

# Chapter 1

1.1 On 18 June 2008, the Senate referred the following matter to the committee for inquiry and report by 27 November 2008:

The operation of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) and other natural resource protection programmes, with particular reference to:

- (a) the findings of the National Audit Office Audit 38 Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999;
- (b) lessons learnt from the first 10 years of operation of the EPBC Act in relation to the protection of critical habitats of threatened species and ecological communities, and potential for measures to improve their recovery;
- (c) the cumulative impacts of EPBC Act approvals on threatened species and ecological communities, for example on Cumberland Plain Woodland, Cassowary habitat, Grassy White Box Woodlands and the Paradise Dam;
- (d) the effectiveness of responses to key threats identified within the EPBC Act, including land-clearing, climate change and invasive species, and potential for future measures to build environmental resilience and facilitate adaptation within a changing climate;
- (e) the effectiveness of Regional Forest Agreements, in protecting forest species and forest habitats where the EPBC Act does not directly apply;
- (f) the impacts of other environmental programmes, eg EnviroFund, GreenCorps, Caring for our Country, Environmental Stewardship Programme and Landcare in dealing with the decline and extinction of certain flora and fauna; and
- (g) the impact of programme changes and cuts in funding on the decline or extinction of flora and fauna.

1.2 On 14 October 2008, the Senate agreed to an extension of time to report on this inquiry to the last sitting day of February 2009. On 11 February 2009, the Senate granted a further extension of time to report, requiring the committee to deliver this, its first report, by 11 March 2009, and a final report on 24 April 2009. A further extension for the first report was later granted, to allow tabling on 18 March 2009.

1.3 In accordance with its usual practice, the committee advertised details of the inquiry in *The Australian*. The committee also contacted a range of organisations and individuals, inviting submissions. The committee received submissions from 113 individuals and organisations, listed at Appendix 1.

1.4 The committee held four public hearings in Melbourne, Canberra and Sydney. Details of these hearings are shown at Appendix 2. A list of tabled documents and additional information is at Appendix 3.

1.5 The committee found that the breadth of the terms of reference led to a lack of a clear focus in submissions, and made it difficult for the committee to gather high quality evidence targeting key issues. Despite these problems, the committee has attempted to address the main concerns expressed by stakeholders.

1.6 This Inquiry did not address the cultural heritage aspects of the Act as the terms of reference were focused on lessons to be learned in protecting Australia's unique plants, animals, threatened species and ecological communities. However, as providing for the protection and conservation of heritage is one of the objects of the Act, the effectiveness of the Act and the performance of the advisory bodies and departments overseeing heritage should be similarly evaluated in the future. The injection of \$60 million to the heritage sector through the recent economic stimulus package made some headway in responding to the substantial decline in federal funding for historic heritage conservation. The committee did not however receive evidence on the extent to which initiatives such as this will meet the current and future demand or provide the needed distribution of heritage conservation skills and knowledge.

### **Design and operation of the EPBC Act**

1.7 The *Environment Protection and Biodiversity Conservation Act 1999* (the Act) is a major piece of environmental legislation that passed parliament in June 1999 and came into effect on 16 July 2000.

1.8 The Act replaced the *Environment Protection (Impact of Proposals) Act 1974* and a number of environment-related Acts,<sup>1</sup> and was designed to address perceived problems with Australia's approach to environment protection.

1.9 The objects of the Act are:

- to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance;
- to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources;
- to promote the conservation of biodiversity;
- to provide for the protection and conservation of heritage;

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1 The *National Parks and Wildlife Conservation Act 1975*; the *Whale Protection Act 1980*; the *World Heritage (Properties Conservation) Act 1983*; and the *Endangered Species Protection Act 1992*.

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- to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples;
  - to assist in the co-operative implementation of Australia's international environmental responsibilities;
  - to recognise the role of Indigenous people in the conservation and ecologically sustainable use of Australia's biodiversity; and
  - to promote the use of Indigenous peoples' knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.<sup>2</sup>

### *Commonwealth environmental responsibilities*

1.10 The Act gives the Commonwealth responsibility for the following matters of national environmental significance:

- world heritage properties;
- national heritage properties;
- Ramsar wetlands of international importance;
- listed nationally threatened species and communities;
- listed migratory species protected under international agreements;
- nuclear actions (including uranium mining); and
- the Commonwealth marine environment.

1.11 Actions<sup>3</sup> that are likely to have a significant impact on a matter of national environmental significance are prohibited unless approved by the Minister for the Environment.

1.12 The Act also gives the Commonwealth responsibility for actions undertaken on Commonwealth land or by the Commonwealth or a Commonwealth agency. Actions that are likely to have a significant impact on the environment of Commonwealth land, or are undertaken by the Commonwealth and are likely to have a significant impact on the environment anywhere in the world, are prohibited unless approved by the minister.<sup>4</sup>

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2 EPBC Act, s. 3(1).

3 An action includes a project, development, undertaking, activity or series of activities, or an alteration of any of these.

4 There are a number of exceptions: actions taken in accordance with a bilateral agreement or accredited Commonwealth approval process, the *Great Barrier Reef Marine Park Act 1975* or a regional forest agreement; authorised by a government decision on advice from the minister; or exempted by the minister on the basis of national interest.

1.13 Environmental matters outside those prescribed for the Commonwealth are the responsibility of the states.

### ***Referrals, assessments and approvals***

1.14 Actions that may have a significant impact on a matter of national environmental significance (MNES) and relevant Commonwealth actions must be referred to the minister. The minister may decide that an action:

- is a controlled action because it is likely to have a significant impact;
- is not a controlled action if undertaken in a manner specified; or
- is not a controlled action and therefore does not require approval.

1.15 The minister must choose one of six methods of assessment for a controlled action: ranging from a full public inquiry, to assessment based on the referral documentation. Alternatively, a controlled action may be assessed by a state or territory process designated in a bilateral agreement or by an accredited Commonwealth process.<sup>5</sup>

1.16 The proponent of the action is usually responsible for the preparation of assessment documentation.

1.17 At the completion of an assessment, the minister must decide whether to approve the action. The minister must consider a number of relevant matters, including environmental values relevant to the assessment undertaken, principles of ecologically sustainable development, relevant assessments and reports and related economic and social matters. The minister may approve an action subject to conditions. The process of referral, assessment and approval is discussed in detail in chapter three.

## **2006 Amendments to the EPBC Act**

1.18 The Environment and Heritage Legislation Amendment Bill (No 1.) 2006 amended the Act. These changes included:

### *Approvals process*

- Enabled examination of preliminary proposals.
- Delegated responsibility to the states where management plans are in place.

### *Heritage listings*

- Streamlined process for transfers to the National Heritage list.
- Removal of places outside Australian jurisdiction.

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5 Bilateral agreements currently exist with Queensland, Western Australia, Tasmania, New South Wales and the Northern Territory. There are currently no accredited Commonwealth processes.

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- Installed an annual cycle for the listing process and simplified the process for emergency listing.
  - Disestablished the Register of the National Estate (RNE).

#### *Enforcement*

- Eliminated prohibition on the Federal court imposing sureties for damages for parties seeking injunctions.
- Expanded the range of enforcement powers and penalties.

#### *Threatened species*

- Amended the process for listing threatened species to an annual thematic process.
- Gave the minister the power to determine conservation themes.
- Removed the requirement for the Scientific committee to assess species on state and territory lists.

### **Criticisms of the Act**

1.19 There have been a number of areas of ongoing criticism or concern relating to the Act. This section outlines some of the claims made about the Act's deficiencies which are discussed more fully in later chapters of this report.

#### *Matters of environmental significance*

1.20 A persistent criticism of the Act is that important environmental matters or actions are not included as MNES, and are therefore unable to trigger the assessment and approval mechanisms. There have been numerous suggestions for additional 'triggers', including:

- climate change/greenhouse gas emissions;<sup>6</sup> and
- cumulative impacts.<sup>7</sup>

#### *Threatened species and the EPBC Act*

1.21 The Act's regime relies on the maintenance of lists of threatened species and ecological communities. A 2006–07 Australian National Audit Office (ANAO) report, taking into account the 2006 amendments, cast doubt on the ability of the current

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6 Chris Smyth (Australian Conservation Foundation), *Marine environment left unprotected by weak laws*, 1 Feb 2008, [http://www.acfonline.org.au/articles/news.asp?news\\_id=1622&c=113435](http://www.acfonline.org.au/articles/news.asp?news_id=1622&c=113435) (accessed March 2009); ANEDO, *EPBC Act: recommendations for reform*, 5 March 2008, pp 6–7, [http://www.edo.org.au/policy/epbc\\_amendment\\_package080305.pdf](http://www.edo.org.au/policy/epbc_amendment_package080305.pdf) (accessed March 2009).

7 ANEDO, *EPBC Act: recommendations for reform*, 5 March 2008, pp 6–7, [http://www.edo.org.au/policy/epbc\\_amendment\\_package080305.pdf](http://www.edo.org.au/policy/epbc_amendment_package080305.pdf) (accessed March 2009).

listing processes to produce accurate and comprehensive lists in appropriate timeframes.<sup>8</sup>

1.22 Recovery plans for listed threatened species and ecological communities set out management actions necessary to maximise the long-term survival of affected species and ecological communities. They also provide a basis for allocation of funding for biodiversity protection and conservation. Despite the 2006 amendments to the Act, progress on completion and monitoring of recovery plans remains slow.<sup>9</sup>

### ***Public participation***

1.23 The Act allows community involvement in decision-making processes; it also envisages broad rights of appeal of decisions made under the Act. This is reflected in the standing granted in some circumstances to interest groups by the Act, allowing them to pursue merits review of certain decisions.<sup>10</sup> Nevertheless, there is scope to re-examine the Act's standing provisions (particularly third-party enforcement), as well as the influence of costs and undertakings as to damages on public participation.<sup>11</sup>

### ***Referrals***

1.24 The scheme of the Act relies predominantly on self-referral by action proponents. Schemes dependent on self-regulation can pose significant challenges for compliance. There is evidence that better information and education strategies could improve the Act's referrals system.<sup>12</sup> In addition, the low number of outright refusals to allow a controlled action has been cited as evidence that the Act's self-referral system may not be capturing all relevant actions.<sup>13</sup>

### ***Compliance and enforcement***

1.25 An effective compliance and enforcement strategy is required to ensure the integrity of the Act, particularly so that the requirements of conditional approvals are observed. Currently, it appears that implementation of compliance monitoring has

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8 ANAO, Audit Report No.31 2006–07, *The conservation and protection of national threatened species and ecological communities*, pp 17–19.

9 ANAO, Audit Report No.31 2006–07, *The conservation and protection of national threatened species and ecological communities*, pp 21–22.

10 ANEDO, *EPBC Act: recommendations for reform*, 5 March 2008, p. 8, [http://www.edo.org.au/policy/epbc\\_amendment\\_package080305.pdf](http://www.edo.org.au/policy/epbc_amendment_package080305.pdf) (accessed March 2009).

11 ANEDO, *EPBC Act: recommendations for reform*, 5 March 2008, pp 9–16, [http://www.edo.org.au/policy/epbc\\_amendment\\_package080305.pdf](http://www.edo.org.au/policy/epbc_amendment_package080305.pdf) (accessed March 2009).

12 ANAO, Audit Report No.31 2006–07, *The conservation and protection of national threatened species and ecological communities*, pp 22–24.

13 Andrew Macintosh and Debra Wilkinson, 'EPBC Act: the case for reform', *Australasian Journal of Natural Resources Law and Policy*, vol. 10, no. 1, 2005, p. 155.

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been insufficient, such that the department 'has not been well positioned to know whether or not the conditions...being placed on actions are efficient or effective'.<sup>14</sup>

### **Independent review**

1.26 While the committee's inquiry was underway, a separate independent review of the Act commenced. That review is based on section 522A of the Act, which requires that a review of the Act take place. It states:

- (1) The Minister must cause independent reviews to be undertaken by a person or body of:
  - (a) the operation of this Act; and
  - (b) the extent to which the objects of this Act have been achieved.
- (2) The first review must be undertaken within 10 years of the commencement of this Act. Later reviews must be undertaken at intervals of not more than 10 years.
- (3) The person or body undertaking a review must give a report of the review to the Minister.
- (4) The Minister must cause a copy of the report to be laid before each House of the Parliament within 15 sitting days of that House after the Minister receives it.

1.27 On 31 October 2008 the minister, The Hon Peter Garrett AM MP, announced the commencement of the independent review. The head of the review is Dr Allan Hawke, and the review is being supported by a panel of experts, comprising:

- The Honourable Paul Stein AM
- Professor Mark Burgman
- Professor Tim Bonyhady
- Ms Rosemary Warnock

1.28 The committee notes that the review issued a discussion paper to support the review, and called for public submissions by 19 December 2008. It is now considering the 195 submissions it received. It is due to report by 31 October 2009.

1.29 The committee was advised that the minister has written to Dr Hawke asking that the independent review take account of this committee's work. The committee is pleased that the independent review will have the opportunity to take account of the discussion, conclusions and recommendations contained in this report.

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14 ANAO, Audit Report No.31 2006–07, *The conservation and protection of national threatened species and ecological communities*, p. 25.

**This report**

1.30 This report concentrates on several key issues raised by submitters to the present inquiry, and foreshadowed above. These are:

- The scope of the Act (chapter two);
- The referral, assessment and approval process (chapter three);
- Agreements and coordination between governments and agencies (chapter four);
- Threatened species and ecological communities (chapter five); and
- Community and stakeholder engagement (chapter six).

1.31 The committee received considerable evidence in relation to the interaction between the Act and environmental impacts in areas covered by Regional Forests Agreements (RFAs). This particular topic will be the subject of the separate report to be provided to the Senate in April.