



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

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I **do not** want this submission to be treated as **confidential** and/or **anonymous**.

This submission does not contain personal information of third party individuals.

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Introduction

The Nature Conservation Society of South Australia (NCSSA) is a community based, not for profit organisation with a diverse membership drawn from all parts of the State. The Society's primary objective is to "foster the conservation of the State's wildlife and natural habitats through effective scientific research and education".

Since its inception in 1963, the NCSSA has taken an active interest in the protection of South Australia's natural resources and the Society continues to run a variety of highly regarded biodiversity conservation projects. These projects target critical gaps in knowledge and action and include: improving the understanding of biodiversity within the community; on-ground action towards the recovery of threatened flora; supporting land managers to restore habitat on private and public land; collecting and communicating high quality scientific and technical information; and contributing to the formation and review of natural resource management policy.

The NCSSA welcomes this opportunity to provide comment on the *Environment Protection and Biodiversity Conservation Act 1999* and commends the Australian Government for commissioning this independent review.

The Society believes the intent of the legalisation is appropriate and responsible but has many concerns about its implementation. These concerns are detailed below, under the 5 broad headings: 1. Referrals and their assessment, 2. Public participation and transparency, 3. Auditing, enforcement, monitoring and evaluation, 4. Recovery planning and 5. Listing matters of national environmental significance.

1. Referrals and their assessment

The precautionary principal isn't applied often enough

Unfortunately it is often the case that the impact of an action on a matter of national environmental significance cannot be conclusively evaluated. Low detectability of species and the complexities of defining critical habitat are two factors that contribute to this uncertainty. It is vitally important that the precautionary principle is applied in circumstances where there is uncertainty or lack of information.

Although, in theory, the criteria for determining significant impact are comprehensive and allow for the indirect impacts of an action to be considered, in practice the interpretation of these criteria has not been sufficiently rigorous and cautious. Actions which are likely to have a significant impact on the recovery of listed threatened species and ecological communities have gained approval due to a reluctance to employ the precautionary principle. The NCSSA is aware of a number of examples to support this claim, which can be provided confidentially on request.

Close the 'death by 1000 cuts' loophole

There is currently no scope for preventing the cumulative effect of 'non-significant' impacts on matters of national environmental significance. Numerous actions, which individually have a 'small' impact on a particular matter of national environmental significance, may be approved without regard to whether the sum of these impacts (their combined effects) results in significant damage. This is a major failing of the Act and is in clear conflict with its Objects.

Bilateral Agreement: the fox in charge of the Malleefowl house

The recent (2 July 2008) Bilateral Agreement between the Commonwealth and South Australia accredits South Australian *Development Act 1993* Major Development Assessment processes (detailed in Schedule 1 of the Agreement) with additional requirements of the South Australian Minister for:

- setting a public consultation period;
- responding to public consultation;
- preparing an assessment report for the Commonwealth Minister; and
- advertising and consultation

The South Australian Minister's advisory body, the Development Assessment Commission, is responsible for formulating assessment guidelines to ensure assessments contain enough information about the action and its relevant impacts to allow the Commonwealth Minister to make an informed decision on whether or not to approve the action under Part 9 of the *EPBC Act 1999* and regulations.

These arrangements detailed by the Bilateral Agreement are unsatisfactory. They will weaken the Australian Government's ability to meet the Objects of the *EPBC Act 1999* for the following reasons.

- The Objects of the South Australian *Development Act 1993* are fundamentally different from the Objects of the *EPBC Act 1999*. For example, neither the *Development Act 1993*, nor any other South Australian legislation currently contains provisions for adequately protecting threatened species, communities or ecosystems.
- The Society is concerned that there is insufficient expertise to rigorously assess the potential impacts on matters of national environmental significance at all the levels of Government with responsibility for development assessment (Local Government, the Department of Planning and Local Government, and the Development Assessment Commission).
- Responsibility is divested to the South Australian Minister for Urban Development and Planning. There is a significant risk that the Minister will be inadequately informed in relation to matters of national environmental significance or will be driven by pro-development agendas that are in conflict with environmental concerns. The Society recommends that the Minister for the Environment and Conservation should be the State signatory to the Agreement. This should

ensure that decisions are made without bias and with the principles of ecologically sustainable development in mind.

- Provisions for monitoring, evaluation, auditing and enforcement are vague and inadequate. The bilateral agreement doesn't identify either Minister as having responsibility for compliance and enforcement. Without adequate enforcement, it is certain that the Objects of the *EPBC Act 1999* will not be met. If monitoring, evaluation and auditing is inadequate, the performance of the bilateral agreement will be unknown.
- It has become apparent that a stringent national framework for best practice environmental protection and management across Australia is urgently required. Bilateral agreements, such as this one will ultimately undermine such an approach. They allow the Commonwealth to divest themselves of their jurisdiction and statutory responsibilities over actions that involve matters of national environmental significance, by deferring to inadequate State and Territory regulatory processes. The Society believes that this is irresponsible and unacceptable and that the concept of such bilateral agreements should be rejected in areas where national standards and legislative checks need to apply.

2. Public participation and transparency

Inefficient data management clouds transparency

Deficiencies in information management are a barrier to evaluating the effectiveness of the Act and the assessment processes. A recent request made to the EPBC section of the Australian Government for a list of referrals relating to a listed threatened species, could not be met. The Australian Government had no ability to search for past referrals relating to the species (other than by geographic area) and could not provide information to identify on what evidence referral decisions were made. This information was requested for the evaluation of a threatened species recovery program and would have assisted in determining whether the implementation of the recovery program was effective and appropriate. Failure to provide this information was a failure to facilitate transparent reporting and evaluation of public investment in the administration of the Act and in the recovery program.

The Society recommends that data management and reporting processes for referral and assessment information be improved.

Community participation: goodwill exploitation

Although the Act does provide scope for public participation in the approval process, there are significant barriers in place which disable the capacity of the public to participate from an equal platform, compared to that of action proponents. These barriers can be summarised by the insufficient length of public comment periods and the lack of resources available for collecting and communicating critical ecological information relating to matters of national environmental significance.

Responsibility to advocate for the protection of matters of national environmental significance frequently falls to under-resourced community groups or individuals, who often hold the best scientific knowledge available on matters of national environmental significance, particularly for those species and communities without recovery plans. The value of this information is under-recognised, and its collection, analysis and communication should be included as a funding priority.

The minimum time period for public comment on referrals is 10 working days, while under the Bilateral Agreement, 28 days is the minimum period for public comment on major development assessments. For a community member with full time employment (and family commitments), it is often extremely difficult to comprehensively research and evaluate the potential impacts of a major development within 28 days. In addition to the considerable time required to gather information, there are also time constraints presented by the governance structures of communities groups.

Unrealistic timeframes create pressure on the public to either compromise the quality of their submissions or compromise their own wellbeing. Both possible outcomes can lead to a loss of credibility of the community environmental movement and ultimately the legislation.

The NCSSA recommends that:

- minimum periods for public consultation be extended to 40 working days for EPBC referrals and accredited development assessment processes under the Bilateral Agreement; and
- the collection, analysis and reporting of ecological information relating to matters of national environmental significance be considered as a high priority for investment.

3. Auditing, enforcement, monitoring and evaluation

Threat of the inflatable rubber stick

The discussion paper for this review reports that 25 compliance audits have been carried out on randomly selected controlled actions and non-controlled (particular manner) actions. This represents only 2.4% of these actions to date. Of 17 audit summaries available on the EPBC website, 10 audits (59%) found non-compliance or partial compliance for at least some of the conditions, while 6 (35%) found full compliance. The summary reports also indicate that many of the non-compliant or partially compliant conditions were subsequently met, presumably in response to the audit. Extrapolating from the above sample, an estimated 619 actions may be non-compliant or partially compliant. Due to the high rate of deficiency in compliance, the NCSSA would ideally like to see every action audited, or at least a substantial increase in the percentage of actions audited. The NCSSA believe this investment is justified by the improved compliance shown by proponents in response to the audits undertaken.

There have been very few cases successfully litigated under the Act. The NCSSA believe that the number of prosecutions is significantly fewer than the number of breaches of the Act. This is probably due to difficulties with the enforcement process including:

- an understandable reluctance of neighbours and NRM extension staff to report breaches of the Act and jeopardize their relationships with the offenders;
- a miss match between the resources available for enforcement and the resources required to act on all reported breaches; and
- difficulties in gathering adequate evidence against offenders.

Penalties for breaching the Act are not high enough as they are unlikely to be sufficient deterrents for large businesses and in most cases they have fallen short of the real cost of repairing the damage caused.

The NCSSA recommends:

- all controlled actions and non-controlled (particular manner) actions are audited;
- more investment is made in using the Act to prosecute breaches; and
- penalties for breaching the Act are increased.

Ignorance is a false economy

The NCSSA recommends that a monitoring strategy should be developed and implemented, to allow for the proper evaluation of decision making under the Act, the level of compliance, and the appropriate use of enforcement. Such a strategy should monitor the outcomes of all actions including non-controlled (no particular manner) actions. Without a comprehensive monitoring strategy there is no evidence on which to evaluate the performance of the Act, no justification for the investment made in administering it, and limited opportunity to improve its efficiency and effectiveness.

4. Recovery Planning

What's a plan without someone to implement it?

The NCSSA support the recovery planning process under the EPBC Act and believe that recovery plans fulfil the functions of guiding recovery actions and guiding NRM decision makers.

However, the NCSSA believes that there has been too great an emphasis on planning at the expense of implementation. While recovery plans are useful documents, they do not make tangible progress in recovery of species and communities without implementation. Investment in recovery planning cannot be justified if there is insufficient investment in implementation.

5. Listing matters of national environmental significance

The cost of indecision

Decisions regarding the nomination of a number of South Australian threatened species and ecological communities have not been made in reasonable time. Notable examples include the nominations for Peppermint Box Grassy Woodland and Iron-grass Natural Temperate Grassland which were finally listed approximately 6 years after the nominations were made. The timeframe represents a significant setback to the recovery of these communities, as resources could not be secured for their recovery until they were listed. Substantial inroads into recovery could have been made in this time period, but instead the decline in these ecosystems was allowed to continue relatively unchecked.

The NCSSA recommends that the process for assessing nominations for threatened species and ecological communities be improved so that species and communities of merit are recognised more quickly.

When it's threatened, every little bit should count

The Policy Statement 3.7 for Peppermint Box Grassy Woodland and Iron-grass Natural Temperate Grassland states that Peppermint Box Grassy Woodland with fewer than 15 native species and/or smaller than 1ha in size, is considered to be in condition class 'C'. Although vegetation in condition class C is described as 'amenable to restoration' it is excluded from the EPBC Act definition of the threatened ecological community and is therefore not protected under the Act.

Given that Peppermint Box Grassy Woodland is listed as threatened because of a severe decline in distribution and ongoing loss of integrity, much of the remnant vegetation of this type is likely to be in small, highly degraded patches. If these patches are not protected the recovery potential for the community is severely compromised.

Therefore, the NCSSA strongly recommends that vegetation in condition class C for Peppermint Box Woodland and other threatened ecological communities is afforded protection under the Act.