

Democrats Minority Report

Provisions of the Environment and Heritage Legislation Amendment

Bill (No.1) 2006

*You can have the best piece of legislation in the world; but, if you have no political will, it is worth nothing. In the end, it is always going to come down to political will. But you can also improve the structures to make sure you get the best out of any piece of legislation and, as such, this legislation has a lot of improving to do.*¹

Poor Legislative Process

Apart from additions made to address Heritage issues, the Environment and Heritage Legislation Amendment Bill (No.1) 2006 contains the first major set of modifying amendments to the Environment Protection and Biodiversity Conservation Act brought forward since the Act was first passed in 1999. Yet the Government engaged in no significant consultation on the Bill with the environment and heritage groups or other bodies that use the Act regularly.

Senator CARR— How many people got to see an exposure draft of the bill?

Mr Early—Nobody.

Senator CARR—Surely an exposure draft would have been circulated to other departments.

Mr Early—No.²

The 409 page Bill was debated in the House of Representatives within a week of its first seeing the light of day. The Government is now bulldozing this major and wide-ranging pile of amendments through the Senate without proper time for scrutiny and analysis. The process is contemptuous of democracy and the environment, and is particularly unfortunate given the enormous amount of time and energy went into consultations and considerations when the EPBC Act was in its gestation phase in 1998-99.

The purpose of properly examining legislation is to conduct the fundamental task of assessing the likely effects in the real world of changes to the law, and whether those effects match what the government says they will be.

¹ Mr Macintosh, Deputy Director, The Australia Institute, *Committee Hansard*, 3 November 2006, p.8.

² Mr Early, First Assistant Secretary, Approvals and Wildlife Division, Department of the Environment and Heritage, *Committee Hansard*, 6 November 2006, p. 54.

The process that has been followed on this occasion is manifestly inadequate, and has simply not allowed fully considered public and expert input, or for serious, comprehensive analysis to occur. Every witness that appeared at the Senate Committee's hearings raised concerns about aspects of the package and said they needed more time to examine and assess perceived problems and potential unintended consequences. For example:

..... if you wanted a well considered response from the Australian Conservation Foundation, given the reach we have to various communities of interest around the country—and, also, we would like to consult with expert advisers on legal implications—it would take a period of approximately three months for us to come back with a much more considered response. We just had a chance to read through and respond to what we saw as some of the most significant changes that we could perceive. We have not been able to think through all of the implications in such a long list of amendments. It is just not adequate.³

Finally, HSI, TCT and WWF have strong reservations about the process and timetable for

these amendments. In the relation to the process, given the substantive nature of the proposed changes to the threatened species and heritage nomination process for example, it would have been appropriate to have had a process that included a discussion paper for public comment to allow proper analysis and scrutiny of the proposed changes. The exceptionally short proposed timetable for passage of this large complex bill through the Parliament will thwart proper parliamentary scrutiny and consideration. As such, the timetable for consideration in the Senate should be extended to 2007.⁴

Even one of the Government's own Committee members admitted that he had not had time to examine the Bill.

I confess that I have not read the bill in detail. I have barely glanced through the explanatory memorandum.⁵

The Government has failed to explain at all why it is necessary for the Bill to pass before the end of the year, or what the consequences would be of waiting a couple of months to allow for greater consultation and examination. The truth is that there is no reason to rush this Bill through. There are no budgetary or national security issues related to this Bill. What we are seeing is an arrogant government that is no longer interested in democracy.

³ Mr Tupper, Australian Conservation Foundation (ACF), *Committee Hansard*, 3 November 2006, p. 26.

⁴ HSI, TCT and WWF, *Submission No. 66*, p. 3.

⁵ Senator Ian McDonald, *Committee Hansard*, 3 November 2006, p. 32.

Of course this is not the first Bill the Government has bulldozed through the parliament. Many pieces of legislation now has ridiculously short Committee Inquiries, with quick reporting dates and truncated hearings. This sausage machine approach not only means governments are more likely to get away with implementing outrageous policy before people have a chance to realise it. Even worse, it means there is a much greater chance that the legislation itself will have flaws that make it harder to understand or enforce, or give rise to unintended consequences.

In June 2005 the Prime Minister, John Howard, promised to use his Senate majority "...soberly, wisely and sensibly. We won't use it capriciously or wantonly or indiscriminately, and I make that solemn promise on your behalf to all of the Australian people."

Complex, contentious legislation, like this Bill, pushed through parliament without proper consideration and debate mean Mr Howard has gone back on his word.

Given the short time frame to examine and report on this lengthy and complex bill, it is difficult to address all our concerns in this minority report.

Strong Environment Laws need Political Will and Adequate Resourcing

For many years the Democrats had called for a stronger and more coherent approach on environmental issues at the national level. In the Democrats' view, major environment issues are too significant to be left to the vagaries of individual state or local government regimes.

The Environmental Protection and Biodiversity Heritage (EPBC) Act 1999 was introduced by the Coalition Government in 1998. After a lengthy Senate inquiry and consultation with many environment groups, the Democrats' negotiated a raft of major improvements before supporting the passage of the legislation. Whilst not a perfect Act, it was clearly better than the laws they replaced, and also provided a good foundation for further improvement.

The Democrats certainly do not believe that we now have the perfect Act, that everything is fine; we think there is a hell of a lot of room for improvement still. But the framework is now in place for more effective improvements to be built on the foundation that is there in a much easier way than using the various disconnected acts that were in place or that currently exist that will be replaced by the new Act when it comes into force next year.⁶

The EPBC Act is undoubtedly the strongest environment law Australia has ever had.

I would like to say that WWF is a science-based solutions-oriented organisation. Because of that we were heavily engaged in the original passage of the EPBC Act through the Senate and have been active supporters of the EPBC Act for a number

⁶ Senator Andrew Bartlett, Speech to Committee Report on the Commonwealth environment powers, Senate Hansard, 26 August 1999.

of years. It is important to put on the record that we did highlight that it was in our opinion world best practice legislation.⁷

Mr Kennedy from the Human Society International (HSI) told the Committee he thought the EPBC was a very powerful piece of legislation:

As you know, we have been supporters of the EPBC. It is undoubtedly, by any standard, a very powerful piece of law.⁸

Despite the lack of political will from the Coalition government to fully use many of the powers contained in the Act, those environment groups who have sought to use the EPBC Act have found it useful. Ms Ruddock, Principal Solicitor, Australian Network of Environmental Defender's Offices outlined to the Committee some of the practical benefits resulting from the operation of the EPBC Act:

I guess our experience with the EPBC Act is that it is an important check, particularly in states like Queensland where things often slip through, and, for lots of reasons, are not assessed in relation to their species.

It has been of very significant assistance in areas of Far North Queensland that I have worked in. Developments such as the False Cape development that was going through in Cairns. That was an old development which sort of slipped through the planning laws with very few checks and balances in that process. The Commonwealth actually banned the marinas and boating developments in that and that has been a significant advantage. They also put limits on the amount of clearing which could occur. Likewise, they have put conditions on a lot of the marina developments around the Whitsundays that have made it a lot stricter than the state government would have put on. So, again, it has been of significant use having those extra conditions. Obviously, none of the developments have been stopped and, obviously some of my clients at various times are probably very disappointed in that sense, but that ability to put on stringent conditions is really important and is part of the checks and balances that you need in having a national system.⁹

Unfortunately a major lack of political will and resourcing has meant the Act has not fulfilled its potential. Mr McIntosh from the Australia Institute (AI) echoed the Democrats' and many environment groups' concerns when he told the Committee:

You can have the best piece of legislation in the world; but, if you have no political will, it is worth nothing. In the end, it is always going to come down to political will.¹⁰

⁷ Mr Glanznig, World Wildlife Fund, *Committee Hansard*, 3 November 2006, p. 33.

⁸ Mr Kennedy, Human Society International, *Committee Hansard*, 3 November 2006, p. 54.

⁹ Ms Ruddock, Australian Network of Environmental Defenders Office, *Committee Hansard*, 3 November 2006, p. 48.

¹⁰ Mr Macintosh, The Australia Institute, *Committee Hansard*, 3 November 2006, p. 12.

Similarly Mr Kennedy from HSI said both the department and ministers demonstrated a lack of political will:

It has been a hard road to try to help this Act to be implemented effectively. We have been a hamstrung for a number of reasons. It is not just resources. In many cases it is clearly a lack of political will by both the department and different ministers.¹¹

The lack of resourcing was raised as a key area of concern by numerous submissions and witnesses to the inquiry. For example, Mr Glanznig from WWF was unequivocal in his statement that the problem with the EPBC Act was not red tape but lack of resources:

The block is not the red tape. The block is a lack of resources. We make that point about

lack of resources in our introduction. The federal environment department has been too under resourced to properly implement the Act.¹²

Ms Ruddock from the Australian Network of Environmental Defenders Office (ANEDO) told the Committee that in her experience, lack of resources was often a reason given by the Department for not enforcing the Act:

Our experience with enforcement certainly has been in the north Queensland office that we were routinely complaining to the department. We probably complained at least once a month about an enforcement issue for areas where critical habitat was being cleared that had not been referred, or some other enforcement issues. Most of the time the response from the department was: you have third-party enforcement rights; we do not really have the resources to take it on; how about you look at it?¹³

Even the Minerals Council of Australia expressed their concerns with the lack of resources:

From our perspective, the Act itself is one of the best developed pieces of legislation that currently relates to environmental approval processes for our industry, and I will limit my comments to the experience of our industry. However, we found that it is actually the administration of the Act that poses more issues for us than the nature of the Act itself. There is a lack of resourcing for that administration that means that processes are often not as clearly articulated to industry and that there is the opportunity for companies to have a

¹¹ Mr Kennedy, Human Society International, *Committee Hansard*, 3 November 2006, p. 58.

¹² Mr Glanznig, World Wildlife Fund, *Committee Hansard*, 3 November 2006, p. 38.

¹³ Ms Ruddock, Australian Environmental Defenders Office, *Committee Hansard*, 3 November 2006, p. 46.

better handle on what the expectations of the Act are and perhaps not over-refer, as is our current practice, which tends to delay the system even more.¹⁴

The Democrats welcome recommendation 3 in the Chairs report to review the level of resources made available for the Department's administration of the Act. Given the concern raised by witnesses that some of the Government's worries could be addressed by better resourcing, rather than changing the process and diminishing accountability, scientific opinion and public scrutiny, the Democrats believe that the Bill should be delayed until this review has been completed.

While there are some positive aspects to the Government's Bill, there are also amendments that have the potential to seriously weaken it and make it far more politicised, as noted by Mr McIntosh from the Australian Institute:

In terms of this bill, you have created a whole collection of new exemptions and a listing process that is far more politicised. So I simply think that we are going to get more of the same in terms of outcomes, and in terms of the listing processes I actually think we are going to get worse outcomes.¹⁵

The Joint submission between HSI, WWF, and Tasmanian Conservation Trust (TCT) stated that without changes the amendments will weaken the Act and it will no longer reflect best practice. They were also concerned that:

Many of the proposed amendments are undemocratic in nature – they will disenfranchise the public and are a significant backward step for public access and government accountability. Additionally, they will undermine the raft of public nominations that have been already submitted by individuals and organisations in good faith by not including a provision that enables already submitted nominations to be subject to the current public nomination process.¹⁶

Mr Kennedy from HSI, a strong supporter of the Act when it was first passed, and a member of the Heritage Council advising the Government, told the Committee that he is now assessing whether it is worth the HSI continuing to engage in the process if the Bill is weakened:

Nonetheless, we have worked very hard. There have been some successes. Fisheries has been an example where the Act has had a good impact upon sustainability in a general sense. So we have to decide as an organisation whether, if these amendments are passed, we would feel that there was sufficient cause and justification for us to continue burying further resources into its implementation, based on restraining nomination processes.¹⁷

¹⁴ Ms Melanie Stutsel, Minerals Council Australia, *Committee Hansard*, 6 November 2006, pp 2-3.

¹⁵ Mr Macintosh, The Australia Institute, *Committee Hansard*, 3 November, 2006, p. 8.

¹⁶ HIS, WWF and TCT, *Submission No. 66*, p. 3.

¹⁷ Mr Kennedy, Human Society International, *Committee Hansard*, 3 November 2006, p. 58.

The Australian Democrats are not opposed to streamlining and improving the Act, so long as scientific opinion and public scrutiny are not sacrificed in the process. Some of the changes appear to be reasonable ones deserving of support and there are no doubt some efficiencies and improvements that are made.

Unfortunately, evidence presented by witness suggest that much of the "streamlining" as proposed in this Bill will serve to further politicise the Act, making it easier for politics to triumph above scientific opinion and will reduce public scrutiny.

The Democrats agree with the sentiments expressed by HIS, WWF and TCT in their submission:

Weakening the legislation and retreating from best practice is an unwise and retrograde step, especially when the challenges facing our natural environment are becoming ever more serious.¹⁸

It will be difficult for the Democrats to support this Bill with out significant amendments.

Third Party Enforcements and Ministerial Review

One of the key concerns for the Democrats is the proposed weakening of options for third party enforcement by removing the review of Ministerial decisions by the Administrative Appeals Tribunal (AAT) and reinstating requirements for financial undertakings for interim injunctions.

The move away from third party enforcements is concerning and flies in the face of proper accountability. There is absolutely no evidence of this appeal right being misused or even being used overly frequently. It is simply a blatant attempt to remove a key check on decisions made by the Minister.

Mr Smith from ANEDO argued that decision making is by its nature political and that's why it is important for appropriate boundaries to be placed around decision making. Accountability mechanisms such as third party enforcement are critical for successful legislative implementation:

The point was made before about whether these reforms politicise, if you like, the decision making process. The thing to remember there is that decision making is by its nature political and it is really just having mechanisms in place to deal with that. Previous speakers have already noted that you need to make a distinction between the scientific aspects of listing, and so on, versus the more political aspects of deciding whether or not something does or does not go ahead. Those decisions about whether something does or does not go ahead, by their nature are political. But there needs to be at least two things: first, some kind of appropriate bounds around that discretion, some guidance as to the

¹⁸ HIS, WWF and TCT, *Submission No. 66*, p. 3.

framework in which a decision is made and, secondly, there needs to be accountability. Those merits review functions where community groups and so on can take action to remake that decision and get another body to look at the arguments for and against it and remake that decision are enormously useful.¹⁹

The Bill removes the right of review for the following Ministerial decisions to:

- issue or refuse a permit;
- specify, vary or revoke a condition of a permit;
- suspect or cancel a permit;
- issue or refuse a certificate under section 303CC(5) or a decision of the Secretary under a determination in force under section 303EU;
- make, refuse, vary or revoke a declaration under sections 303FN, 303FO, 303FP in relation to international movement of wildlife specimens (section 303GJ).

The Majority of submissions strongly opposed the removal of the right of review. For example the Nature Conservation Council (NCC) stated:

Important decisions must be subject to review if the EPBC regime is to be legitimate, credible and accountable.²⁰

The ANEDO noted the usefulness of the AAT on considering the effectiveness of conditions imposed by the minister on projects approval:

Merits review also enables the AAT to consider the effectiveness of conditions imposed in relation to these decisions.²¹

Ms Ruddock from ANEDO told the committee that removal of the right of review eliminates a mechanism which has been important for environmental groups when they wish to bring scientific evidence to the courts:

The merits review in the AAT is also a particularly useful mechanism for environmental groups to bring in scientific evidence and have that heard by the courts to assess some of the conditions that have been imposed on particular decisions made by the minister. So removing that right will certainly have a big effect on their ability to actually also bring scientific evidence before the AAT and strengthen conditions that are put on some of these decisions.²²

¹⁹ Mr Smith, ANEDO, *Committee Hansard*, 3 November 2006, p. 45.

²⁰ Nature Conservation Council, *Submission 21*, p. 1.

²¹ ANEDO, *Submission No. 17*, p. 8.

²² Ms Ruddock, ANEDO, *Committee Hansard*, 3 November 2006, p. 45.

The Department weakly argued that on particular matters, the Ministers decisions should not be able to be overturned:

Basically, the government believes that, with matters of high public importance, decisions should be taken by the minister and, as such, should not be reviewable by an unelected tribunal.

..... a small number of the permit and declaration decisions noted above require careful balancing of competing interests and judgements. The Government considers that where these decisions are sufficiently important to be taken by the Minister as an elected representative, those judgement calls should not be able to be overturned by an unelected tribunal such as the AAT.²³

The Department were not concerned about the need for accountability.

The Question raised by the Law Council of Australia as to what happens if the Minister has not exercised their discretion appropriately remains unanswered:

If the minister has exercised his discretion appropriately, in accordance with the provisions of the bill, then the likelihood is that the Administrative Appeals Tribunal will uphold his or her decision. But what if the minister has not exercised his discretion appropriately? Is there to be no review? If the minister believes in the integrity of this bill and the integrity of his or her decision-making process, then he or she should not be concerned to allow a judicial review of how he or she came to a decision applying provisions of this bill.²⁴

The Bill also proposed to repeal section 478 of the Act which currently prevents the Federal Court from requiring undertakings for damages as a condition of granting an interim injunction. This will effectively cut out third parties from engaging in enforcement actions because of fear of accruing unmanageable financial damages. Ms Ruddock from ANEDO told the committee that groups already do not take action lightly as the costs associated with litigation are often prohibitive for a not-for-profit organisation:

Litigation is very expensive. Even just to file a matter in the Federal Court is, I think, about \$1,700 for an incorporated association, which most of the environmental groups that we have often acted for have been. On top of that you have hearing fees and all sorts of other fees that the Federal Court imposes. That is before you even look at finding a barrister to do the matter for you pro bono or at reduced fees, and having the EDO involved at very little cost for the community group. It is very expensive. If you have a costs order awarded against you, you can be up for a lot of money. The Wildlife Whitsunday Group, which took action against the federal government last year, had a \$300,000

²³ Department of the Environment and Heritage, answers to questions on notice, 10 November 2006.

²⁴ Mrs Peatman, Law Council of Australia, *Committee Hansard*, 6 November 2006, p. 19.

costs bill presented to them after that court case. So it is significantly difficult for groups like that to take on litigation such as that.²⁵

No evidence was produced that the current provision had led to excessive cases being made. In fact the Committee was told that only 10 actions had been made in the past 7 years. Nor was there evidence that the provision was being abused to make frivolous or vexatious claims:

Mr Smith—Certainly you could not define any of the 10 actions that have been undertaken—or, indeed, the three merits cases—as being frivolous or vexatious. Of course, from time to time frivolous or vexatious matters can be brought and have been brought, for example, in New South Wales, but the courts have the mechanism to deal with them and they throw them out; it is an abuse of process; costs are awarded—

Senator BARTLETT—So there is no evidence that you are aware of that there has been misuse of this injunction provision?

Mr Smith—Absolutely not, no. A number of judges have commented at length upon this very issue—the idea that, by having third party rights, there will be floodgates opening and so on, and the courts will be held up for a very long time in dealing with these. But clearly there is no empirical evidence to suggest that that has been the case.²⁶

There was however evidence that the provision was beneficial to everyone that uses the Act:

Senator BARTLETT—Would it be fair to also say that at least some of the court actions, one would suggest, have been of assistance to everybody that uses the Act, including developers, because it has actually clarified what it means?

Mr Smith—At the EDO's annual conference last year we had sitting on the panel the senior member of the Department of Environment and Heritage and I asked him that very question. He basically said that the community actions have the distinct advantage of clarifying the way that things work, of interpreting the legislation and also of keeping the department and the government on their toes.²⁷

The Committee was told that repeal section 478 would result in fewer actions being undertaken:

²⁵ Ms Ruddock, ANEDO, *Committee Hansard*, 3 November 2006, pp 45-46.

²⁶ Mr Smith, ANEDO, *Committee Hansard*, 3 November 2006, p. 47.

²⁷ Mr Smith, ANEDO, *Committee Hansard*, 3 November 2006, p. 47.

Senator BARTLETT—It is not just rhetoric to say that your professional experience would be that these changes will mean that fewer actions will be undertaken?

Ms Ruddock—Particularly the enforcement actions. Our experience with enforcement certainly has been in the north Queensland office that we were routinely complaining to the department. We probably complained at least once a month about an enforcement issue for areas where critical habitat was being cleared that had not been referred, or some other enforcement issues. Most of the time the response from the department was: you have third-party enforcement rights; we do not really have the resources to take it on; how about you look at it? That is not practical for many of those groups, as I have said, for the reasons that I have just set out.²⁸

The Democrats support the assertion made that important decisions must be subject to review if the EPBC regime is to be legitimate, credible and accountable. The amendments in this Bill will seriously undermine the ability for this to occur, and they should not be supported.

Threatened Species, threatened ecological communities and Heritage Nominations and Listing

Concern was also expressed by many of those who provided evidence to the Committee about the proposed changes to the threatened Species, threatened ecological communities and Heritage nominations and listing processes.

According to the explanatory memorandum, the amendments aim to 'streamline' the nominations process and make it more 'strategic'.

The Australian Conservation Foundation (ACF) noted in their submission that there is a backlog of 640 threatened ecological communities requiring assessment and some 250 threatened species recovery plans having been adopted, but many of these had not been reviewed and are years out of date.²⁹

Rather than put more resources into addressing the backlog, the Government have decided to replace the current objective and scientific approach with an annual process for thematic nominations.

The new process begins with the repeal of section 185 which removes the requirement for the Scientific Committee to assess the threatened ecological communities listed on the state and territory lists gazetted by former Environment Minister Robert Hill in November 2001. This wipes over 500 threatened ecological communities from the Committee's current assessment list. The ANEDO was extremely critical of the proposed strategy:

²⁸ Ms Ruddock, ANEDO, *Committee Hansard*, 3 November 2006, p. 46.

²⁹ Australian Conservation Foundation (ACF), *Submission No. 27*, p. 2.

While this may lighten the administrative burden for DEH and the Scientific Committee, and ease political pressure regarding controversial listings, it is heavy handed and arbitrary. It is contrary to the principles of ESD and good governance to deal with the back log of listings in this way....

DEH 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.³⁰

Proposed section 194K allows the Minister without explanation or justification to omit any item from the annual priority assessment list developed by the Scientific Committee. According to the ANEDO and the Australia Institute a nominated species may be removed for commercial or economic grounds regardless of its conservation status:

There is no public consultation on the proposed list, and the Minister may have regard to “any matter that the Minister considers appropriate” in reaching this decision. It is therefore possible under the amendments for a nominated species to be removed from the final Priority Assessment List on commercial or economic grounds, regardless of the conservation status of that species.³¹

That has already occurred under the current process, and in many cases I think it has been borderline illegal. A classic example is the southern bluefin tuna. It has quite clearly been threatened. Everybody in the scientific community has known it has been threatened since the late 1990s. It was nominated and then the government, under the current process, is forced to assess that, and then the minister must make a decision on whether it is listed. If you list it under the current provisions then you cannot be granted an export permit under part 13A, so the government wants to avoid listing any commercial fish species that is exported, because that is going to result in a clamp on the relevant industry. Under the new process, what will happen is that the minister can effectively block nominations. So, if southern bluefin tuna comes up again, the minister can say, ‘No, I am not going to assess that.’ If the endeavour dogfish comes up, he can say, ‘No, I am not going to assess that.’ And as a result we do not get a list that contains all the species that are technically threatened.³²

Witnesses told the Committee that the Minister could effectively delay the listing of a species or heritage area almost indefinitely:

Even when a nomination makes it onto a priority assessment list the Minister can specify an assessment period that is longer than 12 months with no apparent time limitation (the current statutory timeframe for the Scientific

³⁰ ANEDO, *Submission No. 17*, p. 9.

³¹ ANEDO, *Submission No. 17*, p. 11.

³² Mr Macintosh, The Australia Institute, Committee Hansard, 3 November 2006, p. 9.

Committee to consider nominations). He can then give an additional extension to whatever the unlimited original specified period is, for a further 5 years.³³

The ANEDO in their submission pointed out that "the loss of species over the last 5 years demonstrates the dangers of this approach."³⁴

Nominations are further restricted by section 194F(c), which prevents renomination of species previously rejected under section 191. The ANEDO argued that this was problematic:

This is extremely problematic where new scientific information or evidence becomes available regarding certain species, for example, southern bluefin tuna, or the koala.³⁵

The proposed amendments also repeal the requirement for the Minister to make a determination on emergency listing of heritage sites.

Many submissions and witness before the Committee were concerned that the new process was arbitrary, gave the Minister too much discretion and would only serve to politicise the process even further:

Instead of the current objective and scientifically determined process, 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 blatantly politicised and introduces provisions that are easily open to abuse to avoid politically difficult decision making. Enactment of these amendments will be a major retreat from what is national and international best practice.³⁶

We are concerned that the annual thematic process will also allow for certain politically contentious nominations to be continually delayed and deferred. For example, commercial fish species and that kind of thing are always contentious. They will not actually see the light of a proper scientific assessment because under this process they can get put on the backburner.³⁷

I think they are politicising an already politicised process. I am concerned that it gives the minister and the Australian Heritage Council greater control over what goes up and what goes through the process. I am also concerned that the bill does not amend the processes for the minister actually making his or her decision on what gets on the list. My position on all the lists is they should be based on the relevant criteria. For the Heritage List it should be based on

³³ HIS, WWF and TCT, *Submission No. 66*, p. 19.

³⁴ ANEDO, *Submission No. 17*, p. 12.

³⁵ ANEDO, *Submission No. 17*, p. 10.

³⁶ HIS, WWF and TCT, *Submission No. 66*, p. 18.

³⁷ Ms Walmsley, ANEDO, *Committee Hansard*, 3 November 2006, p. 48.

whether the place meets the criteria. If it meets the criteria, it should go on the list. In terms of threatened species, if it meets the criteria for being a threatened species, it should go on the list. There are ample provisions for allowing developments to go ahead even if species or places are listed, so I do not understand why the government refuses to adopt such an approach.³⁸

The idea of themes was considered by many environment organisations to be a joke, as species do not become threatened thematically. Environment groups were also concerned that the proposed process runs the risk of ignoring meritorious and ecologically important species:

Themes may be administratively convenient or politically attractive, but alas species do not become threatened thematically. Rather than focusing resources, a “thematic” approach to assessing threatened species and ecological communities runs the risk of permanently ignoring meritorious and ecologically important species and communities that don’t fit the identified themes or don’t make the priority list, for whatever reason.³⁹

The Democrats are concerned about the potential these amendments will serve to further politicise the listing process and make delays and attempts to avoid difficult nominations valid.

If the amendments do proceed without significant changes, the Democrats would like the Minister to make an undertaking to ensure that all public nominations (for threatened species, ecological communities, key threatened processes and Heritage) submitted in good faith under the existing system will be considered and assessed under the current nomination process.

Recovery Plans and Critical Habitat

The Democrats are also concerned with the Bills proposed changes to recovery plans and critical habitats.

The Bill provides that it is no longer compulsory to have a recovery plan, and allows broad Ministerial discretion regarding recovery plans.

WWF, HSI and TCT in their submission noted that the drafting of recovery plans had been slow, but argued that this was an issue of inadequate resources and not one of too much information.⁴⁰

As noted by ANEDO in their submission, "recovery and threat abatement plans are vital tools for conserving threatened species in Australia, and must be fully supported

³⁸ Mr Macintosh, The Australia Institute, *Committee Hansard*, 3 November 2006, p. 4.

³⁹ WWF, *Submission No. 27*, p. 2.

⁴⁰ HIS, WWF and TCT, *Submission No. 66*, p. 22.

as a priority for the Australian Government."⁴¹ WWF, HIS and TCT outlined in their submission reasons why recovery plans are important:

Threatened species lists are of critical importance for two reasons – firstly, to provide a vital index of species decline over time (irrespective of recovery potential) and secondly, as flagship indicators for the decline of specific habitats or the impact of particular threats, and therefore to generate decisive and effective conservation activity to ameliorate those issues. It is vital that lists be maintained as comprehensively and timely as possible to prevent inaccurate impressions of the state of the environment and inadequate conservation measures.⁴²

It is the Democrats view that the proposed amendments to recovery plans are a step backwards. Recovery and threat abatement plans are vital to the survival of a species and should be compulsory, not up to the discretion of the Minister.

Similarly the amendment to critical habitat process that allows for critical habitats only to be designated "where practicable" and entirely on the Ministers discretion is clearly inadequate.

ANEDO note in their submission that broad discretion for other considerations, includes political considerations and the interest of landholders.

Critical habitat is a crucial element of threatened species protection. Avoiding its recognition does not make it less critical to the species concerned and can lead to death-by-neglect.

The Democrats support calls from WWF, HIS, TCT and ANEDO to amend that Act to:

- provide a formal process for public nominations of critical habitat, equivalent to the current threatened species nomination process.
- provide a mechanism for automatic consideration for listing identified in action plans for listing in the register.
- Provide a time frame of 2-3 years in which existing recovery plans must be revised to identify critical habitat.
- Emergency interim protection orders to be made in relation to critical habitat.

Strategic Assessments and Bioregional Plans

⁴¹ ANEDO, *Submission No. 17*, p. 15.

⁴² HIS, WWF and TCT, *Submission No. 66*, p. 22.

The Bill includes a proposal to undertake strategic assessment or bioregional plans. The Democrats are supportive of such a concept in principle, as we are increasingly concerned about the number of small projects being approved in their own right but the accumulative effects are not taken into account. For example, many small developments have been approved in recent years - albeit sometimes with conditions attached – in coastal areas around Mission Beach in far Northern Queensland, because when assessed in isolation, they only have a small impact on the surrounding environment. However, the cumulative effects of all the developments there have been hugely detrimental to the habitat of the endangered cassowary.

However, while the principle can be supported, the problem with the Bill is that there is little detail as to how the strategic assessment and bioregional plans will work in practice. Evidence to the Committee was also supportive of the concept but cautious and pointed to the lack of detail:

After discussing it with a number of colleagues in ACF, I would like to add that clearly the concept is sound in terms of bioregional planning. That is the way that we have been working on the future protection regimes and our sustainability regimes in regions. As a concept it has a lot of merit. We would like some more time to work through what it means to turn that concept into effective practice.⁴³

Ms Ruddock - There is really no detail at this stage as to how the bioregional plans would work as to whether they would actually look at a cumulative impact. There is nothing in the Act that actually suggests that they could at this stage look at the region and assess it in the way that would assist in somewhere like Mission Beach.....

Senator BARTLETT—I do not want to verbal you, but is it fair, in a very shorthand summary, to say that, as it is presented in the Act, there is no indication that it will serve that purpose potentially, but that if the details were fleshed out, it could? Is that a fair summary?

Ms Ruddock—Yes, that is correct.⁴⁴

While cumulative impact assessment is desirable in principle and is supported in principle, the mechanism by which it is achieved is all-important. The ANEDO submission raises numerous issues pertaining to the amendments designed to streamline the referrals and assessment process.⁴⁵

⁴³ Mr Tupper, ACF, *Committee Hansard*, 3 November 2006, p. 29.

⁴⁴ Ms Ruddock, ANEDO, *Committee Hansard*, 3 November, p. 47.

⁴⁵ HIS, WWF and TCT, *Submission No. 66*, p. 24.

One of the key concerns witnesses raised with the Committee was the potential for the strategic assessment/bioregional plan to be used as a way to avoid proper scrutiny and assessment of individual projects:

There is the potential for this process to be used as a way of avoiding proper scrutiny and assessment.....Given the nature of the powers conferred on the Minister under these provisions, there is a risk they will be used to reduce the opportunities for public consultation and oversight.⁴⁶

This Bill appears to see proponents relieved of the current requirement to undertake individual environmental impact assessments if the projects are within areas covered by “strategic assessments”.⁴⁷

Senator SIEWERT—I want to pick up where we have just left off, and that is on the regional plans. Can I just ask you for further detail around something Senator Bartlett asked? Is it your understanding that, using the planning process in Far North Queensland, if that plan went to the Commonwealth and they ticked it off, any development included in that plan would then therefore not be assessed?

Ms Ruddock—That is my understanding of what could happen. You would effectively get a plan; it would be accredited. It might be a coastal development plan. I know that is what the minister had flagged as one of the areas that he wanted to look at. Once you did something in accordance with that plan, it would be ticked off and it would not need to go through the EPBC procedure. So, that has got significant concerns, not just in relation to particular regions that may have significant species, but with themes like coal or uranium, that there might be a coal plan or a uranium plan that would then be ticked off and then those things would avoid having to go through the EPBC process.⁴⁸

One witness told the Committee that it appeared unlikely that new scientific evidence with respect to an individual project could be taken into account once a strategic assessment or plan had been approved:

Senator SIEWERT— A bioregional plan is prepared. What happens if new scientific information becomes available? Is that able to be taken into account or is it automatically not now covered?

Mr Macintosh—No, if it has been exempted it is exempted, so if new information arises then you cannot take it into account. The action has already been taken, or it has already been basically approved under the bioregional

⁴⁶ The Australia Institute, *Submission No.60*, p. 3.

⁴⁷ HIS, WWF and TCT, *Submission No. 66*, p. 24.

⁴⁸ Ms Ruddock, ANEDO, Committee Hansard, 3 November, p. 48.

plan. The government could then subsequently remake the bioregional plan, but that is totally at its discretion.⁴⁹

Mr McIntosh from the Australia Institute also raised the prospect that once you prepare a plan under another law and then endorse that plan, that that would result in the exemption of all development taken in accordance with that other plan from the EPBC Act.⁵⁰ For example:

One thing you should note about that is that the government is currently carrying out a strategic assessment on exploration, so my guess is that what will happen out of that process now, if this bill goes through, is that they will use the strategic assessment process to exempt petroleum exploration under the legislation. So it will only effectively go through the petroleum act as opposed to having to also go through the EPBC Act.⁵¹

The Department suggested that some of the concerns raised by witnesses were not justified and were misleading:

Mr Early—I think the problem is that people are looking at bioregional plans as something they are not. For example, I do not believe that an approved bioregional plan would cover everything that is likely to happen in that bioregion. The way that we are currently doing our regional risk assessments on a voluntary basis in a number of regions around Australia is to basically try to, if you like, limit the number of activities that subsequently need to go through the project approval. For example, I would see a bioregional plan as identifying the sorts of things that would be required for particular matters that were likely to come up within that bioregion, and then it may well say they do not need approval, but of course the minister has the capacity to attach conditions so there might well be further conditions that would have to be met. The notion that somehow or other we could do a bioregional plan and then the Commonwealth could walk away from that region and not be concerned about anything that might happen is a little bit misleading.

The Democrats believe that there needs to be further detail and examination of this part of the Bill before a reasoned assessment can be made of whether the potential problems outweigh the potential benefits. This is yet another argument for postponing debate on the legislation in the Senate, while further details are developed of how the strategic assessments and bioregional plans will work in practice.

⁴⁹ Mr Macintosh, The Australia Institute, *Committee Hansard*, 3 November 2006, p. 10.

⁵⁰ Mr Macintosh, The Australia Institute, *Committee Hansard*, 3 November 2006, p. 8.

⁵¹ Mr Macintosh, The Australia Institute, *Committee Hansard*, 3 November 2006, pp 10-11.

Search & seizure and strict liability provisions

The Democrats believe the strong concerns voiced by the Scrutiny of Bills Committee⁵² into the penalties for a range of strict liability offences were not adequately addressed by evidence given to this inquiry. It is not good enough to just hope that the Minister's response will allay any fears. Such major penalties from the use of strict liability should not apply unless there are extremely good reasons given. To date, the Minister and the Explanatory Memorandum have given no reasons at all.

The Democrats also note that some of the proposed enforcement provisions will bring the Act into line with existing measures in the Migration Act 1958 and the Fisheries Management Act 1991. This is an example of the problem of allowing a bad principle of excessive curtailment of legal principles or civil liberties into one piece of law, as it is then used to justify further similar changes to other pieces of legislation on the grounds of 'ensuring consistency'.

Whether it was a slippery slope or the thin end of the wedge, the original decision by the Parliament to allow such provisions into law in one circumstance has now been broadened out to have much wider application.

Improving the legislation

Many of the submissions outlined ways that the Act could be improved. Unfortunately there is not enough time to outline them all here, and we would recommend that interested members of parliament and the public read the submissions made to this inquiry.

In his second reading speech on the amending Bill, the Parliamentary Secretary to the Environment Minister Greg Hunt MP said the changes "will allow the Australian Government greater flexibility and capacity to deal with the emerging environmental issues of the 21st century."

Two of the biggest economic, social and environmental issues facing Australia in the 21st century are climate change and water shortages and mismanagement. Yet our National Environment Act has nothing in it to address these issues.

It is no surprise that a number of organisations renewed calls for new matters of National Environmental Significance to be added to the EPBC Act to go some way to dealing with climate change and water mismanagement. Four new triggers were suggested:

- a) Broadscale Land Clearing - The clearing of native vegetation over 100 ha in any two year period, or the clearing of any area of native vegetation that

⁵² Senate Standing Committee for the Scrutiny of Bills, *Alert Digest (No. 12 of 2006)*, 18 October 2006.

provides significant habitat for EPBC Act listed threatened species or ecological communities, or that is on the Critical habitat list.

b) Greenhouse - Any actions likely to result in greenhouse gas emissions of over 100,000 tonnes of carbon dioxide equivalent in any 12 month period or is likely to produce 5 Mt of carbon dioxide equivalent over the likely lifetime of the action.

c) Unsustainable Water Use - The abstraction of surface and ground water resources over 10,000 megalitres.

d) Dams - The construction and operation of any large dam, defined as having a crest height of 15 m or more or a capacity of over 1 M cubic metres.⁵³

The argument for including these 4 new triggers is compelling, and is outlined in Appendix A.

The Majority report response to calls for the new triggers was inadequate. For a start it only focused on one of the proposed new triggers - climate change:

6.4 The committee acknowledges the widely held view that climate change is a matter of national environmental significance. However, the Act already includes the capacity for additional triggers to be established. Accordingly, these concerns are not relevant to consideration of the bill before the committee. No amendment is required for a new trigger to be adopted.

The Democrats reject the majority reports response. Of course these concerns are relevant to the Consideration of the Bill. The Department claim that the Bill is a result of 6 years of review of the Act, yet it has failed to include any new MNE triggers. This is despite the fact that the Democrats extracted a pledge from the government back in 1999 to develop a greenhouse mechanism for the EPBC. This promise has never been fulfilled and this Bill presents the perfect opportunity to fulfil that promise.

The Majority reports response is even more galling when this Bill removes the requirement for the Government to review the need for new triggers every 5 years and publish a report on the findings.

The Democrats strongly urge the inclusion of these 4 new triggers to the EPBC.

Conclusion

It is well known that the Democrats' decision, after negotiating major improvements, to support the passage of the EPBC legislation in 1999 was a controversial one. The party was subjected to vociferous criticism by some environment groups, as were those environment groups and individuals in the environment movement who supported the Democrats' actions.

⁵³ HIS, WWF and TCT, *Submission No. 66*, p. 7

While successive Ministers have not been able to muster the resources and political will to enable the EPBC Act to show its full potential, time has shown that the Act clearly is a significant improvement on the laws it replaced at the time. Even some of the strongest critics of the law at the time of its passage in 1999 have since turned to it in an effort to achieve better environmental outcomes.

There have been significant achievements as a result of the EPBC Act. As evidence to this Inquiry showed, this can occur through mechanisms other than relying on a Minister to stop a development. Indeed, it is a sad indication of the lack of interest in enforcement at government level that some of the biggest environmental wins with this Act have come through conservation groups and individual citizens taking legal and political action. For this reason, the Democrats find the proposal to remove appeal rights to the AAT particularly unacceptable.

Given the Democrats crucial role in bringing the EPBC into being, and our preparedness to take the hard decision to back the Act, when the politically easy thing to do would have been to just attack the government for not producing the perfect law, it is extremely disappointing that the government has seen fit to rush through major changes – some of which clearly weaken the Act and open up more loopholes for environmental and heritage protection to be avoided – without any meaningful consultation with either other political parties or with the many environmentalists who have defended the legislation and sought to work with it and demonstrate its worth over many years. Some of the changes made in this Bill cannot be objectively justified as being beneficial for environmental or heritage protection, and the legislation should not proceed until they are removed.

Recommendation 1

As no remotely justifiable case has been made for urgency, the legislation should be deferred to enable proper consideration and consultation with the many groups in the community who use the EPBC Act regularly to assess the best ways to strengthen the Bill.

Recommendation 2

The sections of the Bill which remove the right of appeal to the AAT for review of Ministerial decisions should be deleted.

**Senator Andrew Bartlett
Deputy Chair**

Appendix A - Additional Matters of National Environmental Significance

Extract from pages 11-16 of the HIS, WWF and TCT submission (Submission No. 66)

Land Clearance

New trigger - A person must not take an action that has, will have or is likely to have a significant impact on the environment by Broadscale clearing.

New definitions -

Broadscale Clearing means the removal, damage or destruction of native vegetation that:

- (a) exceeds a combined area of 100 ha in any two year period, or
- (b) provides significant habitat for listed threatened species or ecological communities, or
- (c) is listed critical habitat.

Native vegetation means

- (a) trees (including any sapling or shrub, or any scrub),
- (b) understorey plants,
- (c) groundcover (being any type of herbaceous vegetation), or
- (d) plants occurring in a wetland,

where not less than 70% of the vegetation are Native Species

While Australia is one of the most biologically diverse nations in the world⁶, it also clears more native vegetation per year than any other developed nation in the world⁷. Broad scale is widely recognised as the key major threat to Australia's terrestrial biodiversity.

In January 2003, WWF- Australia commissioned a scientific analysis of the biodiversity impacts of clearing in Queensland (which prior to 2003 averaged about 500,000 hectares per year). That study found that land clearing killed more than 100 million birds, mammals and reptiles each year in Queensland alone. Satellite data shows that during 1999-2001, 94% of tree clearing in Queensland was for pasture⁸. Combine those figures with the reality that extensive clearing in Queensland has already led to 107,000 hectares of land in the State showing signs of salinity, with over a third of this land no longer able to support farming.

The impact of broadscale clearing is undeniable. Indeed, the 2001 SoE report noted that “the destruction of habitat by human activities remains the major cause of biodiversity loss”. Not only does it result in the destruction of native species, but it has the knock on effect of destroying habitat resulting in further species loss, leading to the occurrence of dryland salinity, increasing the likelihood of weed infestation and invasive species movement, leads to soil degradation and erosion, and contributes over 13% of Australia’s total carbon dioxide emissions.

The *National Objectives and Targets for Biodiversity Conservation 2001-2005* set the target of all jurisdictions having clearing controls in place that will have the effect of reducing the national net rate of land clearance to zero, by 2012. However, in 2001 alone an estimated 248,000 ha of Australian land was cleared¹³. The 2001 review of the *National Strategy for the Conservation of Australia's Biological Diversity*, noted that object 3.2 of the National Strategy had not been achieved. Objective 3.2 called for the Australian Government to “ensure effective measures are in place to retain and manage native vegetation, including controls on clearing” by ensuring that there were adequate policies and controls in place throughout the Australian jurisdiction.

Some of the States have made efforts to halt unsustainable native vegetation clearance. For example, the Queensland Parliament has passed the *Vegetation Management and Other Legislation Amendment Act 2004*, which aims to phase out the large-scale clearing of mature remnant bushland. However, one of the issues preventing State and Territory legislation from adequately protecting the environment from excessive broadscale land clearing is the differing regimes that exist throughout the country.

Without a national focus on land clearing activities, the damage to the Australian Nation will continue. In the past 10 years alone the number of terrestrial bird and mammal species assessed as extinct, endangered or vulnerable rose by 39%¹⁵. The threat and cost of salinity will also rise. In 2000, about 46,500 sq kms (4.6 million hectares) of agricultural land was already affected with a high salinity hazard costing an estimated \$187 million in productivity. The EPBC Act is the most appropriate place for the Australian Government to focus its efforts to combat the impacts of broadscale clearing.

Given the rate of biological loss and environmental degradation caused by broadscale clearing, it is clear that current methods of control are failing to work and Australia is falling far short of its international obligations, such as those under Article 8 (c) – (e) of the Biodiversity Convention.

With broadscale land clearing as an EPBC Act trigger, the Australian Government can actively achieve the objects of EPBC Acts by promoting the principles of Ecologically Sustainable Development. In particular, principles of integrating of long and short term economic, social and equitable considerations, inter-generation equality and the conservation of biological integrity.

Greenhouse emissions

New Trigger - A person must not take an action that has, will have or is likely to have a significant impact on the environment by resulting in, or that is likely to result in greenhouse gas emissions of:

- (a) over a 100,000 tonnes of carbon dioxide equivalent in any 12 month period, or
- (b) 5 Mt of carbon dioxide equivalent over the likely lifetime of the action.

New Definitions

Greenhouse Gas Emission means the release of:

- (a) carbon dioxide (CO₂),
- (b) methane (CH₄),
- (c) nitrous oxide (N₂O),
- (d) perfluoromethane (CF₄),
- (e) per-fluoroethane (C₂F₆), or
- (f) any combination of (a) – (e) above.

Pollution from Greenhouse gas emissions is a global issue that, within the Australian jurisdiction is best dealt with at a National level. Greenhouse gas pollution from human sources has already caused a 0.6°C rise in the global average temperature above the preindustrial level. This seemingly small change in temperature has already had a significant impact on the Australian environment by causing coral bleaching in our marine reserves and World Heritage areas and by increasing the severity of the recent drought and bushfires across the country.

The Inter-governmental Panel on Climate Change¹⁸ identified a range of impacts on ecosystems, human health and the incidence of extreme weather events associated with an increase in the global average temperature of 2°C above the pre-industrial level. This dangerous temperature threshold must be avoided if the risk of large and irreversible changes is to be lowered.

By incorporating a greenhouse trigger into the EPBC Act the Australian Government could have more control over new developments and any increase or changes in existing projects where they are likely to result in the release of greenhouse emissions over a 100,000 tonnes of carbon dioxide equivalent in any 12 month period, or is likely to produce 5 Mt of carbon dioxide equivalent over the expected lifetime of the action. Australia's Greenhouse gas emissions are increasing. Indeed, in the 10 years to 2002 Australia's total net greenhouse emissions increased 8.8% to 550 megatonnes (Mt) CO₂ equivalent. Even without any further increase, given the current levels of greenhouse gas pollution and the inherent inertia of the climate system, the global

community is probably 'locked into' at least a further 1°C rise in the global temperature. This is likely to cause major problems for Australia with increases in extreme weather events, reducing water resources and negative impacts on natural ecosystems, agriculture and fisheries.

Greenhouse is already recognised by the Australian Government as a serious issue with the *National Climate Change Adaptation Programme* allocating \$14.2 million for preparing Australian governments, vulnerable industries and communities for the "unavoidable impacts of climate change". Review of the National Strategy for the Conservation of Australia's Biological Diversity noted that objective 3.6 Impacts of Climate Change on Biological Diversity had not yet been achieved. By incorporating greenhouse gas emissions into the EPBC Act the Australian government will achieve national, cost effective and efficient ways to legislate for any further development that will significantly add to the nation's greenhouse charge.

On 30 December 1992, Australia became the ninth State to ratify the *United Nations Framework Convention on Climate Change* (the FCCC). Under Article 4 of the FCCC, Australia is obligated to adopt national policies and take corresponding measures for the mitigation of climate change. By incorporating a greenhouse gas emissions trigger into the EPBC Act the Australian Government could give effect to its obligations while securing the objects of the EPBC Act.

Unsustainable Water Use

New Trigger - A person must not take an action that has, will have or is likely to have a significant impact on the environment by abstraction or enabling the abstraction of surface and/ or ground water resources over 10,000 megalitres. By 2000, about one-quarter of Australia's surface water management areas were already classed as highly used or overused, with 11% of the surface water management areas and another 11% of the groundwater management units exceeding the overdeveloped threshold. The addition of an EPBC trigger where any person wants to undertake an action that abstracts or enables the extraction or harvesting of surface or ground water exceeding 10, 000 megalitres will provide the Australian Government with a more direct way of regulating the impacts that water extraction has on Australia's environment. For example, such a trigger would apply to large irrigated agriculture developments, including those harvesting water from floodplains via large scale levee banks, channels and dams, which are likely to have a significant impact on downstream aquatic ecosystems and other users.

Water extraction is a National issue that often transcends State borders (such as extraction from the Murray River). Indeed, river systems provide about 73% of the water used in Australia (~24 000 GL) with a further 21% coming from ground water aquifers. Unsustainable water use is a major problem in Australia. So much so that, for example, reducing the level of water over allocation in the Murray-Darling Basin will cost \$500 million over five years commencing in 2004-05.

One of the continuing issues hindering the sustainable use of Australia's water resources is the sheer size of the current diversion coupled with the differing legislative regimes in each of the States and Territories. Australia has 325 surface water management areas, based on the country's 246 river basins, and 538 groundwater management units (hydrologically connected water systems). The river systems and catchments within these areas are at differing stages of use and development and often pass through differing legislative regimes along their length. For example, irrigation corporations along the Murray, Goulburn and Murrumbidgee River systems cumulatively extract over 5,000,000 megalitres each year, effecting the environment across 3 State borders.

Unsustainable water use affects all jurisdictions across Australia. In NSW for example 87% of the river length within the State already has altered hydrologic regimes, while in Tasmania there has been a 173% surge in surface water use in the past 20 years. In Queensland, large scale floodplain harvester Cubbie Station on the Balonne River, has a cumulative storage capacity exceeding several hundred thousand megalitres, and Australia-wide bulk water licences for irrigation corporations can exceed 2,000,000 megalitres.

Water abstraction is a key threat to many wetlands of national and international importance. The NLWRA *Terrestrial Biodiversity Assessment* study of key threats to wetlands listed in the *Directory of Important Wetlands in Australia 2001* identified hydrological change as one of the top 4 threats. Additionally, water abstraction is a key threat to a number of Ramsar listed wetlands, such as the Macquarie Marshes and harvesting of overland flows, especially in highly variable river systems, and reduces connectivity between floodplain features, resulting in fragmentation of freshwater ecosystems.

By adding an EPBC Act trigger for unsustainable water use, at the level of abstraction over 10,000 megalitres, the Australian Government can control the environmental impacts of large scale water projects. This will foster the Australian government's efforts to achieve the objects of the EPBC Act to provide for the protection of the environment, to promote the conservation of biodiversity, and to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources. It will also allow cooperative regimes with the States, with the level of extraction proving a clear indicator of whether the proposed water use is a matter of State or National significance.

Unrelenting and unsustainable use of Australia's water resources will inevitably mean that river systems, aquifers, and caste systems will no longer be able to support their native ecosystems, which, in some cases, exist nowhere else in the world. The Biodiversity Convention requires the Australian Government to promote the protection of ecosystems and natural habitats. Additionally, the Ramsar Convention requires effective management of listed wetlands. With the continued use of Australia's water resource at the current level, Australia will fall far short of its obligations in relation to freshwater ecosystems.

The Construction and operation of Dams

New Trigger - A person must not take an action that has, will have or is likely to have a significant impact on the environment by the construction and or operation of any Large Dam.

New Definition-

Large Dam means any artificial barrier that obstructs, directs or retards natural water flow and that

- (a) has a crest height of 15 m or more; or
- (b) has an impoundment capacity of over 1 M cubic metres.

Australia is the driest inhabited continent with annual rainfall averaging only 455 mm. The rainfall that does occur is distributed unevenly across the continent so that river flows are nearly 3 times more variable in Australia than the world average²⁹. Perhaps a consequence of this restricted rainfall is Australia's fondness of damming its river systems. Australia has 447 large dams with a combined capacity of 79 000 GL of water.

This is equivalent to 158 times the volume of Sydney Harbour. This hydrological modification occurs throughout Australia to varying degrees and has a potentially devastating impact on the Australian environment.

The threat to the Australian environment is increasing with the unsustainable use of the available water resources. Indeed, between 1983/ 84 and 1996/97, surface water use across Australia annually increased by 69 per cent (20 300 GL)³¹. Making large dams an automatic trigger for the EPBC Act will allow the Minister to create clearer guidelines on how dams, as a MNES, will be assessed.

The recent *Nathan Dam*³² Federal Court Case pointed to the difficulties in assessing large scale dam proposals. The full Federal Court found that when assessing the dam, the Minister must consider "all adverse impacts" of the proposal, which was found to be "not confined to direct physical effects of the action on the matter protected by the relevant provision of Pt 3 of Ch 2 of the EPBC Act. It includes effects which are sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be, the consequences of the action on the protected matter".

Making large dam proposals an automatic trigger for the EPBC Act where they are likely to have a significant impact on the environment will provide a more direct method for DEH and the Minister to assess the likely environmental impacts of such an action, reducing proponent's uncertainty and creating a common standard by which all large dam projects are assessed.

As a current example, Queensland's proposed Mary River Dam has been called in for

assessment by the Commonwealth Minister for Environment and Heritage. The assessment process may well seek to focus on specific issues, such as the Queensland lung fish, however the most important factors in maintaining a functional component of freshwater biodiversity are maintenance of water quality, provision of adequate environmental flows and mitigation for potential threats such as cold water pollution. If it seeks to adequately assess this large dam's impact on MNES, the Commonwealth may well need to assess the project on the basis of its wider impact on water.

The issues preventing the issue of dams from being adequately dealt with in the current regime, despite the COAG agreement, are not only the differing legislative regimes but also the failure of some of the States to adequately enforce the existing regimes. In NSW and Victoria there are approximately 30 large dams that breach statutory pollution laws (NSW) or water quality protection policies (VIC) regarding water temperature regimes. For example, from the information available it would appear that 18 large dams owned by State Water in NSW regularly discharge water that exceed the maximum allowable 2 degree Celsius temperature range established by Schedule 3 of the *Protection of the Environment Operations (General) Regulation* 1998:

cl. 10. Any thermal waste (being any liquid which, after being used in or in connection with any activity, is more than 2 degrees Celsius hotter or colder than the water into which it is discharged).

Amendments to the NSW Water Management Act 2000 that passed in 2005 mean that if dam operators have in place a management plan that sets out future management of cold water issues, then they are exempt from the *Protection of the Environment Operations Regulation*.

Some, but not all, have management plans in place and mitigation efforts are often ineffective in the short-term. Commonwealth oversight on development and implementation of cold water mitigation may improve river health over hundreds of kilometres of water courses in the Murray Darling basin.

Large dam projects can have a devastating impact on fresh water ecology and biodiversity, not only by restricting water flow but also by changing nutrient levels, thermal pollution, sediment build up and simply by being in the way and preventing movement. Dams also destroy the ecosystem in the inundation zone, and can effectively starve down stream ecosystems of the water they need to survive.

The Commonwealth and States agreed in 1994, in COAG's National Water Initiative, that

"proposals for investment in new or refurbished water infrastructure continue to be assessed as economically and ecologically sustainable prior to the investment occurring" (Section 69).

By adding an EPBC trigger on the development of large dams, the Commonwealth will play a leading role in implementing this section of the National Water Initiative.

Large Dam projects throughout Australia should be a MNES, and be built in accordance with the overarching principles of ecologically sustainable development. This would help the Australian government achieve the objects of the EPBC Act, especially those in relation to ecologically sustainable development through the conservation and ecologically sustainable use of natural resources as well as promoting the conservation of biodiversity.

