

Please attach the following **one-page summary** to your submission.

Comments on the Interim Report for the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act)

Summary

Name of author/organisation:

Ed Wensing MPIA
Associate Director, SGS Economics and Planning

Contact details:

NICHOLLS ACT 2913

Date:

1 August 2009

Which chapter(s) of the interim report are you commenting on?

Chapters 2, 3, 4, 5, 7, 8, 9, 10, 11, 17, 20, 21, 22 and 23.

Key points of submission

(please identify up to three main priorities or focal points of your submission):

The EPBC Act is a reasonable piece of legislation given the political context within which it was conceived, debated and promulgated. Based on my limited experience, when the right circumstances and ingredients line up, the Act is very powerful. However, there is scope to improve the Act and its scope.

In brief I make the following suggestions:

- The architecture of the EPBC Act be widened to include specified activities in addition to the existing impact trigger.
- The scope of matters listed for protection be broadened to include for example, wetlands of national significance (in addition to those that are RAMSAR listed).
- The heritage protection available under the EPBC Act for places on the National and Commonwealth Heritage Lists be extended to include the place as well as its heritage values.
- Strategic environmental assessment be given a greater role in the EPBC Act and that impacts on the wider environment and sustainability be considered in assessments and not just matters of national environmental significance.
- S.49A of the EPBC Act be amended to ensure the Minister's discretion does not contravene Indigenous people's right to give free, prior and informed consent on decisions that affect their rights and interests and their lives.

References (if possible, include a bibliography of any documents you may wish to make available)

N/A

Confidentiality statement:

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(please state 'yes' or 'no')

No

These comments contain personal information of a third party individuals. The third party individual **consents/does not consent** (*delete or strike out that which is not applicable*) to the publication of their information.

Not Applicable.

Comments on the Interim Report for the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)

Submission by Ed Wensing MPIA
Associate Director, SGS Economics and Planning
(Views expressed are personal and not necessarily those of SGS Economics and Planning)

Background

I am a planner with almost 40 years experience in a diverse range of fields including urban and regional planning and development, cultural and historic heritage planning and management, land administration, Aboriginal land rights and native title matters, and natural resource management. I worked in the Department of the Environment, Water, Heritage and the Arts from December 2003 until May 2008. I did not make a submission to the Review Committee as I had only recently left the Department and I believed it best to wait 12 months before expressing my views.

During my term in the Department I worked in the Heritage Division for 14 months where I had responsibility for implementing the new heritage provisions in the EPBC Act, especially in relation to places with historic heritage values. I also worked in the Natural Resource Management Joint Team between the Department of the Environment, Water, Heritage and the Arts and the Department of Agriculture, Fisheries and Forestry, where I was responsible for the administration of the Natural Heritage Trust and National Action Plan for Salinity and Water Quality, principally in Queensland. Since leaving the Department I have returned to private practice.

My comments in this submission are based on my experiences working with the EPBC Act from several different perspectives, both from inside and outside the Department.

Introductory comments

The EPBC Act commenced in 2000 and is the most fundamental reform of Australia's environmental laws since the 1970's. Based on my limited experience in working with enforcement of the Act, when all the right parts line up, the enforcement provisions in the Act are very powerful. However, in terms of its effectiveness in protecting the environment it has been more of a disappointment rather than a success.

The Act is essentially a consolidation of a number of pieces of legislation that were passed by the Parliament in the 1970's. The new Act is supposed to protect matters of national environmental significance identified in the Act and promote the conservation of biodiversity. The Australia Institute carried out a review of the effectiveness of the Act in 2005 and delivered a scathing report. The Auditor-General carried out a performance audit of the Act to assess and report on the administration of the Act by the (former) Dept of the Environment and Water Resources in terms of protecting and conserving threatened species and threatened ecological communities. I share many of The Australia Institute's concerns and those raised by the Auditor-General in his 2006-07 report.

The Act was amended in 2003 to insert the heritage provisions that replaced the Australian Heritage Commission and introduced a new heritage assessment and management regime, including the National Heritage List and the Commonwealth

Heritage List. These changes were welcome changes in terms of providing a better protection regime for national and commonwealth heritage places because the previous legislation lacked adequate enforcement provision if anyone damaged the heritage values of a place on the Register of the National Estate. The previous heritage legislation was introduced when the concept of protecting heritage values was very new and its ability to provide lasting protection was very limited and had become outdated

The Act was further amended in December 2006. Some of these amendments were of a technical nature and were not significant in the overall scheme of things. However, some of these amendments have only served to further weaken the reach and effect of the Act and should be reversed.

The Act also contains a novel element in the 'environmental assessment and approval' provisions or EAA. In some ways a misnomer, because it assumes that matters referred will be approved, when in fact the Minister has the power to approve, approve with conditions or reject an activity.

The EAA process requires that human activities having a significant impact on any of the listed matters of national environmental significance are to be reviewed and assessed under the Act.

As an Act of the Commonwealth government, the act is limited to the powers granted by the Australian Constitution, which does not expressly refer to the environment. As such, key provisions of the EPBC Act are largely based on the following treaties:

- [World Heritage Convention](#) - The Convention for the Protection of the World Cultural and Natural Heritage 1975;
- the [Ramsar Convention](#) - The Convention on Wetlands of International Importance especially as Waterfowl Habitat 1975;
- The [Convention on Biological Diversity](#) 1992;
- JAMBA - [Japan-Australia Migratory Bird Agreement](#);
- CAMBA - [China-Australia Migratory Bird Agreement](#);
- [Bonn Convention](#) - Convention on the Conservation of Migratory Species of Wild Animals;
- [CITES](#) - The Convention on International Trade in Endangered Species of Wild Fauna and Flora 1976.

The matters of national environmental significance therefore reflect these matters and includes the following:

- [World Heritage properties](#)
- [National heritage places](#)
- [Wetlands](#) of international importance ([Ramsar](#) wetlands)
- [Threatened species](#) and [ecological communities](#)
- [Migratory species](#)
- Commonwealth marine areas
- [Nuclear](#) actions (including [uranium mining](#) & building of [nuclear waste](#) repositories)

The scope of the EPBC Act is limited to these matters and relies on proponents of activities to self assess whether their proposed activity has, will have or is likely to have a significant impact on the environment of the matters protected under the Act.

The architecture of the EPBC Act is therefore based on an ‘impact trigger’ approach rather than a ‘specified activity’ approach. This means the scope of the Act is limited to only considering the likely impact of activities that are referred under the Act based on the list of matters protected under the Act. As such, many activities having adverse impacts on the environment are not captured by the Act.

Comments on Chapter 2 – Commonwealth Role and EPBC Act objectives

Chapter 2 suggests that the Commonwealth has broad powers to deal with environmental matters and that the States and Territories also have broad powers to make laws for the ‘peace, order and good governance’ of the State or Territory which grants them extensive powers to make legislation related to environmental matters in their own jurisdiction (para 2.30). This is not strictly correct. The Commonwealth was created by the six States and they only gave up a limited list of powers to the Commonwealth, most of which they continue to share with the Commonwealth. The Commonwealth does not have head of power in the Constitution for the environment. It is mostly the external affairs powers that have given the Commonwealth the power to take certain actions, as demonstrated by the fact that many of the matters protected under the Act stem from international agreements, treaties or covenants rather than any particular powers that the States or Territories may have given to the Commonwealth. This is particularly evident in the built environment, for matters entered on the National Heritage List for historic heritage values where the Commonwealth’s powers are very limited. This is discussed in more detail under comments on Chapter 11.

The Heads of Agreement between the Commonwealth and the States and Territories that set the scene for the EPBC Act in the 1990s does need to be renegotiated. What emerged at that time was the result of negotiations and compromises at a time when the States and Territories were quite reluctant to see the Commonwealth play a greater role in environmental protection. They were quite reluctant to give the Commonwealth any more power than it was already able to exert based primarily on its external affairs power. The States and Territories have continued to disappoint the community in their responsibility to protect the environment, and it requires a much stronger lead from the Commonwealth. The renegotiation of the Heads of Agreement should seek to extend the architecture of the Act to include a ‘specified activity’ approach in addition to retaining the ‘impact trigger’ approach. This will result in a greater workload for the Commonwealth and the Commonwealth should not shy away from this increased responsibility. As the Interim Report states in para 2.31, it is the Commonwealth’s role to ensure Australia meets its international environmental obligations. I agree with the WWF’s statement that Australia has failed to meet its obligations under Article 8 of the Convention on Biological Diversity

The disjunction between the EPBC Act and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth) is a product of the times at which they were drafted and promulgated. The Howard Government wanted to reform the latter Act. Thank heavens they didn’t ever get round to it because their approach to Aboriginal heritage protection would have taken Australia backward in time. Aboriginal heritage is much better protected under the EPBC Act because the definition of Indigenous heritage value in S.528 is a much better interpretation on Indigenous heritage: “a place that is of significance to Indigenous persons in accordance with their practices, observances, customs, traditions, beliefs or history”. The problem is not the disjuncture between the

two pieces of Commonwealth legislation, but rather with the States and Territories Aboriginal and Torres Strait Islander Heritage Acts. Some State and Territory heritage Acts still take an archaeological and artefact approach to Aboriginal heritage rather than seeing it as a living culture. The Commonwealth could do lot more to protect Aboriginal and Torres Strait Islander heritage by improving the scope of the EPBC Act. This is discussed in more detail later in this submission.

The role of Local Government in the context of the EPBC Act is discussed in Paras 2.126 to 2.128. I agree with the suggestion that Local Government's role in administering the EPBC Act needs to be clarified. I also agree that local Councils should have a clearer role in referring matters under the EPBC Act where they think a proponent has not done so, and that Council must refer a matter before they approve an action or proposal under their own delegated powers from the State/Territory.

In summary on Chapter 2, I agree with the general discussion in Paras 2.141 to 2.143 to change the emphasis of the EPBC Act to better apply the precautionary principle.

Comments on Chapter 3 – Scope of EIA under the EPBC Act

I agree with the comments that the current list of matters of national environmental significance is too narrow. Too many detrimental activities are getting through with out any assessment of their long term and cumulative impacts. I support the inclusion of land clearing, coastal developments, land clearing (especially for urban developments or new agricultural activities), water extraction, wild rivers, wetlands of national significance, invasive species and climate change impacts or greenhouse gas emissions in the list of matters of national environmental significance.

I agree with the discussion in para 3.53 about the difficulty of requiring all national policies to be considered under the EPBC Act and that it may be more effective to encourage or even require State, Territory and local governments to refer more plans for strategic assessment under the Act. I offer further comments on the use of strategic assessments in my comments on Chapter 10.

I agree with the discussion in para 3.58 about the need to broaden the definition of 'action' and in particular the submission from Mr Jamie Pittock and others to include major land use zoning and other natural resource strategies, policies and plans.

In reference to the discussion about the narrow interpretation of 'matters relevant' and the narrowness of the Commonwealth's remit to consider environmental matters, I support the view that the Commonwealth's role in environmental matters should be broadened and that the Commonwealth's powers may expand into areas normally the province of the States or Territories or local government. Sometimes this is necessary because State/Territory referral processes do not provide adequate protection and are sometimes seen, incorrectly, by proponents as a substitute for assessment processes under the EPBC Act.

Comments on Chapter 4 – Environmental Impact Assessment

This chapter is about the nucleus of the Act. The referral process rests largely on proponents of action making a judgement call as to whether their proposed action will have a significant impact on matters protected under the Act. There is no scope for third

party referrals and I am aware that the Department runs a hotline for people to notify the Department of activities that may require approval. While I agree with some of the concerns raised in the discussion around third part referrals, I do support the inclusion of a role for local Councils to have a referral power for matters that come before them for planning and development assessment. They should, as part of their assessment process, have the ability to have a matter referred to the Commonwealth for consideration under the EPBC if they think on their initial assessment that a proposal is likely to have adverse impacts on a matter protected, rather than having to urge a proponent to refer the matter. This would enable the local Council to take the Commonwealth's decision into account in making their decision. This would also enable them to include conditions in their approval and enforce them if not complied with.

I also agree with the comments by the Local Government and Shires Association of NSW at para 4.165 that there is a lack of awareness of Councils' responsibilities under the Act, including in relation to their own activities, and the need for an ongoing awareness raising program. Similar to the EPBC Unit discussed in the preceding paras that used to operate in the non-government conservation sector, there is an equally as great a need for awareness raising and education in local government about the operation of the EPBC Act. The constant changes in local government officials, senior managers and elected members means that corporate knowledge about the application of Commonwealth knowledge is often lost. I worked for Local Government for over a decade and I have to agree there is an appalling level of ignorance about the applicability of Commonwealth legislation, especially the EPBC Act. I conducted an extensive education and awareness-raising program for local government around Australia on the *Native Title Act* following the 1998 amendments. This involved the conduct of over 60 information sessions for elected representatives and senior managers and over 75 full one-day workshops for officials all over the country (excluding Tasmania). These were very effective in raising awareness of the applicability of the Act as well as educating officials on how to work with the Act. The end result is that many more local councils are turning to the agreement provisions in the Native Title Act rather than using litigation to resolve native title matters.

As a planner, I also support any changes to the Act that will improve the Commonwealth's powers to consider the cumulative impact of proposals. It is a pity that one of the key policy recommendations of the inquiry referred to in para 4.249 has not been implemented.

Comments on Chapter 5 – Prior Authorisation and Continuing Use Exemptions

In relation to the continuation of previously authorised uses continuing to be exempt from the EPBC Act, given the Act has now been in place for almost a decade, it may be more appropriate to insert a sunset clause to this exemption. I see no reason why it would be unreasonable for the government to say this clause will only apply for another one or two years, after which any changes to existing uses whether or not they can be regarded as 'an enlargement, expansion or intensification of use' or a 'a change in the nature of the activities comprising the use', should be subject to an initial assessment by the Minister under the EPBC Act. This should apply to any activities that will have an impact on any specified matters of national environmental significance.

Chapter 6 – Forestry

No Comments

Comments on Chapter 7 – Land Clearance

Land clearance in Australia continues to be a major threat to our environment in many different ways. Not only does it impact on salinity and water quality, it also contributes to greenhouse gas emissions, destroys native habitats and biodiversity, and contributes to soil erosion and degradation.

While land clearance is listed as threatening process, too much land clearing, especially for new urban development, continues to escape proper scrutiny under the EPBC Act. I therefore agree with the suggestions by the Green Institute and others in paras 7.9, 7.10 and 7.11.

I also support the views expressed by the ANEDO in para 7.25 that land clearance be made a trigger under the EPBC Act. I see no difficulties with altering the architecture of the EPBC Act to also include specified activities such as land clearance as a trigger under the EPBC Act. The consequences of not assessing the full effects of land clearance at the scale at which it is currently occurring in Australia, is unthinkable.

Comments on Chapter 8 – Climate Change

While I generally agree that the relevance of a 'greenhouse trigger' depends on the implementation of the Australian Government's Carbon Pollution Reduction Scheme', I am concerned by the CSIRO's comments in para 8.87 that the EPBC Act could continue to function effectively for another ten years before it may need major reforms. I am not sure we may need to wait that long before we make changes to take account of new and emerging threats to the environment arising from the impacts of climate change.

I agree with the suggestion in para 8.57 that it is already necessary to introduce appropriate greenhouse triggers into the EPBC Act prior to the establishment of the CPRS because there will inevitably be some delays with its introduction and effective implementation. We need to act now on greenhouse matters and not wait unduly for related mechanisms to be put in place to reduce the impact of greenhouse gas emissions.

Comments on Chapter 9 – Water Issues

As mentioned in the Background above, for almost four years I was responsible for administering the Government's NRM programs in Qld. During that time I visited many parts Qld inspecting projects funded under the Government's NRM programs. I got to visit many wetlands, some RAMSAR listed, and many not listed. The one resounding comment I heard almost consistently around the State, and for that matter from my fellow State/Territory Team Directors in the Joint Team, was that many of our wetlands are not being adequately protected and that much more can be done.

I therefore support the inclusion of 'wetlands of national significance' into the list of matters protected under the EPBC Act. I understand this will have significant impacts for the Dept in terms of workload, but our important wetland resources are not being adequately protected under our current regimes, including under existing State and Territory regimes.

It is outside my areas of expertise to comment on the management plan regime for wetlands, however, I suspect some of the issues with respect to management plans may be similar to those in the heritage management area, discussed in Chapter 11.

Comments on Chapter 10 – Strategic Assessments and Bioregional Planning

As discussed on Para 10.2, landscape scale approaches to planning and assessment are at a broader scale and are undertaken within the context of a landscape or regional setting and that such assessments generally take place ahead of a proposed development, whereas project specific assessments occur in response to a particular proposal.

I note that provisions for strategic assessments have been included in the EPBC Act since its inception, and that their role in the assessment process was improved with the 2006 amendments to the Act. However, for a variety of reasons, I don't think the process of strategic assessments has been applied all that well by the Department. This is partly due the way the Act was initially written and also due in part to the lack of appropriate skills in the Department to apply the methodology.

Good strategic planning can be used in almost any situation to resolve a dispute or problem. It is a way of thinking, as much as it is a process that can be applied to determine the values and priorities, and as a basis for decision making about the use and development of land and natural resources for a particular spatial area.

Strategic planning is about deciding what the ground rules are for the use, development and/or conservation of land and natural resources. It provides the context and the basis for planning instruments (statutory plan making and plan amendments, development controls or codes) under which decisions to grant approval, conditional approval or refusal, are made. Such decisions are the point at which strategic and policy issues can be effectively linked to local actions.

I support the comments by ANEDO of the need for strategic environmental assessments and the need to ensure they are done thoroughly subject to strict criteria and genuine public consultation and involvement, otherwise they risk producing the wrong outcomes.

In a 'Guide to Good Strategic Planning', which I co-authored in 2002 for the Development Assessment Forum, we set out a number of key principles to strategic planning as follows:

- **Identify the spatial area.** The area can be local or regional.
- **Develop a holistic long term vision,** which may be from five to 20 years.
- **Integrate economic, environmental, social, cultural and equity factors.** These factors are inextricably linked.
- **Undertake social and environmental research and analysis.** Information, analysis and understanding are crucial to sound policy development.
- **Respect the capacity of the environment for present and future generations.** Irreversible damage to the environment should be avoided.
- **Involve the community throughout the process, and recognise its diversity.** Any plan must be responsive to community views and values if it is to have any chance of success.

- **Apply the principle of subsidiarity.** The principle of subsidiarity demands that higher levels of government should not undertake what a lower level of government can do for itself.
- **Identify suitable benchmarks and performance indicators for monitoring and evaluation.** Effective monitoring and subsequent review ensures the strategic planning process is flexible, dynamic and relevant.

I believe these principles are also relevant to natural resource planning and management and that they have some applicability within the context of the EPBC Act. These principles are discussed in more detail in the 'Guide to Good Strategic Planning' on the DAF website (www.daf.gov.au)

I agree with many of the comments recorded in the Review Report about strategic assessments, in particular the comments at Paras 10.77 to 10.83. I strongly support the comments by the ACF that Ministers should also be required to consider impacts on the wider environment and not just matters of national environmental significance. I also agree with the comment that it is necessary to move beyond plans to agreements, to which I would add enforceable agreements. There are many instances where sound regional NRM plans provided not only the justification for funding certain NRM activities, but also made the case for more affirmative action with landholders to ensure the protection of valuable natural resources, whether listed for protection or not. In Queensland under the former NHT program, we were beginning to use binding agreements that were entered onto land titles as a way of securing longer term commitment by present and future landholders.

Comments on Chapter 11 – Heritage

This is the part of the EPBC Act that I am most familiar with, because as Director of Historic Heritage Management in the Heritage Division of the Department from December 2003 to March 2005, I was responsible for implementing most of the provisions relating to Commonwealth and National Heritage places with historic heritage values. I am also familiar with the reasons why the heritage provisions were included in the EPBC Act and the rationale. As a planner I had been following the debate for several years since the 1992 heads of agreement on environmental matters between the Commonwealth, States and Territories.

Most places that have been entered on the National Heritage List for their historic heritage values consist of places with built environment features. This includes for example, the Royal Exhibition Building in Melbourne and the Sydney Opera House. In relation to the built environment, the Commonwealth has very limited powers. These two icons are better protected because they are also on the World Heritage List. But other places listed for their historic heritage values that are on state or Territory owned land or privately owned land are not as well protected as a place that is listed for its natural or Indigenous values.

Managing National Heritage places in States and self-governing Territories

For National Heritage places not entirely within a Commonwealth area and that is in a State or self-governing Territory or in coastal waters, the Commonwealth must use its *best endeavours* to ensure a management plan is prepared and implemented in co-operation with the State or Territory (s.324X) (*italics emphasis added*). The

management plan must not be inconsistent with the National Heritage principles (s.324X). The Commonwealth must take *all reasonable steps* to ensure it exercises its powers and performs its functions in a way that is not inconsistent with:

- the National Heritage management principles; or
- the plan for managing the place (if one has been prepared) (s.324X) (*italics emphasis added*).

The Minister may enter into a bilateral agreement with a State or Territory in relation to a National Heritage place only if:

- the Minister is satisfied that the agreement will promote the management of the place in accordance with the National Heritage management principles; and
- the provisions in the bilateral agreement meet the requirements (if any) prescribed by regulations (s.51A).

The Minister may accredit a management plan if the Minister is satisfied the plan will promote the management of a National Heritage place in accordance with the National Heritage Management principles (s.51A and s.46).

These provisions are all well and good, but the stark reality is that the Commonwealth can only use its 'best endeavours' to manage a place that it does not own or control. The issues are even more complex where the place is on privately owned land

Managing National Heritage places on privately owned land

For National Heritage places on the National Heritage List that are owned by individuals protection is provided to the extent of the powers available to the Commonwealth under the Constitution (e.g. the corporations power, the race power, the external trade and inter-state trade powers, and international relations power (i.e. Article 8 of the Biodiversity Convention, the Ramsar Convention)).

Two measures are available to the Minister under the EPBC Act. They are:

- The Minister may enter into a conservation agreement with any person to protect and conserve the National Heritage values of a National Heritage place (s.305).
- The Australian Government may provide technical and/or financial assistance toward protecting or conserving places on the National Heritage List (including preparing management plans). Financial or other assistance may also be given to promote, identify and present places on the National Heritage List (s.324ZB).

The Minister can decide to accredit relevant State/Territory laws if satisfied that they are adequate to ensure the protection of a place on the National Heritage List (s.46).

Under the Constitution, the Commonwealth has a number of legislative powers given to it by the States at Federation. These include amongst other things:

- Trade and commerce with other countries and among the States;
- Foreign corporation and trading or financial corporations formed within the Commonwealth;
- Taxation;
- External affairs;

- Defence of the Commonwealth and the States;
- The acquisition of property on just terms;
- Maritime navigation;
- Quarantine.

Most of these powers are concurrent powers that the Commonwealth shares with the States. That is, the States can also make their own laws on these matters. Where there is any inconsistency, the Constitution provides that the Commonwealth law prevails. Unless one of the above provisions can be made to apply, the only powers available to the Commonwealth to protect a National Heritage place once it is listed is by entering into an agreement with the landholder and/or by providing money to have the place properly managed and protected. There are no provisions in the EPBC Act for penalties should a landholder not enter into an agreement. The general enforcement provisions in the EPBC Act can only act as a deterrent until such time as an offence is committed and then remedial action can be taken, but only after the event.

What this discussion is highlighting is that without a clear head of power in relation to the built environment, the Commonwealth has very limited powers. This needs clarification with and the support of the States and Territories. The quickest way around this problem could be the enactment of appropriate State/Territory legislation providing at least the same level of protection to a place on the National Heritage List that such a place could get under the EPBC Act.

Other heritage matters

I offer two comments in response to para 11.1 and paras 11.86 to 11.91 about the multiple pieces of heritage legislation and heritage lists. In part, this is a consequence of history in that heritage matters were not dealt with comprehensively when the EPBC Act was initially enacted and secondly, some other heritage matters are better dealt with under separate legislation. For example, the Historic Shipwrecks Act (which is currently being reviewed) and the Australian Heritage Council Act, which establishes the Australian Heritage Council as the Minister's advisory body. There are good reasons for maintaining separate legislation for the protection of historic shipwrecks and for moveable cultural heritage objects, as these matters would be too complex to handle within an already complex piece of legislation. Sometimes it is important to apply the 'KISS principle, - 'keep it simple, stupid'. However, the 2006 amendments removed once and for all any remaining protection afforded to places on the former Register of the National Estate for places not now included in the new National or Commonwealth Heritage lists or entered into state/territory or local heritage lists. Before it is too late, an assessment needs to be carried out to see which places fall into this category to ensure some level of protection is put in place before the level of protection offered under the EPBC Act is finally removed.

The *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* was ground-breaking legislation when it was introduced in 1984 and it does require updating. This is discussed in more detail in my comments on Chapter 17.

I agree with the comments in para 11.6 that the listing processes for both the NHL and CHL are too slow (although there are provisions in the Act allowing Ministers to act

swiftly if the heritage values of a place are under threat), and that there is scope to tighten and shorten the process for listing.

I also agree with the concerns expressed in paras 11.25 to 11.29 about the fact that it is the values of a place that are protected when it is listed rather than the place as a whole. From a historic heritage point of view, in many cases some places could be better protected if it was the place that was also protected and not just the place's historic heritage values.

I also agree with the concerns expressed in the Review document as well as in a recent Commonwealth Ombudsman's report on Commonwealth agency compliance with the relevant heritage provisions of the EPBC Act with respect to Commonwealth heritage values. Namely, that many Commonwealth Departments and agencies have not prepared a heritage strategy for their agency and/or have not prepared management plans for places on the Commonwealth heritage list that are within their control. Many Commonwealth agencies are failing to realise that with the heritage amendments to the EPBC Act, their level of responsibility changed significantly and that they are now responsible for managing their heritage matters actively and responsibly in line with the Act. Many agencies are yet to prepare heritage strategies for their agency and to carry out a comprehensive assessment of whether any of the places they own or currently manage have Commonwealth Heritage values. Many of them are also yet to prepare heritage management plans to adequately protect the values and the place.

I also agree with the AHC's suggestion in para 11.96 that the RNE should continue to have effect and that places on the RNE continue to be protected through the EPBC and that this list can only be withdrawn from having any effect when the Commonwealth is satisfied that a place on the RNE will continue to be protected through other statutory instruments, and not the blanket withdrawal of the RNE in 2012.

Comments on Chapter 17 – Indigenous Information

I agree with the Australian Human Rights Commission's (AHRC) comment in para 17.23 that Aboriginal and Torres Strait Islander people's involvement in land and sea management is essential to the effective protection of matters under the EPBC Act and in para 17.30 that the objects of the Act be amended to specifically identify Aboriginal and Torres Strait Islander people's rights and involvement as a crucial consideration in the administration of the Act.

I also agree with the observations in paras 17.31 to 17.34 for the need to improve the links between various pieces of legislation dealing with Indigenous people's rights, interests and culture, including cultural heritage. I have worked in the native title field since 1998 in various capacities and in particular in negotiating agreements between native title holders/claimants and local communities. As a researcher and consultant to the Australian Local Government Association, I developed several resource materials on native title matters including a lay-person's guide to the *Native Title Act 1993* (Cth), an agreements guide and Indigenous Land Use Agreement templates for use by Local Government Councils and local communities. Based on my experience working in this field, I strongly agree with the comments by the Indigenous Advisory Committee in para 17.33 about the need to amend s.93 of the EPBC Act and that the role of Prescribed Body's Corporate in the EPBC Act needs to be strengthened. The links between the recognition and determination of native title rights and the protection of cultural heritage

values needs to be strengthened. While the *Native Title Act 1993* (Cth) provides a regime for 'future acts' in areas where native title exists or may exist, the extent to which cultural heritage considerations need to be considered are not as strong as they could be. There is scope to improve this through amendments to the EPBC and the *Aboriginal and Torres Strait Islander Heritage Protection Act 1984* (Cth).

I support the comments and suggestions in paras 17.35 to 17.40 to improve the level of consultation and participation of Aboriginal and Torres Strait Islander people in various matters under the EPBC Act. The days of '*terra nullius*' when we ignored the fact that Aboriginal and Torres Strait Islander People had any connection with land and waters are well and truly over. Since the High Court's historic decision in *Mabo No.2*, we have a moral if not in some cases a legal obligation to recognise that what we do in the environment has an impact on Aboriginal and Torres Strait Islander people and their rights, interests and culture and we need to be more considerate of those impacts than we previously were willing to be. As such I agree with the discussion in paras 17.41 and 17.46 and in particular the suggestion in para 17.42 that s.49A of the EPBC Act be amended to ensure that the Minister's discretion does not contravene Indigenous people's right to give free, prior and informed consent on decisions that have a direct impact on the rights and interests and lives of Aboriginal and Torres Strait Islander people.

In relation to strategic assessments, I note also that the *Resource Management Act 1991* (NZ) contains provisions for mandatory public hearings which must be undertaken with cultural sensitivity. There is much Australia can learn from our near neighbours in NZ. There is also a lot the Department could learn from the National Native Title Tribunal and the Australian Human Rights Commission about how to conduct consultations and negotiations with cultural sensitivity.

In conclusion, I agree that the EPBC Act does go some way to involving Aboriginal and Torres Strait Islander people as stated in para 17.63, but I agree with the summary of points raised in submissions from para 17.58 to para 17.62 that there is room for improvement.

Comments on Chapter 20 – Review Mechanisms under the EPBC Act

In relation to the discussion on the merits review provisions in the EPBC Act, I agree with the comments by Dr Chris McGrath in para 20.69. In terms of reforming the merits review provisions in the Act, I generally support a combination of Options 1 and 4 in para 20.70, and I agree with the comment in para 20.73 that this matter warrants further deliberation before the Review produces its final report.

Comments on Chapter 21 – Enforcement, Compliance, Monitoring and Audit.

From my experience with the EPBC Act, I think the compliance and enforcement provisions in the EPBC Act are generally very good. However, I agree with the comments from submissions received that the effort applied to compliance and enforcement could be improved. There does not appear to be a strong culture around enforcement because of likely political fall out. The Department needs to develop a much stronger culture of enforcement around the EPBC Act otherwise the Act ends up being worth less than the paper it is written on. In Local Government, Councils have to be in court, day in and day out, enforcing their planning schemes otherwise the community loses confidence in their ability to manage their responsibility for the

community's amenity and environment. The same applies to the Commonwealth. If the Department is not seen to be enforcing the EPBC Act, then the community loses faith in the Department.

Comments on Chapter 22 – Administration under the EPBC Act

My only comment on the administration of the Act is that once legislation is passed by the Parliament and promulgated, Governments have an obligation to provide adequate funding for its proper implementation and administration. It was nothing short of irresponsible that funding for the administration of the EPBC Act was drawn from program funds in recent years and not from an allocation a separate allocation or line entry in the budget for DEWHA. The Government has a responsibility to provide appropriate funding or else it undermines public confidence. This should never be allowed to happen again.

Comments on Chapter 23 – Reducing Regulatory Burden and Streamlining Processes

I strongly agree with the comments of the North Qld Conservation Council (NQCC) about the need for caution in the use of bilateral agreements to streamline assessment processes. I share the NQCC's concerns about the use of assessment bilaterals. As they state, the current assessment bilaterals are used to circumvent the Commonwealth's processes in the EPBC Act rather than complement them. State and Territory environmental assessment processes are not as rigorous as the Commonwealth's and sometimes don't include a rigorous enough assessment against matters of national environmental significance as they could or should do if the proposal was assessed under the EPBC Act.