

# Chapter 5

## Threatened Species and Ecological Communities

### Current law

5.1 To date, the Act has been working to ensure the protection of threatened species and ecological communities throughout the Commonwealth.

5.2 Since the Act has been in operation, nearly 200 species, communities and processes have been included on the lists of threatened species, ecological communities and key threatening processes. Over 250 listed threatened species recovery plans and 50 Ramsar management plans are in place, and over 15,000 wildlife trade permits have been issued.<sup>1</sup> In any Commonwealth area a permit is required to kill, injure, take, keep or move a member of a listed threatened species, threatened ecological community, migratory species or marine species.<sup>2</sup>

### *Plants and wildlife*

5.3 International movement of wildlife and wildlife products is regulated under part 13A of the Act (except cetaceans which are regulated under sections 232A and 232B of part 13).<sup>3</sup> The Act currently regulates the:

- export of Australian native species other than those identified as exempt;
- export and import of all species that are recognised internationally as endangered or likely to become so if trade is not strictly regulated;
- import of species identified by other countries who are members of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973) (known as CITES) as requiring international cooperation to regulate their trade; and
- import of live plants and animals that, if they became established in Australia, could adversely affect native species or their habitats.<sup>4</sup>

5.4 Plants or animals included on the list of exempt native specimens do not require a permit under part 13A of the Act for the export of the native plant or animal, or a specimen derived from the native plant or animal. If the plant or animal is not

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1 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 2.

2 WWF, *Environment Protection and Biodiversity Conservation Act – User's Guide*, p. 34.

3 Commonwealth Department of the Environment and Heritage, *Wildlife trade and conservation*, <http://www.deh.gov.au/biodiversity/trade-use/> (accessed on 30 October 2006).

4 Commonwealth Department of the Environment and Heritage, *Wildlife trade and conservation*, <http://www.deh.gov.au/biodiversity/trade-use/> (accessed on 30 October 2006).

included on this list, then a permit is required before exportation can take place. Commercial export of regulated wildlife and wildlife products may occur only where the specimens have been derived from an approved source (captive breeding program, artificial propagation program, aquaculture program, wildlife trade management operation, or wildlife management plan).

5.5 The list of CITES specimens contains all species included in Appendices I, II and III of the Convention of International Trade in Endangered Species of Wild Fauna and Flora (1973) (CITES).<sup>5</sup> Generally, a permit is required to import or export a member of a species that is included on the list, or a specimen derived from a member of a species on the list.<sup>6</sup>

5.6 The import of CITES listed specimens for commercial purposes must be from an approved commercial import program or approved captive source and is subject to specific conditions (section 303CH) related to the particular appendix on which the specimen is listed. Specific conditions (section 303CH) also apply to the commercial export of CITES listed species.<sup>7</sup>

5.7 Regulated wildlife may also be exported or imported if it is for an eligible non-commercial purpose. Eligible non-commercial purposes include research, education, exhibition, conservation breeding or propagation, a household pet, a personal item or for a travelling exhibition.<sup>8</sup>

5.8 The list of specimens suitable for live import regulates the importation of live plants and animals from outside of Australia.<sup>9</sup> Specimens fall into one of two categories:

- unregulated specimens; and
- allowable regulated specimens.

5.9 Generally, a wildlife trade permit is required for the importation of allowable regulated specimens (subsection 303EN(3)). Unregulated specimens can be imported without a permit. Live specimens that are not included on the list in either of the categories are prohibited from being imported. However, a person may apply to the Minister to amend the list of specimens suitable for live import.

5.10 The Act stipulates that wildlife conservation plans outline the actions that are required to support the continued survival of the relevant species. More particularly,

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5 *Environment Protection and Biodiversity Conservation Act 1999*, subsection 303CA(3).

6 *Environment Protection and Biodiversity Conservation Act 1999*, section 303CG.

7 Commonwealth Department of the Environment and Heritage, *Wildlife trade and conservation*, <http://www.deh.gov.au/biodiversity/trade-use/> (accessed on 30 October 2006).

8 Commonwealth Department of the Environment and Heritage, *Wildlife trade and conservation*, <http://www.deh.gov.au/biodiversity/trade-use/> (accessed on 30 October 2006).

9 *Environment Protection and Biodiversity Conservation Act 1999*, section 303EB.

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they must outline the actions that are necessary to protect the relevant species, identify habitats of the species and specify the actions needed to protect those habitats.

### ***Fisheries***

5.11 Since the Act's inception, over 120 fisheries have been assessed and associated accreditations and declarations made by the Commonwealth.<sup>10</sup>

5.12 A 'Commonwealth marine area' is defined in section 24 of the Act. Marine protected areas are marine areas which are recognised as having conservation value. The Commonwealth marine environment is a matter of national environmental significance under the Act. This includes:

- activities taken in a Commonwealth marine area that are likely to have a significant impact on the environment;<sup>11</sup>
- activities taken outside a Commonwealth marine area that are likely to have a significant impact on the environment in a Commonwealth marine area;<sup>12</sup> and
- fishing in a Commonwealth managed fishery that is likely to have a significant impact on the environment.<sup>13</sup>

5.13 The Commonwealth marine area is the area between three nautical miles and 200 nautical miles from the low water mark of the Australian coast or the edge of the continental shelf (whichever is further).<sup>14</sup>

5.14 Waters less than three nautical miles from the low water mark are considered state or territory waters. However, even if an action is taken within state or territory waters a referral must still be made under the Act if that action may have a significant impact on the environment in Commonwealth waters.<sup>15</sup>

### **Rationale for change**

5.15 Along with the need to streamline existing processes under current legislation, it has been recognised that there is a need to address difficulties in accrediting or

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10 Second Reading Speech, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 3.

11 *Environment Protection and Biodiversity Conservation Act 1999*, subsection 23(1).

12 *Environment Protection and Biodiversity Conservation Act 1999*, subsection 23(2).

13 *Environment Protection and Biodiversity Conservation Act 1999*, subsection 23(3).

14 WWF – The EPBC Project, *The Commonwealth Marine Environment*, [http://www.epbc.com.au/commonwealth\\_marine\\_environment.htm](http://www.epbc.com.au/commonwealth_marine_environment.htm) (accessed 30 October 2006).

15 WWF – The EPBC Project, *The Commonwealth Marine Environment*, [http://www.epbc.com.au/commonwealth\\_marine\\_environment.htm](http://www.epbc.com.au/commonwealth_marine_environment.htm) (accessed 30 October 2006).

recognising fisheries managed under the *Torres Strait Fisheries Act 1984* and the *Fisheries Management Act 1992*.<sup>16</sup>

5.16 A need to strengthen compliance with and enforcement of the Act has also been identified, resulting in the various provisions of the bill relating to the protection of threatened species and ecological communities.<sup>17</sup>

5.17 According to the explanatory memorandum, benefits resulting from the proposed amendments to the Act's wildlife trade provisions will include:

- simplified and streamlined wildlife import provisions and less onerous approval mechanisms for some wildlife exports;
- more effective enforcement through provision for conditions to continue to apply after expiry of import/export permit; and
- more efficient administration and greater certainty through resolution of definitional and technical uncertainty and problems.<sup>18</sup>

5.18 According to the explanatory memorandum, benefits resulting from the proposed amendments to the Act's fisheries provisions will include:

- reduced duplication in regulatory requirements for fisheries through broader capacity to accredit Australian Government and state and territory fishery management arrangements;
- clarification of arrangements for assessment and review of fisheries management accreditations;
- clarification of the application and scope of exemptions; and
- more efficient administration and greater certainty through resolution of definitional and technical uncertainty and problems.<sup>19</sup>

### **Changes proposed by the bill**

5.19 The bill changes the listing processes for threatened species, ecological communities and key threatening processes. Broadly, the amendments aim to 'streamline' the nominations process and, according to the explanatory memorandum,

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16 Second Reading Speech, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 4.

17 Second Reading Speech, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 4.

18 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 12.

19 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 12.

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enable a 'better focus' on protecting threatened species and ecological communities that are of 'real national importance'.<sup>20</sup>

5.20 The bill inserts a new subdivision AA which amends the process for listing threatened species, ecological communities and key threatening processes (at Item 368).

5.21 The key changes to the listing process include the ability for the Minister to determine conservation themes (new section 194D), and the dedicated period in which nominations may be submitted (new section 194E). These could include groups of particular plants, animals and/or geographic regions.<sup>21</sup>

5.22 In relation to protected species, the following are benefits that are expected to flow from the changes to the protected species provisions (as outlined in the explanatory memorandum):

- improved effectiveness of listing procedures and recovery planning for threatened species and ecological communities by allowing for a strategic approach, prioritisation of listings and a stronger focus on conservation outcomes;
- provision for listing of commercially fished species with reduced impact on existing export fisheries;
- simplification of cetacean permit provisions resulting in greater consistency in regulatory requirements and reduced timeframes for decision-making;
- provision for non-disclosure of sensitive information in recovery documents that may jeopardise the survival of a species;
- streamlined reporting requirements for fisheries impacting on protected species; and
- more efficient administration and greater certainty through resolution of definitional and technical uncertainty and problems.<sup>22</sup>

### ***State and territory lists***

5.23 At Item 359, the bill repeals section 185 of the Act. The repeal of section 185 removes the requirement for the Scientific Committee to assess the threatened ecological communities listed on the state and territory lists gazetted in November 2001.

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20 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 2.

21 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 46.

22 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 11.

5.24 The bill repeals the current public nomination process provided for in section 191 of the Act and replaces it with a new annual process for thematic nominations (new section 194D).

### *Nominations*

5.25 The annual theme for nominations is determined by the Minister and could include the conservation of particular groups of species, particular species or particular regions of Australia (new subsection 194D(2)).

5.26 New section 194G requires the Threatened Species Scientific Committee to consider the nominations received (having regard to the Minister's conservation themes) and prepare, for the Minister's consideration, a priority assessment list. This list must be provided to the Minister within 40 business days. The Minister may make changes to the proposed list within 20 days, including omitting an item (new section 194K), before making a finalised priority assessment list.

5.27 The Scientific Committee may add things to the priority assessment list that it considers appropriate or that itself wishes to nominate.<sup>23</sup>

5.28 The bill introduces new section 189B which requires members of the Scientific Committee not to disclose an assessment or information used to make an assessment, of any proposed amendments to lists of threatened species (section 178), lists of threatened ecological communities (section 181) and lists of key threatening processes (section 183), until:

- such an amendment has been registered under division 3 of part 4 of the *Legislative Instruments Act 2003*; or
- the Minister decides not to include the item in the lists; or
- the Minister decides to remove an item from the lists.<sup>24</sup>

5.29 The Minister can give permission for the Scientific Committee to disclose particular information to particular persons. If the Minister does not exercise his or her discretion then the Scientific Committee assessments and advice remain confidential until a listing is made.

5.30 Under new subsection 194F(3), the Minister may reject a nomination from the Scientific Committee if the nomination is 'vexatious, frivolous or not made in good faith' or not made in the manner and form specified by the regulations.

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23 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 47.

24 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 46.

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## Comments and concerns

5.31 A number of witnesses, including the International Fund for Animal Welfare (IFAW), expressed concern about the process for listing threatened species, ecological communities and key threatening processes as proposed in the bill.<sup>25</sup>

5.32 The Australian Network of Environmental Defenders' Offices (ANEDO), Humane Society International (HSI), the Tasmanian Conservation Trust (TCT) and WWF-Australia (WWF) were concerned that the repeal of section 185 'wipes the assessment of 500 threatened ecological communities from consideration by the Scientific Community'.<sup>26</sup>

5.33 Section 185 was designed to provide a strategic framework for the Scientific Committee to consider all the ecological communities that received protection under State and Territory legislation for their appropriate national protection under the EPBC Act.<sup>27</sup>

5.34 ANEDO highlighted the extensive time and funding that environment and community groups have put into making nominations under the Act that are yet to be assessed and finalised. In relation to the new process ANEDO argued:

The new process provides no assurance that any of these nominations will now be assessed for protection. DEH [Department of the Environment and Heritage] has failed to process section 185 and many public nominations under section 191 to date, despite obligations to do so. The removal of obligations to process and assess nominations is a serious flaw in the bill.<sup>28</sup>

5.35 HSI, TCT and WWF-Australia said that HSI alone currently has nominations for 23 ecological communities, four threatened species and three key threatening processes outstanding under the current assessment system.

When we submitted these nominations we did so in good faith on the understanding that their consideration would be through an objective scientific process according to statutory deadlines. If these amendments are passed our nominations may never be incorporated into the Minister's priority lists and the obligation for them to be assessed can ultimately be removed altogether.<sup>29</sup>

5.36 Mr Peter Andren MP did not support the changes and argued:

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25 *Submission 26*, p. 1; Humane Society International, WWF Australia, Tasmanian Conservation Trust, *Submission 66*, p. 18.

26 Australian Network of Environmental Defenders Offices, *Submission 17*, p. 9.

27 Humane Society International, WWF Australia, Tasmanian Conservation Trust, *Submission 66*, p. 18.

28 *Submission 17*, p. 9.

29 *Submission 66*, p. 19.

It is inexcusable that this bill determines the Minister no longer must keep the lists of threatened species and ecological communities up-to-date.<sup>30</sup>

5.37 HSI, TCT and WWF-Australia said that the repeal of section 185 could lead to a 'slower rate of new threatened species being added under the EPBC ACT'.<sup>31</sup>

5.38 As WWF-Australia stated at the committee hearings:

At a general level, the repeal of section 185 has the potential to wipe out around 500 threatened ecological community nominations that were originally gazetted by Minister Hill and that are currently under consideration. That section was strongly supported by WWF, and Michael Kennedy, when he appears before you, will reinforce that for HSI. That to me is one of the critical aspects of this bill. It really is like removing the key provision that seeks to keep the threatened species list up to date. That was its whole purpose. Section 185 enabled the Threatened Species Scientific Committee to review other state and territory lists and basically pull out those that were deemed to be nationally threatened and then place them on the national threatened species or ecological communities lists. From our point of view, the repeal of that section is very disappointing.<sup>32</sup>

5.39 The Australian Marine Conservation Society said:

The bill should not allow the Minister to remove altogether already submitted public nominations for the listing of threatened species, ecological communities...<sup>33</sup>

5.40 Concerns were also raised regarding subsection 194D(2) and the implementation of annual nomination themes which it was argued do not provide a definitive list of criteria. Some groups questioned what factors would be taken into account apart from the conservation status of the species or communities.

5.41 Concerns were raised about the streamlining provisions of the bill in regards to the introduction of themes, with the National Parks Australia Council stating:

That is the difficulty with this bill. It is saying that it is streamlining things and yet, in effect, by declaring a theme it is creating a huge workload in that there would be a constant stream of people on the doorstep saying: 'Look, we have found this thing. We actually need it declared now.' Of course, they would be very urgent because you would already have the ditch digger on site. We do not think it will streamline it.<sup>34</sup>

5.42 The Australian Conservation Foundation stated that:

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30 *Submission 59*, p. 6.

31 *Submission 66*, p. 20.

32 Mr Andreas Glanznig, *Committee Hansard*, 3 November 2006, p. 34.

33 *Submission 40*, p. 1.

34 Ms Christine Goonrey, *Committee Hansard*, 6 November 2006, p. 15.

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The identification of a theme for a year indicates a clear intent to deprioritise the species that do not fall under that theme, and in fact to delay the consideration of those nominations. That is my understanding.<sup>35</sup>

5.43 There were also concerns raised about the ease of the community to engage in the listing process:

If you had a thematic structure we would not be able to engage the process if the theme was not, say, invasive species. Yes, we could go down an advocacy route; we could go down, in a sense, the politicised route of engaging ministers' offices and the department and so on. But, to me, that it is an inferior way of proceeding with this sort of priority, given that you have an existing, science based process that invites any public nomination of a potentially threatened species or community or a key threatening process. That is basically why WWF is supporting the status quo in relation to listings.<sup>36</sup>

5.44 While some witnesses felt the new listing process would make the system more political, others argued to the contrary:

The amendments will also provide for a more strategic approach for listing threatened species, ecological communities and heritage places, through an annual program based on the importance of nominations and listing proposals rather than the current as hoc approach. We support what has the potential to become a more objective, less politicised listing process.<sup>37</sup>

5.45 In looking overall at the issues that were expressed by the majority of concerned parties in relation to the thematic nominations process, they mainly appeared to relate to the use of ministerial discretion, and the loss of existing nominations from the list.

5.46 In response to these concerns the Law Council of Australia provided the following clarifications:

The thematic approach appears to be reasonable considering the objects of the Act. The objects of the Act are to assess and improve actions which are likely to have a significant impact on:

The commonwealth marine area;

World heritage properties;

Ramsar wetlands of international importance;

Internationally threatened species and ecological communities;

Internationally protected migratory species.

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35 Mr Charles Berger, *Committee Hansard*, 3 November 2006, p. 31.

36 Mr Andreas Glanznig, WWF, *Committee Hansard*, 3 November 2006, p. 38.

37 National Farmers' Federation, *Submission 64*, p. 2.

Without being an environmental scientist the thematic approach appears to be in accordance with the objects of the Act.

In terms of themes and the 500 or so listings that are currently waiting for approval and may not fit into this approach they are catered for by the savings and transitional provisions (Schedule 2 Part 7), which deem them to meet the requirements of the new Act depending on where they are up to in the system. For example if there has been a nomination they are treated as though nominated during the first period called for nominations (ie even if theme declared the intention is they would be included). The nominations can only be rejected if they are not in good faith, frivolous or vexatious (same as current provisions 191 and 341E) or do not comply with new regs.<sup>38</sup>

5.47 Another group in support of the thematic listing process was the Minerals Council of Australia, who said that:

Our members did consider this and were supportive of the proposed shift towards a thematic listing process, where things are considered more in terms of a landscape function and where they are looked at as a whole rather than as a piecemeal listing process. One comment that has been made is that the current process could be seen, and has in the past been seen, as stamp collecting.<sup>39</sup>

5.48 The Department of the Environment and Heritage also clarified the fact that the thematic process should be no impediment to nominations falling outside of the annual themes process:

There are a number of aspects. First of all the capacity of the Minister to establish themes is not mandatory, so he may or may not establish themes. As I pointed out earlier, there currently is provision in the existing legislation for themes on heritage places and he has not chosen to actually use that provision, neither did the previous Minister. So there is no guarantee that it is really providing an opportunity for the Minister to establish themes. The second thing is even if the Minister does establish themes, then that is obviously a priority that the threatened species committee or the Heritage Council will look at, but it is not an impediment. It is not saying that if you put up a valid and really good nomination that is outside that theme, that cannot be picked up in the list. The other consideration is that there is nothing in the legislation that says that if someone pops up a really good nomination, whether it is threatened species or heritage, quite outside the annual cycle after the nominations have closed, that they cannot be considered as well. Really this is a facilitating mechanism not a prohibition.<sup>40</sup>

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38 Mrs Maureen Peatman, Law Council of Australia, answers to questions on notice, 14 November 2006.

39 Mr Cormac Farrell, *Committee Hansard*, 6 November 2006, p. 7.

40 Mr Gerard Early, Department of the Environment and Heritage, *Committee Hansard*, 6 November 2006, p. 62.

5.49 Some of the other concerns raised about the proposed changes were:

- the public are only invited to comment on the finalised list and so the public will not necessarily know what the Scientific Committee recommended as priorities for assessment that the Minister omitted from the final list (under new section 194K; note that new section 189B gives the Minister the discretion to allow the Scientific Committee assessments to be made public);<sup>41</sup>
- the Scientific Committee will only consider comments that related to eligibility for inclusion of an item on the list and the effect of including the item in the list on the survival of the species or community concerned;<sup>42</sup> and
- the priority list is not a legislative instrument and therefore not disallowable by parliament.<sup>43</sup>

5.50 Humane Society International (HSI), the Tasmanian Conservation Trust (TCT) and WWF-Australia argued that the current process was 'objective and scientifically determined' and that the changes meant that:

...the Minister will now have broad arbitrary discretion to decide what can and cannot be assessed for listing and protection under the EPBC Act. The amendments open the way for the listing process to become highly and...[e]nactment of these amendments will be a major retreat from what is national and international best practice.<sup>44</sup>

5.51 Others put forward arguments that:

- the amendments would 'significantly limit the public and scientific involvement in the listing of species';<sup>45</sup>
- the changes would make it more difficult for members of the public to secure legal protection under the Act for threatened species and ecological communities;<sup>46</sup>
- that 'the more controversial species' (such as those that are used on a commercial basis) were unlikely to qualify thematically.<sup>47</sup> ANEDO

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41 Humane Society International, Tasmanian Conservation Trust and WWF-Australia, *Submission 66*, p. 19; ANEDO, *Submission 17*, p. 11.

42 Law Council of Australia, *Submission 37*, p. 3.

43 ANEDO, *Submission 17*, p. 11.

44 *Submission 66*, p. 18.

45 ANEDO, *Submission 17*, p. 10.

46 IFAW, *Submission 26*, p. 2.

47 ANEDO, *Submission 17*, p. 10; IFAW, *Submission 26*, p. 2.

submitted that nomination and listing must be based on conservation status only;<sup>48</sup>

- if the new process comes into effect, it is not clear what happens to nominations of a species that is not related to a theme;<sup>49</sup>
- there is no public consultation on the proposed list;<sup>50</sup>
- the Minister may have regard to any matter that the Minister considers appropriate in reaching a decision;<sup>51</sup> and
- the Minister can refuse to allow a previously rejected nomination to be reassessed by the Scientific Committee, even if its conservation status has declined further since the initial assessment.<sup>52</sup>

5.52 In response to concerns expressed regarding the Minister's discretion regarding the listing of threatened species, consideration of nominations for the list and removal of species from the list, the Department explained:

The proposed amendments to the listing process for threatened species are designed to address the problems being experienced as a result of the ad hoc nature of the current process. At the moment, nominations are dealt with as they are submitted, regardless of merit and regardless of whether other species should be accorded greater priority. This means valuable resources from both the Department and the Threatened Species Scientific Committee may be tied up dealing with nominations that have little merit, or do not deserve priority attention or, if successful, would result in little conservation benefit. That is neither a sensible nor optimal way to develop a list of our most threatened and priceless species.

Under the proposed amendments, the Threatened Species Scientific Committee will be asked to identify which nominations are best placed within a strategic framework and will provide that advice to the Minister. This will allow the Minister, on the basis of expert advice, to ensure that efforts are focused on the most important issues. It will also ensure that the highest priority tasks are undertaken in the context of a well planned and manageable work programme.

While decisions on these matters are made by the Minister, the EPBC Act will require, as currently, that the Minister obtains and considers advice from the Threatened Species Scientific Committee.<sup>53</sup>

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48 ANEDO, *Submission 17*, p. 10.

49 ANEDO, *Submission 17*, p. 10.

50 Law Council of Australia, *Submission 37*, p. 2.

51 Law Council of Australia, *Submission 37*, p. 2.

52 IAFW, *Submission 26*, p. 2; ANEDO, *Submission 17*, p. 10.

53 Department of the Environment and Heritage, answers to questions on notice, 10 November 2006.

5.53 There was support offered for the permit provisions contained in the bill: As IFAW Asia Pacific stated:

IFAW does support and welcome amendments (subsection 303CG(2A)) that would provide certain permit conditions related to the import and export of wildlife to continue to have effect after the permit has expired – usually 6 months. This would help to ensure that conservation and animal welfare conditions extend for the life of the animal and its progeny.<sup>54</sup>

5.54 The Law Council of Australia argued that the documentation before the Scientific Committee should be available to the public. It argued further:

...this secrecy is unnecessary and may prevent the Scientific Committee from receiving information or advice which may impact on its decision to list a species or an ecological community.<sup>55</sup>

5.55 In the event that the Scientific Committee were to make 'politically unfavourable listing recommendations', HSI, TCT and WWF-Australia pointed out that the Scientific Committee is prohibited from making this advice public.

5.56 The Law Council of Australia thought that the information should be available to the public under the *Freedom of Information Act 1982* because of potential benefits to the Government of having scientific or local knowledge data from the public placed before the Scientific Committee.<sup>56</sup> As currently drafted, ANEDO said that the amendments are likely to frustrate freedom of information applications and undermine the transparency of the legislation.<sup>57</sup>

5.57 It is important however, that concerns about the amendments contained in the bill are kept in perspective. As was pointed out during the committee hearings:

The perspective needs to be kept at all times that this act does not stand alone. It is not the only threatened species legislation that we have in this country. Most of it is dealt with at the state level, which is why you have the referral provisions; the federal government refers it off to the state in the first instance and then it comes back.<sup>58</sup>

5.58 The Department provided a response to concerns expressed over the removal of the requirement for Recovery Plans for listed threatened species. It was stated by the Department that:

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54 *Submission 26*, p.2.

55 *Submission 37*, p. 3.

56 *Submission 37*, p. 3.

57 *Submission 17*, p. 12.

58 Mrs Maureen Peatman, Law Council of Australia, *Committee Hansard*, 6 November 2006, p. 20.

The proposed removal of the mandatory requirement for recovery plans for all listed threatened species will not impact adversely on the actual recovery in nature of any threatened species or ecological community.

Experience has shown that, for many species, the development of recovery plans is an expensive, time consuming and overly bureaucratic process without benefits commensurate to the effort expended to develop them. The current onerous statutory requirements are arguably skewing the Australian Government's expenditure on threatened species too far towards planning, relative to actual implementation of recovery action. Plans are often too focussed on filling research or knowledge gaps rather than identifying recovery actions or providing information to support statutory decision-making.

This problem with the current process has been recognised by the Threatened Species Scientific Committee. With the approval of the Minister, the Committee has over the past year or so been providing short pragmatic conservation advice at the time of recommending listings to the Minister. This conservation advice, which is made publicly available, sets out the main factors associated with the species' threatened status and information about appropriate recovery action. The advice can be fed directly into regional natural resource management plans and investment strategies, rather than waiting for the development of a recovery plan.

The proposed amendments recognise the success of the new approach and require approved conservation advice to be provided for all listed threatened species and ecological communities at the time of listing.

The proposed amendments also recognise that there will continue to be species and ecological communities that require the development of a detailed recovery plan in the traditional style. The Minister must make a decision whether or not such a recovery plan is required in relation to all listed species and ecological communities. In doing so, he is required to have regard to the independent, expert view of the Threatened Species Scientific Committee.<sup>59</sup>

## ***Fisheries***

5.59 One witness raised concerns specifically about the provisions in relation to the improbability of any future potential listing of commercial fish as protected species. As HSI pointed out:

The Minister now has a wider discretion in what he has to account for. But I should add that, when it comes to listing—and the example of commercial fish is, I guess, the best—there is a tussle going on between NGOs like mine who would like to see commercial fish put on environment lists when recognised as being endangered. That has not yet happened for a commercial fish. The industry does not want that and nor do I think does the federal government's fisheries bureaucracy. So the tussle goes on. So,

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59 Department of the Environment and Heritage, answers to questions on notice, 10 November 2006.

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when there is a nomination made for a commercial fish, what you find is that even under the current law ways are found to delay and to delay.<sup>60</sup>

5.60 However, in contrast to these concerns the Minister recently listed the first commercial fish species under the provisions of the Act. The Minister's 9 November 2006 media release stated that:

The Orange Roughy fish species will be added to the threatened species list under Australian environment law.....Orange Roughy is the first commercially harvested fish to be listed under the Environment Protection and Biodiversity Conservation Act 1999..... Orange Roughy will be listed as conservation dependent, and will be managed subject to a conservation programme to be implemented by the Australian Fisheries Management Authority (AFMA). Scientific advice to me indicated that Orange Roughy is under considerable pressure and protection under environment law is needed if the species is to have any chance of long-term survival..... The conservation programme will protect Orange Roughy from over-fishing, in part by prohibiting targeted fishing in fishing zones. Catch limits at the Cascade Plateau will be set at levels that will conserve the species – AFMA has already announced a reduction in the zone's 2007 total allowable Orange Roughy catch. My decision to add the Orange Roughy to the threatened species list follows careful consideration of the scientific information, as well as extensive consultation with experts and the public," Senator Campbell said.<sup>61</sup>

5.61 The Australian Fisheries Management Authority (AFMA) welcomed the provisions of the bill, pointing out that:

One of the changes is something that we have been seeking for sometime from the portfolio, and that is around an expansion or more flexibility in terms of the sorts of management arrangements that can be accredited under those strategic assessment provisions of the EPBC Act. Rather than just formal management plans under our Fisheries Management Act, we manage some fisheries under fishing permits that are not under formal plans of management, and it has been quite difficult in the past to actually get those accredited or assessed, if you like. These changes clarify those points and expand the sorts of arrangements that can be assessed under that part of the act.<sup>62</sup>

5.62 The Commonwealth Fisheries Association welcomed the changes the bill contained to allow for the recognition of fisheries management plans as conservation plans, saying:

My understanding is that it is more a process of accreditation of the fisheries management plans as conservation plans. That is our hope, and I

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60 Mr Michael Kennedy, *Committee Hansard*, 3 November 2006, p. 55.

61 Senator The Hon. Ian Campbell, Australian Minister for the Environment and Heritage, 'Orange Roughy added to threatened species list', Press Release C300/06, 9 November 2006.

62 Mr Geoffrey Richardson, *Committee Hansard*, 6 November 2006, p. 27.

think that is the intention. But, again, I would not like to be held to that. That is the way I have interpreted it—that these amendments provide the capacity for the Minister for the Environment and Heritage to accept the fisheries management plan as a conservation plan.<sup>63</sup>

5.63 The Department clarified the arrangements under the provisions of the bill in terms of fisheries management plan by stating:

In terms of native fish, basically it is not accrediting AFMA or any other fisheries managers' plans as conservation plans. There are two provisions in the conservation dependence category. For non-fish— if I can put it that way—if the species is a focus of a conservation program the cessation of which would lead to that species going to a higher level of threat, they can be listed as conservation dependent.

What we are saying here—and it picks up a bit of what Richard was saying earlier about the changes that have been introduced over the past 18 months or so—is that it provides that, if the plan of management provides for management actions necessary to stop the decline and support the recovery of the species, it can be listed as conservation dependent rather than at a higher category. So it is actually picking up the management plans of the fisheries authorities. Provided they have the proper measures within their management plans, that is what we would be relying on. It is not duplicating or putting one above the other.<sup>64</sup>

5.64 The committee does note that there may be an unintended consequence of the proposed amendment to subsection 179(6). The Australian Fisheries Management Authority is required to apply the Australian Government's Harvest Strategies to all Commonwealth fisheries, and these will be specified in Plans of Management under section 17 of the *Fisheries Management Act 1991*.

5.65 With the current proposed wording of paragraph 179(6)(b), every Plan of Management developed by AFMA could be considered to be a plan referred to in subparagraph 179(6)(b)(ii). If so, this would have the effect (presumably unintentional) of making every species of fish taken in accordance with an AFMA Plan of Management eligible to be listed as conservation dependant under subsection 179(6).

5.66 Perhaps a more effective arrangement would be to build a link into the EPBC Act back to the Australian Government's Harvest Strategy, which would specify the criteria for a fish species to be listed as conservation dependant. Clause 179(6) would then need to specify that these criteria would be agreed by both the Minister for Environment and Heritage and the Minister for Fisheries in the context of the management plan for the fishery.

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63 Mr Peter Franklin, *Committee Hansard*, 6 November 2006, p. 35.

64 Mr Gerard Early, Department of the Environment and Heritage, *Committee Hansard*, 6 November 2006, p. 62.

**Recommendation 2**

**5.67 The committee recommends that the minister review the wording of proposed new subsection 179(6) in light of the above issue.**

**Conclusion**

5.68 While scepticism was expressed by various witnesses about the changes which would place a greater emphasis on the setting of themes for assessment by the Minister, there was also support for this process. Explanations as to how this system could work effectively while still taking into account provisions for emergency listings were deemed to be satisfactory.

5.69 The committee regards the adoption of the thematic approach as useful and generally supports it, however does stress the need for there to be provisions within the Act for emergency listings to be more adequately accommodated.

