



# MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO THE INDEPENDENT REVIEW OF THE  
OPERATION OF THE *ENVIRONMENT PROTECTION AND  
BIODIVERSITY CONSERVATION ACT 1999*

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## SUPPORTED BY:

QUEENSLAND RESOURCES COUNCIL

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## Executive Summary

Members of the MCA, representing over 85% of minerals production in Australia, have a long-standing commitment to sustainable development, including the responsible stewardship of natural resources. The minerals industry is a significant manager of the landscape, particularly in regional and remote Australia, where our investments in monitoring, reporting and on-ground natural resource management outcomes are ever-increasing.

In this independent review of the *Environment Protection and Biodiversity Conservation Act 1999* ('the Act'), the MCA does not seek a diminution of measures to protect the environment, but rather promotes improvements to the efficiency and co-ordination of legislation within and between jurisdictions.

In each year of the Act's operation, based on departmental statistics, the mining industry has required the most, or second highest, number of approvals. This is despite having a footprint in the landscape of an almost 'biodiversity-irrelevant' 0.3% of the total landmass.

Referrals received by the Department, from the minerals industry, are, on average, twice as likely as the average of all non-mining referrals to be determined a 'controlled action' requiring approval. The cause of this heightened scrutiny on the minerals industry is unknown, but several drivers are noted, as are options to remedy them.

In comparison, the main drivers of biodiversity decline, according to national assessments, are not being captured by the Act. The Act is very tightly managing a very small proportion of the landscape.

Reporting of the Act's operation and performance is based on process, rather than outcomes. Despite the millions of dollars spent on process, documentation, operations, monitoring and reporting, there is unfortunately no way to readily determine whether protected matters are now more secure.

There are significant gaps in biodiversity conservation and management, in Australia, that the Commonwealth could effectively fill with its existing powers under the Act, but the provision of a secondary layer of project approvals is not one of those gaps.

The MCA considers the following key areas of consideration and adjustment over the medium-term (3 year) which would result in better value-for-money investments in the Act's administration from the Commonwealth, leading to demonstrable biodiversity outcomes at a lower overall societal cost:

- Investment in monitoring and reporting of EPBC-listed entities – we can't manage what we can't count, and the ultimate goal should be to remove entities from the list, which we can't do without better data, or, better use of the data already collected under the Act.
- The majority of resources invested through the operation of the Act (both from government and industry) are targeted at projects that are undertaken utilising leading-practice mitigation and management techniques in a very small proportion of the landscape, whilst the degradation pressures that led to the establishment of the Act are largely not captured in the project-by-project approach.
- A more appropriate role for the Commonwealth is strategic bio-regional planning, pre-emptive of project-scale development pressure, and across longer time-frames.
- The Commonwealth role would then be to assess, list, monitor and report on ecological entities of national significance, develop regional plans that cross-cut natural resources portfolios (e.g. biodiversity, water, minerals, socio-economic values), and audit the subsequent activity against the accredited plans.
- Expansion of bilateral arrangements for approvals and assessments are an existing, and grossly underused, mechanism that can be used to give effect to these suggested adjustments.

This would lead to the most efficient role for the Commonwealth in securing biodiversity values of national significance, using tools and capacity that align with its responsibilities. This would also efficiently reconcile the Commonwealth's commitments with existing regulatory arrangements in the other jurisdictions.

Industry would strongly support such a realignment, as it would fill the existing obvious gap in strategic natural resource management planning which currently exists, provide businesses with longer term certainty about areas for investment (with reduced, not no risk), reduce regulatory overlap, and provide a more consistent and appropriate service delivery from the Commonwealth in biodiversity protection.

## Table of Contents

Executive Summary.....	2
1.0 Background.....	4
2.0 Minerals industry intersection with Act.....	5
3.0 Assessing performance of the Act's implementation.....	8
3.1 Are these matters of national environmental significance more secure now?.....	8
3.2 Are the drivers of biodiversity decline being regulated by the Act?.....	9
A Biodiversity Crisis Created in a Data Vacuum.....	10
3.3 Why is the minerals industry more heavily regulated than most?.....	11
3.4 How should the Act's performance be assessed?.....	11
3.5 Is the Act delivering 'value-for-money' outcomes in the most efficient manner possible?.....	12
4.0 Intersection of the Act's implementation and other NRM policies and programs.....	13
4.1 Caring for Our Country & the EPBC Act.....	13
4.2 The intersection of incentive Market Based Instruments the EPBC Act.....	13
Woodlands, Roads and Incentives – A Hypothetical Example.....	14
4.3 Use of the information required to be collected and reported under the Act.....	15
4.4 Landscape planning and integration of regulatory and other NRM instruments.....	15
5.0 Intersection of the Act's implementation and other regulatory instruments.....	16
5.1 Having the offsets cake and eating it too.....	16
5.2 Duplication in regulation between States and the Commonwealth.....	18
5.3 Resourcing for the Act's administration by the Commonwealth.....	19
5.4 Duplication in regulation across the landscape.....	20
6.0 The Vision.....	20
7.0 Other recent MCA submissions highlighting issues of detail.....	21
References.....	24

## 1.0 Background

Members of the MCA, representing over 85% of minerals production in Australia, have a long-standing commitment to sustainable development including the responsible stewardship of natural resources (see [www.minerals.org.au](http://www.minerals.org.au) for a complete list of MCA members).

Whilst only **impacting on 0.3%** of the Australian landscape, minerals operations contribute:

- **8 % national GDP** (Australian Bureau of Statistics, National Accounts 5206, and Mining Indicators, 8417, MCA calculations)
- **42 % of goods and services exports** (ABS International Trade in Goods and Services 5368, ABARE Commodity Statistics, September Quarter 2008); and
- **Tax and royalties in 2007/8 of \$13.04 billion** and in 2008/9 of \$21.019 billion (est.; pending publication: Access Economics, Tax Contribution of the minerals industry).

Most minerals operations are in regional and remote Australia. Many companies own or manage larger tracts of land than those that are subject to extraction activities. Additionally, many companies undertake exploration activities across land owned or leased by others. In regional and remote Australia, minerals companies are a major contributor to natural resource management, including biodiversity conservation initiatives.

The minerals industry is a significant manager of the landscape, particularly in regional and remote Australia, where our investments in monitoring, reporting and on-ground natural resource management outcomes are ever-increasing. Traditionally, the investment that mining operations made in landscape management was mandated by regulatory authorities through the impact assessment process, including the application of the EPBC Act. However, many minerals operations now recognise that initiatives to better-manage their non-operational lands, beyond duty of care requirements, reflect on their 'social license to operate'. Accordingly there has been an increasing effort by minerals companies to invest in landscape management far-beyond mandated requirements (see a compendium of case studies of leading practice biodiversity management in the minerals industry at Appendix 1).

In this submission, the MCA does not seek a diminution of measures to protect the environment, but rather promotes improvements to the efficiency and co-ordination of legislation within and between jurisdictions.

The MCA strongly advocates the principle of minimum effective regulation – that the development of good regulatory process should be informed by the following principles:

- regulatory approaches should not be used unless a clear case for action exists, including an evaluation of why existing measures are not sufficient to deal with the issue;
- a range of policy options (including self-regulatory and co-regulatory approaches) have been assessed and found wanting;
- the regulation represents the greatest net benefit to the community;
- the regulation developed is the most efficient means of achieving the desired outcome at least cost to industry;
- effective guidance is provided for both regulators and stakeholders to ensure that the regulations are correctly implemented and monitored;
- mechanisms such as sunset clauses or periodic reviews are built into the legislation to ensure that the regulations remain relevant over time; and
- there is effective consultation with stakeholders at key stages of the development and implementation of the regulation.

The MCA accordingly supports the COAG commitments to reduce regulatory overlap and burden, and the Commonwealth Commitments to implementing best-practice regulatory approaches, whilst maintaining environmental integrity. This review will be an important signpost for the refinement of environmental regulations in Australia.

## 2.0 Minerals industry intersection with Act

The industry has a long history of environmental regulation, and the general experience with the implementation of the EPBC Act, one of the many with which industry is regulated, can best be summed up as 'frustrating'.

Biodiversity conservation, its policy and responsibilities, in Australia, currently has at least 6 layers: Commonwealth, Inter-jurisdictional bodies, state government agencies, regional NRM bodies, local governments and finally the landowner. These overlap and intersect and intertwine in different ways depending on land tenure and which aspect of 'biodiversity' is of interest. The landscape is being managed, at all levels, as a conglomerate of silos.

The EPBC Act is seen by the minerals industry as simply 'another layer' of the regulatory onion, without providing demonstrable additional value in the protection of biodiversity, above what is already afforded through other jurisdictional requirements. The administration of the Act, from Referrals through to compliance monitoring, varies in intensity and approach through time, related to changes in personnel interests and capability, at all levels, providing uncertainty for business.

Based on DEWHA statistics, the minerals industry has been one of the major stakeholders in the operation of the Act. In each year of the Act's operation, based on departmental statistics, the mining industry has required the most, or second highest, number of approvals (see Figure 1 and Figure 2). This is despite having a footprint in the landscape of less than 0.3% of the total landmass (Table 1).

Referrals made by the mining industry are twice as likely as referrals from all other sectors to be considered a controlled action requiring approval (see Table 1). Again, this is despite minerals industry projects being heavily regulated through other jurisdictional processes, implemented with leading practice frameworks for environmental management, and occurring in a very small, almost 'biodiversity-irrelevant' fraction of the landscape.

Again, the uncertainty associated with variability in the Act's administration comes with little demonstrable added biodiversity value on-the-ground. We estimate that our members spend millions of dollars every year on documentation for the Commonwealth to meet the Act's documentation requirements.

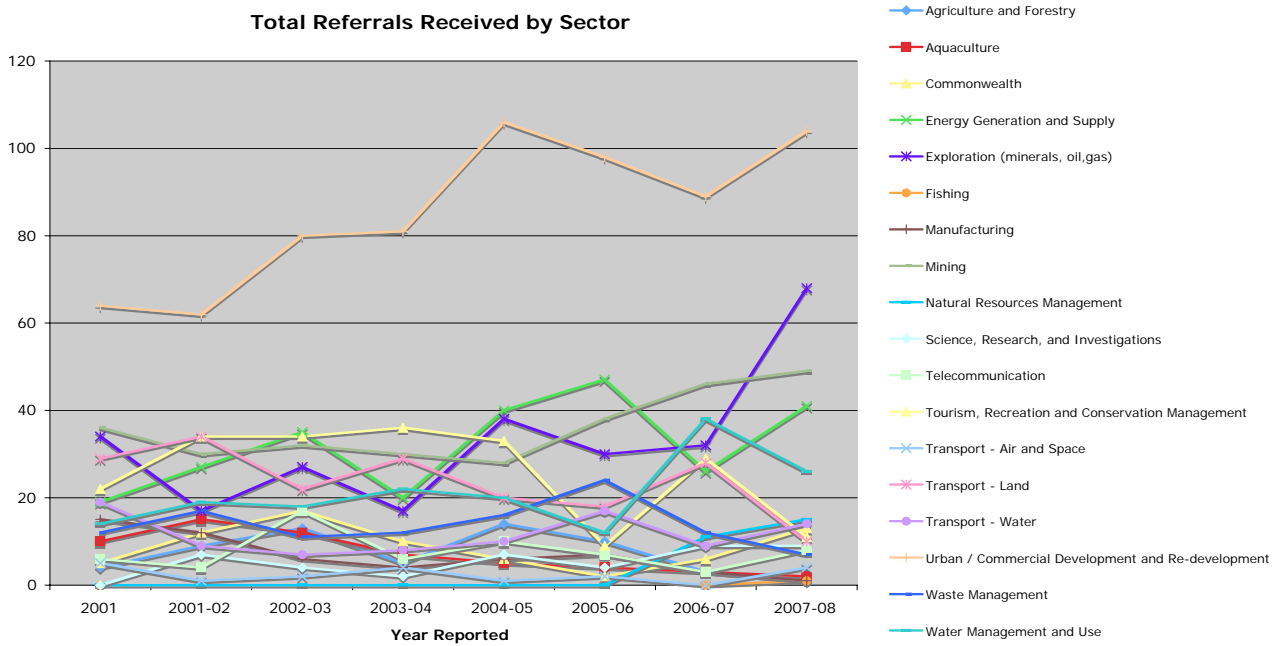
**Table 1 Summary of Rate of Approval Requirements and Landscape Footprint**

Sector <sup>1</sup>	% Land Mass <sup>2</sup>	Rate of Approvals Required <sup>3</sup>
Aquaculture	0.00	0.45
Mining	0.26	0.43
Manufacturing	0.01	0.32
Transport - Water	0.00	0.30
Transport - Land	0.18	0.28
Agriculture and Forestry	71.87	0.26
Water Management and Use	0.49	0.23
Energy Generation and Supply	0.00	0.23
Urban / Commercial Development and Re-development	0.25	0.23
Tourism, Recreation and Conservation Management	9.77	0.18
Waste Management	0.00	0.13
Commonwealth	0.29	0.12
Telecommunication	0.00	0.12

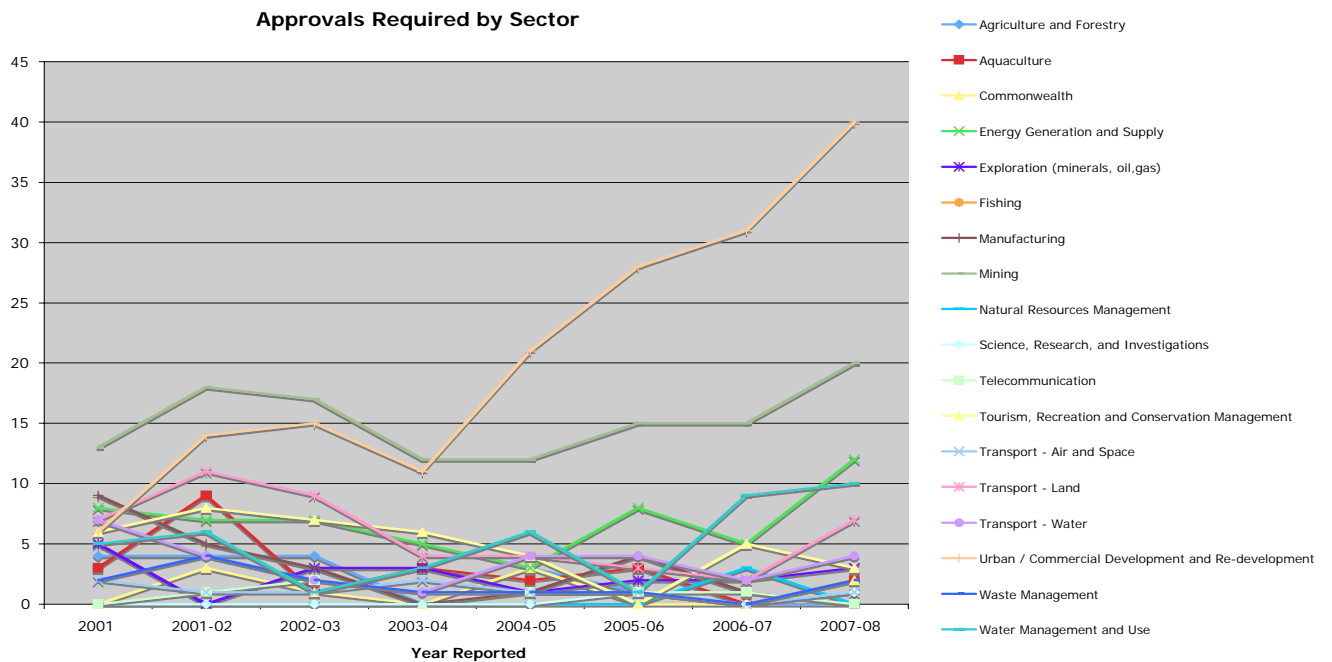
<sup>1</sup> Aggregation of main sectors being captured by the Act, across the years reported

<sup>2</sup> Based on mid-2008 BRS compilation of ACLUMP (Australian Collaborative Land Use Mapping Programme) Catchment Scale Land Use data, aggregated using common sense to the sectors identified by the Act

<sup>3</sup> The ratio of referrals received to approvals required, 'scrutiny of assessment', by the Department, based on annual Departmental reports



**Figure 1** Compilation of Commonwealth Department of Environment Annual Report Statistics for Referrals by Sector (sector categories are combined and split as appropriate, to provide an overview)



**Figure 2** Compilation of Commonwealth Department of Environment Annual Report Statistics for Approvals Required by Sector (sector categories are combined and split as appropriate, to provide an overview)

### Scrutiny of Assessment Against Landscape Footprint

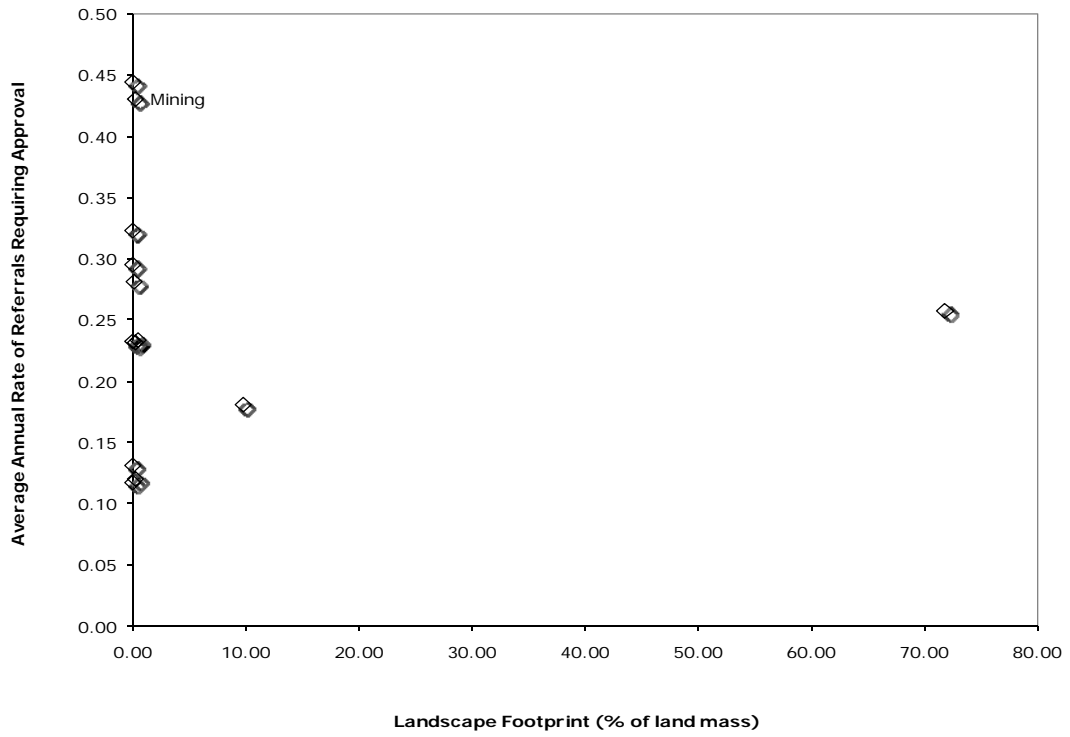


Figure 3 Compilation of Commonwealth Department of Environment Annual Report Statistics for the Rate of Approvals Required from Referrals Received compared with Footprint in the Landscape (See Table 1 for detailed description)

### 3.0 Assessing performance of the Act's implementation

It should be noted that the nature of these comments are primarily related to the 'approvals and assessment' functions of the EPBC Act, and that the minerals industry experience by-and-large is related to assessing and managing impacts on terrestrial and freshwater aquatic biodiversity on private and lease-hold land.

#### 3.1 Are these matters of national environmental significance more secure now?

After a decade of investment in the development and application of the Act, are these matters of national environmental significance now more secure? The MCA is concerned that despite the millions of dollars spent on process, documentation, operations, monitoring and reporting, there is unfortunately no way to readily answer this question.

Current Departmental reporting of the Act's operation is based on process, rather than outcomes. The data reported to the Commonwealth as part of approval conditions is not used in any strategic way to determine whether entities of national environmental significance are now more secure. The 2006 State of the Environment Report (SoE; Beeton *et al.* 2006) chapter on biodiversity, and associated commentary, draw largely on the biodiversity theme report from the 2001 SoE (Australian State of the Environment Committee 2001) and the National Land and Water Resources Audit (NLWRA) analysis of terrestrial biodiversity in 2002 (NLWRA 2002).

Would matters of national economic significance or national security be equally poorly monitored and assessed? The evidence suggests otherwise, with routine reports of inflation, economic activity and labour force statistics used to drive ongoing government economic policy improvements. Why then is the management of environmental matters of national significance so poorly quantified?

'Objectives of legislation should be clearly specified in terms of desired environmental outcomes, so that regulations and decisions link back to these objectives and performance of the regimes can be monitored and assessed' (Productivity Commission 2004). Three key objects of the Act relevant to the minerals industry are:

1. to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance;
2. to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources; and
3. to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous people.

The objects of the Act are framed in somewhat diluted language, meaning that the objectives 'to provide for' can be readily achieved. However, the Department's interpretation of the Act's objectives is much clearer:

'It seeks to protect and manage Australia's environment' (DEWHA 2008a) ...rather than simply 'providing for' such initiatives.

As a major investor in the EPBC Act project assessment and approvals process, spending millions of dollars annually on documentation, the minerals industry is concerned that there is no direct evidence to demonstrate that the protected matters, their populations and distributions, are now more secure. Under approval conditions of the Act, much data on protected species, populations and distributions is collected by the mining industry and provided to governments, but it is not clear whether this data is then used for the protection and management of these entities.

Just as the Australian National Audit Office (ANAO; 2008) recommended better outcomes monitoring for natural resource management [and conservation] incentive programs, so to should there be better outcomes-focussed monitoring for regulatory instruments related to the environment (Productivity Commission 2004). In their 2007 comments on recovery plans, the ANAO recommended measuring the progress of species against temporal goals, this notion should be developed to assess the overall utility and efficiency of the Act.

Additionally, whilst implementation of the Act is requiring industry to deliver outcomes (see for example the draft offsets policy, discussed further below), so too it is appropriate that the legislation itself is monitored based on outcomes (Productivity Commission 2004).

Whilst there is no data collated and published by the Commonwealth, regarding changes in distribution and abundance of matters of national environmental significance (despite its provision by industry under approvals requirements), it is very difficult to transparently and objectively assess the performance of the Act's implementation.

The lack of data collection, and inefficient use of data provided to the Commonwealth, arises in several areas throughout this submission, and is a key stumbling block in the stewardship of biodiversity in Australia.

### *3.2 Are the drivers of biodiversity decline being regulated by the Act?*

Despite there not being a recorded extinction in Australia for two decades now, there is regular alarmism regarding the 'continued decline' of biodiversity in Australia (see the text box below). While the precautionary approach is justified, over the long term it is distorting the expenditure of funds and probably not maximising outcomes.

According to the SoE reports for 2006 and 2001, and the National Land and Water Resources Audit (NLWRA) analysis of terrestrial biodiversity in 2002 (NLWRA 2002), the main drivers of biodiversity decline have been:

- clearance of vegetation;
- changed fire regimes;
- total grazing pressure ('one of the main pressures on biodiversity in Australia'; SoE 2006);
- weeds and feral animals; and
- changes to the aquatic environment.

Minerals operations are appropriately captured by the Act, usually because they remove small amounts of vegetation and interact with local water resources. However, the footprint of minerals operations is very small, less than 0.3% of the landscape, making the high representation in the Act's administration anomalous.

Whilst the sectoral delineation of referrals does not always align with types of actions, it does give insights into the broad scale patterns of land management responsibilities and the Act's intersection with the drivers of biodiversity decline. Based on those landscape managers that have primary responsibility for the drivers of biodiversity decline, including those responsible for changing fire regimes (e.g. State Government agencies and private land holders), managing changes to total grazing pressure (e.g. State Government agencies and private land holders) and controlling weeds and feral animals across the landscape (e.g. State Government agencies and private land holders), there would seem to be a relatively low proportion of referrals received from the 'Agriculture and Forestry', 'Natural Resource Management', and 'Tourism, Recreation and Conservation Management' sectors. This relatively low proportion of referrals (circa 2%, 1% and 8%, respectively; Table 1) is especially concerning considering that these sectors are responsible for managing over 80% of the Australian landscape, and have direct responsibility not only for the drivers of biodiversity decline, but also for the management of many of the listed Matters of National Environmental Significance.

It is unclear why changes in management regimes applied to the landscape, such as altering fire regimes, changing grazing pressure, and reducing exotic species management investments are not considered an 'action' under the Act. If there is a significant change in intensity or approach compared to activity before the Act's establishment (i.e. the 'continued use' provisions should not apply to changes in intensity of management) why are these not considered actions requiring assessment when they have been implicated as key drivers of biodiversity decline? The piecemeal approach to the Act's application results in frustrating for minerals operations, which are heavily regulated by the Act, when the surrounding landscape is not managed to the same degree, often resulting in wasted investments by companies.

Despite, a very small impact on the environment, and not being specifically noted as a driver of biodiversity decline in the fore-mentioned reports, minerals operations are, on average, twice as likely as other activities to require formal approval once a referral has been made. This anomaly needs closer attention by the Department, given their ongoing resourcing concerns (DEWHA 2008a), and their presently identified priority outcomes for natural resource management (DEWHA & DAFF 2008).

One suggested driver for this anomalous level of scrutiny could be the perception that industry is resource-rich, leading to cost shifting of government's duty-of-care conservation responsibilities to industry, through offset requirements mandated by the application of the Act (see below further discussion on application of offsets under the Act).

## A Biodiversity Crisis Created in a Data Vacuum

Australia has had the highest documented extinction rate of vertebrates in the world, but there is scant evidence that it is 'continuing' or 'worsening'. The high extinction 'rate' is largely a result of historic land clearing for agricultural pursuits, and the synergistic effects of the incursion of exotic animals (predators and herbivores), during the first half of the last century (for example see Short and Smith 1994 for the mammals story). If we chose to measure and communicate the rate of documented extinctions across the last two decades, it would likely be 'zero'.

The fact that there is not clear-cut evidence that the 'decline and extinction' is continuing or worsening is significantly due to cooperative efforts from government, landholders, and non-government organisations (and presumably this review will determine whether the EPBC Act has been an efficient, value-adding, tool in that process). While the impetus, enthusiasm and understanding of the needs for much of the work to halt the decline has been previously developed through alarmist approaches, it is now appropriate to take a more mature approach. Stakeholders are limited in their capability to be consulted and engaged repeatedly (Seymour et al. 2007), so there is a need to refine the type and volume of material presented, and deliver objective messages to support decision making processes.

Based on the EPBC Act listings since 2001 there have not been any additional species listed as 'extinct' (DEWHA 2008b), and the last well documented 'extinctions' are generally considered to be the gastric brooding frogs in the 1980's. New evidence may be documented through the National Land and Water Resources Audit's Terrestrial Biodiversity Assessment (due last year, NLWRA pers. comm.), possibly providing some quantitative patterns regarding changes in distributions and abundance of Australia's native plants and animals. Similar national assessments have been limited in the past as they have relied on judgements from conservation agency staff, rather than scientifically quantified patterns of changes in distributions and abundance.

Ongoing alarmist notions that a 'significant proportion' of flora or fauna are 'declining [to] extinction' should not go untested. The EPBC Act has approximately 1,800 threatened or extinct species of flora and fauna, and based on the criteria for listing, some of these may simply be rare, and not declining. Based on DEWHA's (1994) estimates of 23,000 flora, 2000 vertebrate, and 225,000 invertebrate species, the proportions of at-risk species are: 0.7% if invertebrates are included, or 7.2% if they are excluded (DEWHA 1994). If we use the other estimate of 600,000 species on the DEWHA website, the 'significant proportion' reduces to 0.3% of our natural inventory.

Clearly these are gross figures, which undervalue the importance of endemism, but provide some important context and consideration of the alarmist approach, which assumes that the 'ongoing extinction crisis' notion should not be continually re-evaluated. There is a need for better quantitative data to objectively and scientifically communicate the nature of the problem, rather than relying on opinion-based feedback (e.g. see NLWRA 2002).

The scope of the EPBC Act is to determine the conditions under which projects can proceed, whilst protecting matters of national environmental significance (MNES). Any relationship between the Act's operation and changes in the distribution and abundance of MNES need to be considered based on the best available scientific information, with a critical examination and subsequent understanding of the limitations and gaps in that scientific information.

The Act and its implementation needs to be more objective and outcomes focused and this can only be achieved by collation of data on communities and species of interest for comparison over time. Much of this information is provided to the Department through project approval requirements, but seemingly goes unused. The 'precautionary approach', as outlined in the Act's ecologically sustainable development principles, will appropriately continue to drive assessment requirements, until improvements in data collation and reporting are achieved.

When the rate of formal approvals required per the number of referrals received by sector, it becomes clear that there are different levels of scrutiny applied to different sectors through the administration of the Act. Despite impacting on less than 0.3% of the landscape (Figure 3), referrals from the minerals industry are twice as likely as others to require formal approval (Table 1). This is also despite a myriad of other regulation controlling minerals operations, and many operations being undertaken using leading practice environmental management techniques.

### *3.3 Why is the minerals industry more heavily regulated than most?*

Minerals operations are generally highly visible in the landscape, as they create significant local impacts in a short period of time. The aforementioned drivers of biodiversity decline do not appear as quickly, and are generally of a broader scale, making them less readily identifiable to stakeholders interested in biodiversity management. Therefore, because minerals operations are spatially tightly defined and their managers readily identifiable they are easy captured by regulatory authorities.

There is a perception that mining must be impacting significantly on biodiversity, so projects should require approval under the EPBC Act. This contributor to heightened scrutiny of the minerals industry performance can be addressed with improved education, guidance material and understanding within the Department. This can also be addressed by moving away from a process-based assessment of the Act's performance, to an outcomes-based approach, whereby minerals operations would very quickly become insignificant.

Minerals operations also readily refer their actions to the Commonwealth for assessment, to pass the compliance risk back to the government, and circumvent project delays bought by detractors at a later stage. This is also usually not too difficult for the companies to do, because they need to generate almost identical documentation for State jurisdictions, and additionally, implement many of the ecological procedures required as part of their leading practice commitments to environmental management (which ultimately links back to business performance through social license, and more rapid return of rehabilitation bonds due to improved understanding of the ecological systems being managed).

Australian minerals operations have been subjected to tight environmental regulation for several decades. Within the minerals industry there is a broad understanding of the role of government in addressing environmental market failures and the subsequent requirements of industry to meet regulatory requirements in support of those government's responsibilities. However, that does not mean that the resources used in the regulatory process would not be better used elsewhere. From a regulatory sense, and the development and application of the EPBC Act, minerals operations were always going to be the low hanging fruit, it is now time to consider whether picking that fruit has any overall value in biodiversity protection, or whether those resources (from government and industry) could be better applied in other ways.

Additional support for the minerals industry, as per the 'Seconded Officer' model applied to the National Farmers Federation, could also ensure that referrals are only made when required, rather than through a risk-averse approach to project management. Recognition by the Commonwealth of the formal consideration of offsets at the determination of impact significance would also reduce the volume of referrals from an industry largely insignificant in causing biodiversity decline.

### *3.4 How should the Act's performance be assessed?*

It is concerning that the number of referrals is considered by Government as a key performance measure for the effectiveness of the Act, and should be considered to increase for the Act to be successful (ANAO 2007). As minerals operations are repeatedly subjected to the EPBC Act process, they are better accustomed at determining whether a referral should be made or not, and, as per the leading-practice hierarchy for environmental management, would design projects to first avoid impacts on MNES, therefore also reducing the likelihood of referrals.

The regulatory process costs industry and government money. For these investments to be effective, adequate monitoring, assessment and adaptation processes are required (Williams and Price 2008). As noted by the Productivity Commission: 'Objectives of legislation should be clearly specified in terms of desired environmental outcomes, so that regulations and decisions link back to these objectives and performance of the regimes can be monitored and assessed' (Productivity Commission 2004).

There should be outcomes stated for regulatory instruments in a similar nature to those stated for government investments through Caring for Our Country (DEWHA & DAFF 2008). The outcomes for the operation of the EPBC

Act, should be integrated with the national priority outcomes under the funding programs. Until all measures to protect biodiversity are integrated there will continue to be inefficiencies and wasted resources.

Specific performance measures should be related to the security of any listed matters of national environmental significance. Outcomes related to their protection should be clearly stated, and progress towards meeting those outcomes should be monitored and reported. Outcomes would be described based on the accepted variability in populations over a certain period of time, and monitoring and reporting programs would give effect to assessing and reporting on variability of the protected entity.

Data and information reported by industry to government through the operation of the Act, should be published as part of Government's responsibility to manage these entities of national significance (Productivity Commission 2008). Through adaptive management transparent reporting also provides inertia for government to only require reporting of data that is crucial to the long-term management of the protected matter.

Fundamental information should be readily available for each protected matter, and would at least include:

- annual reports of numbers and areas cleared by permission of the Commonwealth;
- annual reports of numbers and areas protected or enhanced through regulatory instruments;
- annual reports of numbers and areas protected or enhanced through other policy programs;
- an annual assessment of whether the protected matter's abundance and distribution is improving, declining or remaining static; and
- an annual assessment, based on the reports above, of the anticipated date and nature of changes to the conservation status of the protected matter.

There is now vast documentation available that can support the development of an outcomes-based monitoring and reporting approach for the implementation of the Act (see Williams and Price 2008; Productivity Commission 2004; NLWRA 2008). Integration of the Act's operation, with the outcomes based monitoring being developed for incentive funding programs, will be fundamental to gain efficiencies, and support the resolution of emerging competition and overlap between regulatory and incentive based instruments trying to independently purchase the same outcomes (see below).

By assessing performance on an outcomes-basis, ongoing investments, from government and industry can be much more acutely targeted to where they are most required. Much of this information is already reported to State and Commonwealth agencies, and the Caring for Our Country Outcomes Statement highlights a five-year plan to make such information more readily available (DEWHA & DAFF 2008).

### *3.5 Is the Act delivering 'value-for-money' outcomes in the most efficient manner possible?*

Neither the value delivered, nor the cost of the outcomes, are readily available to the MCA or any other external stakeholder to undertake a comprehensive assessment of the value delivered. The MCA requests that this question be addressed by the review, because there are concerns that society is not purchasing great biodiversity outcomes by tightly managing projects in a very small proportion of the landscape.

Certainly the value of having a Commonwealth Minister involved in small-scale project developments is questionable on a value-for-money basis. Having Commonwealth Ministerial involvement in project approvals is a form of micro-management (akin to the Defence Minister deciding on which hill a platoon should rest overnight during a training exercise). Given the overlap between State and Commonwealth biodiversity project approvals processes, there are clearly better value-for-money ways that the Commonwealth could invest its resources to protect matters of national environmental significance.

In Australia project approvals are not a 'missing-link' in biodiversity management, the Commonwealth activities in this space are a duplication of existing state processes. However, there are significant gaps in biodiversity conservation and management in Australia, that the Commonwealth could effectively fill with its existing powers under the Act. The MCA identifies the following key areas that would represent better value-for-money biodiversity outcomes, which the Commonwealth should more actively pursue in implementing the Act:

- improved assessment, monitoring, and reporting of matters of national environmental significance;
- integration of State- and Local Government-based project approvals with its incentive delivery programs;

- strategic bioregional planning or assessment;
- auditing and reporting of States in their meeting of the requirements of plans or assessments accredited under the EPBC Act; and
- capacity building within industry and community for improved biodiversity recognition and management.

These are elaborated below where appropriate. By transparently reporting outcomes and regulatory costs of government and industry, an objective assessment of the value of the interventions can be made.

#### 4.0 Intersection of the Act's implementation and other NRM policies and programs

##### 4.1 *Caring for Our Country & the EPBC Act*

It is illuminating that the operation of the EPBC Act is not even noted as having a role in the Australian Government's 'new environmental management initiative', despite its long-term projections including integration of biodiversity management across the Australian landscape, and a reduction in the declining trends in biodiversity (Caring for Our Country Outcomes Statement; DEWHA & DAFF 2008).

Similarly, the influence of the Act was not assessed in the 2008 Evaluation of Responses to Threats to Australia's Biodiversity (Williams and Price 2008).

If the Act and its regulatory functions are not a key policy instrument for addressing the decline of biodiversity it is reasonable to question why industry should be subject to its rigours, and government be continually investing in its application?

Whilst biodiversity management continues to operate through a conglomerate of silos in the landscape, inefficiencies will exist.

##### 4.2 *The intersection of incentive Market Based Instruments the EPBC Act*

The intersection of policy instruments labelled 'market based instruments', and existing regulatory arrangements, both targeted at achieving environmental outcomes, has not been well-considered. Specifically, there has been little consideration of how these instruments intersect with regulatory requirements at both the Commonwealth and State levels.

Typically these instruments involve either: (1) the establishment of a 'cap' on natural resource availability (e.g. as in water sharing plans, carbon in the Emissions Trading Scheme, or biodiversity in the NSW BioBanking scheme) with units beneath that cap able to be traded amongst users, or (2) the direct purchasing of environmental outcomes through tender-style schemes replacing traditional grant devolvement processes. The intersection of these schemes, and regulatory requirements applied by the Commonwealth under the EPBC Act approvals process, needs to be considered.

The risks to industry include:

- wasted resources in offset schemes;
- paying prices for environmental outcomes that are unnecessarily inflated due to Commonwealth competition for the same outcomes (see the example in the text box below);
- regulatory overlap and duplication between Commonwealth and State-based schemes and inefficiencies and inequities resulting from different monitoring and reporting requirements; and
- a lack of a strategic approach to procuring the desired environmental outcomes.

Where market based instruments are developed, the MCA considers that there should be a repealing of legislation related to the values being capped, so that Commonwealth decisions related to project approvals do not influence the functioning of those markets. This includes markets for carbon (the Emissions Trading Scheme), water (water sharing plans) and biodiversity (where it is regulated using a market based instrument – such as BioBanking). Where regulation is retained and focussed on the same environmental values as market based instruments, there needs to be formal processes regarding transparency, timeliness, and declarations, otherwise the market will be unnecessarily inefficient, and in the worst case open to corruption.

Additionally, specific concerns related to minerals industry regulations include the lack of consideration of existing rehabilitation, lease relinquishment and financial surety requirements. When these are not appropriately factored into new regulatory requirements from the Commonwealth, including offset schemes, industry is being asked to pay twice for the same outcomes. There is much work to be done in clearing up this area, including promoting transparency, reducing duplication of regulation, and developing a strategic approach to landscape planning and outcome delivery.

### **Woodlands, Roads and Incentives – A Hypothetical Example**

A State utility is tasked with developing a piece of road infrastructure which is considered as being of national importance, to be delivered under strict Commonwealth funding and timeline arrangements. The road traverses two regional NRM catchments, and will require the removal of EPBC Act listed endangered ecological community woodlands. The utility is required to undertake project environmental impact assessment processes to meet both State and EPBC Act planning requirements.

As part of the State-based assessment, an offsets package is determined based on the area of woodland to be cleared, and a formula that considers likelihood of degraded areas to respond to management actions for their improvement, and risk of failure of those management actions. The utility is required to locate and enhance 100 ha of this hypothetical woodland under state based planning requirements.

For its EPBC Act approval, the Commonwealth requires additional offsets, because it is a woodland of national environmental significance. The utility receives its approval to build the road, and clear the woodland, subject to it locating, securing, and enhancing 200 ha of this woodland type in the two NRM regions within the following 12 months.

At the same time as the utility is searching the landscape for suitable sites to procure and repair, to offset its damage under its regulatory requirements, the Commonwealth decides to run a 'market based instrument' style incentive delivery scheme in the same region, to help secure this woodland of national significance. Essentially the latter is a tendering process available to landholders to receive stewardship payments for the protection and enhancement of the same type of woodland.

Market based instruments are designed to secure the best environmental outcomes for the lowest price.

However, their application, and intersection with existing regulatory instruments (State and Commonwealth) has not been considered, let alone reconciled.

In this hypothetical example, the State utility is purchasing / procuring the same type of woodland, at the same time, as the Commonwealth tender scheme is trying to attract, thereby either reducing the supply for the market based scheme, or the utility.

Why this is problematic:

1. There is no transparency regarding the role that the Commonwealth has played as both a competitor in the environmental outcome market, and regulator, in effecting the price paid by the utility for the environmental outcomes;
2. There is no strategic intersection of the two programs, to ensure that efficiencies in assessment, reporting and procurement are maximised;
3. There is no understanding from the landholder who has offered their site for a stewardship program that the value of their remnant and likelihood and value of potential payments is being influenced by the EPBC Act regulations imposed on the utility; and
4. This leads ultimately to one branch of the Commonwealth purchasing environmental outcomes at an inflated price (per unit outcome), due to the regulatory instruments applied by another. This money may have been better spent in another region.

#### *4.3 Use of the information required to be collected and reported under the Act*

The minerals industry strongly supports the Productivity Commission's recent recommendations (2008) regarding the operation of the EPBC Act and the use of information collected as a mandated requirement through the approvals processes. The Commission recommended:

'Governments should actively manage and release information obtained by proponents as a condition of environmental approvals to enhance the public stock of environmental information and assist in streamlining future approvals.'

If the Department is not going to use information collected by industry, it should not require its collection. Clearly, there are opportunities to better use the information that has been collected over the last decade, to:

- assess performance of the Act, via examining changes in threatened entities' populations;
- examining those actions and listed entities that actually interact with each other, refine the current 'assess all actions on all entities' approach;
- promote transparency and assessment of these matters of national environmental significance;
- priorities future activities and policy; and
- especially, support future strategic landscape planning efforts under the Act's operation.

The Caring for Our Country Outcomes Statement highlights a five-year plan to make such information more readily available (DEWHA and DAFF 2008), and the minerals industry is very supportive of this initiative. In many parts of remote Australia, minerals operations are the only entity on the ground actively collecting ecological information due to regulatory and voluntary requirements. Any information collected by industry for regulatory purposes must be used responsibly by governments, or alternatively, there should be a refinement of those regulatory requirements.

#### *4.4 Landscape planning and integration of regulatory and other NRM instruments*

Project approvals for minerals operations, and the application and use of offsets or other mechanisms to support environmental management, are influenced by a variety of landscape managers, often within and across the same physical areas, including:

- local government (e.g. statutory 'local environment plans', particularly at the rural – urban interface);
- State government agencies (e.g. utilities – 'infrastructure planning', conservation agencies – 'biodiversity strategies', water planning authorities – 'statutory water plans');
- regional NRM organisations (e.g. 'catchment action plans'); and
- Commonwealth, State and local government development approval processes (e.g. which additionally determine where NRM 'offset' resources are placed in the landscape, with or without strategic planning support).

Further evidence of the fragmented approach was the establishment in 2008 of two separate Senate Inquiries, investigating 'conservation and natural resource management' and the operation of the 'Environmental Protection and Biodiversity Conservation Act'. The fragmented approach may continue without due consideration of its efficiency. Both Inquiries should ideally recommend an integrated natural resource management approach from the top. Biodiversity is clearly a natural resource.

These traditionally duplicative, part overlapping, and often conflicting land use planning processes can result in considerable land use conflicts or inefficiencies, including:

- wasted resources in duplicated planning processes, and as noted in Seymour et al. (2007), burn-out of heavily engaged stakeholders;
- a misalignment of land capability, its use and subsequent water resource requirements;
- lack of collation and use of the vast amounts of ecological data collected by industry;

- potential limitations on future land uses based on the location of offset arrangements or conservation agreements, that do not consider future land use options;
- a lack of understanding amongst stakeholders regarding land use planning, access arrangements, and future land use potential;
- perverse interactions between market based instruments and existing regulatory arrangements (outlined above);
- ad-hoc and cumulative impacts of proposals not being well assessed (across spatial and temporal scales); and
- a fragmented approach to stakeholder engagement, resulting in stakeholders being unaware of the implications of some land use planning decisions on their future social and economic opportunities.

The MCA strongly recommends the review to consider whether there is a better 'whole-of-government', and 'whole-of-user', landscape planning model that can meet the EPBC Act, natural resource management and conservation planning objectives of the nation.

The MCA's concern here, is that industry's substantial contribution to landscape management, including operational and non-operational land investments in rehabilitation, and investments in project approvals processes, is often not being implemented as part of a long-term strategic landscape planning and management process, and therefore, may not lead to the best outcome possible for society.

Recently the Commonwealth and WA State Governments have proclaimed 'strategic assessments' under the EPBC Act as a vehicle for regional planning to protect matters of national environmental significance whilst balancing sustainable development outcomes. Clearly the MCA considers the expansion of landscape planning for matters of national environmental significance, and the retraction of the Commonwealth from project approvals, as a measure that would deliver against the objectives of the Act, while providing efficiency dividends for government, and reduced regulatory overlap and increased certainty for businesses.

## 5.0 Intersection of the Act's implementation and other regulatory instruments

### 5.1 *Having the offsets cake and eating it too*

The logic, language and application of 'offsets' is not at a professional standard that is appropriate for the level of investments being made, including those required by the Department through the application of the EPBC Act approvals process. As the Productivity Commission (2008) noted, there is a lack of consistency between jurisdictions in the approaches used, a lack of transparency in decision making, a lack of declaration of uncertainty, and poor quantification of risks and their management.

Additionally, there has been little to no consideration of the way offset application under the EPBC Act intersects with existing regulatory instruments, including financial surety arrangements, where risk of rehabilitation failure is managed financially (rather than through 'offset ratios').

The notion that offsets cannot be considered at the referral stage is problematic. In deciding whether to refer a project to the Department, industry will consider the likelihood of having a significant impact, with regard to its 'context' and 'intensity' as per the DEWHA guidelines. Following efforts to avoid, minimise and mitigate, there will be residual impacts for which either voluntary or regulatory compensation can be developed. Very sophisticated techniques now exist for determining whether an offset can completely replace any impact from vegetation clearing by improving habitat condition elsewhere (see the Victorian Vegetation Management Framework). The MCA considers that it is antiquated and incongruous for the Department to 'not consider offsets at the referral stage', but require industry to consider whether significance of the impact given its context and severity.

Additionally, the notion that 'some impacts cannot be offset', but can be compensated for, is clearly an area requiring specific attention and enhanced clarity.

In the first 5-8 years of the operation of the EPBC Act, most significant impacts on matters of national environmental significance were approved without the requirements for an 'offset package'. The MCA is concerned that Government expectations have escalated unchecked such that now no impacts are acceptable without an offsets package, and the nature of these packages is expanding to include the traditional responsibilities of governments (without recognition that industry is funding these in addition to taxes and royalties paid).

Offset packages were originally used by industry to support and enhance their 'social license to operate', as a voluntary mechanism to differentiate their performance from other developers. There has been a messy adoption of these as regulatory instruments, without a formal policy, without regulatory impact assessment and without due process.

Clearly some impacts on biodiversity have been previously considered as 'acceptable' by the Department, and are required, to support economic development. The use and application of offsets needs to be rethought from a regulatory perspective, and as a regulatory tool, only be mandated for application to provide compensation for that component of an impact that is 'clearly unacceptable', based on the precedents of the Act's administration. Alternatively, there needs to be a transparent process for development of offsets policy that clearly articulates their applicability, the nature of activities that are appropriate for industry investment, and especially, above the government's duty of care responsibilities in biodiversity management (see the MCA's submission on the offsets policy at **Appendix 2**).

An EPBC Act offsets policy is a significant policy instrument that will influence the minerals industry, akin to regulation in its scale of financial implications. For example, in 2007, a single operation in Western Australia was required to provide over \$7.3 million in an 'offsets package' for a range of activities that have traditionally been the role of government conservation and NRM organisations, including:

- funding for government conservation agency personnel;
- funding for regional conservation and other stakeholder non-government organisations (ongoing and establishment); and
- development of threatened entity recovery plans.

There are serious outstanding concerns that the minerals industry has in the development and application of offsets through the EPBC Act, which require further consultation and refinement, to ensure the maximum benefits from our limited resources. Key concerns include:

- the expectation that offsets are now standard for all impacts, rather than their application as a final measure that is required for an impact that is not considered acceptable by any other means;
- taking voluntary leading-practice initiatives in the use of offsets, by companies trying to differentiate themselves from their peers through excellent social and environmental performance, and adopting them as a regulatory baseline (this becomes a disincentive for industry to improve voluntarily);
- non contemporaneous offset decisions from different jurisdictions, resulting in inflated offset requirements without any scientific foundation for the arrangements (for illustration: a State jurisdiction will 'negotiate an offset requirement' and the Commonwealth will simply 'multiply it by 2', without consideration of the science underpinning the original decision and the corresponding role or value of the multiplier);
- inconsistencies developing between Commonwealth and State offset principles and practices;
- the need for better planning and location of offsets in the landscape, in an integrated whole-of-government approach;
- the lack of consideration of offsets at the referral stage, which seems incongruous with their philosophical application (*raison d'être*);
- the incorporation of 'risk of failure' of management actions in offset ratios, for an industry that already pays for the same risk for rehabilitation success through financial surety and lease relinquishment requirements; and
- requirements for industry to have to demonstrate 'real conservation outcomes' from their offset packages, when this is not required of either the Act's implementation, or other landscape managers.

The Productivity Commission's (2008) comments on offset application reflect similar concerns.

## 5.2 Duplication in regulation between States and the Commonwealth

In 1997, the Commonwealth and State Governments, through COAG, agreed to work towards establishing bilateral agreements. See Table 2 for an overview of the present status of bilateral agreements.

**Table 2 Summary of bilateral agreements between the Commonwealth and jurisdictions**

Jurisdiction	Assessment Bilateral	Approvals Bilaterals
QLD	YES	0
NSW	YES	1
VIC	DRAFT	0
SA	YES	0
NT	YES	0
WA	YES	0
TAS	YES	0

Eleven years after the COAG agreement, we are still striving for the shaping and development of approvals bilateral agreements, and the better implementation of assessment bilateral agreements. This rate of policy development and implementation, in any other arena of government policy (outside of natural resources), would be considered negligent.

The minerals industry has been repeatedly frustrated with the overlap in regulatory requirements through the application of the EPBC Act, including, assessment, monitoring and reporting requirements. Whilst government commitments have been repeatedly made to reduce regulatory burdens and overlap, industry has seen scant evidence of effort being invested into the development of the existing mechanisms available to reduce regulatory duplication, that being: (1) the expanded application of assessment bilateral agreements; and (2) the use of approval bilateral arrangements.

The Productivity Commission (2008) has recommended the expansion of use of approval bilateral agreements with States and Territories as a means to reduce unnecessary regulatory burdens. Additionally, in 2007 COAG committed to:

‘the Commonwealth Minister for the Environment and Water Resources will develop a proposal, in consultation with States and Territories, for a more harmonised and efficient system of environmental assessment and approval as soon as possible’

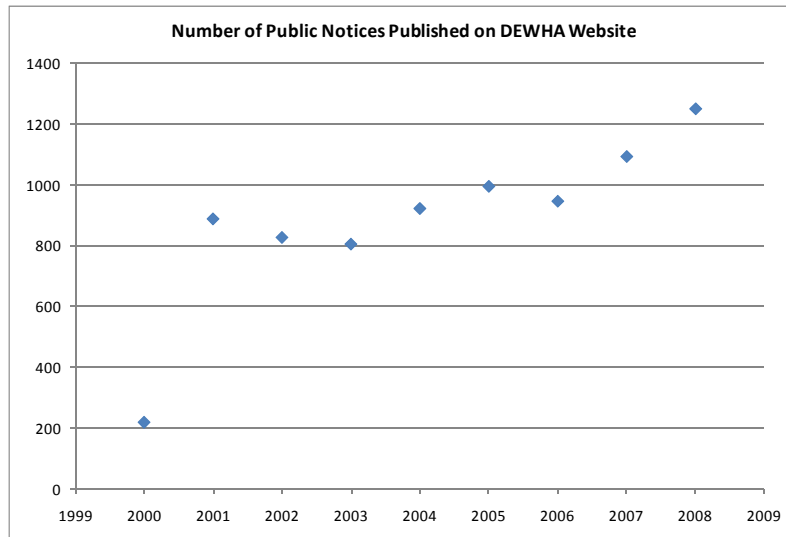
MCA considers that this review should seek to deliver against that commitment. The MCA considers that there is no reason that assessment and approvals bilateral agreements cannot be expanded to address many of the concerns highlighted in this submission, including through:

- accrediting ‘bioregional plans’ or ‘strategic assessments’ developed in jurisdictions through approval bilateral agreements (removing the need for project approvals from the Commonwealth if any action is implemented in accordance with that plan);
- establishing approvals bilateral for project assessments in all jurisdictions;
- establishing assessment and approval bilateral agreements that enable ‘one-stop-shop’ reporting of ecological (and any other) information collected under assessment and approval requirements; and
- accrediting other existing state and local government planning schemes such that any activities undertaken in accordance with those schemes are considered to protect matters of national significance, and therefore do not require approval.

The MCA considers that there must be greater investment in the development and application of assessment and approval agreements by the Commonwealth, with support from jurisdictions, in alignment with their commitments in COAG, to develop streamlined and more efficient biodiversity protection mechanisms.

### 5.3 Resourcing for the Act's administration by the Commonwealth

In previous submissions to the Commonwealth Government, the MCA has advocated increased funding for the administration of the Act. The Act's responsibilities continue to expand as more entities are listed and more referrals are made, as evidenced by number of notices published by the Department increasing by 6% per year since 2001 (see Figure 4).



**Figure 4** Compilation of Commonwealth public notices from the EPBC Act website, indicating the level of resourcing required by the Department is ever-increasing, largely in response to increasing numbers of referrals.

The Review should consider whether resources for the Act's administration have increased in accordance with the process requirements.

Resource limitations have previously been noted by the Department the ANAO and others, and will presumably be reiterated in other submissions to the Department. The MCA seeks to reiterate these concerns with a recent example from one of our regional associates:

'Our experience has also been that the level of Federal interest has varied greatly, from no communication for extended periods, to intense discussions and interest, presumably depending on the resources available to manage compliance and outcomes. Some [mining companies] have had contact with at least 6 different people in relation to EPBC over the past 12 months, most have come and gone. There needs to be some effort put into building a relationship with designated regulators if we are to try and get some environmental benefit from this legislation.'

Similarly, feedback from MCA members indicates that the compliance requirements of an approval under the Act are applied in a strict, and thorough manner, but are often duplicative of State Government requirements.

Reporting obligations under the EPBC Act should be delegated to regulators at a State or regional level wherever possible<sup>4</sup>. In most cases State or regional staff will be undertaking very similar monitoring and compliance functions, to meet State requirements, and are usually more familiar with the ecological intricacies of the system being managed. For example, in Victoria, there is a significant EPBC Act overlap with Victoria's Native Vegetation Framework (VNVF), and the experience is that State VNVF obligations are in practice merged with the EPBC Act obligations, when establishing offsets. In some cases, complying with EPBC requirements has been hindered due to Victorian regulatory processes associated with VNVF, and potentially vice-versa.

<sup>4</sup> MCA members have also requested further guidance around the documentation requirements for a 'certificate' for reporting compliance, and the use of electronic records as 'proof' for compliance audit purposes.

Clearly resource limitations within the Department lead to high staff turnover and inefficiencies. This places an increasing onus on industry to retain corporate knowledge about an EPBC Act process for a site, and repeatedly introduce operations and activities to new regulatory staff.

By striving to reduce regulatory overlap, moving the Commonwealth department away from project-by-project assessments, and into more strategic roles, these limitations can be addressed **without additional resources being required**.

The first stage of this process would be the full implementation of all existing assessment bilateral agreements, resolution of the outstanding assessment agreements, and investing much greater effort into developing approvals bilateral agreements (as outlined above). Additionally, better leverage of incentive programs would be achieved, resulting in better value-for-money environmental outcomes.

#### *5.4 Duplication in regulation across the landscape*

Despite COAG commitments to reduce regulatory burdens on industry, the arena of environmental regulation is ever-expanding, rather than contracting. The recent establishment of the Water Act (2007), largely to protect the environmental values of the Murray-Darling Basin, is an excellent example of burgeoning unnecessary regulation. Why could water extraction from the basin not be listed as a key threatening process under the EPBC Act, instead of establishing a whole new layer of the regulatory onion?

The regulation of indigenous heritage values is another area of duplicative regulation in the Act. The MCA considers that the current cultural heritage regimes are unnecessarily complicated, with heritage registers maintained separately by the Australian Heritage Commission and State and Territory Governments. The current arrangements for the assessment of cultural heritage are imprecise, often leading to substantial delays in the project assessment and approval process. This is particularly the case in Western Australia where the States' heritage requirements are recognised as a significant impediment to accessing Indigenous lands for mining exploration and development. These dual layers of heritage legislation mean that 'forum shopping', where a group may be dissatisfied with the outcomes of a state based cultural heritage approval process may then shift to using the Aboriginal and Torres Strait Islander Heritage Protection (ATSHP) Act to overturn the State decision, can be an issue.

The largest and most onerous area of duplicative overlap is with State governments environmental planning and assessment requirements (including documentation, stakeholder engagement, offsets, and biodiversity assessment, monitoring and reporting). These have been discussed elsewhere, and there are substantial opportunities available to remedy these concerns.

### **6.0 The Vision**

The MCA respectfully requests the Independent Review to take a long-term consideration of the Commonwealth's role in biodiversity conservation, and the operation of the EPBC Act. In consideration of the COAG and the Commonwealth's commitment to reducing regulatory burdens, implementing leading practice policy and regulation development and their role in managing market failures, the Review should sharply consider the most appropriate role for the Commonwealth in the current multi-layered approach to biodiversity management, given its mandate, capability, capacity and reach.

The MCA considers the following key areas of consideration and adjustment which would result in better value-for-money investments in the Act's administration from the Commonwealth, leading to better biodiversity outcomes at a lower overall societal cost:

- appropriate investment in monitoring and reporting of EPBC-listed entities – we can't manage what we can't count, and the ultimate goal should be to remove entities from the list, which we can't do without better data, or better use of the existing data;
- the majority of resources invested through the operation of the Act (both from government and industry) are targeted at projects that are undertaken utilising leading-practice mitigation and management techniques in a very small proportion of the landscape, whilst the degradation pressures that led to the establishment of the Act are largely not captured in the project-by-project approach.
- a more appropriate role for the Commonwealth is strategic bio-regional planning, pre-emptive of development pressure, and across longer time-frames. Individual projects would then be approved by States

and Territories, who have a responsibility to ensure that the project fits within the remit of the bio-regional plan.

- the Commonwealth's role would then be to assess, list, monitor and report on ecological entities of national significance, develop regional plans that cross-cut natural resources portfolios (e.g. biodiversity, water, minerals, socio-economic values), and audit States' and developers' against the subsequent implementation and compliance with the plans and approval conditions.
- expansion of bilateral arrangements for approvals and assessments are an existing, and grossly underused, mechanism that can be used to give effect to these suggested adjustments.

The MCA considers that this would lead to the most efficient role for the Commonwealth in securing biodiversity values of national significance, using tools and capacity that align with its responsibilities. This would also efficiently reconcile the Commonwealth's commitments for biodiversity protection and reducing regulatory burdens on business, with existing regulatory arrangements in the other jurisdictions.

Industry would strongly support such a realignment, as it would fill the existing obvious gap in strategic natural resource management planning which currently exists, provide businesses with longer term certainty about areas for investment (with reduced, not no risk), reduce regulatory overlap, and provide a more consistent and appropriate service delivery from the Commonwealth in biodiversity protection.

### **7.0 Other recent MCA submissions highlighting issues of detail**

In a recent submission to the Senate the MCA made a series of recommendations regarding the Operation of the EPBC Act. The submission to that Senate Committee, and Hansard transcript regarding subsequent representation are attached at Appendix 3.

Similarly, the MCA made a submission to a separate Senate Inquiry into Natural Resource Management and Biodiversity Conservation, it is attached at Appendix 4.

Where we have received additional comments from members regarding the specific questions posed in the review document, we have included those at Appendix 5 (with some specific material in response to the Indigenous heritage questions raised in the discussion paper).

A summary of key recommendations from the Senate review submission (Appendix 3) is copied here:

#### **Summary Recommendations**

##### **Regarding the terms of reference:**

The MCA recommends:

- The operation of the Act be assessed within a framework of the best available scientific information regarding the changes in species distributions and abundances, rather than the assumption that there is an ongoing 'decline and extinction crisis'.
- In the absence of the such information, the [Independent Review] recommend it be obtained, so that resources can be allocated based on appropriate information.

#### **Regarding the assessment of the Act's performance:**

The MCA recommends:

- The [Independent Review] note the focus of the Act's performance-monitoring and -reporting is targeted at process, and there is actually little evidence to determine its effectiveness on biodiversity outcomes.
- The [Independent Review] consider that an increase in process is not necessarily an improvement in performance in meeting the Act's objectives.
- The [Independent Review] consider whether the ongoing investment from Government and Industry, in the resource-intensive project-by-project approach, is the best value-for-money way to reach the Act's objectives.

#### **Regarding efficiency improvements for the current administration of the Act:**

The MCA recommends:

- The development of better guidance on the definition of an 'action', specifically regarding a project's upstream and downstream scope for assessment.
- The development of better guidance on the definition of an 'action', specifically regarding where to 'draw the line' on enabled impacts and requirements for supplementary assessments of enabled impacts, when they are included in a previous assessment.
- Provision of a seconded officer to those industry's 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.
- The development of better guidance to align the types of actions that will lead to impacts on MNES, using a risk-based approach, rather than requiring all impacts be assessed for all protected species within the locality.
- Enabling the consideration of offsets in determining whether an impact is significant at the referral, and therefore for industry at the pre-referral, stage.
- Resourcing for the Act's implementation be better targeted through implementation of efficiency measures and / or targeting activities to better-meet the Act's objectives, or in lieu of that approach, be expanded.

#### **Regarding potential improvements for the Act's administration in the medium-long term:**

The MCA recommends:

- The removal of the Commonwealth from project-by-project approvals processes, via the establishment of 'EPBC Act-compliant' guidelines and frameworks to support nationally consistent approvals processes implemented by State and regional jurisdictions.
- The establishment and full implementation of bilateral agreements for assessments and approvals.
- Establishment and endorsement of regional planning instruments that meet EPBC Act objectives and protection requirements under bilateral approvals, whereby other jurisdictions then subsequently assess and regulate projects.
- Commonwealth activities being focussed on strategic investments, planning support for jurisdictional processes, and assessing outcomes of the Act through monitoring MNES and auditing project and process compliance.

### Regarding several emerging issues:

The MCA recommends:

- Better alignment of regional natural resource management planning, and the operation of the Act, to minimise duplicate planning processes, and land use conflicts, whilst maximising industry investment in the process and landscape (use of offsets, data collected etc.).
- The two Senate Committees [and the Independent Review] currently assessing landscape management and conservation planning processes consider a joint report or joint set of recommendations.
- The [Independent Review] note that there are emerging concerns that Section 78 of the Act may be used inappropriately, and that there are opportunities to improve the review process, through the inclusion of robust and independent mechanisms;
- The [Independent Review] note that (1) the development of the EPBC Act offsets policy to date cannot be considered in-line with the Commonwealth commitment to best-practice regulation development, and (2) that there are significant financial ramifications of the policy's implementation for the minerals industry.
- The [Independent Review] note that there are numerous outstanding concerns regarding the development and application of the EPBC Act offsets policy, including but not limited to:
  - The expectation that offsets are now standard, rather than their application as a final measure that is required for an impact that is not considered acceptable by any other means;
  - Taking voluntary leading-practice initiatives in the use of offsets, by companies trying to differentiate themselves from their peers through excellent social and environmental performance, and adopting them as a regulatory baseline (this, perversely, becomes a disincentive for industry to improve voluntarily);
  - Non contemporaneous offset decisions from different jurisdictions, resulting in inflated offset requirements without any scientific foundation for the arrangements;
  - State and Commonwealth offset policies, if they are both required, having their principles aligned;
  - The need for better planning and location of offsets in the landscape, in an integrated whole-of-government approach;
  - The lack of consideration of offsets at the referral stage, which seems incongruous with their philosophical application (*raison d'être*);
  - The incorporation of 'risk of failure' of management actions in offset ratios, for an industry that already pays for the same risk for rehabilitation activities through financial surety; and
  - Requirements for industry to have to demonstrate 'real conservation outcomes' from their offset packages, when this is not required of either the Act's implementation, or other landscape managers.

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## Appendix One

### Case Studies of Minerals Industry Biodiversity Management Policy & Practice

### *The Australian Minerals Industry & Biodiversity Policy*

In line with this commitment to sustainable development, the MCA has developed *Enduring Value – The Australian Minerals Industry Framework for Sustainable Development*. Developed with the input of over 900 stakeholders, *Enduring Value* contains a series of principles, elements and implementation guidance that provides a framework for the integration of environmental, social and economic considerations into mining and minerals processing at the site level. Commitment to *Enduring Value*, including public reporting of implementation, is a condition of membership to the MCA.

As members of the MCA, over 30 leading minerals companies are signatories to *Enduring Value – The Minerals Industry Framework for Sustainable Development* (see [www.minerals.org.au](http://www.minerals.org.au) for a list of our members). *Enduring Value* provides operational guidance on the implementation of the International Council on Mining and Metals' 10 principles of sustainable development.

Companies that are signatories to *Enduring Value*, are required in their operations in Australia to:

- Contribute to conservation of biodiversity and integrated approaches to land use planning [including]:
  - Respect legally designated protected areas.
  - Disseminate scientific data on and promote practices and experiences in biodiversity assessment and management.
  - Support the development and implementation of scientifically sound, inclusive and transparent procedures for integrated approaches to land use planning, biodiversity, conservation and mining.

Although *Enduring Value* was only established in 2005, there are several excellent examples of how 'biodiversity conservation has been mainstreamed' for minerals operations, some examples of which pre-date *Enduring Value*. In 2008 the MCA released an updated land use policy to better-reflect the land use, including biodiversity management, activities of industry in the landscape (see <http://www.minerals.org.au/enduringvalue> for more information on *Enduring Value*, and [http://www.minerals.org.au/environment/Land\\_Use\\_Policy](http://www.minerals.org.au/environment/Land_Use_Policy) for more information on the land use policy).

Several leading companies have also developed policy positions regarding biodiversity, which have direct influence over practices and impacts associated with biodiversity values. Most of these policies are explicit regarding the company's commitment to supporting and protecting World Heritage Values, Threatened Ecological Entities, and the approaches taken to avoiding, mitigating, and remediating any impacts. See the following links for company-specific biodiversity policy positions:

- BHP Billiton: <http://bhpbilliton.com/bb/sustainableDevelopment/environmentalCommitment/biodiversityAndLand.jsp>
- Rio Tinto: [http://www.riotinto.com/ourapproach/7195\\_biodiversity.asp](http://www.riotinto.com/ourapproach/7195_biodiversity.asp)
- Xstrata: <http://www.xstrata.com/sustainability/environment/biodiversity/>
- Barrick Gold Corporation: <http://www.barrick.com/CorporateResponsibility/Environment/Biodiversity/default.aspx>
- Newmont: <http://www.newmont.com/en/social/environment/biodiversity/index.asp>

To support operational implementation of these policies and principles, the industry has worked collaboratively with the Commonwealth Department of Resources, Energy and Tourism (and its predecessors) to provide implementation guidance to support the protection and conservation of biodiversity through mining operations. The 'Leading Practice Sustainable Development' program has helped 'mainstream' biodiversity conservation, and certainly further integrate its consideration into mining industry practices, through a series of handbooks which provide leading practice guidance to operations. Those handbooks which provide specific guidance on biodiversity conservation, management and rehabilitation for the minerals industry include:

- 'Biodiversity Management' (2007)
- 'Water Management' (2008)
- 'Working with Indigenous Communities' (2007)

- 'Mine Rehabilitation' (2006)
- 'Mine Closure and Completion' (2006)

Importantly, many of these handbooks have been translated into other languages, and are influencing landscape management practices in developing countries, thereby representing an International contribution that Australia can claim in making biodiversity management more mainstream (at least internationally for the mining industry). See [http://www.ret.gov.au/resources/mining/leading\\_practice\\_sustainable\\_development\\_program\\_for\\_the\\_mining\\_industry/Pages/LeadingPracticeSustainableDevelopmentProgramfortheMiningIndustry.aspx](http://www.ret.gov.au/resources/mining/leading_practice_sustainable_development_program_for_the_mining_industry/Pages/LeadingPracticeSustainableDevelopmentProgramfortheMiningIndustry.aspx) for further details on the program.

#### *Putting the Biodiversity Policy Framework into Practice*

Most minerals operations are in regional and remote Australia. Many companies own or manage much larger tracts of land than those that are subject to extraction activities. Additionally, many companies undertake exploration activities across land owned or leased by others. In regional and remote Australia, minerals companies are a major contributor to natural resource management, including biodiversity conservation outcomes.

Many minerals operations recognise that initiatives to better-manage their non-operational lands, beyond duty of care requirements, reflect on their 'social license to operate'.

Here we present case studies of how the minerals industry in Australia has incorporated biodiversity conservation into its business operations.

These are presented to parallel the major phases of industry's intersection with the landscape, and align with our land use policy: the [planning and exploration phase](#), the [land management phase](#), and the [rehabilitation phase](#).

Some of these examples include partnerships with Commonwealth-funded bodies, and all include local community engagement.

## Land Use Planning to Integrate and Balance Biodiversity Conservation and Development Outcomes

### Case Study 1

#### **Biodiversity Assessment and Planning in the Bowen Basin** (<http://www.fba.org.au/programs/miningbiodiversity.html>)

The Fitzroy Basin Association is working in partnership with BHP Billiton Mitsubishi Alliance, Xstrata Coal, Anglo Coal, and Rio Tinto Coal Australia and the Queensland Resources Council to examine ways in which the industry can contribute to biodiversity gains in the Bowen Basin. Four sub-regions of the Brigalow Belt Bioregion host more than 30 coal mines and another four subregions are being explored to find more coal. The project is looking at how best to address the cumulative impacts of many coal mines over time and across the ten million hectares that make up the eight biogeographical subregions.

The aim of this project is to ensure the future survival of threatened species and communities that live in central Queensland's coal mining areas. In January 2006 the project produced a report into the statutory framework that the Queensland and Commonwealth Governments use to assess and refuse or approve coal mines and set requirements in respect of biodiversity. More recently, selected biodiversity values of the coal mining areas in the Bowen Basin have been mapped with the aim of delineating areas whose vegetation, size and condition can contribute to the long term survival of listed ecological communities and species.

### Case Study 2

#### **Biodiversity Assessment and Planning in the Pilbara** (<http://www.austmus.gov.au/riotintopartnerships/pilbara/index.htm>)

In a partnership between the Australian Museum and Rio Tinto, the biodiversity values of the Pilbara region of Western Australia are being systematically documented to support understanding and improved land use planning processes. With the support of Rio Tinto, an Australian Museum team is conducting a biological survey in the Pilbara region to address this knowledge gap. This work is being conducted in consultation with the Western Australian Department of Conservation and Land Management, the Western Australian Museum and other Western Australian stakeholders.

The studies are designed to build understanding of the underlying processes that govern the region's biodiversity. This will enable Rio Tinto and other land managers to monitor and evaluate production regimes with biodiversity protection in mind. Data collected through survey and ecological research will underpin tools for use in development and conservation in the region.

### Case Study 3

#### **Important Bird Areas** (<http://www.birdsaustralia.com.au/our-projects/important-bird-areas.html>)

Important Bird Areas (IBAs) are sites of global bird conservation importance. Each IBA meets one of four global criteria used by BirdLife International. IBAs are priority areas for bird conservation - we aim to monitor birds at our IBAs, advocate their importance to government, and work with land-holders and other local people to conserve them.

In partnership with Rio Tinto, Birds Australia has identified and documented almost all of the Australian IBAs.

Through a joint commitment to conserving Australia's biodiversity, Birds Australia and Rio Tinto agreed to work together for three years to develop and implement the IBA program. The program helps Birds Australia deliver biodiversity conservation through building knowledge of birds and their threats, identifying solutions, and assisting policy makers and land managers to use this knowledge. For Rio Tinto, program outcomes will help deliver its biodiversity strategy in Australia. Rio Tinto has worked in other areas of the world to identify IBAs through its global partnership with BirdLife International.

#### Case Study 4

##### **Development and Conservation Organisation's Strategic Alignment in WA**

The NGO Industry Environmental Forum's (NIEF) objective is to provide a forum for conservation NGOs and the Chamber of Mineral and Energy of Western Australia (CME) member companies to identify strategic environmental issues related to the resources sector with a view to achieving mutually agreed tangible outcomes. Biodiversity and biodiversity planning issues have been central to NIEF discussions to date.

Forum members have identified the need for a better understanding of the states biodiversity values to underpin responsible resource utilisation and biodiversity conservation decision making at a strategic level. Clearer understanding of these values would help to facilitate the environmental approvals process for resource projects.

#### **Land Management to Avoid, Minimise and Manage Biodiversity Impacts**

#### Case Study 5

##### **The Lake Cowal Foundation (<http://www.lakecowalfoundation.org.au>)**

The Lake Cowal Foundation Limited (LCF) is a non-profit Environmental Trust established in June 2000 with the support of Barrick Gold. Its primary goal is to protect and enhance Lake Cowal, a nationally significant wetland located 45km north of West Wyalong, New South Wales (NSW), Australia.

The Lake Cowal Foundation plans and implements projects with a variety of regional stakeholders to support the conservation of the lake's biodiversity values. These projects deliver significant on-ground components by providing financial assistance and working with landholders in the Lake Cowal area to protect, enhance and restore the Lake Cowal environment in a partnership arrangement. The resultant on-ground outcomes included the protection of 325 hectares of the Lake Cowal foreshores and major tributaries, including 20 km of Sandy and Bland Creeks. Community engagement and capacity building is a cross-cutting element of the projects; many people have been involved in the project including eleven local landholders and over 50 other individuals from various groups, organisations and government departments.

#### Case Study 6

##### **The Bendigo Mining Environment Fund**

([http://www.bendigomining.com.au/our\\_environment/community\\_relationship/environment\\_fund.htm](http://www.bendigomining.com.au/our_environment/community_relationship/environment_fund.htm))

Established in 1995, the Bendigo Mining Environment Fund is administered by a Committee and chaired by the Mayor of the City of Greater Bendigo. Through its grant allocations each year, the Bendigo Mining Environment Fund assists organisations with environmental projects to the benefit of the Bendigo community.

The grants are awarded annually, and encourage biodiversity conservation and associated capacity building in the community. Over 50 projects have been funded to date, with many focussed on biodiversity protection and rehabilitation, the fostering of cultural uses of biodiversity (e.g. bush tucker plantings), wildlife rescue and rehabilitation and targeted capacity building for further biodiversity conservation initiatives (e.g. investments in nursery infrastructure, and communication and education initiatives).

#### Case Study 7

##### **Sustainable Rangeland Management in the WA Goldfields**

(<http://sustainability.bhpbilliton.com/2006/environment/caseStudies/biodiversity/rangelandManagement.asp>)

Nickel West (BHP Billiton) is a major landowner in the northern Goldfields of Western Australia; with pastoral leases surrounding the Mount Keith and Leinster nickel operations covering approximately 1.2 million hectares. These holdings are managed by a team of 12, who are undertaking a variety of pastoral activities, including sheep and beef herding and horticulture.

In aiming to manage the rangelands in a sustainable manner, the team faces several challenges, including the remoteness of the holdings, historical overgrazing, impacts of previous exploration and mining activity, and changing pastoral methods and land use. To assist their endeavours, they participate in the Ecosystem Management Understanding (EMU) process.

The EMU process was originated in 2003 by the Centre for the Management of Arid Environments (CMAE) in collaboration with the Western Australian Department of Agriculture. It is designed to help land managers understand the complexity and inter-connectedness of rangeland biodiversity. The process provides a learning framework based on ecological patterns and processes, with a focus on drainage systems and critical eco-junctions. Integrated EMU projects have been established for all our pastoral holdings, targeting areas identified as significant in terms of biodiversity values and sustainability.

#### Case Study 8

##### **Tanami Biodiversity Strategy** (<http://www.beyondthemine.com/2007/>)

The Tanami is a region in central Northern Territory, which supports grasslands, shrublands and savannah communities. Traditional Aboriginal land owners of the Northern Tanami Desert, the Warlpiri people have managed their land for more than 25,000 years.

In 2006, Newmont Tanami started a unique Regional Biodiversity Project in collaboration with the Central Land Council and the Warlpiri Rangers from local communities to monitor the impact of current mining activities on wildlife abundance in the area. The project involves collecting data from the wider Tanami bio-region to evaluate the impact operations have had on regional biodiversity.

The study covers both plants and animals, and identifies wildlife populations, health and other information. The local knowledge and insight of the Warlpiri Rangers, enabled Newmont scientists to collect more accurate baseline data that will help in comparison to future assessments. This information also helps Newmont develop management protocols and programs for future proposed exploration, mining or other operations.

#### Case Study 9

##### Hay Point Rehabilitation and Community Education

(<http://sustainability.bhpbilliton.com/2005/repository/environment/caseStudies/caseStudies21.asp>)

The Hay Point terminal, located near Sarina on the central Queensland coast, handles and despatches coal from the mines operated by BHP Billiton Mitsubishi Alliance (BMA). An ongoing challenge is sustainably operating a facility adjacent to the Great Barrier Reef Marine Park World Heritage area.

On their own initiative, Hay Point Services employees began cleaning general community rubbish from the beach and foreshore. Their activities have evolved into the Hay Point Foreshore Development Project, a community partnership with the environmental group Green Corps, Sarina Landcare Catchment Management Association (SLCMA) and Sarina Shire Council.

The project site is an 18-hectare buffer zone within terminal land. Based on a master vegetation plan, the project aims to protect and revegetate the zone and provide habitat for native species of plants and animals, while still allowing public access. A five-year implementation plan is being developed to ensure restoration works and public access points do not adversely impact flora and fauna. The point and foreshore are significant in terms of regional biodiversity, with extensive mangrove forest and dune vegetation ecosystems. The beach is a nesting site for marine turtles including the vulnerable green turtle (*Chelonia mydas*) and flatback turtle (*Natator depressus*).

#### Landscape Rehabilitation for Biodiversity Return or Improvement

#### Case Study 10

11,000 ha Offset in the Stony Plains Bioregion ([http://www.ozminerals.com/Media/docs/2007\\_SDR\\_Oxiana\\_Limited\\_full-1cd2c524-f9be-4998-b738-4754ea8f5c8e-0.pdf](http://www.ozminerals.com/Media/docs/2007_SDR_Oxiana_Limited_full-1cd2c524-f9be-4998-b738-4754ea8f5c8e-0.pdf))

Oz Minerals' Prominent Hill operations are located in the western region of the Stony Plains Bioregion, within the Breakaway land system that is characterised by low hills and dissected tablelands. The vegetation of the project area generally comprises low open to very open chenopod shrubland and mallee and mulga woodland, while the vegetation of the wellfield area generally comprises chenopod low shrubland, with shrubland and hummock grassland associated with watercourses.

In order to offset the impacts at Prominent Hill, a significant environmental benefit (SEB) offset area of 11,129 ha located within the Mt Eba pastoral lease has been set aside. Contained within the SEB area are 5 major and 2 minor fauna habitats, which support 47 bird species, 11 reptile and 7 mammal species. Management of the SEB offset area is aimed at identifying and managing processes which threaten biodiversity including grazing, disturbance, weed and feral invasion. Control strategies include baiting and trapping of foxes and cats, weed management and the implementation of an extensive monitoring program. Works undertaken in the SEB during 2007 included the construction of stock exclusion fencing and the commencement of biannual monitoring during autumn and spring.

#### Case Study 11

##### **Mt Owen Forest Offsets** ([http://www.mtowencomplex.com.au/biodiversity\\_conservation.html](http://www.mtowencomplex.com.au/biodiversity_conservation.html))

The Central Hunter Valley floor region of NSW has been extensively cleared of native vegetation, primarily for agriculture, mining and urban development. Ongoing pressures from economic development have resulted in further threats to natural habitats and increased the need for "biodiversity sensitive" development practices. In recognition of the importance of conserving biodiversity, Mt Owen Mine has implemented innovative practices, which will help conserve and enhance biodiversity values in the Upper Hunter Valley. Mt Owen's program of biodiversity management forms part of Xstrata Coal NSW's broader biodiversity and land management commitments.

The key components of Mt Owen's Biodiversity Management Program include a 'Biodiversity offset strategy', progressive rehabilitation of disturbed areas to native woodland, a flora and fauna monitoring and management program, and an on-going program of native forest restoration research. To offset the impacts of mining through forest communities, a new 430 hectare area of woodland (known as the "New Forest") has been established. The New Forest, originally open pastureland, was planted with native tree and shrub species indigenous to the forest and surrounding area. Growth rates and survival of the trees have been encouraging and the re-forestation programme has established key species for fauna habitat and encouraged the movement of native fauna into the area.

#### Case Study 12

##### **Arid Recovery Project** (<http://sustainability.bhpbilliton.com/2006/environment/caseStudies/biodiversity/aridRecoveryProject.asp>)

The combined impacts of feral species and unsustainable farming have devastated Australian ecosystems since European settlement. Over 60 per cent of desert mammals have been driven to total or regional extinction, and many other animals and plants remain threatened. However, a unique partnership titled 'Arid Recovery' has started reversing these trends.

Located near BHP Billiton's Olympic Dam mine in South Australia, Arid Recovery is the largest fenced reserve in Australia from which all feral cats, foxes and rabbits have been removed. The reserve straddles the mine lease and sections of four other pastoral properties, two of which are leased by the Company. Native animals and plants are now thriving within the 86-square-kilometre enclave, which has become both a centre for ecological research and the site of a nationally significant conservation program.

Arid Recovery was initiated in 1987 by a partnership comprising the Olympic Dam mine, the South Australian Department for Environment and Heritage, the University of Adelaide and a community group, Friends of Arid Recovery. The partnership's mission is to 'facilitate restoration of arid zone ecosystems through on-ground works, applied research and industry, community and government partnerships'.

Together with other Arid Recovery partners and collaborators, BHP are committed to ensuring maintenance of the existing reserve and the sustainability of research and public education programs. A key future objective is to leverage broad-scale benefits to the environment and to the perception of resource industries by re-establishing threatened species outside the reserve, on both the Olympic Dam mine lease and surrounding pastoral properties.

#### Case Study 13

##### **Koala Venture** ([http://www.pacificcoal.com.au/media/38\\_media\\_releases\\_1134.asp](http://www.pacificcoal.com.au/media/38_media_releases_1134.asp))

Koala Venture is an award-winning partnership between the University of Queensland and Rio Tinto Coal Australia, and is the country's longest running koala study. Koala Venture is an important element of the company's Central Queensland mining operations.

The findings that the research partners develop are used to guide land management and rehabilitation activities. Due to the partnership, there is now a better understanding of the impact of mining operations on the koala population, the mine is able to reduce the likelihood of harm to koalas, and has increased knowledge of plant species required for successful rehabilitation practices.

The research programme was recently expanded last year to include the new Clermont Mine lease, where development is progressing quickly. Radio tracking of koalas on the development site enables vegetation clearing activities to be planned to minimise the potential negative impacts on koalas during that process.

#### Case Study 14

##### **Rehabilitation in the Bandalup Corridor** (<http://hsecreport.bhpbilliton.com/2004/repository/caseStudies/environment16.asp>)

The Ravensthorpe Nickel Project (RNP; BHP Billiton) is located 155 kilometres west of Esperance in Western Australia. The project is within an agricultural region with an established network of small towns. The RNP is located within the Bandalup Corridor, a band of remnant vegetation in an agricultural region adjacent to the Fitzgerald River National Park, and falls within the buffer zone of the Fitzgerald River Biosphere, a world-renowned biodiversity area. The Western Australian Department of Conservation and Land Management (CALM) manages both the National Park and the Biosphere. One of the allowable activities within the buffer zone of a Biosphere is mining, subject to responsible environmental management.

The project's ore deposits are located in areas covered by remnant vegetation. The clearing of this vegetation associated with project development has two main impacts on biodiversity, including loss of habitat for fauna and, to a lesser extent, direct fauna impact from road traffic. The loss of fauna habitat has been compensated through the purchase of an adjacent 650-hectare 'bush block' as a conservation offset, together with the revegetation of approximately 600 hectares of existing cleared farmland to allow its incorporation back into the Bandalup Corridor.

At the completion of these revegetation activities and subsequent mine rehabilitation, the width of the Bandalup Corridor will actually be increased. Significantly, Ravensthorpe Nickel Operations (RNO), the management company 100 per cent owned by BHP Billiton, believes that the effective area for fauna habitat post mine closure will be greater than currently exists.

#### Case Study 15

##### **Contributing to Recover Swift Parrot Populations** ([http://www.bendigominig.com.au/documents/environment/ER\\_2005.pdf](http://www.bendigominig.com.au/documents/environment/ER_2005.pdf))

In early 2005 Bendigo Mining obtained approval under the Commonwealth Environment Protection and Biodiversity Conservation Act for the expansion of its Carshalton mine site. Early and positive consultation with the Commonwealth department responsible for the Act resulted in agreement on a number of ways we could assist in the recovery of the endangered Swift Parrot.

One of the projects suggested by the Commonwealth was the development of a long-term monitoring program to track the status of the species in the Goldfields Bioregion of Victoria. We have developed this program with guidance from independent specialists, members of the Swift Parrot Recovery Team and the Victorian Department of Sustainability and Environment.

Our investment in this program enables re-direction of resources previously used in this area to other Swift Parrot recovery works. We have also secured land with significant habitat for the Swift Parrot. By protecting and rehabilitating this land, it will continue to provide and improve over-wintering habitat for the birds on their migration path from Tasmania to their main feeding grounds in the Box-Ironbark Forests of Victoria and NSW.

These programs, and Bendigo Mining's commitment to high quality progressive rehabilitation, will ensure that the minerals operation has only positive impacts on the Swift Parrot.

## Appendix Two

### MCA Submission to DEWHA Regarding Offsets Policy

6 December 2007

Marina Walkington  
Director, EIA Governance  
Environment Assessment Branch  
Approvals and Wildlife Division  
Department of Environment and Water Resources  
GPO Box 787  
Canberra ACT 2601

**Draft Policy Statement: Use of environmental offsets under the *Environment Protection and Biodiversity Conservation Act 1999***

Dear Marina

The Minerals Council of Australia (MCA) welcomes the opportunity to provide a submission on the formalisation of an offsetting policy under the Environment Protection and Biodiversity Conservation Act 1999 (the EPBC Act). The MCA supports the development of the policy and, broadly, the principles underpinning it.

Members of the MCA, representing over 85 per cent of annual minerals production in Australia, have a long-standing commitment to land stewardship and the application of co-regulatory measures to provide effective environmental protection.

MCA members commit to continuous improvement in their performance, beyond regulatory requirements, as signatories to *Enduring Value – The Australian Minerals Industry Framework for Sustainable Development*. A key element in this Framework is the commitment to 'contribute to conservation of biodiversity and integrated approaches to land-use planning'.

The minerals industry is taking a leading role in the development of rehabilitation principles and practices that underpin biodiversity offset processes. Accordingly, the MCA welcomes the further development of Commonwealth policies and frameworks that support sustainable development through the use of leading practice biodiversity conservation and management.

The MCA also strongly advocates the principle of minimum effective regulation – specifically, that the development of good regulatory process should be informed by the following principles:

- regulation should only be adopted in cases of demonstrated market failure, and there should generally be an assumption that the open and transparent operation of markets will lead to efficient outcomes
- regulatory approaches should not be used unless a clear case for action exists, including an evaluation of why existing measures are not sufficient to deal with the issue;
- regulation should only be adopted after a range of policy options (including self-regulatory and co-regulatory approaches) have been assessed and found wanting;
- the regulation represents the greatest net benefit to the community;
- the regulation developed is the most efficient means of achieving the desired outcome at least cost to industry;
- effective guidance is provided for both regulators and stakeholders to ensure that the regulations are correctly implemented and monitored;
- mechanisms such as sunset clauses or periodic reviews are built into the legislation to ensure that the regulations remain relevant over time; and
- there is effective consultation with stakeholders at key stages of the development and implementation of the regulation.

As you would be aware, the Council of Australian Government (COAG) National Reform Agenda focuses on reducing the regulatory burden across all three levels of government and the implementation of a range of measures to ensure best-practice regulation making and review.

The MCA does not seek a diminution of measures to protect the environment, rather to promote improvements to the efficiency and co-ordination of legislation within and between jurisdictions. In this context, the MCA supports the formalisation of an EPBC offsets policy, and encourages the consideration of reducing duplication in assessment and processing effort given that several States have well developed offsets frameworks and mechanisms, particularly related to native vegetation and biodiversity protection and enhancement.

Given the relatively mature nature of some of the State-based offsetting mechanisms (e.g. Habitat Hectares in Victoria and BioBanking in NSW), the MCA supports the harmonisation of the EPBC Act offsetting approach with existing approaches that are credible, transparent, and acceptable to both industry and the community.

Where bilateral arrangements do not exist, the MCA considers that the Commonwealth offset policy and framework be based on principles already developed by the States with the consideration of template processes or tools to support the development of a nationally consistent approach.

Additionally, the MCA suggests the following specific considerations for inclusion in the refinement of the Commonwealth biodiversity offsets policy, and particularly where a State-based system does not meet the EPBC Act requirements. These suggestions are structured to parallel the Draft Policy Statement.

#### **The definition and use of offsets:**

- Offsets should not be limited in definition to actions taken 'outside of a development site'. This could lead to perverse outcomes, for example; (1) where a site is defined by a large lease area, that has considerable biodiversity values, if offset actions are required to be taken off-lease, like-for-like principles could be compromised or actions of a lesser regional biodiversity value may be enacted; and / or (2) the artificial subdivision of land to delineate 'sites'. Offsets should be placed to maximise biodiversity returns, irrespective of tenure (see below).
- There should be recognition that some impacts cannot be offset and will therefore require differential consideration in the project approval process.
- Decisions to approve actions must consider the development in its entirety, by balancing impacts, mitigation measures, offsets and social and community benefits.
- Any offset measures should be additional to other legislative 'duty of care' requirements.
- The Commonwealth should commit to liaising with the other relevant regulators to ensure that a single acceptable offsets arrangement is implemented.

#### **The difference between environmental offsets and mitigation measures:**

- The scale of the impact at a development site should be calculated with consideration of mitigation measures applied (i.e. providing recognition that if no discount is provided, then a perverse outcome of an unwillingness to invest in mitigation may result).

#### **Principle 1. Environmental offsets should be targeted to the matter protected by the EPBC Act that is being impacted:**

- Offset requirements for matters of National Environmental Significance should be documented by bio-region and agreed with State and Territory agencies, subject to periodic review.
- 'Like-for-like' rules should not result in perverse or distorted conservation outcomes (e.g. requirements to invest in small remnants of the same vegetation type near a project site versus the potential to invest in a conservation program of broader strategic importance that may not meet strict 'like-for-like' rules).

#### **Principle 2. A flexible approach should be taken to the design and use of environmental offsets to achieve long-term and certain conservation outcomes that are cost effective for proponents:**

- Direct offsets should be positioned in the most appropriate location in the landscape to maximise conservation outcomes, irrespective of tenure and land parcel conservation status.
- Magnitude of impacts and offsets need to be quantified in a transparent, repeatable manner.
- Offset requirements should be calculated based on scientific understanding of responses to management actions and risk of failure, and recognise that in some sectors, such as mining, that offsets are applied in addition to rehabilitation requirements.
- The science underpinning the quantification of offset requirements for matters of National Environmental

Significance should be subject to peer-review, and published on the EPBC website.

**Principle 3. Environmental offsets should deliver a real conservation outcome:**

- The MCA considers this a principle of limited utility, as a 'real conservation outcome' is difficult to define, and if the other principles are applied appropriately, the desired conservation outcomes would be achieved. Presumably project stakeholders would not invest in actions that they thought would not lead to a conservation benefit.

**Principle 4. Environmental offsets should be developed as a package of actions, which may include both direct and indirect offsets:**

- The relative value of direct and indirect offsets should be qualified / quantified in a transparent manner, with a limit placed on the ratio of direct to indirect offsets available for any one action, based on the conservation risk to the matter of National Environmental Significance potentially impacted upon.
- Offset packages should be developed with broad stakeholder engagement, including Indigenous communities, conservation groups, surrounding landholders, and other conservation agencies.
- Where 'like-for-like' requirements are required, these should be flexible enough to enable offset investments to gain synergies with other local or regional conservation management programs, such that a greater outcome can be achieved by pooling resources.

**Principle 5. As a minimum, environmental offsets should be commensurate with the magnitude of the impacts of the development and ideally deliver outcomes that are 'like-for-like':**

- The MCA notes that there is some repetition across the principles, and comments made elsewhere regarding 'like-for-like' requirements, are equally applicable to this principle.
- Previous EPBC Act precedents regarding offsets (e.g. the 10:1 ratio for the Swift Parrot) should not be applied generically. In the event that such ratios are used they should only be applied as an interim measure until appropriate ratios are quantified based on scientific understanding and risk of failure.
- Since offset packages are integral to most current developments and are aimed at achieving a 'net gain' or 'balanced' environmental outcome, they should be considered at the Referral stage of the EPBC Act assessment process.
- The quantity-quality relationship at both impact and offset sites must be quantified transparent manner, and therefore enable discounts for impacts on previously degraded matters of NES (e.g. roadside vegetation where connectivity is already limited by road presence), and premiums for high quality pristine sites (for offset and impact sites).
- The application of 'like-for-like' outcomes should not be mandated in circumstances where a proponent can demonstrate that greater conservation outcomes can be achieved through alternative schemes.
- The application of offsets should not impact on the ability to convert such lands to alternative uses in the future, subject to further offsetting arrangements, and should not inadvertently sterilise mineral or other resources.

**Environmental offsets should be located within the same general area as the development activity:**

- This principle encapsulates some overlap, including the 'like-for-like' requirements, and could probably be rationalised.
- Additionally, for very large project sites / leases, this principle is at odds with the Commonwealth definition of offsets being required 'outside the project site'.
- For some types of development, the concept of the 'same general area' is problematic. For example, for long linear infrastructure projects where thin stretches of vegetation are impacted, it would be more appropriate to protect and enhance larger patches of vegetation that are not necessarily in the same 'general area' as all the vegetation removed.

**Principle 7. Environmental offsets should be delivered in a timely manner and be long lasting:**

- Offsets need to be temporally appropriate to maintain conservation values in the landscape and maximise the potential contribution to broader conservation outcomes. Where there is no immediate risk of loss of ecological populations, the location and establishment of offset sites should not arbitrarily be required before the project proceeds, as this could result in the purchase of properties or establishment of sites that do not represent the best long-term biodiversity outcome.
- The offsets policy should recognise, that in some industries where rehabilitation post-land-use is undertaken, that the proposed action, with short-term offsets, may result in a net gain in the long-term. Credits generated through such a process should be quantified and used to offset other impacts / further development.

**Principle 8. Environmental offsets should be enforceable, monitored and audited:**

- The MCA considers there is a significant opportunity for the Commonwealth to provide leadership in this area of the offsetting process. A consistent framework for monitoring, reporting, communication and adaptive management would be a considerable improvement to current procedures. Further, a consistent national approach would provide an opportunity to deliver against broader natural resource Monitoring and Evaluation strategic objectives.
- Any offset conditions should require the proponent to take certain actions, which are agreed between the proponent and the Commonwealth as appropriate to achieve offsets, based on good will and the best appropriate scientific information at the time of the proposal. Offset conditions should not require the proponent to actually achieve the offset [notwithstanding monitoring and reporting requirements] because:
  - (a) achievement cannot be easily measured, may take longer than anticipated, and natural benchmarks may also change through time; and
  - (b) if the proponent cannot achieve the offset, through no fault of its own, it will still be liable for contravention of approval conditions under the strict liability provisions of the EPBC Act.

The MCA looks forward to further engagement on the development of the EPBC Act offsets policy. Should you require clarification of any of the points raised in this submission, please contact me directly, or Dr Jason Cummings – Assistant Director, Environment, who has carriage of this matter in the MCA Secretariat.

Yours sincerely,

**MITCHELL H HOOKE**  
**CHIEF EXECUTIVE**

## Appendix Three

### 2008 MCA Submission to the Commonwealth Senate & Hansard Transcript



5 September 2008

The Secretary  
Senate Standing Committee on Environment, Communications and the Arts  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Via email: [eca.sen@aph.gov.au](mailto:eca.sen@aph.gov.au)

**Re. Senate Standing Committee on Environment, Communications and the Arts – Inquiry into Operation of the Environmental Protection and Biodiversity Conservation Act 1999**

Dear Secretary

The Minerals Council of Australia (MCA) welcomes the opportunity to provide comment on the operation of the *Environment Protection and Biodiversity Conservation Act 1999* ('the Act'). Members of the MCA, representing over 85% of minerals production in Australia, have a long-standing commitment to sustainable development including the responsible stewardship of natural resources.

The MCA strongly advocates the principle of minimum effective regulation – that the development of good regulatory process should be informed by the following principles:

- > regulatory approaches should not be used unless a clear case for action exists, including an evaluation of why existing measures are not sufficient to deal with the issue;
- > a range of policy options (including self-regulatory and co-regulatory approaches) have been assessed and found wanting;
- > the regulation represents the greatest net benefit to the community;
- > the regulation developed is the most efficient means of achieving the desired outcome at least cost to industry;
- > effective guidance is provided for both regulators and stakeholders to ensure that the regulations are correctly implemented and monitored;
- > mechanisms such as sunset clauses or periodic reviews are built into the legislation to ensure that the regulations remain relevant over time; and
- > there is effective consultation with stakeholders at key stages of the development and implementation of the regulation.

Based on DEWHA statistics, the minerals industry has been one of the major stakeholders in the operation of the Act. We estimate that our members spend millions of dollars every year on documentation for the Commonwealth to meet the Act's documentation requirements.

The MCA does not seek a diminution of measures to protect the environment, but rather promotes improvements to the efficiency and co-ordination of legislation within and between jurisdictions. In this context, the MCA supports the intent of the inquiry, and notes that it will provide a useful platform for the independent 10-year review of the Act.

Should you have any further questions regarding this issue, please do not hesitate to contact me directly, or Dr Jason Cummings – Assistant Director Environmental Policy on 02 6233 0627, who has carriage of this matter in the MCA Secretariat.

Yours sincerely,

**MELANIE STUTSEL**  
**DIRECTOR – ENVIRONMENTAL AND SOCIAL POLICY**

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# MINERALS COUNCIL OF AUSTRALIA

SUBMISSION TO THE SENATE ENVIRONMENT,  
COMMUNICATIONS AND THE ARTS COMMITTEE ON THE  
OPERATION OF THE *ENVIRONMENT PROTECTION AND  
BIODIVERSITY CONSERVATION ACT 1999*

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5 SEPTEMBER 2008

## *SUPPORTED BY:*

THE MCA's VICTORIAN DIVISION

THE CHAMBER OF MINERALS AND ENERGY OF  
WESTERN AUSTRALIA

QUEENSLAND RESOURCES COUNCIL

SOUTH AUSTRALIAN CHAMBER OF MINES AND  
ENERGY

NSW MINERALS COUNCIL

## Executive Summary

The minerals industry is a significant manager of the landscape, particularly in regional and remote Australia, and based on DEWHA statistics, has been one of the major stakeholders in the operation of the Act. The Minerals Council of Australia, representing 85% of minerals production, does not seek a diminution of measures to protect the environment, but rather improvements in the efficiency and co-ordination of legislation within and between jurisdictions.

The Minerals Council of Australia expresses concern that the:

- inquiry is founded in the assumption that extinctions of species in Australia are continuing, and therefore the Act is not working, when the species extinction rate across the last two decades is probably 'zero';
- operation of the EPBC Act is not assessed easily, or objectively, whilst the performance monitoring and reporting for the Act is based on process rather than outcomes; and
- majority of resources invested through the operation of the Act (both from government and industry) are targeted at projects that are undertaken utilising leading-practice mitigation and management techniques, whilst the degradation pressures that lead to the establishment of the Act are largely not captured in the project-by-project approach.

Regarding the current implementation of the Act, we recommend the following be considered so that resources can be more efficiently utilised, and better-targeted at the drivers of landscape degradation:

- providing better guidance on the definition of an 'action', specifically regarding a project's upstream and downstream scope for assessment;
- providing better guidance on the definition of an 'action', specifically regarding where to 'draw the line' on enabled impacts and requirements for the supplementary assessments of enabled impacts, when they are included in a previous assessment;
- providing a seconded officer to industry's that intersect significantly with the Act's implementation, to provide better advice on whether a referral is actually required and where assessment efforts should be targeted;
- using a risk based approach to align the types of actions that will lead to impacts on different matters of national environmental significance; and
- enabling the consideration of offsets in determining whether an impact is significant at the referral stage.

Regarding implementation of the Act in the medium-long term, we recommend consideration of:

- the removal of the Commonwealth from project-by-project approvals processes;
- the establishment and full implementation of bilateral agreements for assessments and approvals;
- establishment and endorsement of regional planning instruments that meet EPBC Act protection requirements under bilateral approvals, whereby other jurisdictions then subsequently review and regulate projects; and
- Commonwealth activities being focussed more appropriately on strategic investments and planning support, and assessing outcomes through monitoring and auditing compliance.

Regarding some emerging issues, we recommend:

- reduced overlap of monitoring, reporting and compliance requirements between Commonwealth and State jurisdictions;
- better consideration of the leading-practice regulation development to which the Commonwealth has committed, especially through the development of an EPBC Act offsets policy;
- establishment of more rigorous processes to support Section 78 reviews; and
- better alignment of regional natural resource management planning, and the operation of the Act, to minimise duplicate planning processes, and land use conflicts, whilst maximising industry investment in the process and landscape (use of offsets, data collected etc.).

## Introduction

### *The Australian Minerals Industry*

Members of the MCA, representing over 85% of minerals production in Australia, have a long-standing commitment to sustainable development including the responsible stewardship of natural resources. See [www.minerals.org.au](http://www.minerals.org.au) for a list of our members. Most minerals operations are in regional and remote Australia. Many companies own or manage larger tracts of land than those that are subject to extraction activities. Additionally many companies undertake exploration activities across land owned or leased by others. In regional and remote Australia, minerals companies are a major contributor to natural resource management, including biodiversity conservation outcomes.

Traditionally, the investment that mining operations made in landscape management was mandated by regulatory authorities through the impact assessment process, including the application of the EPBC Act. However, companies now recognise that initiatives to better-manage their non-operational lands beyond duty of care requirements reflect on their 'social license to operate'. Accordingly there has been an increasing effort by minerals companies to invest in landscape management far-beyond mandated requirements. Some of these examples include partnerships with Commonwealth-funded bodies, and all include local community engagement:

- The Lake Cowal Foundation: <http://www.lakecowalfoundation.org.au/> in Western NSW
- The Anglesea Heath Cooperative Agreement: [http://www.alcoa.com/australia/en/info\\_page/anglesea\\_strong.asp](http://www.alcoa.com/australia/en/info_page/anglesea_strong.asp) in Eastern Victoria
- The Bendigo Mining Environment Fund: [http://www.bmnl.com.au/our\\_environment/community\\_relationship/environment\\_fund.htm](http://www.bmnl.com.au/our_environment/community_relationship/environment_fund.htm) chaired by the Mayor of Bendigo
- biodiversity assessment in the Bowen Basin: <http://www.fba.org.au/programs/miningbiodiversity.html>
- biodiversity assessment and planning in the Pilbara with the Australian Museum: <http://www.austmus.gov.au/riotintopartnerships/pilbara/outcomes.htm>

The minerals industry is a significant manager of the landscape, particularly in regional and remote Australia, where our investments in monitoring, reporting and on-ground natural resource management outcomes are ever-increasing. Based on DEWHA statistics, the minerals industry has been one of the major stakeholders in the operation of the Act. We estimate that our members spend millions of dollars every year on documentation for the Commonwealth to meet the Act's documentation requirements.

In this submission, the MCA does not seek a diminution of measures to protect the environment, but rather promotes improvements to the efficiency and co-ordination of legislation within and between jurisdictions.

The MCA strongly advocates the principle of minimum effective regulation – that the development of good regulatory process should be informed by the following principles:

- regulatory approaches should not be used unless a clear case for action exists, including an evaluation of why existing measures are not sufficient to deal with the issue;
- a range of policy options (including self-regulatory and co-regulatory approaches) have been assessed and found wanting;
- the regulation represents the greatest net benefit to the community;
- the regulation developed is the most efficient means of achieving the desired outcome at least cost to industry;
- effective guidance is provided for both regulators and stakeholders to ensure that the regulations are correctly implemented and monitored;
- mechanisms such as sunset clauses or periodic reviews are built into the legislation to ensure that the regulations remain relevant over time; and
- there is effective consultation with stakeholders at key stages of the development and implementation of the regulation.

### *Concern Regarding the Terms of Reference Framework*

The first term of reference for the committee assumes that there is an ongoing extinction crisis in Australia:

'The Senate notes the continuing decline and extinction of a significant proportion of Australia's unique plants and animals'.

Unfortunately this does not set an objective platform for this crucial review.

Australia has had the highest documented extinction rate of vertebrates in the world, but there is scant evidence that it is 'continuing' or 'worsening'. The high extinction 'rate' is largely a result of historic land clearing for agricultural pursuits, and the synergistic effects of the incursion of exotic animals (predators and herbivores), during the first half of the last century (for example see Short and Smith 1994 for the mammals story). If we chose to measure and communicate the rate of documented extinctions across the last decade [or two], it could well be 'zero'.

The fact that there is not clear-cut evidence that the 'decline and extinction' is continuing or worsening is significantly due to cooperative efforts from government, landholders, and non-government organisations (and presumably this review will determine whether the EPBC Act has been an efficient, value-adding, tool in that process). The impetus, enthusiasm and understanding of the needs for much of the work to halt the decline has been previously developed through alarmist approaches, but it is time to take a more mature approach. Stakeholders are limited in their capability to be consulted and engaged repeatedly (Seymour et al. 2007), so we need to refine the type and volume of material presented, and deliver objective messages to support decision making processes.

Based on the EPBC Act listings, since 2001 there have not been any additional species listed as 'extinct' (DEWHA 2008), and the last well documented 'extinctions' are generally considered to be the gastric brooding frogs in the 1980's. We anticipate new evidence from the Senate Committee, possibly documented through the National Land and Water Resources Audit's Terrestrial Biodiversity Assessment (due 'within weeks', NLWRA pers. comm.), which may provide some quantitative evidence of the 'continuing decline and extinction' of our native plants and animals (obviously we hope this is not the case, but do hope for some objective quantification of the scale of the problem). Similar national assessments have been limited in the past as they have relied on judgements from conservation agency staff, rather than scientifically quantified patterns of changes in distributions and abundance.

Any potential species loss is clearly a significant environmental and social concern. However, the terms of reference claim that a 'significant proportion' of flora or fauna are 'declining [to] extinction' is simply not supported by the readily available data. The EPBC Act has approximately 1,800 threatened or extinct species of flora and fauna, and based on the criteria for listing, some of these may simply be rare, and not declining. Based on DEWHA's (1994) estimates of 23,000 flora, 2000 vertebrate, and 225,000 invertebrate species, the proportions of at-risk species are: 0.7% if invertebrates are included, or 7.2% if they are excluded (DEWHA 1994). If we use the other estimate of 600,000 species on the DEWHA website, the 'significant proportion' reduces to 0.3% of our natural inventory.

Clearly these are gross figures, which undervalue the importance of endemism, but provide some important context and consideration of the alarmist approach, which assumes that the 'ongoing extinction crisis' notion should not be tested. There is a need for better quantitative data to objectively and scientifically communicate the nature of the problem, rather than relying on opinion-based feedback (e.g. see the 2002 Terrestrial Biodiversity Audit).

The scope of the EPBC Act is to determine the conditions under which projects can proceed, whilst protecting matters of national environmental significance (MNES). Whilst the Committee's terms of reference are framed with the assumption that species are continuing to decline to the point of extinction, there is the risk that the application and operation of the Act will not be assessed objectively. The focus of the review should be on the operation of the Act, as the title of the inquiry suggests, viewed objectively. Any relationship between the Act's operation and changes in the distribution and abundance of MNES need to be considered based on the best available scientific information, with a critical examination and subsequent understanding of the limitations and gaps in that scientific information.

### *The Minerals Industry is a Significant Stakeholder in the Operation of the EPBC Act*

Although the immediate direct footprint of our operations is small, increasing from 0.02% (DAFF 2006) to 0.2%<sup>1</sup> of the landscape in the last decade, the impacts of our operations in the landscape can be locally significant, not well understood, and easily attract attention from other landscape managers. Despite this low footprint, the Australian minerals industry generates approximately 8% of national GDP, compared, for example, to 3% GDP from agriculture, which uses approximately 50% of the landscape.

Because the local impacts of an operation are obvious in the landscape, the land use is temporary [with leases to be transferred back to the government], and poor environmental performance had historically resulted in legacy sites, the industry has now had several decades of tight regulation regarding environmental performance, including 'natural resource management' on the land it manages.

In several areas of natural resource management, this has led to the investment in research, and development of leading practice, upon which many current activities are based. For example, the minerals industry has led the development of technologies for rehabilitation, including on-ground activities and frameworks for rehabilitation planning, monitoring and reporting. Other examples include the development of leading practice for stakeholder engagement, impact assessment and site water management. Of course, these initiatives have been undertaken with other partners, including regulatory authorities, academic institutions and other landholders.

According to annual departmental reports on the operation of the Act, the minerals industry is consistently one of the major stakeholders in the implementation of Act, despite our very low environmental footprint, and very high investment in remediation of those impacts. Key areas that the industry seeks to highlight to the Committee include:

- assessing performance of the EPBC Act;
- improving efficiency of the existing process;
- resources for the Act's implementation; and
- emerging issues in the implementation and operation of the EPBC Act; including:
  - monitoring, reporting and compliance concerns;
  - Section 78 reviews;
  - development of an EPBC Act offsets policy; and
  - lack of strategic alignment of EPBC Act requirements and other government natural resource and conservation management programs.

These issues are interrelated, and mostly correspond to items 2a), 2b) and 2d) of the Committee's terms of reference.

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<sup>1</sup>latest BRS compilation of ACLUMP (Australian Collaborative Land Use Mapping Programme) Catchment Scale Land Use data

## Discussion and Comments for Consideration by the Senate Committee

### *Assessing Performance of the EPBC Act*

The concern raised above regarding the alarmist nature of the Committee's framework for the inquiry, is directly related to the successful prosecution of the subsequent terms of reference, particularly via assessing the success of the operation of the EPBC Act. The Objects of the Act are to [amongst other things]:

- provide for the protection of...matters of national environmental significance (MNES);
- promote ecologically sustainable development through the conservation and use of natural resources; and
- promote the conservation of biodiversity.

After nearly 10 years of operation, it is very difficult to assess whether the Act has been successful in achieving these objectives, since the performance monitoring is based on 'volume-of-process' rather than 'outcomes'. Routine annual reports from the Department responsible for administering the Act focus on the number of referrals, number of assessments, number of recovery plans and number of listed entities, without quantifying whether the entities for which we generate this documentation are recovering, stable, or continue to decline (i.e. whether the Act is working).

'Objectives of legislation should be clearly specified in terms of desired environmental outcomes, so that regulations and decisions link back to these objectives and performance of the regimes can be monitored and assessed' (Productivity Commission 2004). Additionally, implementation of the Act is requiring industry to deliver outcomes (see for example the draft offsets policy), so it is appropriate that the legislation itself is monitored based on outcomes.

It is concerning that the number of referrals is a key performance measure, and should be considered to increase for the Act to be successful (ANAO 2007). As companies are repeatedly subjected to the EPBC Act process, they are better accustomed at determining whether a referral should be made or not, and, as per the leading-practice hierarchy for environmental management, would design projects to first avoid impacts on MNES, therefore also reducing the likelihood of referrals.

As a major investor in the EPBC Act project assessment and approvals process, spending millions of dollars annually on documentation, the minerals industry is concerned that there is no evidence to demonstrate that the protected matters, their populations and distributions, are now more secure. Just as the ANAO (2008) recommended better outcomes monitoring for natural resource management [and conservation] incentive programs, so to should there be better outcomes-focussed monitoring for regulatory instruments. In their 2007 comments on recovery plans, the ANAO recommended measuring the progress of species against temporal goals, this notion should be developed to assess the overall utility and efficiency of the Act.

We also remain concerned that the volume of effort and documentation developed to assess projects through the EPBC Act, is not actually targeted at the drivers of landscape degradation. Rather, we are focussing on assessing impacts of projects that are implemented using leading-practice environmental management and rehabilitation measures (at least for the minerals industry), whilst that investment (of industry and government capacity and resources) could be better placed reversing the decline, largely caused by historical land-clearing and the introduction of exotic species (SoE 2002).

Further, the Act has created a 'documentation wave'. Companies now generate referrals that are of a similar scale to impact assessment documentation, to ensure that their risk of compliance is passed to the Commonwealth, and demonstrate that all possible activities have been undertaken to minimise impacts on MNES, and thereby reducing the ongoing role of the Commonwealth Government. The complexity and volume of documentation being handled by the Commonwealth, has been cited as a reason for declining performance in timeliness (ANAO 2007). Whilst the Act's implementation success is measured based on the volume of documentation generated, and assuming that more is better, the actual volume generated will be encouraged to rise, generating ongoing implementation capacity constraints.

The previous Senate Committee analysis, based on amendments to the Act, noted:

- 'the Department considered that the proposed amendments would facilitate a shift in the Australian Government's focus from ad-hoc project-by-project approvals to a focus on a more strategic framework'

- [the proposed amendments] 'will improve environmental protection by focusing more on outcomes than process while maintaining our strong commitment to protecting Australia's unique and iconic natural, cultural and Indigenous heritage'

Based on our experience, these findings from the previous Senate Committee review which are appropriate as objectives for the Act's implementation, are yet to be fully realised.

### *Improving Efficiency of the Existing Process*

To improve performance, and implementation of the Act in the short to medium-terms, based on the minerals industry experience, through reducing the number of unnecessary referrals (ANAO 2007) and impact assessment material that is not focussed on the drivers of degradation, the MCA recommends:

- providing better guidance on the definition of an 'action', specifically regarding a project's upstream and downstream scope for assessment;
- providing better guidance on the definition of an 'action', specifically regarding where to 'draw the line' on enabled impacts and requirements for supplementary assessments of enabled impacts, when they are included in a previous assessment;
- providing a seconded officer, as per the National Farmers Federation model, to those industry's that actually 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;
- using a risk based approach to align the types of actions that will lead to impacts on MNES, rather than the current assumption that all actions will influence all MNES, until proven otherwise – there is now a decade of documentation to support refinement of the current 'shotgun' approach; and
- enabling the consideration of offsets in determining whether an impact is significant at the referral, and therefore for industry at the pre-referral, stage.

In the longer-term, the MCA considers that it should not be necessary for the Commonwealth to be involved in project approvals. Accordingly, the establishment and full implementation of bilateral agreements for assessments and approvals is fundamental and crucial to aligning the Commonwealth's capabilities with its mandate. Establishment and endorsement of regional planning instruments that meet EPBC Act protection requirements, whereby other jurisdictions subsequently review and regulate projects in line with the EPBC Act-approved instruments, would be a much more efficient model. Commonwealth activities could then also focus more appropriately on strategic investments and planning, and assessing outcomes through monitoring and auditing compliance.

### *Resources for the Act's Implementation*

In previous submissions to the Commonwealth Government, the MCA has advocated increased funding for the administration of the Act. The Act's responsibilities continue to expand as more entities are listed and more referrals are made. Resource limitations have previously been noted by the Department the ANAO and others, and will presumably be reiterated in other submissions to the Committee. The MCA seeks to reiterate these concerns with a recent example from one of our regional associates:

'Our experience has also been that the level of Federal interest has varied greatly, from no communication for extended periods, to intense discussions and interest, presumably depending on the resources available to manage compliance and outcomes. Some [mining companies] have had contact with at least 6 different people in relation to EPBC over the past 12 months, most have come and gone. There needs to be some effort put into building a relationship with designated regulators if we are to try and get some environmental benefit from this legislation.'

Clearly resource limitations within the Department lead to high staff turnover and inefficiencies. This places an increasing onus on industry to retain corporate knowledge about an EPBC Act process for a site, and repeatedly introduce operations and activities to new regulatory staff.

By striving to reduce regulatory overlap, moving the Commonwealth department away from project-by-project assessments, and into more strategic roles, these limitations can be addressed (without additional resources being required). The first stage of this process would be the full implementation of all existing assessment bilateral

agreements, resolution of the outstanding assessment agreements, and investing much greater effort into developing approvals bilateral agreements. In 1997, the Commonwealth and State Governments, through COAG, agreed to work towards establishing bilateral agreements. See Table 1 for an overview of the status of bilateral agreements. Eleven years after the COAG agreement, we are still striving for the shaping and development of approvals bilaterals, and the better implementation of assessment bilaterals.

**Table 1 Summary of bilateral agreements between the Commonwealth and jurisdictions**

Jurisdiction	Assessment Bilateral	Approvals Bilaterals
QLD	YES	0
NSW	YES	1
ACT	DRAFT	0
VIC	NO	0
SA	YES	0
NT	YES	0
WA	YES	0
TAS	YES	0

## *Emerging Issues in the Implementation and Operation of the EPBC Act*

### Monitoring, Reporting and Compliance Concerns

Feedback from MCA members indicates that the compliance requirements of an approval under the Act are applied in a strict, and thorough manner. There are however, reporting obligations for both the State and Federal requirements, with onerous and unnecessary overlap.

Obligations under the EPBC Act should be delegated to regulators at a State or regional level wherever possible. In most cases State or regional staff will be undertaking very similar monitoring and compliance functions, to meet State requirements, and are usually more familiar with the ecological intricacies of the system being managed. For example, in Victoria, there is a significant EPBC Act overlap with Victoria's Native Vegetation Framework (VNVF), and the experience is that State VNVF obligations are in practice merged with the EPBC Act obligations, when establishing offsets. In some cases, complying with EPBC requirements has been hindered due to Victorian regulatory processes associated with VNVF, and potentially vice-versa.

Our members have also requested further guidance around the documentation requirements for a 'certificate' for reporting compliance, and the use of electronic records as 'proof' for compliance audit purposes.

### Section 78 Reviews

Under Section 78 of the EPBC Act, the Minister can review decisions, where either 'substantial new information' or a 'substantial change in circumstances' arises. This is a necessary and important review mechanism. However, there are some concerns in the minerals industry that this process could be inappropriately used as a mechanism to support spurious claims by project detractors seeking to delay projects for reasons other than the protection of MNES.

Accordingly, the MCA considers that an independent process be established to:

- Determine whether a review is warranted, that is, the materiality of the 'substantial new information' or 'change in circumstances'; and
- Disallow 'new information' for which there is no reason that it could not have been presented during the stakeholder engagement and impact assessment process.

Additionally, the inclusion of sunset clauses should be considered, whereby the window to present 'new information' is defined. Any party planning to present new information should be required to communicate that to the proponent, and the Department, including its intended nature, at least 30 days before doing so (this would provide some equity in enabling a response to be developed by the proponent in the mandated 10 day period). The ecological information involved in these assessments is very complex, and requires significant time to capture, synthesise and report. Therefore, there needs to be some scrutiny over 'new information' and some more equitable opportunity for project proponents to respond.

### Development of the EPBC Act Offsets Policy

From the Office of Best Practice Regulation Website:

*Member countries of the Organisation for Economic Cooperation and Development (OECD) are embracing the notion of regulatory governance which involves the issues of transparency, accountability, efficiency, adaptability and coherence. Major tools identified by the OECD to improve the efficiency and effectiveness of regulation include:*

- *the use of regulatory impact analysis;*
- *the systematic consideration of alternatives;*
- *wide public consultation; and*
- *improved accountability arrangements in the review of existing regulations and the development of new ones.*

*Determining whether regulation meets the dual goals of 'effectiveness' and 'efficiency' requires a structured approach to policy development that systematically evaluates costs and benefits; including:*

- *the problem to be addressed and the related policy objective should be identified as first steps in the policy development process;*
- *the consideration of a range of options for achieving the objective (as well as a 'no action' or status quo option);*
- *an analysis of the likely economic, social and environmental consequences; and*
- *the policy development process should at least ensure that the benefits to the community of any regulation actually outweigh the costs, and give some assurance that the option chosen will yield the greatest net benefits.*

*Both the Australian Government and the Council of Australian Governments (COAG) have made a commitment to improve the mechanisms for consultation with business and supporting appropriate consultation with all relevant stakeholders.*

*Consultation ensures that both those affected by the regulation and the regulator have a good understanding of what the problem is, alternative options to solve the problem, possible administrative mechanisms, possible compliance mechanisms and associated benefits, costs and risks. Lack of consultation can lead to regulation that is inappropriate to the circumstances, costly to comply with and poorly adhered to.*

*Both the Australian Government and COAG have adopted seven principles of best practice consultation.*

*(Commonwealth of Australia 2008)*

The MCA considers that, to date, the development of the EPBC Act offsets policy has been far from best-practice policy development, especially from a consultation and stakeholder engagement process perspective.

An EPBC Act offsets policy is a significant policy instrument that will influence the minerals industry, akin to regulation in its scale of financial implications. For example, in 2007, a single operation in Western Australia was required to provide over \$7.3 million in an 'offsets package' for a range of activities that have traditionally been the role of government conservation and NRM organisations, including:

- funding for government conservation agency personnel;
- funding for regional conservation and other stakeholder non-government organisations (ongoing and establishment); and
- development of threatened entity recovery plans.

The minerals industry was not consulted on the development of the draft policy. This is despite being recognised as leaders in the development and application of rehabilitation and offset practices and theory, evidenced by:

- the international scientific journal *Restoration Ecology* recently devoting an entire issue (2007: 15 s4) to the initiatives of Alcoa in managing and rehabilitating Jarrah Forest in Western Australia;
- the Commonwealth Environment department documenting best practice environmental [and natural resource management] for the mining industry through the 1990's, which provided guidance for a variety of stakeholders;
- the 2006 State of the Environment report ('SoE 2006'; Beeton et al. 2006), which recognised:
  - ⇒ '...many environmental issues are addressed by industry and mining groups at a standard that exceeds that of public sector groups. In some instances, the corporate knowledge base is higher in the private sector than in the public sector. In the longer term, this will cause problems in environmental reporting unless the environmental reporting systems are adapted to include these sectors'; and
- in the single financial year 2000-2001 the minerals industry spent \$98 million on 'minesite rehabilitation' within 0.2% of the landscape (ABS 2002; not CPI indexed for comparison), roughly 10% of the total investment of NHT2 and NAP (AANO 2008), which was spread across several years and approximately 50-70% of the landscape.

Had the EPBC Act administrators engaged with industry in the development of the draft policy, as the Department routinely does on other issues (e.g. materials stewardship, National Pollutant Inventory), the draft policy would have been much further advanced and useful, providing a more meaningful public consultation period (see the MCA's submission on the draft policy at **Attachment 1**).

To date the MCA is unaware of the proposed further consultative mechanisms to support refinement of the policy. Further consultative mechanisms are anticipated, based on the guidelines for policy development to which the Commonwealth has committed. Given the scale of investments made by industry in 'offsets packages' (the example cited above, from one operation, is equivalent to the funding provided to the ACT Government through the NHT2 process), the importance of implementing best-practice regulation development in this policy arena should not be underestimated.

There are serious outstanding concerns that the minerals industry has in the development and application of offsets through the EPBC Act, which require further consultation and refinement, to ensure the maximum benefits from our limited resources. Key concerns include:

- the expectation that offsets are now standard, rather than their application as a final measure that is required for an impact that is not considered acceptable by any other means;
- taking voluntary leading-practice initiatives in the use of offsets, by companies trying to differentiate themselves from their peers through excellent social and environmental performance, and adopting them as a regulatory baseline (this becomes a dis-incentive for industry to improve voluntarily);
- non contemporaneous offset decisions from different jurisdictions, resulting in inflated offset requirements without any scientific foundation for the arrangements (for illustration: a State jurisdiction will 'negotiate an offset requirement' and the Commonwealth will simply 'multiply it by 2', without consideration of the science underpinning the original decision and the corresponding role or value of the multiplier);
- inconsistencies developing between Commonwealth and State offset principles and practices;
- the need for better planning and location of offsets in the landscape, in an integrated whole-of-government approach;
- the lack of consideration of offsets at the referral stage, which seems incongruous with their philosophical application (*raison d'être*);
- the incorporation of 'risk of failure' of management actions in offset ratios, for an industry that already pays for the same risk for rehabilitation success through financial surety and lease relinquishment requirements; and
- requirements for industry to have to demonstrate 'real conservation outcomes' from their offset packages, when this is not required of either the Act's implementation, or other landscape managers.

The MCA looks forward to contributing further to the refinement and use of an offsets policy under the EPBC Act. Additionally, the role of an offsets policy and offsets themselves, in the implementation of the Act, should be considered by the upcoming review, or this Inquiry.

#### Lack of Strategic Alignment of EPBC Act Requirements and Other Government Natural Resource and Conservation Management Programs

Project approvals for minerals operations, and the application and use of offsets or other mechanisms to support environmental management, are influenced by a variety of landscape managers, often within and across the same physical areas, including:

- local government (e.g. statutory 'local environment plans', particularly at the rural – urban interface);
- State government agencies (e.g. utilities – 'infrastructure planning', conservation agencies – 'biodiversity strategies', water planning authorities – 'statutory water plans');
- regional NRM organisations (e.g. 'catchment action plans'); and
- Commonwealth, State and local government development approval processes (e.g. which additionally determine where NRM 'offset' resources are placed in the landscape, with or without strategic planning support).

Recently the Commonwealth and WA State Governments have proclaimed 'strategic assessments' under the EPBC Act as another vehicle for regional planning. The fragmented approach may continue without due consideration of its efficiency. There are currently two separate Senate Inquiries, investigating 'conservation and natural resource

management' and the operation of the 'Environmental Protection and Biodiversity Conservation Act'. Both Inquiries should recommend an integrated natural resource management approach from the top.

These traditionally duplicative, part overlapping, and often conflicting land use planning processes can result in considerable land use conflicts or inefficiencies, including:

- Wasted resources in duplicated planning processes, and as noted in Seymour et al. (2007), burn-out of heavily engaged stakeholders;
- A misalignment of land capability, its use and subsequent water resource requirements;
- Lack of collation and use of the vast amounts of ecological data collected by industry;
- Potential limitations on future land uses based on the location of offset arrangements or conservation agreements, that do not consider future land use options;
- A lack of understanding amongst stakeholders regarding land use planning, access arrangements, and future land use potential;
- Ad-hoc and cumulative impacts of proposals not being well assessed (across spatial and temporal scales); and
- A fragmented approach to stakeholder engagement, resulting in stakeholders being unaware of the implications of some land use planning decisions on their future social and economic opportunities.

The MCA considers that it may be opportunistic for the two current Senate Committee inquiries to consider whether there is a better 'whole-of-government', and 'whole-of-user', landscape planning model that can meet the EPBC Act, natural resource management and conservation planning objectives of the nation.

The MCA's concern here, is that industry's substantial contribution to landscape management, including operational and non-operational land investments in rehabilitation, and investments in project approvals processes, is often not being implemented as part of a long-term strategic landscape planning and management process, and therefore, may not lead to the best outcome possible for society.

## Summary Recommendations

### Regarding the terms of reference:

The MCA recommends:

- The operation of the Act be assessed within a framework of the best available scientific information regarding the changes in species distributions and abundances, rather than the assumption that there is an ongoing 'decline and extinction crisis'.
- In the absence of the such information, the Senate Committee recommend it be obtained, so that resources can be allocated based on appropriate information.

### Regarding the assessment of the Act's performance:

The MCA recommends:

- The Senate Committee note the focus of the Act's performance-monitoring and -reporting is targeted at process, and there is actually little evidence to determine its effectiveness on biodiversity outcomes.
- The Senate Committee consider that an increase in process is not necessarily an improvement in performance in meeting the Act's objectives.
- The Senate Committee consider whether the ongoing investment from Government and Industry, in the resource-intensive project-by-project approach, is the best value-for-money way to reach the Act's objectives.

### Regarding efficiency improvements for the current administration of the Act:

The MCA recommends:

- The development of better guidance on the definition of an 'action', specifically regarding a project's upstream and downstream scope for assessment.
- The development of better guidance on the definition of an 'action', specifically regarding where to 'draw the line' on enabled impacts and requirements for supplementary assessments of enabled impacts, when they are included in a previous assessment.
- Provision of a seconded officer to those industry's 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.
- The development of better guidance to align the types of actions that will lead to impacts on MNES, using a risk-based approach, rather than requiring all impacts be assessed for all protected species within the locality.
- Enabling the consideration of offsets in determining whether an impact is significant at the referral, and therefore for industry at the pre-referral, stage.
- Resourcing for the Act's implementation be better targeted through implementation of efficiency measures and / or targeting activities to better-meet the Act's objectives, or in lieu of that approach, be expanded.

### Regarding potential improvements for the Act's administration in the medium-long term:

The MCA recommends:

- The removal of the Commonwealth from project-by-project approvals processes, via the establishment of 'EPBC Act-compliant' guidelines and frameworks to support nationally consistent approvals processes implemented by State and regional jurisdictions.
- The establishment and full implementation of bilateral agreements for assessments and approvals.
- Establishment and endorsement of regional planning instruments that meet EPBC Act objectives and protection requirements under bilateral approvals, whereby other jurisdictions then subsequently assess and regulate projects.
- Commonwealth activities being focussed on strategic investments, planning support for jurisdictional processes, and assessing outcomes of the Act through monitoring MNES and auditing project and process compliance.

### Regarding several emerging issues:

The MCA recommends:

- Better alignment of regional natural resource management planning, and the operation of the Act, to minimise duplicate planning processes, and land use conflicts, whilst maximising industry investment in the process and landscape (use of offsets, data collected etc.).
- The two Senate Committees currently assessing landscape management and conservation planning processes consider a joint report or joint set of recommendations.
- The Senate Committee note that there are emerging concerns that Section 78 of the Act may be used inappropriately, and that there are opportunities to improve the review process, through the inclusion of robust and independent mechanisms;
- The Senate Committee note that (1) the development of the EPBC Act offsets policy to date cannot be considered in-line with the Commonwealth commitment to best-practice regulation development, and (2) that there are significant financial ramifications of the policy's implementation for the minerals industry.
- The Senate Committee note that there are numerous outstanding concerns regarding the development and application of the EPBC Act offsets policy, including but not limited to:
  - The expectation that offsets are now standard, rather than their application as a final measure that is required for an impact that is not considered acceptable by any other means;
  - Taking voluntary leading-practice initiatives in the use of offsets, by companies trying to differentiate themselves from their peers through excellent social and environmental performance, and adopting them as a regulatory baseline (this, perversely, becomes a disincentive for industry to improve voluntarily);
  - Non contemporaneous offset decisions from different jurisdictions, resulting in inflated offset requirements without any scientific foundation for the arrangements;
  - State and Commonwealth offset policies, if they are both required, having their principles aligned;
  - The need for better planning and location of offsets in the landscape, in an integrated whole-of-government approach;
  - The lack of consideration of offsets at the referral stage, which seems incongruous with their philosophical application (raison d'être);
  - The incorporation of 'risk of failure' of management actions in offset ratios, for an industry that already pays for the same risk for rehabilitation activities through financial surety; and
  - Requirements for industry to have to demonstrate 'real conservation outcomes' from their offset packages, when this is not required of either the Act's implementation, or other landscape managers.

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COMMONWEALTH OF AUSTRALIA

# Proof Committee Hansard

## SENATE

STANDING COMMITTEE ON ENVIRONMENT,  
COMMUNICATIONS AND THE ARTS

**Reference: The operation of the Environment Protection and Biodiversity Conservation Act 1999**

TUESDAY, 9 DECEMBER 2008

CANBERRA

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**SENATE STANDING COMMITTEE ON  
ENVIRONMENT, COMMUNICATIONS AND THE ARTS**

**Tuesday, 9 December 2008**

**Members:** Senator McEwen (*Chair*), Senators Birmingham, Boswell, Ludlam, Lundy, Pratt, Troeth and Wortley

**Substitute members:** Senator Nash for Senator Boswell

**Participating members:** Senators Abetz, Adams, Arbib, Barnett, Bernardi, Bilyk, Mark Bishop, Boswell, Boyce, Brandis, Bob Brown, Carol Brown, Bushby, Cameron, Cash, Colbeck, Jacinta Collins, Coonan, Cormann, Crossin, Eggleston, Ellison, Farrell, Feeney, Fielding, Fierravanti-Wells, Fifield, Fisher, Forshaw, Furner, Hanson-Young, Heffernan, Hogg, Humphries, Hurley, Hutchins, Johnston, Joyce, Kroger, Ian Macdonald, McGauran, McLucas, Marshall, Mason, Milne, Minchin, Moore, Nash, O'Brien, Payne, Polley, Ronaldson, Ryan, Scullion, Siewert, Stephens, Sterle, Troeth, Trood and Xenophon

**Senators in attendance:** Senator McEwen, Senator Nash, Senator Pratt, Senator Siewert, Senator Wortley

**Terms of reference for the inquiry:**

To inquire into and report on:

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

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

**WITNESSES**

<b>ASHE, Mr John Francis, Fellow, Environment Institute of Australia and New Zealand .....</b>	<b>50</b>
<b>BAILEY, Mr Terry, Assistant Secretary, Natural and Indigenous Heritage Branch, Department of the Environment, Water, Heritage and the Arts.....</b>	<b>63</b>
<b>BURNETT, Mr Peter, First Assistant Secretary, Approvals and Wildlife Division, Department of the Environment, Water, Heritage and the Arts.....</b>	<b>63</b>
<b>CUMMINGS, Dr Jason, Assistant Director, Environmental Policy, Minerals Council of Australia.....</b>	<b>2</b>
<b>FARGHER, Mr Ben, Chief Executive Officer, National Farmers Federation.....</b>	<b>15</b>
<b>FLANIGAN, Mr Mark, Assistant Secretary, Strategic Approvals and Legislation Branch, Approvals and Wildlife Division, Department of the Environment, Water, Heritage and the Arts .....</b>	<b>63</b>
<b>GOONREY, Ms Christine, President, National Parks Australia Council .....</b>	<b>27</b>
<b>HOWLETT, Ms Claire, Acting Assistant Secretary, Marine Biodiversity Policy Branch, Department of the Environment, Water, Heritage and the Arts.....</b>	<b>63</b>
<b>KERR, Ms Deborah, Natural Resource Manager, National Farmers Federation.....</b>	<b>15</b>
<b>McNEE, Mr Andrew, Assistant Secretary, Marine Initiatives Branch, Department of the Environment, Water, Heritage and the Arts .....</b>	<b>63</b>
<b>MELHAM, Mr Christopher Maurice, Chief Executive Officer, Commonwealth Fisheries Association.....</b>	<b>40</b>
<b>MOORE, Mr Jeff, Executive Member, Commonwealth Fisheries Association .....</b>	<b>40</b>
<b>RANKIN, Ms Alex, First Assistant Secretary, Land and Coast Division, Department of the Environment, Water, Heritage and the Arts .....</b>	<b>63</b>
<b>STUTSEL, Ms Melanie, Director, Environment and Social Policy, Minerals Council of Australia .....</b>	<b>2</b>
<b>TRINDER, Mr Colin, Director, Environmental Impact Management, Department of Defence.....</b>	<b>56</b>
<b>WARNE-SMITH, Mr Tom, Researcher, National Parks Australia Council .....</b>	<b>27</b>
<b>WHITE, Mr Derek, Acting Assistant Secretary, Environmental Water and Natural Resources Branch, Department of the Environment, Water, Heritage and the Arts .....</b>	<b>63</b>

**Committee met at 9.48 am**

**CHAIR (Senator McEwen)**—Good morning everybody. I open this public hearing of the Senate Standing Committee on the Environment, Communications and the Arts in relation to its inquiry into the operation of the Environment Protection and Biodiversity Conservation Act 1999. The committee's proceedings today will follow the program as circulated. These are public proceedings. The committee may also agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera. I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. If a witness objects to answering a question, the witness should state the ground upon which the objection is to be taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may of course also be made at any other time. With those formalities over, I welcome everyone here today.

[9.49 am]

**CUMMINGS, Dr Jason, Assistant Director, Environmental Policy, Minerals Council of Australia**

**STUTSEL, Ms Melanie, Director, Environment and Social Policy, Minerals Council of Australia**

**CHAIR**—I welcome Ms Melanie Stutsel and Dr Jason Cummings from the Minerals Council of Australia. Thank you both for coming along to talk to us today. The committee has received your submission, submission No. 30. Do you wish to make any amendments or alterations to the submission?

**Ms Stutsel**—No.

**CHAIR**—I invite either or both of you to make a brief opening statement before we go to questions.

**Ms Stutsel**—The Minerals Council of Australia welcomes the opportunity to provide comment on the review of the EPBC Act. Our members represent 85 per cent of minerals production in Australia and have a longstanding commitment to sustainable development, including the stewardship of natural resources. At the outset we wish to highlight that our organisation does not seek a diminution of measures to protect the environment. On the contrary, our members have worked hard over the last decade not only to meet the act's requirements but also to go beyond the regulatory requirements for biodiversity, protection and management.

Regarding our intersection with the act, in each year of the act's operations the mining industry has required the most or the second highest number of approvals, despite having a footprint in the landscape of less than point three per cent of the total landmass. Referrals made by the mining industry are twice as likely as referrals from all other sectors to be considered a controlled action requiring approval. Again, that is despite minerals industry projects being heavily regulated through other jurisdictional processes, implemented with leading practice frameworks for environmental management and occurring in a very small fraction of the landscape.

The industry has a long history of environmental regulation, and general experience with the implementation of the act—one of many under which the industry is regulated—can best be summed up by our sector as frustrating. Biodiversity conservation, its policy and responsibilities in Australia currently have at least six layers—the Commonwealth, interjurisdictional bodies, state government agencies, regional NRM bodies, local governments and, finally, the landowner. These arrangements overlap and intersect in different ways, depending on land tenure and which aspect of biodiversity is of interest. We consider that the landscape is being managed at all levels as a conglomerate of silos. The EPBC Act is seen as yet another layer of the regulatory onion, providing little additional value in the protection of biodiversity above what is already provided through other jurisdictional requirements. The administration of the act, from referrals through to compliance monitoring, varies in intensity and approach over time related to changes in

personnel, their interests and capabilities at all levels and this provides uncertainty for business. Again, that uncertainty comes with little demonstrable added biodiversity value on the ground.

The MCA would respectfully request that the Senate take a long-term consideration of its review of the Commonwealth's role in biodiversity conservation and the operation of the act. This applies not only to this committee but also to the parallel inquiry of the Senate Standing Committee on Rural and Regional Affairs and Transport.

In consideration of the commitment of COAG and the Commonwealth to reducing regulatory burdens and implementing leading practice, policy and regulation we consider that the Senate could sharply consider the most appropriate role for the Commonwealth in this multilayered approach, given its mandate capability, capacity and reach. Accordingly, the MCA considers the following key areas of consideration and adjustment, which would result in better value for money investment in the act's administration from the Commonwealth and which would lead to better biodiversity outcomes at a lower overall societal cost.

Firstly, we would support investment in monitoring and reporting of EPBC listed entities. We cannot manage what we cannot count and the ultimate goal should be to remove these entities from the list, which we cannot do without better data. Secondly, we consider that the majority of resources invested, both by government and industry, through the operation of the act are currently targeted at projects being undertaken, utilising leading practice, mitigation and management techniques, in a very small proportion of the landscape, whilst the degradation pressures that lead to the establishment of the act are largely not captured by this project by project approach.

We therefore consider that a more appropriate role for the Commonwealth would be in strategic bioregional planning, pre-emptive of development pressure and across larger time frames. Individual projects would then be approved by states and territories, which would have responsibility to ensure that the project fits within the remit of the bioregional plan. The Commonwealth's role would then be to assess, list, monitor and report on ecological entities of national significance, to develop regional plans that cross-cut natural resource portfolios—for example, biodiversity, water, minerals and socioeconomic values—and audit states and developers on the subsequent implementation and compliance with these plans and approval conditions.

This would then lead to the most efficient role for the Commonwealth in securing biodiversity values of national significance, using tools and capacities that align with its responsibilities. It would also efficiently reconcile the Commonwealth's commitments with existing regulatory arrangements in other jurisdictions. Our industry would strongly support such a realignment as we consider it would fill the obvious gaps in strategic natural resource management planning which currently exist. It would provide businesses with longer term certainty about areas appropriate for investment, not without any risk but with reduced risk. It would reduce regulatory overlap and, importantly, it would provide a more consistent and appropriate service delivery from the Commonwealth in biodiversity protection.

**CHAIR**—Can I just clarify: the thrust of your argument there was that the MCA does not believe that the Commonwealth should have responsibility for the primary legislation. Are you

saying that that responsibility should lie with the states or the local authorities or that the industry should be self-regulated?

**Ms Stutsel**—We certainly think that the Commonwealth should have primary responsibility for the framing of the legislation, identifying matters of national environmental significance and ensuring that there are appropriate bilateral assessment and approval processes in place with the states to remove the duplication that is occurring between those jurisdictional layers. We as an industry strongly support the existence of regulation. We consider that that provides a minimum for underperformance, but we are always looking to go beyond that in terms of continuous improvement to better align with societal expectations.

**CHAIR**—Who do you think should have the call on whether or not something goes ahead?

**Ms Stutsel**—If the Commonwealth actually sets the regulatory framework, which is the decision-making process, then the states should be able to use that framework to make a determination about whether a project is in compliance with it.

**Senator NASH**—In your opening remarks you referred to the management of landscape as a conglomerate of silos. Could you expand a bit on that for the committee?

**Ms Stutsel**—Currently, we have a number of disparate processes that are occurring across the landscape. When mining companies are going for project approval they are looking at a small area of land and potentially going through six layers of processes to get access to that portion of land. A neighbouring operation may be occurring that is perhaps a non-mining project. Currently, there is no process for actually looking at what the cumulative impact on the landscape is of those two disparate processes. There are two layers of silos—the silos of the individual projects themselves, often occurring in parallel with each other but not being considered as a combined entity and there are also a number of silos at the different layers of biodiversity, management and protection—

**Senator NASH**—How do you see that being fixed? What would the MCA like to see in place to address it?

**Ms Stutsel**—Perhaps a streamlining arrangement where you had the Commonwealth setting the highest level objectives, which obviously align with our international conventions and agreements and matters of national environmental significance, and processes by which the roles of the states were clearly defined in undertaking assessment and approvals on the Commonwealth's behalf so that the states could then apply not only the state environmental requirements but also the Commonwealth's concurrently. That would certainly give the industry certainty in terms of streamlining and efficiency but it would also mean that, once you have gone through that regulatory process, there are no additional hurdles you have to meet—you have dealt with all of them concurrently.

**Senator NASH**—At the one time. You mentioned previously six layers of process to get through. Can you run through those for us?

**Dr Cummings**—The six layers that Melanie referred to are the layers related to biodiversity management in the landscape. For a minerals operation to require approval to proceed, from a

biodiversity perspective we would probably need to tick off on three to four of those layers. That would be the local government level, the state jurisdictional planning processes and the Commonwealth EPBC Act approvals. There may in fact be other interjurisdictional requirements—for example, in the Murray-Darling Basin where we have to demonstrate compliance with broader regional plans. In parallel or sitting next to or intertwined with that are other biodiversity planning processes, such as the previously NHT funded regional planning for catchment management authorities or regional bodies which are out there planning and implementing biodiversity conservation under their plans. But currently there is no integration between those plans and the activities of the industry not only in terms of our impacts but also in terms of our offsets. So the positive things that we do to remediate our impacts on the landscape are not implemented in a broader strategic framework. That is where we see an outstanding need and an excellent role for the Commonwealth under the act, as it already stands, for strategic regional planning for biodiversity.

**Senator NASH**—You referred in your submission to reducing the overlap of the monitoring and reporting and everything else. Given that there are so many players in all of these layers, do you see it as a Commonwealth role to sort that out and streamline it?

**Dr Cummings**—I think so. That would be advantageous. If the Commonwealth showed leadership in that arena and promoted a strategic approach across the landscape that would be very valuable.

**Senator NASH**—Do you have a view on the states' view of the Commonwealth trying to engender a more streamlined approach?

**Dr Cummings**—The one strategic assessment that has been undertaken on a regional scale in Western Australia was supported by the WA Minister for Environment, at least in the media. There was support, I think, for the resources that the Commonwealth brought to bear for that process. That was the first of its kind. We are still waiting for the details of that to wash up.

**Senator NASH**—Another thing I think you mentioned in your remarks was to move away from the project by project approach to that of a more bioregional planning approach. Can you just take us through the project by project approach, where you think that is inappropriate and why and how you would move away from that and put something else in its place?

**Ms Stutsel**—The matters of national environmental significance are broadly defined, so any project which impacts on those are obviously going through the EPBC Act assessment process. Where you have multiple projects having impact on the same NES matter they are being treated as disparate entities and disparate processes for assessment approval, recognising that the more projects you have the greater the cumulative impact there is on that NES matter. Rather than actually looking at projects over time coming into an area and having different scales of impact, a better approach would be to look at areas in the landscape, assess those areas for their natural ecological values and ascertain whether they provide socioeconomic opportunities, what cultural heritage values they may have, what the overlay of native title might be over the area, the various industrial uses that land might be used for, what its mineralogy is and then make an assessment on what the most appropriate activity is for that portion of the landscape.

By taking that approach we would remove some of the requirement for the individual project by project assessments to take place because you would determine from the outset whether an area was broadly suitable for, say, minerals development or was totally unsuitable. So, rather than ending up with six projects applying to operate in an area and all being told after doing lengthy environmental assessment processes that the area was not suitable for, say, minerals development, all companies would know that from the outset.

The example which Jason referred to was really about looking at the location for an oil and gas hub. It was an assessment that was undertaken to establish the areas where you could physically locate a large number of various oil and gas operations—trains co-located with each other—which sites were economically feasible, which sites were environmentally feasible and which sites would be acceptable to traditional owners? Then you get to an area in the landscape where you say, ‘This is the most desirable site on which to encourage that industrial activity,’ because we have removed the impacts it would have on all these other values that would mean that the impact is considered unacceptable by various stakeholder groups. That gives incredible certainty to industry to know that that is an area where the likelihood of being able to undertake that investment is highest.

**Senator NASH**—I suppose that would, quite rightly, work where you have an area where you are looking to place something like an oil and gas hub, but if there is a specific area that perhaps a company is looking at mining that then becomes a specified area. Would you then say that through the process it is more broadly looked at for things for which it would be suitable, say, things other than mining, at that time? I am just trying to get my head around whether, when you go into a specific area, there should be an expectation that it is more broadly assessed at the time for other activities, as well as mining, in the event that they might want to utilise that area?

**Ms Stutsel**—At the time of the mining industry assessment or under a strategic approach?

**Senator NASH**—At the time of the mining assessment. There seems to be two different types of things you are looking at, say, an oil and gas hub—and asking, ‘Where should we put that?’—or at a specific request to go into a specific area. I am just trying to understand how it would work if there is a specific area and a project that is trying to get assessment clearance.

**Ms Stutsel**—In terms of the other values that might co-exist with mining or occur in lieu of mining in an area, most of that is usually picked up through state regulatory processes where you have to look at what the socioeconomic impact or benefit of the project is relative to other land uses in the area. Regarding the application of a strategic regional assessment approach for the minerals industry there are obviously areas where it would not be easily transferable, where you are talking about a single project. For example, that might be mineral sands operations, which tend to be located differently from other industry. If you are looking at an area like the Pilbara, for example, where there are significant mineralisation and iron ore resources, rather than each project in an area where there are already exploration licences granted having to go through separate assessment processes, you might assess the region as a whole and determine that there are pockets of the landscape which are appropriate for development and other pockets which are not. People could apply to achieve project licences within that framework.

**Senator NASH**—You also mentioned in your opening remarks changes in personnel. I am assuming you are referring to when staff move on and you lose that corporate knowledge that

they may have built up. Is that what you meant? Can you give us an outline of the impact on, say, the MCA of changes in staffing?

**Ms Stutsel**—I would start by saying there has absolutely been a high level of churn within the department in terms of the officers who have been responsible for EPBC Act assessments.

**Senator NASH**—Why do you think that is?

**Ms Stutsel**—I think historically that area has been under-resourced both in the financial capacity to undertake the role they have been given and in providing them with the ongoing training and capacity building to have a broader context for what the nature of these industrial activities are and what their impacts on the landscape are. We have found, historically, that taking EPBC Act officers out to operating mine sites to give them the opportunity to ask whatever questions they like about what a mine looks like and what mining processes are—

**Senator NASH**—Do you not often have departmental people actually going out on site to try to get an understanding of what is going on?

**Ms Stutsel**—No. And also, given that they are largely looking at a project on paper, there is nothing physically for them to look at at that particular site. It is really about finding alternative sites that are of a similar nature or that have a similar scale of impact for them to get that visual context to then undertake their desktop assessment.

One of the other things our companies have raised with us is the difference in the scale of the resources that are invested by the industry in undertaking the environmental impact assessment work versus the resources that are located in the department. I am not sure if Dr Cummings wants to add to that.

**Dr Cummings**—I think part of the problem is that the scale of the documentation is ever increasing in terms of assessing our impacts and that leads to greater expectations within the department of their capability and capacity—and the interaction of those two—to assess and contribute to that process. It is pure speculation, but I would say that would be a frustrating position to be in in the department. From an industry perspective the other problem with the turnover is that it leads to variability in the application of the act and the conditions under which the development can proceed—the monitoring requirements, the reporting requirements. The expectations from the department change with the officers responsible for managing that particular project through time.

**Senator NASH**—So the interpretation may change?

**Dr Cummings**—Yes, that is right. And the expectations of the officer for what the company should be providing back to the department change and that makes it very difficult to budget and to align with other ongoing initiatives at the operation.

**Senator NASH**—A few of the submissions called for more resourcing of the department. From your perspective would that be purely extra personnel or extra funding to do their job—how would you define the extra resourcing that you think is required?

**Dr Cummings**—I think, in the bigger picture, if we were able to slowly move the Commonwealth away from project-by-project approvals and into a more strategic regional biodiversity planning role, under the existing act—the mechanism is already there within the act—there would not need to be more resources provided. It would be a realignment of the existing resources.

**Senator NASH**—Is there any risk in moving away from the more specific project-by-project approach?

**Dr Cummings**—No, if there are bilateral approvals and assessments agreed on and signed off, as was the intention, then I do not see any risk.

**Senator WORTLEY**—In your submission you are critical of the terms of reference and you say that there is little evidence of decline or extinction going on. In fact you say:

Australia has had the highest documented extinction rate of vertebrates in the world, but there is scant evidence that it is 'continuing' or 'worsening'.

Another comment is:

If we chose to measure and communicate the rate of documented extinctions across the last decade [or two], it could well be 'zero'.

Another point you make in the submission is:

The fact that there is not clear-cut evidence that the 'decline and extinction' is continuing or worsening ...

I was just wondering whether or not you were aware of the 2001 and 1006 state of the environment reports?

**Ms Stutsel**—Yes, we are, Senator.

**Dr Cummings**—We reviewed that material and, coming from a scientific background, we were seeking quantification of those claims. My understanding, based on reviewing that material, and the other material provided on the departmental website is that in fact there has not been an extinction, that we are aware of, for approximately the last two decades. Most of the extinctions in Australia happened in the early part of the last century as a result of land clearing and the introduction of feral animals and the synergistic effects of those two drivers. More importantly, this goes to monitoring and assessing the performance of the act in terms of the entities that are listed, and getting some numbers around whether there are outcomes from the act's implementation related to improved security of those matters of national environmental significance or increasing vulnerability. So, if we are listing these matters of national environment significance there is a responsibility to monitor and report them so that we know whether our investments in the regulation process, and elsewhere in the landscape, are actually leading to improved outcomes.

**Senator WORTLEY**—Specifically relating to those reports, do you reject their contention that decline is continuing for many species and ecosystems for which data is available?

**Dr Cummings**—I certainly do not challenge the notion that populations in the landscape are changing. The distribution and abundance of species and communities will change through time. Certainly some will decline and some will increase.

**CHAIR**—Following on from Senator's Wortley's questions, a number of people in the hearings, yesterday in particular, said that there is a dearth of good data about species' extinction and potential for extinction, and that one of the things the Commonwealth should address is that issue of good data collection. Do you have a view about that?

**Dr Cummings**—Yes, we strongly support those comments from whomever they came, and at all levels in terms of fundamentally monitoring these matters of national environmental significance and reporting on them annually, and the way that links with the act's implementation. There is a dearth, as you have said rightly, of quality ecological information about these matters. So the precautionary approach—the risk-averse approach—is therefore to take the assumption of the worst-case scenario, and that is manifest upon us in terms of documentation requirements and impact assessment requirements through the administration of the act.

**Ms Stutsel**—And one of the issues that we have considered for some time now is that there is actually quite a body of scientific information that is collected as part of the EPBC Act assessments, and it is disappointing to see that that is not made publicly available to help inform and to grow the overall body of scientific literature more effectively throughout the country.

**CHAIR**—You made a point about resourcing issues in the Commonwealth department. If your preferred option, with the overarching Commonwealth principles and responsibility for implementation at the state level, was implemented do you think there would be adequate resources in the state jurisdictions to do what needs to be done?

**Dr Cummings**—My experience has been that, by and large, they are doing it anyhow, so the Commonwealth process is a duplication—so, yes.

**CHAIR**—The committee has also received evidence about offsets, and the role of offsets in negotiating approval for projects. There is a view that offsets should not be considered at all in deciding whether or not projects should go ahead. Can you just elaborate a bit on what the MCA's position is on the offsets as part of the negotiation process? Are there times when it is appropriate to have offsets and times when it is inappropriate?

**Dr Cummings**—I think the whole role of offsets needs to have some thought given to it in regard to its relation to the act.

**Senator NASH**—Can I just jump in there and ask you to explain in more detail about the offsets of the MCA and how that works and precisely how that operates for you as an organisation.

**Dr Cummings**—Under the hierarchy of environmental management, firstly we try to avoid or minimise impacts. For our developments there is a residual impact on the landscape and sometimes that is considered unacceptable by stakeholders. Offsets were traditionally used by

our companies as a leading practice initiative to differentiate their performance from other companies and other landscape users to provide some compensation for those residual impacts.

**Senator NASH**—When you say differentiate their performance from others, what do you mean by that?

**Ms Stutsel**—This was prior to being required by any regulatory frameworks. It was undertaken by the industry as a voluntary initiative and was really determined at the company by company level initially and then more generally adopted as an industry-wide approach.

**CHAIR**—Are you talking about remediation of sites or financial support for Indigenous communities? Can you be more specific?

**Ms Stutsel**—At the moment the remediation of sites is actually required under our regulatory requirements and has been for quite some time. The offset was in addition to that. It was usually environmental in nature rather than cultural requirements. That has been more along the lines of the social licence to operate agenda and also recognising our responsibilities under the Native Title Act and the Aboriginal Land Rights Act and working with Indigenous communities. The nature of the offset itself tended to be looking at a similar geographical area and actually very localised, so providing an opportunity for people in the local area who felt that they were having, say, diminished ecological values because of the nature of the mining project even post-rehabilitation of that project, that there would be another area that had similar values that they could still enjoy and that would be protected into the longer term.

**Senator NASH**—You mentioned in your submission your view that the offsets have now become standard rather than as a final measure and that is a specific concern for you, that it is a standard practice rather than looking at it down the track. I think I cut you off part way through, Dr Cummings.

**Dr Cummings**—I was going to continue and say that offsets now have been written into legislation such as the legislation New South Wales and the work in Victoria. But there is a disconnect between those critical frameworks and also the offsets packages that are negotiated by industry and come under the survey of the EPBC Act. So offset packages now include a variety of measures, including communication activities, research and development, on ground improvement of habitat quality, for example monitoring and reporting of threatened species. So offsets have come a long way in terms of the way they are quantified and used by different jurisdictions. Their intersection with the EPBC Act is really catching up compared to some of the other jurisdictions. For our industry we see that there is a disconnect between their expectation that we provide them with a development but that they cannot be considered in the impact assessment process, at least at the referral stage.

**Senator NASH**—So would you say that at the moment the requirement to provide an offset is too great? If you are looking at it as becoming standard rather than a final measure, is complying with that too great or is the requirement too great? And how would you see it being redressed or reversed, if you like?

**Dr Cummings**—There is one key issue regarding the decision-making process of offsets. It has often become a negotiating-barring process between the developer, the state jurisdiction and

the Commonwealth jurisdiction, with each jurisdiction trying to get an increase in the quality of the package. The first issue of note regarding offset negotiation is that decisions about them should be made at the state and Commonwealth level at the same time so there cannot be one-upmanship from one to the other.

**Senator NASH**—Is that what happens—you get between state and federal double bidding, if you like?

**Dr Cummings**—Exactly.

**Ms Stutsel**—The other point, as Jason mentioned earlier, is that there is a hierarchical approach to controlling environmental impact. We try to avoid the impact in the first place and then we manage it and try to mediate it, whereas there now seems to be an automatic assumption that we need to offset that impact rather than deal with it through those other mechanisms.

**Senator NASH**—So, rather than an assumption that you will be able to deal with it in a proper manner and this will not be necessary, the assumption is that this will be necessary—is that right?

**Ms Stutsel**—Yes.

**Dr Cummings**—Our voluntary initiatives have been taken on board by governments and are now going to become mandated requirements.

**Senator PRATT**—You made some comments before about the desirability of moving towards regional assessments. I think I got a bit of a picture of the implications for industry in the kind of piecemeal way it is being done currently, but could you give a bit more depth to that with regard to the implications of each of those applications being dealt with on a piecemeal basis. Are you saying that it would also mean that industry would avoid even contesting certain areas because a strategic assessment was already complete and it would appear to be unviable to put in a bid for a particular area? What are the current economic implications of the piecemeal process you are forced to undertake?

**Ms Stutsel**—I will take the second part of your question first concerning the other areas and the landscape that we would avoid. At the moment the minerals industry has made a commitment internationally to not undertake exploration or mining in world heritage areas, despite the fact that in most jurisdictions that is available to us, particularly where ministerial override of existing environmental process is enabled. We recognise that our activity is not compatible with all land areas. We have been able to look at world heritage areas as a blanket categorisation, but there are certainly other areas in the landscape where mining activities may not be appropriate. They may not be appropriate because the regulatory requirements consider that they are not appropriate, but they may also not be appropriate because the communities in which we are operating consider them inappropriate. So our social licence to operate would be under threat. It would be very difficult to actually have the stability we would require for that project. There would be large-scale protests and upheaval, and it may impact on things like people wanting to work for that company and the like as well.

We consider that the strategic bioregional approach would assist in identifying those areas where mining is considered to be an appropriate land use and where there is an open and transparent assessment of the whole range of values that occur across that place in the landscape—for example, the conservation values, the social values and the mineralogy of the region are all considered concurrently and transparently and provide a very steady platform for both government decision making and business decision making. I will leave the first and third parts of the question to my colleague.

**Dr Cummings**—I will firstly comment on the cost implications for the piecemeal approach, which manifest themselves at several levels. Firstly, there is the lack of attention to cumulative impacts of operations across the landscape. That affects our company's reputation and future approvals. If you are the last company to enter an area, it is much harder to receive approval for your operation, because you are attracting the attention of stakeholders who may have complained that other operations have already been in the region for a longer period of time.

The other thing about the piecemeal approach is the lack of certainty for companies as to operations. It is about whether there are ever going to be operations established in a region. So that will be shored up and, hopefully, that will be reflected in streamlined approvals processes. There has already been some strategic regional assessment of the appropriateness of the location for a minerals operation, so there should already be some support to streamline the approvals process through that. That reduces the approvals time, which is directly related to costs. The other area is the positive side, being the offsets that we were talking about before. If there were a strategic approach to our investment in the landscape, whether we are spending a million dollars on returning to grassland a waste dump versus a million dollars to manage a remnant under some sort of strategic regional biodiversity plan, such decisions could be better made and the investment in biodiversity outcomes would be likely to have a better pay-off.

**Senator PRATT**—Is part of what you are saying—and I think you have not said it yet—that government has not been ahead of waiting for the request to mine in terms of making holistic assessments like with the approach in the Kimberley? So, as a government or as a community, we have not come to grips with which parts of the environment we really want to protect and what our major assets are. Take the mid-west of Western Australia, which is an emerging area receiving attention from mining. It has a range of environmental values but we have not really got around to assessing them. It seems as if the mining push might lead us to get in there and make assessments about which parts of the area are important to protect. Is that the kind of example that you mean?

**Ms Stutsel**—I broadly agree with what you have just said. I think there are two aspects to that approach. The first is that, as a nation, we have not invested enough in the body of scientific knowledge so as to get a good handle on where those values lie in the landscape and whether they truly are unique and need to be protected either nationally or in an international context.

The second is that, by not taking a strategic approach, we are ending up with a mosaic of projects occurring across the landscape that may be potentially impinging on those values. Interestingly, a lot of work has been done around the fact that, for example, the Kakadu World Heritage area was only listed as a World Heritage area because the scientific work that was done by the Ranger uranium mine identified that there were unique ecological values in that region. So you end up with an interesting situation where you actually have the mining data providing

the body of knowledge that leads to conservation of an area that will not be available to mining into the future. We would consider that to be an entirely appropriate outcome. But if we were to be more strategic and were to invest those resources into either the scientific work or the strategic regional assessment, to make sure that we are looking at the landscape as a whole, we would get better outcomes as to conservation. As well, we would make sure that development is located appropriately, with business certainty.

**Senator PRATT**—I am interested in whether there are some innovative ways of paying for an approach like that. It also implies that government needs to get in first and make an assessment. As you are well aware, government agencies are very underfunded. Indeed, they rely on mining companies for their data and information. But if the data and information is pertaining only to your patch, the one that you want to mine—and then it is whether it is aye or nay to that particular area—there is an interesting question as to how we have a more holistic approach and how both government and industry might work together to fund something like that in the future. You might have some comments about that. Otherwise, it might be something on which you would consider putting views forward.

**Ms Stutsel**—I would make two points as to that. The first was made earlier by my colleague. We consider that if the existing resources in the system were better allocated one would be able to achieve better outcomes in a strategic regional planning sense without needing to invest substantial new resources at a Commonwealth level.

In terms of what role industry can play, at the moment we have numerous projects in a common area undertaking assessments over their parcel of land only. Some of those are actually joined or continuous across the landscape. If you were to take the Pilbara approach, for example, what you might do, rather than having them all undertaking separate assessments, is to look at them as a group of entities and share that funding to actually do a common set of assessment work across that region as a whole. It is a better investment of existing monies from both industry and government.

**Senator PRATT**—It would require quite a substantial transformation of the process for companies to, I suppose, surrender their money to a more collective process. I can entirely see that it is possible, but we would need a new framework from within which to do that, wouldn't we?

**Ms Stutsel**—That is correct.

**Senator PRATT**—Thank you.

**Dr Cummings**—Can I add something to that. There is a problem with the independent nature of mining companies funding these processes. There is also a very large amount of money going to government from the royalties and taxes. But if we had a more strategic model, we should be able to use it as a way to attract investment. So you are really borrowing from the future. If we can get a strategic regional planning process undertaken across the landscape and we identify mineral resources for other sectors then that will actually attract investment. It needs a longer term view than what we are currently using.

**Senator NASH**—Have you had discussions with the minister or the minister's office around your views? Is this something you have raised before with government?

**Ms Stutsel**—It is something that we have certainly raised over a number of years with government, yes.

**Senator NASH**—And the response?

**Ms Stutsel**—Certainly the trial that is going on at the moment with the strategic regional assessment in Western Australia is giving us indications that there is a willingness on behalf of government to look at that approach. I guess we would like to see an independent review of that process being undertaken to actually provide an impartial assessment of its effectiveness and potential for transposition to other areas in the landscape. But we have not yet had an indication from government about whether there is a willingness to do that.

**Dr Cummings**—There is also generally a lack of understanding about how this should work. There are not good models out there for how we should be doing this across the landscape, even though they have been talked about for generations. So we are in fact investing in some work to develop models for how this might flesh out.

**Senator NASH**—When are you expecting that to be completed?

**Dr Cummings**—Probably the latter part of next year. Certainly we will have that material available to align it with the current departmental review of the act.

**CHAIR**—Thank you. If there are no further questions, thank you very much Ms Stutsel and Dr Cummings for your submission to the inquiry and also for taking the time to appear before the committee today. We appreciate it very much.

**Proceedings suspended from 10.32 am to 10.45 am**

## Appendix Four

### 2008 MCA Submission to Senate Inquiry into Biodiversity Conservation & NRM



27 August 2008

The Secretary  
Senate Standing Committee on Rural and Regional Affairs  
PO Box 6100  
Parliament House  
Canberra ACT 2600

Via email: [rrat.sen@aph.gov.au](mailto:rrat.sen@aph.gov.au)

**Re. Senate Rural and Regional Affairs and Transport Committee – Inquiry into Natural Resource Management and Conservation Challenges**

Dear Secretary

The Minerals Council of Australia (MCA) welcomes the opportunity to provide comment on Natural Resource Management in Australia. Members of the MCA, representing over 85% of minerals production in Australia, have a long-standing commitment to sustainable development including the responsible stewardship of natural resources. In many locations in regional and remote Australia mining companies are the most significant local contributor to natural resource management outcomes.

The MCA is particularly interested in commenting on three inquiry matters:

- the overall costs and benefits of a regional approach to planning and management of Australia's catchments, coasts and other natural resources;
- the need for a long-term strategic approach to natural resource management at the national level; and
- the capacity of regional NRM groups, catchment management organisations and other national conservation networks to engage...

Whilst generally supportive of the regional NRM governance model, the minerals industry considers that there are substantial opportunities for improvement, particularly related to the better-integration, engagement and cooperation of existing NRM agencies with non-agricultural landscape managers.

The industry considers the development of cooperative landscape management frameworks, that incorporate all landscape managers, provides the most efficient model for further landscape planning and subsequent sustainable development.

These suggestions are explained further in the attached submission. Should you have any further questions regarding this issue, please do not hesitate to contact me directly, or Dr Jason Cummings – Assistant Director Environmental Policy on 02 6233 0627, who has carriage of this matter in the MCA Secretariat.

Yours sincerely,

MELANIE STUTSEL  
DIRECTOR – ENVIRONMENTAL AND SOCIAL POLICY

A handwritten signature in blue ink, appearing to read "Melanie Stutsel".

*MCA Submission to Senate Inquiry into Natural Resource Management*

## Executive Summary

The Australian minerals industry is a significant contributor to natural resource management outcomes in regional and remote Australia. As the minerals industry has expanded and improved its sustainable development performance, there has been an increasing effort by minerals companies to invest in landscape management far-beyond mandated requirements. The capital invested by industry can be commensurate with Commonwealth funding for some regions.

Industry is concerned that the traditional approach to 'natural resource management' by the Commonwealth Government, in focussing on investment in the agricultural sector has been too narrow, and supported duplicate and overlapping, but not integrated, land use planning and management processes.

The MCA considers that there are considerable benefits in the regional approach to natural resource management, but that it is still too fragmented to be considered 'integrated'. The minerals industry is concerned that there have been opportunities lost, and opportunity costs incurred, due to the lack of a strategic whole-of-landscape approach, specifically via:

- Missed opportunities to leverage and partner with industry investment in the landscape;
- Lack of strategic consideration of the best application of industry's NRM resources in the landscape;
- Lack of strategic use of the vast volumes of ecological and environmental quality data collected and reported by industry;
- Lack of use of the regional capacity and capability of industry in natural resource management in regional and remote areas;
- Potential future resource use limitations through the ad-hoc nature of offset and conservation covenant placement in the landscape; and
- Lack of communication with all stakeholders regarding the potential future land use limitations, and the social, economic and environmental consequences of those decisions, through conservation covenants and other land tenure changes.

The MCA strongly supports the Commonwealth being more proactively involved in developing and establishing long-term strategic approaches to natural resource management. *Especially natural resource management that is integrated across the landscape.*

With improved alignment between government and industry initiatives, there will be increased capacity to deliver on-the-ground outcomes. An improved landscape planning model will better-leverage against industry's investments in on-ground activities, as well as routine ecological and environmental quality monitoring, reporting and communication activities.

The MCA envisages the benefits of a truly integrated regional natural resource management model to include:

- The most efficient allocation of limited NRM investments in the landscape;
- More efficient planning and stakeholder engagement processes (including data acquisition and analysis, reduced stakeholder burn-out);
- Reduced risks related to overallocation of scarce resources, including land and water resources, to inefficient users;
- Better consideration and strategic alignment of systemic cumulative impacts, positive and negative, from all landscape activities;
- Increased capacity to respond to changes in resource availability through climate change; and
- Reduced likelihood of land use planning conflicts, since all stakeholders can be involved in a long-term strategic land use planning process.

## Introduction

### *The Minerals Industry is a Significant Natural Resource Manager in Regional and Remote Australia*

Although the immediate direct footprint of our operations is small, increasing from 0.02% (DAFF 2006) to 0.2%<sup>1</sup> of the landscape in the last decade, the impacts of our operations in the landscape can be locally significant, not well understood, and easily attract attention from other landscape managers. Despite this low footprint, the Australian minerals industry generates approximately 8% of national GDP, compared to 3% GDP from agriculture, which uses approximately 50% of the landscape.

Because the local impacts of an operation are obvious in the landscape, the land use is temporary [with leases to be transferred back to the government], and poor environmental performance had historically resulted in legacy sites, the industry has now had several decades of tight regulation regarding environmental performance, including 'natural resource management' on the land it manages. In several areas of natural resource management, this has led to the investment in research, and development of leading practice, upon which many current activities are based. For example, the minerals industry has led the development of technologies for rehabilitation, including on-ground activities and frameworks for rehabilitation planning, monitoring and reporting. Other examples include the development of leading practice for stakeholder engagement, impact assessment and site water management. Of course, these initiatives have been undertaken with other partners, including regulatory authorities, academic institutions and other land holders.

Some evidence of this leadership is demonstrated by:

- The international scientific journal *Restoration Ecology* recently devoted an entire issue (2007: 15 s4) to the initiatives of Alcoa in managing and rehabilitating Jarrah Forest in Western Australia;
- The Commonwealth Environment department documenting best practice environmental [and natural resource management] for the mining industry through the 1990's, which provided guidance for a variety of stakeholders;
- The 2006 State of the Environment report ('SoE 2006'; Beeton et al. 2006), which recognised:
  - ⇒ '...many environmental issues are addressed by industry and mining groups at a standard that exceeds that of public sector groups. In some instances, the corporate knowledge base is higher in the private sector than in the public sector. In the longer term, this will cause problems in environmental reporting unless the environmental reporting systems are adapted to include these sectors.'
- In the single financial year 2000-2001 the minerals industry spent \$98 million on 'minesite rehabilitation' within 0.2% of the landscape (ABS 2002; not CPI indexed for comparison), roughly 10% of the total investment of NHT2 and NAP (ANAO 2008), which was spread across several years and approximately 50-70% of the landscape.

Traditionally, the investment that mining operations made in landscape management was mandated by regulatory authorities through the impact assessment process. However, companies now recognise that initiatives to better manage their non-operational lands beyond duty of care requirements reflect on their 'social license to operate'. Accordingly there has been an increasing effort by minerals companies to invest in landscape management far-beyond mandated requirements. Some of these examples include partnerships with NHT-funded bodies, and all include local community engagement:

- The Lake Cowal Foundation: <http://www.lakecowalfoundation.org.au/> in Western NSW
- The Anglesea Heath Cooperative Agreement: [http://www.alcoa.com/australia/en/info\\_page/anglesea\\_strong.asp](http://www.alcoa.com/australia/en/info_page/anglesea_strong.asp) in Eastern Victoria

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<sup>1</sup>latest BRS compilation of ACLUMP (Australian Collaborative Land Use Mapping Programme) Catchment Scale Land Use data

- The Bendigo Mining Environment Fund: [http://www.bmnl.com.au/our\\_environment/community\\_relationship/environment\\_fund.htm](http://www.bmnl.com.au/our_environment/community_relationship/environment_fund.htm) chaired by the Mayor of Bendigo
- Biodiversity Assessment in the Bowen Basin: <http://www.fba.org.au/programs/miningbiodiversity.html>
- Biodiversity Assessment and Planning in the Pilbara with the Australian Museum: <http://www.austmus.gov.au/riotintopartnerships/pilbara/outcomes.htm>

The minerals industry is a significant manager of the landscape, particularly in regional and remote Australia, where our investments in monitoring, reporting and on-ground natural resource management outcomes are ever-increasing. Our response to this inquiry has been framed by the MCA's *Land Management Working Group*, based on industry's experience in natural resource management activities across Australia.

### **Why Improve the Regional NRM Model?**

The MCA considers the following as key challenges faced in regional natural resource management:

- The fragmented approach to managing a connected system;
- Increasing reliance on industry to undertake traditional government responsibilities, without strategic support and appropriate recognition; and
- Lost opportunities for best-returns on investments through lack of coordination.

### *Striving for an Integrated Approach*

Gorrie and Wonder's (1999) manuscript which framed the governance arrangements for the NHT era called for an 'integrated approach' to natural resource management. Their vision for rural industries identified 'innovative landholders of the future [which will fully integrate environmental outcomes]' into their business models, which would provide a foundation for rural economies and for wealthy and vibrant rural communities. The 'integrated approach' was really aimed at integration of water, soil and vegetation management for the agricultural sector, which is 'integration' across half of the landscape.

The subsequent Act, which established the NHT process was similarly limited in that it refined 'natural resource management' to those activities, that were related to soil, water and vegetation management. The focus of the activities under NHT was then appropriately targeted at improving practices and outcomes for the agricultural sector, and the 60% of the landscape under their stewardship.

It is only humans that perceive the landscape as a fragmented matrix of commercial sectors and uses. The landscape responds to our interventions in its entirety, and our planning and management of the landscape should be integrated to align with landscape processes (Briggs 2001).

Across the NHT era, landscape planning for natural resource management, including funding for repair and decisions about where those investments are placed, has been undertaken by a variety of agencies, often within and across the same physical areas, including:

- Local government (e.g. statutory 'local environment plans', particularly at the rural – urban interface);
- State government agencies (e.g. utilities – 'infrastructure planning', conservation agencies – 'biodiversity strategies', water planning authorities – 'statutory water plans');
- Regional NRM organisations (e.g. 'catchment action plans');
- Commonwealth land managers (e.g. Department of Defence & Commonwealth Parks agencies); and
- Commonwealth, State and Local Government development approval processes (e.g. which additionally determine where NRM 'offset' resources are placed in the landscape, with or without strategic planning support).

Recently the Commonwealth and WA State Governments have proclaimed 'strategic assessments' under the EPBC Act as another vehicle for regional planning. This fragmented approach is likely to continue without due consideration

of its efficiency. These traditional duplicative, part overlapping, and often conflicting land use planning processes can result in considerable land use conflicts or inefficiencies, for example:

- Overallocation of water resources within a basin, based on perceived land use capability outweighing water availability;
- Wasted resources in planning processes, and as noted in Seymour et al. (2007), burn-out of heavily engaged stakeholders;
- Potential limitations on future land uses based on the location of offset arrangements or conservation agreements, that do not consider future land use options;
- A lack of understanding amongst stakeholders regarding land use planning, access arrangements, future land use potential; and
- A fragmented approach to stakeholder engagement, resulting in stakeholders being unaware of the implications of some land use planning decisions on their future social and economic opportunities.

There is surely a better, truly integrated, landscape planning model.

Leadership from the Commonwealth is required. There are currently two separate Senate inquiries, investigating 'conservation and natural resource management' and the operation of the 'Environmental Protection and Biodiversity Conservation Act'. Recommendations from these inquiries should be consolidated into a coordinated vision for landscape planning and management in Australia.

### *The Increasing Role of Industry in Regional and Remote Natural Resource Management*

As our member companies have become more pro-active in engaging and implementing landscape management beyond operational land, expectations from government and other stakeholders have risen, such that this is now considered the baseline industry contribution from some stakeholders. The role of government and industry in regional and remote Australia, vis a vis natural resource management, is beginning to blur (as also noted as a requirement for sustainability in SoE 2006). For example, in 2007, a single operation in Western Australia was required to provide over \$7.3 million for a range of activities that have traditionally been the role of government conservation and NRM organisations, including:

- Funding for government conservation agency personnel;
- Funding for regional conservation and other stakeholder non-government organisations (ongoing and establishment); and
- Development of threatened entity recovery plans.

This investment from the mining company, in NRM activities in one region, is greater than the sum of Commonwealth NHT2 and NAP funding for the ACT, and 8% of the total NHT2 funds provided by the Commonwealth to the West Australian Government (based on ANAO 2008 figures).

These investments are additional to the mining company's duty of care requirements to manage the landscape that they control (e.g. noxious weed and feral animal management), site environmental compliance (including rehabilitation activities), and supplementary to royalty payments and taxes that will also be paid to governments. These activities were negotiated as a response to development pressure, rather than part of a proactive and long-term strategic approach to regional land use planning.

The MCA's concern here, is that industry's substantial contribution to landscape management, is often not being implemented as part of a long-term strategic landscape planning and management process, and therefore, may not lead to the best outcome possible.

Although some communities and regions have worked together to develop more integrated planning models, including those engaging with industry (see case studies above), there is a clear need from the Commonwealth for leadership in the promotion and development of more mature, and truly integrated, land use planning models.

## *Opportunities Lost*

The fragmented approach to landscape planning, and natural resource management investments has led to opportunities being lost. Industry collects data, undertakes reporting and invests in landscape management activities at time-scales beyond the political process. A long-term landscape planning process, more robust to changes in political governance, would provide industry and regional landscape managers, with more certainty that investments made were supporting a long-term strategic plan.

For example, the ad-hoc nature of placing investments in landscape repair through NHT, has rarely considered whether those locations may be subject to future minerals exploration or mining licenses, potentially resulting in future land use conflicts and wasted resources. A long-term strategic land use plan would identify potential minerals prospectivity areas, no-go areas for minerals exploration, and areas of high-importance for landscape investments, providing all landscape managers and investors with confidence that their actions are well-placed via strategic coordination.

Such a landscape planning process would specifically:

- Reduce inefficient allocation of resources available for landscape management (e.g. industry offset resources not applied for the best strategic outcomes – and usually negotiated in response to local development pressure, rather than prioritised through an integrated planning process);
- Reduce wasted on-ground resources (e.g. industry offsets resources applied to follow leading practice, and regulatory requirements, whilst other landscape elements, perhaps strategically more important, are not managed to duty of care standards); and
- Utilise the ecological and other environmental quality data collected and reported by industry in a systemic manner, rather than having it simply filed for regulatory process.

## **Is a Better Model Available?**

The minerals industry is proud of its contribution to natural resource management, and environmental management more broadly, and will continue to strive for performance improvements. See **Attachment 1** for the MCA's land use policy.

Based on our experience working and investing in these landscapes, we have several suggestions for improvements regarding the regional natural resource management model:

1. It should be truly integrated, to incorporate all landscape managers;
2. It should be truly integrated, to incorporate all current and proposed land use activities; and
3. It should be appropriately resourced, which wouldn't require more resources, just a realignment of existing resources.

The SoE 2006 noted:

National capability is being built at the scale of the whole landscape. This involves multiple land tenures of both public and private land, and integration of conservation and development. It has created a regional delivery system that places enormous demands on regional groups and local government.

By developing a model for regional natural resource management that incorporates all land users and managers, the following benefits would be achieved:

- More strategic alignment of industry environmental investments in broader landscape priorities;
- Better leveraging and use of industry environmental monitoring and reporting (which is largely unused, beyond regulatory compliance, despite millions being invested monthly);
- Better communication and engagement between industry and other landscape managers, such that lessons-learned by industry in natural resource management can be shared;
- More efficient opportunities for partnerships to be developed; and

- Land use planning conflicts and inefficiencies could be more readily avoided, through all stakeholders being involved and informed of implications of land use decisions through planning processes.

In 1976 Gibson and Timmons outlined a 'Multi Goal Land Use Model' where land use planning was viewed as an ongoing process, and required a model for 'projecting future non-agricultural and agricultural land uses under varying assumptions and alternative public policies'. That imperative remains, and is stronger with the uncertainties brought by climate change, the Commonwealth's policy response to climate change, and the 'shrinking of the world' from trade, communication and technological perspectives.

The difference between the 1970's and now is not the planning processes we have adopted, they seem to have the same flaws, but rather the tools that we have at our disposal to support the Gibson and Timmons' vision.

In Australia we have several proposed models that could be used to inform the development an integrated land use planning model (incorporating water, land, vegetation and minerals resources), which can guide NRM investment from governments, industry and other stakeholders. The Marine Parks Planning Model, the EPBC Act Strategic Assessments process, the eco-civic regional models, and the existing regional NRM model for the development of catchment action plans (or similar in other jurisdictions).

An analysis of the strengths and weaknesses of each approach should be undertaken, to develop a better model, that integrates all landscape users and stakeholders in the decision making process. Clearly the control and management of different elements of the landscape will remain fragmented, but there is no reason that the planning across landscapes cannot be integrated (since it is simply a process).

The guidelines for the re-badged NHT, *Caring for our Country*, has not limited its investment to the agricultural sector. This is an important first-step acknowledgement that other landscape users are crucial in developing an efficient national environmental support program. However, it will take time and resources to realign the Commonwealth Government's personnel, funding and communication frameworks, and general philosophy to develop a whole-of-landscape approach to prioritising investments. Additionally, a more mature approach to landscape management requires other stakeholders to be collaborative and invest in improving engagement and planning processes.

It will take time, but a new government represents an opportunity for new leadership and new (?) ideas in natural resource management, and from a minerals industry perspective, the greatest opportunity lies in improved land use planning, engagement, and activity in a whole-of-landscape approach. Our major concern is that our present significant investments in landscape management are not appropriately supported by a strategic land use planning process, and therefore may not be the most efficient application of those resources.

## Summary Comments

1. Regarding 'the overall costs and benefits of a regional approach to planning and management of Australia's catchments, coasts and other natural resources'

The MCA considers that there are considerable benefits in the regional approach to natural resource management, but that it is still too fragmented to be considered 'integrated'. The minerals industry is concerned that there have been opportunities lost, and opportunity costs incurred, due to the lack of a strategic whole-of-landscape approach, specifically via:

- Missed opportunities to leverage and partner with industry investment in the landscape;
- Lack of strategic consideration of the best application of industry's NRM resources in the landscape;
- Lack of strategic use of the vast volumes of ecological and environmental quality data collected and reported;
- Lack of use of the regional capacity and capability of industry in natural resource management in regional and remote areas;
- Potential future resource use limitations through the ad-hoc nature of offset and conservation covenant placement in the landscape; and

- Lack of communication with all stakeholders regarding the potential future land use limitations, and the social, economic and environmental consequences of those decisions, through conservation covenants and other land tenure changes.

The MCA envisages the benefits of a truly integrated regional natural resource management model to include:

- The most efficient allocation of limited NRM investments in the landscape;
- More efficient planning and stakeholder engagement processes (including data acquisition and analysis, reduced stakeholder burn-out);
- Reduced risks related to overallocation of scarce resources, including land and water resources, to inefficient users;
- Increased capacity to respond to changes in resource availability through climate change; and
- Reduced likelihood of land use planning conflicts, since all stakeholders can be involved in a long-term strategic land use planning process.

2. Regarding **'the need for a long-term strategic approach to natural resource management at the national level'**; and

The MCA strongly supports the Commonwealth being more proactively involved in developing and establishing long-term strategic approaches to natural resource management. *Especially natural resource management that is integrated across the landscape.*

The predicted international demand for the minerals industry commodities is strong (Access Economics 2008), and the future sustainable development of some regions, particularly in northern Australia (Commonwealth of Australia, 2020 Vision report, 2008), is intrinsically linked with development of that potential. To avoid a 'Murray-Darling Basin style' misalignment of land use planning and resource availability, significant investment in an improved resource planning process is required. This is particularly important for regional and remote areas, where there is not capacity to undertake these tasks.

Blanch (2008) called for new cooperative governance arrangements for northern Australia, to enable sustainable development. The MCA welcomes that sentiment, but encourages incorporation of other stakeholders into the governance arrangements, since in many areas, industry is already contributing to governance in these regions. Additionally, history aside, there is no reason more cooperative arrangements cannot be established elsewhere in Australia.

The SoE 2006 noted that mining will underpin the ongoing viability of some regional and remote communities, especially small towns. Many of these small towns are typically in remote locations, where resource planning has not been properly conducted. Similarly, when irrigated agriculture began in the Murray-Darling Basin, all the towns were small. To avoid resource use conflicts in the long-term, better strategic land use planning is required. There is a role, at the national level, to develop frameworks and processes for better land use planning and natural resource management at the regional level. Some preliminary work needs to be undertaken to define that role, rather than assuming a continuance of the previous models.

3. Regarding **'the capacity of regional NRM groups, catchment management organisations and other national conservation networks to engage...'**

With improved alignment between government and industry initiatives, there will be increased capacity to deliver on-the-ground outcomes. An improved landscape planning model will better-leverage against industry's investments in

on-ground activities, as well as routine ecological and environmental quality monitoring, reporting and communication activities.

The acceptance under *Caring for our Country* that funding is available to any party that can demonstrate nationally-significant outcomes is an important first step to developing better-integrated approaches.

However, the MCA would reiterate that better, whole-of-landscape approaches to planning and management would make the most efficient use of the scarce resources available.

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## MINERALS COUNCIL OF AUSTRALIA LAND USE POLICY



Access to land and its responsible management is critical to the mining industry.

Whilst the total area of land disturbed is relatively small, the nature of the mining activities can result in significant long-term impacts.

Accordingly, Australian minerals companies have adopted the following vision to deliver sustainable land use outcomes:

*Australian mining companies will be recognised as responsible stewards of the land by delivering long-term balanced economic, social and environmental outcomes.*

The MCA advocates the application of the following principles to achieve this vision:

### Land use planning and access

- Land use planning should facilitate compatible land uses to maximise economic, social, cultural and conservation values for the benefit of current and future generations
- Land use planning should be holistic with integrated consideration of cultural, environmental and economic values
- Mining, conservation and other land uses can be complimentary as sequential or neighbouring activities
- The rights and knowledge of traditional owners and community stakeholders should be considered in integrated land use planning processes
- Planning decisions that impact access and use arrangements should be ethical and transparent, and consider the social, environmental and cultural implications of developing or sterilising mineral resources

### Land management

- Mining activities should minimise disturbance, and provide for ongoing progressive rehabilitation, directed at achieving an agreed final land use
- Non-operational land should be managed responsibly considering adjacent and future land uses

### Future landuse

- Mining planning activities will pro-actively engage stakeholders on an ongoing basis and consider changing circumstances
- Closure standards should reflect agreed expectations for the post-closure land use

May 2008

## Appendix Five

### Other Feedback from Members on Specific Questions in the Discussion Paper

## *Questions raised in this Discussion Paper*

Some MCA member responses to key questions interspersed throughout this discussion paper, which are posed primarily as ‘thought starters’ and are not intended to limit comments or submissions on the Act, are consolidated here for convenience.

Responses to many of these questions are contained in the text above, and previous submissions as attached.

### *Scope of the Act*

Q1 What are your views on the following aspects of the Act:

- (a) Are the objects of the Act appropriate to the Commonwealth’s role in environment protection and management?

*‘The Commonwealth should focus on any environmental impacts caused by a Commonwealth agency plus impacts by industries, development or activities that affect matters of National Significance.’*

- (b) Are the principles of Ecological Sustainable Development (ESD) appropriate to the Commonwealth’s role in environment protection and management? Does the legislation provide an adequate framework to guide ESD decisions made under the Act?

*The principles of ESD are appropriate to the Commonwealth’s roles in environmental protection.*

*Members of the MCA support these principles, evidenced by their being signatories to ‘Enduring Value’*

*In support of the ESD approach the MCA recommends that the EPBC Act be amended to provide that, for mining and petroleum proposals, the Minister for Environment, before making a final decision under the EPBC Act, must first consult with the relevant federal Resources Minister on whether the proposal should proceed, and also what conditions should be imposed on the project. Or, at the very least, that the Minister for Resources be consulted before the Minister for the Environment rejects any proposals.*

- (c) Are the existing matters of national environmental significance (NES) appropriate? Do you think that there should be any additional matters of NES, and if so, how should such matters be framed?

*Existing NES are appropriate.*

*One of the concerns regarding the EPBC Act is the open ended nature of its jurisdiction. By allowing the creation of new matters of NES (either as standalone categories, such as greenhouse, or as new entrants to existing matters of NES, such a species or national place), uncertainty is created for industry and other participants in impact assessment.*

*Consideration should be given to provide in the Act that no new matters of NES may be created if they are adequately protected under some other regime, whether that be State or Commonwealth. Further, whether existing matters of NES adequately covered elsewhere (Aboriginal heritage for example – although sensitive) could be removed. Again, this would assist in reducing the creation of duplication in process and condition setting for new projects.*

- (d) Is the definition of an ‘action’ in the Act appropriate?

*No. It is difficult to determine exactly what is an “action”.*

*Clarification around what is ‘an action’ and what are the ‘impacts’ of the action is required.*

*The EPBC Act could be amended to provide clear recognition for proponents to choose, in appropriate cases, to split which might be seen as one action into a range of referrals, particularly where the action comprises component parts that, when operating, will be under the control of different legal entities.*

- (e) What kind of impacts should be considered under the Act? Does the Act adequately encompass not just direct but also indirect impacts?

*This Act should focus on any environmental impact caused by a Commonwealth department plus only significant impacts on “Matters of NES”. Non-significant impacts caused by development are generally managed by other State based Environmental Approvals.*

- (f) Does the test of significance, in the context of actions having a ‘significant’ impact on a matter of NES, operate effectively in practice? If you think that there should be another test, what should it be?

*The test for significance can be difficult in situations where there is limited background information.*

*‘Most companies will refer regardless, rather than take the risk of being referred by a third party or investigated later on. It takes a lot of time and resources to refer something for a decision when internally you really believe it is insignificant. The test of significance could be conducted by the State Environmental Agency on referral of project.’*

### *Assessment and Approvals*

- Q2 Does the public understand their responsibilities under the Act to refer proposed actions to the Minister?

*‘I would suggest that the awareness of public responsibilities under this Act is very poor.’*

- Q3 Are appropriate projects being referred for approval? Does the referral process meet the objects of the Act?

- Q4 Do you think that the Act contains an effective hierarchy of environmental assessment approaches, ranging from assessment on referral information to assessment by public inquiry? Are the methods of assessment providing the required information for informed approval decisions?

*‘Yes’.*

- Q5 Does the Act provide appropriate scope for public participation and transparency in the assessment and approval process under the Act?

*‘Yes’*

*However there are concerns regarding consistency in condition setting, with the following recommendations:*

- Amending the Act to provide that the Commonwealth Minister should not repeat*

*conditions that have already been established by a State approvals process, or by other legislation. This would remove duplication and creation of legal obligations for the same issues.*

- *Further, the Act could be amended to provide that the Commonwealth Minister must not issue conditions which are inconsistent with State approval conditions or obligations under other legislation (subject to discharging statutory obligations).*
- *Further, specifically in relation to offsets, that the Commonwealth would accept any offsets package that has been formulated at State level and made a condition of the State approval. That acceptance would not manifest itself in conditions under the EPBC Act. Offset parameters be clearly articulated in the EPBC Act, rather than simply appearing as a matter of course as is presently occurring.*

Q6 Does the Act operate effectively in conjunction with State and Territory planning and environmental impact legislation? Are existing bilateral agreements achieving the objects of the Act?

Q7 Are there further opportunities to harmonise the Act with other State and Territory legislation, planning and approval processes?

*‘Yes, at the referral stage. State referral is usually required – it could be part of a bilateral agreement that the State assessed significance and EPBC approval requirements.’*

Q8 Does the use of strategic approaches, such as strategic assessments and bioregional plans, provide opportunities for streamlining Commonwealth involvement in environmental issues? Do such approaches provide an appropriate means for dealing with cumulative impacts?

*‘Yes. The use of strategic assessment provides more opportunity to effectively undertake cumulative impact assessments than the current project by project approach.’*

### *Biodiversity*

Q9 Does the Act provide an effective regulatory framework for the conservation of Australia’s biodiversity? If not, what improvements could be made?

*Not really as it focuses just on Threatened Species and iconic areas. Protection of a single species does not always ensure the protection of the Biodiversity values of an area.*

Q10 What are your views on the process for nominating threatened species, ecological communities and key threatening processes?

Q11 Given the length of time required for the assessment of nominations, should the Act allow for the emergency listing of species and ecological communities which may be threatened (similar to the provisions for the emergency listing of National Heritage places)? Would the advantages of this be outweighed by the financial and administrative costs?

*Yes. The use of an interim listing would prevent further degradation of a species while the status is confirmed.*

*Any emergency listing of species and ecological communities should not influence projects already approved, being assessed, or for which a referral has already been received (i.e. they cannot be retrospectively applied).*

Q12 What matters should the Minister consider when deciding whether to list a threatened species or ecological community?

*Location, quality of available data, threatening processes (natural and manmade) and historic*

*and future predicted ranges.*

*As per Regulatory Impact Statement requirements – implications for the access and use of natural resources within the range of the entity. That is, the community should understand what is being ‘given up’ when an area is protected (especially for a community or establishment of a World Heritage Area).*

Q13 Are the categories of threat appropriate?

*No. This list should be revised to include salinity, fire, broad scale clearing, changes in grazing intensity and land use, changes in investment in management of exotic species, and changes in management of the protected area estate.*

Q14 Are there opportunities to reduce duplication between the Commonwealth and State and Territory listing regimes or do overlaps between the regimes provide significant protection for threatened species and ecological communities?

Q15 What factors should be considered in setting priorities for recovery planning?

Q16 Does the planning regime support the effective recovery of threatened species and ecological communities?

*There are species or ecological communities protected by the Act but only a limited amount of resources are being allocated to develop and implement appropriate responses.*

Q17 Are there opportunities to improve the co-ordination between the Commonwealth and State and Territory recovery regimes? If so, what might these be?

Q18 Are the provisions of the Act for the protection and recovery of threatened species and ecological communities, migratory species, listed marine species and cetaceans effective? What alternative approaches might be available?

*No because it is often unclear if the activity should be referred.*

Q19 Does the Act provide an appropriate legislative framework for addressing climate change and other emerging pressures in the context of environmental protection and biodiversity conservation? If not, how can such matters be considered when making decisions under the Act?

*The intersection of developing market-based approaches and the EPBC Act needs to be carefully considered.*

### *Indigenous Involvement (MCA Responses)*

**Q31** Are there opportunities to harmonise legislative provisions for the protection of indigenous heritage values? If so, how?

Australia's Indigenous heritage is an issue of critical importance to be taken into account in Australia's land management systems. Such arrangements should provide not only for the comprehensive identification and protection of both fixed and movable cultural heritage, but should also provide opportunities for the direct involvement of Indigenous communities, including resourcing for their involvement in the ongoing management of cultural heritage sites, artefacts and intangible heritage items.

The Minerals Council of Australia considers that the current cultural heritage regimes are unnecessarily complicated, with heritage registers maintained separately by the Australian Heritage Commission and State and Territory Governments.

- The current arrangements for the assessment of cultural heritage are imprecise, often leading to substantial delays in the project assessment and approval process. This is particularly the case in Western Australia where the States' heritage requirements are recognised as a significant impediment to accessing Indigenous lands for mining exploration and development;
- The dual layers of heritage legislation mean that 'forum shopping', where a group may be dissatisfied with the outcomes of a state based cultural heritage approval process may then shift to using the ATSIHP Act to overturn the State decision, can be an issue; and
- The arrangements involve high transactional costs both in terms of direct costs but also time imposts on project approval timelines. In NSW the costs are much higher given the issues around self-nomination of Aboriginal parties with interests and a lack of recognition of the specific rights of Traditional Owners.

Accordingly, the MCA considers that the Australian Government needs to develop a consistent approach to Indigenous heritage matters and to integrate Indigenous heritage conservation procedures with other land management procedures to avoid duplication and overlap between legislative instruments and requirements.

Reform of the ATSIHP Act to include an accreditation process that requires an agreed set of outcomes to be achieved through bilateral arrangements with State and Territory Governments would be of value. Within this framework, the ATSIHP Act would continue to provide a safety net for absent or weak state legislation and an opportunity for higher authority / appeal where it is deemed the state has made a decision in error. Importantly, however, the bilateral arrangements would provide all parties with certainty that the ATSIHP Act was not intended to run in parallel, nor seek to undermine or supplant state legislation.

In addition, there would need to be reforms to some existing State legislation. Specifically, the older legislation, such as WA and NSW, could particularly benefit through reform that addresses links with the Native Title Act and allows for formal recognition of agreements between developers and Aboriginal groups, on the basis that there are strong backup controls in place to ensure the protection of cultural heritage values.

**Q32** Does the Act adequately support Indigenous involvement in the preparation of management plans for Commonwealth reserves? If not, what improvements could be made?

The involvement of Indigenous groups, and particularly traditional owners, in the preparation of management plans for Commonwealth reserves is necessary to ensure that the ongoing protection of Indigenous rights and interests to these lands, including the protection of cultural heritage.

While the EPBC Act requires the Government to engage Indigenous people in the development of management plans and the establishment of governance structures such as Joint Management Boards, it is arguable that the participation of Indigenous Australians is not being maximised in this process.

The historic under resourcing of Indigenous representative organisations and the lack of appropriate, government funded social and physical infrastructure in Indigenous communities, including health and education facilities, continue to provide systemic barriers, limiting the participation of Indigenous people in decision making and management of their lands. In addition, the lack of real commitment to building the capacity of Indigenous communities to transition to self-management arrangements, through building skills in governance, park management, communication, financial management and other core disciplines, is also limiting the opportunities that could be provided to Indigenous Australians to take a leading role in the management of their lands where these are designated as Commonwealth reserves, and to more actively participate in mainstream economic activities such as cultural tourism.

Given this lack of capacity to participate equitably, it could be argued that current practice where the ongoing management of reserves being undertaken through the informal ongoing interactions between park staff and traditional owners does not provide sufficient surety that the opportunities of such engagement in achieving better land management outcomes through the application of traditional environmental knowledge and culture are fully realised, nor that the objects of the Act are being properly met.

**Q33** Do the processes under the Act facilitate the involvement and cooperation of Indigenous people as owners of knowledge of biodiversity?

The EPBC Act appropriately provides a framework for the involvement of Indigenous people in advising the Minister on Indigenous peoples knowledge and historical management practices for sites, as well as their involvement in the development of key agreements and management plans under the Act.

It is not however clear what arrangements that the Commonwealth has put in place to ensure the protection and recognition of Indigenous peoples Intellectual Property Rights in relation to traditional environmental knowledge. Nor is it clear what resourcing is provided to properly identify and engage with Indigenous Australians who may have rights or interests over the area of land being managed, or to secure their ongoing participation in providing advice on the management of such sites in perpetuity.