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Senate Standing Committees on Environment and Communications
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By email to: ec.sen@aph.gov.au

14 December 2012

Dear Sir or Madam

Re: Senate inquiry into the effectiveness of threatened species and ecological communities' protection in Australia

Humane Society International (HSI), the world's largest conservation and animal welfare organisation, welcomes the opportunity to provide the following submission to this Senate inquiry on behalf of 11 million supporters worldwide, and 50,000 Australian supporters.

Unfortunately, due to the pressures of recent campaigning activities, particularly in relation to the Prime Minister's plan to devolve Commonwealth environmental protection powers to the states and territories, and the short time for making submissions to this inquiry, we have not been able to devote the time and energy required for a detailed submission, so our comments should not be treated as a comprehensive review of our concerns and ideas. We have also included a number of previous HSI submissions and papers that deal in detail with some of the issues of interest to this inquiry.

Through HSI's nomination program, we have been responsible for many of the threatened species, threatened ecological communities, key threatening processes and heritage places listed under the Act. We have participated in numerous recovery and threat abatement teams and been a member of the Australian Heritage Council. We have actively engaged in public consultation processes on referrals, administrative guidelines, strategic assessment of fisheries and permits to harm and trade in species. Through this work we have gained a detailed understanding of threatened species and ecological community protection in Australia, both the areas where it is succeeding and where it is failing to protect Australia's environment and biodiversity.

HSI supported the passage of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) through Parliament in 1999 recognising it as an improvement on the legislative regimes it replaced. We were attracted to the broad infrastructure of the Act where the Environment Minister has the central role in environmental decision making and where the triggers for Commonwealth intervention are Matters of National Environmental Significance (MNES) occurring in state and territory jurisdictions as well as

Commonwealth. We also saw significant potential for the Commonwealth to engage pro-actively in biodiversity conservation through Chapter 5 of the Act.

Unfortunately, much of the potential within the EPBC Act has not been realised due to insufficient political will and an ongoing failure to direct sufficient resources to its implementation. The potential for the EPBC Act to be a powerful and effective tool for environment protection and biodiversity conservation remains and can be realised with increased political support and financial resourcing, and important amendments to strengthen some of its provisions. Amendments in 2006 that created a triage and drip feed process for listing threatened species, threatened ecological communities, key threatening processes and heritage places on the EPBC Act need to be repealed and the previous process reinstated with improvements and adequate funding to ensure all that warrants protection under the EPBC Act receives it. It should be that the Minister is required to maintain up to date and comprehensive lists, on the basis of current knowledge, and that all species, ecological communities, key threatening processes and heritage places nominated for protection in good faith be duly assessed within prompt statutory timelines.

The EPBC Act can only protect those species and places already listed as Matter of National Environment Significance. In an ideal world, the Act's schedules should reflect all known threatened species and places caught under the current breadth of MNES triggers. Unfortunately, the schedules under the EPBC are updated primarily through a public process nomination system. The reality is that this process will take decades before a comprehensive representation of all MNES can be achieved. It is not good conservation. As we note in our submission, the Commonwealth should instigate a system that speedily reviews all candidates for listing as MNES and should provide the resources that would allow this to be achieved.

The recent reforms proposed under the Council of Australian Governments (COAG) to hand over approval powers to State and Territory Governments is of significant concern to HSI and our partner organisations, which has led to the development of the '*Protect the Laws that Protect the Places You Love'* campaign alliance, which now consists of over 35 groups united in our aim to rally against the COAG reforms underway. More information on our campaign can be viewed at www.placesyoulove.org We believe that these reforms will result in a setback on decades of progress towards the conservation of threatened species and ecological communities, threatening commitments Australia has made at the international level. Whilst we understand that the recent COAG meeting held on 7th December 2012 has resulted in a delay in these reforms, we remain concerned that if approval powers in particular are handed over to State and Territory Governments it will have detrimental impacts on the conservation status of many threatened species and ecological communities.

The attached comments seek to address each of the inquiry's terms of reference in turn. HSI would be pleased to provide further information or clarification on any of these points as required.

Yours sincerely

Alexia Wellbelove
Senior Program Manager

Humane Society International Submission to Senate inquiry into the effectiveness of threatened species and ecological communities' protection in Australia

Humane Society International (HSI) has been responsible for the listing of many threatened species, threatened ecological communities, key threatening processes and heritage places under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). We have participated in numerous recovery and threat abatement teams and been a member of the Australian Heritage Council. We have actively engaged in public consultation processes on referrals, administrative guidelines, strategic assessment of fisheries and permits to harm and trade in species. It is with the background of this experience, and the detailed understanding of threatened species and ecological community protection in Australia we have gained in this process, that we provide the Committee with the following submission.

The following comments seek to address each of the inquiry's terms of reference in turn.

a) management of key threats to listed species and ecological communities;

It is clear that when sufficient resources and expertise are applied to conservation programs or actions that focus on a particular species they can be effective. However, currently there are insufficient resources available to deal with the magnitude of the threats facing threatened species and communities, so that many are still in decline despite being listed under the EPBC Act.

Unfortunately, much of the potential within the EPBC Act to manage threats to listed species and communities has not been realised due to insufficient political will and an ongoing failure to direct sufficient resources to its implementation. The potential for the EPBC Act to be a powerful and effective tool for environment protection and biodiversity conservation remains, and can be realised with increased political support and financial resourcing and important amendments to strengthen some of its provisions. Amendments in 2006 that created a triage and drip feed process for listing threatened species, threatened ecological communities, key threatening processes and heritage places on the EPBC Act need to be repealed and the previous process reinstated with improvements. Adequate funding is also required to ensure all that warrants protection under the EPBC Act receives it. The Minister should be required to maintain up to date and comprehensive lists, on the basis of current knowledge. All species, ecological communities, key threatening processes and heritage places nominated for protection in good faith should be duly assessed within prompt statutory timelines.

HSI recommends that substantially more funds and other resourcing be made available and directed towards improving the conservation status of listed species and ecological communities.

HSI has witnessed the ongoing decline of several species and ecological communities despite listing on the EPBC Act. The Cumberland Plain Woodland, nominated by HSI and subsequently listed as endangered in 1998, was nominated again by HSI in 2007 and subsequently upgraded to being listed as critically endangered in 2009. And this is just one of many examples. This ongoing decline is often the result of the absence of an effective recovery plan or other pro-active conservation measures under the EPBC Act, leaving conservation actions to the limitations of the assessment and approval processes.

In our view, one of the main limitations in the assessment and approval processes is the failure to address cumulative impacts. Whilst there remains no ability to undertake an overall

assessment of a species or communities' health, it is inevitable that threatened species and ecological communities will continue to face the same threats which are the reason for their decline.

HSI therefore recommends that cumulative impacts be considered for threatened species and ecological communities.

HSI also considers the listing of key threatening processes under the EPBC Act to be too slow, with many of HSI's nominations taking at least three years from submission date to listing. In one example, a nomination for a key threatening process submitted in October 2005 is still under consideration by the Minister with a decision on the outcome repeatedly delayed and now scheduled for early 2013, eight years later. Once listed, the subsequent development of threat abatement plans, where these are required to be developed, is also a slow process which further delays implementation or amelioration of the threats on the ground.

HSI recommends that the mandatory production of a threat abatement plan for each key threatening process in response to the listing, with specified funding provided for the implementation of the plan.

b) development and implementation of recovery plans;

As noted above, recovery plans are not a required action as a result of listing under the EPBC Act. For example the critically endangered Cumberland Plain Woodland has no recovery plan to direct recovery or conservation efforts.

For those species that will benefit from the development of a recovery plan, there is often a significant time lag from the date of the species being listed to the recovery plan being finalised and in place. For example the Grey-headed Flying-fox was listed under the EPBC Act as vulnerable in November 2001. Since that time, a recovery plan has been in preparation, which is being led by the New South Wales Government. Frustratingly, more than 11 years and no doubt many drafts later, we are yet to have a final recovery plan for the species. This is a totally unacceptable situation, with significant delays being a common occurrence.

HSI therefore recommends the mandatory production of recovery plans after listing of a species or community under the Act, and that these be produced within a specified timeframe, for example two years.

Once a recovery plan is made, section 279(2) the EPBC Act requires that an evaluation of the recovery plan be undertaken at intervals of not longer than five years. Recovery plans for two listed shark species, the critically endangered east coast population of the grey nurse shark and the vulnerable great white shark, were both made in 2002 after the two species were listed under the EPBC Act. The review of both recovery plans began in 2008 (one year after the required five year limit period). However at the end of 2012, we are still yet to see a public consultation period for either species' recovery plan. This means that in reality by the time the review itself has concluded, ten years will have passed since the recovery plans were made, meaning that the recovery plans should be on their second review and not just their second iteration. In the meantime the conservation of these species continues, but with no funding to direct research on the out-dated recovery plans already in place. This has contributed, in the case of the great white shark, to uninformed and unscientific comments in the media about the conservation status of this species. HSI believes that had there been an

up-to-date and well-funded recovery plan in place in this period, many of these inaccuracies about the status of the great white shark could have been avoided, and potentially we could have had some of the questions being asked about these species on their way to being answered as a result of well-directed research funding identified in the recovery plan.

This situation is by no means limited to these two species. HSI considers that insufficient departmental and scientific resources are currently allocated to the important task of maintaining, implementing and reviewing recovery plans which must be rectified if we are to address species conservation, particularly for the more 'controversial' species.

The development of recovery plans involves the identification of a list of priority actions which necessarily need to be undertaken to improve the conservation status of the listed species or ecological community, with the ultimate aim being removal from listing under the EPBC Act. HSI has been a participant in this process on many occasions. However, despite many experts putting significant time and resources into getting these recovery plans correct and finalised, there is no specific funding source available to ensure that the actions set out under the recovery plan can be implemented. As a result, many recovery plans are little more than documents that sit gathering dust on the shelves of Canberra bureaucrat's offices.

HSI believes that the development of recovery plans is essential to reverse the decline of threatened listed species and would go a long way towards reversing the biodiversity crisis in Australia. However, with no publicly available measure of implementation it is difficult to understand what the hurdles are to proper implementation of current recovery plans.

HSI recommends that increased and dedicated resources be allocated to funding the implementation and review of recovery plans.

c) management of critical habitat across all land tenures;

EPBC Act provisions for conservation agreements, covenants, conservation orders, conservation zones, critical habitat protection, important cetacean areas, bioregional plans, recovery plans, wildlife conservation plans and threat abatement plans are all underutilised and underfunded. Given sufficient political will and financial resourcing, they all offer considerable scope for biodiversity protection.

The following is taken from an HSI paper[1] presented at the Environmental Defender's Office (EDO) National Conference in Sydney in March 2005

> "*There has also been a dearth of critical habitat listings under the EPBC Register of Critical Habitat. Despite a 2001 election commitment from the Coalition to list on the Register, all the critical habitats of all endangered and critically endangered species, only eight critical habitats have been listed for five species. Only four habitats for two species have been listed in mainland Australia, while the rest are on Australia's sub-Antarctic islands. Whereas hundreds of critical habitats have been identified in the Recovery Plans that the TSSC has approved and the Minister has gazetted. How hard can it be to transfer what has been identified in Recovery Plans across to the Register? Yet, ignoring the will of the Parliament in creating the Register and the election commitment, DEH has argued gazetting critical habitats on the Register is not a priority. They simply refuse to do it.*

[1] Grumpy Old Greenies - lamenting waiting lists, wasted opportunities and wayward pork barrelling in Australia's biodiversity programs, Humane Society International A paper presented at the Environmental Defender's Office National Conference May 2005. Available at http://www.hsi.org.au/editor/assets/admin/Grumpy_Old_Greenies.pdf

We are told listing critical habitats is simply not a priority for high profile and publicly adored endangered species such as marine turtles, the humpback whale, the blue whale and even the grey nurse shark, which perilously close to extinction, has not had its nineteen tiny and clearly demarcated critical habitats listed on the Register. (DEH argues that declaring a Marine Reserve at the Cod Grounds critical habitat site is the utmost top priority for the grey nurse shark – agreed - but even that has been promised for two years and not been delivered!).

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

Since this paper was written things have gotten far worse with the Hawke report recommending deleting of the Critical Habitat Register from the EPBC Act which the Government has accepted and plans to amend the EPBC Act accordingly in 2013. The Critical Habitat Register must be maintained in the EPBC and it should be mandatory for all species/and community critical habitats to be listed and consequently protected.

HSI recommends that the Critical Habitat Register be maintained and fully utilised to ensure the protection of critical habitat areas.

In 2010, HSI and WWF-Australia published a report '*Protecting Critical Marine Habitats: the key to conserving our threatened marine species*'[2]. Although focussed on the marine environment, the recommendations of this report can be equally applied in most cases to critical habitat on both land and sea. The report recommended that critical habitat be identified and protected as an essential step to stem the rapid decline of our biodiversity. It had ten recommendations as follows:

1. *Develop and implement a long term critical habitat protection strategy that:*
    a. *Is a core element of the National Biodiversity Strategy (NBS) and includes timebound, quantitative targets for systematically identifying and protecting critical habitats;*
    b. *Includes estimates for the financial requirements and levels of investment required to achieve the strategy's aims;*
    c. *Recognises that Indigenous people have specific legal and cultural responsibilities and rights to marine areas. Any form of protected area should result from meaningful dialogue and full prior informed consent of Traditional Owners, and should not extinguish the marine Native Title rights of Indigenous people.*
2. *Utilise the Commonwealth marine bioregional planning process to identify and protect critical habitats for threatened marine species.*
3. *Develop a wide range of implementing provisions to strengthen critical habitat protection across all jurisdictions.*
4. *Clarify the definition of critical habitat to specifically include climate refugia.*
5. *A mandatory inclusion of critical habitats on the EPBC Act Critical Habitat Register.*
    a. *All critical habitat already identified in recovery plans should be listed on the register within 12 months and protected through available legislative tools, without the need for amendments to the EPBC Act;*

[2] Gibson, L.E. and Wellbelove, A.P. 2010. Protecting Critical Marine Habitats: *The key to conserving our threatened marine species.* A Humane Society International and WWF-Australia report. Available at http://www.hsi.org.au/editor/assets/admin/ProtectingCriticalMarineHabitat.pdf

   b. *Critical habitat should be placed on the Register concurrently with the listing of new threatened species or ecological communities on the EPBC Act. Critical habitat identification and protection should form part of the 'conservation advice' now given at point of listing or at least be placed on the Register within 12 months of the listing of the species;*
   c. *In the future, critical habitat identified in recovery plans should automatically be listed on the EPBC Register and this should be required through an amendment to the EPBC Act;*
   d. *Where critical habitat is listed under state or territory legislation, a mechanism should be introduced which ensures the automatic listing on the Commonwealth register of all such critical habitat.*
6. *Strengthen legislative provisions to ensure no actions detrimental to critical habitat are approved.*
   a. *A mandatory level of Environmental Impact Assessment (EIA) for critical habitat should be required for any referral or proposal involving potential negative impacts on critical habitat listed on the Register or identified in recovery plans or conservation advice;*
   b. *The Minister should be prohibited from approving actions that cause detrimental impacts on critical habitat (including critical habitat identified in recovery plans, conservation advice and listed on the Register);*
   c. *Consideration should be given to an amendment to the EPBC Act to designate critical habitat as a Matter of National Environmental Significance (MNES) in its own right.*
7. *Ensure critical habitat in the marine environment is highly protected across all jurisdictions.*
8. *Establish a national network of whale and dolphin sanctuaries across Australia's Commonwealth, state and territorial waters.*
   a. *Ensure critical habitat assessments are undertaken as part of this process and include species currently classified as 'data deficient' and/or 'migratory' such as the snubfin dolphin and Indo-Pacific humpback dolphin.*
9. *Develop critical habitat maps.*
10. *Implement periodic reporting and evaluation processes.*

HSI urges the Committee to consider the recommendations above as part of this inquiry.

In the State and Territories the situation is not much better. The ACT, South Australia, Western Australia, Queensland and the Northern Territory have either no provisions or no requirement to list critical habitat under their respective legislation. Victoria, Tasmania and NSW all have the provision to list critical habitats. However Tasmania has not listed any critical habitats, Victoria made just one critical habitat determination in 1996 which was revoked almost immediately, and NSW has just four declared critical habitat areas. This is clearly an unacceptable situation given the lack of protection provided for the critically endangered and other species found in the states and territories.

Critical habitat protection at the State / Territory level must be substantially improved.

d) regulatory and funding arrangements at all levels of government;

As noted in sections a) and b) above, the amount of funding available is totally insufficient to address the threats posed to threatened species and ecological communities. Whilst the

resources available at the Federal level is low, these are further diminished when the State and Territory Governments resourcing is considered.

Resourcing, both financial and increased staff capacity, for the conservation of threatened species and ecological communities needs to be significantly increased at all levels of Government if we are to reverse the biodiversity crisis.

The recent reforms proposed under the Council of Australian Governments (COAG) to hand over approval powers to State and Territory Governments is of significant concern to HSI and our partner organisations, which has led to the development of the '*Protect the Laws that Protect the Places You Love'* campaign alliance, which now consists of over 35 groups united in our aim to rally against the COAG reforms underway. More information on our campaign can be viewed at www.placesyoulove.org

We believe that these reforms will result in a setback on decades of progress towards the conservation of threatened species and ecological communities, impacting on commitments Australia has made at the international level. Whilst we understand that the recent COAG meeting held on 7th December 2012 has resulted in a delay in these reforms, we remain concerned that if approval powers in particular are handed over to State and Territory Governments it will have detrimental impacts on the conservation status of many threatened species and ecological communities.

The Federal Government must retain powers for key decisions impacting on threatened species and ecological communities and not delegate these decisions to State and Territory Governments.

A report by the Australian Network of Environmental Defender's Office Inc (ANEDO)[3] commissioned by the *Places You Love* campaign found that:

> *"While the laws in some jurisdiction look good on paper, they are not effectively implemented. There are a number of important legislative tools available for managing and protecting threatened species that are simply not used. For example, interim conservation orders and management plans are not utilised in Victoria, no native plants have been declared prescribed species on private land in South Australia, no critical habitats have been listed and no interim protection orders have been declared in Tasmania, and no essential habitat declarations have been made in the Northern Territory.*
>
> *Key provisions are often discretionary. Critical tools such as recovery plans and threat abatement plans are not mandatory. Time frames for action and performance indicators are largely absent."*
>
> "…*threatened species laws in all jurisdictions needed to be reviewed, strengthened, and fully resourced and implemented*."

We refer to the ANEDO report for further detail and recommendations on this issue.

[3] *An assessment of the adequacy of threatened species and planning laws in all jurisdictions in Australia*, December, 2012, Australian Network of Environmental Defender's Offices Inc (ANEDO). Available at: http://www.edo.org.au/edonsw/site/policy_discussion.php and http://www.edovic.org.au/law-reform/submissions-and-reports

e) timeliness and risk management within the listings processes;

HSI has substantive experience in preparing and submitting nominations for listing under the EPBC Act. Between 2007 and 2010 alone, HSI nominations formed 20 of the 103 nominations (or 19.4%) added to the Final Priority Assessment List (FPAL) and therefore eligible for further consideration by the Threatened Species Scientific Committee. These were comprised of threatened species, threatened ecological community and key threatening process nominations. However this figure is only the tip of the iceberg. HSI has submitted many more nominations for species listings, threatened ecological community listings, heritage listings and key threatening processes which we believe to be candidates for inclusion under the EPBC Act, however many of these have not made it past the first 'hurdle' of the FPAL.

The EPBC Act can only protect those species and places already listed as Matter of National Environment Significance. In an ideal world, the Act's schedules should reflect all known threatened species and places caught under the current breadth of MNES triggers, as identified by the IUCN or other international body. Unfortunately, the schedules under the EPBC Act are updated primarily through a public process nomination system. The reality is that this process will take decades before a comprehensive representation of all MNES can be achieved. It is not good conservation.

The Commonwealth should instigate a system that speedily reviews all candidates for listing as MNES and should provide the resources that would allow this to be achieved within 5 years.

The following are a series of excerpts taken from an HSI paper presented at the EDO National Conference in March 2005[1] and relates to a period when there had been some progress towards comprehensive assessment of a large number of threatened ecological communities:

> "*Section 185 of the EPBC, a progressive amendment secured in the EPBC negotiations between the Democrats and the Government, was meant to fix the listing process. Section 185 allows the Federal Environment Minister to assess all the ecological communities on state and territory lists for consideration for EPBC listing and also requires the Minister to keep the EPBC lists "up to date". The idea behind s185 was to bring the EPBC lists rapidly up to date and to reduce the reliance on ad hoc nominations from the public. After five years, s185 should have led to near comprehensive protection for all nationally endangered and vulnerable ecological communities across Australia.*
>
> *Things did progress well in the first year of the EPBCA. In 2000, HSI referred to the then Minister, Senator Robert Hill, all the state and territory lists of threatened ecological communities. Specifically, lists of threatened ecological communities under the NSW Threatened Species Conservation Act, 1995, the ACT Nature Conservation Act, 1980, the WA threatened ecological communities database, and forest communities identified in the Tasmanian and other Regional Forests Agreements (RFAs). These lists were subsequently gazetted, and the Minister instructed the Threatened Species Scientific Committee (TSSC) to assess the 500+ ecological communities on these lists for EPBC protection. At HSI's urging, the Minister also referred to the Committee the Queensland list of regional ecosystems and the ecological communities listed under the Victorian Flora and Fauna Guarantee Act, 1988…"*

> *"…Therefore, by the end of 2000, the TSSC had literally millions of hectares of threatened wildlife habitats awaiting its critical assessment. In realisation of such a heavy workload, the TSSC set about developing a 'Strategic Framework' which was supposed to help them systematically go through all the ecological communities, to identify those that were nationally threatened and qualified for EPBC listing…"*
>
> *"HSI also squeezed a 2001 Federal Election commitment from Liberal Party Campaign Director, Lynton Crosby, agreeing to refer all the threatened ecological communities identified by the Commonwealth's yet to be published Terrestrial Biodiversity Assessment Audit, to the TSSC for potential listing under the EPBC. The Audit subsequently identified nearly 3000 nationally threatened communities…"*
>
> *"To get around this, the Minister started rejecting public nominations claiming that the TSSC would address them through the Strategic Framework."*

To shorten a very long story, lots of political interference and rural backlash from some large land-holders in Queensland, where there had been significant listings of threatened ecological communities, saw a go-slow on Commonwealth assessments until in 2006, section 185 was removed from the EPBC. From that point on all impetus for relatively quick assessments and listings of larger numbers of threatened ecological communities was lost. The Commonwealth must regain such impetus as soon as possible.

More recently, the Commonwealth has released its '*National Threatened Ecological Communities Strategic Workshop (2012)'* report, the result of consultations with experts from all states and territories, which identifies 33 high national priority communities for assessment and potential listing. At the very least, the Federal Environment Minister should ensure that these 33 threatened habitats are immediately assessed for national protection.

In many cases, particularly for a number of recent shark species, HSI has been told that 'insufficient data' is available on the population size or to quantify any decline to enable further assessment and listing under the EPBC Act, despite all international indicators suggesting the same shark species are in decline. Sadly in Australia there are fewer researchers available to undertake what are often complex and long term scientific investigations of species such as sharks, many of which migrate across international boundaries. With the Threatened Species Scientific Committee failing to even consider species without detailed local information, for many species it may be too late by the time enough data has been obtained to enable the species to clear the first hurdle in the nominations progress by listing on the FPAL. In these cases the TSSC and the Minister must invoke the precautionary principle.

Listings under the EPBC Act should be kept up to date, reflect recent stakeholder advice and consider the precautionary principle, and not be limited by lack of funding or political decisions. Increased funding is required to support this process.

f) the historical record of state and territory governments on these matters; and

The state and territory governments generally have a poor record on delivering strong protection for listed species and ecological communities, as noted earlier in this submission.

ANEDO has conducted a thorough assessment of threatened species laws and planning legislation in each jurisdiction for the *Places You Love* alliance. It is clear that **no state or**

territory planning laws meet best practice standards for environmental assessment. The failings of State and Territory laws to effectively avoid and mitigate impacts on threatened species is most apparent in relation to provisions for the fast-tracking of environmental impact assessment for major projects.

Given the common failings of legislation in all jurisdictions, a clear finding of this report is that **threatened species laws in all jurisdictions needed to be reviewed, strengthened, and fully resourced and implemented.** Given the decline in biodiversity noted in each state and territory, combined with increasing population pressures, land clearing, invasive species and climate change, now is *not* the time to be streamlining and minimising legal requirements in relation to threatened species assessment.

We refer the committee to the ANEDO report[3] for further information on this issue.

g) any other related matter.

In light of the challenges facing Australia's biodiversity, it is clear that **at both a federal and state level stronger laws are needed to protect listed species and communities to reverse the biodiversity decline.**

These reforms must be supported by a **much greater level of funding at all levels of the Government** to ensure strengthened laws are fully utilised and implemented so that they are used to best effect.

Humane Society International
14 December 2012

HUMANE SOCIETY INTERNATIONAL

Grumpy Old Greenies - lament waiting lists, wasted opportunities and wayward pork barrelling in Australia's biodiversity programs

Nicola Beynon[1], Michael Kennedy[2] and Alistair Graham[3]

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

This paper concentrates on the Commonwealth legislative responses to a national biodiversity crisis, nearly six years after the passage of the EPBC (Environment Protection and Biodiversity Conservation Act, 1999) and some four years after the current authors wrote about the development of that law,[4] and conveyed optimistic thoughts on its future implementation and environmental effect. While the authors remain convinced that the EPBC is a legal instrument fully capable of meeting modern day environmental management needs, it is clear to us that the Commonwealth has failed miserably to live up the EPBC's immense protective potential. We go on to suggest some actions that might be equal to meeting the conservation demands of Australia's increasingly beleaguered ecosystem services.

Australia's biodiversity crisis is well documented in State of the Environment Reports (1996, 2001), the *Australian Terrestrial Biodiversity Assessment* (2002) (which reported that no less than 2891 ecosystems and other ecological communities are considered threatened) and most recently the Australian Bureau of Statistics *Measures of Australian Progress: Summary Indicators (2005*) (which reported that between 1994 and 2004 the number of terrestrial bird and mammal species assessed as extinct, endangered or vulnerable rose by 39%). Indeed, the latest State of the Environment Report noted, on the plus side, that many procedural indicators were positive (more money, more effort, more engagement) but that the performance indicators were negative (we're still going backwards – what we're doing is not working – or making it worse).

HSI and WWF also conducted their own joint review[5]of the national implementation of the Australian *National Strategy for the Conservation of Biological Diversity* in 1998

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[1] Wildlife & Habitat Protection Program Manager, Humane Society International
[2] Campaign Director, Humane Society International
[3] Consultant, Humane Society International; Campaigner, Tasmanian Conservation Trust
[4] M Kennedy, N. Beynon, A. Graham and J. Pittock, `*The Development and Implementation of Conservation Law in Australia*', in RECIEL (Review of European Community and International Environmental Law), Volume 10, Issue 3, 2001. Blackwell Publishers, Oxford, UK
[5] *From Words to Action: A Preliminary Review of Progress to Implementation the National Strategy for the Conservation of Australia's Biological Diversity* (May 1998) Humane Society International and World Wide Fund for Nature Australia Discussion Paper

(the Strategy was launched in 1996) finding even early implementation woefully lacking. This was followed by a 2000 HSI report card[6] on the same topic, in which governments were told:

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

This was followed in 2004, by an extremely comprehensive investigation[7] and analysis of the progress in implementing the revised *National Objectives and Targets for Biological Diversity Conservation, 2001 – 2005*, commissioned by the National Biodiversity Alliance (NBA)[8]. This report was published by HSI and WWF prior to the 2004 Federal Election. Of the 29 targets reviewed, only 10%were met within the timeframe; 28% were largely or unlikely to be met within the timeframe; 52% were not met within the timeframe, and 10% were undetermined.

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

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

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

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

Emergency Waiting lists

The EPBC promised significant advances in biodiversity protection. Threatened species[9] and endangered[10] ecological communities became Matters of National Environmental Significance (MNES). As with the other MNES triggers, for the first time the Environment Minister has had the power to modify, or even veto, activities

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

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

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

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

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

that could significantly impact upon them. These were great shifts in power to the Commonwealth and to its Environment Minister. But, of course only those species and ecological communities that are actually listed on the EPBC schedules have any hope of benefiting.

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

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

Things did progress well in the first year of the EPBCA. In 2000, HSI referred to the then Minister, Senator Robert Hill, all the state and territory lists of threatened ecological communities. Specifically, lists of threatened ecological communities under the NSW *Threatened Species Conservation Act*, *1995*, the ACT *Nature Conservation Act, 1980*, the WA threatened ecological communities database, and forest communities identified in the Tasmanian and other Regional Forests Agreements (RFAs). These lists were subsequently gazetted, and the Minister instructed the Threatened Species Scientific Committee (TSSC) to assess the 500+ ecological communities on these lists for EPBC protection. At HSI's urging, the Minister also referred to the Committee the Queensland list of regional ecosystems and the ecological communities listed under the Victorian *Flora and Fauna Guarantee Act*, *1988*.

Therefore, by the end of 2000, the TSSC had literally millions of hectares of threatened wildlife habitats awaiting its critical assessment. In realisation of such a heavy workload, the TSSC set about developing a '*Strategic Framework*' which was supposed to help them systematically go through all the ecological communities, to identify those that were nationally threatened and qualified for EPBC listing.
Then in April 2001 Senator Hill listed brigalow woodlands, blue grasslands, semi evergreen vine thickets and mound springs. These were four highly biodiverse ecological communities, primarily found in Queensland, representing over one million hectares of threatened habitats, and submitted by HSI under the old *Endangered Species Protection Act* in 1999, concerned they were rapidly falling under the bulldozer in Queensland[11].

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

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

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

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

Whether the Minister continued to receive advice on threatened ecological community listings from the TSSC during this time or whether the Department simply ran dead on the process, is open to conjecture. We suspect it was a combination of the two, but there is also good reason, in our view, to assume the National Farmers Federation (NFF) attempted to use its political clout to influence the EPBC listing process.

Section 185 does not include statutory deadlines for the TSSC to assess threatened ecological communities, so the TSSC was able to take things slowly – very, very slowly. However, the TSSC was still receiving public nominations under s191, which do have a 12 month statutory deadline for TSSC assessment and 90 day deadlines for the Minister's decision on receipt of their advice. To get around this, the Minister started rejecting public nominations claiming that the TSSC would address them through the *Strategic Framework*.

The Minister used this excuse to improperly reject 12 perfectly valid ecological community nominations from HSI, including the coolabah black box woodlands[12] rapidly being cleared in NSW. HSI knew the *Strategic Framework* was going nowhere, and so the EDO wrote to the Minister on our behalf, pointing out that having a *Strategic Framework* was not a valid reason to reject a public nomination[13].

The Minister partially conceded this point and agreed to reconsider the nominations, but we were subsequently advised by DEH that because they were nominations under 'reconsideration' they were no longer considered public nominations under s191 and, therefore, the TSSC and Minister would not be bound by the statutory deadlines. So, all but one of these critical nominations[14] are still waiting decisions that were originally due in 2002 – a triumph for Sir Humphrey.

We consider the five year hiatus in ecological community assessment a travesty of good governance and a crushing disappointment, especially when considering the deepening biodiversity crisis facing this island continent. Many of the ecological communities sat in the TSSC's in-tray will have been suffering severe rates of

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

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

[14] Temperate Highland Peat Swamps on Sandstone listed May 2005. The Minister has also since listed one more HSI nomination Weeping Myall Woodlands in the Hunter Valley in July 2005

clearing over the five years (think particularly of the panic clearing in NSW and QLD - and more recently in Tasmania - ahead of new vegetation clearing controls) and several were already critically endangered when HSI nominated them back in 1999 and 2000. The delays are scandalous and utterly inexcusable.

Since Senator Ian Campbell has been Minister there are signs the blockage may be easing. He has listed three ecological communities and several have been distributed for public comment. There are, none-the-less, literally thousands of threatened ecological communities covering many millions of hectares still stuck in the pipeline.

The Minister can take comfort from the Productivity Commission report into the *Impacts of Native Vegetation & Biodiversity Regulations* which largely exonerated the EPBC Act when it comes to the impact on farmers' businesses – although it was critical of policy vagueness "… more fundamental change is required to promote better targeting of policies to achieve clearly-specified environmental outcomes as efficiently as possible." – quite so![15]

In a rare moment of unison, HSI and NFF have both recommended the Government set up stewardship funds[16] to assist private landholders meet their EPBCA obligations and actively protect ecological communities identified on their properties – a bit of carrot with the stick. Unfortunately, the NFF feels that it cannot work with HSI in promoting the concept.

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

Critical Habitats

There has also been a dearth of critical habitat listings under the EPBC Register of Critical Habitat. Despite a 2001 election commitment from the Coalition to list on the Register, all the critical habitats of all endangered and critically endangered species, only eight critical habitats have been listed for five species. Only four habitats for two species have been listed in mainland Australia, while the rest are on Australia's sub-Antarctic islands. Whereas hundreds of critical habitats have been identified in the Recovery Plans that the TSSC has approved and the Minister has gazetted. How hard can it be to transfer what has been identified in Recovery Plans across to the Register? Yet, ignoring the will of the Parliament in creating the Register and the election commitment, DEH has argued gazetting critical habitats on the Register is not a priority. They simply refuse to do it.

We are told listing critical habitats is simply not a priority for high profile and publicly adored endangered species such as marine turtles, the humpback whale, the blue whale and even the grey nurse shark, which perilously close to extinction, has not had its nineteen tiny and clearly demarcated critical habitats listed on the Register. (DEH argues that declaring a Marine Reserve at the Cod Grounds critical habitat site is the utmost top priority for the grey nurse shark – agreed - but even that has been promised for two years and still not been delivered).

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[15] Productivity Commission, April, 2004

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

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

Heritage

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

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

Internal assessments have been triggered by the AHC (Australian Heritage Council) and at the launch of the first listings under the National Heritage List in Ballarat in the winter of 2004, AHC Chair Tom Harley announced that fourteen "Natural Heritage *Hotspots*" were to be reviewed for their suitability for listing. Internal reviews however do not have any legislative deadlines, unlike public nominations which have to be assessed within 12 months. Increased public nominations for national heritage places are absolutely crucial.

Where the provisions for emergency heritage listings have been tested, it has to be said the results have not been encouraging.[17] The thresholds for what constitutes 'national heritage' are being set at very lofty heights. There is the potential however, that taking an extremely conservative view of what should end up on the National Heritage List will be at odds with the political parties and independent Senators that fought hard to steer suitable EPBC heritage amendments through the Senate. This will simply bring disrepute. How these processes and standards are finally determined, will have significant long-term conservation implications for biodiversity in this country.

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

In addition, and working with our colleagues at the Tasmanian Conservation Trust (TCT) we have helped trigger public nominations for the Tarkine and the Great Western Tiers, and are attempting to trigger nominations for Barrow Island and the Walpole Wilderness in Western Australia. HSI is also concerned to see the *heritage*

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

rivers concept, first proposed by Peter Cullen, see the light of day under this new regime.

Key Threatening Processes (KTP)

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

Now, however, the Minister does not have to develop a TAP if he or she believes that it is not 'feasible, effective or efficient way to abate the process'[18]. So it is that TAPs have not even been developed for Climate Change[19] and Land clearing[20], even though they are two of the gravest threats to Australia's biodiversity and endangering more species and habitats than any others. Without the weight of a TAP it seems unlikely that the substitute *National Biodiversity and Climate Action Plan* or the *National Framework for the Management and Monitoring of Australia's Native Vegetation* will lead to regulations and drive any significant change on the ground. However, National Threat Abatement Plans supported by new MNES triggers for land clearing and climate change[21], and large sums of appropriately directed Commonwealth funds, might help reverse the situation.

Species affected by other key threats are missing out altogether. Their threats haven't even been listed, never-mind abated. The Environment Minister still has not decided whether *Loss of Hollow Bearing Trees During Firewood Collection*[22] should be listed as a KTP, even though HSI submitted the nomination eight years ago! Not even Sir Humphrey could come up with an excuse for that one.

HSI was also stunned earlier this year when the Minister, accepting TSSC advice, rejected our nomination to list Shark Control Nets[23] as a Key Threatening Process. The nets, already listed a key threat by the Government responsible for the program under *NSW Fisheries Management Act 1994,* kill grey nurse sharks. As per the criteria for listing a KTP, HSI contended that the nets would cause the grey nurse shark to be listed in a higher EPBC category - that is, it would move from critically endangered

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[18] EPBC s270A

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

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

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

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

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

to extinct. NSW Fisheries scientists have predicted the grey nurse could reach quasi extinction (less than 50 breeding females) in as little as six years[24] and two breeding females were killed in the nets on the very first day of the NSW shark net season last summer.

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

Fisheries

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

For example, defying logic, the Southern and Eastern Scalefish Shark Fishery (SESSF) a well-known basket case in marine conservation circles was gazetted as an ecologically sustainable Wildlife Trade Operation in January 2004. To do this the Minister should have been satisfied that *"the fishery to which the plan or regime relates does not, or is not likely to, adversely affect the survival or recovery in nature of the species"*. At the time, no less than 6 species, for whom the fishery is unquestionably *the* key threat had been nominated for listing as threatened species (orange roughy, eastern gemfish, school shark, Harrison's dogfish, endeavour dogfish and southern dogfish). Indeed, HSI had even nominated the fishery itself for listing as a key threatening process.

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

HSI wishes we had more resources to have mounted a challenge to the SESSF accreditation. Fortunately the opportunity to bring a radical shift in the management of this fishery will present itself again to conservation groups in December 2006 when the WTO expires, if it is, once again, not an opportunity taken up by the Minister himself.

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

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

Protection Poorly Implemented and Undermined

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

Ecological communities such as Cumberland Plain woodland in the Sydney basin, the first ever ecological community protected by the Commonwealth[25], is still facing potential extinction by "death of a thousand cuts".

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

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

Another prime example of a commendable protective measure undermined, comes in the shape of the grey-headed flying-fox. HSI mounted an exhaustive campaign to see this much maligned and controversial species given its due protection under the EPBC and a successful listing was achieved in 2001. Our win was short lived for soon after DEH published Administrative Guidelines to explain how the listing would

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

take effect. These guidelines stated that 1.5%of the population could still be shot without requiring a referral, and would not be considered a significant impact. Effectively sanctioning continuation of a key threat to the species, the Guidelines also completely ignored the well known reality that permits given to trigger happy fruit farmers were not being enforced by state authorities, so that numbers of flying foxes permitted to be killed were routinely exceeded.

HSI appealed the guidelines in the Federal court, gaining a win, with the help of the EDO and Barrister Chris McGrath. That win will hopefully ensure that no current or future Minister will attempt to pre-empt, in the public arena, what is a significant impact. Although HSI won this case, the Federal Court Judge still required us to pay our own costs, which amount to approximately $40,000.00. The Department had to redraft the Guidelines to advise farmers that they needed to make *their own decision* as to whether their actions are having a significant impact and need to make a referral.

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

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

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

One particularly glaring example of the EPBC not being properly enforced, are the failure to enforce the Australian Whale Sanctuary in Antarctica against Japanese whaling. HSI is currently in the Federal Court to try and injunct the Japanese Whaling company concerned.

National Biodiversity Priorities Starved of Funds

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

DEH have barely enough resources to keep the impact assessment provisions of EPBCA going – Part 3 - the front end of the EPBC Act. They have paltry funds with which to chase compliance and no education program to let landholders know of their conservation responsibilities and legislative liabilities. It is little wonder then that the discretionary 'back end' of the EPBCA - the biodiversity provisions in Part

12, 13 and 14 - are being completely neglected. No wildlife conservation plans have been published, no bioregional plans have been developed, no covenants for critical habitat exist, only one conservation agreement has been concluded, and recovery plans are still missing for species and ecological communities listed 7 years ago.

The Government will say that they are spending up big on the environment and it's true that billion dollar slush funds are available for regional 'bottom up' environmental protection through NHT and NRM. But crucially, DEH itself is starved of its own funds to give protection for 'top down' national biodiversity priorities. The divisions of DEH dealing with wildlife, threatened and migratory species and wetlands are all operating on a shoe string. They've no capacity and resources to influence other parts of DEH, let alone to go to a local government and suggest a bioregional plan or to a landholder and suggest a conservation agreement. Recovery planning, for instance, is sadly neglected and it is now alarming to hear that the Government is considering abandoning this approach – without having an effective replacement.

The Act was supposed to be the big stick held in reserve while the Government negotiated recovery plans and other agreements with state governments and landholders lubricated by technical and financial support. This should have been – and should be – the cornerstone of NRM and NHT funding.

Frustratingly the sections of DEH that are engaged in NHT/NRM programs, and wrestling with DAFF and local interests over expenditure, seem quite unwilling or unable to insist on biodiversity outcomes being inserted into these 'bottom up' regional plans – let alone into the attached investment plans. Just like Landcare and NHT1 before it, NHT2 is turning into the largest rolling pork barrel this country has ever seen – careering across the Australian landscape devoid of strategic direction and control, spending a large proportion of the national environmental budget to limited discernable effect.

Don't Get Grumpy, Get Even

To try and turn things around, HSI knows we need to be more than just grumpy. HSI has taken several matters to the Federal Court[26] and the Commonwealth Administrative Appeals Tribunal[27], and are likely to increase legal actions of this type in the future. We have also been engaged in the New South Wales Administrative Appeals Tribunal and the Victorian Supreme court for the protection of the grey-headed flying foxes.

HSI has also given the Coalition Government several solid and constructive proposals to tackle Australia's biodiversity head on and effectively.

"Future Proofing Australia"

With an eye on the proceeds from any third Telstra sale, HSI gave the Coalition Government, in early 2004, a major proposal to "*Future Proof Australia*"[28]. Although

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

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

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

HSI and the NFF appear to have been gazumped by the Treasurer in allocating funds from the sale of Telstra to a new Future Fund to meet past governments' failure to provide for government public servants' pension payments (though new talk of a rural fund to pacify the Nationals may provide some leeway for stewardship funding). Wherever the funds are sourced from, we have recommended a multi billion dollar investment over the next 15 years to secure Australia's biodiversity assets through a *National Conservation Action Program*, a *National Conservation Farm Program* and a *National Environmental Information and Auditing Commission*. The National Biodiversity Alliance has similarly called for a *New National Biodiversity Initiative*[29].

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

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

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

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

We have also recommended DEH be given resources to set up regional offices around the country so landholders and the swarms of NHT facilitators can find out what should be done to conserve biodiversity in their property and community and meet their EPBC obligations to protect Matters of National Environmental Importance. This is an absolutely essential next step for implementation. Frustratingly, we have learnt the hard way that these swarms of NHT-funded state officials and NRM facilitators are simply not doing their job. Someone has to get out there and actually tell landholders what their responsibilities and liabilities are – with a mandate to offer genuine assistance to the willing and genuine persuasion to the recalcitrant.

EPBC Watch Dog

We also think that the conservation movement needs to get serious about making the EPBC work. The national conservation movement has failed to engage fully and effectively in EPBC implementation, and is largely uneducated about the significant potential powers and very broad national reach of the Act, despite the excellent and

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

very strenuous efforts of the EPBC Unit[30] in Canberra. The authors believe this is a lingering hangover from the vocal opposition to the Act from the Greens, Australian Conservation Foundation and The Wilderness Society when it passed Parliament in 1999.

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

Conclusion

If the political will were mustered, the Australian Government has the power, the money and the means to attack this continent's biodiversity crisis with serious conviction. Instead world class legal provisions lie dormant, dollars are misspent and all the while the crisis deepens. DEH needs to become far less conservative in its general approach, far more proactive and forceful in implementing the EPBC, and develop an attitude to NGO involvement in policy development and execution that does not make us think that DEH is a part of the problem. The Minister's office needs to take charge.

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

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