

Chapter 5

Threatened species and ecological communities

Pressure on species and ecological communities

5.1 All major scientific studies of Australia's flora, fauna and ecosystems indicate that there is significant ecosystem degradation taking place across Australia, and that numerous species are in decline, with some of them facing extinction. Three species have been declared extinct since 2000:

- *Galaxias pedderensis* (Pedder Galaxias) (a fish) listed as "extinct in the wild", on 6 June 2005.
- *Nyctophilus howensis* (Lord Howe Long-eared Bat) listed as "extinct in the wild", on 4 April 2001.
- *Vanvoorstia bennettiana* (Bennett's Seaweed) listed as "extinct", on 16 October 2001.¹

5.2 In addition, there have been no reported sightings for many years for several other species, including:

- *Cinclosoma punctatum anachoreta* (Spotted Quail – thrush (Mount Lofty Ranges)) last recorded in 1984.
- *Litoria nyakelensis* (Mountain Mistfrog) last recorded in 1990.
- *Litoria lorica* (Armoured Mistfrog) last recorded in 1991.²

5.3 The 2002 Australian Terrestrial Biodiversity Assessment concluded:

The extent of landscape modification in Australia means that 2891 ecosystems and other ecological communities are now threatened. These assemblages are a priority for conservation to protect the immense species diversity associated with them and for the protection of ecological processes... The high number of threatened ecosystems identified in this assessment indicates how extensive the repair task will be unless comprehensive action is taken.³

1 DEWHA, answer to question on notice, 9 December 2008 (received 10 February 2009).

2 DEWHA, Species Profile and Threats Database, http://www.environment.gov.au/cgi-bin/sprat/public/publicthreatenedlist.pl?wanted=fauna#MAMMALS_CRITICALLY%20ENDANGERED, (accessed 10 March 2009).

3 Paul Sattler and Colin Creighton, *Australian Terrestrial Biodiversity Assessment 2002*, National Land and Water Resources Audit, 2002, chapter 4, http://www.anra.gov.au/topics/vegetation/pubs/biodiversity/bio_assess_threat.html (accessed January 2009).

5.4 It stated in respect of mammals that:

[t]here has been a significant contraction in the geographical ranges and species composition of Australia's indigenous mammal fauna... [and that] [e]vidence suggests that the wave of mammal extinctions in Australia is continuing.⁴

5.5 Similarly, the 2006 *State of the Environment* report stated:

Australia's most vulnerable ecosystems have been the first to suffer massive biodiversity decline but this does not mean that other systems will not follow. It is only a question of how long it will be before pressures will overwhelm the resilience of the remaining ecosystems. This issue of decline is now recognised by Australian farmers and others in the community, and it is increasingly being incorporated into the evolving natural resource management response.⁵

5.6 Noting significant limitations on available data, the *State of the Environment* report nevertheless concluded that fish species numbers have declined, as have waterbird numbers and aquatic indicator species.⁶

5.7 Prominent ecologist Professor David Lindenmayer, surveying the state of Australian biodiversity, described Australia as 'a leader in environmental degradation', with many species on an 'extinction trajectory'.⁷ The committee notes that, of the issues raised in submissions it has received, concerns over the protection of endangered species and ecological communities have been most prevalent.

5.8 The committee heard of:

- concern about the effects of amendments made to the legislation in 2006;
- doubt whether the Act was effective in affording protection even when species were listed;
- questions over the effectiveness of recovery plans; and
- criticism of the use of offsets in development approvals.

4 Paul Sattler and Colin Creighton, *Australian Terrestrial Biodiversity Assessment 2002*, National Land and Water Resources Audit, 2002, chapter 6, http://www.anra.gov.au/topics/vegetation/pubs/biodiversity/bio_assess_mammals.html (accessed January 2009).

5 State of the Environment 2006, section 5.1, <http://www.environment.gov.au/soe/2006/publications/report/biodiversity-1.html> (accessed January 2009).

6 State of the Environment 2006, section 5.1, <http://www.environment.gov.au/soe/2006/publications/report/biodiversity-1.html> (accessed January 2009).

7 David Lindenmayer, *On Borrowed Time: Australia's Environmental Crisis*, Penguin Books & CSIRO Publishing, 2007.

How the Act works: listing threatened species and ecological communities

5.9 The Act requires the responsible minister to establish a list of threatened species divided into the following categories:

- (a) Extinct;
- (b) Extinct in the wild;
- (c) Critically endangered;
- (d) Endangered;
- (e) Vulnerable;
- (f) Conservation dependent.⁸

5.10 In addition, the Act also requires the establishment of a list of threatened ecological communities, which must be assigned to one of the following categories:

- (a) Critically endangered;
- (b) Endangered;
- (c) Vulnerable.⁹

5.11 Nominations for listing may be made during each assessment period, usually an annual cycle. The process for nomination and listing normally followed during an assessment period involves a number of steps:

- (a) The minister may determine conservation themes (optional).
- (b) The minister invites people to make nominations for inclusion on the lists for threatened species, threatened ecological communities or key threatening processes. These nominations are given to the Scientific Committee.
- (c) The Scientific Committee prepares and provides to the minister a proposed priority assessment list. The proposed priority assessment list developed by the committee must include an assessment completion time for each item.
- (d) The minister finalises the list of items that are to be assessed ('finalised priority assessment list'). In finalising the priority assessment list, the minister may add or omit any item, or make any other change(s) in accordance with the regulations to the Act.
- (e) The Scientific Committee invites people to provide comments about the items in the finalised list.

8 EPBC Act, s. 178.

9 EPBC Act, s. 181.

- (f) The Scientific Committee assess the items in the finalised list and gives the assessments to the Minister. The Scientific Committee must assess the items in the finalised priority assessment list by the time specified in that list or by that time as extended under section 194P of the Act. In total, the Minister may grant extensions of time up to but not beyond five years.
- (g) The Minister decides whether an assessed item should be included in the relevant list. The Minister must decide whether or not to include an assessed item on a list under the Act within 90 days of receiving the assessment. This period can, however, be extended indefinitely.¹⁰

5.12 Nominations for listing of native species, ecological communities and threatening processes can be made by the public. Nominations require supporting evidence such as information on the taxonomy, legal status and ecology of the nominated item.¹¹ Listing provides for:

- Identification of species and ecological communities as threatened;
- Development of conservation advice and recovery plans for listed species and ecological communities;
- Development of a register of critical habitat;
- Recognition of key threatening processes; and
- Where appropriate, reducing the impacts of these processes through threat abatement plans.¹²

5.13 A species or ecological community listed as threatened under the Act becomes a MNES.¹³ In addition, listed threatened species are eligible for funding via the Threatened Species Network Community Grant Program, a collaboration between the Australian government and WWF-Australia. The Threatened Species Network Grant Program provides funding to on-ground, community-based conservation projects, including habitat restoration, feral predator control, and monitoring and surveying species populations.¹⁴

10 EPBC Act, ss 194A and 194Q.

11 DEWHA, 2008, *Threatened Species Nomination Form*, <http://www.environment.gov.au/biodiversity/threatened/pubs/nominations-form-species.doc> (accessed 18 December 2008).

12 DEWHA, 2008, *Listed threatened species and ecological communities*, <http://www.environment.gov.au/epbc/protect/species-communities.html> (accessed 5 January 2009).

13 DEWHA, 2008, *What is protected under the EPBC Act?* <http://www.environment.gov.au/epbc/protect/index.html> (accessed 5 January 2009).

14 WWF-Australia, 2008, *Threatened Species Network*, <http://wwf.org.au/ourwork/species/tsn/> (accessed 6 January 2009).

5.14 Species or ecological communities that are not listed as threatened under the Act do not benefit from the protection mechanisms afforded by it, regardless of their conservation status.

5.15 There are significant differences between the scope of endangered species listings under Commonwealth and state legislation. For example, in the Cumberland Plain in 2002, there were 85 species listed under the NSW legislation, the *Threatened Species Conservation Act 1995*, as endangered or vulnerable. However, at that time the Commonwealth had only 35 species listed as endangered or vulnerable under the EPBC Act.¹⁵

Comments about the listing process

5.16 Prior to the amendments enacted by the *Environment and Heritage Legislation Amendment Act (No. 1) 2006*, section 185 of the Act required that the minister maintain the lists in 'up-to-date condition' by taking 'all reasonably practical steps to amend as necessary'.¹⁶ It was also a requirement that nominations be considered within one year of receipt.¹⁷ The repeal of section 185 removed the obligation on the minister to update or amend lists for threatened species or ecological communities in a timely manner.

5.17 Concerns have for some time been expressed by stakeholders about delays in the listing process, and about whether some nominations have been inappropriately rejected. These delays in the listing process were an issue before enactment of the 2006 amendments. The Wilderness Society claimed that these delays were due to inadequate resources devoted to the task and that keeping the lists up to date, as required, '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'.¹⁸

5.18 The removal of the section that had required the minister to maintain lists under the Act in up-to-date condition appears to have endorsed delays already apparent in the listing process. ANEDO described the repeal as 'a serious flaw in the Act'.¹⁹

15 Paul Sattler and Colin Creighton, *Australian Terrestrial Biodiversity Assessment 2002*, National Land and Water Resources Audit, 2002, chapter 10 case studies, http://www.anra.gov.au/topics/vegetation/pubs/biodiversity/bio_assess_cumberland.html (accessed January 2009)

16 EPBC Act, s. 185 (repealed by *Environment and Heritage Legislation Amendment Act (No. 1) 2006*).

17 Mr Peter Burnett, First Assistant Secretary, Approvals and Wildlife Division, Department of the Environment, Water, Heritage and the Arts, *Committee Hansard*, 9 December 2008, p. 64.

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

19 ANEDO, *Submission 90*, p. 27.

5.19 EIANZ considered that the listing process is slow and noted that the minister has discretion whether to list a species or not, 'irrespective of whether Australia has an international obligation to conserve it'.²⁰ The Institute stated:

Getting species listed is difficult and because of a lack of integrated biodiversity monitoring at the national level, the process of reconsidering the status of species is even slower.²¹

5.20 Further, EIANZ argued that the listing process is inadequate, as the Act limited its scope to species that are considered 'vulnerable' or above, noting that:

All species are threatened to an extent and the challenge we face is not to focus [on] just those species that are heavily threatened, but to make sure those more commonly occurring do not become increasingly uncommon.²²

5.21 There has been criticism of the lack of transparency and certainty that the Act currently creates in the nominations process. These uncertainties relate to many aspects of the process, including the timeframes for decisions; the criteria considered by the minister in determining priorities for assessment; and the lack of transparency in decision-making under this part of the Act.²³

5.22 ANEDO was critical of the very long extensions of time for assessment that were possible under the Act, and of the wide range of factors that could affect priority assessment lists, rather than priorities for assessment being based solely on conservation status and threats.²⁴

5.23 HSI contrasted their experience under federal legislation with that at the state level:

We also note in regard to both the technological challenges and the resourcing issues, that other jurisdictions have been able to process HSI's nominations within their statutory deadlines. While HSI doesn't always agree with their decisions, processes to list threatened ecological communities and threatened species under the NSW *Threatened Species Conservation Act 1995* and the Victorian *Flora and Fauna Guarantee Act 1998*, run comparatively smoothly and efficiently.²⁵

5.24 The use of conservation themes is intended to prioritise the consideration of relevant listing nominations, perhaps because their protection is deemed more urgent. However, the use of conservation themes for each annual cycle appears to be unpopular. It also appears there may have been an unintended consequence resulting

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

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

22 EIANZ, *Submission 14*, p. 8.

23 HSI, *Submission 58*, pp 5–6.

24 ANEDO, *Submission 90*, p. 27.

25 HSI, *Submission 58*, p. 6.

in all listing nominations outside of the conservation themes being excluded from consideration:

In deciding upon a theme, the Minister has broad discretion which may relate to a particular group of species, a particular species or a particular region of Australia. This is not a definitive list of criteria and so in practical terms, this means that a range of considerations may come into play, not just the conservation status of the species. It is likely that the more controversial species (such as those currently commercially exploited) are unlikely to qualify thematically.²⁶

5.25 IFAW held a similar view about the effect of themes,²⁷ while Birds Australia described it as 'inappropriate. The listing process needs to be timely, rigorous and comprehensive, and it needs to clear a large backlog of neglected taxa. The only way to do this is to resource it adequately'.²⁸

5.26 The committee sought details from the department of how many nominations made it on to priority assessment lists, and how many had failed to be listed twice and thus were no longer eligible for consideration. The department advised the committee that sixty outstanding nominations for listing made prior to the 2006 amendments had been considered for inclusion in the 2007 and 2008 finalised priority assessment lists. Of these nominations, 21 were not placed on the finalised priority list for either of the two assessment periods and were therefore no longer eligible for consideration.²⁹

5.27 Further, the committee was informed that since the commencement of the 2006 amendments, 101 nominations for listing (including the 60 nominations described above) had been considered and 71 of these had been placed on a finalised priority assessment list. Of the 71 included on a finalised priority list, 32 had been the subject of a decision by the minister whilst 39 are currently under assessment.³⁰

5.28 The committee notes the important role members of the public and conservation groups play in making submissions to the threatened species and ecological communities lists. Further, the committee recognises the resources that some conservation groups devote to making nominations to the lists under the Act.

5.29 The amendments to the Act in 2006 and the application of a system of prioritisation appear to have had a limited impact on delays in the listing of threatened species and ecological communities. The evidence presented to the committee suggests that in some instances, the 2006 amendments and the use of priority areas have exacerbated existing problems. These delays and the need to repeatedly re-

26 ANEDO, *Submission 90*, p. 27.

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

28 Birds Australia, *Submission 39*.

29 DEWHA, answer to question on notice, 9 December 2008 (received 10 February 2009).

30 DEWHA, answer to question on notice, 9 December 2008 (received 10 February 2009).

submit nominations falling outside of annual priority areas has caused frustration for conservation groups.

5.30 The committee acknowledges that the volume of nominations for listing received by the department appears currently to necessitate some form of prioritisation. It is otherwise difficult to choose between nominations which may be equally worthy of consideration, in a situation where it is not possible to consider them all in a timely manner. The committee is aware that the department has had recent increases in resources, some of which are being used to deal with threatened species and ecological community nominations. The department stated that it has:

- increased resources to the listing of threatened species and ecological communities
- increased resources dedicated to the development of recovery plans and recovery actions, which has included accelerating the preparation of conservation advices for listed threatened species under the Act.³¹

5.31 The committee also notes the work capacity of the Scientific Committee is identified in the legislation as a potential constraint on conducting assessment of nominations.³² The committee did not take evidence from members of the Scientific Committee; however it would be concerned if a lack of resources to this committee was resulting in a bottleneck in the assessment process. The committee hopes that this possibility was addressed in the allocation of the increased resources received by the department generally, and the Approvals and Wildlife Division in particular, in 2007.

5.32 The committee notes that, whereas the Scientific Committee is restricted in the matters it can consider when preparing advice on a listing, the minister is not. The Scientific Committee's assessment is based on whether an item is eligible for inclusion on a list, and 'the effect that including the item in that List could have on the survival of the native species or ecological community concerned'.³³ No equivalent clause guides the minister's decision.

5.33 This appears to reduce the transparency and policy consistency of the decision process. The decision to list does not in itself have direct consequences for development proposals that will be assessed pursuant to Part 3. The Act gives the minister scope to consider matters other than just impacts on matters of national environmental significance at that later point. It is not clear why such broad, and unspecified, discretion operates at the point of a decision on whether a species or ecological community deserves listing.

5.34 The committee is concerned that the ministerial discretion and indefinite extensions of time provided for under section 194 of the Act are undermining the

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

32 EPBC Act, s. 194G.

33 EPBC Act, s. 194N(4).

credibility of the nomination and listing process. The committee believes all stakeholders benefit from greater certainty under the Act regarding how listings will occur, how long the process will take, and what information will be taken into account during the consideration of proposed listings.

Recommendation 8

5.35 The committee recommends that the process for nomination and listing of threatened species or ecological communities be amended to improve transparency, rigour and timeliness. Changes that should be considered include:

- **Either requiring publication of the Scientific Committee's proposed priority assessment list or reducing ministerial discretion to revise the priority list under section 194K; and**
- **Reducing the maximum period allowed for an assessment under section 194P(3).**

Effectiveness of listings under the Act

5.36 Clearly, ensuring the effectiveness of listing processes was a major concern for many submitters. However, perhaps paradoxically, the committee received similar numbers of submissions expressing dissatisfaction with events *after* listing had taken place.

5.37 The committee was given numerous examples by submitters of particular species or communities where they felt that recognition of conservation value under the Act had not led to improvements in environmental management, or had not prevented continuing decline. These cases included abalone fisheries,³⁴ Southern Brown Bandicoot (*Isodon obesulus*),³⁵ Short-tailed Shearwater (*Ardenna tenuirostris*),³⁶ Golden Sunmoth (*Synemon plana*) and Leadbeater's Possum (*Gymnobelideus leadbeateri*),³⁷ Lungfish (*Neoceratodus forsteri*),³⁸ Baw Baw Frog (*Philoria frosti*),³⁹ South-eastern Red-tailed Black Cockatoo (*Calyptrorhynchus banksii graptogyne*),⁴⁰ Grassy Box woodland,⁴¹ White Box woodland,⁴² and the Western

34 Dr S.A. Shepherd AO, *Submission 1*.

35 Aldgate Valley Landcare Group, *Submission 4*.

36 Mr Barry Hebbard, *Submission 5*; Mrs Mavis Rowlands, *Submission 23*; Mrs Mary C Clemons, *Submission 37*.

37 Ms Ann Jelinek, *Submission 15*; Dr. Ralph Ballard, *Submission 24*; Ms Melissa Gunner, *Submission 33*.

38 Mr Dave Milligan, *Submission 20*; Ms Carolyn Robins, *Submission 40*.

39 Ms Joanne Goossens, *Submission 26*.

40 Birds Australia, *Submission 39*.

41 Central West Environment Council, *Submission 43*.

42 The Wilderness Society, *Submission 51*, p. 12.

Ringtail Possum (*Pseudocheirus occidentalis*).⁴³ In addition, numerous submissions made reference to species in Tasmanian forests that have been discussed in the context of the Regional Forest Agreement and the Wielangta case (to be discussed in the committee's second report), including the Swift Parrot (*Lathamus discolor*), the Tasmanian Wedge-tailed Eagle (*Aquila audax fleayi*), stag beetles and the endangered orchids *Corunastylis nuda* (Tiny Midge Orchid) and *Pterostylis atriola* (Snug Greenhood).⁴⁴

5.38 In all these cases, the species or community nominally has some form of protection under the Act. Submitters were particularly concerned that listing of a species did not appear to consistently result in protection of its habitat from damage or from clearing. The MCA and The Wilderness Society alike voiced concerns that the Act may not always be delivering improved environmental outcomes.

5.39 The committee does not wish to debate the details of individual cases, and it recognises that some of the circumstances in any particular example may be beyond any party's control. The committee believes that there are a range of positive developments which will go some way toward addressing these concerns. These include:

- The increased resources of the Approvals and Wildlife Division, which appear to be facilitating progress both with listings of species and communities, and with raising the quality and reliability of assessments of proposed actions;
- Increased enforcement action taken by the department, also underpinned by additional resources;
- The department's decision to prepare and implement a communications plan,⁴⁵ and to make use of outplaced staff and field officers; and
- Ministerial leadership being used to raise the benchmark for developments with regard to protecting endangered species, such as in the case of Carnaby's black cockatoo.⁴⁶

5.40 The committee also believes that several of its recommendations, if adopted, will also address this situation, particularly in relation to:

- Continuing to increase the resources of the Approvals and Wildlife Division for their activities (chapter three);
- Review of provisions governing discretion in ministerial action (this chapter);

43 Possum Centre Busselton, *Submission 49*; Western Australian Forest Alliance, *Submission 88*.

44 Dr Chris James, *Submission 10*; Ms Vivienne Ortega, *Submission 17*; Mr Ian Matthews, *Submission 34*.

45 Mr Peter Burnett, First Assistant Secretary, Approvals and Wildlife Division, DEWHA, *Committee Hansard*, 8 December 2008, p. 66.

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

- Carefully limiting the use of offsets in habitat conservation (this chapter); and
- Expanding the scope of judicial review of certain actions under the Act (chapter six).

Recovery plans

5.41 Under the Act, the minister may make or adopt and implement a recovery plan for a listed species of threatened fauna or flora⁴⁷ or a listed threatened ecological community.⁴⁸ Recovery plans are intended to stop the decline, and support the recovery, of listed threatened species or threatened ecological communities.

5.42 Recovery plans are binding for the Australian government and government agencies must act in accordance with a recovery plan once it is made or adopted.⁴⁹ This includes ministerial decisions under the Act itself.

5.43 The regulations to the Act require that a recovery plan describe:

to the extent practicable, with spatial information

- (a) The location of species or ecological communities for which it is made; and
- (b) Areas of habitat critical to the survival of the species or ecological communities; and
- (c) Important populations of the species or ecological communities that are necessary for their long-term survival and recovery; and
- (d) Any areas that are affected by a key threatening process.

A recovery plan should state:

- (a) What must be done to stop the decline of, and support the recovery and survival of, the species or ecological community, including action:
 - (i) To protect important populations; and
 - (ii) To protect and restore habitat; and
 - (iii) To manage and reduce threatening processes; and
- (b) To the extent possible, what management practices are necessary to avoid significant adverse impact on the species or ecological community.

5.44 The committee notes that there are currently 354 recovery plans covering 456 species and 15 ecological communities.⁵⁰ There are another 244 recovery plans currently under preparation.⁵¹

47 Other than 'conservation dependent' species.

48 DEWHA, 2008, *Recovery plans*, <http://www.environment.gov.au/biodiversity/threatened/recovery.html> (accessed 22 December 2008).

49 DEWHA, 2009, *Recovery plans made or adopted - Common name order*, <http://www.environment.gov.au/biodiversity/threatened/recovery-list-common.html> (accessed 2 February 2009).

5.45 The department advised that, following the 2006 amendments to the Act, conservation advices had been developed and used preferentially in some instances over recovery plans. This change was in recognition that recovery plans 'were not necessarily effective and efficient in terms of driving recovery action'.⁵² Conservation advices are prepared by the department in consultation with the Threatened Species Scientific Committee and focus on known threats to the relevant species.⁵³

5.46 An approved conservation advice has a number of legislative implications. Once a conservation advice has been approved for a threatened species or ecological community, the Act requires that the minister must have regard for the conservation advice when:

- Making a declaration that actions do not need approval under Part 9 of the Act (section 33);
- Entering into a bilateral agreement (section 53);
- Deciding whether to approve an action which will have or is likely to have a significant impact on a listed threatened species or ecological community (section 139);
- Approving an action (section 146K); and
- Issuing permits under the Act (sections 202 and 238).⁵⁴

5.47 The department explained what they perceived to be the benefits of conservation advices over recovery plans:

We think those are a much more useful document. They are more rapid to prepare, they target what the real risks are to the species and they get information out to people quickly.

Frankly, we found the old process of doing recovery plans sclerotic. It was slow. It tended to pull together established interests, if you like. And it tended to identify research questions and open-ended things rather than really focussing on management requirements. So we have been trying to free the system up, while still focussing on identifying the risks to species

50 Department of Environment, Water, Heritage and the Arts, answer to question on notice, 9 December 2008 (received 10 February 2009).

51 Mr Mark Flanigan, Assistant Secretary, Strategic Approvals and Legislation Branch, Approvals and Wildlife Division, DEWHA, *Committee Hansard*, 9 December 2008, p. 80.

52 Mr Mark Flanigan, Assistant Secretary, Strategic Approvals and Legislation Branch, Approvals and Wildlife Division, DEWHA, *Committee Hansard*, 9 December 2008, p. 80.

53 Mr Mark Flanigan, Assistant Secretary, Strategic Approvals and Legislation Branch, Approvals and Wildlife Division, DEWHA, *Committee Hansard*, 9 December 2008, p. 80.

54 EPBC Act, ss 33, 53, 139, 146K, 202 and 238.

and finding ways to deal with that. So we tend now not to focus on recovery plans per se. We look at the whole package.⁵⁵

5.48 The committee also heard evidence in support of the use of conservation advice but in addition to recovery plans rather than as an alternative:

I think it is an improvement that they do the conservation advice on listing so that, as soon as the species or community or heritage place is listed, there is advice going across to the people who do the environmental impact assessments, rather than waiting for a recovery plan, which would take three to five years or would not happen at all. So I think it is good that that conservation advice is developed at the point of listing. However, that does not take away the need to do a more detailed recovery plan, so I do not think it should be either / or. Not that all species warrant a recovery plan, but most would.⁵⁶

5.49 Both recovery plans and conservation advices play key roles in determining steps to be taken in conserving and protecting threatened species and ecological communities. In addition, the publication of proposed recovery plans on the department's website and the opportunity for public comment is vital to ensuring public engagement and providing assurances that recovery plans are appropriate and likely to be effective.

5.50 The committee notes, however, that recovery plans for some threatened species and ecological communities are never developed, or are developed and not implemented.

5.51 It was suggested to the committee that recovery plans could be an effective means of implementing and enforcing requirements from strategic assessments. The ACF explained:

Senator BIRMINGHAM – Are there any provisions at present for that type of very sweeping strategic assessment to be undertaken and for its findings to be enforced in some way, either at a state level or through the Commonwealth?

Mr Berger – I think the species recovery plans are one possible mechanism for advancing that. The recovery planning generally has been of the form of, say, targeted land acquisitions, additional research plans, reintroduction and relocation programs. That tends to be the bread and butter of these recovery plans, but there is no reason that they could not be somewhat more ambitious in terms of containing broader guidance for private landholders in terms of what is likely to be allowable and what is not and for mobilising much greater resources than typically we have seen go into the recovery planning. So there is a tool there and, again, I think the strategic

55 Mr Mark Flanigan, Assistant Secretary, Strategic Approvals and Legislation Branch, Approvals and Wildlife Division, DEWHA, *Committee Hansard*, 9 December 2008, p. 81.

56 Ms Nicola Beynon, Senior Program Manager, Humane Society International, *Committee Hansard*, 10 December 2008, pp 19–20.

assessments, if used robustly and with the goals of the act squarely in mind, are another possible tool that can be used.⁵⁷

5.52 The committee believes that recovery plans play an important role in detailing steps to be taken to prevent the continued decline, and assist in the recovery, of listed threatened species and ecological communities.

The use of offsets in habitat conservation and species protection

5.53 According to the department's 2007 'Draft Policy Statement: Use of environmental offsets under the *Environment Protection and Biodiversity Conservation Act 1999*':

The Australian Government defines environmental offsets as 'actions taken *outside a development site* that compensate for the impacts of that development – including direct, indirect or consequential impacts'...Environmental offsets provide compensation for those impacts which cannot be adequately reduced through avoidance and mitigation. They should be distinguished from 'mitigation', which refers to the range of actions that can be undertaken to reduce the level of impacts of a development (usually undertaken on-site).⁵⁸

5.54 Environmental offsets fall into two categories: direct offsets and indirect offsets. Direct offsets are aimed at on-ground maintenance and improvement of habitat or landscape values. Indirect offsets cover the range of actions that improve knowledge, understanding and management resulting in improved conservation outcomes.⁵⁹

5.55 The Australian Government's draft policy statement describes eight principles which should be applied to the use of environmental offsets:

- (i) Offsets should be targeted to the matter protected under the Act that is going to be impacted.
- (ii) A flexible approach should be taken to the design and use of environmental offsets in order to achieve long-term and certain outcomes which are cost-effective for proponents.
- (iii) Offsets should deliver a real conservation outcome.
- (iv) Offsets should be developed as a package of actions, which may include both direct and indirect offsets.

57 Mr Charles Berger, Director of Strategic Ideas, ACF, *Committee Hansard*, 8 December 2008, p. 13.

58 DEWHA, *Draft Policy Statement: Use of environmental offsets under the Environment Protection and Biodiversity Conservation Act 1999*, August 2007, p. 2.

59 DEWHA, *Draft Policy Statement: Use of environmental offsets under the Environment Protection and Biodiversity Conservation Act 1999*, August 2007, p. 3.

- (v) Offsets should, at a minimum, be commensurate with the magnitude of the impacts of the development and ideally deliver outcomes that are 'like for like'.
- (vi) Offsets should be located within the same general area as the proposed action.
- (vii) Offsets should be delivered in a timely manner and be long lasting.
- (viii) Offsets should be enforceable, monitored and audited.⁶⁰

5.56 Offsets may be seen as a measure of 'last resort',⁶¹ when no other approach to impact mitigation is feasible. In a recent paper, DEWHA Deputy Secretary Gerard Early wrote:

Sometimes there are simply no mechanisms available to avoid impacts of developments on habitat which, although not of critical importance, may nevertheless have value for wildlife either now or in the future. The value of such habitat may not be sufficient to deny approval to the development. On such occasions, the use of offsets may be appropriate. In such cases, offsets are not sought simply on a one-for-one basis; the aim is to secure a positive environmental outcome.⁶²

5.57 The committee heard a degree of disquiet amongst submitters about offsets. The committee heard evidence in favour of the use of offsets as well as concern that offsets were inadequate and / or being used inappropriately.

5.58 The Central West Environment Council discussed the approval of offsets in association with clearing of Grassy Box Woodland in the central west of NSW:

In 2007 Moolarben Coal Project Stage 1, adjacent to Wilpinjong Coal Project received approval to clear 65 ha of mature, good condition Grassy Box Woodland. This approval was granted by a member of the EPBC Unit.

These approvals were given with a condition that a 2:1 offset be purchased on private land to be transferred to the NSW Minister for the Environment and Climate Change. However, the [critically endangered ecological community] on private land is already protected under the NSW Native Vegetation Act 2004. Clearing of CEEC under the state legislation would not be approved or with much larger offsets of up to 50:1.⁶³

60 DEWHA, *Draft Policy Statement: Use of environmental offsets under the Environment Protection and Biodiversity Conservation Act 1999*, August 2007, p. 4, <http://www.environment.gov.au/epbc/publications/pubs/draft-environmental-offsets.pdf> (accessed 23 January 2009).

61 See, eg, MCA, *Submission 30*.

62 Gerard Early, 'Australia's National Environmental Legislation and Human/Wildlife Interactions', *Journal of International Wildlife Law and Policy*, Vol. 11, No. 2, 2008, p. 141.

63 Central West Environment Council Inc. of NSW, *Submission 43*, p. 2.

5.59 The government has released only a draft policy statement on the use of offsets and is yet to develop a final policy.⁶⁴ However, the committee would be concerned that the approval of offsets as allegedly occurred in the example above may not have been consistent with the government's intention that 'offsets should be real'⁶⁵ and 'should not rely on securing habitat that is already protected for conservation purposes'.⁶⁶

5.60 A claim was put to the committee that the minister 'improperly took an offset into consideration when making the decision' to approve the clearing of wetland on the Fleurieu Peninsula in South Australia.⁶⁷ Further, it was suggested to the committee that the private landholder in question had failed to comply with the offset requirement and had been given more than one extension of time to do so.⁶⁸

5.61 The committee notes that the decision on the referral in question (2005/2060) did not involve an offset. The decision determined that the area of 2ha to be cleared contained 0.8ha of swamp which was degraded and of low biodiversity value, and that the loss of this area would not significantly impact on the listed 'Swamps of the Fleurieu Peninsula' ecological community.⁶⁹ Notwithstanding that the proposed action would not have a significant impact on the swamp ecological community, the landholder had proposed that 19.7ha of remnant vegetation, comprising the listed ecological community and open woodland, be fenced and rehabilitated.⁷⁰ The department had approved a number of extensions to complete the fencing, as the requests were made on the grounds of delays in council approval processes, legal proceedings and inclement weather.⁷¹

5.62 The Possum Centre Busselton succinctly summarised the concerns of a number of submitters on the use of offsets:

64 As at 23 January 2009. DEWHA, *Draft Policy Statement: Use of environmental offsets under the Environment Protection and Biodiversity Conservation Act 1999*, August 2007, <http://www.environment.gov.au/epbc/publications/pubs/draft-environmental-offsets.pdf> (accessed 23 January 2009).

65 DEWHA, *Draft Policy Statement: Use of environmental offsets under the Environment Protection and Biodiversity Conservation Act 1999*, August 2007, p. 5.

66 DEWHA, *Use of Environmental Offsets Under the Environment Protection and Biodiversity Conservation Act 1999 Discussion Paper*, August 2007, p. 5.

67 NPAC, *Submission 93*, p. 20.

68 Mr Tom Warne-Smith, Researcher, National Parks Australia Council, *Committee Hansard*, 9 December 2008, p. 34.

69 DEWHA, answer to question on notice, 9 December 2008 (received 10 February 2009).

70 DEWHA, answer to question on notice, 9 December 2008 (received 10 February 2009).

71 DEWHA, answer to question on notice, 9 December 2008 (received 10 February 2009).

Offsets are often insufficient, not providing like for like, and in some instances the same offset is used by the proponent for several stages of the development in order to 'get away cheaply'.⁷²

5.63 The committee also heard evidence from proponents regarding the use of offsets. The NFF commented on what they felt was the inconsistent application of offset conditions:

It is not the offsets that are the concern for the NFF but the inconsistency by which they are implemented. NFF stresses that each application should be assessed on its merits but individual farmers should have some faith that there is an equal and consistent approach to how their application is assessed.⁷³

5.64 The MCA recommended the development of an offsets policy under the Act. The MCA supported the use of offsets but had been unhappy about the application of offset conditions to date.⁷⁴ The MCA was not alone in questioning the scientific basis for offsets. Conservation groups were also critical of the absence of scientific evidence supporting the use of offsets, albeit for different reasons:

An emphasis on offsetting is inconsistent with the first listed object of the EPBC Act which is "to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance". The idea that impacts on such unique matters of national environmental significance can simply be offset, is deeply concerning. In many cases it will not be possible to offset impacts on specific unique places and species...There is no standard scientific methodology for assessing quantity, quality or location of offsets, and there is little evidence of success of offsets...⁷⁵

5.65 The evidence did not make clear the current status of any offset policy. The policy appears still to be a draft, though a departmental official did remark that he thought that 'offsets are used a bit more these days than they have been in the past... perhaps partly because there is now a properly developed policy dealing with offsets, so the rules are a bit clearer'.⁷⁶ The submission of the MCA also appeared to indicate the policy was still under preparation, and expressed concerns about the consultation process.⁷⁷

72 Possum Centre Busselton Inc., *Submission 49*, p. 3.

73 National Farmers Federation, answer to question on notice, 16 January 2009, p. 4.

74 MCA, *Submission 30*, p. 13.

75 ANEDO, *Submission 90*, p. 20.

76 Mr Peter Burnett, First Assistant Secretary, Approvals and Wildlife Division, DEWHA, *Committee Hansard*, 8 December 2008, p. 83.

77 MCA, *Submission 30*.

5.66 The committee recognises that the use of offsets must only be applied as an adjunct to avoidance and mitigation. Offsets must not be used as a tool to get projects, which would otherwise be unacceptable, 'over the line'. Whilst government statements on the use of offsets are clear that they should not be used in this way, the evidence provided to the committee suggests that at least in some circumstances, offsets may not be improving the 'net effect of a proposal on the environment because of the reparation or "environmental gain" achieved through those actions'.⁷⁸

Recommendation 9

5.67 The committee recommends that government policy regarding the use of 'offsets' for habitat conservation state that the use of offsets:

- **is a last resort;**
- **must deliver a net environmental gain; and**
- **should not be accepted as a mitigating mechanism in instances where other policies or legislation (such as state vegetation protection laws) are already protecting the habitat proposed for use as an offset.**

78 DEWHA, *Use of Environmental Offsets Under the Environment Protection and Biodiversity Conservation Act 1999 Discussion Paper*, August 2007, p. 4.