lots requiring remain subject to clay sealing process to reduce rainfall infiltration to groundwater;
- a condition that construction of subdivision comply with nutrient discharge both into groundwater and as part of stormwater match standards set out in exhibit 15;
- a condition on all accommodation units, multiple dwellings and detached housing preliminary approvals that no such future use may be occupied by permanent residents of any kind; and
- other conditions as agreed between parties.

As this is a preliminary approval, there remains scope for more exhaustive conditions and the Mackay Conservation Group will continue to liaise with the developer and the Council throughout the development approval process to ensure strict conditions are imposed.

The outcome of this appeal exposes some of the problems with planning laws in protecting the environment. In particular, it demonstrates the flexibility in which Courts will construe planning schemes to allow for development on State land along the coast.

EDO North Queensland will now be pursuing a number of important law reform issues, including the weight to be given to State Coastal Management Plans to protect important areas of the coast. EDO North Queensland will also seek to have

HIGH COURT GRANTS SPECIAL LEAVE FOR GWYDIR APPEAL

Nature Conservation Council v Minister Administering the Water Management Act 2000.

On Friday, 2 September 2005, the High Court granted the Nature Conservation Council (NCC) special leave to appeal the decision of the NSW Court of Appeal in relation to the validity of the Gwydir Water Sharing Plan. The Court of Appeal found that the Minister had failed to provide for environmental health water in accordance with the *New South Wales Water Management Act 2000,* but found that the water sharing plan was valid, notwithstanding the failure to fulfill this requirement.

The failure to provide for environmental health water may have serious implications for the health of the Gwydir River and its dependent ecosystems, including the internationally listed Gwydir Wetlands.

The High Court appeal will be heard next year. The NCC will be represented by EDO New South Wales and barristers Tim Robertson SC and Jayne Jagot.

To read the Court of Appeal judgment in this matter, see: www.austlii.edu.au/au/cases/nsw/NSWCA/2005/9.html.

To read Testing the Waters, a paper by Ilona Millar, discussing the Court of Appeal decision, please visit: www.edo.org.au/edonsw/site/papers.php.

EDO Report: Climate Change and the Great Barrier Reef

EDO New South Wales has recently released a report, prepared by the Sydney Centre for International and Global Law, entitled *Global Climate Change and the Great Barrier Reef – Australia's Obligations Under the World Heritage Convention.*

The report addresses the following key questions:

(a) whether in deciding not to ratify the Kyoto Protocol Australia has breached its obligations under the World Heritage Convention in relation to the GBRWHA;

(b) whether in negotiating the conclusion of the Kyoto Protocol, Australia acted in breach of its obligations under the World Heritage Convention;

(c) whether a failure by Australia to commit to deep cuts in greenhouse gas emissions amounts to a breach of Australia's obligations under the World Heritage Convention;

(d) whether other States Parties to the World Heritage Convention have obligations to protect the GBRWHA from the effects of climate change;

(e) whether Australia must report its climate change policies pursuant to the World Heritage Convention;

(f) in what circumstances the GBRWHA may be included on the List of World Heritage in Danger by the World Heritage Committee.

To read the full text of the report, please visit: www.edo.org.au/edonsw/site/pdf/final_GBR_report.pdf.

In a related development, the UNESCO World Heritage Committee has agreed to establish an expert working group to examine the threat that climate change poses to World Heritage sites across the world and develop a response strategy to deal with it. This decision was made following lobbying by public interest environmental lawyers and campaigners from around the world.

EDO Submission on review of Great Barrier Reef Marine Park Authority

In September 2005, EDO North Queensland and EDO Queensland made a joint submission on the review of the Great Barrier Reef Marine Park Act ('the Act').

The key recommendations contained in the submission include:

1. greater scope for the Great Barrier Reef Marine Park Authority (GBRMPA) to manage impacts on the Great Barrier Reef under the ***Environment Protection and Biodiversity Conservation Act 1999*** (EPBC Act), including increased powers to assess coastal developments and other activities which may affect the reef;
2. increased public consultation and access to information regarding GBRMPA's permit system;
3. consideration of cumulative impacts of development and the principles of ecologically sustainable development, including the precautionary principle, in all decisions made under the GBRMP Act;
4. broader enforcement rights and greater resources for GBRMPA, including public enforcement rights and increased penalties under the Act to more closely align with EPBC Act penalties;
5. prohibit mining in the whole of the Great Barrier Reef region, including the Coral Sea; and
6. clarify Great Barrier Reef Marine Park boundaries to match the boundaries of the World Heritage Area.

For more information about this submission, contact Jo Bragg, Principal Solicitor, EDO Queensland, on 07 3211 4466.

Federal Court Dismisses Greentrees Land Clearing Appeal

Last week, the Full Court of the Federal Court dismissed Mr Ron Greentree's appeal in *Greentree v Minister for the Environment and Heritage* [2005] FCAFC 128.

Mr Greentree and the company he controlled were convicted of breaching the *Environment Protection and Biodiversity Conservation Act 1999* by clearing an internationally listed Ramsar wetland without the prior consent of the Minister.

Mr Greentree was fined $150,000 and his company was fined $300,000. They were also restrained from using the wetland and ordered to carry out remediation works.

Mr Greentree appealed this decision on the basis that the affected Ramsar wetlands had not been adequately mapped and that the penalties imposed were excessive.

The Full Federal Court dismissed Mr Greentree's appeal and ordered him to pay the Minister's costs.

This case is the second time the Federal Environment Minister has taken legal action to enforce the EPBC Act since the Act came into effect five years ago.

This decision sends a clear signal that the Federal Court is willing to impose high penalties for serious breaches of the EPBC Act.

The judgment is available at www.austlii.edu.au/au/cases/cth/FCAFC/2005/128.html

Australia's First Wild Rivers Act Passed by Queensland Parliament

Environment groups in Queensland are celebrating a major breakthrough in the campaign to protect wild rivers throughout that state.

On 28 September 2005, the Queensland Parliament brought into law Australia's first stand alone legislation to protect wild rivers from a range of threats including the construction of large dams, weirs and levees and the expansion of damaging large scale irrigation activities.

The Wild Rivers Act 2005 creates a framework for the protection of wild rivers through a process of river by river nomination followed by a permanent wild river declaration. The Act will provide long term protection for declared 'wild rivers' by prohibiting a range of destructive activities and controlling other activities that may impact on wild river values.

"Wild river protection is an asset to the eco tourism and adventure tourism industries and supports the protection of rivers…"

The Queensland Government has announced that it intends to protect up to 19 wild rivers before the end of 2006. Most of these rivers are located Cape York Peninsula and Gulf of Carpentaria regions

In practical terms wild river protection will be delivered through a two stage process. The first stage will involve a public announcement by the Queensland Government of its intention to nominate a river for possible protection. The Government will then produce an information document for public consultation that will outline the natural values of the river catchment.

"The high preservation zone will include the most important features such as the channel of the wild river, the floodplain, wetlands, important groundwater zones and other special features."

The document will also identify two levels or 'zones' of protection in the river catchment. The high preservation zone will include the most important features such as the channel of the wild river, the floodplain, wetlands, important groundwater zones and other special features. This zone will offer strong protection against the construction of dams, weirs and levees and threatening activities such as land clearing.

The remainder of the catchment will be zoned a preservation zone. In this zone a range of activities will be regulated to ensure the ongoing protection of important features throughout the entire catchment.

Following public consultation, the Queensland Government must then decide whether to 'declare' the river catchment as a wild river.

The protection of wild rivers is of global significance. Freshwater accounts for only 0.003 percent of our planet's water but provides critical habitat for 41 percent of all fish species.

Wild river protection is an asset to the eco tourism and adventure tourism industries and supports the protection of rivers that feed into Australia's multi-million dollar recreational and commercial fishing industries.

In the face of increasing pressure from the mining and the irrigation industry, environment groups are seeking community support to ensure the Queensland government protects 19 of the best of the best of Queensland's Wild Rivers under the new legislation.

For more information about the campaign to protect Queensland's Wild Rivers, visit: www.wildrivers.org.au.

International Collaboration Exposes Environmental Crime in Indonesia

Indonesian environment group Telapak and the Environmental Investigation Agency (EIA), an international organisation based in London, have urged the Indonesian government to increase its efforts to apprehend the influential bosses responsible for massive timber theft and illegal logging in Papua Province.

This year, EIA and Telepak published a report entitled the ***Last Frontier***, which exposed the world's largest timber smuggling racket, estimated to be worth around one billion dollars a year, from Papua to China. Indonesia has had a log export ban in place since 2001.

In response the Indonesian President Susilo Bambang Yudhoyono launched a huge crackdown — Operation Hutan Lestari II — led by the national police and supported by the military. The operation was reported to have netted more than 170 suspects and seized over 385,000 cubic metres of logs. It also affected the market for merbau timber, with shortages and price rises reported in both Indonesia and China.

Illegal merbau logs in Papua, Indonesia, awaiting collection, February 2003. Copyright Dave Currey/Environmental Investigation Agency

Speaking in Jakarta, Telapak's Forest Campaigner M. Yayat Afianto said, 'Although we recognise the operation has had an immediate effect on reducing illegal logging, the operation will be ineffective if the major criminal networks are not broken. The government is well aware of some of the politicians and top officials in Papua and Jakarta behind illegal logging yet we see no evidence of them being investigated.'

Even during the government's crackdown, EIA and Telapak monitored some shipments of merbau logs escaping to China without being seized by the Chinese authorities. The Chinese response has been unsupportive.

'We urgently call on the government of Indonesia to place merbau logs and sawn timber on Appendix 3 of the Convention on International Trade in Endangered Species to provide the legal mechanisms for all countries to seize illegal merbau shipments,' said Julian Newman, Head of Forests Campaign at EIA.

EIA and Telepak have expressed hope that this operation was only a first step and marked a turning point in the fight against illegal logging in Indonesia, pledging to work with their network to monitor the government follow-up to the operation.

'If the timber mafia are effectively removed it will give a chance to the people of Papua to benefit from their own natural resources,' said M Yayat Afianto.

For more information about EIA, please visit www.eia-international.org.

The ***Last Frontier*** is available online at: www.eia-international.org/files/reports93-1.pdf .

GECKO, Friends of Springbrook Alliance & O'Sheas v Gold Coast City Council

In 2003, EDO Queensland represented the Gold Coast and Hinterland Environment Council (GECKO), the Friends of Springbrook Alliance, and local residents Ken and Jeanette O'Shea in an appeal against a decision by Gold Coast City Council to approve the expansion of a tourist development in an ecologically sensitive area of the Gold Coast hinterland, near the World Heritage listed Springbrook National Park.

The court approved the development, but found that the development should be subject to additional conditions. On 16 August 2005, the final conditions of approval were made by an order of Judge Newton, including conditions requiring the developer to change the proposed location of cabins from forest to already cleared sites, reduce cabin size, change wastewater disposal practices and allow for the protection of many rare plant species.

This case reduced the environmental impacts of the development, and sets an important precedent for limiting the impact of future developments in sensitive areas.

Disincentives for Sustainable Land and Water Management in New South Wales

DAVID JEFFERY
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EDO NEW SOUTH WALES

Earlier this year, EDO New South Wales prepared a detailed submission to a state parliamentary inquiry into disincentives for ecologically sustainable land and water use in New South Wales.

The submission raised a range of issues in relation to incentives and disincentives for sustainable land and water management, many of which are relevant to other states and territories Australia.

The key arguments presented in the submission are summarised below. To read the full text of the submission, please visit: www.edo.org.au/edonsw/site/policy.php.

Introduction

The Standing Committee on Natural Resource Management was established on 8 May 2003 to inquire into issues in the sustainable management of natural resources in NSW, in particular on the following terms of reference:

- current disincentives that exist for ecologically sustainable land and water use in NSW;
- options for the removal of such disincentives and any consequences in doing so;
- approaches to land use management on farms which both reduce salinity and mitigate the effects of drought;
- ways of increasing the up-take of such land use management practices;
- the effectiveness of management systems for ensuring that sustainability measures for the management of natural resources in NSW are achieved;
- the impact of water management arrangements on the management of salinity in NSW.

This submission relates to terms of reference (a) and (b).

EDO Comments and Recommendations

Taxation of land used for conservation

A range of improvements have been made in relation to taxation of land used for conservation purposes over the past few years, but there are remaining tax differences in the treatment of land used for primary industry and for conservation. These include tax deductibility of expenditure on managing the land, deductibility of interest and GST differences. These differences should be removed so that differential tax treatments do not penalise landowners for changing land to conservation use where it could be beneficial for the sustainable management of the land.

Agricultural subsidies

New South Wales still suffers land degradation from a range of past agricultural subsidies, especially the subsidisation of fertilisers and water. Most agricultural subsidies have ended but irrigation water is still heavily subsidised (see *Water Pricing*).

Water Management Act

There are a number of disincentives to sustainable land and water use in the *Water Management Act 2000* (*WM Act 2000*) and the water sharing plans made under the Act. These include a failure in the plans to provide for adaptive management; a failure to value environmental flows; and uncontrolled interception of overland flows. These disincentives could be removed by:

- including provisions in water sharing plans that allow for adaptive management;
- setting environmental flow allocations at a minimum of 66% of natural flows;
- including in plans a methodology for managed environmental releases from stored water and a description the ecological values to be protected by the plan;
- monitoring and capping or charging for extracting overland flows.

Removing these disincentives would assist with ensuring that the WM Act promotes sustainable water management, by being able to adapt to changing conditions, reflecting the economic value of environmental flows and including overland as well as in-river flows.

Water Pricing

It is essential for sustainable water management that water be priced efficiently, to reflect all its costs including environmental costs. Irrigation water is currently heavily subsidised. These subsidies should be removed. The efficient pricing of water will create incentives to use water efficiently and sustainably and will reduce the environmental costs of water extraction.

Drought relief

There are a number of drought relief measures, both federally and in NSW, that arguably do not encourage self-reliant approaches to managing the risks of climatic variability and instead may encourage inefficient operators and the use of marginal land. The focus of drought policy and drought assistance should be on proactive drought preparedness and risk management rather than reactive drought response and damage control. Drought relief measures should be assessed to see whether they contribute to, or hinder, sustainable land management in the long term.

Monitoring and compliance

Both the native vegetation and water management legislation seek to establish a regime for sustainable water and land management. They include restrictions, incentives and the ability to trade or use offsets. However, to achieve sustainable management, the regimes must have integrity and be enforced. Monitoring and enforcement under both regimes is inadequate and a lack of enforcement can create disincentives to comply with the legislation and thus disincentives to sustainable land management. We recommend that metering and monitoring should be improved under both regimes. Under the native vegetation legislation, penalty notices should not be used for substantive breaches of the legislation, DIPNR should adopt an effective compliance policy, a public register should be available on Catchment Management Authority websites, and information should be shared between relevant authorities.

Accessibility of information

There are a wide range of incentives for conservation activities on private land, with incentives available from a number of sources through many different programs. In addition to direct incentives, indirect incentives such as tax deductibility and rates and land tax concessions are available. However, it is difficult for landholders to access information on the range of incentive programs available, mainly because they are administered by disparate bodies. The state government should make this information, as well as simple and reliable scientific information on sustainable land and water management, available through a single website as well as through local council offices, council libraries and regional offices of State government agencies.

Other options for removing disincentives

Offsets and trading schemes have the potential to assist in removing existing disincentives to sustainable land and water management by allowing sustainable outcomes to be achieved with more flexibility and at lower cost. However, individual proposals need to be examined carefully t ensure that they do in fact improve environmental outcomes. A range of non-profit organisations are working to conserve ecosystems on private lands – such as revolving trusts and bush conservancy organisations. Such organisations should be supported and assisted where possible by government.

For more information about this policy submission, please contact Rachel Walmsley, Policy Officer, EDO New South Wales, on 02 9262 6989.

Grumpy Old Greenies

Waiting lists, wasted opportunities and wayward pork barrelling in Australia's biodiversity programs

NICOLA BEYNON[I], MICHAEL KENNEDY[II] AND ALISTAIR GRAHAM[III]

The title of the paper will not mean much to those that have not seen the BBC TV show Grumpy Old Men. Those that have will know it features middle aged British celebrities, ranting about their disappointments and exasperations with the world. They bemoan everything from mobile phone etiquette, incoherent street signage, computerised call centres, personal stereos, to the currently fashionable low slung jeans worn by young women. On the morning after watching an episode of the program, three weary environmentalists sat in the coffee shop of Canberra airport ahead of a days lobbying in Parliament, and ranted about the ailing state of the Australia's biodiversity, the state of conservation laws and policies, and the state of the conservation movement. We realised that we were grumpy old greenies – but with deadly serious and far from amusing or trivial concerns.

This paper concentrates on the Commonwealth legislative responses to a national biodiversity crisis, nearly six years after the passage of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC) and some four years after the current authors wrote about the development of that law,[iv] and conveyed optimistic thoughts on its future implementation and environmental effect. While the authors remain convinced that the EPBC is a legal instrument fully capable of meeting modern day environmental management needs, it is clear to us that the Commonwealth has failed miserably to live up to the EPBC's immense protective potential. We go on to suggest some actions that might be equal to meeting the conservation demands of Australia's increasingly beleaguered ecosystems.

We would also like to acknowledge the stunning contribution made to national environmental management and protection by the Environmental Defender's Office (EDO) since its inception some twenty years ago. The Humane Society International (HSI) is very proud to have been able to work closely with the EDO Network on numerous occasions over the last eleven years, and it is absolutely impossible to image life without them.

Australia's biodiversity crisis is well documented in State of the Environment Reports (1996, 2001), the *Australian Terrestrial Biodiversity Assessment* (2002) and most recently the Australian Bureau of Statistics *Measures of Australian Progress: Summary Indicators (2005*). Indeed, the latest State of the Environment Report noted, on the plus side, that many procedural indicators were positive (more money, more effort, more engagement) but that the performance indicators were negative (we're still going backwards – what we're doing is not working – or making it worse).

HSI and WWF Australia also conducted their own joint review[v] of the national implementation of the 1996 *National Strategy for the Conservation of Biological Diversity* in 1998 finding even early implementation woefully lacking. This was followed by a 2000 HSI report on the same topic, in which governments were told:

"Far too little is being done. There is a failure to meet set objectives, with problems escalating in some regions. This is an area in which the Commonwealth must use its new and existing powers to show leadership".[vi]

This was followed, in 2004, by an extremely comprehensive investigation[vii] and analysis of progress in implementing the revised *National Objectives and Targets for Biological Diversity Conservation 2001-2005*, commissioned by the National Biodiversity Alliance (NBA).[viii] This report was published by HSI and WWF prior to the 2004 Federal Election. Of the 29 targets reviewed, only 10% were met within the timeframe, 28% were largely unmet or unlikely to be met within the timeframe, 52% were not met within the timeframe and 10% were undetermined.

It is a crisis that is continental in scale, utterly predictable, widely known and generally understood, and yet the response by all governments has been pitifully inadequate at best, and grossly incompetent at worst.

The legislative power is now available to the Federal Environment Minister to deliver significantly advanced legal protection for Australia's biodiversity assets through the EPBC, and the authors give credit to the current Government for bringing in this piece of legislation. But what use the power without the will to wield it?

In many key areas, there has been a serious failure to implement critical provisions of the Act that would substantively improve biodiversity protection and coherent environmental impact assessment. Where commendable protective measures have been taken, all too often they have been undermined or nullified by exemptions or wholly inadequate implementation procedures. While the EPBC includes expanded standing provisions for third party enforcement – and these have been getting a decent work out by a few non-government organisations – conservation organisations can only do so much to compensate for the Government's scarce political will to exercise its own considerable powers, and for the meagre resources given to the Department of Environment and Heritage (DEH) for implementation of the Act.

This paper is not meant to be a comprehensive review of EPBC implementation problems, but does address the provisions that impact mostly on biodiversity that are, in our view, doing the most damage and where we are being let down the most.

Emergency Waiting Lists

The EPBC promised significant advances in biodiversity protection. Federally listed threatened species[ix] and endangered ecological communities[x] became 'matters of national environmental significance' (MNES). As a result, the Federal Environment Minister has had the power to modify, or even veto, activities that could significantly impact upon them. This represented a great shift in power to the Commonwealth and to its Environment Minister. But, of course, only those species and ecological communities that are actually listed have any hope of benefiting from the provisions of the Act.

Ecological communities

Ecological communities, which should be the bastion of biodiversity protection, are missing out. Despite literally thousands of threatened ecological communities meeting the criteria for EPBC protection, only 31 are listed. Only 10 have been added in the five years since enactment of the EPBC, the others brought forward from the previous *Endangered Species Protection Act 1992*.

Section 185 of the EPBC, a progressive amendment secured in the EPBC negotiations between the Democrats and the Government, was meant to fix the listing process. Section 185 allows the Federal Environment Minister to assess all the ecological communities on state and territory lists for consideration for EPBC listing and also requires the Minister to keep the EPBC lists "up to date". The idea behind s185 was to bring the EPBC lists rapidly up to date and to reduce the reliance on ad hoc nominations from the public. After five years, section 185 should have led to near comprehensive protection for all nationally endangered and vulnerable ecological communities across Australia.

Things did progress well in the first year of the EPBCA. In 2000, HSI referred to the then Minister, Senator Robert Hill, all the state and territory lists of threatened ecological communities. Specifically, lists of threatened ecological communities under the New South

Wales *Threatened Species Conservation Act 1995*, the ACT *Nature Conservation Act 1980*, the Western Australian threatened ecological communities database, and forest communities identified in the Tasmanian and other Regional Forests Agreements (RFAs). These lists were subsequently gazetted, and the Minister instructed the Threatened Species Scientific Committee (TSSC) to assess the 500+ ecological communities on these lists for EPBC protection. At HSI's urging, the Minister also referred to the Committee the Queensland list of regional ecosystems and the ecological communities listed under the Victorian *Flora and Fauna Guarantee Act 1988*.

Therefore, by the end of 2000, the TSSC had literally millions of hectares of threatened wildlife habitats awaiting its critical assessment. In response to this heavy workload, the TSSC set about developing a *Strategic Framework* which was supposed to help them systematically go through all the ecological communities, to identify those that were nationally threatened and qualified for EPBC listing.

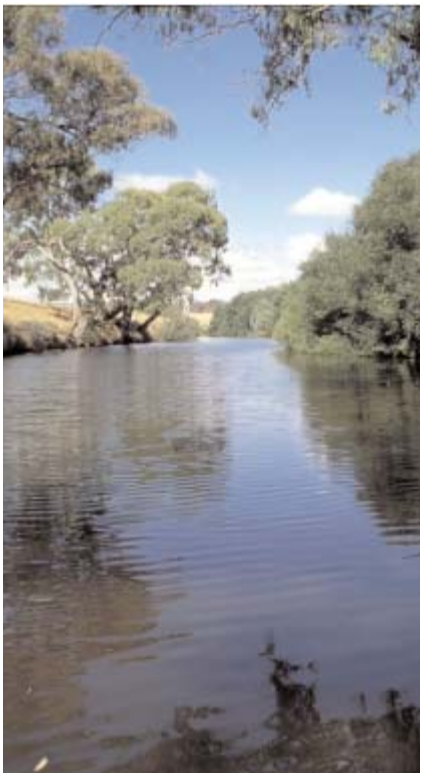
In April 2001, Senator Hill listed brigalow woodlands, bluegrass grasslands, semi-evergreen vine thickets and mound springs. These were four highly biodiverse ecological communities, primarily found in Queensland, representing over one million hectares of threatened habitats, and submitted by HSI under the old *Endangered Species Protection Act* in 1999, concerned they were rapidly falling under the bulldozer in Queensland.[xi]

Farming lobby groups, particularly AgForce, had an apoplectic fit – you could hear the pitch forks being sharpened all the way from the paddocks of Charleville to the coffee shops in Canberra. There was a subsequent call for Senator Hill's resignation.

Rumour has it that the Environment Minister then received an instruction to ease up on EPBC listings without the assent of his colleagues – a remote prospect at the best of times.

Sure enough, no more ecological communities were listed during the rest of Senator Hill's term and only two were listed by the next Environment Minister, Dr Kemp. In addition to the massive number of threatened ecological communities already waiting adjudication, HSI also squeezed a 2001 election commitment from Liberal Party Campaign Director, Lynton Crosby, agreeing to refer all the threatened ecological communities identified by the Commonwealth's yet to be published *Terrestrial Biodiversity Assessment Audit*, to the TSSC for potential listing under the EPBC. The Audit subsequently identified nearly 3000 nationally threatened communities.

Whether the Minister continued to receive advice on threatened ecological community listings from the TSSC during this time or



whether the Department simply ran dead on the process, is open to conjecture. We suspect it was a combination of the two, but there is also good reason, in our view, to assume that farm industry lobby groups attempted to use their political clout to influence the EPBC listing process.

Section 185 does not include statutory deadlines for the TSSC to assess threatened ecological communities, so the TSSC was able to take things slowly – very, very slowly. However, the TSSC was still receiving public nominations under section 191, which do have a twelve month statutory deadline for TSSC assessment and 90 day deadlines for the Minister's decision on receipt of their advice. To get around this, the Minister started rejecting public nominations claiming that the TSSC would address them through the *Strategic Framework*.

The Minister used this excuse to improperly reject twelve perfectly valid ecological community nominations from HSI, including the coolabah black box woodlands[xii] rapidly being cleared in New South Wales. HSI knew the *Strategic Framework* was going nowhere, so the EDO wrote to the Minister on our behalf, pointing out that having a *Strategic Framework* was not a valid reason to reject a public nomination.[xiii]

The Minister partially conceded this point and agreed to reconsider the nominations, but we were subsequently advised by DEH that because they were nominations under 'reconsideration' they were no longer considered public nominations under section 191 and, therefore, the TSSC and Minister would not be bound by the statutory deadlines. As a result, all but one of these critical nominations[xiv] are still waiting decisions that were originally due in 2002.

We consider the five year hiatus in ecological community assessment a travesty of good governance and a crushing disappointment, especially when considering the deepening biodiversity crisis facing this island continent. Many of the ecological communities sitting in the TSSC's in-tray will have been suffering severe rates of clearing over the last five years (think particularly of the panic clearing in New South Wales and Queensland - and more recently in Tasmania - ahead of new vegetation clearing controls) and several were already critically endangered when HSI nominated them back in 1999 and 2000. The delays are scandalous and utterly inexcusable.

Since Senator Ian Campbell has been Minister there are signs the blockage may be easing. He has listed two ecological communities and several have been distributed for public comment. There are, nonetheless, literally thousands of threatened ecological communities covering many millions of hectares still stuck in the pipeline.

The Minister can take comfort from the Productivity Commission report into the *Impacts of Native Vegetation and Biodiversity Regulations* which largely exonerated the EPBC Act when it comes to the impact on farmers' businesses – although it was critical of policy vagueness: 'more fundamental change is required to promote better targeting of policies to achieve clearly-specified environmental outcomes as efficiently as possible'.[xv]

In a rare moment of unison, HSI and the National Farmers' Federation (NFF) have both recommended that the Government set up stewardship funds[xvi] to assist private landholders meet their EPBC obligations and actively protect ecological communities identified on their properties – a bit of carrot with the stick. Unfortunately, the NFF feels that it cannot work with HSI in promoting the concept.

We are offering our strongest possible encouragement to Minister Campbell to make up on seriously lost ground. But if the encouraging signs of late do not eventuate into listings, HSI has taken legal advice from EDO on our options to pursue the matter through the courts. A list of threatened ecological communities HSI has been striving to protect can be found in Table 1.

Critical Habitats

There has also been a dearth of critical habitat listings under the Act. Despite a 2001 election commitment from the Coalition to list all critical habitats of all endangered and critically endangered species, only eight critical habitats have been listed for five species. Only four habitats for two species have been listed in mainland Australia, while the rest are on Australia's sub-Antarctic islands.

Nonetheless, hundreds of critical habitats have been identified in the Recovery Plans that the TSSC has approved and the Minister has gazetted. How hard can it be to transfer what has already been identified in Recovery Plans across to the register of critical habitat? Yet, ignoring this election commitment, and the will of the Parliament in creating the register, DEH has argued gazetting critical habitats on the Register is not a priority. They simply refuse to do it.

We are told listing critical habitats is simply not a priority for high profile endangered species such as marine turtles, the humpback whale and the blue whale. Even the grey nurse shark, which is perilously close to extinction, has not had its nineteen tiny and clearly demarcated critical habitats listed on the register.

HSI has provided the Commonwealth with the data to allow it to list critical habitats for well over 60 species in the Register, but all our applications have been ignored.

Heritage

The heritage sections of the EPBC were added in 2003. Again they offered significantly advanced protection for places that would be listed on the Commonwealth and National Heritage Lists, and became MNES triggers. You would think that with the EPBC's most powerful protective measures on offer (in effect conferring de facto World Heritage protection) the major conservation and heritage organisations would be queuing up to see their pet places listed and nominations would be coming thick and fast. Aside from a handful of emergency nominations, and a growing list of nominations from small cultural heritage groups around the country, public nominations have been virtually non-existent.

In this case, the major conservation and heritage organisations need to be mindful of their own performance when they protest the slow rate of listings. The legislative process gives clear priority to the assessment of public nominations, and without such a rigorous public process in action, the National and Commonwealth Heritage Lists can hardly be expected to grow at the rate that is obviously required.

Internal reviews have been triggered by the Australian Heritage Council. However, unlike public nominations (which have to be assessed within 12 months), internal reviews are not subject to legislative deadlines. Increased public nominations for national heritage places are absolutely crucial.

Where the provisions for emergency heritage listings have been tested, it has to be said the results have not been encouraging.[xvii] The thresholds for what constitutes 'national heritage' are being set at very lofty heights. How these processes and standards are finally determined, will have significant long-term conservation implications for biodiversity in this country.

For our part, HSI has been fairly active on the heritage nomination front. We have submitted an emergency application to have the critical habitats of the critically endangered grey nurse shark listed, along with the all 70 Tasmanian Seamounts. We are about to submit nominations for the whole of Australia's Antarctic Territory (AAT), which would include the entire exclusive economic zone (EEZ), and for the critical habitats of Australia's remaining and viable dingo populations. Several other potential nominations are being reviewed, including for the Cumberland Plains Woodland and the Brigalow Belt in Queensland.

Working with our colleagues at the Tasmanian Conservation Trust (TCT), we have helped trigger public nominations for the Tarkine and the Great Western Tiers, and are attempting to trigger nominations for Barrow Island and the Walpole Wilderness in Western Australia. HSI also hopes to see the *heritage rivers* concept, first proposed by Peter Cullen, see the light of day under this new regime.

Key Threatening Processes (KTP)

We were dudded in the EPBC negotiations over the Key Threatening Process (KTP) provisions. It is no longer a mandatory requirement to develop a Threat Abatement Plan (TAP) once a KTP is listed. In the days when TAPs were mandatory, a 1995 HSI nomination was able to bring about Australia's first TAP, the 1998 *Threat Abatement Plan for the Incidental Catch of Seabirds During Oceanic Longline Fishing Operations.* This TAP has been more than shelf decoration, and was implemented through some serious regulations. Without the TAP driving things, it is doubtful tuna longline fisheries would have made any effort to mitigate their devastating impact on endangered albatross and petrels. But even with this TAP, ten years after submitting the nomination, the problem is far from mitigated and industry has resisted many of the measures in the plan. HSI is hopeful a review of TAP that is currently under-way will lead to much more effective mitigation measures being prescribed.

Now, however, the Minister does not have to develop a TAP if he or she believes that it is not 'feasible, effective or efficient way to abate the process'.[xviii] So it is that TAPs have not even been developed for climate change[xix] and land clearing,[xx] even though they are two of the gravest threats to Australia's biodiversity and endangering more species and habitats than any others. Without the weight of a TAP it seems unlikely that the substitute *National Biodiversity and Climate Action Plan* or the *National Framework for the Management and Monitoring of Australia's Native Vegetation* will lead to regulations and drive any significant change on the ground. However, National Threat Abatement Plans supported by new MNES triggers for land clearing and climate change,[xxi] and large sums of appropriately directed Commonwealth funds, might help reverse the situation.

Species affected by other key threats are missing out altogether. Their threats haven't even been listed, let alone abated. The Environment Minister still has not decided whether *Loss of Hollow Bearing Trees During Firewood Collection*[xxii] should be listed as a

KTP, even though HSI submitted the nomination eight years ago.

HSI was stunned earlier this year when the Minister, accepting TSSC advice, rejected our nomination to list shark control nets[xxiii] as a key threatening process. The nets, already listed as a key threat by the New South Wales government following an HSI nomination, kill grey nurse sharks. As per the criteria for listing a KTP, HSI contended that the nets would cause the grey nurse shark to be listed in a higher EPBC category - that is, it would move from critically endangered to extinct. NSW Fisheries scientists have predicted the grey nurse could reach quasi extinction (less than 50 breeding females) in as little as six years[xxiv] and two breeding females were killed in the nets on the very first day of the New South Wales shark net season last summer.

With this evidence before them, the TSSC still advised the Minister that it is not a 'key' threat because the nets are not the only or greatest threat to the grey nurse shark (more are killed by commercial and recreational fishing). HSI considers this to be a galling case of hair splitting when dealing with a species so very close to extinction. We utterly reject the Committee's interpretation that a key threatening process can only be the threat that is causing the highest mortality rate above all others. See Table 2 for a list of HSI KTP nominations.

Fisheries

Since the introduction of the EPBC, Commonwealth and export fisheries are receiving environmental impact assessment and, not withstanding a few notable exceptions, this is beginning to yield some solid improvements in their management – if not the revolutionary shift to ecologically sustainable management that we had hoped for. The exceptions are perhaps more notorious than notable. The notion now being floated by officials and fishers that fisheries accredited under this process be certified as well managed and environmentally friendly with a label in the market place is both hilarious and horrifying. HSI will be warning consumers not to be duped.

For example, defying logic, the Southern and Eastern Scalefish Shark Fishery (SESSF), a well-known basket case in marine conservation circles, was gazetted as an ecologically sustainable wildlife trade operation in January 2004. To do this, the Minister should have been satisfied that *"the fishery to which the plan or regime relates does not, or is not likely to, adversely affect the survival or recovery in nature of the species"*. At the time, no less than six species, for whom the fishery is unquestionably *the* key threat had been nominated for listing as threatened species (orange roughy, eastern gemfish, school shark, Harrison's dogfish, endeavour dogfish and southern dogfish). Indeed, HSI had even nominated the fishery itself for listing as a key threatening process.

HSI could not understand how DEH and the Minister could possibly find management of the SESSF to be ecologically sustainable, when AFMA was continuing its long held tradition of timidly setting quotas that do nothing to constrain drastically falling catches – and presiding over the by catch of several hundred fur seals every year. Neither had AFMA done anything to see that the fishery avoided catching critically endangered dogfish – if anything they were further endangering the species by allowing an expansion of auto-longlining, enabling the fishery to exploit previously inaccessible canyons, the species' only remaining refuge.

HSI wishes we had more resources to have mounted a challenge to the SESSF accreditation. Fortunately, the opportunity to bring a radical shift in the management of this fishery will present itself again to conservation groups in December 2006 when the wildlife trade approval expires.

HSI is currently mounting a legal challenge to the Minister's declaration that the Southern Bluefin Tuna (SBT) Fishery is an ecologically sustainable wildlife trade operation, and things look set to get very heated in the Commonwealth Administrative Appeals Tribunal. Here the Minister does not argue that the stocks are not badly overfished. There is no getting around the fact that Australia's SBT scientists say the parental biomass has been reduced to 5% of the level it was in the 1960s and has less than a 10% chance of recovering. Instead, the Minister claims his hands were tied because Australia has no choice but to allow its industry to fish the entire grossly unsustainable quota that is handed down by the international Commission for the Conservation of Southern Bluefin Tuna (CCSBT), which has remained unchanged since 1989. This is an argument for which HSI can find no legal basis. We should also note that a motion from the Australian Democrats to disallow the accreditation of the Fishery is not likely to be supported by the ALP, just in case they think our grumpiness does not also extend to them on this particular matter.

Protection Poorly Implemented and Undermined

We have discussed the lack of various listings at length – because it is a crucial aspect of the legislation. If nationally important biodiversity components are not on an EPBC list, the Commonwealth can do little to protect it. But the way the EPBC is being implemented, even those biodiversity treasures that are listed remain at risk.

Ecological communities such as Cumberland Plain Woodland in the Sydney basin, the first ever ecological community protected by the Commonwealth,[xxv] is still facing potential extinction by "death of a thousand cuts".

Blame for this could be laid on the general inability of environment impact legislation to deal effectively with cumulative impacts of many small actions, but there is more that could be done to grapple with the cumulative impact problem through the EPBC. For example, Cumberland Plain Woodlands deserve administrative guidelines of the type that DEH might normally issue, to explain what will be considered significant impact upon this ecological community. For Cumberland Plain Woodlands, such guidelines should state that clearing of any of the paltry 5% of habitat type remaining, would be considered "significant" and no clearing applications would be approved. Cumberland Plain Woodlands certainly deserve a grossly overdue recovery plan, but it seems that neither the Commonwealth nor the New South Wales government have seen fit to fulfil their statutory obligations in this regard.

The experience of Cumberland Plain Woodland highlights the general problems with environmental impact assessment processes. There is in fact a crisis in regard to the implementation of environmental impact assessment procedures under the EPBC.

Another prime example of a commendable protective measure undermined, comes in the shape of the grey-headed flying-fox. HSI mounted an exhaustive campaign to see this much maligned and controversial species given its due protection under the EPBC and a successful listing was achieved in 2001. Our win was short lived, for shortly after DEH published administrative guidelines to explain how the listing would take effect. These guidelines stated that 1.5% of the population could still be shot without requiring a referral, and would not be considered a significant impact.

Effectively sanctioning continuation of a key threat to the species, the guidelines also completely ignored the well known reality that permits given to trigger happy fruit farmers were not being enforced by state authorities, so that numbers of flying foxes permitted to be killed were routinely exceeded.

HSI appealed the guidelines in the Federal court, gaining a win, with the help of the EDO and Barrister Chris McGrath. That win will hopefully ensure that no current or future Minister will attempt to pre-empt, in the public arena, what is a significant impact. Although HSI won this case, the Federal

Court Judge still required us to pay our own costs, which amount to approximately $40,000. The Department had to redraft the guidelines to advise farmers that they needed to make *their own decision* as to whether their actions are having a significant impact and need to make a referral.

Then there are the administrative guidelines that are ignored even by the Department that published them. DEH published administrative guidelines for the endangered south eastern mainland population of tiger quolls in 2004, which stated that 1080 aerial baiting programs in the vicinity of tiger quoll habitat will be considered likely to cause significant impact and be treated as a controlled action. Since they were issued, there have been at least three referrals for aerial baiting that would impact tiger quoll habitats, yet the Minister has not declared them controlled actions. We are sure that there are many other occasions when referrals simply don't happen.

For example, DEH recently concluded that a proposed 1080 baiting program for the Singleton Training Area and the Bulga Coal Mine in NSW will not be deemed a 'controlled action' even though the program involves aerial 1080 baiting, dropping 21 baits per square kilometre. So much for the guidelines. HSI is currently developing a KTP nomination for 1080, and will consider what legal actions may be available to oppose such programs in the future.

HSI also understands that DEH is currently developing administrative guidelines for land clearing, but holds out no serious hope that they might be applied in a manner that will conserve biodiversity under threat.

Other examples of a failure to enforce the legislation include: the failure to enforce the Australian Whale Sanctuary in Antarctica against Japanese whaling; and, a recent decision to allow the importation of a number of ornamental fish for commercial trade, despite risk assessment recommendations not to import, and the fact that two were IUCN listed threatened species. We also expect to see the importation of nine critically endangered Asian elephants from Thailand, even though, in HSI's opinion, the importation is for exhibition and primarily commercial purposes.[xxvi]

National Biodiversity Priorities Starved of Funds

If DEH were not so grossly under-funded, perhaps the waiting lists would not be so long, the thresholds for protection would not be set unassailably high, recovery plans would be developed and the critical habitats of critically endangered species would not be subject to such extreme levels of triage.

DEH have barely enough resources to implement the impact assessment provisions contained in Part 3 of the EPBC. They have pal-

try funds with which to pursue compliance and no education program to inform landholders about their conservation responsibilities and legislative liabilities. It is little wonder that the discretionary 'back end' of the EPBCA - the biodiversity provisions in Parts 12, 13 and 14 - are being completely neglected. No wildlife conservation plans have been published, no bioregional plans have been developed, no covenants for critical habitat exist, only one conservation agreement has been concluded, and recovery plans are still missing for species and ecological communities listed seven years ago.

The government will say that they are spending up big on the environment and it's true that billions of dollars are available for regional 'bottom up' environmental protection. But crucially, DEH itself is starved of funds for 'top down' national biodiversity priorities. The divisions of DEH dealing with wildlife, threatened and migratory species and wetlands are all operating on a shoestring. They have no capacity or resources to influence other parts of DEH, let alone to go to a local government and suggest a bioregional plan or to a landholder and suggest a conservation agreement.

Frustratingly, the sections of DEH that are engaged in funding programs seem quite unwilling or unable to insist on biodiversity outcomes being inserted into these 'bottom up' regional plans – let alone into the attached investment plans. The Natural Heritage Trust is turning into the largest rolling pork barrel this country has ever seen – careering drunkenly across the Australian landscape devoid of strategic direction and control, spending a large proportion of the national environmental budget to limited discernable effect. The NHT needs a new and strategic biodiversity driver.

Don't Get Grumpy, Get Even

To try and turn things around, HSI knows we need to be more than just grumpy. HSI has taken several matters to the Federal Court[xxvii] and the Commonwealth Administrative Appeals Tribunal,[xxviii] and are likely to increase legal actions of this type in the future. We have also been engaged for example in the New South Wales Administrative Decisions Tribunal and the Victorian Supreme Court for the protection of the grey-headed flying foxes. HSI has also given the Coalition Government several solid and constructive proposals to tackle Australia's biodiversity crisis effectively.

Future Proofing Australia

With an eye on the proceeds from any third Telstra sale, HSI gave the Coalition Government, in early 2004, a major proposal to 'future proof' Australia.[xxix] HSI and the National Farmers' Federation have just been gazumped by the Federal Treasurer in allocating funds from the sale of Telstra to the new Future Fund to meet past governments' failure to provide for government public servants' pension payments.

Wherever the funds are sourced from, we have recommended a multi-billion dollar investment over the next 15 years to secure Australia's biodiversity assets through a *National Conservation Action Program*, a *National Conservation Farm Program* and a *National Environmental Information and Auditing Commission*. The National Biodiversity Alliance has similarly called for a *New National Biodiversity Initiative*.[xxx]

HSI envisages a new national biodiversity program with the financial and political stature of the *National Action Plan for Salinity* and the *National Water Initiative*. It is clear that existing natural resource management programs do not necessarily nor primarily serve biodiversity conservation priorities. Australia needs a major new program specifically dedicated to conserving national and international biodiversity.

Our *Future Proofing* proposal includes a suite of biodiversity conservation initiatives and programs that would give purpose and direction to future mass expenditure in the environment. The programs would be underpinned by a generously resourced DEH, to fully implement the EPBC.

The proposal includes a stewardship fund, as there seems to be an emerging consensus that this is the way to go in engaging landholders in Australia. In our proposal, this delivery mechanism is driven by focused and effective policy, programs and initiatives as advocated by the Productivity Commission, and would not become yet another aimless pork-bar-

relling exercise like Landcare and NHT before it.

To help avoid this, HSI proposes the new national biodiversity program be steered by committee of expert professionals from the biodiversity conservation field and be subject to an independent auditing body.

We have also recommended DEH be given resources to set up regional offices around the country so landholders and the swarms of NHT facilitators can find out what can be done to conserve biodiversity on their property and to meet their legal obligations. This is an absolutely essential next step for implementation.

Frustratingly, we have learnt the hard way that these swarms of NHT-funded state officials and NRM facilitators are simply not doing their job. Someone has to get out there and actually tell landholders what their responsibilities and liabilities are – with a mandate to offer genuine assistance to the willing and genuine persuasion to the recalcitrant.

EPBC Watch Dog

We also think that the conservation movement needs to get serious about making the EPBC work. The national conservation movement has failed to engage fully and effectively in EPBC implementation, and is largely uneducated about the significant powers and very broad national reach of the Act, despite the excellent and very strenuous efforts of the EPBC Unit.[xxxi] The authors believe this is a hangover from the vocal opposition to the Act by the Greens, Australian Conservation Foundation and the Wilderness Society, following its passage through Parliament in 1999.

The EPBC Unit in Canberra is principally intended to provide information and education about the role of the EPBC. There is an additional and separate need for an EPBC 'watch dog', and it is a role that should be fulfilled by a major national conservation organisation. It should be an NGO program that systematically follows all the EPBC processes, and jumps on the failings and transgressions. A dedicated NGO program needs to track EIS processes, monitor what happens to species and communities, and raise merry hell about legal failures and environmental injustices, helping to coordinate legal actions that may result.

Conclusion

If the political will were mustered, the Australian Government has the power, the money and the means to attack this continent's biodiversity crisis with serious conviction. Instead, world class legal provisions lie dormant, dollars are misspent and all the while the crisis deepens. DEH needs to become far less conservative in its general approach, far more proactive and forceful in implementing the EPBC, and develop an attitude to NGO involvement in policy development and execution that does not make us think that DEH is a part of the problem. Sometimes you could be forgiven for thinking that DEH itself has no belief in the power of the EPBC. The Minister's office needs to take charge.

With the effective removal of administrative grants to NGOs around Australia; the recent Federal budget all but ignoring biodiversity; and the loss of the balance of power by the minor parties in the Australian Senate from July this year, 'grumpy' is a word that doesn't really do justice to the extent of our perennial frustration.

ENDNOTES

[i] Wildlife & Habitat Protection Program Manager, Humane Society International

[ii] Campaign Director, Humane Society International

[iii] Consultant, Humane Society International; Campaigner, Tasmanian Conservation Trust

[iv] M Kennedy, N. Beynon, A. Graham and J. Pittock, `*The Development and Implementation of Conservation Law in Australia*', in RECIEL (Review of European Community and International Environmental Law), Volume 10, Issue 3, 2001. Blackwell Publishers, Oxford, UK

[v] *From Words to Action: A Preliminary Review of Progress to Implementation the National Strategy for the Conservation of Australia's Biological Diversity* (May 1998) Humane Society International and World Wide Fund for Nature Australia Discussion Paper

[vi] *Report Card: Implementation of Australia's National Strategy for the Conservation of Biological Diversity* (2000), prepared by Community Solutions for Humane Society International

[vii] *Small Steps for Nature; A Review of Progress Towards the National Objectives and Targets for Biological Diversity Conservation 2001-2005*, (2004), prepared by Griffin NRM Pty Ltd for the National Biodiversity Alliance (NBA)

[viii] The National Biodiversity Alliance(NBA) comprises the Australian Bush Heritage Australian Wildlife Conservancy, Birds Australia, Greening Australia, Humane Society International and the World Wide Fund for Nature

[ix] Threatened includes the categories critically endangered, endangered and vulnerable

[x] Regrettably vulnerable ecological communities are not MNES triggers, something hopefully to be addressed in the current 5 year review of the MNES.

[xi] Degraded due to grazing pressure in the case of the mound springs

[xii] Coolabah black box woodlands have been listed by the NSW Government on the NSW *Threatened Species Conservation Act* after an HSI nomination. Farming lobby groups have vigorously opposed this listing, even though they are knee deep in negotiations to end land clearing in that state. HSI has recently received a Freedom of Information request relating to this nomination and documents. We believe a farming lobby group is preparing a nomination to have it de-listed.

[xiii] A public nomination can only be rejected based on the conservation status of the species or community being nominated.

[xiv] Temperate Highland Peat Swamps on Sandstone listed May 2005

[xv] Productivity Commission, April, 2004

[xvi] NFF has proposed a $250 million National Environment Management Program. It was not successful in the 2005 Federal Government budget outcomes.

[xvii] Noting that nominations for emergency heritage listings are assessed by DEH and the Minister does not receive the benefit of the Australian Heritage Council's advice.

[xviii] EPBC s270A

[xix] Loss of climatic habitat caused by anthropogenic emissions of greenhouse gases listed as a KTP under the EPBC in April 2001, following a HSI nomination

[xx] Land clearing listed as a KTP under the EPBC in April 2001, following a nomination by Mike Krockenberger, Professor Jamie Kirkpatrick and Michael Kennedy

[xxi] In a submission to Senator Campbell in 2005, the Australian Council of National Trusts, the Tasmanian Conservation Trust, WWF and HSI proposed the addition of four new MNES triggers on broad scale land clearing, greenhouse gas emissions, unsustainable water use and large dam construction. The combined groups have also urged amendments to broaden existing triggers on ecological communities (to include vulnerable), the Commonwealth marine environment, nuclear actions and migratory species

[xxii] While the KTP has not yet been adjudicated, we are led to believe it did assist the Government in bringing states and territories together to discuss national solutions to the problem.

[xxiii] Death or injury to marine species following capture in lethal shark control programs on ocean beaches was nominated as a KTP under the EPBC, by HSI in September 2002. The Minister rejected it in March 2005

[xxiv] Otway, N.M., Bradshaw C.J.A., Harcourt, R.G. (2004) *Estimating the rate of quasi-extinction of the Australian grey nurse shark (Carcharias taurus) population using deterministic age and state classified models,* Biological Conservation

[xxv] Cumberland Plain Woodland listed as endangered in 1997 on the *NSW Threatened Species Conservation Act 1995* and in 1998 on the *Commonwealth Endangered Species Protection Act 1992* both as a result of a joint nomination from Humane Society International and the Australian Conservation Foundation.

[xxvi] In 2001, Traffic Oceania and HSI had proposed important EPBC wildlife trade and regulation amendments through the Australian Democrats in the Senate, but the ALP declined to support their passage.

[xxvii] HSI vs. Kyodo Senpaku Kaisha Ltd (2004) (Japanese Whalers)
HSI vs. Minister for Environment and Heritage (2003) (grey-headed flying-fox)

[xxviii] HSI vs. Minister for Environment (2005) (southern bluefin tuna)
Tasmanian Conservation Trust and HSI vs. Minister for Environment and Heritage (2000) (brushtail possums in Tasmania and bennett's wallabies and Tasmanian pademelons on Flinders Island).

[xxix] *Future Proofing Australia, A proposal incorporating the establishment of a National Conservation Action Program, a National Conservation Farm Program, and a National Environmental Information and Auditing Commission,* 2004, prepared by Humane Society International and the Tasmanian Conservation Trust (S. Brown,, M. Kennedy, A. Graham, and N. Beynon).

[xxx] *Proposal for a New National Biodiversity Initiative Securing Australia's Nationally Important Biodiversity and Ecosystem Services. National Biodiversity Alliance (NBA) 2004*

[xxxi] The EPBC Unit is project of the National Trust, Tasmanian Conservation Trust and Word Wide Fund for Nature with funds from the Department of Environment and Heritage (HSI was originally a founding member of the EPBC Unit)

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