



**Submission to the Senate  
Environment, Communications,  
Information Technology and the  
Arts Committee Inquiry into the  
provisions of the *Environment &  
Heritage Legislation Amendment  
Bill (No. 1) 2006***

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**Contacts:**

**Michael Kennedy, HSI**

**Alistair Graham, TCT**

**Andreas Glanznig, WWF-Australia**

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# Introduction

Humane Society International, the Tasmanian Conservation Trust and WWF-Australia welcome the opportunity to provide a submission to the Federal Senate Environment, Communications, Information Technology and the Arts Committee inquiry into the provisions of the *Environment & Heritage Legislation Amendment Bill (No.1) 2006*.

This submission supports and endorses the Australian Network of Environmental Defender's Offices Inc (ANEDO) submission. It is designed to particularly elaborate on key issues of major concern to HSI, TCT and WWF-Australia.

At the outset, HSI, WWF and TCT wish to emphasise the point raised by the EDO in their submission that a lack of DEH resources is not an excuse to streamline the assessment requirements for actions that impact on Matters of National Environmental Significance (MNES) (nor to change the nomination processes to give the Minister unfettered political discretion to limit what species, habitats and heritage places receive MNES protection under the Act). The EPBC Act is currently lauded as best practice internationally and it can be implemented efficiently and effectively if the Government chose to give DEH the level resources that are warranted to protect Matters of National Environmental Significance. 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.

Our organisations have been strong advocates for the EPBC Act since it passed Parliament to the present day. This support is evidenced by our organisations administering the EPBC Unit Project, which aimed to increase community understanding of the Act and enable the community to engage the public participation processes under the Act.

Based on the nature of the current proposed amendments particularly in relation to review of Ministerial decision, threatened species nomination and listings process, and heritage nomination and listings process, it is important for our organisations to draw a line in the sand. Without significant changes to the bill, HSI, TCT and WWF believe that the Act will be weakened and will no longer reflect international best practice. 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.

In addition, the bill has missed a major opportunity to address major threats to Australia's environment by not introducing four new MNES triggers to better address broadscale land clearing, greenhouse emissions, unsustainable water use and construction of large dams, and strengthen the provisions pertaining to threatened species critical habitat.

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.

***Recommendation 1: That the timetable for passage of the bill be extended to enable proper parliamentary scrutiny and consideration.***

## **About HSI**

Humane Society International (HSI) Australia is a program of The Humane Society of the United States (HSUS). HSUS is the largest animal protection organisation in the world with approximately 10 million members. HSI Australia has 40,000 supporters.

HSI Australia works on national and international biodiversity policy and law, focusing on habitat protection, private refuge systems, marine conservation, international treaties, and providing small grants to NGOs in biodiversity *hotspot* regions in the Asia Pacific region.

HSI was a key NGO player in the development and passage of the *Environment Conservation & Biodiversity Conservation Act, 1999*, and has undertaken considerable efforts in helping facilitate its subsequent implementation. HSI has been and remains an adviser to a range of Australian Government biodiversity conservation programs and other national and international Government initiatives. HSI has also undertaken actions in the Federal Court and the Administrative Appeals Tribunal through the EPBC's third party provisions.

## **About WWF-Australia**

WWF-Australia is part of the WWF International Network, the world's largest and most experienced independent conservation organisation. It has close to five million supporters and a global network active in more than 100 countries.

WWF's mission is to stop the degradation of the planet's natural environment and to build a future in which humans live in harmony with nature, by:

- conserving the world's biological diversity;
- ensuring that the use of renewable natural resources is sustainable; and
- promoting the reduction of pollution and wasteful consumption.

With over 80,000 supporters, and active projects in Australia and the Oceania region, WWF works to conserve Australia's plants and animals, by ending land clearing, addressing climate change and invasive species, and preserving and protecting our fresh water, marine and land environments.

WWF achieves this by working on the ground with local communities, and in partnership with government and industry, using the best possible science to advocate change and effective conservation policy.

## **2.0 A preferred way forward: an amendment checklist**

Below is a checklist of HSI, TCT, and WWF-Australia amendments that should be reflected in a bill that would genuinely strengthen the EPBC Act.

### **Referrals**

1. The EPBC Act is operating at present as a wholly voluntary system. It is heavily reliant on the honesty and goodwill of proponents to refer their own actions to the Minister for approval. This means that there are potentially thousands of referable actions that are being undertaken in breach of the EPBC Act. The EPBC Act should be amended to:
  - a) either: specifically allow any person to refer an action to the Minister for assessment as to whether it is a controlled action.
  - b) or: include an express right for any person to advise the Minister of an action that may need EPBC approval and a corresponding express obligation for the Minister to require the action taker to provide such information as is necessary for the Minister to determine whether to call in the action for a controlled action decision.
2. Increase the time periods available for public comment at both the controlled action and the assessment stages of the assessment and approval process. Community groups find it almost impossible to meet the current time frames.
3. Ensure that notices of invitations to comment on referrals are advertised in relevant local and national newspapers. Currently referrals are only published on the DEH website site. Not everyone has access to the internet, especially in remote areas, so restricting notification to the internet effectively precludes participation by whole sectors of the community.
4. Require that a copy of each referral be published on DEH's website, even where the proponent has stated that the action is a controlled action and regardless of whether the referral is open to public comment. This allows the public to begin working on submissions for the assessment stage of the process as early as possible.

### **Reconsideration of decisions**

5. Require public consultation as part of the Minister's reconsideration of a controlled action decision.

### **Choice of Assessment Approach**

6. The choice of assessment approach and the reason for that choice is currently a grey area in the EPBC Act processes. The public has no right to comment on what assessment approach is most appropriate for the particular referral. The EPBC Act should be amended to require public comments to be invited and taken into account in relation to the choice of assessment approach

7. Require guidelines to be published that provide clear criteria for the choice of assessment approach.
8. With 18% of referrals being assessed by accredited assessment there is the possibility that referrals are being assessed to different standards. Regulations are required to prescribe minimum standards, public comment periods, and the scope/content of the assessment.
9. Currently 71% of referrals are being assessed on preliminary documentation. Ensure that only a minority of relatively minor referrals are assessed on preliminary documentation; and assess the majority by way of an environmental assessment.

## **Assessment**

10. Ensure that Ministerial declarations to accredit assessment processes expire after 5 years (as is currently the case for assessment bilateral agreements). Before it expires, the Minister must review the declaration and publish a report of the review.
11. Subject assessment bilateral agreements to parliamentary scrutiny and disallowance (as is currently the case for approval bilateral agreements)
12. Once the EPBC Act is triggered (ie once the action has been declared a controlled action), ensure that all environmental impacts (and not just impacts relating to the matters protected under Part 3) are assessed and taken into account in the assessment and approval process. Assessments are currently unrealistically narrow in their focus, which effectively prevents the Act from achieving its objective of providing protection for the environment and promoting ecologically sustainable development.
13. Ensure that assessment documentation under accredited assessment is required to be made widely available.
14. Make all assessment documentation available on the DEH website.
15. Require copies of public comments on assessment documentation to be provided to the decision maker and taken into account (rather than the proponent revising documents to take into account public comments).
16. Specifically provide that assessment must expressly include cumulative impacts.
17. Institute a system whereby audits can be undertaken to ensure that all comments are received by DEH.
18. Remove the ability for proponents to charge the community for access to the assessment documents.

## **Approval**

19. Remove the capacity for approval powers to be delegated to States through approval bilateral agreements.
20. Remove the capacity for approval powers to be delegated to other Commonwealth agencies through Ministerial declarations.
21. Improve the quality of conditions to ensure legal enforceability of conditions.

22. Ensure that time restrictions on approvals, compliance with plans, and independent auditing become standard EPBC Act approval conditions.
23. Ensure that Statements of Reasons are developed for all approvals that received comments at the assessment stage.

## **RFA Exemption**

24. Amend 40(1) to exclude new forestry operations in RFA regions where the operation requires the clearing of remanent native vegetation or listed critical habitat.
25. Exclude forestry operations where the operation will or is likely to have a significant impact on a Matter of National Environmental Significance – allowing the Minister to place conditions on the operation to minimise those impacts.
26. Require strategic assessment of forestry operation and the institution of management plans to minimise impacts on Matters protected under Part 3 of the Act.
27. Amend the definition of “forestry operations” to expressly exclude matters not directly connected to the operation such as run-off into streams, and the effect of clearing on places outside the RFA region.

## **Matters of National Environmental Significance**

28. New matters of National Environmental Significance should be added to the EPBC Act to give effect to the objects of the Act.
  - 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 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

## **Conservation of Biodiversity**

### **Species and Communities**

29. Add ‘near threatened’ to the categories for threatened species (to ensure consistency with IUCN categories)
30. Add ‘near threatened’ and ‘conservation dependent’ to the threatened ecological community categories to mirror the threatened species provisions, with ecological

communities in the category of ‘vulnerable’ to become a Matter of National Environmental Significance.

31. Provide for interim protection for threatened species and ecological communities to cover them in the period between nomination and listing.
32. Extend the Migratory Species trigger to include the highly migratory species listed in Annex I of *United Nations Convention on the Law of the Sea*.
33. Require inventories for threatened species, ecological communities, migratory species and marine species on Commonwealth land to not only identify and state the abundance of the relevant species, but also to identify range, habitat, critical habitat, and corridors where known.
34. Amend the provisions relating to wildlife conservation plans so that:
  - a) the preparation of wildlife conservation plans is compulsory, rather than at the Minister’s discretion;
  - b) Commonwealth agencies are required to not act inconsistently with wildlife conservation plans, rather than just taking reasonable steps to act in accordance with wildlife conservation plans; and
  - c) Commonwealth agencies are required to implement wildlife conservation plans in Commonwealth areas (as is required for recovery plans).

#### **Critical Habitat**

35. Provide a formal process for public nominations of ‘critical habitat’, equivalent to the threatened species nomination process.
36. Provide a mechanism for automatic consideration for listing in the critical habitat register of habitat identified as critical in TSSC listing advice and/or recovery plans.
37. Extend powers to protect critical habitat for threatened species and ecological communities, by including offences for damaging critical habitat *outside* Commonwealth areas.
38. Provide a deadline (3 years) for identifying and listing critical habitat for all critically endangered and endangered species on the *Register of Critical Habitat*.

#### **Key Threatening Processes**

39. Ensure that once a key threatening process is listed a threat abatement plan for that key threatening process must be developed and within a specified time frame.

#### **Invasive Species**

40. Invasive species are one of the major threats to Australia’s biodiversity.
  - a) either: Develop and implement strong regulations for the control of invasive species under s301A of the EPBC Act;
  - b) or: Insert a new Part into the EPBC Act to regulate the control of invasive species.

## **Commonwealth reserves**

41. Regulations or amendments that explicitly prohibit killing, injuring, taking, trading or moving any member of a native species (including species not listed under the EPBC Act) in a Commonwealth reserve.

## **Compliance and Enforcement**

42. Broaden standing provisions to allow ‘any person’ rather than just ‘interested persons’ to apply to the Federal Court for an injunction or judicial review
43. Create guidelines to define the scope of public interest litigation under the EPBC Act to assist in costs orders.
44. Significantly increase the maximum penalty that can be prescribed for offences in the EPBC regulations from 50 penalty units (\$5,500) so that the penalty acts as a reasonable deterrent.
45. Amend the penalty provisions under Part 12 of the Regulations so they are strict liability offences.
46. Engage in proactive compliance and auditing. Breaches should be prosecuted.
47. Where negotiated settlements are reached, these should be in the form of enforceable covenants and contracts, not hand shake agreements.
48. Investigate the possibility of instituting an on the spot fine system for minor breaches.

## **Miscellaneous**

49. Review and allow for public comment on the review of all conventions to which Australia is a signatory to review whether those conventions are applicable to the operation and objects of the EPBC Act, and include relevant conventions in the list of agreements in relation to which regulations may be made under the EPBC Act.
50. Amend s391 to ensure the precautionary principle must be taken into account when making all relevant decisions under the EPBC Act.

## **2.1 The strategic role of critical habitat**

The statutory regime to enable recovery of threatened species is currently inappropriately constrained, and is leading to on-going cumulative habitat loss and decline – in short ‘death by a thousand cuts’. The reason is three-fold.

First, while the two national State of the Environment reports to date have both highlighted that the major threat to Australia’s terrestrial biodiversity is habitat loss, the statutory provision that links habitat protection and recovery under the EPBC Act – critical habitat - is severely constrained (for example, offence provisions only applying in or on a Commonwealth area (s207B)). The summary above (points 35 to 37) recommends amendments to extend powers to protect critical habitat outside of Commonwealth areas (this extension would also need to apply to current s196 and s196A,B,C,D,E pertaining to permit system for threatened species and communities). This proposed amendment would bring the EPBC critical habitat provision more into line with the statutory powers associated with critical habitat under the US *Endangered Species Act*.

Second, while other terrestrial biodiversity related MNES, such as wetlands of international significance, migratory species (and their concomitant habitat), and heritage MNES, generally have clearly delineated boundaries, the delineation of threatened species critical habitat falls several quanta below these. This impedes threatened species habitats being adequately integrated into regional and local development plans and systems.

Third, to date the Australian Government has listed a mere five critical habitats on the *Register of Critical Habitat* – for less than 1% of listed species - and all but two are found on off-shore islands.<sup>1</sup> This exceptionally slow rate of critical habitat is impeding strategic consideration of how to maintain these habitats in the face of incremental development pressure. In comparison, under the US *Endangered Species Act*, as of 23 August 2005, 37 percent of listed threatened species has designated statutory habitat, and the US Fish and Wildlife Service (USFWS) and the National Marine Fisheries Service took only 2 years to develop a prioritised list of 190 critical habitats.<sup>2</sup>

A recent review of the performance of the US *Endangered Species Act* highlighted the strategic role that statutory designated critical habitat plays in threatened species recovery. In short, quantitative analysis found a positive correlation between threatened species recovery and listing of critical habitat under the Act. A summary appears in the box below.

#### **Impact of critical habitat under US *Endangered Species Act***

Since the inception of the *Endangered Species Act*, 15 species have recovered and been removed from the threatened species list. Although the short time most species have been listed makes any expectation of hundreds of recoveries unrealistic, it is notable that most of these recovered species were primarily threatened by hunting, pollution, or exotic species. Thus, although habitat loss is the primary cause of endangerment, recovery efforts have been most successful at recovering non-habitat threatened species (Suckling and Taylor 2005).<sup>3</sup>

An USFWS review of an unpublished study demonstrated a positive correlation between species' recovery trends and presence of critical habitat (Skorupa 2003 cited in Suckling and Taylor 2005).<sup>4</sup> This finding was reinforced by a recent quantitative analysis of the effectiveness of the *Endangered Species Act* that correlated the population trends for 1095 species listed as threatened and endangered with the length of time the species were listed and the presence or absence of critical habitat and recovery plans. It found that species with critical habitat for two or more years were more than twice as likely to have an improving population trend in the late 1990s, and less than half as likely to be declining in the early 1990s, as species without. It also found that species with dedicated recovery plans for two or more years were significantly more likely to be improving and less likely to be declining than species without. On the basis of these findings the analysis recommended increased funding for earlier listing of imperilled species and prompt provision of critical habitat and recovery plans.<sup>5</sup>

## **2.2 New Matters of National Environmental significance triggers needed**

The Australian Government endeavours to achieve the objects of the EPBC Act via permit, Environmental Impact Assessment (EIA) and approval processes. With the addition of additional new MNES, the Australian Government would be better placed to achieve the

EPBC Act objects, particularly those that relate to conservation and protection of biodiversity and the environment, and those relating to ecologically sustainable development and use of natural resources.

## 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 world<sup>6</sup>, it also clears more native vegetation per year than any other developed nation in the world<sup>7</sup>. 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 pasture<sup>8</sup>. 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.<sup>9</sup>

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”<sup>10</sup>. 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<sup>11</sup>.

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 2001<sup>12</sup>. However, in 2001 alone an estimated 248,000 ha of Australian land was cleared<sup>13</sup>. 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.<sup>14</sup> 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 issue 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%<sup>15</sup>. 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<sup>16</sup>. 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 cause 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) 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 (CO<sub>2</sub>),
- (b) methane (CH<sub>4</sub>),
- (c) nitrous oxide (N<sub>2</sub>O),
- (d) perfluoromethane (CF<sub>4</sub>),
- (e) per-fluoroethane (C<sub>2</sub>F<sub>6</sub>), 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 pre-industrial level<sup>17</sup>. 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 Change<sup>18</sup> 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) CO<sub>2</sub> equivalent<sup>19</sup>. 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<sup>20</sup>.

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"<sup>21</sup>. 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<sup>22</sup> 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<sup>23</sup>. 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<sup>24</sup>. 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)<sup>25</sup>. 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<sup>26</sup>, while in Tasmania there has been a 173% surge in surface water use in the past 20 years<sup>27</sup>. 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.<sup>28</sup> 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 average<sup>29</sup>. 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<sup>30</sup>. 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)<sup>31</sup>. 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*<sup>32</sup> 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.

## 3.0 Comments on the EHL Amendment Bill

### 3.1 Removal of Merits Review

HSI, WWF and TCT strongly object to the removal of ministerial decisions from merits review and support the EDO's comments in this regard. The EDO provides a list of the decisions that will no longer be subject to review in Section 1 of their submission. To illustrate our concerns may we remind the Committee that university researchers have previously had permits for research that involved hot branding seals on Macquarie Island, seriously wounding the animals and causing a public outcry. Ministerial decisions to issue permits to interfere with marine species such as seals will not be subject to merits review (section 263A). The public will no longer be able to challenge Ministerial decisions to interfere and harm cetaceans, for instance the issuing of a permit to allow seismic testing in close proximity to known habitat for endangered whale species (section 243A).

***Recommendation 2: The Amendments to remove merits review of Ministerial Decisions should be opposed.***

### 3.2 Removal of Merits Review for Wildlife Trade Decisions

HSI, WWF and TCT strongly object to the removal of decisions in relation to the international movement of wildlife specimens from merits review. The ability to seek merits review for Ministerial decisions relating to wildlife imports and exports has existed in Commonwealth law since 1983 in the *Wildlife Protection Import and Exports Act (1982)*. Removing the public's democratic right to appeal such decisions is a retrograde step for wildlife protection in Australia. Our organisations have used these provisions judicially on a very limited number of occasions and achieved important concessions for the welfare and conservation of the species involved that have had lasting effect.

May we draw the attention of the Committee specifically to the importation and exportation of animals to and from zoo institutions. Decisions relating to the international movement of wildlife between zoos are already exempt from the usual public consultation processes in the EPBC Act. In fact, due to extraordinary concessions given to the zoo community during the negotiation of the original EPBC Act in 1999, this is one of the very few decision making processes in the existing EPBC Act that is not transparent and subject to public consultation. To now exempt ministerial decisions relating to zoo imports and exports from merits review will entirely remove these processes from any public scrutiny. This is unacceptable. Such decisions are often a matter of serious public concern, for example the importation of species listed on the Convention for International Trade in Endangered Species such as polar bears and Asian elephants to unsuitable enclosures in Australia and the exportation of native Australian wildlife (koalas, wallabies) to controversial entertainment parks in Asia.

HSI does support new section 303GE(5A) that clarifies that conditions may be placed on an import permit that extend beyond the time it takes to import the species. This is important and enables the Minister to ensure that the animal's welfare is taken care of in the longer term, consistent with the Minister's requirements to ensure the importing facility can meet the behavioural and biological needs of the species in deciding whether to grant an import permit. (In a court case over the importation of Asian elephants, barristers for Taronga and Melbourne Zoos argued that the Minister was not able to place long term conditions on import permits).

*Recommendation 3: Merits review for decisions relating to all wildlife imports and exports should be retained and instead amendments are required to include zoo trade in wildlife in the usual EPBC Act public consultation processes.*

### **3.2 Removal of Review of Matter of National Environmental Significance ‘Triggers’**

HSI, WWF and TCT object to the removal of the requirement to conduct a five yearly review of whether to add new Matters of National Environmental Significance ‘triggers’, and publication of a report on the review. HSI, TCT, and WWF advocate the addition of MNES triggers for greenhouse gas emissions, water extraction and allocation, vulnerable ecological communities and vegetation clearing.

*Recommendation 4: Object to the removal of the requirement to conduct a public 5 yearly review of the Matters of National Environmental Significance triggers.*

### **3.3 Threatened Species, Ecological Community and Key Threatening Process Nominations and Listing**

HSI, WWF and TCT hold grave concerns for the proposed process for listing threatened species, ecological communities and key threatening processes<sup>1</sup>. 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.

This 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 Minister Robert Hill in November 2001. This wipes over 500 threatened ecological communities from the Committee’s current assessment list. Section 185 was designed to provide a strategic framework for the Scientific Committee to systematically consider all the ecological communities receiving protection under state and territory legislation for their appropriate national protection under the EPBC Act. It is one of the clauses that our organisations found attractive when giving the Government strong support for the EPBC Bill during its controversial passage through the Senate in 1999. We strongly oppose the repeal of this clause.

In determining the new ‘priority assessment lists’ of public and Scientific Committee generated nominations, the Minister will now have an extraordinary level of unfettered discretion to decide which nominations the Committee can assess. It may be that once the Minister actually receives a recommendation from the Scientific Committee to list a species he is ostensibly constrained to considerations of conservation status, but this offers no comfort if before it gets to this point, the Minister has arranged for the Scientific Committee not to assess species, ecological communities and threatening processes that he can predict will pose political difficulties for the Government. See new section 194K “*In exercising the power to make changes to the priority [assessment] list the Minister may have regard to any matters the Minister considers appropriate*”.

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<sup>1</sup> (Once listed critically endangered, endangered and vulnerable species and critically endangered and endangered ecological communities are Matters of National Environmental Significance).

Further, the Minister may **repeatedly** refuse to include a public or Scientific Committee proposed nomination in the priority assessment list – there is no ultimate obligation to have a nomination considered at all and he is not even required to give reasons for omitting a public nomination from assessment.

There does not appear to be a requirement to publicly disclose the draft assessment list the Scientific Committee provides to the Minister. Therefore, the public will not necessarily know what the Committee recommended as priorities for assessment that the Minister chose to omit from the final list.

HSI alone currently has nominations for 23 ecological communities, 4 threatened species and 3 key threatening processes outstanding under the current assessment system. WWF has at least 3 threatened community and one key threatening process nominations outstanding. These scientific nominations were prepared at considerable effort and expense to our organisations which are public charities. 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.

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

Finally, if politically unfavourable listing recommendations from the Scientific Committee do ever reach the Minister's office, the Amendment Bill makes it very clear that members of the Committee are prohibited from making this advice public and that the Minister can extend the deadline for his decision on the recommendation indefinitely. In the current EPBC Act the minister is required to reach a decision on a recommendation from the Scientific Committee within 90 days. The amendments will allow him to sit on any politically unfavourable recommendations that may still manage to reach his office indefinitely.

We are not expressing undue cynicism in forecasting the politicisation and abuse of these processes. Already, under the current system we have seen the Minister's office and DEH use even the current provisions to continually postpone the assessment of politically difficult nominations. HSI's threatened species nomination to have the eastern gemfish, a commercially exploited species, has recently been postponed for the fifth time. It took seven years for the Minister to reach a decision on the listing of 'Loss of Hollow Bearing Trees During Firewood Collection' as a Key Threatening Process to forest and woodland dwelling threatened species and in the end he disregarded the Scientific Committee's advice and chose not to list it claiming other processes were in place to deal with the threat (a reason we consider invalid). In 2002 the Minister attempted to reject 12 HSI nominations for threatened ecological communities occurring on private land giving reasons that our lawyers argued were invalid. He was forced to concede this and agreed to have the Scientific Committee reconsider them, but then stated that 'nominations under reconsideration' are not subject to statutory deadlines –decisions on all 12 nominations still remain pending. Indeed, HSI is waiting on Ministerial decisions for nominations we submitted in 1999 under the EPBC Act's predecessor legislation the *Endangered Species Protection Act*.

Now, the Amendment Bill appears to be deliberately designed to make such delays and attempts to avoid difficult nominations perfectly valid. Whereas, our organisations have instead been advocating amendments to tighten the listing process and prevent such political

obfuscation. (see HSI and WWF separate submissions to the Australian National Audit Office enquiry in to threatened species protection under the EPBC Act – both attached).

Our organisations do not accept the excuse for the amendments that the Scientific Committee and DEH are suffering an onerous workload. We agree they are under-resourced, however, it is undoubted that the motivation behind the delays already experienced are largely political.

***Recommendation 5: Oppose the amendment and retain the current listing process for threatened species, ecological communities and key threatening processes. Improve the current listing processes with amendments to limit the Minister's ability to extend the Committee's timeline to provide him with advice to a maximum of two years from the date the nomination was submitted and to require the publication of the Committee's advice when it is passed to the Minister for a decision.***

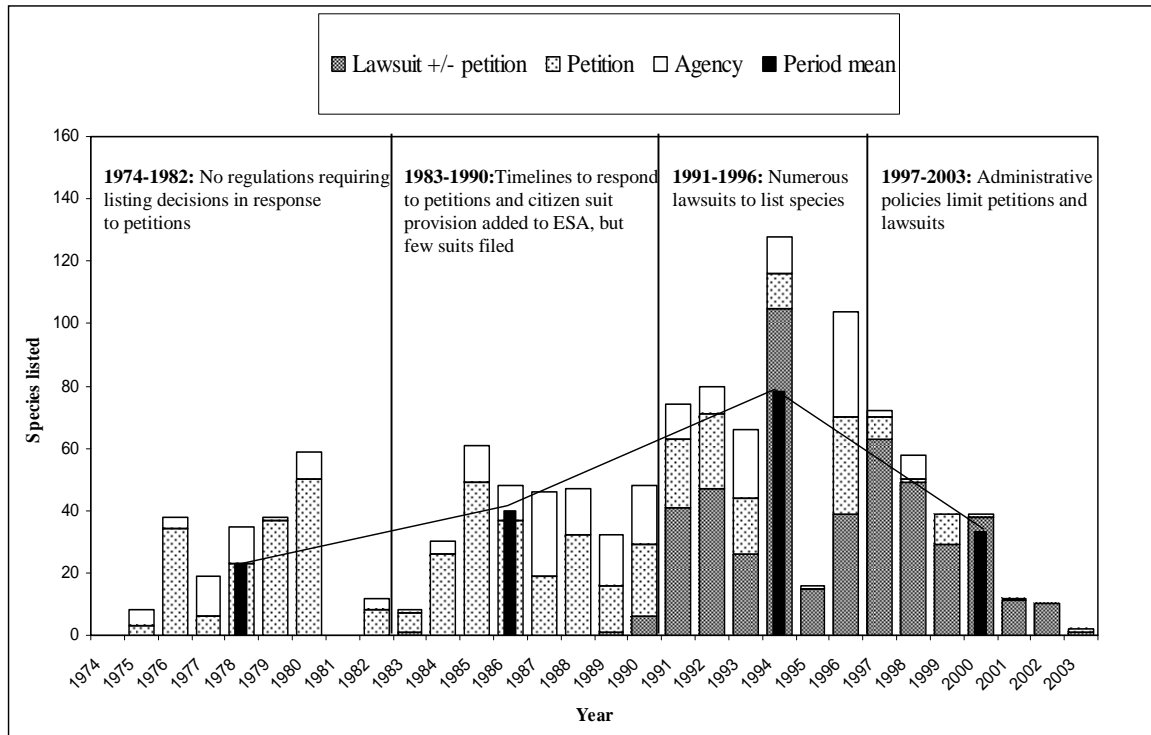
***We also support the EDO recommendation for DEH to convene and resource an expert team to assist the Scientific Committee that is dedicated to assessing the backlog of public nominations and ecological communities gazetted under s185 within a period of 2 years.***

***If this amendment is to be passed, insert a new provision to ensure that public nominations submitted in good faith under the current public nomination system must be considered and assessed under th current public nomination process.***

#### **Possible consequence of new threatened species listing regime**

The proposed limits to the public nomination process and repeal of s185 will inevitably lead to a slower rate of new threatened species being added under the EPBC Act. It is instructive to note parallels with the proposed amendments to limit the public nomination listing process and the experience under the US *Endangered Species Act* once administrative policies were implemented to limit public petitions and lawsuits (the US public nomination equivalent) from 1997. The US experience has been a significantly slower rate of threatened species listings.

**Figure 1: Species listed on the US ESA by year following petitions, lawsuits and agency action, 1974-2003.**



**Source:** Greenwald, D.N. Suckling, K.F. and Taylor, M. 2005.<sup>33</sup>

### Conservation Dependent Category for Threatened Species

HSI, WWF and TCT support the changes to Section 179 to create additional provisions for the listing of conservation dependent species. This is an important category that should be used to arrest the decline of a species before it qualifies for listing in higher categories. However, we note that the intent of new section 179(6)(b) is to use the category to list species of commercially exploited marine fish even if they qualify for listing in higher categories. Offence provisions do not apply to conservation dependent species, fishing can continue and the species can be traded. Our organisations would prefer to see marine fish species that meet the criteria for listing as critically endangered, endangered and vulnerable listed in those categories and not given a lower tier of protection because the Federal Environment Minister is not willing to bring a halt to the commercial exploitation that is endangering the species. The provisions for listing all conservation dependent species would be improved if regulations were developed to specify criteria for conservation programs and management plans to ensure recovery is achieved.

We note that when state and territory governments do give proper threatened species protection for commercial marine fish under their threatened species laws, and thereby halt targeted commercial exploitation in their waters, (as the NSW Government has done with southern bluefin tuna and is about to do with Eastern gemfish), the species can still be sold within the state or territory jurisdiction because the Commonwealth still allows the species exploitation and sale and therefore it is unlawful for the NSW Government to prevent sale. It would be preferable for the Commonwealth Government to complement state protection and list species in the correct category they qualify for (as NSW does) so that sale is prevented and there is no longer an incentive to exploit the species.

### 3.4 Conservation Advice and Recovery Plans

WWF, HSI and TCT have a number of grave concerns about the proposed changes to the conservation planning for listed species. While the drafting of recovery plans has certainly been a slower process than is useful for conservation purposes, this is an issue of inadequate resourcing, not one of superfluous information in the plans. This issue is not eased by 'stream-lining' the information essential for recovery activities from local to whole-of-range scale. It is extremely unlikely that broad Conservation Advice (not legislative instruments) would lead to meaningful conservation action at appropriate scales. Based on many years experience of assessing and working with recovery plans, it is our opinion that the information contained in such a plan is essential for guiding sensible conservation strategies.

The removal of the compulsory writing of recovery plans for listed species or communities removes a significant potential conservation benefit attached to listing. Furthermore, given the increased ministerial discretion with respect to listing, the Minister may decide not to list species or communities that he deems not to require a recovery plan. 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.

***Recommendation 6: That species lists be maintained as comprehensively as possible using whatever means necessary (see previous point) and that recovery or wildlife conservation plans be mandatory for all listed species and communities. Furthermore, we recommend that broad-scale threats affecting significant components of Australia's biodiversity be tackled and resourced strategically to efficiently provide real conservation benefits for entire suites of species and communities. It is vital that the development and enactment of conservation plans be mandatory and not at the discretion of a Minister.***

### 3.5 Critical habitat

The committed designation of critical habitat is one of the actions most likely to yield real environmental protection for threatened species habitats. The designation of critical habitat has been at the discretion of the Minister in the past, with the result that only five critical habitats have been listed in 6 years, none of the likely to face development pressures. This blatant neglect of conservation potential to minimise conflict with development interest has been given further leeway within the current bill, which requires that critical habitat 'may' be designated 'where practicable', both entirely at the Minister's discretion.

***Recommendation 7:***

***WWF, HSI and TCT recommend that the designation of critical habitat – habitat essential to the conservation of a species – be made mandatory and be resourced adequately and immediately. The non-recognition of critical habitat in legal provisions makes it no less critical to the species in question. Avoiding the recognition of critical habitat is resulting in a death-by-neglect (eg. of the Mountain pygmy possum) and fundamentally undermines the object of the EPBC Act.***

***Provide a formal process for public nominations of 'critical habitat', equivalent to the threatened species nomination process.***

*Provide a mechanism for automatic consideration for listing in the critical habitat register of habitat identified as critical in TSSC listing advice and/or recovery plans*

*Extend powers to protect critical habitat for threatened species and ecological communities, by including offences for damaging critical habitat outside Commonwealth areas*

*Provide a deadline (3 years) for identifying and listing critical habitat for all critically endangered and endangered species on the Register of Critical Habitat*

### **3.6 Heritage Nominations and Listing**

HSI, WWF and TCT hold grave concerns for the proposed process for listing places of National and Commonwealth Heritage. The proposal follows the same theme-based process outlined above for the listing of threatened species, ecological communities and key threatening processes, and our concerns for Heritage listings mirror those described above.

Again, the Minister will be afforded unprecedented discretion over the listing process, by constraining public nominations into themes, rather than considering the heritage status of the place being nominated. Furthermore, the Minister will also have the power to omit politically controversial places from the priority assessment list provided by the Australian Heritage Council, prior to the list being available for public comment. Nominations that are not included on the priority list, while being eligible for inclusion in the annual cycle of subsequent years, have the potential to be repeatedly excluded from consideration. There is no requirement for assessment of any publicly nominated place, nor are there any final statutory deadlines applying to nominations that are not on the priority list. This will enable the Minister to indefinitely delay the assessment of politically contentious nominations. HSI alone already has 12 Heritage nominations outstanding in the current assessment system, three of which (the Australian Antarctic Territory, Barrow Island and Ningaloo Reef) have already been subject to delays. Given that HSI, WWF and TCT were instrumental in the passage of the *Heritage Amendment Bill* to the EPBC Act through the Senate in 2003, we are greatly concerned about the fate of these nominations, and the proposed alterations to the listing process that are likely to diminish the scientific consideration of places the original heritage amendments were designed to facilitate.

In addition, the repealing of section 391A has frozen and demoted the Register of the National Estate (RNE), removing the requirement for the Minister to have regard for these places when making decisions, but maintaining them as an archive of heritage data. Such an archive will not consider the conservation or heritage status of these places, and will be effectively meaningless. The RNE is the register that protected Heritage prior to the EPBC Act. These places remain valuable Heritage sites and it is utterly unnecessary to remove them from consideration altogether.

***Recommendation 8: Oppose the amendment and retain the current listing process of Heritage places. Improve the current listing processes with amendments to limit the Minister's ability to extend the Council's timeline to provide him with advice to a maximum of two years from the date the nomination was submitted and to require the publication of the Council's advice when it is passed to the Minister for a decision. If this amendment is not opposed, commit to including on the priority list for the new annual cycle, all outstanding Heritage nominations submitted in the current assessment system.***

***Recommendation 9: Oppose the repealing of section 391A and retain the Minister's obligation to consider the RNE when making decisions under the EPBC Act. Provide a means for the transfer of items on the RNE to the National Heritage List.***

### **3.7 Strategic assessment**

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.

Of particular concern is the risk of reducing proper consideration of threatened species and heritage requirements, especially given the dearth of designated critical habitat.

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".

***Recommendation 10: Support the range of changes proposed in the ANEDO submission.***

### **3.8 Third party enforcement**

While HSI, TCT and WWF generally endorse the amendments that seek to strengthen the compliance and enforcement arrangements under the Act, we strongly oppose the proposed amendment to repeal s478 (which currently prevents the Federal Court from requiring undertakings for damages as a condition of granting an interim injunction). The proposed amendment will significantly increase the financial risk of third parties seeking injunctions and in doing so can be expected to lead to a virtual cessation of third party enforcement actions.

It is instructive to note that third parties have used the court system very judiciously, and given the Australian Government has such poor surveillance arrangements in place to ensure compliance, enabling individuals and organisations to ensure the objects of the Act are achieved should be encouraged not dissuaded.

A good example is the Booth vs. Boswell case in relation to the culling of flying foxes on a farm adjacent to the Wet Tropics World Heritage Area. The case enabled the Federal Court to examine the meaning of "significant impact" and gave guidance on what is meant by "likely".

#### **Third party initiated injunction saves thousands of flying foxes and protects world heritage values**

A concerned citizen, Dr Carol Booth, inspected Mr Bosworth's lychee farm and found that Mr Bosworth was operating a series of 14 aerial electric grids with a total of 6.4km of electrified wire to protect his crop. Over four nights, Dr Booth recorded the death of 300-500 Spectacled flying foxes (*Pteropus conspicillatus*) each night on the electric grid system.

After inadequate responses from the State and Federal governments, Dr Booth made an application in the Federal Court for an injunction under s475 of the EPBC Act to stop Mr Bosworth from operating his electric grid on the basis that he was likely to have a significant impact on the World Heritage values of the Wet Tropics.

The Court found that Mr Bosworth in the 2000-2001 lychee season killed in the order of 18,000 Spectacled flying foxes. This death tally means that in one season Mr Bosworth killed roughly 20% of the total Australian population of Spectacled flying foxes.

Given these numbers, the probable impact of Mr Bosworth's use of the grids on an annual basis was that Mr Bosworth's actions would halve the population of Spectacled flying foxes in less than 5 years. This would render the Spectacled flying fox an endangered species in the Wet Tropics World Heritage Area, and because of their role in seed dispersal and ecological function would have a significant impact on the World Heritage values of the Wet Tropics.

***Recommendation 11: Strongly oppose the amendment to repeal s478***

### **3.9 Lack of new MNES triggers**

There is strong evidence that the objectives of the EPBC Act would be more effectively and efficiently realised through the addition of specific new MNES triggers that target actions that are major threats to Australia's biodiversity. These are outlined in section 2.2 of this submission.

HSI, TCT and WWF strongly believe that this Bill should be used as an opportunity to add new MNES triggers.

***Recommendation 12: Amend the Bill to include new triggers for broadscale land clearing, greenhouse gas emissions, unsustainable water use and large dams.***

## **Conclusion**

In conclusion, HSI, TCT and WWF have major concerns with key elements of the Bill, namely:

- **Process and timetable.** Given the proposed major overhaul of the threatened species and heritage public nomination process, it would have been appropriate to have a public process to fully analyse and consider different models and invite community input (for example through a discussion paper). Instead, the community has been presented with a truncated process that seeks to bulldoze the bill through without proper scrutiny and analysis.
- **Removal of merits review.** A modern democracy depends on a functioning civil society. Greatly reducing the Ministerial decisions that can be challenged by third parties is a backward step.
- **Removal of review of MNES triggers.** Removal of the five year review curtails systematic and regular analysis to determine whether new MNES triggers are needed.
- **Constraints placed on the threatened species public nomination and listings process.** The proposed amendments are a major backward step that will inevitably result in a reduced number of new listings, particularly those that are potentially controversial. They will:
  - Potentially wipe 500 threatened ecological communities from the current waiting list for protection under the EPBC Act (amounting to millions of hectares of endangered habitat across the country).
  - Make it harder for the public to secure legal protection for threatened species and ecological communities with a new requirement for public nominations

- to comply with "themes" set by the Minister or risk having their nominations left off lists for consideration;
- Give the Minister arbitrary discretion to remove a publicly nominated species or ecological community from the annual list of species to be assessed for listing (currently the Minister gives his Scientific Committee repeated extensions to postpone consideration of politically controversial nominations such as commercial marine fish and ecological communities occurring on private farm land – a new amendment will allow him to remove controversial nominations from the Committee's consideration altogether).
  - Allow the Minister to refuse to have assessed a threatened species previously rejected for protection even if its conservation status has worsened (also open to abuse for controversial species).
- **Conservation advice and recovery plans.** The amendments remove the mandatory requirement to develop a Recovery Plan once a threatened species or ecological community is listed under the law as threatened.
  - **Critical habitat.** The amendments remove the mandatory requirement to identify "critical habitat" for threatened species in any Recovery Plans that are developed. They also miss the opportunity to strengthen provisions to enable critical habitat to be better integrated into strategic assessments and planning
  - **Heritage nominations and listing process.** A major backward step that gives the Minister unprecedented discretion over the listing process, by constraining public nominations into themes, rather than considering the heritage status of the place being nominated. Furthermore, the Minister will also have the power to omit politically controversial places from the priority assessment list provided by the Australian Heritage Council, prior to the list being available for public comment.
  - **Third party enforcement.** The removal of the provision preventing the Federal Court from requiring undertakings for damages as a condition of granting an interim injunction creates a significant new barrier to third party enforcement through the courts. Third parties have used the courts very judiciously, and the Government has provided no evidence to substantiate the need to repeal s478.
  - **Strategic assessments.** While cumulative impact assessment is desirable in principle, the ANEDO submission raises numerous issues that need to be addressed in the amendments to ensure proper consideration of MNES, particularly those that are poorly delineated such as critical habitat for listed threatened species.
  - **Lack of new MNES triggers.** These amendments are a missed opportunity to introduce new triggers for broadscale clearing, greenhouse emissions, unsustainable water use and large dams.

We encourage the government to consider amendments to the Bill to address the above concerns.

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