

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

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Which chapter(s) of the interim report are you commenting on? Chapter 2

The comment that the foundation of the EPBCA is ESD is too optimistic. Despite the Act urging that ESD should be 'promoted', ESD at best only has to be 'considered' not necessarily applied in decision-making; and as the Blue Wedges decision shows that consideration need only be 'global'. The EPBCA makes the same mistake as many other pieces of legislation; it treats ESD as part of a process for 'consideration' not as the outcome towards which decision-making should be directed. ESD would be more the foundation of the EPBCA if it were amended along the lines of the National Parks and Wildlife Act 1974 (NSW) s.2A(2) to the effect that "The objects of this Act are to be achieved by applying the principles of ecologically sustainable development". As it stands the trigger for the approvals process, 'significant impact', together with the obligation only to 'consider' ESD (even if an object of the Act is to 'promote' it) confers too much discretion on the minister to 'read down' the provisions of the Act. If the trigger is pulled, then principles of ESD should be required to be applied in the decision-making process. The principles of ESD (s.3A) should also include the principle of prevention (lower trigger threshold than 'precaution').

Another general point is the tortuous nature of the drafting of the Act. It doesn't win any prizes for 'plain English' drafting. The concepts (controlling provisions' etc), organisation and language all conspire to make this Act virtually unintelligible to anyone who hasn't a few days to waste unravelling it (and I know because that's how long it initially took me). The amendments accepted by the Howard Government to appease the Democrats and Greens have no practical effect; they serve only to further complicate already unacceptably long-winded and badly conceived drafting. The Act needs an overhaul to convert concepts and principles into coherent and readily understood language.

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