Chapter 3

The environmental assessment and approval process

3.1 The Commonwealth's role in environmental impact assessment has a long history, and was a function set out under the old *Environmental Protection (Impact of Proposals) Act 1974* legislation that preceded the current Act.[1] The current legislation has more detailed criteria for determining whether the Commonwealth has an assessment role in relation to development proposals (the MNES, or so-called 'triggers'), as well as specifying the assessment process in more detail.

3.2 Part 3 of the Act establishes the scope of activities to which environmental assessment and approvals processes apply. As outlined in the previous chapter, these include matters of national environmental significance (Division 1) and development proposals involving the Commonwealth itself (Division 2). The committee has already discussed one of they key concerns of stakeholders; namely, that the MNES currently set out under the Act do not adequately describe the range of environmental impacts that are of national concern and that require a Commonwealth role.

3.3 Beyond the question of the appropriate scope of triggers under the Act, a range of other issues about the operation of Commonwealth impact assessment have been raised with the committee. This chapter is concerned with the nature of the impact assessment approach used by the Commonwealth and whether reform might result in better environmental protection outcomes. The issues and suggestions discussed here are:

- The use of strategic impact assessments and planning instruments;
- The assessment of cumulative environmental impacts;
- The appropriateness of the assessment and approval process; and
- Ministerial discretion under the Act, and the possible role of a statutory assessment body.

3.4 A further issue raised by submitters was the relationship between the Act and operations conducted under RFAs. This matter will be the subject of a later report by the committee.

The Commonwealth's role

3.5 Commonwealth environmental assessments occur under the Act for anything that is determined to be a 'controlled action'. A person (including a company,

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1 See *Environment Protection (Impact of Proposals) Act 1974*, http://www.austlii.edu.au/au/legis/cth/num_act/epopa1974481/ (accessed January 2009).

government or agency) who is considering taking an action that might impact on a MNES is responsible for notifying the department prior to undertaking that action.[2] The minister then determines whether the action is:

- Not a controlled action;
- Not a controlled action, provided it is conducted in a particular manner;
- A controlled action; or
- Clearly unacceptable.[3]

3.6 A controlled action is one 'that is likely to have a significant impact on a protected matter' (meaning a matter of national environmental significance under Part 3 of the Act). Between July 2000 (when the Act commenced) and 30 June 2008, 2567 proposed actions were submitted to the department and subject to a decision under the Act. Of these, it was determined that:

- 1517 were not controlled actions;
- 446 were not controlled actions, provided they were conducted in a particular manner;
- 604 were controlled actions;[4] and
- 1 was clearly unacceptable.[5]

3.7 Thus just under a quarter of actions referred to the Commonwealth have been administered under the Act as controlled actions.

3.8 Once an activity is determined to be a controlled action, the Commonwealth then decides the level of assessment that is required in order to adequately scrutinise the proposal. The range of assessment options is designed:

> to account for differences in the nature of proposed actions, the quality of available information available, the level of public interest in a particular proposal and the nature and scale of the likely impacts from the action.[6]

3.9 The diverse types of environmental assessment allow different levels of scrutiny of projects and create mechanisms that support cooperation between levels of government, or between Commonwealth agencies, in undertaking an environmental assessment. The assessment approach options include:

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2 DEWHA, *Submission 85*, p. 16.

3 DEWHA, *Submission 85*, pp 17–18.

4 DEWHA, Correspondence to the committee, 9 February 2009. Note that, owing to the revision of this figure by the department, the four categories now add up to one more than the total of 2567 provided in the original submission.

5 DEWHA, *Submission 85*, p. 18.

6 DEWHA, *Submission 85*, p. 19.

- assessment based on information provided in the referral (a category recently introduced by the 2006 amendments to the Act);
- assessment based on preliminary documentation;
- assessment by public environment report (PER);
- assessment by environmental impact statement (EIS);
- assessment by public inquiry;
- assessment under an accredited process (by agreement with a Commonwealth agency, or state or territory government); and
- assessment under a bilateral agreement with a state or territory.[7]

3.10 Of the 604 actions that were determined to be controlled actions, the breakdown of assessment approaches was:

- five based on information provided in the referral;
- 241 based on preliminary documentation;
- 31 by PER;
- 29 by EIS;
- none by public inquiry;
- 83 under an accredited process (other than a bilateral agreement); and
- 108 under a bilateral agreement.[8]

3.11 Of the remaining 107 cases, 79 were either withdrawn or lapsed before the assessment approach decision was made. The department indicated to the committee that:

> The remaining 26% have either stalled or not yet had an assessment approach determined. This is most likely due to DEWHA waiting on further information before being able to make the decision.[9]

3.12 The proportion of actions being assessed under bilateral agreements is rising, as more such agreements are put in place.[10]

3.13 Once it has been determined what kind of assessment process should be followed, the proponent, the department and public submissions may all play a role in generating further information about the impacts of the proposed action, and about steps to be taken to mitigate those impacts. This information forms the basis of the decision on whether the action should be approved; approved but with conditions

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7 DEWHA, *Submission 85*, p. 20.

8 DEWHA, *Submission 85*, p. 20.

9 DEWHA, Correspondence to the committee, 9 February 2009.

10 DEWHA, *Submission 85*, p. 20.

placed upon it; or refused. Of the 604 actions that were determined to be controlled actions:

- 231 actions were approved with conditions;
- 11 actions were approved without conditions;
- seven actions were refused;
- 147 actions were withdrawn or lapsed after it was decided that the action was a 'controlled action';[11] and
- 97 are being assessed as an accredited assessment or under a bilateral agreement (and are therefore yet to be subject to a Commonwealth approval decision).[12]

In addition, 26 are subject to reconsideration under sections 78, 78A or 79 of the Act. The remaining 85 are currently under active consideration.[13]

3.14 The committee received evidence critical of the operation of the approvals process in three main areas:

- The effectiveness of Commonwealth assessment actions under the existing legislation;
- Problems with the assessment of cumulative impacts, and uncertainty over the merits of strategic impact assessments; and
- The high degree of ministerial discretion allowed by the Act (a criticism that was applied to other areas of the Act as well).

Evaluations of the Commonwealth's environmental assessment actions

3.15 How effective the Act has been, and how effectively it is enforced, are difficult to determine. Certainly, since the Act's inception, a large number of proposed developments and activities have been assessed by the department, and many conditions have been placed on particular projects. Others may not have proceeded at all because of the impacts they would have had on the environment. On the other hand, very few projects have been refused approval, and almost no prosecutions have been undertaken.

3.16 The ANAO, in its 2002–03 audit, noted that there had been no prosecutions for breaches of the Act at that time. It commented:

> Responses to potential breaches of the Act have been patchy in terms of timeliness and effectiveness. A timely and effective approach is particularly important, as even a legal remedy may not be available after an irreversible

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11 DEWHA, *Submission 85*, p. 22.

12 DEWHA, Correspondence to the committee, 9 February 2009.

13 DEWHA, Correspondence to the committee, 9 February 2009.

> action such as land clearing has taken place…Finalising compliance and enforcement procedures and guidelines [and] a more effective and timely approach to potential breaches of the Act… would assist in this area.[14]

3.17 In a second audit four years later, the ANAO reported some progress, but also flagged serious issues with the effectiveness of assessments and with enforcement. It noted that, since its last audit, the department had been involved in legal actions under the Act, including at least one successful prosecution of a breach of the legislation.[15]

3.18 In relation to actions that were declared to not be controlled actions, provided they were conducted in a particular manner, the ANAO observed:

> the department does not have sufficient information to know whether particular manner decisions are generally met or not. There is no follow up on the requirements and no effective management of information coming in from proponents.[16]

3.19 The ANAO was even more critical of the treatment of controlled actions:

> there has been no comprehensive examination as to whether or not terms and conditions are being met. Consequently the department is not well positioned to know how effective the Act has been in meeting its objectives and whether or not the conditions that are being placed on approvals are efficient and effective. This gives an unfair advantage to proponents who breach conditions. It also creates the perception that the department is not seriously enforcing its own legislation. This is particularly important as the Act contains 86 criminal and 17 civil penalty provisions and is the Commonwealth's primary means of protecting matters of national environmental significance.[17]

3.20 The ANAO noted that the department had conducted a small audit of some controlled actions and of actions that were not controlled provided they were conducted in a particular manner. The audit found that 12 per cent of actions were non-compliant, a further 30 per cent were only partly compliant, and that compliance was worse for the controlled actions than for those that were not controlled actions provided they were conducted in a particular manner.[18]

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14 ANAO, *Referrals, Assessment and Approvals under the Environment Protection and Biodiversity Conservation Act 1999*, Performance Audit No. 38 of 2002–03, p. 99.

15 ANAO, *The Conservation and Protection of National Threatened Species and Ecological Communities*, Performance Audit No. 31 of 2006–07, p. 146.

16 ANAO, *The Conservation and Protection of National Threatened Species and Ecological Communities*, Performance Audit No. 31 of 2006–07, p. 142.

17 ANAO, *The Conservation and Protection of National Threatened Species and Ecological Communities*, Performance Audit No. 31 of 2006–07, p. 142.

18 ANAO, *The Conservation and Protection of National Threatened Species and Ecological Communities*, Performance Audit No. 31 of 2006–07, pp 142–3.

3.21 The ANAO noted that the department had sought increased budget funding to undertake compliance and enforcement activities, but that the government had not agreed with the request, leaving the department without sufficient budget funding in this area.[19]

3.22 The 2006 *State of the Environment* report briefly examined the operation of the Act. The report indicated that the Act had made a positive contribution to environmental protection 'beyond what would otherwise be achieved under state and territory laws', describing the results of assessments under the Act as 'good, though mixed'.[20] Both the *State of the Environment* report and analyst Chris McGrath have highlighted two individual legal cases under the Act as delivering important environmental benefits.[21] The *State of the Environment* report also was positive about the Act's role in fisheries, describing the 'comprehensive assessment of fishery operations and management, including the effects of fishery operations on non-target species and ecosystems'.[22]

3.23 A wide range of submitters, from the Minerals Council of Australia (MCA) to the ACF, expressed concern at the difficulty in determining whether the Act was in fact delivering environmental protection outcomes.[23] The Wilderness Society and others were particularly critical of changes made in 2006 to the processes for listing threatened species. They argued that this was a case of the legislation being amended to reflect resource constraints:

> Since its inception, the processes mandated under the EPBC have been chronically under-resourced resulting in backlogs in processing and assessing threatened species listings, and there have been only a couple of successful prosecutions under the Act. The resourcing problem is most clearly evident in the 2006 amendments to the Act. The original Act required the Minister to keep threatened species lists up to date, but with lack of resources this proved impossible so instead of the government finding more resources, the Act was changed to 'relieve' the obligation to keep the lists up to date.[24]

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19 ANAO, *The Conservation and Protection of National Threatened Species and Ecological Communities*, Performance Audit No. 31 of 2006–07, p. 148.

20 2006 Australian State of the Environment Committee, Australia State of the Environment 2006, p. 99, http://www.environment.gov.au/soe/2006/publications/report/index.html, (accessed January 2009).

21 2006 Australian State of the Environment Committee, Australia State of the Environment 2006, p. 100, http://www.environment.gov.au/soe/2006/publications/report/index.html, (accessed January 2009); Chris McGrath, 'Swirls in the stream of Australian environmental law: Debate on the EPBC Act', *Environmental and Planning Law Journal*, Vol. 23, 2006, pp 170–173.

22 2006 Australian State of the Environment Committee, Australia State of the Environment 2006, p. 99, http://www.environment.gov.au/soe/2006/publications/report/index.html, (accessed January 2009).

23 MCA, *Submission 30*, p. 8; ACF, *Submission 52*, p. 8.

24 The Wilderness Society, *Submission 51*, p. 11.

The committee examines this in more detail in chapter five.

3.24 The committee received evidence arguing that the Act was ineffective in securing environmental protection, and evidence that compliance with assessments and approvals was not adequate. It has been argued that the very small number of actions that have been found to be clearly unacceptable or have failed to receive approval suggests that the Act is not cost-effective in controlling adverse environmental impacts.[25] Some stakeholders have suggested that the performance of the Act is so poor that, unless it is radically reformed, it may as well be scrapped.[26]

3.25 The National Farmers' Federation (NFF) expressed concern at the limits to the expertise and engagement of departmental staff when considering individual projects under the Act. The NFF commented that, while progress was being made, 'there is still a level of uncertainty and a lack of information or communication about the act down at the farm level'.[27] Case studies were provided to the committee that suggested deficiencies in project assessments under the Act.

3.26 It was argued that enforcement action has been poor, delayed and ineffective.[28] A range of submitters endorsed the findings of the ANAO audits and expressed concern that these suggested the Act was not operating effectively.[29] Some felt that a lack of staff in compliance and enforcement was an issue,[30] with an over-reliance on information supplied by proponents.[31] Others noted a 'growing need to bolster efforts and resources for training and education programs and for the development of other supporting tools' to deal with emerging needs under the Act.[32]

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25 Andrew Macintosh, *Environment Protection and Biodiversity Conservation Act: An Ongoing Failure*, The Australia Institute, July 2006, p. 4. See also Andrew Macintosh and Deb Wilkinson, 'Evaluating the success or failure of the EPBC Act; A response to McGrath', *Environmental and Planning Law Journal*, Vol. 24, 2007, pp 81–89.

26 Wildlife Protection Association of Australia, *Submission* 27; Andrew Macintosh, *Environment Protection and Biodiversity Conservation Act: An Ongoing Failure*, The Australia Institute, July 2006.

27 Mr Ben Fargher, CEO, National Farmers Federation, *Proof Committee Hansard*, 9 December 2008, p. 16.

28 Land & Environment Planning, *Submission 18*.

29 NCC(NSW), *Submission 35*, p. 5; ACF, *Submission 52*; HSI, *Submission 58*; Office of the Secretary and Chief of the Defence Force, *Submission 67*; ANEDO, *Submission 90*; Professor Lee Godden, *Submission 92*.

30 For example, Ms Vanessa Richardson, *Submission 32*.

31 BOCA, *Submission 72*, p. 3; Mr Ivan Jeray, *Submission 79*.

32 South Australian Government, *Submission 105*, p. 8.

3.27 Both the MCA and the department rejected a link between the low number of actions refused and a lack of effectiveness of the Act.[33] The department pointed out, firstly, that:

> the formal number of rejections is not an accurate reflection of the number of proposals that have not proceeded as a result of the legislation. Secondly, even if it were, the argument does not take account of the substantial environmental improvements made to proposals through the assessment process even if they ultimately receive approval under the Act.[34]

3.28 The department explained that many proposals were withdrawn by proponents, or allowed to lapse, once they were declared to be controlled actions. Some of these did not proceed, it said, 'because of the difficulty foreseen with environmental approval, either following initial discussions with the department or when the assessment approach is decided'.[35]

3.29 Legal expert Chris McGrath also critiqued claims that the low rate of refusals under the Act is an indication of failure. In a paper in 2006 he pointed out that, at that time, most projects being considered under the Act had to receive a section 130(1B) notice before they proceeded to consideration by the Commonwealth.[36] Such notices were issued by state and territory governments, confirming that they had assessed 'the certain and likely impacts of the action on things other than matters protected by' the Commonwealth's legislation.[37] Thus, in most cases, a project was not even considered by the Commonwealth until aspects of its environmental impact had been examined by the relevant state or territory government, and had secured that government's approval on that basis. This might be expected to have played a part in already minimising any adverse environmental impacts of projects being considered for approval under the Act.

3.30 The committee notes that, in its submission to this inquiry, the department stated that it is currently preparing a formal response to the 2006–07 ANAO Performance Audit. That audit commenced in February 2006 and was finalised in March 2007.[38] Given that this was the second ANAO audit relating to the administration of the Act and that in both cases significant concerns were raised by ANAO, the committee is concerned that it is taking a long time for the department to fully respond to the audit recommendations. However, it also notes that the

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33 MCA, *Submission 30*.

34 Correspondence from DEWHA, 14 November 2008, p. 4.

35 Correspondence from DEWHA, 14 November 2008, pp 4–5.

36 Chris McGrath, 'Swirls in the stream of Australian environmental law: Debate on the EPBC Act', *Environmental and Planning Law Journal*, Vol. 23, 2006, p. 169.

37 EPBC Act, s. 130(1B)(b)(i) – *prior* to the 2006 Act amendments, which modified this provision.

38 ANAO, *The Conservation and Protection of National Threatened Species and Ecological Communities*, Performance Audit No. 31 of 2006–07, p. 43.

department has significantly expanded its compliance and enforcement staff,[39] is receiving significantly more complaints about possible incidents,[40] and that there has been a significant increase in resources allocated by the government in the wake of the 2006–07 audit.[41]

3.31 Calls for greater resourcing for government functions are regularly heard by committees. In this case however, the calls are particularly widespread, and the evidence base for them appears compelling. A number of experts such as Professor Godden were cognisant of the 2006 reforms and the improvements made in the administration of the Act, but were nevertheless adamant that the resourcing of a range of functions, particularly compliance and enforcement, needs to increase.[42] Similarly the Australian Freshwater Turtle Conservation & Research Association advocated increased use of compliance auditing, particularly following the conclusion of projects approved under the Act.[43]

3.32 This need for greater compliance and monitoring resources is consistent with submissions by many other groups, and with the tenor of the two ANAO reports. Furthermore, the department itself has noted that demands on the assessment process are increasing. The increase in resources has allowed it to make more site visits, but it is still not reaching all proposals, particularly not if the matter is determined not to be a controlled action:

> With the increase in resources, one of the practice changes we made was to have people visit sites more regularly. I think it is probably much more up in the high percentages—70 or 80 per cent—for projects that are controlled actions. It is still a bit lower for the first part of the process, the decision on whether or not a project is a controlled action.[44]

3.33 The committee is strongly supportive of more resources being allocated to ensure compliance with the Act. At present, the Commonwealth incurs significant costs in ensuring that matters of national environmental significance are protected and impacts of actions are effectively mitigated. The committee did not have the opportunity to explore the question of whether the right balance exists between government and proponents in bearing the costs of protecting the national environment. It notes that at present those costs incurred by the Commonwealth in the environmental assessment process are not recovered from proponents. The committee

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39 DEWHA, *Submission 85*, pp 70–71.

40 DEWHA, *Submission 85*, p. 74.

41 Mr Peter Burnett, First Assistant Secretary, Strategic Approvals and Legislation Branch, DEWHA, *Proof Committee Hansard*, 9 December 2008, p. 64.

42 Professor Lee Godden, *Submission 92*.

43 Australian Freshwater Turtle Conservation & Research Association, *Submission 46*.

44 Mr Mark Flanigan, Assistant Secretary, Strategic Approvals and Legislation Branch, DEWHA, *Committee Hansard*, 9 December 2008, p. 67.

proposes that either the government and/or the independent review of the act consider such mechanisms.

Recommendation 4

3.34 The committee recommends that the government give urgent consideration to increasing the resources available to the department in the areas of assessment, monitoring, complaint investigation, compliance, auditing projects approved under Part 3, and enforcement action.

3.35 The committee notes the broader concern, expressed by diverse stakeholders participating in this inquiry, that the government is not always able to determine what effect decision-making under the Act is having on the environment in the longer term. This applies to decisions in relation to environmental assessment, but is a concern about decisions made under the Act in general, including threatened species and ecological community listing decisions.

3.36 The committee believes that long-term evaluation of the impact of decisions under the Act is desirable. It believes that the department should initiate action to examine the longer-term environmental outcomes from decisions. It recognises that this may represent a new activity, and should be properly resourced as such.

Recommendation 5

3.37 The committee recommends that the department undertake regular evaluation of the long-term environmental outcomes of decisions made under the Act, and that the government ensure agency resources are adequate to undertake this new activity.

Cumulative impacts and strategic impact assessment

3.38 The committee received numerous submissions arguing that the cumulative environmental effects of many different developments are not being addressed adequately under the legislation as it currently stands. They were concerned that a 'death of a thousand cuts' was the fate that awaited many species and ecosystems, mainly because of habitat destruction caused by many unrelated development activities.

3.39 Some submitters were concerned that, in the case of projects where several components were known from the outset to make up a larger planned development, environmental assessments were nevertheless being separately conducted for each of the constituent elements.[45] This was unnecessarily exacerbating the problems of assessing cumulative impacts. They argued that such projects should not be broken up, but be assessed in a holistic manner.

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45 E.g. Mr Steve Burgess & Ms Elaine Bradley, *Submission 44*; Australian Freshwater Turtle Conservation & Research Association, *Submission 46*.

3.40 The Nature Conservation Council of NSW (NCC(NSW)) argued:

> Unrelated developments that may impact one critical habitat are assessed separately without consideration of their combined threat to local or national biodiversity and matters of national significance. While each individual development may not be considered a "significant impact", holistic examination reveals their cumulative significance to be very pronounced.[46]

3.41 Others have likewise argued that cumulative impacts need to be assessed. The Possum Centre at Busselton discussed the case of developments at Dalyellup:

> Development and therefore referral of a proposal in stages might sometimes soften the impact; however it also leads to impact assessments of small areas in isolation and does not consider the cumulative effect…If the whole picture is not taken into account, no benefit will come from 'controlled actions' regarding a few scattered developments…All are assessed individually and some not at all because of zoning issues or non-referral. Zoning seems to be a more powerful instrument than the EPBC act.[47]

3.42 Cumulative impacts are a challenging problem for environmental management and regulation. One of the approaches designed to deal with cumulative impacts is to conduct strategic impact assessments, instead of relying solely on assessments of individual projects. Strategic impact assessments are allowed for under Commonwealth legislation, and their features were outlined by the department:

> A strategic assessment may examine the potential impacts of actions, including cumulative impacts, which are to be taken in accordance with one or more policy, program or plan. It is, by its nature, a collaborative assessment process undertaken by the Australian Government in conjunction with the person responsible for the adoption or implementation of the policy, program or plan. By way of example, such persons can include state and local governments, developers or resource and mining companies.
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> A strategic assessment can also consider impacts on the full range of matters of NES within a particular area or associated with a particular policy, plan or program including world heritage and national heritage values, threatened species, threatened ecological communities, the ecological character of wetlands of international importance, listed migratory species and Commonwealth marine areas.[48]

3.43 Part 10 of the Act is designed specifically to facilitate strategic assessment processes. It contains two Divisions: Division 1 provides a framework for the conduct of strategic assessments. Division 2 establishes a process for strategic assessments of Commonwealth-managed fisheries.

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46 NCC(NSW), *Submission 35*, section 1.1.

47 Possum Centre Busselton, *Submission 49*, pp 3–4.

48 DEWHA, *Submission 85*, pp 25–26.

3.44 Strategic assessments have always been possible under the Act, however, the limited benefits that they offered meant that little use was made of the provisions. As originally legislated, the outcomes of strategic assessments 'could effectively only be taken into account in deciding the [subsequent] appropriate assessment approach for a particular action'.[49] Thus a proponent would have to go through two assessments – a strategic one, and a project-specific one, potentially significantly increasing the amounts of time and effort involved. Two strategic assessments commenced under the Act were never completed for this reason.[50] Prior to 2006, strategic assessments were only undertaken in the area of fisheries, as these were mandatory under the legislation.[51]

3.45 The limited adoption of strategic approaches to impact assessment is evident from the fact that, even with the 2006 amendments in place, to date only one strategic assessment has commenced under Division 1 of the Part 10 provisions. This began in February 2008, with an agreement between the Commonwealth and the Western Australian government to undertake 'a joint strategic assessment of the site selection and management of a common-user liquefied natural gas hub to service the Browse Basin gas reserves'.[52]

3.46 Despite their use being limited to date, the department strongly endorsed the use for strategic assessments, particularly in dealing with the cumulative impact of gradual habitat destruction. They described strategic assessment as desirable:

> to try to get ahead of the game through strategic assessments, because otherwise we are always trying to catch up with the cumulative impacts and, no matter how many resources you have got, you can never do it if you are doing it case by case. The idea with strategic assessments is to get ahead of the game, get in and work with the states, look at the entire area—taking the Carnaby’s black cockatoo example, look at the entire habitat of the bird around metropolitan Perth—and ask, ‘Where are the key bits of habitat? How can we preserve these?’ That is in advance of anybody actually proposing the next tranche of development. That is the sort of discussion that we are having with the WA government and with others. These provisions for strategic assessment are still relatively new and only a couple of them are formally underway. There are a number of others that are under

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49 Gerard Early, 'Australia's National Environmental Legislation and Human/Wildlife Interactions', *Journal of International Wildlife Law and Policy*, Vol. 11, No. 2, 2008, p. 115.

50 Gerard Early, 'Australia's National Environmental Legislation and Human/Wildlife Interactions', *Journal of International Wildlife Law and Policy*, Vol. 11, No. 2, 2008, p. 127.

51 The committee notes that there are other cases where the department has taken a strategic approach in fulfilling its goals, such as in contributing to the Queensland government's planning exercise for Far North Queensland: DEWHA, *Annual Report 2007–08*, Volume 2, p. 17; Gerard Early, 'Australia's National Environmental Legislation and Human/Wildlife Interactions', *Journal of International Wildlife Law and Policy*, Vol. 11, No. 2, 2008, p. 127.

52 DEWHA, *Annual Report 2007–08*, Volume 2, pp 17, 107.

> discussion. That is the sort of thing that we would like to do. That is the long-term solution.[53]

3.47 There was in-principle support for the use of strategic assessments.[54] Professor Godden thought that its application to fisheries had shown how the process can be useful:

> I think strategic environmental assessment tends to be a crisis response and, in the fisheries area, it was implemented in the knowledge that a lot of the scientific data was pointing to very serious declines in fisheries. So the strategic environmental assessment has been useful there and its application more widely in other environmental protection and natural resource management areas would be useful, particularly because it allows adaptive governance.[55]

3.48 NPAC likewise thought the process had potential, though they were also cautious about the risks of allowing particular types of development to be exempted by the strategic assessment from needing further approvals.[56]

3.49 The ACF saw scope for an increasing emphasis on strategic assessment in protecting biological diversity, but linked this to broadening the scope of the Act:

> …what you would need to do is to broaden the trigger significantly so that it does encompass all projects that will have an adverse effect on biological diversity. Obviously there would be a piece of work to identify—how do you go about determining that and what do you mean by 'biological diversity' as such?—and you would talk about populations as well as threatened species, for instance.
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> But ultimately, you would then have to have a heightened focus on the strategic assessment and forward planning and adaptive management processes in order to actually make that approach workable—in other words, you could not simply say, 'All projects that impact biological diversity have to be referred.' … you would have to have strategic assessments covering particular types of activities and particular regions.[57]

3.50 The Commonwealth Fisheries Association (CFA) argued that strategic assessments would be of benefit provided other processes then did not apply:

> We actually support the EPBC Act and the strategic assessment process generally—we do believe that it has improved fisheries management—but what we do not agree with is that, if your fishery is strategically assessed,

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53 Mr Peter Burnett, First Assistant Secretary, Approvals and Wildlife Division, DEWHA, *Committee Hansard*, 8 December 2008, p. 72.

54 Eg. Professor Lee Godden, *Proof Committee Hansard*, 8 December 2008, p. 1.

55 Professor Lee Godden, *Proof Committee Hansard*, 8 December 2008, p. 3.

56 Ms Christine Goonrey, President, and Mr Tom Warne-Smith, Researcher, NPAC, *Proof Committee Hansard*, 9 December 2008, pp 31–32.

57 Mr Charles Berger, ACF, *Proof Committee Hansard*, 8 December 2008, p. 10.

> then different sections of the EPBC Act can come in, such as protected species legislation, and create export problems or even impose conditions on a fishery which has previously been assessed as sustainable.[58]

3.51 The Australian Fisheries Management Authority (AFMA) was also concerned about duplication and inconsistency between assessment processes under different parts of the Act, describing their operation as 'less than optimal', and expressing concern at 'the failure to fully integrate the various sections of the EPBC Act'.[59] Their frustration with processes to date suggested to the committee that the potential for strategic assessments under the Act is still not being realised.

3.52 The committee notes that, while strategic assessment has some support, in the one area in which it has been regularly applied under the Act – ocean fisheries – the committee received submissions indicating that not all stakeholders are happy with the processes and their results.[60] Likewise, the committee is aware that New South Wales strategic planning instruments – the State Environmental Planning Policies, or SEPPs – have had a mixed record in the eyes of stakeholders when it comes to facilitating environmental protection.[61] The committee also notes that RFAs represent a type of strategic assessment process and, as the committee's second report will show, they do not have widespread acceptance amongst community groups, environmental NGOs, and independent researchers.

3.53 While strategic impact assessments appear to be supported in theory, the evidence suggests they may be controversial in practice. The committee is aware that there are other ways of attempting to tackle cumulative environmental impacts, including by direct regulation. For example, many states have remnant vegetation protection laws, designed to address the pressures caused by land clearing. There is also the option of using the 'key threatening process' provisions under the current Act.

Alternatives to strategic impact assessment

3.54 Strategic impact assessments are not the only option for assisting the management of cumulative impacts. The Act provides for the listing of threatened species or ecological communities, and the preparation of recovery plans for them. This is addressed further in chapter five.

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58 Mr Jeff Moore, Executive Member, CFA, *Proof Committee Hansard*, 9 December 2008, p. 41.

59 AFMA, *Submission 59*, pp 1–2.

60 HSI, *Submission 58*, pp 6–7; AFMA, *Submission 59*.

61 Compare, for example, *Hastings Point Progress Association Inc v Tweed Shire Council and Anor*; *Hastings Point Progress Association Inc v Tweed Shire Council and Ors* [2008] NSWLEC 180 (6 June 2008), http://www.austlii.edu.au/au/cases/nsw/NSWLEC/2008/180.html (accessed January 2009) with *Evans and Anor. v Maclean Shire Council and Anor.* [2004] NSWLEC 512 (9 September 2004), http://www.austlii.edu.au/au/cases/nsw/NSWLEC/2004/512.html (accessed January 2009).

3.55 In addition, the Act makes provision for the identification of key threatening processes,[62] and the preparation of threat abatement plans to address these.[63] A process can be listed as a key threatening process if it could:

- cause a native species or ecological community to become eligible for inclusion in a threatened list (other than the conservation dependent category); or
- cause an already listed threatened species or threatened ecological community to become more endangered; or
- adversely affect two or more listed threatened species or threatened ecological communities.[64]

3.56 As of February 2009, there were 17 listed key threatening processes, most of them relating to the introduction of exotic pests. Two listed key threatening processes are particularly relevant to concerns raised with the committee about cumulative impacts: 'loss of terrestrial climatic habitat caused by anthropogenic emissions of greenhouse gases'; and land clearance.[65] Both were listed in 2001.

3.57 The committee noted that, while land clearance and climate change have been listed for over eight years, and are widely regarded as crucial threatening processes affecting threatened species and ecological communities nationwide, no threat abatement plan is in place, or in draft, in either case.[66] Submitters were highly critical of what they saw as a failure to pursue such high priority issues.[67]

3.58 The committee notes that there are limits to the effectiveness of threat abatement plans,[68] as many activities to which they apply may be the responsibility of state and territory governments and agencies. However the minister, in making approval decisions under the Act, cannot act inconsistently with a threat abatement plan[69] and this provision could have potential to play a role in dealing with cumulative impacts. The Humane Society International (HSI) was highly critical of a failure to make use of this provision in regard to one of the most endangered types of ecological community, Cumberland Plain Woodland:

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62 EPBC Act, ss. 183, 188.

63 EPBC Act, ss. 270A-284.

64 DEWHA, Key threatening processes under the Environment Protection Biodiversity Conservation Act, http://www.environment.gov.au/biodiversity/threatened/ktp.html (accessed February 2009), based on the EPBC Act, s. 188.

65 DEWHA, Listed key threatening processes, http://www.environment.gov.au/cgi-bin/sprat/public/publicgetkeythreats.pl (accessed February 2009).

66 The committee notes that, under s. 279 of the Act, the decision on whether to have a threat abatement plan for these two processes is currently under review.

67 HSI, *Submission 58*, pp 18–20; WWF-Australia, *Submission 81*, p. 3

68 EPBC Act, ss. 268, 269.

69 EPBC Act, s.139(1).

> HSI submissions for critical habitat remnants of Cumberland Plain Woodland to be listed on the Register have been ignored and remnants on Commonwealth land, such as the former ADI site at St Mary's, have been sold without covenants to the detriment of their conservation.[70]

3.59 As in other areas of the implementation of the Act, there was disappointment expressed at the resources applied to dealing with key threatening processes:

> The identification of KTPs and the development of TAPs is an appropriate way to manage the threats of established high-threat invasive species. However, the plans are generally poorly funded and therefore not effective…[71]

3.60 Submitters were concerned that there was too much ministerial discretion when it came to the application of the threat abatement plan provisions, and other similar parts of the Act. IFAW noted that, under section 267 of the Act, the minister only has to arrange for preparation of a threat abatement plan if the minister thinks that it will be a 'feasible, effective and efficient way of abating the [threatening] process'.[72] It suggested this kind of provision was 'far too broad and open to abuse'.[73] The CCSA described the discretion available regarding preparation of threat abatement plans as 'an opportunity lost'.[74]

3.61 The Act also provides for the maintenance of a register of critical habitat. However, it only has practical effect within Commonwealth areas.[75] There are only five critical habitat listings, only two on either mainland Australia or Tasmania, and only one appears to apply to land that is not under direct Commonwealth control.[76] However, the register does have one other function of note: Commonwealth land that includes listed critical habitat must, should it be leased or sold, have a covenant protecting the critical habitat included in the contract.[77]

Ministerial discretion under the EPBC Act

3.62 Criticism of the ministerial discretion around the preparation of threat abatement plans was just one example of the broad rejection by many stakeholders of the scope of ministerial discretion in the Act. Currently the Act contains a very large

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70 HSI, *Submission 58*, p. 12.

71 Invasive Species Council, *Submission 55*, p. 29; see also ANEDO, *Submission 90*, p. 30; South Australian Government, *Submission 105*, p. 15.

72 EPBC Act, s.267. IFAW, *Submission 28*, p. 3.

73 IFAW, *Submission 28*, p. 3.

74 CCSA, *Submission 89*, p. 11.

75 EPBC Act, s.207B(1)(c).

76 DEWHA, Register of critical habitat, http://www.environment.gov.au/cgi-bin/sprat/public/publicregisterofcriticalhabitat.pl (accessed February 2009).

77 EPBC Act, s.207C.

number of provisions that allow ministerial discretion in decision-making processes. These include (and the list is by no means complete):

- A range of decisions on whether to list something under the Act to afford that thing some type of protection;[78]
- Declarations that actions do not need approval under the Act, provided the minister believes they are consistent with the Act and are covered by accredited assessment processes or authorisation processes;[79]
- Choices as to what type of environmental assessment process will be followed;
- Decisions under assessment processes, within certain constraints;[80]
- Determinations of conservation themes for assessments of threatened species, ecological communities[81] and national heritage places;[82]
- Determinations of whether to list a species or an ecological community as threatened,[83] or to list a national heritage place;[84]
- Extensions (potentially indefinite) in the time allowed for a decision to be made about a threatened species or ecological community listing,[85] or about a national heritage place;[86]
- Decisions on whether to list habitat as critical habitat for a listed species;[87]
- Decisions on whether or not to initiate preparation of a threat abatement plan;[88] and
- Decisions on whether or not to initiate preparation of a recovery plan.[89]

3.63 The committee received a number of submissions that were critical of the effects of ministerial discretion. These criticisms were both general, and in relation to particular powers under the Act. A local Landcare group were concerned that the Act:

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78 For example, EPBC Act, ss. 14 (World Heritage Areas), 17A (Ramsar wetlands), 249 (listing marine species).

79 EPBC Act, ss. 33–34F.

80 EPBC Act, ss. 136–140A.

81 EPBC Act, s. 194D.

82 EPBC Act, s. 324H.

83 EPBC Act, s. 194Q(1).

84 EPBC Act, s. 324JJ.

85 EPBC Act, s. 194Q(4).

86 EPBC Act, s. 324JJ(3).

87 EPBC Act, s. 207A.

88 EPBC Act, s. 270A.

89 EPBC Act, s. 269AA.

> has been rendered irrelevant because it gives too much discretionary power to the Minister, allowing politics to dominate over science.[90]

3.64 The Environment Institute of Australia and New Zealand (EIANZ) submitted that:

> The listing process is slow and the Minister has discretion over whether to list a species or not, irrespective of whether Australia has an international obligation to conserve it.[91]

3.65 IFAW made similar remarks:

> The 2006 amendments to the Act not only removed the obligation on the Commonwealth Environment Minister to ensure lists are kept up-to-date, but initiated a new listing process that relies heavily upon ministerial discretion. The move towards priority listing of threatened species is contentious, as it risks species that do not fall within annual 'conservation themes' or those that are of low socio-economic and cultural importance being overlooked, despite their ecological importance or conservation status.[92]

3.66 The Wilderness Society went further, characterising the Act's scheme for environmental protection as one in which 'the Minister has absolute discretion to *not* act to protect the environment or conserve biodiversity'.[93]

3.67 Friends of the Earth Australia believed that the range of ministerial discretion granted by the Act should be reduced, in particular in relation to endangered species.[94] Birds Australia made the same argument, stating that '[t]he circumstances under which exemption via ministerial discretion apply need to be tightly defined to provide more certainty and confidence in the operation of the Act'.[95]

3.68 Although there was much criticism of the discretionary provisions in the Act, it was not always clear what alternatives were being proposed, nor was it clear whether any alternative arrangements would better meet the objectives of the legislation. Decision-making under the Act can involve complex balancing of a wide range of information and factors. It can require environmental protection goals to be weighed against their social and economic implications. It is clear from submissions that stakeholders are sometimes dissatisfied with individual decisions. Sometimes this is because they believe those decisions give insufficient weight to environmental

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90 Aldgate Valley Landcare Group, *Submission 4*, p. 1.

91 EIANZ, *Submission 14*, p. 12.

92 IFAW, *Submission 28*, p. 3.

93 The Wilderness Society, *Submission 51*, p. 5.

94 Friends of the Earth Australia, *Submission 48*, pp 10–11.

95 Birds Australia, *Submission 39*.

protection. In other cases, there are stakeholders dissatisfied because they believe economic or social benefits were not given sufficient emphasis.

3.69 The complexity of the task was described in correspondence from the department:

> This requires judgements to be made about the likely impacts of the action in relation to the timing, duration and frequency both of the action and its impacts; on-site and off-site impacts; direct and indirect impacts; the geographic area affected; existing levels of impact from other sources; and the degree of confidence with which the impacts of the action are known and understood. In the case of decisions about whether or not to approve a proposal, relevant economic and social matters must also be taken into account. There is often room for differences of opinion about the weight to be given to all of these factors, and their likely effect, in any particular case.
>
> Against such a background, it is not surprising that such differences of opinion are, from time to time, expressed about the merits of decisions made under the EPBC Act.[96]

3.70 The committee is aware of a range of options that could change the transparency of decision making and the role of ministerial discretion in the Act. These could include:

- Reducing discretion in ministerial actions;
- Increasing the transparency of ministerial actions;
- Enhancing the capacity for independent review; or
- Transferring some decision-making responsibilities to a statutory body.

3.71 Ensuring transparency and appropriate ministerial discretion in relation to threatened species and ecological community listings is discussed in chapter five. The third option is considered further in chapter six. Remaining aspects of these options are discussed below.

3.72 Given the extensive role of the minister under the Act, there may be opportunities to reduce the minister's discretion. However ministerial discretion is in many cases not able to be simply removed. For example, the Act contains numerous points at which a minister is allowed to make a decision. The need for such a decision itself cannot be eliminated. Thus ministerial discretion could only be reduced by legislating to place more constraints on the decision.

3.73 In other cases, removing the discretion may simply create regular administrative breaches of the Act without achieving greater transparency. For example, it would be possible to remove the minister's discretion to extend the time available for certain documents to be prepared. If departmental and ministerial promptness did not improve, the effect might be to put the department or a scientific

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96 DEWHA, Correspondence to the committee, 14 November 2008.

committee in breach of the Act, but not to have achieved any improved environmental outcomes. It is also possible that these sorts of reforms would take the department's attention away from addressing high priority issues in favour of ensuring compliance with timeframes. This indeed was a factor in the (controversial) decision to reform the threatened species and ecological communities listing process in 2006:

> The 2006 amendments to the EPBC Act have assisted in this regard by establishing a new process for listing threatened species, ecological communities and key threatening processes. This new process has improved the effectiveness of listing with a more strategic approach, focussing on those species and ecological communities in greatest need of protection, and has streamlined the process through an annual cycle of nominations from the community.[97]

3.74 Furthermore, the committee received evidence about an example where the *removal* of ministerial discretion by an amendment to the Act in 2006 was, in the submitter's view, bad policy. Mr Tom Baxter, like a range of submitters, was critical of the way the Act restricts the minister's role in addressing any negative environmental impacts of logging and related activities in some circumstances. He argued that section 75(2B) of the Act removes the minister's discretion to consider adverse impacts of forestry operations under RFAs.[98] This removal of discretion from the minister, it was argued, inhibits his or her ability to fulfil the Act's objectives.

3.75 A second option for addressing ministerial discretion is to increase transparency of processes under the Act. There are limited opportunities however for this to take place. The Act already provides for the production of statements of reasons for most decisions. There may be scope for further decision documentation to be automatically made public, however this did not in itself appear to be an issue of major concern amongst submitters. A specific option for increased transparency, relating to the work of the Scientific Committee, is discussed further in chapter five.

3.76 One submission suggested an alternative approach based on establishing 'a new independent multidisciplinary body ("IMB") charged with implementation of key processes and decisions under the EPBC Act'.[99] It suggested certain types of decision would be transferred to such a body, including most decisions relating to environmental assessments. The ACF did suggest that the minister should have discretion 'allowing the minister to make the final decision in defined circumstances' (ie. call-in powers), or alternatively that the IMB public release recommendations for a decision by the minister, with the minister still taking final approvals decisions. The ACF saw the IMB as an opportunity to shift the minister's role from being a day-to-day decision maker to 'strategic oversight of the portfolio'.[100]

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97 DEWHA, Correspondence to the committee, 14 November 2008.

98 Mr Tom Baxter, *Submission 65*, p. 8.

99 ACF, *Submission 52*, p. 29.

100 ACF, *Submission 52*, p. 31.

3.77 The committee received limited evidence about this proposal, and notes that the ACF itself commented that it intended 'to provide more detail in relation to the potential operation and role of such a body in the course of submissions made to the statutory review of the EPBC Act'.[101] The committee has some concerns that such a proposal, as well as not having widespread support, would increase administrative complexity without necessarily resolving stakeholder dissatisfaction over key decisions. Committee members are aware, for example, that call-in powers of planning ministers in many jurisdictions are themselves controversial. Unresolved questions about the scope of such an independent body's powers highlight the fact that ultimately there must be a decision-maker who must weigh up diverse factors in making approval decisions. This cannot be avoided – and neither can the fact that some stakeholders will be disappointed with individual outcomes.

3.78 The committee believes that some discretion in administrative decision making can be important when complex decisions must be taken, and when these decisions involve weighing up diverse factors and types of evidence. For example, in determining whether to approve a proposed action, the minister must consider economic and social matters in addition to the need to protect matters of national environmental significance.[102] At the same time the committee recognises that the fact that a decision is complex can be a reason to *reduce* discretion, not to increase it, so that there is more guidance for the decision maker, and so that those seeking decisions under the Act operate in a more predictable decision environment, increasing certainty. The committee also notes that complexity can be an argument for greater access to legal review mechanisms, since more complexity may mean more scope for error.

3.79 The dissatisfaction expressed by stakeholders relates to a minority of decisions, typically regarding proposals that are already controversial before the Act comes into play. The committee formed the impression that in some of these cases, dissatisfaction with ministerial decisions was not clearly related to evidence regarding matters of national environmental significance. Nevertheless, the committee believes that ensuring that high quality information and advice is available to the minister is important, as is guaranteeing a high quality of ministerial decision-making. The committee believes that increased resources, and improved scrutiny of the decision-making process, are two key factors that will ensure effective outcomes under Act processes.

3.80 Through an increase in resources for monitoring and compliance as recommended earlier in this chapter, and through the other recommendations made in chapters five and six, the committee believes that the Act can be strengthened, addressing concerns that were raised about ministerial discretion under the current Act.

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101 ACF, *Submission 52*, p. 29.

102 EPBC Act, s. 136(1).