

**Independent Review**  
*Environment Protection and  
Biodiversity Conservation Act 1999*

***SUBMISSION***

*Mary J. Chandler*

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## **Inquiry into the operation of the *Environment Protection and Biodiversity Conservation Act 1999***

I thank you for the opportunity to respond to the inquiry into the operation of the *Environment Protection and Biodiversity Conservation Act 1999*. I am a writer, historian and conservationist and as such have been concerned for some time with the continuing decline and extinction of a significant proportion of Australia's unique plants and animals. Unfortunately extinction cannot be reversed and it is vital that appropriate legal safeguards are in place to address the decline of so many species and legislation must be tightened to deal with nationally threatened species.

When the EPBC Act 1999 was proclaimed on July 16, 1999, significant advances in biodiversity protection were promised. However it would appear that the Commonwealth in the 10 years since the Act came into being has failed miserably to live up to the EPBC's immense protective potential. There is no doubt the referral, assessment and approval process has not been as effective in preventing loss of biodiversity, species and protecting communities listed under the Act as it could have and should have been.

It is of great concern to me, that out of the many referrals received by the Minister, very few are refused. Two recent ones come to mind, Gunns Pulp Mill in Tasmania and Blue Wedges fight against drilling Port Phillip Bay, Melbourne. This shows that there is an urgent need to reassess the Act to enable weaknesses to be identified and amended. The Minister seems to be reluctant to refused an approval and this is continually being question in court. The legislative power is available to the Federal Environment Minister to deliver significantly advanced legal protection for Australia's biodiversity assets through the EPBC Act, but it is useless to have the power to act without the will to do so.

The Act places an obligation upon the proponent to refer actions openly, honestly and in their entirety. In all cases the proponents are biased towards their project so that actions are either not referred or are limited in scope.

Over recent years I have participated in two projects which I would like to comment upon. The first one was the **Nowingi Long-Term Containment Facility** in the mallee country of north-west Victoria.

The proposal was referred to DEH on July 20, 2004 and on August 18, 2004 it was considered a controlled action with a provision to include the Mallee Emu Wren. Major Projects Victoria, had to provide preliminary information for the Minister to determine what form of assessment was required.

Major Projects provided misleading information to DEH, stating that there were no endangered or threatened species on the site and this lead to the following Drilling Agreement process, which is taken from my Submission to the Panel Hearing.

## “Drilling Agreement

The imminent onset of hydrology drilling on site during the breeding season of the Mallee Emu-wren activated the Alliance and culminated in the historic Drilling Agreement.

- On October 8<sup>th</sup> 2004, Fiona Murdoch advised the Federal Department of Environment and Heritage that Major Projects Victoria was about to commence exploratory drilling on the site and this was likely to have a significant impact on the nesting season of the Mallee Emu-wren. The action had not been referred to the Federal Minister under the EPBC Act.
- Ms Murdoch subsequently provided submissions from Mallee Emu-wren experts including Mr. Jody Gates and Mr. Andrew West (SA Dept Environment and Heritage), Dr. David Paton (University of Adelaide) and Dr. Rohan Clarke (LaTrobe University) to support this:
  - The only major conservation reserves where the bird occurs are Hattah/Kulkyne National Park, Murray/Sunset National Park and Big Desert Wilderness in Victoria and Billiatt Conservation Park and Ngarkat Conservation Park in South Australia.
  - Dramatic declines have been recorded in Billiatt (one site record – Gates 2004), and Ngarkat CP’s (90% decline – Paton 2004) in south Australia. No Mallee Emu-wrens were recorded in South Australia in ‘Birds Australia Atlas Survey’ (Clarke (2004)). The status of the bird in South Australia is vulnerable, however the current review process has identified the bird as endangered (West 2004).
  - In Victoria the Mallee Emu-wren is now absent from large areas of Big Desert following fires in 2002 and appears extinct in Bronzewing FFR (Clarke 2004). The Hattah/Kulkyne area supports a particularly high density of birds, whilst birds are encountered less often in Murray/Sunset National Park (Clarke 2004; Garnett 1992; Mustoe 2004).
  - Due to the poor dispersal ability of the bird and recent serious declines in abundance, all locations at which it occurs are likely to be critical for foraging and breeding (Clarke 2004, Gates 2004).
- Major Projects Victoria was advised by Federal DEH on October 25, 2004 to delay drilling until December. MPV decided to continue regardless.

- Minister Batchelor requested an amendment to the Mildura Planning Scheme from Minister Delahunty on October 25, 2004. The amendment was made to allow the exploratory drilling to proceed without the usual permits. Minister Delahunty stated that “the preliminary work will not have a significant environmental effect,” an opinion which was at odds with current scientific opinion.
- A union-endorsed, community picket line was established 25-26<sup>th</sup> October, 2004 with farmers, bird observers, conservationists and Mallee community standing firm to protect this iconic Mallee species. Negotiations finalised on October 26<sup>th</sup>, 2004 agreed to delay drilling until December 6<sup>th</sup>, 2004. The Agreement was signed by the Save the Food Bowl Alliance, Mildura Rural City Council, Murray Mallee Trades and Labour Council and Major Projects Victoria.

It was a relieved community that saw the Drilling Agreement finally signed and adhered to. However, the community still felt it had no reason to trust MPV and this has proved to be the case throughout the whole EES process.”

This proved to be the longest Panel Hearing in Victoria’s history and finally the Panel recommended that the proposal be rejected on a planning issue that had environmental overtones. The decision was an excellent environmental outcome.

The second Hearing I attended was the **Sugarloaf Pipeline Project**. (see attached Submission) We are still awaiting the Minister’s decision on a **REQUEST FOR RECONSIDERATION OF A REFERRAL DECISION UNDER THE EPBCACT 1999 S78 REGARDING SUGARLOAG PIPELINE PROJECT, GOULBURN RIVER TO SUGARLOAF RESERVOIR VICTORIA EPBC 2880/3960**

The referral for the project, which is a 70km pipeline taking 75?GL of water per year from the Goulburn River to the Sugarloaf Reservoir, Victoria (2008/3960) is a ‘decision made under Section 75 and Section 87 of the EPBC Act.’ Once again the action has been deemed a ‘controlled action’.

This has been a flawed project from its very beginnings. The very obvious undue haste with which matters were listed for referral have been less than rigorously assessed by the State Government with its choice of a PIA; the limiting of the scope of the referral particularly with regard to issues the Advisory Committee could deal with reveals that the State Government and the Proponent are demonstrating bias. This example shows how very easy it is for a government or a proponent to limit the scope of a referral. This should be addressed under the Act so that no-one can limit the scope of referrals and that a rigorous assessment must be carried out to the full.

I attended this Hearing with Maria Riedl and below please find issues listed by her that were improperly addressed:

- The Victorian Minister for Planning decided that an Environmental Effects Statement (EES) reviewed by a panel was not required and a Project Impact Assessment (PIA) reviewed by an advisory committee, if completed to a satisfactory standard would be sufficient to inform both himself and the Commonwealth Minister as to the potential effects of the proposed pipeline route.<sup>49</sup>
- The terms of reference for the advisory committee excluded the associated issue upon which the pipeline is predicated, which is the water savings to be actualized by the Food Bowl Modernization Project.
- The water savings which are meant to fill this pipe have not been verified and this has been acknowledged by the Victorian Auditor-General,<sup>50</sup> this means that there are likely to be significant impacts on Ramsar wetlands listed under the EPBC Act.
- The Goulburn River is listed under the Heritage Rivers Act and one must apply the Act which states; 'New water diversions not to significantly impair attributes of area'.<sup>51</sup> Extracting 75GL for the pipeline will have a significant effect, both on the Goulburn, as well as downstream, to the mouth of the Murray River in South Australia.
- No investigations have been made of the potential environmental impacts because of the reduction of flows on those matters listed under the EPBC Act such as; Ramsar wetlands and migratory species downstream of the extraction.<sup>52</sup>

<sup>49</sup> EPBC Act Referrals Section, Sugarloaf Pipeline Project, Goulburn River to Sugarloaf Reservoir, Victoria (EPBC 2008/3960) <<http://www.environment.gov.au/epbc>>

<sup>50</sup>Victorian Auditor-General DDR Pearson, *Planning for Water Infrastructure in Victoria* (2008) 32-34 <<http://www.audit.vic.gov.au>>

<sup>51</sup>*Heritage Rivers Act 1992 (Vic)* sch 3; *Heritage Rivers (Further Protection) Bill* No 68 of 2006

<sup>52</sup>Commonwealth, State and Territory Governments of Australia, *Garnaut Climate Change Review*, (2008)

- The proponent has chosen not to provide information about the water savings without which this pipeline cannot operate. They have failed in their '[d]uty to provide accurate information' and they have provided both false and 'misleading information to obtain approval or a permit.' It is a fact that this is 'component of a larger action' as the pipeline cannot be operated without water.<sup>53</sup>
- The Victorian government has colluded and misleads the Commonwealth by rushing the study of impacts for this pipeline, by using a PIA and by declaring that it is an emergency. This is untruthful, their own document *Our Water Our Future the Next Stage of the Government's Water Plan*, June 2007 states on page 17; 'Melbourne households [will] move off the current restrictions regime to the more secure level of service they have historically received.'
- The information provided to the Minister does not include enough information to make an informed decision and he should request more information.<sup>54</sup>
- The Minister is obliged to consider 'all adverse impacts' and this is a wide interpretation of the Act.<sup>55</sup>
- The Minister must be assured that in allowing an 'accredited process' he is satisfied that Section 87(a) of the EPBC Act is adhered to fully.<sup>56</sup>
- The objects of the EPBC Act especially the principles of ESD<sup>57</sup> are being regarded in a superficial manner because the Victorian government has decided that this project will proceed no matter what the consequences.

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22-23; *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s16(1), s17B(1), s20(1), s20A(1).

<sup>53</sup> *Ibid* s489, s490, s 491; s74A(1).

<sup>54</sup> *Ibid* s76.

<sup>55</sup> *Ibid* s75(2).

<sup>56</sup> *Ibid* s87(4).

<sup>57</sup> *Ibid* ch 1(3), (3A).

- The Victorian Auditor-General has stated that that the public need to be informed about the cost-benefits of the entire project. This has not been done and in fact because of the rush 'the standard of rigour was less than normally expected when asking the Government to commit to a project.'<sup>58</sup> This is in contrast to the requirement of ESD under the EPBC Act.<sup>59</sup>
- The advisory committee chair Kathryn Mitchell stated they were 'operating under time constraints' and the various experts for the proponent also stated that they would have liked more time to do additional surveys. The choice of a PIA v EES was made to limit the information available to advisory committee and the Minister. The result is there is not enough information for any Minister to make an informed decision as they are obliged to.<sup>60</sup>
- To consider also are Sections 136(4) in the EPBC Act, a person's environmental history and 138 where the Minister is 'not to act inconsistently with Australia's obligations under the Ramsar Convention.'<sup>61</sup>

## CONCLUSION

It is evident that without the EPBC Act's implementation and its enforcement, further environmental degradation will occur. There have been positive and negative outcomes under the Act and these are reflected in the number of cases that have come before the courts.

<sup>58</sup> Victorian Auditor-General DDR Pearson, *Planning for Water Infrastructure in Victoria* (2008) 34-36 <<http://www.audit.vic.gov.au>>

<sup>59</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s3A(e)

<sup>60</sup> *Ibid* s 87(4), s132, s136, s139, s140, s74A(1).

<sup>61</sup> *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s136(4), s138.

I would like to request that the following issues be included under the EPBC Act in the future. They are

- Greenhouse Gas emissions and climate change;
- Land Clearing;
- Dioxins;
- Water extraction;
- Wild Rivers;
- Wilderness;
- Murray Darling Basin;
- Coorong and
- Fire issues

### **Greenhouse Gas**

Reports that have come down recently show that the global average surface temperature has increased over the 20<sup>th</sup> century, Australia has suffered a prolonged severe drought, the Arctic ice is melting rapidly and the global average sea level has risen and ocean heat content has increased. There is no doubt that our global climate is changing and it will have a serious impact on our environment. With the prospect of our hot dry climate becoming even drier and hotter over the years both Federal and State leadership is required. I would like to see an effective “climate change trigger” under the EPBC Act.

### **Land Clearing**

The impact of land clearing on natural heritage and biodiversity has been of great concern over many decades. I believe the Act is failing to address this major environmental issue. At the present time land clearing does not trigger the EPBC Act unless it is next to a World Heritage Area, is critical habitat for a threatened species or is in a RAMSAR listed wetland. In the case of the Nowingi Long Term Containment facility which was proposed to be built next to a RAMSAR wetlands (Hattah Lakes) a National Park and held critical habitat for the Mallee Emu Wren, this was not taken into account. Though it was only a small area I believe areas that provide habitat for listed threatened species or communities whatever the size should trigger the Act.

### **Murray Darling Basin, Water and Coorong**

These three matters trigger alarm bells today. Reports put out by the Murray Darling Basin and CSIRO reveal just how critical the situation is. I believe that the trigger should focus on major development projects in the Murray Darling Basin. Criteria for assessing impact should be based on interference with rivers caused by major works (Eg. dams and pipelines such as the Sugarloaf Pipeline which will decrease inflows into the Murray River and major wetlands); the extraction or diversion of volumes of water of a certain amount of that are likely to impact upon compliance with the MDBC cap. In fact the cap should be lowered, new irrigation areas should not be allowed to open up and water trading and unbundling should be stopped. Water is such a precious item, it should not become a commodity as it is essential for survival.

The Coorong with its precious wetlands should also become a trigger.

## **Fire Regimes**

I believe that fire regimes should also become a trigger, particularly with the prospect of climate change. In Victoria fire control is to be extended to control burn two-thirds more each year than previously undertaken. This includes National Parks, Wilderness areas and all public lands. I am attaching my submission to the Mallee Fire Plan for your information. Huge areas of the Victorian Mallee are burnt each year and gradually all the hollow trees are disappearing. There was a proposal to burn the Nowingi Block (to save the species of Mallee Emu Wren, Bat and Moth). This was hotly disputed by locals and scientists and it won a 10 year reprieve because these species would not have survived a control burn. A trigger must be set in place to prevent the states from systematically destroying vital habitats and biodiversity, particularly in wilderness areas or areas of high scientific value.

In conclusion, the EPBC Act must have tighter control over referrals and the Minister must be persuaded to act appropriately and rigorously in all matters referred to him. There is a need for the above issued to be added as Triggers to the Act.

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5/9/08.

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Threatened species and endangered ecological communities became Matters of National Environmental Significance (MNES)