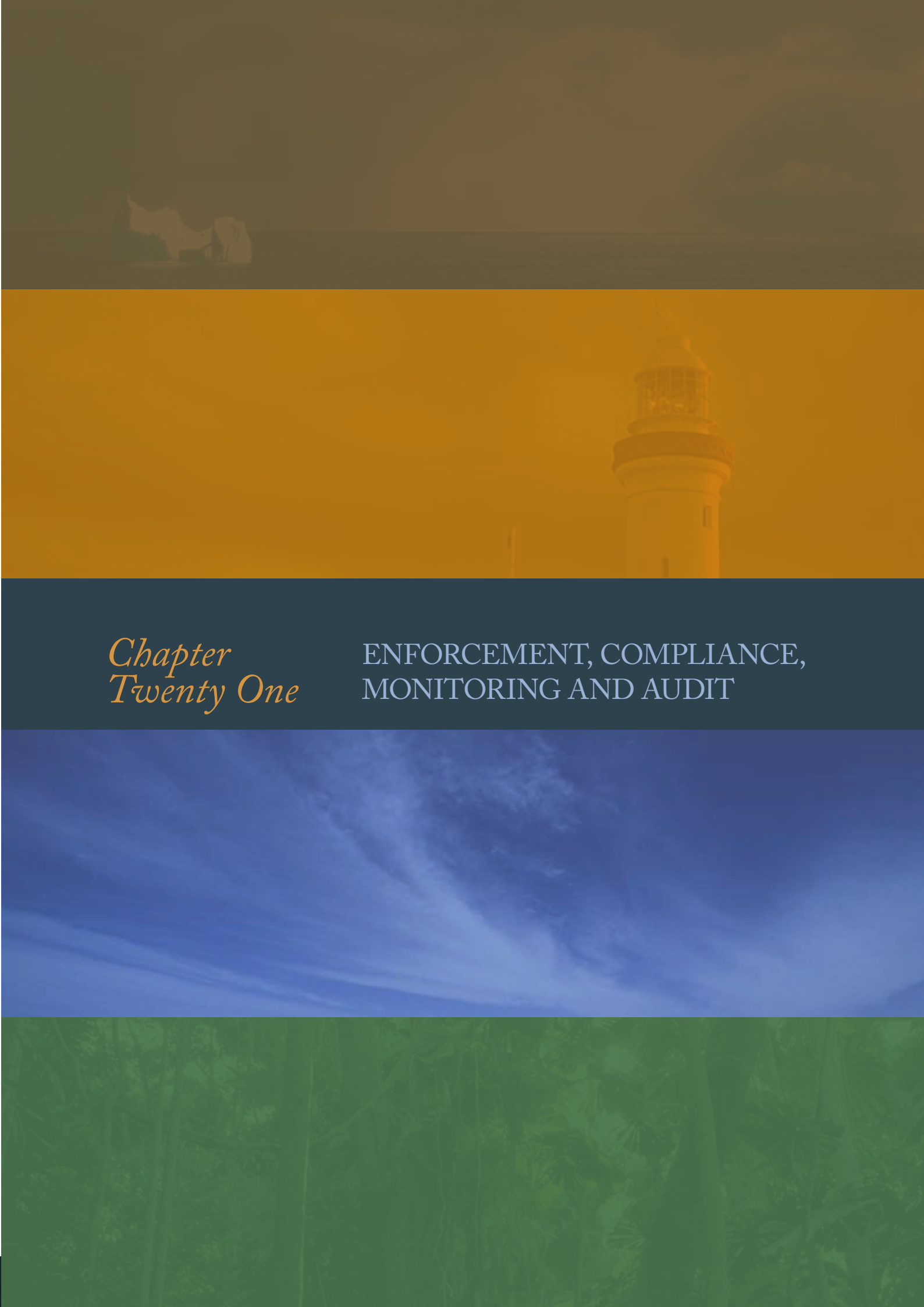

Chapter Twenty One

ENFORCEMENT, COMPLIANCE, MONITORING AND AUDIT

Chapter 21: Enforcement, Compliance, Monitoring and Audit

Key points

Compliance and enforcement

- There is a general support for the compliance and enforcement provisions under the Act.
- There is a need for more proactive compliance and enforcement action under the Act.
- There is concern at the lack of Commonwealth 'on-ground' enforcement presence in regional areas leading to poor compliance, or lack of local knowledge, impacting on the quality of judgements.
- There may be benefits from greater co-operation and strengthening of compliance networks with State and Territory agencies, with the suggestion of accreditation of powers of enforcement to other jurisdictions.
- There is a need for increased ongoing training and professional development of compliance and enforcement staff.
- The role of the Commonwealth Director of Public Prosecutions in enforcing breaches of the Act was questioned.

Post approvals monitoring and audit

- Post-approval audits to check compliance with approvals is critical to achieving the Act's objectives.
- There is a need for more proactive monitoring and audit and adequate resourcing to ensure that follow up monitoring of compliance with conditions of approval are carried out in a timely manner.
- There is currently little knowledge of the existing monitoring and audit program.

Current provisions of the Act

Compliance and enforcement

21.1 The Act provides a regulatory framework which includes a wide range of monitoring, audit, compliance and enforcement powers. It establishes a tiered suite of criminal, civil and administrative penalty provisions to allow for a range of sanctions commensurate with the relative seriousness of different contraventions of the Act.

21.2 The compliance and enforcement processes are exercised in accordance with the Department's Compliance and Enforcement Policy[1] which advocates a graduated compliance response.

21.3 The Australian National Audit Office (ANAO) has undertaken audits of the operation of the EPBC Act. The ANAO has made a number of recommendations to improve the compliance and enforcement regime under the Act, including establishing appropriate mechanisms for enhanced communication and knowledge sharing about the Act, emphasising the capacity to enforce provisions under the Act and strengthening monitoring and review arrangements.

21.4 The Department has a dedicated compliance and enforcement branch which currently handles about 400 EPBC Act compliance incidents per year.

21.5 A range of enforcement mechanisms are available under the Act, including criminal and civil penalties, administrative penalties, conservation orders, remediation orders and determinations, injunctions and enforceable undertakings. Many of the enforcement mechanisms apply only to specific contraventions of the Act (for example civil penalties are limited to Part 3).

1 A copy of DEWHA's Compliance and Enforcement Policy is available at: http://www.environment.gov.au/about/publications/compliancepolicy.html - this policy is currently being reviewed.

21.6 **Criminal offences** are public wrongs, enforced by the state in a court and are designed to punish improper conduct. For a conviction, proof must be beyond reasonable doubt. Convictions for criminal offences can result in imprisonment and/or a monetary fine as well as other sanctions such as rendering a person ineligible to sit on a board of directors for a public company.

21.7 **Civil penalty provisions** are set out in a similar way to criminal offences and are also enforced through the courts. However, hearings for contraventions of civil penalty provisions are subject to the procedures and rules of evidence for civil cases. Proof is at the lower standard of 'on the balance of probabilities'. A civil penalty provision only carries a financial penalty, not imprisonment. The imposition of a civil penalty does not result in a criminal conviction.

21.8 **Remediation orders** are orders able to be made by the Federal Court requiring a person to take action to repair or mitigate damage that has been, will be, or is likely to be caused to the environment by a contravention of the EPBC Act or Regulations. Applications to the Federal Court to issue a remediation order can only be made by the Minister.

21.9 **Infringement notices** are notices that specify an alleged criminal offence and the suspected offender, and provide that the suspected offender may pay a specified penalty, usually a monetary fine, in order to avoid prosecution. Paying a fine imposed by an infringement notice does not result in a criminal conviction. Currently, the Regulations only provide for the issue of infringement notices in relation to various activities undertaken in Commonwealth reserves and not for other EPBC Act offences.

21.10 **Enforceable undertakings** are available for breaches of civil penalty provisions under the Act. They are a written undertaking provided by a person to the Minister that specifies that the person will pay a specified amount within a specified period, to the Commonwealth or to another specified party, for the purpose of protecting and conserving a matter protected under the EPBC Act. The Minister can elect to accept an enforceable undertaking instead of undertaking litigation to enforce a breach of a civil penalty provision. If a person fails to comply with an enforceable undertaking, the Minister may apply to the Federal Court for an order enforcing the terms of the undertaking.

21.11 **Conservation agreements** are available for contraventions of Part 3 of the Act. The Minister may enter into a conservation agreement with a person, requiring that person to take measures to repair or mitigate damage caused by a contravention of a provision of Part 3 of the Act. Conservation agreements must be entered into voluntarily. Conservation agreements can be enforced in the Federal Court and non-compliance can result in the imposition of a civil penalty.

21.12 **Remediation determinations** are similar to conservation agreements and are available for contraventions of civil penalty provisions in Part 3 of the Act. The Minister may make a remediation determination requiring a person to take action to repair or mitigate damage that has been, will be, or is likely to be caused to a matter protected by the contravention of a Part 3 civil penalty provision. Remediation determinations can be issued by the Minister without the voluntary agreement of the person alleged to have contravened the civil penalty provision. Remediation determinations can be enforced in the Federal Court and non-compliance can result in the imposition of a civil penalty.

21.13 **Injunctions** are orders issued by the Court preventing a person/s from undertaking or continuing with an activity. The EPBC Act allows an 'interested person' to apply directly to the Federal Court for an injunction to stop a party from undertaking or continuing an activity that contravenes the EPBC Act or Regulations.

21.14 **Administrative sanctions** include sanctions such as suspending an approval provided under the EPBC Act or cancelling an export permit.

Post-approvals monitoring and audit

21.15 Under Division 12 of the EPBC Act the Minister can direct a person to undertake an environmental audit. The Minister can make such a direction if he or she believes or suspects on reasonable grounds that the terms and conditions of an approval are being or likely to be contravened, or the impacts of an action are significantly greater than was indicated in the information available when the approval decision was made.

21.16 In other cases, an audit may have been required as a condition of the approval and this will be assessed as part of the post monitoring process. Finally, the Department may decide to undertake an audit of a project on its own initiative.

21.17 All of these forms of compliance audits are designed to ensure projects with the potential to impact on the matters protected under the EPBC Act are implemented as envisaged at the time of approval. They also provide information about the level of compliance with approval conditions.

21.18 The Department has created a dedicated post-approvals monitoring and audit section which has established a targeted project auditing strategy and post-approvals monitoring program to assess whether projects are implemented and designed in accordance with approval conditions and particular manner decisions. The strategy at least aims to ensures that 10% of all projects are randomly audited in each year. In 2007-2008, the Department undertook 10 audits and five post-approvals monitoring site inspections. It is anticipated that 18 audits and 13 site inspections will be completed between July 2008 and June 2009. A summary report of every audit is published on the Department's website.

Key points raised in public submissions

Compliance and enforcement

21.19 The Australian Network of Environmental Defender's Offices (ANEDO) noted that:

> The success of a regulatory regime like the Act depends to a large extent on whether the Act's provisions are complied with and whether those who breach them are appropriately penalised and prosecuted, ensuring sufficient deterrence and protection of the integrity of the Act. [2]

21.20 The scope of penalty provisions under the Act were generally considered adequate and the wider range of enforcement options established under the 2006 amendments having the potential to deliver positive environmental outcomes. However, WWF stated that while the provisions themselves are appropriate, the number of times that they have been used compare unfavourably to the number of potential and reported breaches of the Act. Submitters felt that the Department relies too heavily on members of the community understanding the Act and reporting breaches to the Department.[3] It is clear that the Department is reliant on the public to be its eyes and ears. Programs to educate the wider community on their responsibilities in relation to the Act were suggested.

21.21 Despite the increases in resourcing of the compliance and enforcement function of the Act in recent years, the lack of resourcing to the Department to undertake these activities effectively was raised in a number of submissions. Many argued that the compliance and enforcement provisions under the Act were under-utilised, due to a lack of adequate resourcing and trained personnel.

21.22 As the ANEDO noted:

> the full scope of the penalty provisions must be utilised by the Department, as opposed to the historical trend whereby responses to potential breaches of the Act have focussed on (implementing) the 'less robust options'. Deterrence is greatly undermined if decision-makers continue to consistently implement the 'softer' penalty provisions of the Act.[4]

21.23 Many submissions support the Senate Committee's conclusion that an increase in resources for monitoring and compliance would strengthen the Act.

2 Submission 189: The Australian Network of Environmental Defender's Offices, p.15.

3 Submission 181: WWF.

4 Submission 189: The Australian Network of Environmental Defender's Offices, p.15.

21.24 It was the Australian Human Rights Commission's (AHRC) view that the principles of ecologically sustainable development (ESD) should be linked to the compliance and enforcement requirements of the legislation and have specific monitoring, assessment, and reporting requirements as to how these principles have been respected and fully implemented. [5] The AHRC recommended that Section 3A of the Act be amended to link the ESD principles to the compliance and enforcement requirements of the legislation.

21.25 A number of submissions felt that the lack of 'on-ground' enforcement available from the Department did not engender a timely compliance response and there was scope for increased co-operation with State and Territory compliance and enforcement agencies. It was noted that:

> The ability of the Commonwealth to assess, monitor and enforce these matters in anything approaching an effective manner is severely compromised by the fact that this is done remotely by a central agency.[6]

21.26 WWF also supported greater Commonwealth and State and Territory co-operation, arguing that the compliance and enforcement capacity of the Commonwealth within the States has been negligible and that there was considerable scope for much closer co-operation between jurisdictions in regards to compliance and enforcement under the Act.[7] WWF suggested that a Commonwealth-State-Territory partnership to share information and encourage enforcement, which incorporates long-term compliance and enforcement bilaterals pursuant to all bilateral assessments, should be developed. It should be noted that, with all jurisdictions, there is provision for collaboration on compliance and enforcement activities.

21.27 Whales Alive noted that cetacean watching is a growing and valuable industry in Australian waters however, a permit is not required for whale and dolphin watching in the Australian Whale Sanctuary provided the operation is done in accordance with the EPBC Regulations. [8]

21.28 Whales Alive examined in detail issues relating to the interaction with the Regulations of the Act and the *Australian National Guidelines for Whale and Dolphin Watching 2005*[9] and pointed out a number of key areas that it considered problematic:

- definitions of 'interfere', 'disturbance', 'harassment', 'chase' and 'herd' need to be clarified, in relation to cetaceans;
- regulations do not outline best practice for cetacean watching operations and the facilitation of education and interpretation programs;
- a provision for increased protection for 'Animals of Special Interest' was needed;
- regulations do not allow for protection of migratory species that cross State, Federal and International borders;
- penalties outlined under Part 8 of the Regulations (interacting with cetaceans and whale watching) are not stringent enough to deter offenders;
- incorporation of all the *Australian Whale and Dolphin Watching Guidelines* into the Act to make it a comprehensive legislative framework was required; and
- lack of consistency in the cetacean watching regulations between State, Territory and Federal governments through bilateral agreements. There are currently some inconsistent guidelines between State and Federal waters and no agreements are required between the two bodies to provide a consistent approach to the management of cetacean watching in Australian waters.

5 Submission 193: The Australian Human Rights Commission.

6 Submission 121: Sunshine Coast Regional Council, p.5.

7 Submission 181: WWF.

8 *Environment Protection and Biodiversity Conservation Regulations 2000* (Cth).

9 *The Australian National Guidelines for Whale and Dolphin Watching* are available at: http://www.environment.gov.au/coasts/publications/pubs/whale-watching-guidelines-2005.pdf

21.29 Whales Alive went on to say that:

> It is imperative that consistency in the regulations concerning cetacean watching between State and Commonwealth waters is achieved. There is currently no strict enforcement in either state or Commonwealth waters to ensure cetacean watching operations are being undertaken in accordance with the guidelines. It is essential that the federal government provides sufficient resources to monitor and enforce the cetacean watching industry which is currently being left unchecked. These measures must be undertaken in order to promote ecologically sustainable development of this valuable industry.[10]

21.30 A similar issue was raised by a recreational fishing group, relating to inconsistencies of management arrangements in national marine parks.

Post-approvals monitoring and audit

21.31 It is clear from submissions that post-approval monitoring and audit is viewed as an essential component of the Act. Effective compliance and enforcement depends on technically sound, measurable, auditable and legally enforceable approval conditions. It also depends on an active audit program that assesses the level of compliance with approval decisions and responds to breaches appropriately and in a timely manner.

21.32 Submissions observed that monitoring compliance with conditions of consent was central to the effective application of legislation as proponents are more likely to take serious notice of the legislation if they know they will be held accountable. However, submitters felt that while the Act provides for reasonable penalty regimes, there were insufficient resources to manage a growing number of referrals, assessments, approvals and compliance activities. Further, the provisions for monitoring, evaluation and follow-up in the Act have not been sufficiently tested to be able to judge their efficacy.

21.33 Most major projects approvals include strict provisions relating to environmental audit and reporting requirements. There was some criticism regarding the lack of ability by the public to access these documents. Some consideration should be given to including a provision in the Act which requires that public disclosure of environmental audits and other reporting documentation, required as part of approval conditions, be made mandatory.

Senate inquiry into the operation of the EPBC Act

21.34 The Senate Committee noted that:

> An effective compliance and enforcement strategy is required to ensure the integrity of the Act, particularly so that the requirements of conditional approvals are observed. Currently, it appears that implementation of compliance monitoring has been insufficient, such that the department 'has not been well positioned to know whether or not the conditions…being placed on actions are efficient or effective.[11]

21.35 The Senate Committee also noted:

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

10 Submission 062: Whales Alive, p.6.

11 The Senate Standing Committee on Environment, Communications and the Arts, *The operation of the Environment Protection and Biodiversity Conservation Act 1999: First report* (2009) http://www.aph.gov.au/senate/committee/eca_ctte/epbc_act/report/report.pdf at 4 May 2009, para [1.25].

12 Senate Committee Report, para [6.43].

21.36 The Senate Committee observed that through an increase in resources for monitoring and compliance, the Act could be strengthened and was strongly supportive of more resources being allocated to ensure compliance with the Act. It recommended that:

> the government give urgent consideration to increasing the resources available to the department in the areas of assessment, monitoring, compliant investigations, compliance, auditing projects approved under Part 3, and enforcement action. [13]

Discussion of key points

21.37 The Department receives about 1,000 compliance incidents per year. Most of the reported incidents do not significantly affect protected matters. Those that do, or pose high risks to such matters, are pursued to ensure referral or appropriate remedial action. Between 1 July 2008 and 31 March 2009, 601 reports were received. Of these, 400 were incidents or activities which potentially fall within the jurisdiction of the EPBC Act and required some level of examination.

21.38 Submissions have clearly indicated the need for increased funding for compliance, enforcement, post-approval monitoring and audit activities. In 2007–2008, the Department allocated significantly more resources to these matters and undertook a number of additional activities including community education, workshops, seminars and compliance assurance programs to monitor and raise awareness and facilitate voluntary compliance with the Act.

21.39 Since the Department commenced its random compliance audit program in 2006, over 25 audits have been undertaken of high and medium risk projects. The audit strategy is designed to assist in ensuring that the objectives of the EPBC Act are being met. As such, it plays an important role, not only in checking compliance with conditions, but also in changing the behaviour of the regulated community.

21.40 Proponents undertaking actions that have, will have, or are likely to impact on matters of NES are more likely to design and then implement effective methods of reducing impacts if they believe there is a real prospect of being examined post-approval. The Department is currently undertaking a review of condition setting and this review will address issues of standardisation, enforceability and auditability. Improving the skills of Departmental officers in this area will be important in the credibility of approvals and subsequent compliance activities.

21.41 The ANEDO commented that the full scope of the penalty provisions must be utilised by the Department. A number of successful investigative outcomes have been achieved recently, in particular, several civil prosecutions and the first criminal prosecution for a breach of s.74AA. A number of other actions are close to finalisation, but cannot be discussed publicly at this time. The increased use of administrative enforcement actions by the Department is noted, including:

- a remediation determination for clearing native vegetation in Central Queensland;
- the suspension of approval and directed audit for a resort proposal in Northern Queensland; and
- an enforceable undertaking for clearing of habitat of a listed threatened species in Victoria.

21.42 However, getting the enforcement message out is vitally important. It would seem that this is currently not as effective as it could be. Whether this is a consequence of the legislation or administrative practice will be reviewed further.

21.43 When responding to compliance matters, the Department has a suite of options available. The primary focus is to ensure the best outcome for the environment and, as such, administrative options are often found to be the best approach. In deciding to pursue civil or criminal penalties in the courts, the Department must consider the range of factors set out in the Compliance and Enforcement Policy,[14] including the cost of the proposed response option compared to the benefits of that option and the standard of evidence collected.

13 Senate Committee Report, para [3.34].

14 DEWHA, *Complience and Enforcement Policy* (2008) http://www.environment.gov.au/about/publications/compliancepolicy.html at 22 June 2009.

21.44 The Department's enforcement record does appear to be improving. However, many of the Department's actions remain highly contentious. At issue is both the speed at which the Department has responded and the nature of the enforcement action taken. A recent decision by the Minister to 'fine' Great Southern Plantations following a breach of approval conditions was criticised. It was also argued by others that the seriousness of the breach should have seen the operators prosecuted and approval immediately withdrawn.

21.45 The role of the Commonwealth Director of Public Prosecution (CDPP) in prosecuting criminal offences and civil penalties under the Act was questioned by some submitters. It can be argued that the use of the CDPP ensures that only matters that meet evidentiary requirements and are in the public interest proceed to court. However, the approach by the Department of Environment and Climate Change NSW, involving the use of internal legal Counsel to assess the prospects of success, represent the State or support Counsel from the NSW DPP was suggested as a positive alternative model for responding to breaches.

21.46 Comments made by submitters regarding the perceived lack of joint investigation activities between the Commonwealth and State compliance agencies are noted. There are ongoing activities currently undertaken by the Department to build working relationships with other Commonwealth agencies and other jurisdictions. The Department works closely with other Australian Government agencies on compliance matters including Customs and the Australian Fisheries Management Authority. Officers of certain agencies are *ex-officio* inspectors and wardens under the Act. The Department also plays a key role in the Australasian Environmental Law Enforcers and Regulators Network (AELERT), which aims to build relationships between jurisdictions to facilitate sharing of information, to improve the regulatory compliance of member agencies and to develop national standards for training and best practice in environmental regulation. AELERT was recently brought under the auspices of the Environment Protection and Heritage Council, aligning it with the COAG framework.

21.47 A number of groups, particularly community NGO's felt that there needs to be a provision for third party referrals under the Act. There was, however, little recognition of the ability to report suspected breaches of the Act to the Department's Compliance Branch. This needs to be corrected. The legislation relies on public input as a means of ensuring compliance with the Act. This is why the standing provisions are so wide and why there is a capacity for communities to seek injunctive relief. While third party referrals, *per se*, may be impracticable, improvements to ensure people can understand how to report breaches (or suspected breaches) should be pursued.