Chapter 6

Engaging stakeholders

6.1 Stakeholders in the community – including project proponents, landholders, community associations or environmental non-government organisations – are vital players in the operation of the legislation. Maintaining good relationships and effective communication is an important part of the department's task in ensuring the Act operates well – a task to which they have recently committed further resources.[1]

6.2 The committee heard evidence on a range of issues regarding the roles of stakeholders in the operation of the Act, particularly in relation to:

- Whether proponents are referring all actions that should be being assessed under the Act;
- Whether proponents should be able to withdraw and re-submit a proposal, and under what conditions;
- The effects of assessment time frames under the Act on ensuring effective public participation;
- The costs to community groups of litigation; and
- The need to ensure parties affected by decisions under the Act can access independent reviews of decisions.

Are all projects that need to be referred getting referred?

6.3 Proponents intending to undertake an action which will have or is likely to have a significant impact on a matter of national environmental significance are required to seek approval for that action under the Act. This includes activities undertaken by landholders on privately owned land.

6.4 The committee heard that some proponents remain unclear about when and for which actions they must seek approval under the Act. This lack of understanding may have resulted in some actions that require approval not being referred and vice versa. Land & Environment Planning stated:

> Development proponents common lack an understanding of the responsibilities under the Act. It appears that in many cases there are actions which would have a significant effect on matters of national

1 Mr Peter Burnett, First Assistant Secretary, Approvals and Wildlife Division, Department of Environment, Water, Heritage and the Arts, *Committee Hansard*, 9 December 2008, p. 66.

> environmental significance which are not referred to the Commonwealth, particularly in relation to land development and smaller projects.[2]

6.5 The agricultural sector was specifically cited as one where there continues to be significant confusion about the application of the Act and the need for referral:

> As the Productivity Commission has stated in relation to the agricultural sector, "In terms of preventing activities, or of requiring activities to undergo the assessment and approval process, the EPBC Act to date has had little direct impact on the agricultural sector." [Productivity Commission, *Impacts of Native Vegetation and Biodiversity Regulations*, Report No 29 (2004)]. The referral figures support this view in 06-07 the department received 3 referrals for the agriculture and forestry category, all of which were found to be not controlled actions.[3]

6.6 Routine activities undertaken on farms may require referral under the Act, depending on their impact on matters of national environmental significance. However, sections 43A and 43B of the Act exempt certain actions from requiring assessment and approval. Section 43A exempts actions with prior authorisation under a law of the Australian Government, a state or self-governing territory (granted before 16 July 2000) from assessment and approval under the Act.[4] For example, 'an activity that could be exempted under the prior authorisation provision is cattle grazing in accordance with a crown land licence issued under the Victorian *Land Act 1958*'.[5] Section 43B provides for 'actions that are lawful continuations of use of land' to be exempt from assessment and approval, so long as the action commenced prior to 16 July 2000, the land use is lawful and the action has continued in the same location without enlargement, expansion or intensification.[6] An example of an action exempt under section 43B is 'continuing cropping and crop rotation'.[7]

6.7 Confusion regarding these provisions appears to have arisen specifically around the enlargement, expansion or intensification of farming practices. The NFF stated:

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2 Land & Environment Planning, *Submission* 18.

3 NPAC, *Submission* 93, p. 24.

4 EPBC Act, s. 43A; DEWHA, 2008, *Prior authorisation and continuing use exemptions - Sections 43A and 43B*, http://www.environment.gov.au/epbc/publications/exemptions.html (accessed 25 February 2009).

5 EPBC Act, s. 43B; DEWHA, 2008, *Prior authorisation and continuing use exemptions - Sections 43A and 43B*, http://www.environment.gov.au/epbc/publications/exemptions.html (accessed 25 February 2009).

6 DEWHA, 2008, *Prior authorisation and continuing use exemptions - Sections 43A and 43B*, http://www.environment.gov.au/epbc/publications/exemptions.html (accessed 25 February 2009).

7 DEWHA, 2008, *Prior authorisation and continuing use exemptions - Sections 43A and 43B*, http://www.environment.gov.au/epbc/publications/exemptions.html (accessed 25 February 2009).

> As NFF understands it, the continuing use provisions state that when a farmer continues to use his land as it has been historically managed then there is no requirement for an assessment process. However, this provision does not cover intensification or expansion of the historic farming practice, e.g. increasing the number of livestock being grazed or expansion of the area traditionally cropped.[8]

6.8 The NFF went on to explain:

> Where a farmer has significant biodiversity on his or her place and those species, for example, are listed under the act or the area is within an ecological community that is threatened under the act, the farmer has to consider how increasing cropping or increasing stocking rates of livestock may impact on those species and needs to seek approval under the act from the department. It is that simple. First they have to acknowledge that the act is in existence and the understanding within our farming community is quite low, so there is a communication issue. They also have to understand what threatened species and what ecological communities of value are on their place. Where there are none of value, they do not need to seek approval. But where their property is an area that, for example, has threatened species then they need to seek approval under the act. It is not clear to farmers where those continuous use provisions kick in and where they do not.[9]

6.9 The committee is aware that ensuring effective regulation of the impacts of agriculture and land clearing under the Act is a long-standing issue for both the department and stakeholders. The ANAO in its 2002-03 audit, examining this issue, remarked:

> The most surprising figure is the low level of referrals from agriculture and forestry. Given the impact of land clearing on listed threatened species it could be expected that there would be a higher number of referrals in this area. The exemptions relating to existing activities prior to the Act's introduction and where Regional Forest Agreements are in place might explain this to some extent.[10]

6.10 In recognition of the impact of the Act on farmers in particular, the department has an out-placed Resource Liaison Officer based with the NFF to provide advice to the agricultural sector on the application of the Act.[11] This arrangement was

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8 NFF, *Submission 87*, p. 12.

9 Ms Deborah Kerr, Natural Resource Manager, National Farmers Federation, *Committee Hansard*, 9 December 2008,

10 ANAO, *Referrals, Assessment and Approvals under the Environment Protection and Biodiversity Conservation Act 1999*, Performance Audit No. 38 of 2002–03, p. 82.

11 NFF, *Submission 87*, p. 6.

in place at the time of the 2002–03 ANAO audit,[12] and is continuing. The NFF commented on the need for and usefulness of this support:

> NFF is grateful to DEWHA for the provision of this service for Australian farmers. With the recent cut back in funding for on-ground regional based NRM facilitators (Landcare in particular), the role of the out posted Officer will be increasingly important to ensure that farmers are aware of their responsibilities under the EPBC Act.[13]

6.11 ANAO, however, in 2006–07 noted that referrals from the agricultural sector have not increased, despite land clearing (including illegal clearing) being known to be a significant environmental problem:

> Since 2002–03, referrals from the rural sector have continued to be low. Referrals from the agriculture sector were 2.8 per cent of total referrals, or 46 out of 1 630 referrals to June 2006.[14]

6.12 The committee also notes that the ANAO was critical of the department's capacity to address the substantive underlying problems with referrals in relation to agriculture and land clearing:

> At the national level, the department has provided an out-posted officer on secondment to the National Farmers Federation since 2002–03. The out-posted officer provides a range of services such as advice on aspects of the Act, assistance with referrals, guides facts sheets, information and training to relevant stakeholders. This is an important initiative to promote the Act to potential proponents. Some 92 presentations (involving 1,380 farmers from 920 farm businesses) have been conducted since 2002. This represents contact with approximately one per cent of the target audience. Despite the considerable efforts being made, the current resource allocation is insufficient to fully engage all relevant rural and regional stakeholders throughout Australia – especially in the absence of the EPBC Unit which previously undertook much of the work in this area.[15]

6.13 It was suggested to the committee that the out-placement of departmental officers would be useful to other sectors. The MCA recommended that a seconded officer be provided, based on the NFF model, 'to those industry's [sic] that intersect significantly with the Act's implementation, to facilitate better advice on whether a referral is really required and where impact assessment efforts should be targeted'.[16]

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12 ANAO, *Referrals, Assessment and Approvals under the Environment Protection and Biodiversity Conservation Act 1999*, Performance Audit No. 38 of 2002–03, p. 82 (footnote).

13 NFF, *Submission 87*, p. 6.

14 ANAO, *The Conservation and Protection of National Threatened Species and Ecological Communities*, Performance Audit No. 31 of 2006–07, p. 132.

15 ANAO, *The Conservation and Protection of National Threatened Species and Ecological Communities*, Performance Audit No. 31 of 2006–07, p. 134.

16 MCA, *Submission 30*, p. 15.

6.14 The department advised the committee that field officers are also located in Perth and Hobart.[17] These field officers have been placed on-ground to assist with specific matters – in Perth, the field officer assists with applications associated with Perth's urban growth; in Hobart, the field officer assists with work associated with the proposed Gunns pulp mill development.[18]

6.15 The committee recognises the assistance provided by the department out-placed officer to the agricultural sector, and the value the sector places on this service. The committee also notes the placement of field officers in Perth and Hobart to provide assistance with identified areas of increased workload under the Act. The committee accepts the concerns expressed through both ANAO audits regarding the adequacy of referrals in the area of agriculture and land clearing. The committee hopes that the increase in resources already received by the department; the department's plan to implement a communications strategy; and the additional funding recommended in chapter three of this report, will collectively ensure improvements in this area.

Withdrawal and re-submission of proposals

6.16 As it currently stands, the Act does not prevent a proponent who has withdrawn a referral from subsequently re-submitting that same proposal:

> (1) Subject to subsection (2), a person who:
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> (a) has referred a proposal to take an action to the Minister under section 68; or
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> (b) is named as the person proposing to take an action in a proposal that is referred to the Minister under section 69 or 71;
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> may withdraw the referral, by written notice to the Minister.
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> (2) The referral cannot be withdrawn after the Minister has decided, under Part 9, whether or not to approve the taking of the action.
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> (3) If the Minister receives a notice withdrawing the referral, the Minister must publish a notice of the withdrawal of the referral in accordance with the regulations.
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> (4) If the referral is withdrawn, the provisions of this Chapter that would, apart from this subsection, have applied to the action cease to apply to the action.[19]

6.17 Mr Michael Stokes described the withdrawal and subsequent re-submission of the pulp mill proposal by Gunns and raised the question of whether 'a proponent who has withdrawn from the selected assessment [should] have the right to withdraw the

17 Mr Peter Burnett, First Assistant Secretary, Approvals and Wildlife Division,DEWHA, *Committee Hansard*, 9 December 2008, p. 66.

18 Mr Peter Burnett, First Assistant Secretary, Approvals and Wildlife Division, DEWHA, *Committee Hansard*, 9 December 2008, pp. 66–67.

19 EPBC Act, s. 170C.

referral and restart the process, effectively requiring the minister to reconsider the original choice of assessment process'.[20] Mr Stokes stated:

> Common sense suggests that if the Act permits such strategic withdrawals, the appropriate decision for the minister would be to require that the proposal be re-submitted to the original assessment, which would then continue from where it left off. But it is not clear that such a decision would be valid. The Act is silent on the issue of how the re-referral of a withdrawn referral is to be dealt with.[21]

6.18 In light of the Full Court's decision in the *Wilderness Society Case* that there were no restrictions to prevent Gunns from re-submitting the proposed pulp mill after having withdrawn the same referral, Mr Stokes suggested that proponents should not have an unlimited right to withdraw and re-refer a proposal. It was recommended to the committee that:

> …it is likely that the EPBCA intended that the proponent should not be able to withdraw and re-refer a proposal for no other reason than to avoid the limits on the minister's powers to reconsider an earlier decision that the proposal was a controlled action or that it was to be assessed in one way rather than another…Therefore, s 170C, which permits a proponent of a referral of an action for assessment and approval to withdraw the referral, should make it clear that a proponent who withdraws a referral does not have an unqualified right to re-refer the proposal. There are a number of ways in which this could be done. One is to impose a time limit, for example of two years in which a proponent who withdrew a referral would not be able to re-refer substantially the same proposal. Such time limits are common in development control legislation. Another would be to prevent the Minister from considering a re-referral of a withdrawn proposal where a major reason for the withdrawal and re-referral was to force the Minister to reconsider whether the proposal was a controlled action or the proposed method of assessment.[22]

6.19 The committee notes that the efficacy of restrictions such as those suggested by Mr Stokes would rely in part on the definition of 'substantially the same'. In other jurisdictions this has been determined in the courts:

> I took those ideas out of state planning legislation, where quite often you cannot resubmit substantially the same proposal. You are quite right, there has been quite a lot of litigation about when a proposal is 'substantially the same'. I do not know that we can define 'substantially'. The important thing from the EPBC Act is that what is being proposed is fairly similar, and the impacts are likely to be similar – nothing has really changed with respect to

20 Mr Michael Stokes, *Submission 54*, p. 6.

21 Mr Michael Stokes, *Submission 54*, p. 6.

22 Mr Michael Stokes, *Submission 54*, p. 7.

> those impacts on the environment, because that is what we are concerned about here.[23]

6.20 Whilst acknowledging that the extent to which proposals are determined to be 'substantially the same' may in part be determined by the courts, the committee believes that limiting proponents' ability to withdraw and re-refer the same proposal warrants consideration. Appropriate limitations on a proponent's right to withdraw and re-refer a proposal would prevent the proponent from seeking a strategic advantage whereby their proposal can avoid rigorous scrutiny under the Act.

Public participation: assessment timeframes; providing information

6.21 The Act provides for interested members of the public to provide comment on matters such as referrals, assessments, nominations for listing, recovery plans and threat abatement plans. Typically, a notification and relevant documents are made available via the DEWHA website. The period for public comment is usually 10 or 30 business days.[24]

6.22 The committee heard from numerous submitters that the current timeframes provided for public comment prohibit meaningful public engagement and that extension of these periods would be appropriate:

> Experience shows that the lack of time available for public comment on referrals has hindered effective community engagement in the administrative processes of the EPBC Act. It is suggested that 3 - 4 weeks for comment is more reasonable than the present arrangement.[25]

6.23 The ACF commented:

> Minimum public consultation periods mandated by the EPBC Act can often be too short to enable meaningful public engagement in EIA processes conducted under the EPBC Act. This is particularly the case where the action under assessment is large-scale and impacts upon communities that are socially marginalised and / or dispersed over large geographical areas…ACF considers that statutory minimum time frames mandated for key steps in EIA processes conducted under the EPBC Act should be extended to enable meaningful public participation in these processes. In ACF's view, a legislatively mandated minimum period of 90 days for more complex processes is required, with the ability for longer periods to be prescribed where necessary.[26]

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23 Mr Michael Stokes, Senior Lecturer, Law School, University of Tasmania, *Committee Hansard*, 18 February 2009, p. 5.

24 For example, see EPBC Act, ss 74(3) and 194M(3).

25 Land & Environment Planning, *Submission 18*.

26 ACF, *Submission 52*, p. 35.

6.24 Submitters were particularly critical of the 10 days provided for public comment on referrals, recommending that the time frame be extended:

> The process of notification of referrals and the 10 day turn around for response is inadequate for public participation in commenting on the impacts of projects submitted for referral. This period needs to be extended to 28 days.[27]

6.25 Bird Observation and Conservation Australia (BOCA) made a similar request. As well as favouring a longer comment period, BOCA also noted that it can take time for an organisation simply to establish whether a referral is of interest to them: 'Matters listed on the DEWHA website provide little clue as to the major concerns or issues that have triggered the referral'.[28] BOCA was also critical of the effects of the time frame on the reliability of available information:

> In many instances BOCA must rely on local knowledge and records to support or refute the claims of proponents and their representatives. The collation and analysis of relevant information (both published and local) is time consuming, often requiring much longer than the relevant 10 day period for adequate analysis and submission preparation.[29]

6.26 Submitters suggested various extended periods for public comment. These ranged from approximately 28 through to 90 days 'for more complex processes'.[30]

6.27 There were other complaints about documentation of the assessment process. When a decision is made that the manner of assessment will be by accredited assessment process, it is not always clear from the published notice of decision what that assessment process actually involves. NPAC commented:

> There is no requirement to publish the details of the assessment process. The decision notification documents for referrals 2008/3948, 2007/3809 and 2008/3960 do not state what the accredited assessment process is. The public is left with no idea as to how these referrals are to be assessed.[31]

6.28 The committee notes that section 91 of the Act does appear to require details to be published; it states in part:

> If the Minister decided that the relevant impacts of the action are to be assessed by an accredited assessment process, the written notice and the published notice must specify the process.[32]

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27 Central West Environment Council, *Submission 43*.

28 BOCA, *Submission 72*.

29 BOCA, *Submission 72*.

30 See Land & Environment Planning, *Submission 18* and Australian Conservation Foundation, *Submission 52*, p. 35.

31 NPAC, *Submission 93*, p. 13.

32 EPBC Act, s. 91(2).

6.29 The committee examined the three examples and agreed that there did appear to be limited information accessible regarding the assessment approach through the department's online database.

6.30 It remains unclear to the committee to what extent the department is able to take into consideration information provided to it by members of the public. Public comment both engages stakeholders in EPBC processes and provides an opportunity for the department to be presented with information, relevant to a referral or other public notice, of which it may have been unaware. For example, the committee notes that the department may be unfamiliar with a specific location(s) and public comment provides a mechanism by which potentially valuable 'local knowledge' can be obtained.

6.31 The ANAO noted examples where information provided to the department by members of the public had been significant in detecting and addressing possible impacts on matters of national environmental significance.[33] In light of earlier discussion, the committee believes it is significant that both cases involved habitat destruction.

6.32 Public input may also be important in identifying incorrect information that might be provided by proponents. The committee notes that section 489 of the Act makes it an offence to provide false or misleading information in order to obtain approval or a permit under the Act.[34]

6.33 The Act thus places responsibility on the proponent to provide accurate information. However, where this is contested by comments provided by a member of the public (an individual or organisation), and is deemed to be neither frivolous nor vexatious, this should be a source for concern. The committee understands there is a role for the department to investigate the accuracy of information provided to it where there is discrepancy between that provided by the proponent and that received during public comment. Given the limited resources with which the department operates, the committee was unsure of the extent to which this takes place.

The costs of litigation

6.34 Public interest litigation represents a means by which third parties, usually conservation groups or other non-government organisations, can bring alleged breaches of the Act before the courts. Public interest litigation is considered by some experts to play an important role as 'surrogate regulation' in protecting the environment.[35]

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33 ANAO, *Referrals, Assessment and Approvals under the Environment Protection and Biodiversity Conservation Act 1999*, Performance Audit No. 38 of 2002–03, pp 83–84.

34 EPBC Act, s. 489.

35 See Dr Chris McGrath, *Submission 38*, p. 2.

6.35 The committee heard evidence that the costs associated with litigation, most notably the threat of adverse costs orders, orders for security for costs and undertakings for damages, are a prohibitive barrier to those wishing to challenge or seeking to enforce decisions made under the Act:

> Under current rules, costs generally "follow the event" i.e. at the conclusion of the court proceedings, an award can be made that the unsuccessful party bear both its own legal costs plus the costs of the other parties to the litigation. Furthermore, a party to litigation may apply to the court, and be granted, an order requiring the application to provide security for that party's costs or (in the case of an application of an interlocutory injunction) an undertaking for damages.
>
> The threat of these orders operates as a powerful disincentive to individuals and organisations wishing to challenge decisions made under the EPBC Act or apply for an injunction to enforce it. Individuals or community organisations face financially ruinous orders for costs in the event that they lose expensive proceedings conducted in the Federal Court of Australia.[36]

6.36 Lawyers for Forests went further, stating:

> The right to challenge decisions made under the Act is being significantly undermined by matters relating to costs, for example the threat of security for costs against applicants and costs being ordered on an unsuccessful application.[37]

6.37 NPAC was unhappy about the apparent inconsistency in determinations awarding costs, citing a number of cases brought before the Federal Court:

> Theses cases illustrate that there is no clear rule about when cost will follow or the quantum of those costs. Yet all the judgements recognise that these cases are brought in the public interest on issues that a significant proportion of the community supports, have an important role in defining the application of the Act and merited judicial consideration. Reform of the EPBC Act is needed to address the costs issue…[38]

6.38 Numerous submitters recommended changes to the Act to limit the extent to which applicants are exposed to costs associated with litigation. ANEDO's recommendations were representative of these:

- The insertion of a provision into the Act that allows the court to consider granting an order that each party to a proceeding bear their own costs.
- The insertion of a provision into the Act that allows the court to consider granting a protective costs order to a party to the proceeding (or include public interest costs orders in the *Federal Court Rules*).

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36 ACF, *Submission 52*, p. 33.

37 Lawyers for Forests, *Submission 68*, p. 3.

38 NPAC, *Submission 93*, pp 34–35.

- The insertion of a provision into the Act allowing public interest parties to apply for a maximum costs order.
- The insertion of a provision into the Act that prevents a party from making an application for security costs against a public interest applicant.
- Reinstate the repealed section 478 into the Act in its original form.[39]

6.39 The 2006 amendments to the Act repealed section 478 'No undertakings as to damages'. Section 478 provided:

> The Federal Court is not to require an applicant for an injunction to give an undertaking as to damages as a condition of granting an interim injunction.[40]

6.40 The repeal of section 478 has exposed applicants to the possibility of having to undertake to pay costs for potential damages as a requirement of the injunction sought being granted.

6.41 The committee heard that amending the Act to protect applicants from the costs associated with litigation was unlikely to open the 'floodgate' on environmental litigation:

> There is no evidence of that vexatious nature of proceedings, and there is no evidence that, if you open up court systems, it is the floodgates opening, and people will start running through them. We have had open standing in New South Wales since 1979, nearly 30 years, and there have been only a handful of matters brought by third parties – by 'third parties' I mean any person who does not have a direct material or financial interest – because one simply does not go to court lightly. We are in the business of going to court, and we do not go to court lightly.[41]

6.42 Dr Chris McGrath agreed with this position:

> I fully support a costs provision being there in appropriate cases where a respondent has incurred costs because some mad person has run a case, but that is rare. If we want third parties involved – and, as I have argued in my article, I think there is a really important role for third parties in enforcing the act – we really need to support them and indicate to the Federal Court that costs should not be awarded against them and that if there is a valid case and if it is well run they should be allowed to not risk bankruptcy.[42]

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39 ANEDO, *Submission 90*, p. 16.

40 EPBC Act, s. 478 (repealed by *Environment and Heritage Legislation Amendment Act (No. 1) 2006*).

41 Mr Jeff Smith, Director, Australian Network of Environmental Defenders' Offices, *Committee Hansard*, 10 December 2008, p. 27.

42 Dr Chris McGrath, *Committee Hansard*, 10 December 2008, p. 50.

6.43 Evidence provided by the department certainly suggests that there is little litigation initiated under the Act – either by third parties, proponents of actions, or permit applicants. In the approximately eight years since the Act commenced, there have been just eight applications to courts for injunctions, 21 applications for judicial review of decisions, and 12 applications for merits reviews of decisions.[43] When it is considered that this is Australia's main national environmental legislation, containing 86 criminal and 17 civil penalty provisions[44] as well as third party standing provisions, this appears to be an extremely low level of litigation.

6.44 In addition to reinstating section 478 and inserting other provisions in the Act to protect applicants from the costs of litigation, some submitters recommended to the committee that legal aid be established to assist public interest litigants in running their cases.

Administrative review of decisions

6.45 According the Commonwealth Administrative Review Council (ARC),[45] 'the community is entitled to expect that public administrators will act lawfully, rationally, openly and efficiently in their dealings with the community'.[46] Indeed, 'public acceptance of Government and the roles of officials depend upon trust and confidence founded upon the administration being held accountable for its actions'.[47]

6.46 In basic terms, 'administrative review' refers to processes by which a party whose interests are affected by a government administrative decision can challenge that decision (or the failure to make a decision) via internal review mechanisms or in a court or tribunal. According to the ARC,

> Expressed in its simplest form, administrative review has a dual purpose:
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> - to improve the quality, efficiency and effectiveness of government decision-making generally; and
> - to enable people to test the legality and the merits of decisions that affect them.[48]

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43 DEWHA, *Submission 85*, pp 78–79.

44 At the time of the 2006–07 Audit: ANAO, *The Conservation and Protection of National Threatened Species and Ecological Communities*, Performance Audit No. 31 of 2006–07, p. 142.

45 The Commonwealth Administrative Review Council is a statutory body established under the *Administrative Appeals Tribunal Act 1975*, and is tasked with monitoring the system of administrative review and to provide the government with recommendations for reform.

46 ARC, *The Contracting Out of Government Services*, Issues Paper, 1997.

47 ARC, *The Contracting Out of Government Services*, Report No 42, 1998, Chapter 2, p. 5.

48 ARC, 'Overview of the Commonwealth System of Administrative Review', http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Overview_Overview_of_the_Commonwealth_System_of_Admin_Review (accessed 24 February 2009), paragraph 1.

6.47 Key elements of the Commonwealth administrative review system designed to safeguard the rights and interests of people and corporations in their dealings with government agencies include:

- Judicial review under the *Administrative Decisions (Judicial Review) Act 1977* ('the ADJR Act') of the lawfulness of most statutory decisions;
- Merits review of statutory decisions by independent tribunals such as the Administrative Appeals Tribunal (AAT), or internal merits view by the agency responsible for the decision;
- Investigation by the Ombudsman of complaints of maladministration; and
- Access to information via the *Freedom of Information Act 1982*, and the regulation of the use the use and storage of information about individuals through the *Privacy Act 1988* and *Archives Act 1983*.[49]

6.48 Stakeholders provided the committee with a number of views in relation to the current system of administrative review of decisions under the EPBC Act, particularly judicial and merits review provisions. Some of the issues raised are discussed below.

Judicial Review and the EPBC Act

6.49 Along with most other Commonwealth legislation, the EPBC Act is subject to judicial review provisions. Thus, an "interested person" may apply to the Federal Court for judicial review of an administrative decision made under the Act. As the ARC notes, the scope of judicial review is limited to whether or not a decision is correct in law. Thus, it does not involve re-visiting the merits of a case. Rather, the purpose of judicial review is to ensure that the decision maker acted lawfully by not exceeding their authority and followed the correct legal procedures (including considering all relevant considerations).

6.50 Where a decision is found to have been affected by legal error, the power of the court is generally limited to setting the decision aside and referring the matter back to the decision maker for reconsideration according to the law. The ADJR Act sets out the procedure by which a 'person aggrieved by a decision', or the imposing of a condition or requirement, may apply to the Federal Court for an order for review, the grounds for a review, the relief that the court can provide, and the procedure by which a person can obtain a written statement of reasons for a decision prior to commencing action.

6.51 Section 487 of the EPBC Act extends the meaning of 'persons aggrieved' under the ADJR Act to include persons or organisations which are engaged in activities in Australia for protection, conservation or research into the environment during the previous two years. In other words, the EPBC Act extends the right to seek

49 ARC website, http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Overview (accessed on 20 February 2009).

judicial review (also known as *standing*) to include third parties, including some community organisations.

6.52 The department stated that 'since the commencement of the EPBC Act there have been 21 applications for judicial review of decisions made under the EPBC Act (not including cases on appeal)… in the majority of those cases, the decision making process employed under the EPBC Act has been upheld'.[50] While judicial review has the potential to play a more significant role environmental law, its cost may account for the lack of public interest litigation.

6.53 In 2007–08, ten court actions were commenced seeking judicial review of decisions made by the Minister under the Act.[51] At least two of these court actions led to decisions being set aside. In the case of *Phosphate Resources Ltd v Minister for the Environment, Heritage, Water and the Arts (no. 2)* [2008] (FCA 1521), the decision by the then Minister, the Hon Malcolm Turnbull MP, to refuse approval for the expansion of phosphate mining operations on Christmas Island was set aside due to two errors contained in the departmental briefing provided prior to the Minister's decision (in particular, the briefing did not sufficiently call the Minister's attention to the mandatory requirement to consider the proponent's Environmental Impact Statement).[52]

6.54 In the case of *Lansen v Minister for Environment and Heritage* [2008] (FCAFC 189), the decision of the then Minister, the Hon Ian Campbell, to approve the change from underground to pit mining at McArthur River in the Northern Territory (requiring the diversion of the river) was set aside by the Federal Court. The reason for the decision was the perceived failure to consider any conditions imposed by the Northern Territory Government when deciding to impose conditions on approval for the action.[53]

6.55 It should be emphasised that, because these are examples of judicial review, the decisions were set aside on legal grounds, and made no judgement as to whether the decision was the 'preferable' one. As one analysis of the Phosphate Resources case put it, 'any "replacement" decision on the expansion project may turn out to be no

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50 DEWHA, *Submission 85*, p. 79.

51 DEWHA, *Annual Report 2007-2008*, Vol. 2, pp. 67–69.

52 Buchanan J, Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2) [2008] FCA 1521, http://www.lexisnexis.com/au/legal/search/runRemoteLink.do?service=citation&langcountry=AU&risb=21_T5862629342&A=0.7143174628039017&linkInfo=F%23AU%23FCA%23year%252008%25page%251521%25sel1%252008%25&bct=A (accessed 26 February 2009).

53 Moore, Tamberlin and Lander JJ, Lansen v Minister for the Environment and Heritage [2008], FCAFC 189, http://www.lexisnexis.com/au/legal/auth/checkbrowser.do?ipcounter=1&cookieState=0&rand=0.43577769203106753&bhcp=1 (accessed 26 February 2009).

different from the original April 2007 decision'.[54] In this light, it is worth noting that the current Minister for the Environment, Heritage and the Arts, Hon Peter Garrett AM MP, has re-approved the proposed action at McArthur River on 20 February 2009, albeit with additional conditions.[55]

6.56 One potential avenue for judicial review is to consider the 'reasonableness' of administrative decisions. Mr Andrew Walker noted:

> The Minister's decision is not really reviewable, except on administrative law grounds, including the main ground, that the decision was unreasonable. The test for ascertaining whether this is the case is the so-called Wednesbury unreasonableness test. Under the Wednesbury unreasonableness test, an applicant for review must establish that, in summary, no reasonable Minister could make such a decision in the circumstances. That is pretty hard to establish, given the Minister's discretionary powers under the EPBC Act.[56]

6.57 However, this ground for appeal would have to be justified on the basis of the particularities of the case. Even if a court held that the decision was 'unreasonable', it does not necessarily follow that remitting the case to the decision maker for re-consideration, would yield a 'superior' result. Given the difficulties indicated by Mr Walker with this approach, several stakeholders have claimed there is a need for specific merits review procedures to be adopted. This possibility is discussed further in the section below.

Merits review of decisions

6.58 According to the ARC, 'the purpose of a merits review action is to decide whether the decision which is being challenged was the 'correct and preferable' decision. If not, a new decision can ordinarily be substituted'.[57] Merits review is generally undertaken by administrative tribunals, the principal of which is the AAT Unlike judicial review, merits review rights must be specifically assigned by legislation (usually by the legislation under which the decision is made).

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54 Briggs, John, 'Federal Court overturns Minister's decisions to refuse approval for expansion of mining operations on Christmas Island,' 1 December 2008, http://www.blakedawson.com/Templates/Publications/x_article_content_page.aspx?id=53701, (accessed 24 February 2009).

55 The Hon Peter Garrett AM MP, Minister for the Environment, Heritage and the Arts, 'McArthur River Mine Decision Remade with Extra Conditions', Press Release PG/216, 20 February 2009.

56 Andrew Walker, *The EPBC Act: An Overview*, Biodiversity Summit, September 2006, http://www.biodiversitysummit.org.au/walker.html (accessed 19 February 2009).

57 Administrative Review Council 'Overview of the Commonwealth System of Administrative Review', http://www.ag.gov.au/agd/WWW/archome.nsf/Page/Overview_Overview_of_the_Commonwealth_System_of_Admin_Review (accessed 20 February 2009).

6.59 The Act allows for merits review by the AAT in certain specific instances, including of decisions relating to:

- Permits for activities affecting listed threatened species or ecological communities, listed migratory species, listed marine species and citations under Part 13;
- Permits under Part 13A; and
- Advice on whether an action would contravene a conservation order under Part 17.[58]

6.60 In addition, the Act provides stakeholders with mechanisms for internal review of some decisions. For example, section 78 of the Act allows a Minister to revoke and substitute decisions relating to approvals of controlled actions on numerous grounds, including the availability of new information or changed circumstances.

6.61 The department noted in its submission that there had been 12 applications for merits review of decisions under the Act.[59] The AAT website lists 11 cases since 1 January 2006, dealing with 7 separate decisions made under the Act. All cases listed since 2006 relate to decisions made under Part 13A of the Act, including appeals against decisions to approve wildlife trade management plans or operations (under sections 303FO or 303FN), to withhold 'exceptional circumstances' permits for export of living Australian wildlife specimens (under section 303GB) or to grant permits for import of species from overseas (under section 303CG).[60] All except two of the cases since January 2006 were brought by third parties (environmental NGOs).

6.62 Some of these cases involved decisions made by the Minister personally (e.g. the decision of the AAT to vary permit conditions for the import of live elephants from Thailand for Australian zoos in December 2005). As a result of amendments to the Act in 2006, AAT review of decisions made by the Minister personally was removed. The power is now confined to review of decisions made by a delegate of the minister (meaning a senior official in the Department of Environment, Water, Heritage and the Arts). This removal was criticised by NPAC, which argued:

> While decisions of the Delegate of the Minister remain reviewable, it is reasonable that the Minister's decision (as he/she is exercising discretion) can be tested on appeal to the AAT. Improving public rights to review leads to better public participation and the NPAC strongly believes that any limitations on that review should be removed.[61]

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58 DEWHA, *Submission 85*, p. 79.

59 DEWHA, *Submission 85*, p. 79.

60 Administrative Appeals Tribunal decisions can be found at http://www.austlii.edu.au/au/cases/cth/aat/.

61 NPAC, *Submission 93*, p. 30.

6.63 At the time the amendments were being considered, the then Minister justified the removal of merits review of decisions made personally by the Minister on the grounds that 'where decisions are sufficiently important to be taken by the Minister as an elected representative, those judgements should not be overturned by an unelected tribunal such as the AAT'.[62] Despite this explanation, the Senate Scrutiny of Bills committee expressed concern, remarking that it 'finds the explanation that such important and complex decisions "should not be able to be overturned by an unelected tribunal such as the AAT" obscure'.[63]

6.64 In 1999, the ARC released a report outlining principles that should determine what decisions should be subject to merits review.[64] That report stated:

> As a matter of principle, the Council believes that an administrative decision that will, or is likely to, affect the interests of a person should be subject to merits review. That view is limited only by the small category of decisions that are, by their nature, unsuitable for merits review, and by particular factors that may justify excluding the merits review of a decision that otherwise meets the Council's test.
>
> The Council's approach reflects the requirements for standing to appear before the AAT. Section 27 of the Administrative Appeals Tribunal Act 1975 ('AAT Act') provides that persons whose interests are affected by a decision may apply to the AAT for review of the decision.[65]

6.65 Adopting the reasoning under the ARC's approach, it seems that administrative decisions made under Parts 7 and 8 of the Act (relating to environmental assessment decisions) would be suitable for merits review, for both applicants and third parties.[66] The logic underpinning this conclusion also appears relevant to administrative decisions made under section 184 of the Act. Section 184 of the Act deals with the Minister's power to amend lists of threatened species, threatened ecological communities and key threatening processes.

6.66 There has been concern among some stakeholders that the existing scope for merits review in the EPBC Act is too narrow:

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62 Scrutiny of Bills Committee, *Alert Digest No. 4 of 2006*, p. 38, cited in Scrutiny of Bills Committee, *Work of the Committee in the 41st Parliament: Nov 2004 – Oct 2007*, p. 62.

63 The Hon Ian Campbell, cited in Scrutiny of Bills Committee, *Eleventh Report of 2006*, p. 223.

64 Administrative Review Council, *What Decisions should be Subject to Merit Review*? AGPS, 1999, http://www.ag.gov.au/agd/WWW/arcHome.nsf/Page/Publications_Reports_Downloads_What_decisions_should_be_subject_to_merit_review (accessed January 2009).

65 Administrative Review Council, *What Decisions should be Subject to Merit Review*? AGPS, 1999, Chapter 2.

66 Part 7 of the Act deals with deciding whether approval of actions is needed. Part 8 of the Act deals with assessing the impacts of controlled actions.

> The EPBC Act has no merits review system [for listings decisions], unlike for example Victoria's planning system where the Victorian Civil and Administrative Tribunal ('VCAT') is able to review, on their merits, decisions made by Councils to issue (or not to issue, or failing to issue) planning permits. Instead, the Minister decides whether to make a listing and the avenues of review are limited. Perhaps they have not been tested to their full extent yet, because the EPBC Act does have strong objectives, so there may be scope to argue that the Minister's decision was unreasonable in the circumstances, and to challenge the Minister's decision on other administrative law grounds.[67]

6.67 Other parties arguing that scope for merits review should be expanded included Lawyers for Forests[68] and the NPAC.[69]

6.68 Dr Chris McGrath argued that the application of the principles provided by the ARC would mean that decisions under sections 75 and 133 of the Act should be subject to merits review.[70] Section 75 decisions are those determining whether an action is a controlled action. Section 133 decisions are those determining whether an action will be approved and under what conditions.

6.69 The Wilderness Society recommended that there be merits review of:

- whether an action is a controlled action (i.e. subject to the EPBC);
- approvals of actions;
- listing of threatened species and communities;
- heritage listings.[71]

6.70 The ACF's position was similar, supporting merits review for 'key decisions under the EPBC Act – including key controlled action and "listing" decisions under Parts 7 to 9 and 13'.[72]

6.71 Since the Act was changed in 2006 there does appear to have been a reduction in the number of merits review cases brought before the AAT, though the number of cases was never high. There appear to have been about seven distinct AAT decisions from July 2004 until amended Act took effect on 19 February 2007, and only two since that time. At the same time, there appears to have been an increase in third parties seeking administrative review in the Federal Court or High Court (though,

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67 Andrew Walker, *The EPBC Act: An Overview*, Biodiversity Summit, September 2006, http://www.biodiversitysummit.org.au/walker.html (accessed 19 February 2009).

68 Lawyers For Forests, *Submission 68*, p. 9.

69 NPAC, *Submission 93*, pp 30–31.

70 Dr Chris McGrath, *Submission 38*, p. 3.

71 The Wilderness Society, *Submission 51*, p. 10.

72 ACF, *Submission 52*, p. 33.

again, the total number of cases involved is very small). The figures suggest that there is little scope for any form of judicial review at present.

6.72 Dr McGrath has noted that creating increased scope for merits review could lead to an increase in costs and the length of time involved in gaining approvals under the Act. Dr McGrath also noted increased scope for merits review could lead to an increase in appeals from proponents who are dissatisfied with decisions under the Act, noting that 'developer appeals far outnumber public interest litigation under State planning laws that allow merits review.' He argued in relation to these costs that 'if good decision-making is the main objective rather than merely cheap and speedy decisions then merits review is attractive'.[73]

6.73 There appeared to be an expectation amongst some stakeholders that increased opportunity for merits review would result in decisions that favoured the position of environmental organisations. However one of the recent administrative review cases highlights the possibility that expanded access to merits review could lead to more cases being brought by proponents seeking favourable decisions on their development approvals. In *Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts*, the proponent had in fact tried unsuccessfully to argue the case on merits grounds. Buchanan J noted 'the arguments advanced suggesting there was no evidence to support a range of findings really sought to invoke an impermissible review of the merit of those findings'.[74] If merits review had been available, the outcome could have been different. Given that proponents are likely to be better resourced than community groups and NGOs, the committee is not sure why some groups think that merits review will result in fewer approvals of developments, or tighter development conditions.

6.74 The committee notes the view expressed by the then Minister in 2006 that some decisions are appropriately the responsibility of elected officials and should not be overturned by unelected officials. The committee recognises that there are decisions of national significance and which are effectively policy decisions are appropriately the realm of government. The committee agrees with the approach of the ARC, however, and notes that decisions of the type made under the EPBC Act are not all necessarily of this character. It is not unusual for Ministerial decisions (and not just those of delegates) to be subject to merits review. The committee is of the opinion that greater access to merits review for decisions taken under the Act may be

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73 Chris McGrath, 'Flying Foxes, dams and whales: Using federal environmental laws in the public interest,' (2008), 25 EPLJ 324 – *Submission 38 (Attachment 1)*, p. 354.

74 Buchanan J, Phosphate Resources Ltd v Minister for the Environment, Heritage and the Arts (No 2) [2008] FCA 1521, http://www.lexisnexis.com/au/legal/search/runRemoteLink.do?service=citation&langcountry=AU&risb=21_T5862629342&A=0.7143174628039017&linkInfo=F%23AU%23FCA%23year%252008%25page%251521%25sel1%252008%25&bct=A (accessed 26 February 2009), paragraph 58.

appropriate in certain cases, as it could have the overall impact of improving the quality of decision making under the Act.

6.75 The committee recognises that increasing the number of decisions under the Act that are subject to merits review could have resource implications both for the department and the AAT. The committee notes that the AAT already employs a range of specialists, including those with environmental qualifications or experience. It also notes that the Tribunal organises its work into Divisions that both reflect areas of significant workload and which allow the Tribunal members to develop specialist expertise.[75]

Recommendation 10

6.76 The committee recommends that consideration be given to expanding the scope for merits review in relation to ministerial decisions under the Act, particularly in relation to:

- **whether an action is a controlled action,**
- **assessment decisions; and**
- **decisions on whether a species or ecological community is to be listed under the Act.**

The committee recommends that the independent review examine this possibility in the first instance, and that the process of consideration should include consultation with the Administrative Appeals Tribunal.

Senator Anne McEwen
Chair

75 Administrative Appeals Tribunal, Introduction to the AAT, http://www.aat.gov.au/AboutTheAAT/IntroductionToTheAAT.htm (accessed 27 February 2009).