



# **HUMANE SOCIETY INTERNATIONAL**

## **Submission to the Review of the Commonwealth *Environment Protection and Biodiversity Conservation Act, 1999***

**January 2008**

### **Introduction**

Humane Society International (HSI) has been closely involved with the Commonwealth *Environment Protection and Biodiversity Conservation (EPBC) Act (1999)* since its inception, giving advice to parliament when the legislation was first negotiated and during all subsequent amendments.

During the first four years of the operation of the Act, HSI co-managed the EPBC Unit in Canberra along with WWF, Tasmanian Conservation Trust and The National Trust. The EPBC Unit was Government funded and its intent was to encourage public participation in EPBC Act decision making processes to help maximise its effective implementation.

Through HSI's nomination program, we have been responsible for many of the threatened species, threatened ecological communities, key threatening processes and heritage places listed under the Act and we have participated on numerous recovery and threat abatement teams and been a member of the Australian Heritage Council. We

have actively engaged in public consultation processes on referrals, administrative guidelines, strategic assessment of fisheries and permits to harm and trade in species.

There have been occasions where we have challenged the merits of ministerial decisions taken under the Act in relation to wildlife trade and fisheries and another where we challenged the legal impropriety of administrative guidelines for a Matter of National Environmental Significance (MNES). HSI also brought a successful case before the Federal Court seeking an injunction for activities in breach of the Act in relation to whaling.

Through this work we have gained a detailed understanding of the Act and the areas where it is succeeding and where it is failing to protect Australia's environment and biodiversity.

To supplement this submission please note the following attachments:

1. HSI submission to Senate Enquiry into the *Environment Protection and Biodiversity Conservation Act, 1999*, September 2008
2. Joint letter to Federal Environment Minister, Peter Garrett, in relation to EPBC Act reform from the Environmental Defenders Office, HSI, WWF and The Wilderness Society.
3. WWF-Australia, Australian Council of National Trusts, Tasmanian Conservation Trust (TCT), Humane Society International joint submission on potential additional Matters of National Environmental Significance for the *Environment Protection and Biodiversity Conservation Act, 1999*, May 2005
4. HSI, TCT & WWF Comments on the Australian Government's Draft Policy Statement: Use of environmental offsets under the *Environment Protection and Biodiversity Conservation Act, 1999*.
5. National Biodiversity Alliance (2004) Proposal for a new *National Biodiversity Initiative* securing Australia's Nationally Important Biodiversity and Ecosystem Services.

6. Beynon N, Graham A & Kennedy M (2005) Grumpy Old Greenies - lament waiting lists, wasted opportunities and wayward pork barrelling in Australia's biodiversity programs.
7. Drafting instructions for a *Tropical Forest Conservation Act* [and amendments to the EPBC Act to regulate illegal and unsustainable timber imports] prepared for HSI by the Environmental Defenders Office in August 2008

### **General comments**

HSI supported the passage of the EPBC Act through Parliament in 1999 recognising it as an improvement on the legislative regimes it replaced. We were attracted to the broad infrastructure of the Act where the Environment Minister has the central role in environmental decision making and where the triggers for Commonwealth intervention are Matters of National Environmental Significance (MNES) occurring in state and territory jurisdictions as well as Commonwealth. We also saw significant potential for the Commonwealth to engage pro-actively in biodiversity conservation through Chapter 5 of the Act.

Unfortunately, much of the potential within the EPBC Act has not been realised due to insufficient political will and an ongoing failure to direct sufficient resources to its implementation. The potential for the EPBC Act to be a powerful and effective tool for environment protection and biodiversity conservation remains and can be realised with increased political support and financial resourcing, and important amendments to strengthen some of its provisions.

HSI has always maintained opposition to aspects of the law. We believe there should be constraints on the broad ministerial discretion that is presented at almost all decision making points of the Act, so that clearer guidance is given to ministers in exercising that discretion and to remove the potential for politicisation of decisions. Amendments are required to remove some of the exemptions that undermine protection available to matters of National Environmental Significance (for example the RFA exemption s38) and the very subjective exemption for matters in the national interest (s158). We also remain very concerned by the opportunity for the Commonwealth to completely devolve

decision making through 'approval bilaterals' with states that have inadequate environmental assessment regimes.

The removal of rights to challenge the merits of ministerial decisions was an affront to public accountability in the 2006 amendments to the Act and these rights should be reinstated. Indeed, the ability to appeal decisions ought to be further extended so that approvals to cause significant impact on MNES can be challenged on their merit.

Amendments in 2006 that created a triage and drip feed process for listing threatened species, threatened ecological communities, key threatening processes and heritage places on the EPBC Act need to be repealed and the previous process reinstated with improvements and adequate funding to ensure all that warrants protection under the EPBC Act receives it. It should be that the Minister is required to maintain up to date and comprehensive lists, on the basis of current knowledge, and that all species, ecological communities, key threatening processes and heritage places nominated for protection in good faith be duly assessed within prompt statutory timelines.

The Matters of National Environmental Significance need to be expanded to meet the national conservation challenges of today, most obviously climate change, but also vulnerable ecological communities, unsustainable water use, broadscale landclearing, and migratory fish listed under Annex I of the United Nations Convention for the Law of the Sea.

In relation to climate change and beyond a greenhouse trigger, existing provisions in the Act will need to be better used and the Act further amended to create new provisions to contribute to and support the national mitigation effort against climate change. Climate change considerations should be explicitly brought into decision making throughout the EPBC Act. A Threat Abatement Plan, with regulatory underpinning, to assist species adaptation to climate change is certainly warranted.

We note that the Government would like the Review to take into account the Government's deregulation agenda to reduce and simplify the regulatory burden on people, businesses and organisations, while maintaining 'appropriate and efficient' environmental standards. HSI rather hopes the Government's goal would be to maintain 'high and best practice' environmental standards as a paramount objective.

HSI will respond to the questions posed in the discussion paper that relate to the provisions of the Act where we have experience and expertise. We will not address all questions posed. HSI would also like to register our strong support for the comprehensive submission from the Australian Network of Environmental Defenders Offices.

### **Objects of the Act**

The objectives of the Act would be clearer in intent if they were ‘to conserve biodiversity’ rather than ‘to promote the conservation of biodiversity’ and ‘to protect’ the environment and MNES instead of ‘to provide for protection of the environment and matters of national environmental significance’. ‘Promote’ and ‘provide’ are ambiguous terms and case law has already highlighted problems with this<sup>1</sup>.

#### **Recommendation:**

**Amend the objects of the Act to remove ambiguity and require protection for the environment and the conservation of biodiversity.**

### **Principles of ESD**

HSI considers the principles of ESD are appropriate to guide the Commonwealth’s role in implementing the Act. They are principles that are widely recognised in environmental law. However, HSI believes application of the precautionary principle should be extended to decisions to list threatened species, ecological communities, critical habitats and heritage places, currently excluded from the list of decisions where the principle must be taken into account. If a species, community, habitat or heritage place is not listed it does not receive any protection under the Act, surely at the first point of entry to the legislation adherence to the precautionary principle is warranted.

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<sup>1</sup> See *Brown v Forestry Tasmania* (No 4) [2006] FCA 1729; and *Forestry Tasmania v Brown* [2007] FCAFC 186, para 72-73, 80 and 92.

**Recommendation:**

**Application of the precautionary principle ought to be expanded to listing decisions for species, ecological communities, key threatening processes and heritage places.**

**Matters of National Environmental Significance MNES**

HSI supports the retention of all the current MNES ‘triggers’.

We consider it remiss that ‘vulnerable’ ecological communities were not included in the current MNES triggers. Ecological communities that are vulnerable to extinction are identified and listed under the Act but unlike species that are listed as vulnerable to extinction, they do not trigger the Act’s EIA provisions in Chapter 4. Ecological communities listed as ‘vulnerable to extinction’ should be added as a MNES trigger. This would be a sensible policy to help prevent such ecological communities becoming endangered.

Additional MNES triggers are required for vegetation clearance, greenhouse gas emissions, unsustainable water use, dams and the migratory marine species listed under UNCLOS. Further details on how each of the above could be incorporated as a MNES are found in a joint submission submitted to the Government in 2005 from HSI, WWF, Tasmanian Conservation Trust and the Australian Council of National Trusts on potential additional matters of National Environmental Significance to the EPBC Act (see attached).

Since our 2005 submission we note an Emissions Trading Scheme is planned for greenhouse gas emissions in the Government’s Carbon Pollution Reduction Scheme. HSI contends that this does not in any way take away the need for a greenhouse gas trigger in the EPBC Act. A MNES trigger, as proposed in our 2005 submission, would only deal with major new greenhouse gas emitting projects. A greenhouse trigger would enable the Government to intervene and ensure that new major greenhouse gas emitting projects are built to best practice standards to reduce the amount of carbon pollution they create – whereas the Carbon Pollution Reduction Scheme will rely on the

price of carbon permits being sufficient incentive to build new projects to best practice standards and by no means guarantee it. The Government should establish the capacity to regulate new greenhouse gas emitting projects in order to assist implementation of any international commitments that may be agreed.

We further note that the emissions from deforestation in 2006 at 11% of Australia's total emissions, are still the 4<sup>th</sup> largest source of emissions after stationary sources, transport and agriculture<sup>2</sup> and vegetation clearance is continuing at significant rates through inadequate regulatory regimes in the states and territories. Including major vegetation clearance activities as a MNES would give the Commonwealth greater opportunity to regulate this source of greenhouse gas emissions and significant threat to biodiversity.

**Recommendation:**

**The following MNES matters should be added:**

- **vulnerable ecological communities**
- **major new greenhouse gas emitting projects**
- **major new vegetation clearance proposals**
- **ground and surface water extraction and dams**
- **migratory species listed on Annex 1 of the UN Convention for the Law of the Sea**

**Thresholds proposed for the above MNES triggers are included in the joint submission provided at Attachment 3.**

**Significant, indirect and cumulative impacts**

The test of significance has led to the problem of cumulative impacts on many Matters of National Environmental Significance because each action must be likely to reach a 'significant impact' threshold before the assessment and approval processes are

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<sup>2</sup> Carbon Pollution Reduction Scheme Green Paper. July 2008.

triggered. HSI notes that failure to deal successfully with cumulative impacts is a major problem with environmental impact assessment laws generally.

We suggest the Government introduce a clause into the legislation to deal more directly with cumulative impacts such as that which now exists in Queensland law. Section 14 of the QLD *Environment Protection Act, 1994* defines environmental harm as that which *'may be caused by an activity a) whether the harm is a direct or indirect result of an activity; or b) whether the harm results from the activity alone or from the combined effects of the activity and other factors'*. The EPBC needs a similar definition for significant impact so that cumulative and indirect impacts are considered when assessing individual referrals. This would clarify what case law has already determined in the Nathan Dam Case where the Federal court 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"<sup>3</sup>.

We also suggest the Government could make better use of the Administrative Guidelines for Matters of National Environmental Significance to interpret what is considered significant impact and to explain that cumulative impacts will be taken into account in determining this.

As another strategy to deal with cumulative impacts, HSI welcomes the move towards Strategic Assessments to assist with strategic planning for areas where impacts on MNES are anticipated, as is being undertaken for The Kimberley region. However, strategic assessments also pose a risk if they subsequently act as an exemption from impact assessment processes. Therefore, before this approach moves further forward, guidelines need to be developed for strategic assessments to give the community confidence in the process and ensure strong outcomes for the environment and biodiversity will be delivered. For example, guidelines should make clear that a strategic assessment process will not allow a detrimental impact on a MNES, such as a threatened species, and ensure its conservation is enhanced.

Bioregional plans also offer opportunities for pre-emptive planning to deal with cumulative impacts on MNES. We note that the Government is proposing their use in the Commonwealth marine environment and this is welcome. HSI has proposed that

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<sup>3</sup> Nathan Dam Case (2004) 139 FCR 24, 38 (Black CJ, Ryan and Finn JJ)

conservation of terrestrial biodiversity in Australia would benefit from systematic bioregional planning for all of Australia's IBRA bioregions (or some other regional scale) focusing on national priorities such as the EPBC Act MNES and with the cooperation of states and territories. We believe the bioregional planning provisions of the EPBC Act ought to be strengthened so public consultation is required, guidelines are drawn up to ensure protection of the environment and conservation of biodiversity is ensured and so that the Minister cannot contravene a bioregional plan (currently a minister must only have regard to a bioregional plan).

HSI further notes that an urgent and immediate strategy is required to deal with cumulative impacts on the Cumberland Plain Woodland which is the most obvious case study to illustrate how cumulative impacts on a MNES have been tolerated under the EPBC Act. The Cumberland Plain Woodland was the first threatened ecological community listed under Commonwealth and NSW law and the fact that the NSW Scientific Committee last month recommended it be upgraded to critically endangered on the *NSW Threatened Species Conservation Act* illustrates the failure of both tiers of government to use their respective laws to prevent further endangerment of this threatened community, let alone achieve any recovery. Minister Garrett is also considering an upgraded listing for Cumberland Plain Woodland to critically endangered on the EPBC Act with a decision at the end of 2009.

Cumberland Plain Woodland has suffered death by a thousand cuts. That this has occurred cannot be blamed solely on the limitations of the significant impact test to deal with cumulative impacts in the EIA processes of the EPBC Act and state planning laws. Political will to protect this ecological community has been sorely lacking. A recovery plan has never been developed to guide and bind EIA decision making under the EPBC Act in relation to Cumberland Plain Woodland. Neither were opportunities taken under Chapter 5 of the EPBC Act, for example to list critical habitat remnants for Cumberland Plain Woodland on Commonwealth land on the EPBC Critical Habitat Register so that their protection was required through covenants when that land was sold to developers and the state government (see section 207A). If pro-active protective biodiversity conservation measures had been taken under the EPBC Act, Cumberland Plain Woodland would not have been at the mercy of the EIA processes. Urgent Administrative Guidelines, a Recovery Plan and other protective measures are required to make clear no further clearance of Cumberland Plain Woodland will be approved as

all further clearing is to be deemed significant, particularly if EPBC Act protection is upgraded to critically endangered as expected.

**Recommendations:**

**We suggest the Government introduce a clause into the legislation to deal more directly with cumulative impacts similar to that in Section 14 of the QLD *Environment Protection Act, 1994* which takes into account cumulative and indirect impacts in defining environmental harm.**

**Administrative Guidelines should be published which make clear that the Government will consider cumulative impacts in the referral, assessment and approval processes and proponents will need to factor this into referrals.**

**Strategic assessments are a pro-active means to engage in planning processes at an early stage to avoid cumulative impacts on MNES. Guidelines are needed for strategic assessments to ensure they protect and conserve biodiversity.**

**Provisions for bioregional plans ought to be strengthened to require public consultation, ensure conservation of biodiversity and protection of the environment and so that they cannot be contravened by the Minister.**

**Recovery plans, threat abatement plans, bioregional plans, conservation agreements, conservation zones and other tools in Chapter 5 of the Act ought to be better deployed to avert cumulative impacts on MNES.**

**An urgent strategy should be employed to reduce any further cumulative impacts on the Cumberland Plain Woodland.**

**Assessment and approvals**

HSI has witnessed the ongoing decline of several species and ecological communities despite listing on the EPBC Act. This has often been when, in the absence of an effective recovery plan or other pro-active conservation measures under the EPBC Act, their conservation has been left to the limitations of the assessment and approval

processes. The upgrade for Cumberland Plain Woodland to critically endangered is but one example.

HSI is further concerned at the trend towards environmental offsets in the approval processes under Part 9 of the EPBC Act which allow matters of national environmental significance to suffer significant impact with inadequate and uncertain 'compensation'. Under the previous government DEWHA sought to formalise this trend and issued a Draft Policy Statement: *Use of environmental offsets under the Environment Protection and Biodiversity Conservation Act 1999*. Please find at Attachment 4 a joint submission from HSI, TCT and WWF strongly opposing the policy. Our submission concluded that offsets are not appropriate for use in relation to matters of national environmental significance. The principle of offsets presupposes that MNES which are the subject of a development footprint are replaceable. However, the very fact that a listed species is endangered or vulnerable due to habitat loss or degradation constitutes an admission that such habitat as remains is critical and often irreplaceable in a time frame meaningful to the recovery of the threatened species or threatened ecological community in question.

Approval should not be given to cause significant impact to matters of national environmental significance and conditions on approvals should be to ensure that significant impacts do not occur and rather than attempt to offset them. HSI has welcomed examples of decision making to that effect in some instances from the present environment minister. In 2008, Minister Garrett rejected at least 6 referrals because they would have caused significant impact to matters of national environmental significance, which contrasts with the rejection of just two referrals between 2000 and 2007. For example, the Minister recently refused a development application which could cause significant impact to the endangered cassowary population at Mission Beach. The latest shift in the culture of decision making under the Act is very welcome but it does demonstrate that decision making under the EPBC Act is open to the vagaries of ministerial discretion and stronger guidelines are required to steer ministers to decisions that clearly protect matters of national environmental significance.

In addition to the above matters, HSI gives full support for the recommendations given in relation to assessment and approval processes in the submission to the review by the Australian Network of Environmental Defenders Offices.

**Recommendation:**

**The EPBC Act should be strengthened through amendment and guidelines to limit ministerial discretion so that approvals cannot be given to cause significant impact to threatened species or ecological communities or to damage World Heritage, National and Commonwealth Heritage Sites and Ramsar sites. Critical habitat for threatened species must also be strictly protected from harm.**

**The use of offsets is not appropriate for matters of national environmental significance.**

**Biodiversity**

There is much under utilised potential in Chapter 5 of the EPBC Act to provide greater protection for Australia's biodiversity.

First and foremost it is necessary to ensure that MNES lists are comprehensive and that all that qualifies for EPBC Act protection receives it. There remains a backlog in the listing of terrestrial ecological communities and marine species that are known to be threatened. The Minister should direct DEWHA to address the backlogs as an urgent priority and direct sufficient resources to the task. The current nomination and listing process which is drip feeding species and communities on to the lists is wholly inadequate as HSI will further detail in the section below.

In general, it is unfortunate that the day to day decision making of the assessment and approval processes necessarily tie up much of the already very limited resources that are available for EPBC implementation leaving little funding for more pro-active use of EPBC Act provisions to protect biodiversity such as those in Chapter 5.

EPBC Act provisions for conservation agreements, covenants, conservation orders, conservation zones, critical habitat protection, important cetacean areas, bioregional plans, recovery plans, wildlife conservation plans and threat abatement plans are all underutilised and underfunded. Given sufficient political will and financial resourcing, they all offer considerable scope for biodiversity protection.

In some instances failure to use these provisions has been deliberate rather than a resourcing issue. For example past ministers decided against creating a Threat Abatement Plans for Climate Change (to assist threatened species adapt through habitat protection measures e.g. corridors and buffer zones) and a Threat Abatement Plan for Vegetation Clearance. As these are the two of the greatest threats facing Australia's biodiversity HSI is extremely pleased these decisions are being reviewed. The progress that has been made to address the threat longline fishing poses to albatross and petrels shows the benefits of a Threat Abatement Plan that is well funded, receives political support and is implemented through regulations.

HSI recommends much greater use of Wildlife Conservation Plans under the EPBC Act to adequately conserve conservation dependent and migratory species. The provisions for Wildlife Conservation Plans should be strengthened and flexibility introduced so that they may be prepared for species or groups of species that may not be formally listed. There are many iconic species that are dear to Australians but that are not listed as threatened that would benefit from coordinated national conservation action through Wildlife Conservation Plans; species such as the koala, the dugong (listed as migratory) and the dingo.

Bioregional planning offers considerable potential for biodiversity protection. HSI has welcomed the Government intention to use the bioregional planning provisions in the Commonwealth marine environment. In 2004 HSI and colleagues in the National Biodiversity Alliance<sup>4</sup> recommended the Government implement a *National Biodiversity Initiative* which would develop bioregional plans as a tool for landscape planning across Australia to deliver protection for nationally important biodiversity and ecosystem services on different tenures (see Attachment 5). We proposed bioregional plans be developed systematically for all of Australia's IBRA bioregions working cooperatively with states and territories. HSI still recommends this form a key plank of the Government's Caring for Our Country program noting that it would help achieve an intended outcome for the program to ensure, through appropriate landscape scale planning, that investments in conservation and management of private land complement the National Reserve System. The provisions for bioregional planning should be

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<sup>4</sup> The National Biodiversity Alliance (2004) Proposal for a New National Biodiversity Initiative, securing Australia's nationally important biodiversity and ecosystem services (Australian Bush Heritage Fund, Australian Wildlife Conservancy, Australian Centre for Environmental Law, Birds Australia, Greening Australia, Humane Society International and WWF).

strengthened to support such strategies (e.g. opportunity for public consultation, guidelines to ensure protection for MNES, requirements on minister not to contravene).

The exemption for actions covered under Regional Forest Agreements to undergo assessment and approval for MNES impacts undermines biodiversity conservation in forest areas. It should be removed or, failing that, significantly constrained to ensure that Regional Forest Agreements are required to avoid detrimental impacts on, and enhance the conservation of threatened species, threatened ecological communities and migratory species, and to strictly protect their critical habitats. New information about a listed species impacted by a RFA, or the listing of a new species onto the EPBC Act that is impacted by a RFA, should both require a review of the RFA to remove those impacts.

In the marine environment HSI holds serious concerns over exemptions for offences for killing threatened, marine, migratory and cetacean species that happen during the course of commercial fishing. Fisheries bycatch poses a serious threat to marine biodiversity and is the key threat for many threatened species. Certain actions are not offences if they are 'taken in accordance with a management arrangement or an authorisation process that is an accredited management arrangement or an accredited authorisation process for the purposes of the declaration'. In order to justify an exemption for killing a listed species a fishing operation should employ proven mitigation measures that enable a high level of confidence that listed species will not be killed. Yet, many fisheries operate in Australia knowing full well that they have a good chance of killing a threatened species and that their mitigation measures, if any, are inadequate, even if they are in accordance with an accredited management arrangement or authorisation process. HSI recommends stricter requirements to avoid killing listed species during fishing operations.

**Recommendations:**

**Existing provisions for pro-active EPBC Act intervention in biodiversity conservation need to be better utilised and funded such as recovery plans, threat abatement plans, wildlife conservation plans, bioregional plans, conservation zones, conservation agreements and covenants.**

**Threat Abatement Plans should be developed for Climate Change and Vegetation Clearance.**

**Provisions for bioregional plans ought to be strengthened to require public consultation, ensure conservation of biodiversity and protection of the environment and so that they cannot be contravened by the Minister.**

**The exemption for Regional Forest Agreements should be repealed or significantly constrained so that RFAs ensure the conservation of threatened species, threatened ecological communities and migratory species is enhanced and critical habitats are strictly protected.**

**New information about a listed species impacted by a RFA, or the listing of a new species onto the EPBC Act impacted by a RFA, should both require a review of the RFA to remove those impacts.**

**Greater use should be made of Wildlife Conservation Plans for conservation dependent and migratory species with flexibility to prepare them for unlisted species that would benefit from coordinated national conservation action (such as the dingo and koala).**

**There should be stricter requirements to avoid killing listed species during fishing operations to qualify for exemptions for offences.**

### **Critical habitats**

Critical habitat protection should be the bastion of threatened species and biodiversity conservation. If their critical habitats are not protected, threatened species do not stand a chance. The Government must significantly increase investment in critical habitat protection if we are to arrest the decline in biodiversity loss in this country – there is no getting around it. The current provisions for critical habitat in the EPBC Act are not being used, in part because the Department argues they do not provide effective protection. The EPBC Act needs amendments to deliver much stronger protection for critical habitats.

It is a requirement that recovery plans for threatened species identify 'habitats that are critical to the survival of the species or community concerned and the actions needed to protect those habitats'. Hundreds of critical habitats have been identified in recovery

plans. Yet DEWHA has declined to list these critical habitats on the EPBC Act Register of Critical Habitats making use of Section 270A(1b) arguing that there are more effective means to protect critical habitats (which are rarely pursued either). There should be an explicit legal requirement for critical habitats identified in recovery plans to be listed on the Register and protected.

As amendments in 2006 have seen a regrettable move away from mandatory recovery planning, there should be a requirement to identify and protect critical habitat immediately following listing of a threatened species or ecological community. The 2006 amendments did see the welcome introduction of a requirement for 'Conservation Advice' at the point of listing which sets out 'information about what could appropriately be done to stop the decline of, or support the recovery of, the species or community' (section 266B). It should be a requirement for the TSSC and Minister to include a list of the species' critical habitats, where known, in the conservation advice and for them to be listed on the EPBC Act Register. This is because since the 2006 amendments we are no longer able to rely on the development of recovery plans to provide this essential information for the conservation and recovery of threatened species. Given the excessive lengths of time given to the TSSC to assess threatened species and ecological community nominations this is not an unreasonable request.

HSI has always maintained that the EPBC Register for Critical Habitat should be used as a central database for listing all critical habitats identified through recovery plans and other processes, so that proponents, community groups and other stakeholders, have one place to go to see if their activities will harm or benefit critical habitats for threatened species. Currently, stakeholders have to trawl through all the different recovery plans to locate the critical habitats that have been identified. Section 207A requires the Minister to keep a Register but gives him discretion not to list anything on it. This section should be amended so that listing critical habitats, once identified and scientifically verified, is a mandatory requirement.

Section 270A (1a) states that in considering whether to list habitat, the Minister must take into account the potential conservation benefit of listing the habitat. This is the clause used by DEWHA to avoid going to the trouble of getting the Minister to list critical habitats. There may be very occasional conservation grounds when you wouldn't publish details of critical habitat because it could attract harm to those places, for example the

site of a rare plant species that is the subject of illegal trade. But these are very rare circumstances. Ordinarily, there would not be any downside to listing critical habitat on the EPBC Register. Section 270A (1A) should be repealed. Section 189A already enables a Minister to keep information about a threatened species confidential if its disclosure will threaten a species.

However, HSI strongly agrees that, as it currently stands, listing on the Register is not sufficient to protect a species. There should be subsequent requirements on the Minister to ensure that critical habitats on the Register are strictly protected through various regulatory tools available in the EPBC Act, for example 'red flags' in the impact and assessment processes and requirements to develop conservation agreements, covenants, conservation zones and Commonwealth Reserves (with discretion to decide which particular protective options are appropriate) and to negotiate such levels of protection with private landholders, state and territory governments.

Further, it should be made clear through Administrative Guidelines that clearance of critical habitat will be considered significant impact and will not be approved.

Earlier this year Minister Peter Garrett announced that \$250,000 will be directed to the identification of climate refugia for threatened species. These are places where threatened species are predicted to find secure and suitable habitat as the climate changes – they will be critical for species to adapt to climate change. The EPBC Act should be used as a tool for protecting climate refugia for threatened species once they have been identified. The definition of critical habitat should be expanded to include climate refugia.

It should also be possible to list critical habitats for listed migratory species on the EPBC Act Register of Critical Habitats.

Please see our submission to the Senate EPBC Enquiry at Attachment 1 and our paper Grumpy Old Greenies at Attachment 6 for further comments on critical habitat protection.

**Recommendations:**

**The Government needs to significantly increase investment in critical habitat protection and strengthen provisions for it in the EPBC Act.**

**The definition of critical habitat should be amended to include climate refugia for threatened species.**

**It should be mandatory to list critical habitat for threatened species and ecological communities on the EPBC Register for Critical Habitat.**

**Critical habitats for migratory species should be eligible for listing on the EPBC Register for Critical Habitat.**

**Critical habitats for a threatened species or ecological community should be identified in the conservation advice that must be in place for every threatened species under section 266B.**

**Protection for critical habitats should be strengthened in both Commonwealth, state and territory jurisdictions.**

**It should be made clear through Administrative Guidelines that detrimental impacts on critical habitat will be considered significant impact and will not be approved (including critical habitat identified in recovery plans, conservation advice and listed on the Register)**

**The Minister should be prohibited from approving detrimental impacts on critical habitat (including critical habitat identified in recovery plans, conservation advice and listed on the Register).**

**The Minister should be required to secure the conservation of critical habitats through conservation agreements, covenants or other regulatory tools as appropriate and be required to negotiate such protection with state and territories where critical habitat falls outside the Commonwealth jurisdiction.**

### **Nomination and listing processes**

HSI does not support the new triage and drip feed process for nominating threatened species, ecological communities and key threatening processes, Commonwealth and National heritage places introduced in the 2006 Amendments.

For fifteen years a core activity of our organisation has been to nominate critical habitats, threatened species and ecological communities for protection under state and federal legislation and we are the organisation in Australia with the greatest experience of these processes<sup>5</sup>.

HSI invests resources in this effort because unless a species or ecological community is listed it does not trigger any of the protective provisions of the Act (it is not a Matter of National Environmental Significance) nor is it eligible for the development of a recovery plan and other conservation measures in Chapter 5 of the Act or Commonwealth funding. Therefore, we have strived to ensure that every species and ecological community that qualifies for EPBC Act protection receives it.

Unfortunately, over the past 10 years our effort to achieve this comprehensively has been thwarted by a lack of political will and a lack of resources dedicated to assessing nominations – and in several cases in the past overt political interference and abuse of process. Prior to the 2006 amendments we witnessed ministers deliberately postpone deadlines for their decision making on controversial nominations for several years, notably in the case of commercially fished marine species and ecological communities on private land, by repeatedly extending the statutory deadlines for the Threatened Species Scientific Committee to assess those nominations. We also experienced a minister rejecting controversial nominations on invalid grounds, then concede the grounds were invalid and so agree to re-consider them, but claim nominations under reconsideration are not subject to statutory deadlines! Such exercises in bureaucratic farce are detailed in HSI's submission to the Senate Enquiry on the operation of the EPBC Act and our paper *Grumpy Old Greenies* (Attachments 1 and 6). HSI has been informed that TSSC advice went to Ministers never to be seen again (a breach of the Act) and that advice was withheld from ministers knowing it was controversial.

Instead of fixing the process so that the opportunities for politicisation of the process and delays were removed, the 2006 amendments simply brought in a new nomination processes which has entrenched and legitimised the delays and specifically enabled opportunities for politicisation of the process.

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<sup>5</sup> HSI has been responsible for the listing of over 100 threatened species under state laws and the EPBC Act, 5 of the 17 key threatening processes listed on the EPBC Act and almost a quarter of the threatened ecological communities listed on the EPBC Act and the NSW *Threatened Species Conservation Act 1995*.

The 2006 amendments introduced a process whereby only the public nominations considered priorities by the Minister and the TSSC are assessed in any given year. The Minister determines a 'finalised priority assessment list' annually, after taking advice from the TSSC, and any nomination that does not make the priority list for two consecutive years is completely removed from the process, forcing the nominee to resubmit. Therefore, nominations that are not considered to be priorities are effectively rejected before they have been properly assessed which is unfair to the nominee.

If listing species and ecological communities is to largely rely on a public nomination process and the good will and generosity of time and expertise of scientists acting in a voluntary capacity, it is only fair that all nominations are duly assessed.

In determining a 'proposed priority assessment list' the TSSC in s194G is required to have regard to conservation themes set by the Minister, their own views as to what constitutes a priority and their capacity to make assessment and *any other matter that the Committee considers appropriate*. This gives the TSSC fairly broad discretion.

There is no requirement for the proposed priority assessment list to be published nor is there opportunity for public consultation on the list. This required amendment.

On receiving the proposed priority assessment list, the Minister has incredibly broad discretion to determine the finalised priority assessment list. Section 194K(3) states that *in exercising the power to make changes [to the final priority assessment list], the Minister may have regards to any matters that the Minister considers appropriate*. It is usually the intent of threatened species laws to strictly quarantine listing decisions from political considerations (whereas socio-economic factors can be taken into account in the assessment and approval stages). As the public does not have access to the proposed priority assessment list, section 194K(3) offers a clear opportunity for politicisation of the prioritisation process that should be removed.

When the amendments were debated in Parliament, then opposition environment spokesperson Mr Anthony Albanese described section 194K(3) as an *“extraordinary provision – placing even more power in the hands of a minister who already treats the act as his political plaything”*. He also remarked to Parliament that these amendments *“will increase the Howard Government’s politicisation of environment and heritage protection”*.

So, whereas previously Ministers rejected ecological community nominations on dubious legal grounds or repeatedly gave the TSSC extensions to consider nominations that were politically controversial, now a Minister is able to decree a nomination is not a priority, for whatever reason he considers appropriate for two years in a row and remove it from the system altogether, with little explanation or accountability.

Several of our nominations have been rejected in this way having not been included in the 2007 or 2008 finalised priority assessment lists. These nominations were submitted long before the 2006 amendments in good faith that they would be assessed and after considerable effort on the part of our organisation.

While HSI does acknowledge that controversial species and ecological communities have been included in the finalised priority assessment lists in 2007 and 2008, it remains the case that, in the hands of a minister that is so inclined, the new process, and the broad discretion built into it, seriously risks facilitating and formalising the politicisation of the listing process that has been experienced over the past 8 years. This falls far short of national and international best practice decision making in threatened species laws.

The new process has certainly formalised the excessive delays whether for political reasons or not. For even if a nomination makes it on to the Minister's finalised priority assessment list, the TSSC can now be granted excessively long assessment times at the outset. For example, New England Peppermint Woodlands which HSI originally nominated in December 2000, have been included in the Minister's finalised priority assessment list but they still have to wait until 20 September 2010 for a decision on whether or not they will be protected. HSI's nomination for the Coorong Wetlands in the Lower Murray River – a matter of intense current public interest - has been included in the 2008 FPAL but the deadline for assessment is not until 30 September 2011. Any Australian watching the news in the past year could tell you the Coorong is endangered and a federal election will likely be held before the Minister's deadline comes up. Other imperilled ecological communities such as the Macquarie Marshes simply have not made it on to the Minister's priority list (despite fitting the year's freshwater theme). On current timeframes, it will take at least another decade for the EPBC lists of threatened ecological communities to be comprehensive. That is simply not good enough when there is an urgent need to arrest the ongoing decline in the nation's biodiversity.

HSI notes that while the TSSC can be given extremely long deadlines for assessing public nominations, the public is given very little time to prepare nominations once a call for nominations and conservation theme have been announced. The minimum timeframe allowed is 40 business days. Speaking from considerable experience, HSI can advise that public nominations take longer than this to prepare, relying as they often do on the provision of scientific expertise given in a voluntary capacity.

Therefore, HSI's first preference is for the 2006 nomination process to be repealed and the previous nomination process reinstated with improvements to prevent Ministers from postponing decisions. Prior to the 2006 amendments, unless the Minister granted an extension, the Threatened Species Scientific Committee (TSSC) was required to provide the Minister with advice on whether a species or ecological community should be protected within 12 months of receiving the public nomination, and the Minister then had 90 days to consider their advice before reaching a final decision on whether or not to list. This remains the process for most state and territory threatened species laws. With political will and sufficient resources, DEWHA and the TSSC should be capable of assessing all public nominations within those statutory deadlines, as do most states and territories with similar laws.

However, if the process introduced in 2006 remains, HSI would recommend a number of amendments to improve it to make it fairer to public nominees and to remove the opportunities for excessive delays and politicisation of the process.

**Recommendation 1:**

**HSI supports the reinstatement of the listing process that was repealed in 2006 but with the following changes:**

- The Minister should only be able to give the TSSC one extension to consider a nomination and that extension should not be for more than an additional 12 months.**
- There should be public notification when advice passes from the TSSC to the Minister so that the Minister may be held accountable to the 90 day statutory deadline for his or her decision. It would also be preferable for the actual advice from the TSSC to be made public at this point.**

**Recommendation 2:**

If the nomination and listing process introduced in 2006 is to remain then HSI recommends the following amendments:

- All public nominations should be assessed within a maximum of three years.
- Prioritisation should be in regard to determining the deadline for a listing decision within a maximum time frame of three years.
- Discretion in determining the deadlines for listing decisions should be constrained to a preliminary assessment of the conservation status of the species or ecological community nominated. Socio-economic considerations should not be taken into account in determining priorities (as per listing decisions).
- The proposed priority assessment list should be made public when it is passed to the Minister.
- There should be opportunities for public consultation in determining the finalised priority assessment list.
- Funds to the section in DEWHA that services the TSSC and assists in the assessment of public nominations should be significantly increased.
- The public should be allowed at least 60 business days to submit a nomination once a call for nominations and conservation theme has been announced.

**In both instances:**

- There should be the opportunity for the public to nominate critical habitats for listing on the Register of Critical Habitats.
- The precautionary principle should apply to decisions to list threatened species, ecological communities, key threatening processes, heritage places and critical habitats on the Register (amend section 391).

**- Decisions not to list threatened species, ecological communities, key threatening processes, heritage places and critical habitats ought to be open to merits review.**

### **Maintaining lists up to date**

Further sanctioning the delays in listing threatened ecological communities was the repeal of section 185 in the 2006 amendments. Section 185 (1) required the Minister to keep the lists of threatened species and ecological communities in an up to date condition. There was no excuse for repealing such an important requirement. Also repealed was section 185 (2), which required the Minister to assess the ecological communities on state and territory lists for EPBC Act protection. Had this clause been implemented properly it would have seen the comprehensive listing of most of the continent's known threatened ecological communities by now. Section 185 (1) and (2) should be reinstated.

HSI notes that this is given support in the Australian National Audit Office Audit 31 into the EPBC Act and threatened species protection, which remarked:

*In addition to processing public nominations, there was a substantial backlog of approximately 700 State and Territory ecological communities to be considered. However, amendments to the Act repealed this requirement. The removal of the requirement to review State and Territory threatened ecological communities creates a risk that many eligible communities not identified through public nominations will not be considered for listing. The ANAO considers that the State and Territory listed ecological communities should be at least considered by the department and the TSSC within the context of the new listing process.*

### **Recommendations:**

**Repealed s185 that required the Minister to maintain the lists of threatened species and communities in an up to date condition and to decide whether to list a threatened ecological community listed on a gazetted state or territory list should be reinstated.**

## **Emergency Listings**

The discussion papers asks ‘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?’

If excessive timeframes for assessing nominations remain, HSI believes the need for emergency listing provisions is as important as ever. The Minister needs to have the ability to act swiftly where there are immediate or ongoing threats of significant impact to a nominated species or ecological community. Otherwise, given the typical timeframes currently given for assessing nominations, a species or ecological community could well find itself qualifying for a higher category of threat at the point of listing to what it did at the point of nomination.

### **Recommendation:**

**There should be provisions for the emergency listing of threatened species and ecological communities.**

## **Considerations when listing species**

HSI recommends the predicted impacts of climate change on a species or ecological communities should be considered explicitly when deciding whether to list them as threatened. Such an approach would assist the Government deal with the threat climate change poses to biodiversity in a pre-emptive rather than reactive manner. Currently, a species is only protected under the Act once its conservation status has already deteriorated to a level where recovery is very difficult. Given that climate change presents such a grave and pervasive threat to biodiversity, it would be prudent for the EPBC Act to become more pre-emptive in dealing with it.

**Recommendation:**

**HSI recommends predicted impacts of climate change on species and ecological communities are considered in listing decisions.**

**Categories of threat**

This discussion paper asks if the categories of threat are appropriate. They are no longer appropriate for marine fish. The 2006 amendments introduced new provisions especially for the listing of commercially exploited marine fish to deal with the political difficulties involved. Prior to the 2006 amendment a species could only be listed in the 'conservation dependent' category if it did not qualify for listing in a higher category. This remains the case for all species other than marine fish.

In 2006 a clause was introduced specifically to enable marine fish to be listed as conservation dependent even though they qualify for listing in a higher category – see s179(6). If a terrestrial or marine mammal species becomes threatened with extinction it is no longer considered appropriate for them to be commercially exploited. There is no justification for this not to apply to marine fish.

The amendment followed the highly controversial listing of orange roughy as conservation dependent in 2005. Orange roughy qualified for listing as endangered and the Minister at that time said in a public radio interview that he was preparing to list it as such. An endangered species listing would have prevented commercial fishing for the species in Commonwealth waters and strenuous lobbying from the fishing industry ensued. The Minister finally listed it as conservation dependent which enabled commercial fishing to continue even though, at the time, it did not qualify for that category (this was prior to the 2006 amendment).

The 2006 amendment now specifically allows for commercial fish to be listed as conservation dependent so that fishing may continue, albeit with increased oversight from DEWHA. HSI is waiting on listing decisions for a number of species we have nominated where commercial fishing is the principal threat (school shark, eastern

gemfish and southern bluefin tuna). It should be a requirement that all species are listed in the highest category for which they meet the criteria.

In the case of conservation dependent species there should be an explicit requirement for the Minister to have to approve the conservation program for the species and for that program to ensure that the species avoids qualifying for listing in the vulnerable, endangered or critically endangered categories.

Conservation dependent is a sub-category of the 'near threatened' category used by the IUCN. The other sub-category is near threatened: lower risk. Under the EPBC Act a species only qualifies for listing as conservation dependent 'if the species is the focus of a conservation program' the cessation of which would cause it to become vulnerable, endangered or critically endangered (s179(4)). This unduly limits the near threatened species that qualify for EPBC Act protection. Many near threatened species are only just on the radar for conservation action and so conservation programs have not yet been developed for them.

The EPBC should more properly reflect the IUCN categories and include a near threatened category for species and ecological communities that could then be subdivided into conservation dependent and lower risk. There should be requirements for pre-emptive conservation action to be taken to avert near threatened species qualifying for listing in a higher category in the future. Once a near threatened species has been listed, there should be a requirement that a conservation program is developed and the Minister should be required to approve this conservation program. This should certainly be a mandatory requirement where the species is commercially exploited.

There should be a near threatened (conservation dependent and lower risk) category for ecological communities, as currently conservation dependent listings are only available for species.

HSI recommends much greater use of Wildlife Conservation Plans under the EPBC Act to adequately conserve conservation dependent and migratory species. The provisions for these plans should be strengthened.

It is important that conservation action for near threatened species qualifies for funding from the Commonwealth to avert further endangerment which would be more expensive to remedy down the track.

As previously mentioned in the section on additions to MNES, vulnerable ecological communities should trigger the impact and assessment provisions.

**Recommendations:**

**All species, including commercially fished marine fish, should be listed in the categories they qualify for according to their biological criteria.**

**The EPBC Act categories should more closely reflect the IUCN categories so that there is a 'near threatened' category which divides into 'conservation dependent' and 'lower risk'.**

**There should be a requirement for conservation programs in place for conservation dependent species to be approved by the Minister, particularly if the species is commercially exploited.**

**There should be a requirement to develop a conservation program for approval by the Minister for near threatened (lower risk) species to avoid their conservation status deteriorating such that they qualify for listing as vulnerable or higher, particularly if the species is commercially exploited.**

**The current conservation dependent category should apply to ecological communities, as should any new near threatened category.**

**Near threatened species and ecological communities (conservation dependent and lower risk) should be eligible for Commonwealth funding.**

**Duplication with state and territory lists**

The discussion paper asks if there are 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.

State and territory regimes do not provide sufficient protection for threatened species and ecological communities. Witness Cumberland Plain Woodland as but one example from NSW. Similar experiences can be found nationwide. Once a species or ecological community is considered nationally threatened it is rightly the responsibility of the Commonwealth Government to protect it and see that it is recovered, and to secure cooperation from states and territories to this effect. EPBC Act protection acts as a vital safety net for the failure of state and territory protective regimes – and vice versa there should be opportunities for state and territory regimes to step in when the EPBC Act fails or does not apply.

Further, it is perfectly acceptable that there should be discrepancies between Commonwealth, state and territory lists because they are protecting species and ecological communities according to different scales of responsibility. For example, a species may be threatened within NSW but elsewhere in its range its conservation status may be more favourable such that overall it doesn't qualify for listing nationally. It remains the responsibility of NSW to ensure human induced threats to that species are removed in NSW.

HSI notes that under the EPBC Act, the Minister is taking the approach to list broadscale ecological communities that are nationally threatened. Whereas, under the *NSW Threatened Species Conservation Act* and the *Victorian Flora and Fauna Guarantee Act* the same ecological communities are 'divided up' into ecological communities classified at a finer scale where distinctions in the species composition might be more differentiated, such that what constitutes one ecological community protected under the EPBC Act may be comprised of several more narrowly defined ecological communities protected under the NSW Act. In ecological terms this is valid; an ecological community can be defined at different scales. In terms of conservation outcomes, there are pros and cons with both approaches and both are valid.

HSI would however urge cooperation between the Commonwealth, states and territories in the sharing of data and expertise to ensure assessments for listing under their respective laws happen as efficiently as possible.

HSI cautions against diverting too many resources, from what is a very limited pool, into 'harmonising' Commonwealth, state and territory lists instead of ensuring the EPBC Act lists are comprehensive.

**Recommendation:**

**That there will be discrepancies between Commonwealth, state and territory lists should be accepted.**

**Commonwealth, states and territory agencies should certainly cooperate in data and expertise sharing, to assist each other maintain up to date comprehensive lists according to their own criteria.**

**HSI cautions against diverting limited resources to harmonising EPBC Act lists with state and territory lists and instead asks that priority be given to ensuring the EPBC Act lists are comprehensive.**

**Recovery Planning**

The discussion paper asks if the planning regime supports the effective recovery of threatened species and ecological communities, whether the provisions of the Act for the protection and recovery of threatened species and ecological communities, migratory species, listed marine species and cetaceans are effective and what alternative approaches might be available.

Successive State of the Environment Reports and the Terrestrial Biodiversity Assessment (2004) all show biodiversity decline is a continuing trend. Species and ecological communities are moving up the threatened categories and it is very rare that a species is de-listed because it has recovered. To reverse these trends, as we must, there needs to be significantly greater investment in recovery and restoration of biodiversity than is currently the case.

Earlier in the submission, HSI has addressed the problems of cumulative impacts and offsetting policies for species and ecological communities that are Matters of National Environmental Significance. HSI has also commented that if the biodiversity provisions

of Part 5 of the EPBC Act were implemented more rigorously and effectively, and strengthened, the protection of threatened species and ecological communities would not be abandoned to the planning process alone. Recovery and Threat Abatement Plans must be used more effectively to support the planning processes. Noting that a Minister must not contravene a recovery plan, recovery plans need to give clear and precise guidance to be followed in the decision making that takes place under the planning regimes of the EPBC Act.

The EPBC Act certainly does not support the effective recovery of threatened species and ecological communities now that a decision can be taken not to have a recovery plan for a listed species or ecological community, as is the case since the 2006 amendments. The Government must direct sufficient funds to the task of biodiversity recovery so that DEWHA does not have to be resigned to the need for triage. Triage has already taken place at the point of listing; what is listed now needs urgent attention.

In HSI's view, once a species or ecological community has such a poor conservation status that it is listed as vulnerable or worse on the EPBC Act, it should be mandatory that the Government initiates a statutory recovery or threat abatement process of some sort within a statutory timeframe (unless it is the very rare circumstance where the threats to the species are not human induced with no prospect of controlling them).

There should be flexibility for efficiencies and economies of scale in the development of multi-species recovery plans and there would be considerable merit in developing multi-species recovery plans tailored made for particular bioregions where it might be that several key threats operate that are common to numerous species. Again, there should be flexibility for threat abatement plans to be conducted at a bioregional scale where this is considered most effective. For some species and threats, recovery plans and threat abatement plans that are national in scope are more appropriate. However, one way or other it is vital that once a species is listed as threatened there is a clear legal obligation to enact recovery and threat abatement strategies to remove all key threats and institute recovery measures comprehensively across the species range - and for the Commonwealth to be required to negotiate this with states and territories and private landholders within set timeframes.

HSI does welcome the new requirement to issue conservation advice at the point of listing a threatened species. This enables guidance to be given to the Minister in relation to that species which can immediately be taken into account decision making that may involve that species until such time as a recovery plan is prepared. The requirement should be extended to conservation dependent species (which can be subject to ongoing exploitation and whose management could benefit from TSSC advice). There should be a clause that prevents the Minister contravening approved conservation advice as there is with a recovery plan (particularly if there will not necessarily be recovery plans for many species now).

HSI would once again draw attention to our proposal for systematic bioregional planning for biodiversity protection as outlined in the National Biodiversity Initiative proposal in Attachment 5. Statutory bioregional plans could also be a vehicle for effective recovery and threat abatement strategies for threatened species and ecological communities under the EPBC Act. This would also provide a platform for improved cooperation between the Commonwealth, states and territories.

**Recommendation:**

**Recovery planning provisions should be strengthened, including reinstating mandatory planning with increased funding to achieve this, with flexibility for multi-species recovery plans and threat abatement plans to apply at different scales, providing threats are addressed comprehensively across each species or ecological community's range.**

**Statutory recovery plans must be negotiated for all species and ecological communities with states and territories where their range falls wholly or partly outside the Commonwealth jurisdiction – to avoid the common circumstance where a recovery plan has not been enacted for a species or ecological community because its range is not wholly within the Commonwealth jurisdiction.**

**Systematic bioregional planning, using strengthened provisions under the EPBC Act, could also be used as a vehicle for recovery and threat abatement measures.**

**The Minister should not be able to contravene approved conservation advice (particularly if recovery plans are no longer mandatory) and publication of**

**approved conservation advice should also be a requirement for conservation dependent species (and any other threat category that may be added).**

### **Climate change**

The discussion paper asks whether the Act provides an appropriate legislative framework for addressing climate change in the context of environmental protection and biodiversity conservation. Elsewhere in the submission HSI has called for a MNES trigger for the Government to regulate new greenhouse gas emitting projects and for a Threat Abatement Plan to assist EPBC listed species adapt to predicted climate change. HSI has also advocated predicted climate impacts be a consideration in listing decisions. It is our general view that the EPBC Act ought to be amended so that climate change is a consideration at all relevant decision making junctures throughout the Act.

### **Recommendation:**

**The EPBC Act ought to be amended so that climate change is a consideration at all relevant decision making junctures throughout the Act.**

**New greenhouse gas emitting projects should be a Matter of National Environmental Significance.**

**A Threat Abatement Plan for Climate Change is required to assist biodiversity adapt to predicted climate impacts.**

### **International Movement of Wildlife**

International trade in animals and their body parts poses an unsustainable threat to hundreds of species around the world. Trade in live species can also threaten Australian biodiversity if exotic animals are released into the Australian environment. Serious animal welfare concerns also arise during the movement of live specimens.

HSI believes the EPBC Act requires amendment to provide more effective legislation to protect species involved in unsustainable wildlife trade and to protect biodiversity vulnerable to impacts from introduced species.

### ***Illegal & unsustainable timber imports***

HSI recommends that the EPBC Act be amended to address the large percentage of timber imports to Australia that are illegally sourced. Please see Attachment 8 Drafting instructions for a Tropical Forest Conservation Act prepared for HSI by the Environmental Defenders Office (EDO) of NSW in August 2008. Australia is, after China and Japan, the third biggest consumer of timber and timber products in the Asia Pacific region and in 2005, a Department of Agriculture, Fisheries and Forestry (DAFF) commissioned report found that approximately nine percent or A\$452m of all timber and timber products imported into Australia come from an illicit source. A further and much larger percentage of imports will come from forestry operations that are ecologically unsustainable. Given that deforestation and degradation of forests is responsible for an estimated 18-25% of global greenhouse gas emissions, combating illegal and unsustainable logging is an important climate change mitigation strategy as well as necessary for biodiversity conservation. The Rudd Government has committed to addressing the problem and the EDO advises that the EPBC Act provide an appropriate legal framework to do so.

HSI and the EDO recommend new provisions in the EPBC Act to regulate the importation of timber, palm oil and other tropical forest products from developing countries to prevent imports that are from illegal and ecologically unsustainable sources. It is advised that the EPBC Act is the appropriate place for the regulation of tropical forest imports, particularly as the Act already regulates the importation and trade of threatened flora and fauna consistent with the Convention on the International Trade of Endangered Species (CITES). The regulation of timber imports through the EPBC Act would in turn be consistent with CITES as well as the United Nations Convention on Biological Diversity and the International Tropical Timber Agreement 1994. Drafting instructions are contained in Attachment 7.

### *Fisheries*

HSI strongly supports retention of the strategic assessment processes for fisheries and the requirement for the Environment Minister to approve Commonwealth and export fisheries for their ecological sustainability. The EPBC Act introduced environmental impact assessments for fisheries for the first time, and, while HSI has not always agreed with decision making in this area, we believe that, overall, the involvement of DEWHA and the Environment Minister in this area has been instrumental in driving significant improvements in the way Australia's Commonwealth and export fisheries are managed. However, there is a long way to go before all Commonwealth and export fisheries could truly be considered ecologically sustainable and any weakening of the EPBC Act provisions for the regulation of fisheries to meet a streamlining or deregulation agenda would risk the ability to make further progress.

### *Internet trade*

HSI gives full support to recommendations given in the submission to this review from the International Fund for Animal Welfare for there to be a ban on online trade in species listed on Appendix I of CITES and that on-line facilitation of and participation in illegal trade should be a prosecutable crime. An investigation by IFAW has demonstrated the increasing role the internet is playing in unregulated and illegal wildlife trade. A HSI investigation in 2002 found thousands of ivory items for sale a day on the internet. To support EPBC implementation in this regard we also endorse IFAW recommendations for increased compliance efforts to be directed to combating illegal internet trade in wildlife.

### *Cooperative Conservation Plans*

This is one of the few areas of decision making in the EPBC Act where public consultation is sorely lacking and where provision for it could provide considerable benefits. HSI believes public consultation is required in the assessment of Co-operative Conservation Programs for CITES Appendix I species. The Department does not always have the animal welfare and conservation expertise that is specific to the exotic species proposed for importation, breeding and life in captivity and would benefit from wider consultation with other stakeholders and independent experts. Independent assessments and public opinion should then be considered in an open and transparent

manner prior to any approval being given by the Minister. There has already been an instance where a ministerial decision to import Asian elephants to Australia was challenged on its merits at the Administrative Appeals Tribunal by HSI, IFAW and the RSPCA and where the IUCN did not recommend captive breeding for the species.

The Asian elephant case also raised the problem of species being acquired by zoos and moved into quarantine in the exporting country, prior to approvals being received for their importation to Australia, placing undue pressure on the decision makers in Australia. The EPBC Act should require approvals to be gained prior to acquisition of the animals.

### *CITES obligations*

The discussion paper asks whether the Act provides appropriate provisions to ensure that Australia complies with its obligations under CITES. HSI would note that in the Asian elephant case there were serious irregularities with the documentation provided for the elephants imported to Australia in 2005 and it could not be proven that each of the young elephants was bred in captivity of captive parents. As the parentage of several of the elephants could not be proven, it was impossible for anyone to give genuine assurances that the elephants had not originally come into captivity in Thailand illegally. There is a significant illegal trade in juvenile Asian elephants in Thailand and neighbouring countries. The species is critically endangered and listed on Appendix I of CITES. It is CITES convention for countries to accept each others' non detriment findings and export permits at face value, however, in this instance, the Australian Government had enough information that should have raised serious alarm bells and demanded further verification of the animals origins. HSI recommends EPBC Act amendments to require greater vigour in the assessment of Non Detriment findings and permits of exporting countries to determine the origins of CITES 1 species.

HSI supports the recommendation from IFAW for a Wildlife Trade Task Force to be established, consisting of government officials, NGO representatives and other experts), to provide advice to the Government to help ensure it complies with its CITES obligations and to help develop CITES policy.

### *Live imports - hybrids*

The Minister recently rejected the importation of savannah cats from the United States, which are a hybrid of the African Serval and domestic cats and had the potential to cause a serious threat to Australia's native wildlife. To do this the Minister amended the live import list to exclude species with the genes of the African wild cat in the definition of a domestic cat. As a further response to the problems highlighted in this import proposal, HSI recommends closing the quarantine law loophole that allows the import of wild-pet hybrids (of all species) in the absence of a rigorous pest risk assessment, by amending the Part 13A regulations of the *Environment Protection and Biodiversity Conservation Act*, pertaining to what constitutes a domestic species under the 'List of Live Specimens Suitable for Import'. We suggest that the amendment requires all wild-domestic hybrids, to be subject to mandatory pest risk assessment, and requires the Minister to consider, as a minimum, the advice from the Vertebrate Pests Committee (VPC) in making decisions about whether to allow the import of a new hybrid species. We would also support this amendment giving the VPC a veto provision on proposed imports of new or hybrid species.

### *Quarantined CITES species*

HSI supports the recommendation from IFAW in their submission to this review to increase to 72 hours the turn around time to find a suitable location to repatriate a confiscated CITES listed species because 24 hours is unrealistic.

### *Personal and household effects*

HSI also supports the recommendation from IFAW in their submission to this review to re-evaluate the impact of the 'personal and household' effects exemption currently available for wildlife trade in the EPBC Act.

### **Recommendations:**

**Regulation of timber imports should be brought under the EPBC Act to ensure they are not sourced from illicit or ecologically unsustainable forestry operations.**

**The Environment Minister should retain assessment and approval powers over Australia's Commonwealth and export fisheries to ensure that they continue to improve towards ecological sustainability.**

**There should be an explicit ban on online trade in species listed on Appendix I of CITES and on-line facilitation of, and participation in, illegal trade should be a prosecutable crime.**

**Cooperative Conservation Programs should be subject to public consultation processes.**

**The EPBC Act should require import permits be obtained before the acquisition of animals takes place.**

**The EPBC Act should require more vigorous checks on the origins of CITES Appendix I animals that are the subject of an import application.**

**The vertebrate pest committee should be given power of veto over decisions to import new or hybrid species.**

**The turn around time to repatriate confiscated CITES Appendix I animals should be increased to 72 hours.**

**The personal and household effects exemptions should be reviewed.**

### **Heritage**

HSI's concerns in relation to the new assessment processes for listing species and ecological communities apply equally to the new assessment processes for the listing of Commonwealth and National heritage places. If a listing process is to rely on public nominations it is only fair that all nominations are duly assessed within prompt and efficient timelines. The assessment process for heritage nominations should be amended so that every public nomination is assessed within a reasonable timeframe (no longer than 2 years) and so that public nominations cannot be removed from the process without any assessment.

HSI will soon provide the Government with a Heritage Strategy to speed up the listing of heritage places on the EPBC Act and realise the considerable potential in the heritage

provisions to protect nationally significant components of biodiversity such as the nation's biodiversity hotspots.

HSI is aware that there is considerable debate amongst the heritage community on the advantages and disadvantages of a values versus properties approach to heritage protection. HSI supports both approaches and does not believe them to be mutually exclusive. In our view case law such as Booth versus Bosworth (where the offsite culling of flying foxes was determined to have a significant impact on the values of The Wet Tropics rainforests) has clearly demonstrated the merits of a values approach to heritage protection taken in the EPBC Act and we support its retention. We also recognise there can be limitations in this approach and would also support additional explicit protection for heritage properties as well as values.

**Recommendation:**

**All public nominations for Commonwealth and National Heritage places should be assessed within set timeframes (no longer than two years).**

**The EPBC Act heritage provisions should be fully utilised to protect nationally significant components of biodiversity, such as the nation's biodiversity hotspots.**

**Compliance and enforcement**

In relation to compliance and enforcement, HSI gives full support for the recommendations made in the submission prepared for the review by the Australian Network of Environmental Defenders Offices.

**Recommendation:**

**HSI endorses the recommendations given in the submission to the review from the Australian Network of Environmental Defenders Offices.**

**Merits & Judicial Review**

The removal of rights to challenge the merits of ministerial decisions was an affront to public accountability in the 2006 amendments to the Act and these rights should be reinstated.

As shadow environment minister Anthony Albanese agreed. He said the 2006 amendments to the EPBC Act *'contained five separate measures to strip away the right to appeal ministerial decisions before the Administrative Appeals Tribunal. They relate to threatened species, migratory species, marine species, whales and dolphins and wildlife trade permits. This sets an extraordinary precedent. The appeal rights in relation to wildlife permits have existed since 1981. The checks and balances and transparency that were said to be such an integral part of the act are fast disappearing. Labor will restore that transparency. We will move amendments to repeal those sections of this amendment bill that remove the right to appeal ministerial decisions to the Administrative Appeals Tribunal'* Anthony Albanese 18 October 2006 Environment and Heritage Amendment Bill (No1) 2006 Second Reading.

Mr Albanese went on to move the amendments he promised but they did not succeed. HSI looks forward to the Rudd Government reinstating the rights of third parties to seek merits review in the bill prepared as a result of this review.

In HSI's view, the ability to appeal decisions on their merit ought to be further extended so that approvals to cause significant impact on MNES are subject to merits review.

We would further recommend the establishment of a specialist Environment Tribunal to hear merits review cases brought under the EPBC Act.

HSI also notes that the cost of bringing a public interest case to the Federal Court is prohibitive for conservation organisations when we risk having to pay for the respondent's costs should we lose. Therefore, HSI supports the insertion of a provision into the Act that allows courts to consider granting an order that each party to a proceeding bears their own costs. It would also be helpful if the court was able to consider granting a protective costs order to a party to a proceeding. We would further welcome the insertion of a clause to enable public interest parties to apply for a maximum costs order and the insertion of a clause that prevents a party from making an application for security costs against a public interest applicant.

**Recommendation:**

**To reinstate the rights to merits appeal removed in the 2006 amendments to the Act.**

**To extend the merit appeal rights to approvals for actions that impact Matters of National Environmental Significance.**

**To establish an expert Environment Tribunal to hear merits review cases.**

**To amend the act to ensure the risk of costs awarded to public interest applicants is not prohibitive.**

**Animal welfare**

Currently, concerns for animal welfare are only a consideration in the wildlife trade provisions of the EPBC Act. Yet, many decisions taken under the Act give rise to animals welfare issues. For instance, in decisions to issue permits to harm listed species or to cause significant impact and to manage wildlife on Commonwealth lands.

**Recommendation:**

**HSI recommends the EPBC Act be reviewed to ensure that animal welfare considerations are taken into account in all relevant decisions.**

Humane Society International thanks the review panel for considering our views and recommendations.

**For further information contact:**

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