

Chapter 7

Regulatory arrangements at all levels of government

...threatened species laws in all jurisdictions need to be reviewed, strengthened, and fully resourced and implemented...no State or Territory has a good track record of adequately resourcing or effectively implementing and enforcing their threatened species laws.¹

- 7.1 This chapter discusses issues raised during the committee's inquiry relating to:
- state and territory regulatory arrangements in relation to threatened species and ecological communities, including the role and record of state and territory governments; and
 - environmental assessment processes where developments impact on threatened species and ecological communities

Role of state and territory governments

7.2 The committee heard that there are concerns about the role of state and territory² governments in relation to threatened species and ecological communities, especially proposals for approval powers under the EPBC Act to be delegated to state

1 ANEDO, *Submission 137*, p. 5.

2 Note that the committee received very little evidence about the role of local government in protecting threatened species and ecological communities: see Mr Philip Collier, *Submission 32*, p. 3; Yarra Ranges Council, *Submission 69*, p. 2; Earth Learning Incorporated, *Submission 124*, p. 2.

and territory governments.³ This issue was considered in detail by the inquiry into the EPBC Amendment (Retaining Federal Approval Powers) Bill 2012.⁴

7.3 The committee does not intend to re-examine the issues raised during that inquiry. However, the committee notes that many of the submissions to this inquiry highlighted the importance of the Commonwealth playing a strong leadership role in relation to nationally listed threatened species and communities.⁵

7.4 Further, the committee notes that the submission to this inquiry from ANEDO contained a comprehensive review of threatened species laws in all jurisdictions and concludes that 'threatened species laws in all jurisdictions need to be reviewed, strengthened, and fully resourced and implemented'.⁶

7.5 The ANEDO review was widely cited by many other submissions.⁷ For example, ACF recommended that 'a comprehensive review of biodiversity protection law at the state and federal level is required on an urgent basis, to implement best practice standards and adequately fund their implementation'.⁸

7.6 As Ms Rachel Walmsley of ANEDO told the committee:

3 For example Professor David Lindenmayer, *Submission 15*, p. 2; Australasian Native Orchid Society and the Australian Orchid Council, *Submission 4*, p. 6; Dr Emma Rooksby and Dr Keith Horton, *Submission 41*, p. 2; Wentworth Group of Concerned Scientists, *Submission 57*, p. 1; Associate Professor Mark Lintermans, *Submission 60*, p. 1; WWF Australia, *Submission 81*, pp 2, 8; BirdLife Australia, *Submission 82*, p. 10; Friends of Grasslands, *Submission 86*, p. 3; HSI, *Submission 88*, p. 6; Conondale Range Committee, *Submission 96*; Professor Lee Godden, *Committee Hansard*, 20 February 2013, p. 11; Colong Foundation for Wilderness, *Submission 43*, p. 3; Mr Philip Rance, *Submission 105*, p. 2; NPA NSW, *Submission 145*, p. 8; Bendigo and District Environment Council, Bendigo Field Naturalists Club and Bendigo Sustainability Group, *Submission 73*; Ms Jasmyn Lynch, *Submission 74*, p. 1; Blue Mountains Conservation Society, *Submission 75*, pp 2–5; Greater Mary Association, *Submission 104*, p. 1; Caldera Environment Centre, *Submission 106*, p. 1; Urban Bushland Council WA, *Submission 114*, p. 5; Earth Learning Incorporated, *Submission 124*, p. 1; Canberra Ornithologists Group, *Submission 113*, p. 5; Australasian Bat Society, *Submission 110*, p. 14; Batwatch Australia, *Submission 139*, p. 11; National Parks Australia Council, *Submission 142*, p. 12 cf NFF, *Submission 167*, p. 1; PGV Environmental, *Submission 166*, pp 2–3.

4 See further Senate Environment and Communications Legislation Committee, *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012*, March 2013.

5 See, for example, Batwatch Australia, *Submission 139*, p. 14; ANEDO, *Submission 137*, p. 5; ACF, *Submission 147*, p. 4; Colong Foundation for Wilderness, *Submission 43*, p. 3; Blue Mountains Conservation Society, *Submission 75*, pp 3–4.

6 ANEDO, *Submission 137*, p. 4; see also Ms Rachel Walmsley, ANEDO, *Committee Hansard*, 15 February 2013, pp 43–44.

7 See, for example, NPA NSW, *Submission 145*, p. 8; BirdLife Australia, *Submission 82*, p. 1; Nature Conservation Council of NSW, *Submission 134*, pp 2–3; HSI, *Submission 88*, p. 6; National Parks Australia Council, *Submission 142*, p. 4; ACF, *Submission 147*, p. 3.

8 ACF, *Submission 147*, p. 5.

No state or territory meets all the core requirements of best practice threatened species legislation. While the laws in some jurisdictions look good on paper, they are not effectively implemented. There are a number of important legislative tools available for managing and protecting threatened species that are simply not used. Key provisions are often discretionary; critical tools such as recovery planning and threat abatement plans are not mandatory; timeframes for action and performance indicators are largely absent. Effective implementation is further hampered by a lack of data and knowledge about the range and status of biodiversity across Australia.⁹

7.7 Ms Walmsley further told the committee that 'there is poor integration between threatened species laws and other natural resources management laws in most jurisdictions'. She then gave an example:

For example, in New South Wales there are 14 pieces of legislation that affect biodiversity and there are nine additional government policies, which must be confusing for any developer or land owner. And that is just New South Wales. There is some streamlining that can be done, but it is not about reducing protections for threatened species. It is about identifying the threats to the threatened species and integrating natural resource management laws, planning laws and threatened species laws so that they are more effective.¹⁰

7.8 The committee also heard, by way of example, that threatened species legislation in Western Australia is out-dated.¹¹ The recently re-elected Western Australian government has committed to introducing new legislation to replace the *Wildlife Conservation Act 1950* (WA) 'as a matter of priority'.¹² However, Dr Burbidge was sceptical, observing that this was 'probably the fourth election campaign I can recall where that promise has been made'.¹³ ANEDO urged that Western Australia 'should implement best practice legislation as a matter of urgency'.¹⁴

7.9 Despite this, Professor John Woinarski observed:

Some states, particularly Western Australia, have done remarkably good jobs in terms of threatened species management. Others have been less good. But across all Australian states I think that the resourcing and the capability are diminishing.¹⁵

9 Ms Rachel Walmsley, ANEDO, *Committee Hansard*, 15 February 2013, pp 43–44; see also for example, Hunter Bird Observers Club, *Submission 176*, p. 1.

10 Mr Brendan Sydes, ANEDO, *Committee Hansard*, 15 February 2013, p. 44.

11 Dr Andrew Burbidge, *Committee Hansard*, 7 March 2013, pp 3–4; Urban Bushland Council WA, *Submission 114*, pp 1–2.

12 Premier of Western Australia, *Submission 169*, p. 2.

13 Dr Andrew Burbidge, *Committee Hansard*, 7 March 2013, pp 3–4.

14 ANEDO, *Submission 137*, p. 5.

15 Professor John Woinarski, *Committee Hansard*, 7 March 2013, p. 8.

7.10 Professor Woinarski believed that 'in many cases the state agencies do have better on-ground knowledge of the situation than those based in Canberra'.¹⁶

7.11 Dr Burbidge agreed that 'on-ground conservation of land and species' is largely done by state conservation agencies:

Most progress in conserving threatened species has been the result of State and Territory initiatives. In most cases, it is clear what science and management actions are required; the limitation is resources. State and Territory governments, like the Commonwealth, have allocated limited resources to threatened species conservation.¹⁷

7.12 However, BirdLife Australia called for 'improved collaboration and coordination among states', particularly for the management of species that require actions to occur in to or more states.¹⁸

7.13 SEWPAC's submission also emphasised the need for collaboration across jurisdictions:

As responsibility for the environment is shared between all levels of government, effective protection of threatened species and ecological communities requires close collaboration with state and territory governments. Hence, the Department continues to foster partnerships with the states and territories in order to effectively deliver all of the statutory and non-statutory protection measures for threatened species and ecological communities. Key examples of co-operation include through: EPBC Act strategic assessments; streamlined and more consistent listing assessments; recovery plan development and implementation; building the NRS [National Reserve system]; delivery of Caring for our Country; coordinated efforts in conservation seed banking; and implementing national biodiversity policies and frameworks.¹⁹

State and territory management of national parks

7.14 Concerns were raised during the committee's inquiry in relation to state government management of 'national' parks and potential impacts on threatened

16 Professor John Woinarski, *Committee Hansard*, 7 March 2013, p. 8.

17 Dr Andrew Burbidge, *Submission 46*, p. 3; see also *Committee Hansard*, 7 March 2013, p. 2.

18 BirdLife Australia, *Submission 82*, p. 13.

19 SEWPAC, *Submission 143*, p. 13.

species and communities.²⁰ The committee notes that the title 'national park' is somewhat of a misnomer as the vast majority are managed by states and territories.²¹

7.15 As the National Parks Australia Council (NPAC) observed, 'national parks are not national at all but managed according to a wide range of legislative measures, objectives, priorities and management systems'. They were concerned that 'despite their key role in conservation, national parks have become the subject of political horse-trading. The Council claimed that respect for their role in conservation of biodiversity is at an all-time low'.²²

7.16 Dr Andrew Burbidge described national parks and reserves as 'the jewel in the crown for looking after our threatened species', but noted that the primary responsibility for these rested with state conservation agencies.²³

7.17 WWF-Australia agreed that the states play an important role:

The states have also been the main engines of expansion of the national parks system, with commonwealth assistance through the National Reserve System program, with major benefits for threatened species.²⁴

7.18 However, concerns were raised at recent funding and staff cuts by various state governments, particularly in environment departments and parks management.²⁵ For example, the committee heard that 300 staff had been lost from the Department of

20 Professor David Lindenmayer, *Submission 15*, p. 2; Save the Bilby Fund, *Submission 16*, p. 3; Australian Deer Association, *Submission 83*; Dr Emma Rooksby and Dr Keith Horton, *Submission 41*, p. 2; Earth Learning Incorporated, *Submission 124*, p. 1; Canberra Ornithologists Group, *Submission 113*, p. 2; see also Tim Flannery, *After The Future: Australia's New Extinction Crisis*, Quarterly Essay Issue 48, p. 32.

21 'National' parks managed by the Commonwealth Director of National Parks include Booderee, Kakadu and Uluru-Kata Tjuta National Parks, each jointly managed with their Indigenous owners through statutory boards of management; and Christmas Island, Norfolk Island and Pulu Keeling National Parks located in Australia's external territories: see Director of National Parks, *Submission 144*, p. 3.

22 National Parks Australia Council, *Submission 142*, p. 5.

23 Dr Andrew Burbidge, *Committee Hansard*, 7 March 2013, p. 7.

24 WWF, *Submission 81*, p. 8; see also Dr Greg Clancy, *Submission 52*, p. 3.

25 See, for example, Dr Andrew Burbidge, *Committee Hansard*, 7 March 2013, p. 2; Professor David Lindenmayer, *Submission 15*, p. 2; BirdLife Australia, *Submission 82*, pp 9 and 15; Mr Petrina Maizey, Gold Coast and Hinterland Environment Council and Save Bahrs Scrub Alliance, *Committee Hansard*, 22 February 2013, p. 17; Mr Edward Fensom, Brisbane Region Environment Council, *Committee Hansard*, 2 April 2013, pp 16–17; Clarence Valley Conservation Coalition, *Submission 38*, p. 2; Mr Philip Rance, *Submission 105*, p. 2; Dr Tanzi Smith, *Submission 103*, p. 1; Australasian Bat Society, *Submission 110*, pp 15–16; Batwatch Australia, *Submission 139*, p. 11.

Environment and Resource Management in Queensland, including the loss of key staff in the area of threatened species.²⁶

7.19 Mr Andrew Heaver expressed support for government conservation staff:

My experience with staff from various conservation-related governmental agencies has been overwhelmingly positive. I feel assured that the staff of those agencies are highly skilled, and enthusiastically committed to the task at hand. It is highly unfortunate that these agencies are currently facing severe financial and personnel pressures, because I feel confident that these agencies could achieve results that Australia could be incredibly proud of, if they were to remain well-resourced and well-staffed.²⁷

7.20 Professor David Lindenmayer similarly observed:

...there are several good examples of effective conservation management when good staff are retained and funding levels are appropriate. For instance, biodiversity management and monitoring in Booderee National Park in the Jervis Bay Territory...and woodland conservation on private land under the Australian Government's Environmental Stewardship Program.²⁸

7.21 In this context, many submissions stated their opposition to state government proposals to allow recreational shooting in national parks as a means of controlling feral animals.²⁹ NPA NSW stated that recreational hunting 'poses a range of safety and animal welfare concerns, and has been shown to be ineffective as a means of feral animal control'.³⁰

7.22 In contrast, the Australian Deer Association recommended that relevant legislation be amended to enable accredited conservation hunters to control feral animals in all national parks, wilderness areas, world heritage areas, conservation areas and other protected areas in Australia.³¹

26 Mr Petrina Maizey, Gold Coast and Hinterland Environment Council and Save Bahrs Scrub Alliance, *Committee Hansard*, 22 February 2013, p. 17; see also Mr Edward Fensom, Brisbane Region Environment Council, 2 April 2013, pp 16–17; Mr Roger Currie, Wide Bay Burnett Environment Council, 22 February 2013, p. 17.

27 Mr Andrew Heaver, *Submission 134*, p. 3.

28 Professor David Lindenmayer, *Submission 15*, p. 2.

29 North East Forest Alliance, *Submission 174*, p. 62; Mr Petrina Maizey, Gold Coast and Hinterland Environment Council and Save Bahrs Scrub Alliance, *Committee Hansard*, 22 February 2013, p. 17; Logan & Albert Conservation Association, *Submission 165*, p. 2; Clarence Valley Conservation Coalition, *Submission 38*, p. 5; Colong Foundation for Wilderness, *Submission 43*, pp 6–7; Dr Greg Clancy, *Submission 52*, p. 3; Clarence Environment Centre, *Submission 63*, p. 3; Caldera Environment Centre, *Submission 106*, p. 5; National Parks Australia Council, *Submission 142*, p. 5; NPA NSW, *Submission 145*, p. 8.

30 NPA NSW, *Submission 145*, p. 14; citing Carol Booth (2009) *Is recreational hunting effective for feral animal control?* Invasive Species Council; see also the Colong Foundation for Wilderness, *Submission 43*, p. 8.

31 Australian Deer Association, *Submission 83*, p. 8.

7.23 Concerns were also raised about recent state government proposals to introduce livestock grazing to national parks.³² For example, several submissions mentioned the proposal by the Victorian government to reintroduce cattle to the Alpine National Park in Victoria, which was determined to be unacceptable under the EPBC Act and did not proceed.³³ Several submissions suggested that this demonstrated the need for Commonwealth oversight in terms of approvals powers under the EPBC Act.³⁴ NPAC suggested that national parks should be made a matter of national environmental significance under the EPBC Act 'because of their importance to the overall conservation of biodiversity'.³⁵

7.24 Finally, the committee heard concerns that recreational demands for national parks are being given priority over nature conservation, resulting in a diminished level of protection for threatened species and ecological communities. It was suggested, for example, that recreational uses such as horse riding, mountain biking and 4WDs intensify threats to threatened plant species and ecological communities.³⁶

7.25 For example, the Clarence Valley Conservation Coalition expressed its view:

The National Parks estate plays a critical role in providing sanctuary for threatened species. Yet this estate in NSW is increasingly threatened by the demands of interest groups seeking approval for inappropriate activities in these reserves – activities which are inimical to the core function of biodiversity conservation.³⁷

7.26 Similarly, the Hunter Bird Observers Club suggested that national parks are 'often managed to meet the requirements of recreational stakeholders whose activities are detrimental to threatened species and their habitat'. The Club gave the example of Stockton Beach, north of Newcastle, where they said that the breeding failure of Australian Pied Oystercatchers is due to vehicular traffic along the beach.³⁸

32 Professor David Lindenmayer, *Submission 3*, p. 3; Australasian Native Orchid Society and Australian Orchid Council, *Submission 4*, p. 4; Clarence Valley Conservation Coalition, *Submission 38*, p. 6; Mr Philip Rance, *Submission 105*, p. 2; Clarence Environment Centre, *Submission 63*, p. 5; NPA NSW, *Submission 145*, p. 9; Bendigo and District Environment Council, Bendigo Field Naturalists Club and Bendigo Sustainability Group, *Submission 73*, p. 2; National Parks Australia Council, *Submission 142*, p. 5.

33 See further: SEWPAC, *Alpine National Park*, at <http://www.environment.gov.au/epbc/notices/assessments/victoria-alpine-national-park/> (accessed 9 April 2013).

34 Professor David Lindenmayer, *Submission 3*, p. 3.

35 National Parks Australia Council, *Submission 142*, p. 5.

36 Threatened Plant Action Group of the Nature Conservation Society of South Australia, *Submission 157*, p. 3; Australasian Native Orchid Society and Australian Orchid Council, *Submission 4*, p. 4; Colong Foundation for Wilderness, *Submission 43*, p. 3; National Parks Australia Council, *Submission 142*, p. 5; NPA NSW, *Submission 145*, pp 14–15.

37 Clarence Valley Conservation Coalition, *Submission 38*, pp 4–5.

38 Hunter Bird Observers Club, *Submission 176*, p. 7.

Other issues

7.27 Other issues raised relating to the role of state governments included:

- concerns about proposed reforms to state vegetation clearing legislation; and
- forestry practices in state forests and the regional forest agreement (RFA) exemption in the EPBC Act.

7.28 These are discussed further below.

Vegetation clearing legislation in state and territories

7.29 As outlined in Chapter 3, the committee received evidence that controls on land clearing introduced by state and territory governments in recent years seem to have made an impact in relation to habitat loss and fragmentation. For example, WWF-Australia argued that:

...the states have played an important role over the last decade in passing various vegetation protection laws. These have had a dramatic effect on reducing direct habitat destruction.³⁹

7.30 Similarly the Queensland Minister for Environment and Heritage Protection submitted that the introduction of legislation to end broadscale clearing in Queensland 'was a major step forward for the protection of threatened species and communities'.⁴⁰

7.31 However, several submissions expressed concerns about state vegetation clearing legislation, including recent or proposed reforms.⁴¹ For example, Dr Adrian Manning noting that 'potential nest trees for the superb parrot are on a trajectory of decline', expressed concern that some of the proposed changes to state vegetation clearing legislation 'could have serious negative consequences' for the super parrot and other species dependant on hollow bearing trees.⁴²

39 WWF, *Submission 81*, p. 8.

40 Minister for Environment and Heritage Protection Queensland, *Submission 130*, p. 9.

41 Professor David Lindenmayer, *Submission 15*, p. 3; Dr Adrian Manning, *Submission 30*, pp 1–2; see also Nature Conservation Society of South Australia, *Submission 150*, p. 4; Bendigo and District Environment Council, Bendigo Field Naturalists Club and Bendigo Sustainability Group, *Submission 73*, pp 4–5; see also Urban Bushland Council WA, *Submission 114*, p. 3.

42 Dr Adrian Manning, *Submission 30*, pp 1–2.

Forestry and the RFA exemption

7.32 The committee received numerous submissions expressing concern about forestry practices in state forests, and the RFA exemption in the EPBC Act.⁴³

7.33 Under section 38 of the EPBC Act, forestry operations undertaken in accordance with an RFA are not subject to the environmental assessment and approval provisions in Part 3 of the EPBC Act.

7.34 Submissions expressed concern that forestry operations pose a serious threat to a number of threatened species, such as koalas;⁴⁴ the Leadbeater's possum;⁴⁵ and tiger quolls.⁴⁶ In particular, there was concern that there has been non-compliance with RFAs, as well as difficulties in enforcing RFAs.⁴⁷ It was therefore suggested that the exemption in section 38 of the EPBC Act should be removed.⁴⁸ The removal of section 38 would mean that Part 3 of the EPBC Act would apply to forestry operations and 'the Commonwealth would need to approve logging of threatened species habitat in advance of it occurring'.⁴⁹

7.35 The inquiry in 2009 into the operation of the EPBC Act by this committee's predecessor, the Senate Standing Committee on Environment, Communications and the Arts, considered in great detail the interactions between RFAs and the EPBC Act. That inquiry recommended that the Hawke review:

43 For example Professor David Lindenmayer, *Submission 15*, p. 2; Ms Harriett Swift, *Submission 19*; South East Forest Rescue, *Submission 62*; Clarence Environment Centre, *Submission 63*; Lawyers for Forests, *Submission 70*; LIV Young Lawyers' Section, Law Institute of Victoria, *Submission 84*; Mr Jeremy Tager, *Submission 89*, p. 6; Healesville Environment Watch, MyEnvironment Inc and Friends of Leadbeater's Possum, *Submission 92*; Mr Mark Selmes, *Submission 126*; Mr Wayne Gumley, *Submission 133*; Environment East Gippsland, *Submission 149*, pp 1–2; North Coast Environment Council, *Submission 161*; MyEnvironment, *Submission 163*; South East Region Conservation Alliance, *Submission 164*; The Wilderness Society (Victoria), *Submission 172*; North East Forest Alliance, *Submission 174*. Note some submissions also raised concerns about private native forestry and its impacts on threatened species, see, for example, Clarence Environment Centre, *Submission 63*, p. 5.

44 See, for example, North East Forest Alliance, *Submission 174*; South East Region Conservation Alliance, *Submission 164*; MyEnvironment, *Submission 163*.

45 See, for example, Healesville Environment Watch, MyEnvironment Inc and Friends of Leadbeater's Possum, *Submission 92*; Ms Pamela Miskin, *Submission 61*; The Wilderness Society (Victoria), *Submission 172*; North Coast Environment Council, *Submission 161*; Mr Don Butcher, *Submission 146*; Ms Sera Blair, *Submission 67*; Mr David Blair, *Submission 79*.

46 Ms Harriet Swift, *Submission 19*, pp 1–2.

47 Ms Vanessa Bleyer, Lawyers for Forests, *Committee Hansard*, 20 February 2013, p. 26.

48 South East Region Conservation Alliance, *Submission 164*, p. 4; North Coast Environment Council, *Submission 161*; Lawyers for Forests, *Submission 70*, pp 16–19; ANEDO, *Submission 137*, Attachment, p. 83.

49 Ms Vanessa Bleyer, Lawyers for Forests, *Committee Hansard*, 20 February 2013, p. 22 and see also p. 25.

...recommend proposals for reform that would ensure that RFAs, in respect of matters within the scope of Part 3 of the EPBC Act, deliver environmental protection outcomes, appeal rights, and enforcement mechanisms no weaker than if the EPBC Act directly applied.⁵⁰

7.36 Subsequently, Chapter 10 of the Hawke report considered RFAs and the EPBC Act, and made recommendations 38 and 39 to address the issue. In summary, recommendation 38 recommended that the provisions of the EPBC Act relating to RFAs be retained, but 'be subject to rigorous independent performance auditing, reporting and sanctions for serious non-compliance'.⁵¹ Recommendation 39 proposed the Commonwealth government work with the states to improve the independence of compliance monitoring; and develop processes to make publicly available information about the number and nature of complaints about RFA operations and the results of any investigations.⁵²

7.37 The government response to the Hawke review agreed with recommendation 39 and agreed in part to recommendation 38, noting the concerns raised about the operation of RFA, but stating that:

The government remains committed to RFAs as an appropriate mechanism for effective environmental protection, forest management and forest industry practices in regions covered by RFAs. The government is also committed to working with state governments to improve the review, audit and monitoring arrangements for RFAs, including their timely completion, and to clearer assessment of performance against environmental and sustainable forestry outcomes.

...

These improvements will inform the consideration of RFA renewal processes. The government does not agree to the recommendation to change section 38 of the Act, as the existing mechanisms for continuous improvement contained within the RFAs can be used to achieve ecologically sustainable forestry outcomes.⁵³

Environmental assessment processes

7.38 This section discusses concerns raised in relation to environmental impact assessment processes where developments impact on threatened species and ecological communities. The focus is primarily on environmental assessments under the EPBC Act, however, some of the concepts discussed are equally applicable to state or territory environmental impact processes.

50 Senate Standing Committees on Environment, Communications and the Arts, Second and final report: *The operation of the Environment Protection and Biodiversity Conservation Act 1999*, April 2009, para 1.106.

51 See further Hawke review, Chapter 10 and p. 252 for full recommendation.

52 Hawke review, p. 253.

53 *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, August 2011, p. 71.

7.39 The committee notes that the majority of actions requiring assessment and approval under the EPBC Act have been triggered by potential impacts on listed threatened species or ecological communities.⁵⁴

7.40 Two key issues raised during this inquiry relating to environmental assessment and approval processes included:

- dealing with cumulative impacts; and
- use of environmental offsets.

7.41 Other issues raised relating to environmental assessment and approval processes included:

- difficulties identifying threatened species and ecological communities;
- adequacy of assessment documentation;
- cost recovery proposals;
- transparency and accountability; and
- monitoring, compliance and enforcement.

7.42 These issues are discussed in turn below.

Cumulative impacts

7.43 Several submissions expressed concern about the cumulative impacts of developments on threatened species and communities.⁵⁵ As Professors Lee Godden and Jacqueline Peel explained:

A cumulative impact is understood as ongoing, progressive environmental degradation caused by the combined effects of multiple projects in an area. Although each project is individually assessed, the collective effect is commonly described as 'death by a thousand cuts' and it is a major cause of biodiversity loss.⁵⁶

54 ANEDO, *Submission 137*, Attachment 1, p. 81, citing SEWPAC, *Annual Report 2010-2011*, p. 148 which stated that 130 out of 240 controlled actions in 2010-11 relating to listed threatened species or ecological communities.

55 See, for example, ACF, *Submission 147*, p. 2; HSI, *Submission 88*, pp 1–2; Dr Martine Maron, *Submission 55*; Greater Mary Association, *Submission 104*, p. 6; Mary River Catchment Coordinating Committee, *Submission 115*, p. 4; Canberra Ornithologists Group, *Submission 113*, p. 3; Batwatch Australia, *Submission 139*, p. 10; Ms Alexia Wellbelove, HSI, *Committee Hansard*, 15 February 2013, p. 20.

56 Professor Lee Godden and Jacqueline Peel, *Submission 123*, p. 3; see also Professor Lee Godden, *Committee Hansard*, 20 February 2013, p. 12; Ms Petrina Maizey, Gold Coast and Hinterland Environment Council and Save Bahrs Scrub Alliance, *Committee Hansard*, 22 February 2013, p. 12.

7.44 However, many believed that environmental assessment processes, including under the EPBC Act, do not adequately address cumulative impacts.⁵⁷ Indeed, the Wentworth Group of Concerned Scientists stated that:

The major flaw of the environmental impact assessment regime of the EPBC Act is that it does not effectively manage the cumulative impact of multiple developments on these species and communities.⁵⁸

7.45 Dr Greg Clancy agreed that a major problem with the EPBC Act and similar legislation is that it relies on whether or not there is likely to be a 'significant impact' on threatened species. He noted that:

The loss of small areas of threatened species habitat may not be significant in themselves but added to all of the other losses around the country may well add up to a serious decline in threatened species habitat and the species themselves.⁵⁹

7.46 Others echoed these concerns:

...no consideration is given to the cumulative impact of multiple developments...While the risks associated with any one project may appear reasonable with maintaining sufficient habitat to sustain the future of a threatened species this may not be the case at the landscape scale. The cumulative impact of multiple projects may result in habitat fragmentation to an extent where there is insufficient connectivity to ensure the survival of species....⁶⁰

7.47 For example, it was submitted that while 'individual instances of habitat loss are often considered to be small...cumulatively they represent the main threat to the persistence' of the south-eastern red-tailed black cockatoo.⁶¹

7.48 Ms Alexia Wellbelove from HSI gave the example of the Cumberland Plain Woodlands ecological community. It was initially listed in 'endangered' category, but was subsequently upgraded to 'critically endangered'. She argued that this upgrade 'was mostly due to cumulative impacts on that community'⁶² and lamented that:

...if we are not able to consider cumulative impacts under our legislation, then we are really missing out on the bigger picture.⁶³

57 Professor Lee Godden and Jacqueline Peel, *Submission 123*, p. 3; see also Professor Lee Godden, *Committee Hansard*, 20 February 2013, p. 12; Ms Petrina Maizey, Gold Coast and Hinterland Environment Council and Save Bahrs Scrub Alliance, *Committee Hansard*, 22 February 2013, p. 12.

58 Wentworth Group of Concerned Scientists, *Submission 57*, p. 1.

59 Dr Greg Clancy, *Submission 52*, p. 2; see also Clarence Environment Centre, *Submission 63*, p. 3.

60 Hunter Bird Observers Club, *Submission 176*, p. 6.

61 Dr Martine Maron, *Submission 55*, p. 1.

62 Ms Alexia Wellbelove, HSI, *Committee Hansard*, 15 February 2013, p. 22.

63 Ms Alexia Wellbelove, HSI, *Committee Hansard*, 15 February 2013, p. 20.

7.49 Submissions therefore suggested that there was a greater need to consider cumulative impacts on, and to incorporate them into decision-making in relation to, threatened species and ecological communities.⁶⁴

7.50 The Wentworth Group of Concerned Scientists put forward a proposal to improve environmental assessment standards and to better address cumulative impacts, in part through greater use of regional environmental plans and/or strategic assessments using existing provisions in the EPBC Act.⁶⁵

7.51 WWF-Australia also supported of the use of bioregional plans:

Comprehensive, cooperatively designed bioregional plans could provide adequate protection for all state and federal listed environment matters, define no go areas, areas for further assessment and areas pre-approved for particular types of development, with strong scientific support, that would satisfy the planning requirements of all three levels of government.⁶⁶

7.52 The committee notes that the Hawke Review recommended that the Commonwealth government 'expand the role of strategic assessments and bioregional plans so that they are used more often; and strengthen the process for creating these plans and undertaking these assessments, so they are more substantial and robust'.⁶⁷ The Commonwealth government's response agreed to this recommendation.⁶⁸

7.53 SEWPAC submitted that it is increasingly using 'landscape wide' strategic assessments and bioregional planning 'to identify important areas of habitat for threatened species and ecological communities as part of the development assessment process'.⁶⁹ SEWPAC further outlined that:

The Department has already either completed or begun several strategic assessments to address threats affecting species and ecological communities at a landscape scale. Importantly, these strategic assessments allow for cumulative impacts on threatened species and ecological communities to be more effectively dealt with, as well as encouraging protection

64 See, for example, Ms Alexia Wellbelove, HSI, *Committee Hansard*, 15 February 2013, p. 20; Dr Martine Maron, *Submission 55*, p. 2; Clarence Valley Conservation Coalition, *Submission 38*, p. 2; Dr Greg Clancy, *Submission 52*, p. 2; Blue Mountains Conservation Society, *Submission 75*, pp 5–6.

65 Wentworth Group of Concerned Scientists, *Submission 57*, p. 1; and pp 6–7 of the 'Statement on Changes to Commonwealth Powers to Protect Australia's Environment' contained in that submission; see also EPBC Act, Part 12, Division 2 (bioregional plans) and Part 10, Division 1 (strategic assessments).

66 WWF, *Submission 81*, p. 8; see also Mr Bruce Boyes, *Submission 107*.

67 Hawke review, recommendation 6 (1).

68 Australian Government, *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, August 2011, p. 15.

69 SEWPAC, *Submission 142*, p. 1.

considerations earlier in planning processes. Approaches to the use of this mechanism are continually being refined.⁷⁰

7.54 The committee notes that a number of strategic assessments are currently underway under section 146 of the EPBC Act.⁷¹ There was some support greater use of strategic assessments and regional environmental plans—subject to certain safeguards—to deliver better outcomes.⁷² For example, Professors Godden and Peel explained that:

Strategic Assessments assess the environmental consequences of a policy or plan, rather than a specific project. They provide a mechanism to approve classes of development across a region. They thus negate the need for EIA's, which are only necessary where strategic assessments and bioregional plans are not in place and where proponents wish to undertake development that is not covered by accredited plans.⁷³

7.55 However, they also cautioned that:

...strategic assessment should not be treated as providing 'blanket zones' for development that does not allow more finely graded assessments and approvals to operate in respect of threatened species and ecological communities.⁷⁴

7.56 Others were quite critical of the use of strategic assessments. Some were concerned that strategic assessments are being used 'primarily to establish a blueprint for development'.⁷⁵ For example, NPAC argued that:

...the current move towards strategic assessments a tool for more strategic Federal involvement is failing at the first tests. This approach is based in a fundamental misconception that higher level strategic planning can adequately substitute for specific case-by-case assessment of proposals. Experience t[o] date has shown that State/Federal co-operation is not improved by this strategy and that environmental outcomes are more at long term risk under such an assessment than under a case-by-case assessment.⁷⁶

70 SEWPAC, *Submission 142*, p. 7.

71 See further SEWPAC, *Strategic assessments*, at: <http://www.environment.gov.au/epbc/assessments/strategic.html> (accessed 18 April 2013).

72 See, for example, Wentworth Group of Concerned Scientists, *Submission 57*; WWF, *Submission 81*, p. 8; Zoos Victoria, *Submission 42*, p. 2; Mr Peter Cosier, Wentworth Group of Concerned Scientists, *Committee Hansard*, 15 February 2013, p. 34; Professor Lee Godden, *Committee Hansard*, 20 February 2013, p. 13; Nature Conservation Society of South Australia, *Submission 150*, pp 4–5.

73 Professor Lee Godden and Jacqueline Peel, *Submission 123*, p. 3.

74 Professor Lee Godden and Jacqueline Peel, *Submission 123*, p. 4.

75 See, for example, Mr Jeremy Tager, *Submission 89*, pp 5–6; Colong Foundation for Wilderness, *Submission 43*, p. 10.

76 National Parks Australia Council, *Submission 142*, p. 6.

7.57 NPAC gave the example of the Melbourne Urban Growth Boundary Strategic Assessment under the EPBC Act, raising concerns about non-compliance, lack of independent monitoring, inadequate consultation and inadequate protection for matters of national environmental significance. NPAC alleged that:

The process has been a windfall for the property development industry, who not only get their approval process and assessment undertaken by the tax payer (including \$3-5 million of government funded environmental surveys), but also get a upfront or umbrella regulatory approval – bankable for decades (up to 40 years).⁷⁷

7.58 NPAC concluded that the strategic assessment process 'is not fulfilling its key role of protecting endangered species—in fact it may be worse than the previous regulatory frameworks'.⁷⁸ Others suggested that the Melbourne strategic assessment process should be reviewed and evaluated before the strategic assessment process is used anywhere else in Australia.⁷⁹

7.59 Recent strategic assessments undertaken under the EPBC Act in relation to urban development in the ACT were also discussed. It was felt that some elements were positive, for example, the requirement for a buffer between housing and a high quality woodland area. However, the Canberra Ornithologists Group concluded that 'for the most part, environmental outcomes have been disappointing'.⁸⁰ Friends of Grasslands expressed qualified support for strategic assessments undertaken in the ACT noted that they 'have been useful', but warned that their long term impact 'in terms of an improved conservation outcome is still to be seen'.⁸¹

7.60 Some suggested that the process relating to strategic assessments under the EPBC Act needs to be strengthened. For example, Ms Claire Parkes from the Wentworth Group of Concerned Scientists acknowledged that:

...there have been quite a few concerns with some strategic assessments which have been done...they need to be improved and strengthened in law. One specific thing is that there needs to be a requirement that the strategic assessments include an assessment of whether the development which is going to occur in that area is going to improve or maintain environmental outcomes. That provides a much stronger test of whether the development is going to be good for the environment or not.⁸²

7.61 ANEDO agreed strategic assessments have the potential to redress the problem of cumulative impacts, but argued that 'the process for strategic

77 National Parks Australia Council, *Submission 142*, p. 9.

78 National Parks Australia Council, *Submission 142*, p. 9.

79 Ms Yasmin Kelsall, *Submission 100*, p. 2.

80 Canberra Ornithologists Group, *Submission 113*, p. 3; see also National Parks Australia Council, *Submission 142*, pp 10–11.

81 Friends of Grasslands, *Submission 86*, p. 3.

82 Ms Clair Parkes, Wentworth Group of Concerned Scientists, *Committee Hansard*, 15 February 2013, p. 35.

environmental assessment needs to be strengthened within the EPBC Act'.⁸³ They noted that 'the process at present seems implicitly focused on streamlining and reducing the regulatory burden rather than on achieving the best environmental outcomes'.⁸⁴ Mr Brendan Sydes from ANEDO described strategic assessment as 'the only credible way of dealing with that death by a thousand cuts phenomenon—the cumulative impacts', but warned that:

While a strategic impact assessment can be a good way to lock in a good outcome for the long term, it is also a good way to lock in a bad outcome for the long term. The way they are sold is that they give everyone certainty. But you also need to reserve a certain degree of flexibility to cover the fact that new information might be uncovered...⁸⁵

7.62 Professors Godden and Peel suggested that:

Consideration might be given to strategic assessments which adopt a landscape ecology approach and which identify priority conservation zones where the case for development might involve the precautionary principle, such that where there is a risk of irreversible harm this alters the burden of proof to one where the development needs to discharge a 'no harm' threshold.⁸⁶

7.63 The committee notes that in 2011 SEWPAC released 'a guide to undertaking strategic assessments'.⁸⁷ This guide states that the strategic assessment should use four mechanisms 'to maximise beneficial outcomes' for matters of national environmental significance. The four mechanisms are (1) avoidance of impacts; (2) mitigation of potential impacts; (3) application of environmental offsets where impacts can't be avoided or mitigated; and (4) ongoing 'adaptive management'. The guide goes on to state that avoiding impacts to matters of national environmental significance 'is the highest priority'.⁸⁸

83 Ms Rachel Walmsley, ANEDO, *Committee Hansard*, 15 February 2013, p. 45.

84 ANEDO, *Submission 137*, Attachment, p. 83.

85 Mr Brendan Sydes, ANEDO, *Committee Hansard*, 15 February 2013, p. 45.

86 Professor Lee Godden and Jacqueline Peel, *Submission 123*, p. 4.

87 Available at: <http://www.environment.gov.au/epbc/publications/guide-to-strategic-assessments.html> (accessed 18 April 2013).

88 SEWPAC, *A Guide to undertaking strategic assessments*, pp 7–9.

Use of offsets

7.64 Submitters also raised the use of biodiversity 'offsets' and concerns about their potential to adversely impact on threatened species and communities.⁸⁹ It was noted that offsets are '...not specifically addressed within the EPBC Act', but their use 'has developed as an administrative practice over a number of years'.⁹⁰

7.65 In October 2012, SEWPAC released a policy guiding the use of offsets under the EPBC Act, in order to provide 'transparency around how suitable offsets are determined'.⁹¹ This policy describes offsets as:

...measures that compensate for the residual impacts of an action on the environment, after avoidance and mitigation measures are taken. Offsets provide environmental benefits to counterbalance the impacts that remain after avoidance and mitigation measures...Offsets can help to achieve long-term environmental outcomes for matters protected under the EPBC Act, while providing flexibility for proponents seeking to undertake an action that will have residual impacts on those protected matters.⁹²

7.66 Dr Martine Maron observed that environmental offsets 'are increasingly being used in an attempt to reconcile development and conservation'. However, Dr Maron submitted that her research indicates offsetting the loss of biodiversity in one place with a gain elsewhere has had 'limited success to date'.⁹³

7.67 Professors Godden and Peel noted that there is 'considerable research that has examined whether offsets can effectively compensate for biodiversity loss'. However, they argued that:

More research is needed into the long-term repercussions of the practice of offsetting on biodiversity protection and how this practice aligns to

89 See, for example: Dr Martine Maron, *Submission 50*, p. 3; Friends of Grasslands, *Submission 86*, p. 2; Professors Lee Godden and Jacqueline Peel, *Submission 123*, p. 4; Gecko - Gold Coast and Hinterland Environment Council and Save Bahrs Scrub Alliance, *Submission 156*, pp 9–10; Mr Edward Fensom, Brisbane Region Environment Council, *Committee Hansard*, 22 February 2013, p. 16; Hunter Bird Observers Club, *Submission 176*, pp 5–6; Australasian Native Orchid Society and the Australian Orchid Council, *Submission 4*, p. 8; Clarence Environment Centre, *Submission 63*, p. 7; Bendigo and District Environment Council, Bendigo Field Naturalists Club and Bendigo Sustainability Group, *Submission 73*; Colong Foundation for Wilderness, *Submission 11*, pp 10–11; Blue Mountains Conservation Society, *Submission 75*, p. 1; WWF, *Submission 81*, Attachment 2, p. 6; Mr Jeremy Tager, *Submission 89*, p. 2; Canberra Ornithologists Group, *Submission 113*, p. 2; Nature Conservation Council of NSW, *Submission 134*, p. 9; National Parks Australia Council, *Submission 142*, p. 9.

90 Professor Lee Godden, *Committee Hansard*, 20 February 2013, p. 11.

91 SEWPAC, *Submission 143*, p. 7; see also SEWPAC, *EPBC Act environment offsets policy*, at: <http://www.environment.gov.au/epbc/publications/pubs/offsets-policy.pdf> (accessed 2 April 2013).

92 SEWPAC, *EPBC Act environment offsets policy*, at: <http://www.environment.gov.au/epbc/publications/pubs/offsets-policy.pdf> (accessed 2 April 2013), p. 7.

93 Dr Martine Maron, *Submission 55*, p. 3.

measures such as conservation planning. More careful monitoring over longer time spans is required to ensure that offsetting where it does occur continues to achieve the biodiversity protection objectives in the long term.⁹⁴

7.68 Professors Godden and Peel recommended that:

...the 'practice' of offsetting as a condition on approvals of developments be re-examined with a view to ensuring that higher order biodiversity protection measures such as [avoiding] or minimising the loss be given greater priority.⁹⁵

7.69 Some described offsets as 'deeply flawed' or 'totally inadequate'.⁹⁶ Others suggested that the use of biodiversity offsets be prohibited where any threatened species and communities are involved.⁹⁷ Some argued that biodiversity offsets effectively sanction, rather than avoid, habitat destruction and should only be used as a last resort.⁹⁸ Others cited concerns about the long-term management of offsets.⁹⁹

7.70 For example, the Urban Bushland Council WA complained that:

Loss of habitat of a threatened species simply cannot be replaced as complex ecosystems cannot be replanted or recreated in a new location. There is always a net loss of habitat and therefore the concept of offsets is fundamentally flawed on ecological grounds.¹⁰⁰

7.71 Professor Godden also expressed alarm at the 'proliferation of offsets'.

...the first step should be avoiding harm, keeping threatened species and ecological communities intact where possible. After that, offsets should only be used where necessary and feasible. I have concerns that they are being used in the first instance and we are not giving sufficient attention to that first step: avoiding the harm where possible...offsets are becoming the more convenient way to balance development interests and environmental protection. We need further investigation and research in this area, particularly in respect of compliance issues in terms of offsets.¹⁰¹

94 Professors Lee Godden and Jacqueline Peel, *Submission 123*, p. 4.

95 Professors Lee Godden and Jacqueline Peel, *Submission 123*, p. 4.

96 Ms Petrina Maizey, Gold Coast and Hinterland Environment Council and Save Bahrs Scrub Alliance, *Committee Hansard*, 22 February 2013, p. 12; Canberra Ornithologists Group, *Submission 113*, p. 2.

97 See, for example, Nature Conservation Council of NSW, *Submission 134*, p. 12.

98 Blue Mountains Conservation Society, *Submission 75*, p. 1; Hunter Bird Observers Club, *Submission 176*, p. 8.

99 Hunter Bird Observers Club, *Submission 176*, p. 1.

100 Urban Bushland Council WA, *Submission 114*, p. 4; see also Bendigo and District Environment Council, Bendigo Field Naturalists Club and Bendigo Sustainability Group, *Submission 73*, pp 4–5; and Hunter Bird Observers Club, *Submission 176*, pp 5–6.

101 Professor Lee Godden, *Committee Hansard*, 20 February 2013, p. 11.

7.72 WWF-Australia provided a statement made with other organisations in a letter to the former Minister for Environment Protection, Heritage and the Arts:

We have strong reservations about a national biodiversity banking scheme and the use of biodiversity offsets. If an action has a significant impact on a MNES [matter of national environmental significance] then it should not be approved, rather than attempts made to offset the impacts in ways that are uncertain and unreliable. The scientific literature shows that offsetting schemes have generally not met their aspirations in practice. We oppose general adoption of offsets until empirical research on pilot programs proves they actually result in improved species recovery through the course of normal operation.¹⁰²

7.73 The NFF had a slightly different perspective on the use of offsets. They suggested that there might be a need to streamline government offset policies,¹⁰³ pointing out that:

...one of the big issues is that with some species there is nothing left to put in place as an offset. So, if they are looking to do a development—whether it is on-farm, whether it is mining, whether it is an urban development—one of the perverse outcomes is that they are seeking agricultural land to plant back into or to re-establish that community that no longer has areas that are viable.¹⁰⁴

7.74 In response to questions on the use of offsets, SEWPAC told the committee that the Commonwealth had brought in its offsets policy late last year 'after several years of consultation on its development' and that the concerns that 'many people have with offsets were considered at some length'.¹⁰⁵ SEWPAC informed the committee that the offsets policy was 'proving useful', by 'giving a clear guide as to how to calculate offsets and when, and how to determine where they would best deliver the broader ecological and biodiversity outcome'. This was compared to the past practice which SEWPAC representatives described as 'ad hoc and project specific'.¹⁰⁶

7.75 SEWPAC told the committee that, up until this offset policy was put in place:

...it has often been the case that, if they have come through, for example, state processes or the like, the Commonwealth has not actually been aware of the offsets that might have been given up. So one of the things that we are trying to do with our new policy is to standardise the approach to Commonwealth offsets and to also be able to standardise our monitoring of them so that we know where they are. We have a project going on in the department at the moment to sort of go back and try to discover those ad hoc arrangements and map them so that we know where they actually are in

102 WWF-Australia, *Submission 81*, Attachment 2, p. 6; see also Nature Conservation Council of NSW, *Submission 134*, p. 12; Mr Jeremy Tager, *Submission 89*, p. 2.

103 Ms Deborah Kerr, NFF, *Committee Hansard*, 15 February 2013, p. 5.

104 Ms Deborah Kerr, NFF, *Committee Hansard*, 15 February 2013, p. 5.

105 SEWPAC, *Committee Hansard*, 15 February 2013, p. 69.

106 SEWPAC, *Committee Hansard*, 15 February 2013, p. 69.

the landscape...It is the first step to saying whether or not they have had an effect.¹⁰⁷

7.76 However, SEWPAC cautioned that there has not yet been time to evaluate the 'actual effect of the policy':

It is a new tool to us. It is one that obviously has to be used carefully; but it is one that we think does give us an additional positive outcome...¹⁰⁸

Other issues

Identification of threatened species and communities

7.77 The committee heard that the identification of threatened species and ecological communities poses a challenge in many circumstances. For example, the NFF submitted that:

...in many situations, the skills and abilities required to identify species and ecological communities are not capacities that landholders generally have – these being skills of appropriately qualified scientists. Anecdotally, the NFF has been informed that there are perhaps only a few such qualified people in Australian scientific community.¹⁰⁹

7.78 Others agreed that 'failure to recognise a known listed species is a major problem'. It was noted, for example, that the identification of orchids is particularly challenging 'due to the deciduous nature of most terrestrial orchid species and their reluctance to present either leaves or flowers if conditions are unsuitable in any given season'.¹¹⁰

7.79 In circumstances where there is uncertainty or lack of information, it was suggested that the precautionary principle¹¹¹ needs to be more widely applied.¹¹²

7.80 However, others were sceptical of the precautionary principle. For example, the NSW Council of Freshwater Anglers suggested that instead:

...where lack of scientific certainty exists in respect of serious concerns as whether a species is likely to undergo decline or as to key threatening process or similar issues, that Scientific Committees should have power to

107 SEWPAC, *Committee Hansard*, 15 February 2013, p. 69.

108 SEWPAC, *Committee Hansard*, 15 February 2013, p. 69.

109 NFF, *Submission 167*, p. 2; see also Ms Deborah Kerr, NFF, *Committee Hansard*, 15 February 2013, p. 3.

110 Australasian Native Orchid Society and the Australian Orchid Council, *Submission 4*, pp 1–2.

111 As set out in ss.391(2) of the EPBC Act.

112 See, for example, Nature Conservation Society of South Australia, *Submission 150*, p. 3; Blue Mountains Conservation Society, *Submission 75*, p. 7; Mr Jeremy Tager, *Submission 89*, p. 6; Caldera Environment Centre, *Submission 106*, p. 4 cf NSW Council of Freshwater Anglers, *Submission 125*, p. 1.

recommend key research programmes, and have a budget to commission urgent critical research.¹¹³

7.81 It is noted that the need for more surveys and data relating to threatened species was discussed in Chapters 2 and 5.

Adequacy of assessment documentation

7.82 Adequacy of assessment documentation was also raised as an issue.¹¹⁴ Several submissions were concerned that surveys conducted for environmental assessment purposes are inadequate and unsystematic.¹¹⁵ For example, the Hunter Bird Observers Club expressed the view that 'too often there is an unrealistic time limit placed on environmental consultants to prepare environmental assessments, preventing a thorough seasonal analysis of habitat use by threatened species.'¹¹⁶

7.83 Several submissions were also critical of the process by which the proponent prepares the assessment documentation, suggesting this could lead to a conflict of interest. For example, the Hunter Bird Observers Club submitted that:

This is a situation which places an onus on the consultant to obtain an outcome which is best for the developer rather than the environment...Put bluntly, some proponents would find another consultant prepared to support the development and the environmentally sympathetic consultant would risk continuity of business.¹¹⁷

7.84 WWF-Australia suggested that the Commonwealth should commission 'independent, objective, scientific assessments of impacts, funded out of development application fees'.¹¹⁸ Cost recovery mechanisms are discussed further below.

7.85 At the same time, it was suggested that information or data collected on threatened species by proponents during the environmental assessment process should be collated and made available in publicly accessible databases such as SEWPAC's National Species Profile and Threat (SPRAT) database.¹¹⁹

7.86 However, the Nature Conservation Society of South Australia also felt that there is a need for improved data management and reporting processes for referral and assessment information under the EPBC Act:

113 NSW Council of Freshwater Anglers, *Submission 125*, p. 3.

114 Ms Petrina Maizey, Gold Coast and Hinterland Environment Council and Save Bahrs Scrub Alliance, *Committee Hansard*, 22 February 2013, p. 15; Mr Wayne Gumley, *Submission 133*, p. 5; Canberra Ornithologists Group, *Submission 113*, p. 3.

115 Australasian Native Orchid Society and the Australian Orchid Council, *Submission 4*, p. 7.

116 Hunter Bird Observers Club, *Submission 176*, p. 5.

117 Hunter Bird Observers Club, *Submission 176*, p. 9; see also Mr Jonathan Meddings, *Submission 58*, pp 6–7.

118 WWF-Australia, *Submission 81*, p. 8.

119 S. Burgess and E. Bradley, *Submission 101*, p. 2; see also Dr Tanzi Smith, *Submission 103*, p. 3; Mary River Catchment Coordinating Committee, *Submission 115*, p. 2.

Deficiencies in information management are a barrier to evaluating the effectiveness of the EPBC Act and the assessment processes. A recent request made to the EPBC section of the Australian Government for a list of referrals relating to a listed threatened species, could not be met. The Australian Government had no ability to search for past referrals relating to the species (other than by geographic area) and could not provide information to identify on what evidence referral decisions were made. This information was requested for the evaluation of a threatened species recovery program and would have assisted in determining whether the implementation of the recovery program was effective and appropriate. Failure to provide this information was a failure to facilitate transparent reporting and evaluation of public investment in the administration of the Act and in the recovery program.¹²⁰

Cost recovery proposals

7.87 The issue of cost recovery in relation to environmental assessment processes was also canvassed during the committee's inquiry.

7.88 The Commonwealth government has proposed the introduction of cost recovery arrangements for environmental impact assessments and strategic assessments under the EPBC Act as part of the EPBC Act reform package, and as recommended by the Hawke review.¹²¹ A draft *Cost Recovery Impact Statement* was released for public consultation in 2012. The committee notes that cost recovery cannot take effect until the passage of amending legislation and new regulations are made.¹²²

7.89 Some were supportive of cost recovery mechanisms. WWF-Australia submitted that cost recovery should be a 'key principle of EPBC implementation'.¹²³ BirdLife Australia similarly stated that cost recovery is 'needed to ensure that the Environment Department is adequately resourced to ensure operation of the Act and monitor performance'.¹²⁴

7.90 In contrast, the NFF expressed concerns about proposals to cost recovery processes for the EIA process under the EPBC Act.¹²⁵ The NFF argued that the proposals for cost recovery would mean it would cost a farmer 'around \$7,000 or

120 Nature Conservation Society of South Australia, *Submission 150*, pp 5–6.

121 Hawke review, recommendation 62.

122 SEWPAC, *Cost Recovery under the EPBC Act*, <http://www.environment.gov.au/epbc/publications/consultation-draft-cost-recovery.html> (accessed 4 April 2013).

123 WWF-Australia, *Submission 81*, p. 8.

124 BirdLife Australia, *Submission 82*, p. 11; see also Batwatch Australia, *Submission 139*, p. 10.

125 NFF, *Submission 167*, p. 2; Ms Deborah Kerr, NFF, *Committee Hansard*, 15 February 2013, p. 4.

\$8,000 just to seek a referral', and that if a farmer needed approval under the EPBC, this could cost around '\$80,000 for a simple approval'.¹²⁶

7.91 The NFF argued that:

...the vast majority of farmers are prepared to play their part and are prepared to, as much as possible, try to match productivity and environmental outcomes on their own property, but not when they are lumped with the lion's share of the cost burden.¹²⁷

7.92 In answers to questions on notice, SEWPAC noted that 'exemption and waiver criteria for environmental impact assessments were proposed in the draft *Cost Recovery Impact Statement*, which include fee exemptions individuals and small businesses with less than \$2 million annual turnover – consistent with that of the Income Tax Assessment Act definitions for small businesses'. SEWPAC noted that:

One of the drivers for exempting small business from EPBC cost recovery was feedback from stakeholders such as the NFF regarding impacts on the agriculture industry. The agriculture industry currently makes up 0.8 per cent of the 430 referrals the department receives under the EPBC Act per year.¹²⁸

Compliance and enforcement

7.93 Several submissions called for increased resources for enforcement of threatened species laws. For example, Professors Godden and Peel were concerned that 'monitoring and compliance are vital, if often overlooked areas' and that:

Greater consideration needs to be given to examining how well the laws and regulations that seek to protect threatened species and ecological communities are enforced and how compliance occurs...There have been relatively few prosecutions under the EPBC Act and there are significant gaps in Commonwealth monitoring of projects conditions.¹²⁹

7.94 They recommended that 'sufficient resources should be made available for robust long term monitoring and a more proactive approach is given to compliance matters'.¹³⁰ Similarly, the ACF called for 'increased resources for adequate monitoring and enforcement with increased penalties for non-compliance'.¹³¹

7.95 However, the NFF suggested that, rather than more resources for compliance issues, more resources were needed to communicate the requirements of the EPBC

126 Ms Deborah Kerr, NFF, *Committee Hansard*, 15 February 2013, p. 4; see also NFF, *Submission 167*, p. 2.

127 Mr Matt Linnegar, NFF, *Committee Hansard*, 15 February 2013, p. 6.

128 SEWPAC, *Answers to questions on notice from public hearing*, 15 February 2013, p. 17 [Q.16].

129 Professors Lee Godden and Jacqueline Peel, *Submission 123*, p. 4.

130 Professors Lee Godden and Jacqueline Peel, *Submission 123*, p. 5.

131 ACF, *Submission 147*, p. 4.

Act to farmers and the business community—in line with the recommendations of the Hawke review.¹³²

7.96 Some suggested that penalties for breaches of the EPBC Act be increased. The Nature Conservation Society of South Australia argued that the penalties 'are not high enough as they are unlikely to be sufficient deterrents for large businesses and in most cases they have fallen short of the real cost of repairing the damage caused'.¹³³

7.97 ANEDO noted a number of successful enforcement actions that have been undertaken under the EPBC Act. It also remarked that the Commonwealth has been able to seek 'significant penalties' which are 'a critical part of deterrence in any enforcement and compliance regime'.¹³⁴ Nevertheless, they suggested that resources for enforcement need to be increased.¹³⁵

7.98 In terms of enforcement, several submissions also called for enhanced third party enforcement provisions in threatened species legislation.¹³⁶ For example, ANEDO claimed that:

Threatened species laws are further subjugated in many states and territories by the absence of third party rights that enable communities to enforce laws to protect threatened species.¹³⁷

7.99 Some further suggested that the community should be able to refer possible controlled actions under the EPBC Act:

...it is up to the developer to report any significant issues on their property to do with the EPBC Act. We cannot report it as a controlled action.¹³⁸

7.100 The committee notes that, while third parties cannot formally make referrals under the EPBC Act, there is nothing to prevent members of the public from contacting the compliance and enforcement section of SEWPAC to discuss compliance issues.¹³⁹

132 Mr Matt Linnegar, NFF, *Committee Hansard*, 15 February 2013, p. 6; cf Mr Graham Tupper, ACF, *Committee Hansard*, 15 February 2013, p. 25; and see also Hawke review, recommendation 46.

133 Nature Conservation Society of South Australia, *Submission 150*, p. 4.

134 ANEDO, *Submission 137*, Attachment, p. 84.

135 ANEDO, *Submission 137*, p. 4.

136 The Colong Foundation for Wilderness, *Submission 43*, p. 2; see also ACF, *Submission 147*, p. 6; Mr Brendan Sydes, ANEDO, *Committee Hansard*, 15 February 2013, p. 49.

137 Ms Rachel Walmsley, ANEDO, *Committee Hansard*, 15 February 2013, p. 44.

138 Ms Petrina Maizey, Gold Coast and Hinterland Environment Council and Save Bahrs Scrub Alliance, *Committee Hansard*, 22 February 2013, p. 15; see also Port Campbell Community Group, *Submission 31*, pp 2 and 5; and ANEDO, *Submission 137*, Attachment, p. 83.

139 See SEWPAC, *Report a breach of the EPBC Act*, at: <http://www.environment.gov.au/epbc/breach.html> (accessed 5 April 2013).

7.101 Another suggestion was that there needs to be greater monitoring and enforcement of conditions on approvals.¹⁴⁰ For example, Mr Jeremy Tager argued that:

Unfortunately, there is little oversight and certainly no audit of the extent to which conditions imposed on developments have any beneficial outcomes or have prevented the harms they were intended to prevent.¹⁴¹

7.102 He was also concerned that:

...conditions of approval are increasingly requiring data and information that should have been part of the initial assessment and decision process and not a condition of approval. This includes critical data on both species and habitats. The notion that this information can be deferred until after approval is given assumes that all the impacts are manageable.

It also means that less and less work is being done to determine whether a development should proceed. The process becomes one of 'how' not whether a development can proceed.¹⁴²

7.103 In this context, several submissions raised the issue of the approval of the Paradise Dam in Queensland. One of the conditions of the approval under the EPBC Act was the construction of a fish transfer device 'suitable' for lungfish (which are listed as 'vulnerable' under the EPBC Act). It was alleged that during flood events, large numbers of lungfish have been killed or injured on the spillway installed on the dam.¹⁴³ It was also reported that the fishways have not been operational since damage was incurred during recent flood events. As a result, concerns were raised at whether the fish transfer device is 'suitable' as per the conditions of approval.¹⁴⁴ Mr Tager was concerned that SEWPAC nevertheless considers that the conditions of approval have been met.¹⁴⁵ He argued that this case 'demonstrates serious problems with conditions imposed on approvals', and that :

The conditions imposed on the proponents were to build infrastructure that was designed to protect the lungfish. Once the building has been done, the Department takes no responsibility for how and when or even if it operates. There is virtually no public enforcement right in the EPBC Act for

140 Clarence Valley Conservation Coalition, *Submission 38*, p. 6; Mr Jeremy Tager, *Submission 89*, p. 2; Greater Mary Association, *Submission 104*, p. 4; Mary River Catchment Coordinating Committee, *Submission 115*, p. 5; Batwatch Australia, *Submission 139*, p. 10.

141 Mr Jeremy Tager, *Submission 89*, p. 2.

142 Mr Jeremy Tager, *Submission 89*, p. 2.

143 Mr Roger Currie, Wide Bay Burnett Environment Council, *Committee Hansard*, 22 February 2013, pp 13–15.

144 See further Dr Chris McGrath, *Submission 78*, pp 3–5; Mr Roger Currie, Wide Bay Burnett Environment Council, *Committee Hansard*, 22 February 2013, p. 13; Mr Jeremy Tager, *Submission 89*, pp 2–3 and *Supplementary Submission 89*.

145 Mr Jeremy Tager, *Supplementary Submission 89*, p. 1.

conditions imposed nor is there an obligation in the Act that conditions imposed are effective in meeting their objectives.¹⁴⁶

7.104 He suggested that the EPBC Act be amended so that conditions imposed on approvals clearly state the purposes and objectives of the conditions.¹⁴⁷

7.105 AFMA also submitted that in relation to conditions on approvals relating to Commonwealth fisheries:

It should be noted that it is the activity that is subject to the EPBC Act and not the government regulator (e.g. AFMA). However, EPBC Act conditions are often written so as to place conditions on the regulator rather than on the activity which is a legally unsound approach.¹⁴⁸

Overlap and duplication in fisheries

7.106 The committee notes that AFMA raised the issue of overlap and duplication between fisheries management and assessment functions conducted by SEWPAC and AFMA. It argued that this overlaps 'creates considerable inefficiency and uncertainty for both governments and stakeholders, particularly the Australian fishing industry'.¹⁴⁹

7.107 AFMA explained that Commonwealth-managed fisheries are covered by separate assessments under Part 10, Part 13 and Part 13A and that 'all of these assessments consider the effect of fisheries on the marine environment, protected species and communities and the ability of fisheries management to minimise the risk of unacceptable impacts':

Moreover, individual species within those fisheries are separately assessed through nomination as threatened species or the method of fishing as a Key Threatening Process (KTP). The potential for duplication and/or inconsistency in decision making is obvious. The subsequent listings of Southern Bluefin Tuna and Patagonian Toothfish under the EPBC Act when they are the sole or predominant species in fisheries that had previously passed strategic assessment under a different part of the EPBC Act are examples of the perceived inconsistencies of the EPBC Act processes.¹⁵⁰

7.108 AFMA submitted that this 'multilayered approval process' should be replaced 'with a single environmental approval process for each fishery'.¹⁵¹

7.109 The committee notes that this issue was addressed in the Hawke review, which recommended that the EPBC Act be amended so that 'the fisheries provisions under Parts 10, 13 and 13A are streamlined into a single strategic assessment

146 Mr Jeremy Tager, *Supplementary Submission 89*, p. 1.

147 Mr Jeremy Tager, *Supplementary Submission 89*, p. 2.

148 AFMA, *Submission 148*, p. 7.

149 AFMA, *Submission 148*, pp 1–2 and also p. 6.

150 AFMA, *Submission 148*, Attachment 2, p. 1.

151 AFMA, *Submission 148*, p. 6.

framework for Commonwealth and State and Territory-managed fisheries to deliver a single assessment and approval framework'.¹⁵² This was agreed to in principle in the Commonwealth government response to the Hawke review.¹⁵³

7.110 AFMA observed that there has been 'apparent inconsistency' in dealing with threats to Australian sea lions from gillnet fishing across Commonwealth and state jurisdictions—noting that conditions imposed on South Australian and Western Australian fisheries are less stringent than the requirements imposed on the Commonwealth-managed fisheries.¹⁵⁴

Committee view

7.111 The committee acknowledges the evidence that threatened species laws in all jurisdictions need to be reviewed. The committee considers that there is merit in the Australian Law Reform Commission undertaking a full review of threatened species laws in all jurisdictions, particularly in order to ensure consistency across jurisdictions and remove bureaucratic obstacles to their successful implementation.

Recommendation 36

7.112 The committee recommends that the Australian Law Reform Commission conduct a review of threatened species laws to ensure effective, comprehensive and consistent protections are in place across all jurisdictions.

7.113 The committee recognises that effective protection of threatened species and ecological communities requires close collaboration between Commonwealth, state and territory governments. The committee acknowledges that support was expressed for the work of state and territory governments in on-ground conservation work relating to threatened species and ecological communities. At the same time, the committee notes the concerns raised about recent proposals in some states, for example, relating to national parks management, and proposed reforms to state vegetation clearing legislation.

7.114 The committee acknowledges the department's evidence that it continues to foster partnerships with the states and territories in order to effectively deliver measures for the protection of threatened species and ecological communities, including, for example, through strategic assessments, coordinating listing assessments, recovery plan development and implementation and delivery of programs such as Caring for our Country.

7.115 The committee notes concerns about the potential impacts of forestry operations on some threatened species, but does not consider that the RFA exemption needs to be removed from the EPBC Act. Rather, the government should ensure that it continues to work with state governments to improve the review, audit and monitoring

152 Hawke review, recommendation 40.

153 Australian Government, *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, August 2011, p. 73.

154 AFMA, *Submission 148*, p. 7 and Attachment 3.

arrangements for RFAs, with a view to ensuring that forestry operations avoid impacts on threatened species and ecological communities.

Recommendation 37

7.116 The committee recommends that the Commonwealth government continues to work with state governments to improve the review, audit and monitoring arrangements for Regional Forest Agreements, with a view to ensuring that forestry operations avoid impacts on threatened species and ecological communities.

7.117 The committee welcomes the increased use of strategic assessments under the EPBC Act, and recognises the potential for strategic assessments to deal with cumulative impacts on threatened species and ecological communities. Nevertheless the committee acknowledges some of the concerns with the strategic assessments that have been undertaken to date but believes there are benefits to the greater level of certainty strategic assessments can provide all stakeholders.

7.118 The committee suggests that SEWPAC conduct a review of those strategic assessments undertaken under the EPBC Act to date with a view to improving the process in the future.

Recommendation 38

7.119 The committee recommends that the Department of Sustainability, Environment, Water, Population and Communities conduct a review of those strategic assessments undertaken under the *Environment Protection and Biodiversity Conservation Act 1999* to date with a view to improving the process in the future. The committee recommends that this review be publicly released.

7.120 In relation to the use of offsets, particularly under the EPBC Act, the committee welcomes SEWPAC's publication of a formal policy guiding the use of offsets under the EPBC Act. The committee acknowledges the department's evidence that it is designed to improve transparency around how suitable offsets are determined.

7.121 However, the committee considers that offsets should be used with great caution where threatened species and ecological communities are involved.

7.122 The committee notes with concern that SEWPAC is only now reviewing offsets that have been granted in the past. The committee recommends that an audit be conducted of those offsets granted under the EPBC Act to date and their effectiveness. This audit should evaluate and assess the impacts of those offsets on threatened species and ecological communities.

Recommendation 39

7.123 The committee recommends that the Department of Sustainability, Environment, Water, Population and Communities conduct an audit and evaluation of the offsets granted under the *Environment Protection and Biodiversity Conservation Act 1999* to date, and make the results of this audit publicly available.

7.124 The committee notes concerns about proposals to introduce cost recovery mechanisms under the EPBC Act, but is reassured by the evidence from SEWPAC that small businesses will be exempt from cost recovery mechanisms. While the committee supports the principles of cost recovery, the committee expects that the legislation containing the proposed amendments will be subject to close scrutiny when introduced into Parliament, including by this committee (or its successors). In particular, the committee notes that cost recovery measures could compound concerns about so-called 'green tape'. In particular, there is a need to ensure that the potential to pass on costs in this area won't lead to excessive costs and deter both investment and/or referrals. The committee therefore suggests that the Department of Sustainability, Environment, Water, Population and Communities engage in extensive consultation with affected stakeholders prior to the introduction of amendments to the EPBC Act to establish cost recovery mechanisms for environmental assessment processes.

Recommendation 40

7.125 The committee recommends that the Department of Sustainability, Environment, Water, Population and Communities engage in extensive consultation with affected stakeholders prior to the introduction of amendments to the *Environment Protection and Biodiversity Conservation Act 1999* to establish cost recovery mechanisms for environmental assessment processes.

7.126 The committee notes concerns about the level of resourcing for compliance and enforcement under the EPBC Act. In particular, the committee notes the evidence raising concerns about monitoring and enforcement of conditions on approvals under the EPBC Act, especially where they relate to threatened species and ecological communities. The committee recommends that the minister and SEWPAC ensure that conditions on approvals under the EPBC Act are kept as straightforward as possible and worded clearly to ensure that conditions are enforceable.

Recommendation 41

7.127 The committee recommends that the minister and the Department of Sustainability, Environment, Water, Population and Communities ensure that conditions on approvals under the *Environment Protection and Biodiversity Conservation Act 1999* are kept as straightforward as possible and worded clearly to ensure that conditions are enforceable.

Recommendation 42

7.128 The committee recommends that the Commonwealth government develop a new compliance strategy in consultation with the states for monitoring and compliance activities relating to the *Environment Protection and Biodiversity Conservation Act 1999*.

7.129 The committee further notes that the Australian National Audit Office's (ANAO) Audit Work Program for this year lists 'Compliance with EPBC Act Approval Conditions' as a potential audit.¹⁵⁵ In light of concerns received during this inquiry, the committee recommends that the ANAO pursue this audit.

Recommendation 43

7.130 The committee recommends that the Australian National Audit Office conduct an audit of monitoring of compliance with approval conditions under the *Environment Protection and Biodiversity Conservation Act 1999*.

7.131 In relation to the concerns raised by the Australian Fisheries Management Authority, about the overlap and duplication in Commonwealth fisheries, the committee notes that the Hawke review made recommendations to address this issue, which have been accepted by the government. The committee recommends that amendments to the EPBC Act implement these recommendations are introduced into parliament as soon as possible.

Recommendation 44

7.132 The committee recommends that the *Environment Protection and Biodiversity Conservation Act 1999* be amended so that 'the fisheries provisions under Parts 10, 13 and 13A are streamlined into a single strategic assessment framework for Commonwealth and State and Territory-managed fisheries to deliver a single assessment and approval framework' subject to the objects of the *Environment Protection and Biodiversity Conservation Act 1999* being upheld.

**Senator Simon Birmingham
Chair**