

22 January, 2009

Secretariat
Independent review of the EPBC Act 1999
GPO Box 787
Canberra ACT 2601
Australia



RE: Submission to the Independent review of the *Environment Protection and Biodiversity Conservation Act 1999*

Dear Sir/Madam,

The International Fund for Animal Welfare (IFAW) welcomes the opportunity to provide a submission to the independent review of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

IFAW works to improve the welfare of wild and domestic animals in more than 40 countries around the world by reducing commercial exploitation of animals, protecting wildlife habitats, and assisting animals in distress. IFAW seeks to motivate the public to prevent cruelty to animals and to promote animal welfare and conservation policies that advance the well-being of both animals and people.

In introducing the EPBC Act, Australia established a strong and welcome legislative framework for protecting our unique and important natural heritage. However, legislation is only as good as the ability for it to be effectively implemented and enforced. Consequently, having considered the provided terms of reference and the discussion paper, there are a number of concerns that IFAW wishes to raise about the operation of the EPBC Act. It is submitted that in order for the EPBC Act to effectively achieve its stated objectives, significant reforms must be made to Government administration, implementation and enforcement of the Act in order to promote more systematic and strategic biodiversity conservation in Australia. A number of key recommendations for reform are made in our submission in this regard.

IFAW wishes to thank the independent panel for the opportunity to provide our comments on the operation of the EPBC Act and would welcome the chance to discuss any of this submission in greater detail if required.

Yours sincerely,

A handwritten signature in black ink, appearing to read "Darren Kindleysides", is positioned below the text "Yours sincerely,". The signature is fluid and cursive.

Darren Kindleysides,
Programs Manager, IFAW Asia Pacific

Executive Summary

Australia has an unenviable record of native habitat destruction and species extinction. In just two centuries since Europeans arrived, Australia has lost at least 28 species and subspecies of mammals, the highest rate of extinction for any country or continent over the same period, with 17 being marsupials.¹ The rate of species decline has been exacerbated by large-scale land clearing of native vegetation, resulting in degraded ecosystems and ecological communities, such as temperate woodlands and grasslands, dwindling to near extinction.² There are critical signs that many living species are on borrowed time and may vanish if we lower our guard.

The conservation and protection of Australia's unique, and often rare, species of flora and fauna should be considered by the Federal Government to be in the national interest for ecological, educational, recreational, humanitarian, scientific and economic reasons. However, it is submitted that the government should have a clearer and broader vision of what are national environmental issues.³ In addition, where issues involve potentially significant impacts on matters of national environmental significance, it is crucial that resources are available for comprehensive, transparent and accountable environmental impact assessment to be undertaken.

Notwithstanding, a recent independent review of the implementation and environmental achievements of the EPBC Act by the Australia Institute is scathing, describing the administration of the act as an "ongoing failure".⁴ In addition, the 2006 Senate inquiry held to consider amendments to the EPBC Act found that chronic under-resourcing was a major hindrance to effective administration of the environmental impact assessment process.⁵ Without sufficient Federal Government commitment, resources and political will to implement and enforce the Act's provisions, biodiversity conservation in Australia is without foundation and will certainly fail to achieve its objectives and international obligations under the 1992 Convention on Biological Diversity (CBD).

It is with due consideration that IFAW thus submits that there is a significant need to instil a more holistic approach to the assessment of the environmental impacts of projects under the EPBC Act. Moreover, if the Act is to be considered to be operating effectively, real achievements must be made in stabilising and restoring threatened species populations, ecological communities and their habitats upon which they depend.

The following submission responds to key questions presented in the discussion paper. IFAW has not responded to all questions, confining our submission to particular areas of our expertise.

¹ Dickman, C. (2007) *A Fragile Balance: The extraordinary story of Australian marsupials*, Craftsman House, Sydney at 164. The remainder comprises nine species of native rodents and two species of bats.

² Mapping of the vegetation of the Cumberland Plain in 2000 estimated that only 9% of the original Cumberland Plain Woodland community remains, with an additional 13% present as degraded patches of varying sizes within the landscape. See NPWS (2000) Interpretation Guidelines for the Native Vegetation Maps of Cumberland Plain, Western Sydney. NSW National Parks and Wildlife Service, Hurstville.

³ See Gumley (2005) 'Calls for New Matters of National Environmental Significance', *National Environmental Law Review*, p 45.

⁴ See Macintosh, A. 'Environment Protection and Biodiversity Conservation Act: An Ongoing Failure'. The Australia Institute (2006) <<http://www.tai.org.au/documents/downloads/WP91.pdf>>

⁵ *Senate Report: Standing Committee on Environment, Communications, Information Technology and the Arts, Parliament of Australia, Environment and Heritage Legislation Amendment Bill [No 1] 2006* (2006) [6.12]-[6.14].

Summary of IFAW's Recommendations in response to questions posed in the discussion paper	
Scope of the Act	
Q1(c)	<ul style="list-style-type: none"> • That other potential 'matters of national environmental significance' be added to the EPBC Act under Part 3, including: <ul style="list-style-type: none"> - A greenhouse gas emissions trigger that may also work towards protecting and enhancing greenhouse sinks; - Ozone depleting substances; - Agricultural land clearing; - Genetically modified organisms which may have adverse environmental effects; - Management of hazardous wastes; - Prevention of land and water degradation, including water extraction.
Q1(e)	<ul style="list-style-type: none"> • That provisions be introduced in Part 9 of the EPBC Act that provide for a more comprehensive planning framework and adequate consideration of cumulative impacts. • Specific provisions be made for considering local government plans, NRM plans, bio-regional plans, regional marine plans and other policy documents for projects that are likely to impact biodiversity 'hot-spots' and listed endangered ecological communities.
Assessment and Approvals	
Q4 to Q8	<ul style="list-style-type: none"> • That conditions on approvals be enshrined in legally-binding agreements that are registered on land title and have effect in perpetuity, in order to provide more certain and assessable conservation outcomes. • That any conditions to approvals incorporate long-term commitments to monitoring and include clear restoration goals and a design that enables experimental evaluation in a rigorously controlled and replicated manner. • DEWHA should require the modification of design of developments to reduce or avoid impacts all together instead of offsetting biodiversity losses. Furthermore, the DEWHA must show the political will to refuse projects where no feasible restoration technology exists to achieve critical habitat replacement.
Biodiversity	
Q9	<ul style="list-style-type: none"> • A substantive amendment to the EPBC Act mandating the Minister to consider any relevant bio-regional marine plan when assessing referrals under Part 9 of the Act.
Q10/12	<ul style="list-style-type: none"> • The repeal of the amendments made to the following sections as a result of the Environment and Heritage Legislation Bill (No.1) 2006: s 267 and 269AA, and for sections 185 and 189(4) (5) (6) to be reinstated. • That recovery plans (not 'actions') should be reinstated and be made mandatory requirements for the conservation of threatened species. Recovery plans provided an invaluable basis on which funds should be prioritised and directed for biodiversity protection and conservation. • The Commonwealth Government must ensure that the Department of Environment, Water, Heritage and the Arts (DEWHA) is adequately resourced to review nominations for threatened species listing and to implement recovery plans in a timely manner. • That ecological communities that are in the categories of 'vulnerable', 'near threatened' and 'conservation dependent' and also 'near threatened species' should be provided due consideration under EPBC Act listing and project approval provisions.
Q11	<ul style="list-style-type: none"> • The EPBC Act should allow for the emergency listing of species and ecological communities which may be threatened.
Q14/17	<ul style="list-style-type: none"> • That the Commonwealth should intervene to regulate activities under an RFA if information comes to light that demonstrates a real threat to an endangered species, or world heritage or national estate values.

	<ul style="list-style-type: none"> • That section 75 (2B) be repealed to enable the Minister to give adequate consideration to any adverse impacts that might arise under an RFA forestry operation under Division 4 of Part 4. • That RFAs be amended specifically ‘to protect’ listed threatened species under the EPBC Act and to provide for threatened species management plans to be submitted to the DEWHA as a condition for exemption.
International Movement of Wildlife	
Q22	<ul style="list-style-type: none"> • When CITES listed species are in quarantine, the turnaround time should be increased to at least 72 hours to make finding a location for repatriation more realistic.
Q23	<ul style="list-style-type: none"> • Institute a total ban on all online trade of any Appendix I species of wildlife, as well as products from subspecies listed on Appendix II or “look-a-like” species. Where products can easily be confused, species should be covered by a simple blanket ban. • Ensure that the online facilitation of and participation in illegal trade in wildlife products is a prosecutable crime. • Introduce processes to monitor and research wildlife trade on the Internet in order to secure reliable data and maintain a high level of awareness of the volume and trends of trade in CITES-species on the Internet at any one time and thus be able to adopt effective responses in a timely manner to combat illegal trade. • Enhance systems for policing of potentially fraudulent CITES permits and other tactical enforcement techniques. • Ensure thorough investigations of illegal internet trade in wildlife to garner sufficient evidence for the judiciary in order to obtain appropriate convictions and therefore deter future illegal sales.
Q24	<ul style="list-style-type: none"> • The EPBC Act should be amended to ensure: an increased level of information sharing and coordination between agencies; the creation of a Wildlife Trade Task Force (consisting of government officials, NGOs representatives and other key stakeholders); increase penalties for wildlife smugglers, especially for repeat offenders • Re-evaluate the impact of the “personal and household effects” exemption currently available under the EPBC Act. • An independent assessment of the Co-operative Conservation Program for CITES I species by stakeholders would be vital in achieving a diversity of input and perspective to sufficiently address and manage the welfare and conservation of animals in captivity. • A time delay/lag in the application for custodial rights and the subsequent transfer of animals is vital to ensure adequate assessment of CCP protocols is undertaken. • Conditions on permits to import CITES species for CCPs must be enforceable for the life of the animal and its progeny. Conditions must be monitored by Government and contingency plans enacted if conditions can not be met.
Compliance and Enforcement	
Q35 to 37	<ul style="list-style-type: none"> • That the DEWHA be compelled to publish twice yearly a list of firms (companies, industry, property development) that either do not comply with the EPBC Act or whose environmental performance is of concern (that is, a Public Disclosure Strategy). • That the DEWHA be required to undertake an ecological audit of funded restoration projects, which addresses the extent to which the restored areas follow a trajectory towards some specified target state and that represents ‘natural’ or undegraded conditions. • That further indirect modes of regulation be evaluated as an effective means for influencing the behaviour of environmental actors, rather than relying on government action and sanctioning: The insertion of a provision into the EPBC Act that allows the court to grant the opportunity to obtain merits review on decisions regarding ‘controlled action’ decisions under Parts 7-9 of the Act; the insertion of a provision into the EPBC Act that allows the court to grant the opportunity to obtain merits review on decisions regarding ‘listing process’ under section 184 of the Act; that the former protection provided under EPBC Act s478 be reinstated in its original form. This would prevent the Federal Court from requiring undertakings for damages as a condition for granting an interim injunction, which is a significant benefit for public interest litigation.

Scope of the Act

Q1(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?*

Additional Matters of National Environmental Significance

The identification of ‘matters of national environmental significance’, which themselves must fall within the ambit of the Commonwealth’s constitutional heads of power⁶, sets the jurisdictional scope of the EPBC Act by determining which types of development project with an environmental impact will require approval by the Commonwealth Environment Minister.⁷ Currently, the EPBC Act specifies seven ‘matters of national environmental significance’, including one protected matter which was added by way of amendment after the legislation’s enactment.

An important decision by the Federal Court highlights the way in which the application of the EPBC Act may be hindered by the narrow focus of its specified ‘matters of national environmental significance’. The case of *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* (*Wildlife Whitsunday*)⁸ concerned a challenge by an environmental NGO to decisions of the Department of the Environment and Water Resources that two new Queensland coal mines could not be designated ‘controlled actions’ on the basis of the potential for resulting greenhouse gas emissions to adversely affect ‘matters of national environmental significance’ like the Great Barrier Reef World Heritage Area. The absence of an effective greenhouse gas trigger led to the flow-on effects and cumulative impacts of the proposal on ‘matters of national environmental significance’ not being given adequate consideration in that case.

Therefore, it is submitted that the EPBC Act is too narrow in its focus and is not as comprehensive as it needs to be to protect matters that are legitimately of ‘national environmental significance’. Notably, the restricted number of triggers for environmental impact assessment constrains the circumstances in which the Federal Government will be involved in decision-making regarding the environmental assessment and approval of projects. However, under the EPBC Act, there is capacity for further ‘matters of national environmental significance’ to be identified and added, whether by way of amendment or via regulations issued under the Act.⁹

⁶ Relevant constitutional heads of power with respect to external affairs, trade and commerce, and corporations have been broadly construed by the High Court: see, e.g. *Murphyores Inc Pty Ltd v Commonwealth* (1976) 136 CLR 1; *Commonwealth v Tasmania* (1983) 158 CLR 1; *New South Wales v Commonwealth* (2006) 231 ALR 1. In practice, such expansion has given the Commonwealth Parliament ‘the Constitutional power to regulate... most, if not all, matters of major environmental significance anywhere within the territory of Australia’: Senate Environment, Communications, Information Technology and the Arts Committee, Parliament of Australia, *Commonwealth Environment Powers* (1999) [2.19]. See also Justice Catherine Branson, ‘The *Environmental Protection and Biodiversity Conservation Act 1999* – Some Key Constitutional and Administrative Issues’ (1999) 6 *Australian Journal of Natural Resources Law and Policy* 33.

⁷ The *Environmental Protection and Biodiversity Conservation Act 1999* (Cth), Chapter 2.

⁸ [2006] FCA 736 (Unreported, Dowsett J, 15 June 2006).

⁹ *EPBC Act s 25*. New ‘matters of national environmental significance’ triggers added by way of regulation under s 25 must follow the Act’s mandated processes for consultation with state and territory governments. Prior to its amendment in late 2006, s 28A of the Act also required the Commonwealth Environment Minister to review the impact assessment triggers every five years and to prepare a report as to whether further ‘matters of national environmental significance’ should be included. However, this review requirement has now been repealed.

Recommendations

- That other potential ‘matters of national environmental significance’ be added to the EPBC Act under Part 3, including:
 - A greenhouse gas emissions trigger that may also work towards protecting and enhancing greenhouse sinks;¹⁰
 - Ozone depleting substances;
 - Agricultural land clearing;
 - Genetically modified organisms which may have adverse environmental effects;
 - Management of hazardous wastes;
 - Prevention of land and water degradation, including water extraction.¹¹

Q1(e) What kind of impacts should be considered under the Act? Does the Act adequately encompass not just direct but also indirect impacts?

Consideration of Cumulative Impacts

It is submitted that the EPBC Act lacks a comprehensive planning system and fails to adequately deal with cumulative impacts.¹² The referral and assessment process does not address the cumulative impacts of development and no assessment is currently provided for the overall impact of a series of unrelated developments on critical habitat for certain species or for World Heritage values.

The widespread destruction of natural habitat areas and the spread of urbanization have radically increased the likelihood that even relatively small projects may involve direct, indirect or cumulative impacts on species and ecological communities listed as threatened under the EPBC Act. As a result, it is inadequate to consider the environmental impacts of human activities for one project in isolation from others to which it is linked.¹³ Notably, the Full Federal Court on appeal in the *Nathan Dam Case* held that the notion of ‘impact’ under the EPBC Act “can readily include the “indirect” consequences of an action and may include the results of acts done by persons other than the principal actor”.¹⁴

In this regard, greater guidance for regional and local councils is required to ensure matters of national environmental significance are given acceptable consideration in the initial stages of the approval process. In addition, the Commonwealth Government may need to work with key local councils where zoning and planning laws can reasonably be expected to affect World Heritage values, RAMSAR wetlands, river catchments or coastal waterways. It has also been

¹⁰See, eg, Nick Minchin, ‘Responding to Climate Change: Providing a Policy Framework for a Competitive Australia’ (2001) 24 *University of New South Wales Law Journal* 550, 550-1. See also Commonwealth Department of the Environment and Water Resources, ‘Possible Application of a Greenhouse Trigger under the *Environment Protection and Biodiversity Conservation Act [EPBC] 1999*’ (Consultation paper, Environment Australia, 1999); Environmental Defender’s Office New South Wales, *ANEDO Submission ‘EPBC Act: Recommendations for Reform* (March 2008) available online http://www.edo.org.au/policy/epbc_amendment080305.htm

¹¹ Council of Australian Governments, *Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment* (1997) attachment I pt II.

¹² Cumulative impacts may be described as environmental effects arising either from persistent additions from one process or development or compounding effects involving two or more processes or developments.

¹³ *Nathan Dam Case* (2004) 139 FCR 24, 40 (Black CJ, Ryan and Finn JJ). See also *Mees v Roads Corporation* (2003) 128 FCR 418, 456 (Gary J).

¹⁴ *Nathan Dam Case* (2004) 139 FCR 24, 38 (Black CJ, Ryan and Finn JJ).

suggested that integrating NRM planning and regional marine planning into decision-making in Part 9 of the EPBC Act would allow for the consideration of cumulative impacts and improve the legislative framework of the Act.¹⁵

Recommendations

- That provisions be introduced in Part 9 of the EPBC Act that provide for a more comprehensive planning framework and adequate consideration of cumulative impacts.
- Specific provisions be made for considering local government plans, NRM plans, bio-regional plans, regional marine plans and other policy documents for projects that are likely to impact biodiversity 'hot-spots' and listed endangered ecological communities.

Assessment and Approvals

The Ad-hoc Application of Environmental Offsets

The informal use of offset-like measures at the controlled action decision stage of EPBC Act approval processes is unlikely to achieve the objectives of the Act. Remediation or mitigation requirements in conditions on EPBC Act approvals do not extend beyond the operating life of the development, and are expressed in extremely vague terms that do not necessarily lead to real conservation outcomes.¹⁶ The use of conditions on approvals also encumbers project developers with conservation responsibilities which they are unable or unprepared to implement, and which the DEWHA is ill-resourced to enforce.

The regulatory approval process under the EPBC Act should seek to prevent damage to ecosystems rather than placing undue reliance on offsets that aspire to replace losses with reconstructed ecosystems. It has been suggested that mitigation policies should include recognition that compensation sites may never fully replace natural sites and that the time required for restoration may exceed traditional expectations and will thereby contribute to species decline due to a loss of native habitat that cannot be immediately restored.¹⁷

¹⁵ McGrath, C. 'Swirls in the stream of Australian environmental law: Debate on the EPBC Act', *Environment and Planning Law Journal* (2006) 23: 165- 184 at 182.

¹⁶ Conditions based upon 'mitigation', 'offsets', 'credits' or 'no net loss' policies have been applied to developments that destroy or degrade natural assets and are predicated on undertakings to carry out compensatory actions elsewhere, such as restoration of degraded ecosystems or reconstruction of habitat. These conditions are rarely monitored for compliance.

¹⁷ Zedler, J.B. and Callaway, J.C. (1999) 'Tracking wetland restoration: do mitigation sites follow desired trajectories?' *Restoration Ecology* 7: 69-73.

Recommendations

- That conditions on approvals be enshrined in legally-binding agreements that are registered on land title and have effect in perpetuity¹⁸, in order to provide more certain and assessable conservation outcomes.
- That any conditions to approvals incorporate long-term commitments to monitoring and include clear restoration goals and a design that enables experimental evaluation in a rigorously controlled and replicated manner.¹⁹
- DEWHA should require the modification of design of developments to reduce or avoid impacts all together instead of offsetting biodiversity losses. Furthermore, the DEWHA must show the political will to refuse projects where no feasible restoration technology exists to achieve critical habitat replacement.

Biodiversity

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

Integrating Bio-regional Marine Plans

The EPBC Act specifically enables (though does not require) the Minister to prepare, or co-operate, in the preparation of bioregional plans.²⁰ The advantage of bioregional planning is that conservation of ecosystems can be based on a broad appreciation of their range rather than geographically limited to particular areas. Additionally, activities having impacts within and across terrestrial and marine ecosystems are given consideration and become subject to strategic planning.²¹ Thus, a bioregional plan will provide the 'blueprint' for the sustainable management of natural resource within a bioregion.

Currently, ecosystem-based regional marine plans are prepared under Australia's Oceans Policy.²² However, the *EPBC Act* does not provide an overarching framework for full consideration of the effects of multiple users on the marine environment. The lack of any federal statutory process into which they are integrated is an obvious deficiency. Integrating these plans into decision making in Part 9 of the EPBC Act would improve the legislative framework for the Act and would thereby enable the broad ecological footprint of a project with the potential to impact (directly or indirectly) upon a marine ecosystem to be rigorously assessed.

¹⁸ This is a feature of offset schemes such as the New South Wales *BioBanking Bill*, Queensland's Vegetation Incentives Program, and the Victorian BushTender program.

¹⁹ See Chapman, M.G. and Underwood, A.J. (2000) 'The need for a practical scientific protocol to measure successful restoration.' *Wetlands* (Australia) 19: 28-49; Wilkins, S., Keith, D.A., and Adam P. 'Measuring success: Evaluating the restoration of grassy eucalypt woodland on the Cumberland Plain, Sydney, Australia' *Restoration Ecology* (2003) 11(4): 489-503.

²⁰ Section 176 of the *EPBC Act*. A bioregion is an area comprising a whole ecosystem or several interconnected ecosystems, characterised by landforms, vegetation cover, human culture and history.

²¹ For further discussion of the advantages of bio-regional marine planning see McGrath, C. 'Swirls in the stream of Australian environmental law: Debate on the EPBC Act', *Environment and Planning Law Journal* (2006) 23: 165-184 at 178.

²² Section 176 (bioregional plans) of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth). At this stage, only a Bioregional Profile has been produced for the South-west Marine Region (there are 5 Marine Regions).

Recommendations

- A substantive amendment to the EPBC Act mandating the Minister to consider any relevant bio-regional marine plan when assessing referrals under Part 9 of the Act.

Q10 What are your views on the process for nominating threatened species, ecological communities and key threatening processes? / Q12 What matters should the Minister consider when deciding whether to list a threatened species or ecological community?

Threatened Species Nominations and Listing

Currently, some 800 species of plants and 111 species of animals are considered endangered or vulnerable in Australia. However, there is a magnitude of disparity between the two levels of government in Australia, with the Federal Government listing 30% of Australia’s species of marsupials as extinct or threatened, compared with 19% (Qld) to 62% (NSW) for the individual states.²³ IFAW is of the opinion that the process which underlies the movement from national threatened species lists to the relevant EPBC schedules is based upon ministerial whim as much as independent scientific review.

The 2006 amendments to the Act not only removed the obligation on the Commonwealth Environment Minister to ensure lists are kept up-to-date,²⁴ but initiated a new listing process that relies heavily upon ministerial discretion.²⁵ The move towards priority listing of threatened species is contentious, as it risks species that do not fall within annual ‘conservation themes’ or those that are of low socio-economic and cultural importance being overlooked, despite their ecological importance or conservation status.²⁶

Furthermore, under section 267 the Minister must ensure a threat abatement plan is in force for a key threatening process “only if the Minister decides that a plan is a feasible, effective and efficient way of abating the process.” It is submitted that the current discretionary power bestowed on the Environment Minister under Part 13 of the Act is far too broad and open to abuse. Recovery plans and threat abatement plans are necessary prerequisites in order to maximise the long term survival of affected species and ecological communities. Resources, not ministerial discretion, must be made available for the Department of Environment, Water, Heritage and the Arts (DEWHA) to adequately monitor the implementation of recovery plans. Current funding levels are notably insufficient to reverse the decline in biodiversity.

Recommendations

- The repeal of the amendments made to the following sections as a result of the *Environment and Heritage Legislation Bill (No.1) 2006*: s 267 and 269AA, and for sections 185 and 189(4) (5) (6) to be reinstated.

²³ ²³ Dickman, C. (2007) *A Fragile Balance: The extraordinary story of Australian marsupials*, Craftsman House, Sydney at 165.

²⁴ This was effected by the repeal of the former s 185.

²⁵ EPBC Act s 194.

²⁶ 2006 amendments repealed section 185 of the EPBC Act and introduced priority listing. The priority assessment list scheduled to commence on 1 October 2008 includes iconic species such as the Tasmanian Devil and the Koala, and included the endangered ecological communities of the Cumberland Plain Woodlands and the Lower Murray River and associated wetlands.

- That recovery plans (not ‘actions’) should be reinstated and be made mandatory requirements for the conservation of threatened species. Recovery plans provided an invaluable basis on which funds should be prioritised and directed for biodiversity protection and conservation.
- The Commonwealth Government must ensure that the Department of Environment, Water, Heritage and the Arts (DEWHA) is adequately resourced to review nominations for threatened species listing and to implement recovery plans in a timely manner.
- That ecological communities that are in the categories of ‘vulnerable, ‘near threatened’ and ‘conservation dependent’ and also ‘near threatened species’ should be provided due consideration under EPBC Act listing and project approval provisions.

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?

The emergency listing of species and ecological communities which may be threatened would be beneficial given the lengthy timeframes and assessment processes currently operating under the EPBC Act. IFAW believes that this approach is in agreement with the precautionary principle. Given the primary consideration of the Act – the conservation of biodiversity – the advantages would outweigh secondary considerations such as financial or administrative burdens.

Recommendation

- The EPBC Act should allow for the emergency listing of species and ecological communities which may be threatened.

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

Effectiveness of the Regional Forestry Agreement (RFA) Exemption

Regional Forest Agreements, of which there are now 10 covering forest areas in four states,²⁷ are the outcome of an inter-governmental forestry management process that was initiated in the early 1990s by the National Forestry Policy Statement and associated Comprehensive Regional Assessment of Australian forests.²⁸ Under section 38 of the EPBC Act the Commonwealth undertakes to refrain from exercising its environmental legislative powers for

²⁷ Department of Agriculture, Fisheries and Forestry, *Regions* (7 August 2008)

<http://www.daffa.gov.au/rfa/regions>. The forest regions covered are the Eden, north-east (upper and lower) and southern regions in NSW; the East Gippsland, Central Highlands, North East, Gippsland and western regions in Victoria; the south-west forest region in WA; and the whole of the state of Tasmania. The Commonwealth and state governments completed a Comprehensive Regional Assessment for the south-east Queensland region, but did not sign a regional forest agreement. The RFAs cover regions where commercial timber production is a major native forest use.

²⁸ *National Forestry Policy Statement* (1992).

the duration of the Agreement (20 years), having ‘accredited’ the relevant state forestry practices and laws. However, serious flaws in the information and scientific process underpinning the RFAs undertaken to date have been identified.²⁹ These flaws call into question the capacity of the concluded RFAs to observe the precautionary principle.

In an illustrative case, Marshall J of the Federal Court in *Wielangta Forest*³⁰ determined that forestry operations in the area were not being carried out ‘in accordance with’ the RFA due to various management failures and hence did not enjoy exemption from the ordinary environmental protection provisions of the *EPBC Act*.³¹ Marshall J was of the opinion that the promotion of biodiversity conservation sought by the legislation:

“can only be achieved by favouring a construction of the *EPBC Act* which views protection of the environment as an act of not merely keeping threatened species alive, but actually restoring their populations so that they cease to be threatened.”³²

Thus, the RFA exemption may no longer hold whereby agreements are not effectively implemented and do not deliver actual conservation outcomes in terms of protecting and restoring populations of threatened species. Whilst there is limited scope for agreements to be amended, the Federal Government in accordance with its obligations under the Convention on Biological Diversity, should ensure that Comprehensive Adequate and Representative (CAR) Reserve Systems and Ecologically Sustainable Forest Management (ESFM) are in accordance with best practice and are rigorously assessed and reviewed every five years.

Recommendations

- That the Commonwealth should intervene to regulate activities under an RFA if information comes to light that demonstrates a real threat to an endangered species, or world heritage or national estate values.
- That section 75 (2B) be repealed to enable the Minister to give adequate consideration to any adverse impacts that might arise under an RFA forestry operation under Division 4 of Part 4.
- That RFAs be amended specifically ‘to protect’ listed threatened species under the *EPBC Act* and to provide for threatened species management plans to be submitted to the DEWHA as a condition for exemption.

International Movement of Wildlife

Q22 What are your views on the effectiveness and utility of wildlife trade management practices under the Act? Do you have any suggestions about how the system could be improved?

Quarantined CITES Species

Australian Quarantine and Inspection Service (AQIS) confiscates items suspected to be a threat to the safety of Australian people, wildlife and environment. When live animals and/or eggs are found, the AQIS veterinarian on staff is called to take the animal/s to an AQIS site, either at the airport or nearby, to identify the species, determine if it is a CITES listed species, and verify if it has any detectable diseases.

²⁹ See McDonald, J. ‘Regional Forest (Dis)agreements: The RFA Process and Sustainable Forest Management’ (1999) **11** *Bond Law Review* 295; Redwood, J. ‘Sweet RFA’ (2001) **26** *Alternative Law Journal* 255.

³⁰ [2006] FCA 1729 (Unreported, Marshall J, 19 December 2006). See also *Brown v Forestry Tasmania* (No 4) (2006) 157 FCR 1

³¹ *Wielangta Forest* [2006] FCA 1729 (Unreported, Marshall J, 19 December 2006) at 293.

³² *Wielangta Forest* [2006] FCA 1729 (Unreported, Marshall J, 19 December 2006) at 300.

If the animal is exotic and is not a CITES listed species, it is usually humanely euthanized because they cannot take the risk of it potentially carrying a disease that could harm Australian native wildlife. If it is a CITES listed species there is a 24 hour turnaround time when DEH and AQIS officials must work together to find a location to repatriate the animal. If a location is not found within 24 hours, the animal must be euthanized.

IFAW believes that the turnaround time should be increased to at least 72 hours to make finding a location for repatriation more realistic, particularly for CITES listed species.

Recommendations:

- Increase the turnaround time to at least 72 hours to make finding a location for repatriation more realistic, particularly for CITES listed species.

Q23 Are the arrangements between the Commonwealth and the States and Territories for managing the domestic movement of exotic and native wildlife effective and appropriate?

Illegal trade in wildlife is one of the most significant global threats to biodiversity. IFAW believes that trade in wildlife products results in the killing of endangered species around the world. Perpetuating this trade drives these animals towards extinction. Additionally, trade in live species threatens domestic biodiversity as the exotic animal can potentially be released/escape into Australia's fragile native ecosystems. Exotic species increase competition for food and habitat and introduce disease to native species.

Domestic Wildlife Trade on CITES Appendix I Species

Internet Trade

IFAW investigations have uncovered the internet as a market for endangered species that is contributing to a booming illegal trade in wildlife.

Between April and June 2008, IFAW conducted a global investigation into the trade in endangered species (and products made from endangered species) on the internet. The investigation tracked over 7,000 wildlife products listings on 183 internet market providers in 11 countries (including Australia).³³

The research focused on advertisements and communiqués offering potentially illegal trade in species and wildlife products listed under the Appendix I of CITES.

Key Results for Australia

- 11 websites were tracked in Australia and exotic birds emerged as the most prevalently traded item (51.22%), followed by elephant products (15.85%).
- The majority of potential violations identified in this country study originated from eBay Australia (42.68%), and Petlink, a popular Web site in which users post classified advertisements for pets and equipment, ranked second (28%).

³³ The Full report (*Killing with Keystrokes: An Investigation of the Illegal Wildlife Trade on the World Wide Web*) can be downloaded here:
http://www.ifaw.org/Publications/Program_Publications/Wildlife_Trade/Campaign_Scientific_Publications/asst_upload_file848_49629.pdf

- Policies on sites (except for those on eBay Australia) ranged from no stated policy to abdication by site owners of responsibility for the content of advertisements on their sites.
- Australian sellers generally made no attempt to acknowledge or comply with their legal obligations by providing or referencing required documentation. Nearly 72% were classified as Likely Violations.
- Australian sellers by percentage were also among the worst global offenders regarding international shipping: Nearly one third (32) of the listings overtly offered this feature.

The EPBC Act states that anyone in possession of an exotic (non-native) bird that is listed under CITES must be able to demonstrate the legal origin of the specimen/s, and clearly states that the possession of unlawfully imported specimens and the progeny of such specimens is an offence and various penalties may apply.

However, IFAW's research found that in Australia, exotic birds emerged as the most prevalent traded item. And sellers over the internet are not making any attempt to acknowledge or comply with their legal obligations by providing or referencing required documentation, thus potentially violating the EPBC Act requirements for the domestic trade of exotic and endangered trade of wildlife.

Recommendations

- Institute a total ban on all online trade of any Appendix I species of wildlife, as well as products from subspecies listed on Appendix II or "look-a-like" species. Where products can easily be confused, species should be covered by a simple blanket ban.
- Ensure that the online facilitation of and participation in illegal trade in wildlife products is a prosecutable crime.
- Introduce processes to monitor and research wildlife trade on the Internet in order to secure reliable data and maintain a high level of awareness of the volume and trends of the trade in CITES-species on the Internet at any one time and thus be able to adopt effective responses in a timely manner to combat illegal trade.
- Enhance systems for policing of potentially fraudulent CITES permits and other tactical enforcement techniques.
- Ensure thorough investigations of illegal internet trade in wildlife to garner sufficient evidence for the judiciary in order to obtain appropriate convictions and therefore deter future illegal sales.

Q24 Does the Act provide appropriate provisions to ensure that Australia complies with its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)?

IFAW believes that there is a need for better organisation of information regarding the import and export of wildlife, which can be facilitated by an increase in information sharing and coordination between agencies.

Cooperation between government agencies is recognized as a high priority by CITES. Objective 3.1 of their Strategic Plan is: "To promote a high degree of cooperation, coordination and collaboration between national and international law enforcement agencies."

Additionally, IFAW believes that creation of a Wildlife Trade Task Force (consisting of government officials, NGOs representatives and other key stakeholders), would be highly beneficial to ensure that Australia complies with its obligations under the CITES.

Recommendations:

- The EPBC Act should be amended to ensure :
 - An increased level of information sharing and coordination between agencies.
 - The creation of a Wildlife Trade Task Force (consisting of government officials, NGOs representatives and other key stakeholders).
 - Convicted smugglers face harsher penalties, especially for repeat offenders.

Personal Effects Exemption

As explained by Lin³⁴, describing tourist demand for wildlife products as “low-volume and low-value” may cause some misunderstanding of the serious problems that such demand poses. Relative to syndicated smuggling, tourist demand is certainly minor in volume and monetary value. However, aggregate tourist demand is far from insignificant.

For example, tourist demand for ivory products has contributed to the domestic illegal ivory trade in Thailand, where Payuhakiri in Nakorn Sawan Province has become well known in recent years as the centre of the ivory carving industry in Thailand.

Under CITES, countries may exempt identified personal effects from all permitting requirements in accordance with Paragraph 3 of Article VII of CITES. Also, the EPBC Act provides that the Minister may recognize personal effects as exempt from the permitting requirements in specific instances. Where a CITES listed specimen is proposed to be exported and is identified in the regulations (Schedule 4A) as a personal or household item, no export permit is required.

Thus, the “personal and household effects” exemption essentially legalizes the importation of wildlife souvenirs from CITES listed species.

IFAW believes that these exclusions are in fact promoting wildlife trade of endangered species and are sending the wrong message to the public and traders. Thus, IFAW submits that Australia should re-evaluate the impact of this exemption and amend the EPBC Act accordingly.

Recommendation

- Re-evaluate the impact of the “personal and household effects” exemption currently available under the EPBC Act and subsequently amend the EPBC Act accordingly.

Interim Guidelines and Application Form for Approval of a Co-operative Conservation Program for CITES I species

IFAW strongly believes that an independent assessment of Co-operative Conservation Programs (CCP) by stakeholders would be vital in achieving a diversity of input and

³⁴ Lin J. (2005) Tackling Southeast Asia’s Illegal Wildlife Trade. Singapore Year Book of International Law and Contributors. Vol. 9 SYBIL 191–208

perspective to sufficiently address and manage the welfare and conservation of animals in captivity.

Additionally, IFAW submits that a period of time involving the request for public opinion and input should be considered (or at very least a period for interested parties such as NGOs to comment as suggested tentatively by the Regulations). The independent assessment and the public opinion should then be considered openly and transparently prior to any approval being given by the Minister.

IFAW also believes that a time delay/lag in the application for custodial rights and the subsequent transfer of animals is vital to ensure adequate assessment of CCP protocols is undertaken. A discrepancy involving similar circumstances was illustrated in the management scenario surrounding the Asian Elephants transferred to Taronga and Melbourne Zoos. Allowing for these elephants to be transferred into quarantine before CCP approval creates a scenario in which ‘blackmail’ situations can arise (e.g. the CCP needs to be swiftly approved in order to move the elephants into a more suitable zoo home as soon as possible).

Under Australian legislation, zoos are not allowed to import Asian elephants simply for exhibition and commercial purposes. Thus, if both the *Act* and the *Regulations* are used to assess a CCP then IFAW considers that there is an issue regarding the concept of “commercial purposes” (which we read as any commercial purpose – not just primary as stated in the *Act*).

Additionally, the *Regulations* state that the program’s objectives must be based on the conservation status and needs of the species. Nonetheless, while Asian elephants are endangered - the IUCN (International Union for Conservation of Nature) specialist group does not recommend captive breeding of the species for conservation.

In relation to the transfer of animals between institutions, the *Regulations* overlook the welfare of individual animals. Thus IFAW believes this critical aspect should be specifically addressed when moving animals.

Finally, conditions on permits to import CITES species for CCPs must be enforceable in perpetuity. In other words, the conditions need to be for the life of the animal and its progeny. The conditions also need to be enforceable which has been one of the major problems. Furthermore, DEWHA needs to commit to assessing whether conditions are being met and contingency plans enacted if they are not. In the case of the Asian elephant import to Australian zoos, for example, this would mean the elephants moving to the free range zoos if conditions can not be met.

Recommendations:

- An independent assessment of the Co-operative Conservation Program for CITES I species by stakeholders would be vital in achieving a diversity of input and perspective to sufficiently address and manage the welfare and conservation of animals in captivity.
- A time delay/lag in the application for custodial rights and the subsequent transfer of animals is vital to ensure adequate assessment of CCP protocols is undertaken.
- Conditions on permits to import CITES species for CCPs must be enforceable for the life of the animal and its progeny. Conditions must be monitored by Government and contingency plans enacted if conditions can not be met.

Compliance and Enforcement

Q37 Does the Act contain a sufficiently comprehensive and appropriate range of enforcement mechanisms? Are those mechanisms capable of deterring and responding to contraventions of the Act?

Monitoring and enforcing compliance with the provisions of the EPBC Act is crucial to the effective operation of the Act. However, the implementation of environmental laws, regulations, and standards has suffered from a lack of resources to undertake appropriate monitoring activities and reluctance to use stringent enforcement actions toward recalcitrant polluters and offenders. The implementation difficulties that the EPBC Act has faced as a result of the vagaries of government administration and the limited resources available to environmental groups to scrutinise decision-making under the legislation, threaten to seriously undermine the EPBC Act's effectiveness as an environmental protection tool.

The Australian National Audit Office has found that the DEWHA did not have sufficient information to know whether conditions on the decisions are generally met or not.³⁵ Still more alarming is the likelihood that the outcomes of administrative audits based on numbers of dollars spent, hectares planted, or volunteers engaged may be misinterpreted as signals of habitat restoration success in the absence of a satisfactory ecological audit. Clearly, the conspicuous absence or inadequacy of ecological audits in restoration and bio-offset projects needs an urgent remedy.

Moreover, the main impetus for change to the EPBC Act has come from the ruling courts, combining with the activism of environmental groups, rather than through consistent government action (the Greentree decision³⁶ notwithstanding). In order to counteract deficient political will, the opportunity for both applicants and third parties to apply for merits review must be reinstated. Pursuing accountability through legal means can come at a significance cost, particularly where court actions before the Federal court are involved. The EPBC Act provisions currently impede environmental organisations and NGOs from commencing litigation due to excessive costs, and thereby limit their ability to assist conservation of biodiversity and cultural heritage.³⁷

Recommendations

- That the DEWHA be compelled to publish twice yearly a list of firms (companies, industry, property development) that either do not comply with the EPBC Act or whose environmental performance is of concern (that is, a Public Disclosure Strategy).
- That the DEWHA be required to undertake an ecological audit of funded restoration projects, which addresses the extent to which the restored areas

³⁵ Australian National Audit Office. 'The Conservation and Protection of National Threatened Species and Ecological Communities', Audit Report No. 31 2006-07 at p 25.

³⁶ *Minister for the Environment and Heritage v Greentree (No 1)* [2003] FCA 857; *Minister for the Environment and Heritage v Greentree (No 2)* [2004] FCA 741; *Minister for the Environment and Heritage v Greentree (No 3)* [2004] FCA 1317.

³⁷ Macintosh, A. (2004) 'Why the Environment Protection and Biodiversity Conservation Act's Referral, Assessment and Approval Process is Failing to Achieve its Environmental Objectives', *Environment and Planning Law Journal* 21: 288.

follow a trajectory towards some specified target state and that represents 'natural' or undegraded conditions.³⁸

- That further indirect modes of regulation be evaluated as an effective means for influencing the behaviour of environmental actors, rather than relying on government action and sanctioning.³⁹
- The insertion of a provision into the EPBC Act that allows the court to grant the opportunity to obtain merits review on decisions regarding 'controlled action' decisions under Parts 7-9 of the Act.
- The insertion of a provision into the EPBC Act that allows the court to grant the opportunity to obtain merits review on decisions regarding 'listing process' under section 184 of the Act.
- That the former protection provided under EPBC Act s478 be reinstated in its original form. This would prevent the Federal Court from requiring undertakings for damages as a condition for granting an interim injunction, which is a significant benefit for public interest litigation.

³⁸ Success may be assessed by measuring aspects of species composition, community structure and ecosystem function. See ³⁸ Zedler, J.B. and Callaway, J.C. (1999) 'Tracking wetland restoration: do mitigation sites follow desired trajectories?' *Restoration Ecology* 7: 69-73.

³⁹ See Peter N Grabosky, 'Governing at a Distance: Self-Regulating Green Markets' in Robyn Eckersley (ed), *Markets, the State and the Environment: Towards Integration* (1995) 197; Catherine Lyall and Joyce Tait (eds) *New Modes of Governance: Developing an Integrated Policy Approach to Science, Technology, Risk and the Environment* (2005).