

Independent review of the EPBC Act 1999

Submission from
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I welcome the opportunity to make a submission to the Independent Review of the EPBC Act. I have read the Discussion Paper introducing the Review, and will comment on some of the specific questions raised in the paper, after some general comments.

The Commonwealth's involvement with environmental matters has grown with the increasing number of international treaties addressing environmental issues. These treaties provide an avenue for the Commonwealth to be directly involved in environmental control and management within the States. However, the Commonwealth has control of the environment over a vast area without interaction with the states. This area includes a far flung collection of Commonwealth Territories, which in their own right have outstanding biodiversity value, and since the advent of the UNCLOS regime, the marine EEZ, one of the largest national marine zones in the world, extending from the tropics to the sub-Antarctic. The conservation and sustainable use of this marine area presents many challenges. Firstly, relative to terrestrial Australia, we know relatively little about the biota and other resources of the area. Secondly our ability to police the EEZ is limited, particularly in sub-Antarctic regions. I acknowledge the considerable efforts that are being made in marine research, and also the role of the Navy and RAAF in surveillance but there is still much more to be done. The Department of the Environment is not a lead 'on the water' action agency in the marine environment, but can be active in policy development and co-ordination. The Commonwealth framework which incorporate both aquatic and terrestrial matters within the one piece of legislation is preferable to the artificial separation of different components of biodiversity between different agencies under different legislation such as is the case in NSW.

On land the situation is complicated by the overlapping jurisdiction of the Commonwealth and the States. The Department has limited on the ground staff compared to the State agencies. Many of the issues in terrestrial environments arise in the context of land use planning and approvals processes and the Department is not a land use planner; this role is still firmly under state control. The lack of direct involvement of the Commonwealth in planning is a major constraint on the overall effectiveness of the EPBC Act. Once proposals are locked into a plan then subsequently there is a presumption (even if this is not absolute nor enshrined in law) that the development will go ahead. The extent to which

environmental matters are fully addressed in plan preparation varies but there is no certainty that all the matters relevant to the EPBC Act will have been adequately addressed. At present the scope for referral of a proposal to the Commonwealth occurs when the proposal is more concrete than an option being considered in plan development. Although I am sure that any such suggestion would be strongly resisted by State and Local Government there could be merit in there being an avenue for referral to the Commonwealth during planning; this could cut off some damaging proposals before they had acquired momentum and substantial expense had been incurred in preparing detailed development applications.

The EPBC Act, as the discussion paper acknowledges, is a very substantial piece of legislation. It was a considerable tome when first enacted, with the subsequent addition of the heritage provisions it is a very large volume. While there was clearly an argument for consolidating the various pieces of antecedent independent legislation, the Act in its present form is pretty intimidating, and perhaps consideration should be given to simplification, or even to separating some of the functions.

Definitions

An extremely important part of the Act is its glossary in s528. I would not think it appropriate for the current Review to re-write this section of the Act, but nevertheless a recommendation that the definitions be revised as a separate process could be appropriate. Two particular concerns which I have are with the definition of species and the restriction of coverage to indigenous species. The definition of a species for purposes of the EPBC Act is the biological species concept (unlike, for example, the definition of species in the NSW *Threatened Species Conservation Act* which is much looser – See Preston, B .J. and Adam, P. (2004) Describing and listing threatened ecological communities under the *Threatened Species Conservation Act 1995* (NSW): Part 1. 21 EPLJ 250.

The biological species concept is a hypothesis – it states the attributes that we would expect of a ‘proper’ species but the number of named species for which this hypothesis has been tested is small. I see two dangers in endorsing the definition – the inclusion of a species on the schedules could be challenged on the grounds that the species has not been shown to exhibit the correct breeding pattern; and secondly hybridization is, internationally, being increasingly recognized as a threat to biodiversity, with numerous examples from both flora and fauna being described in the literature. Hybrids present particular difficulties for conservation, but identification in particular instances of hybridization as a threat is problematic in that under a strict application of the biological species concept, if two entities interbreed (hybridise) then they are not separate species.

Restriction to native species is, in general terms, desirable – we do not want to see scarce conservation dollars expended on weeds or other introduced species. However, imposition of a cut off date creates a difficulty in that data to demonstrate beyond doubt that a particular species was present in Australia at that time is often lacking. Setting a cut off also

implies that natural distribution processes ceased at that date. Certainly humans have been responsible for many range changes in the last few centuries, but natural processes still operate. This is an important consideration for the future if species distribution changes in response to climate change. A species establishing a tenuous beach head in Australia would not, under the present definition, be eligible for the benefit of any protection under the EPBC Act.

Question 1

c) The existing matters of NES serve as triggers for the involvement of the Commonwealth in issues. Many of these arise from the Commonwealth's obligations under international treaties. Now that the Commonwealth is engaged with the Kyoto process there is both international as well as a national interest in Greenhouse matters being an additional NES.

I would strongly support this, although crafting an appropriate set of words is a challenge as Greenhouse matters could arise in almost every development proposal – while the scope of Greenhouse matters would need to be large they should not be so broad that the Department was overwhelmed with referrals. If Greenhouse becomes a matter of NES it would be necessary, however defined, that both direct and indirect impacts be considered.

d) As discussed earlier, the definition of action should be expanded to incorporate the planning process. This might raise issues under the current exclusions of 'government policy or program, or a government decision to issue a governmental authorization or award a grant' and these exclusions may need to be revisited. The list of actions is not inclusive, but illustrative; however, it may be appropriate to add forestry (including plantation establishment) to agriculture and vegetation clearance.

e) & f) The interpretations by the Federal Court and the insertion of s527E give impact an appropriately broad meaning. 'Significant' is more problematic. Significance in this context does not necessarily mean significant in a statistical sense. The test of significant is similar to that in other legislation, and subject to judicial review, inevitably gives the decision maker considerable discretion. The breadth of discretion will be criticized by those unhappy with any particular decision. It is, however, difficult to construct a more satisfactory test – those making submissions on particular issues should make their arguments sufficiently strong as to impress the Minister with their logic and relevance.

Actions not requiring approval

Existing use rights are protected, as they would be under legislation in the States. However, defining existing use and determining whether or not existing use has lapsed have occupied much time in courts over the years. I am not aware that these have yet been issues for the EPBC Act, but it may be desirable for pre-empt future litigation by seeking to define existing use.

It is easy to acknowledge, in hypothetical circumstances, the need for a 'national interest' over-ride. However the 'national interest' is difficult to define and gives a Minister a great deal of discretion. It would be desirable if some limits to the discretion were imposed in the Act.

Question 2

My suspicion would be that the majority of the public would not be aware of the existence of the EPBC Act, let alone what responsibilities might flow from it. Amongst those who do have some vague knowledge there is a great deal of confusion between Commonwealth and State legislation. On a number of occasions when I have been approached as a possible consultant I have found that even quite large developers are confused about their responsibilities. Although the immediate response would be to have a major publicity campaign, I am not sure that this is the answer; despite the supposed power and reach of advertising campaigns some people are remarkably impervious to information.

Even amongst those who are aware of their responsibilities a grey area is 'one likely to have'. If a project is referred because some components clearly 'have' or 'will have' impacts the Department has the opportunity to identify other components which 'are likely to have' impact even if those proposing to take the action have not considered it. However, if there are no components which 'clearly have' or 'will have' impact, and the proponent considers that there are no aspects which are likely to have significant impact there will be no opportunity for an independent evaluation of that assessment.

Question 3

The total number of referrals appears large, but given the continental context of the Act, it is probably small. It is difficult, in the absence of data on matters which the proponents did not consider required referral, to know whether the process is working satisfactorily. It would be very difficult for this to be investigated, but one amendment which might assist is, in the case of proposals for which some form of approval from state or local government is required is for these authorities to have the power to refer matters to the Commonwealth when it appears that a significant impact on matters relevant to Commonwealth could occur, if there is no indication that the person making the proposal has already taken that step.

Question 4

This is a difficult question to answer given that we have not yet seen the full spectrum of approaches in that there has not been a Public Inquiry, and nor is it clear under what circumstances the Minister might deem that a Public Inquiry is required.

Compared to the number of referrals, the number of controlled actions is relatively small. Without knowing the details of all the referred matters it is difficult to assess whether the

proportion is appropriate, but I am aware from numerous' phone calls and other contacts from environmental groups there is considerable disappointment (along with cynicism) about the outcomes of the referral process.

Question 5

An issue for many groups with the current process is the very limited time available between notification that a matter has been subject to referral and the deadline for receipt of submission (10 days). Although there are many merits in having a rapid process, it is difficult for volunteer groups to prepare submissions within this short time frame. This is exacerbated by the fact that unlike state processes where calls for submission are still subject to advertisement in state and local newspapers, notification under the EPBC is only by the matter appearing on the Departmental website. Unless one is a regular visitor to the website it is easy to miss things, particularly if the name of the proposal and the proponent may be different from that under which it has been known to local groups.

Question 6 and 7

The relationship with the States and Territories is one of the key issues for the operation of the Act. Realistically the Department does not have the resources to independently check (and in particular to carry out its own on-site inspections) all the matters referred to it. Pragmatically some form of arrangements between the Commonwealth and the relevant State and Territory authorities is required.

However, these authorities normally work within the constraints of their own legislation – whose objects and processes are not necessarily congruent with those of the EPBC Act. In instances where threatened species and ecological communities are involved there will be cases where there are differences between the national and state schedules and where the state officers would need to be aware of this in providing advice to the Commonwealth.

Concern has been expressed by conservation groups about the appropriateness of bilateral agreements (see for example Jury, T. (2008) Threatened flora and 'the law' in South Australia: more issues than tissues? *Australasian Plant Conservation* 17 (2), 36-38 which raises concerns regarding the bilateral with South Australia. In NSW the appropriateness of a bilateral arrangement for proposals which are covered by Part 3A of the *Environmental Planning and Assessment Act* (NSW) has been queried by the conservation movement).

The credibility of the EPBC Act will depend on the success of the arrangement with the States and Territories. Most of the commentary on the issue is currently anecdotal, and a more systematic independent evaluation would be desirable.

Question 8

Strategic approaches clearly have a role, but in so far as they deal with matters on the Schedules cannot be regarded as 'fixed'. Changes to the Schedules arising from new

discoveries, or from re-evaluation of status would need to be incorporated into strategic approaches as they occur.

Cumulative impacts remain a continuing problem for environmental assessments under all jurisdictions. A strategic assessment may provide a framework for considering cumulative impacts, and importantly for setting limits, but this will not obviate in many cases the need to examine closely individual proposals.

Question 9

At least in theory Chapter 5 of the EPBC Act should provide an effective regulatory framework. Whether this framework provides for the delivery of the desired outcomes depends in large part on the exercise of the Ministerial discretion inherent in the assessment of significant impact.

Question 10, 11, 12

Having been heavily involved in with the listing processes under the NSW *Threatened Species Conservation Act* I have some concerns over the nomination processes for the EPBC Act.

The setting of a theme (or priority) has advantages in highlighting areas where there may be deficiencies in parts of the Schedules. However, while the theme which commenced in October 2007 is clearly an important one, aspects of it are not readily addressed by the general public (Concepts like 'groundwater dependent species' require considerable technical knowledge). I would see the themes as identifying projects to be conducted either by agencies or appointed consultants. While the public may be able to make nominations under a theme I would not like to constrain the public from nominating other matters for which a case can be made.

Only nominations which pass through a bureaucratic filter are submitted to the TSSC. In NSW nominations go directly to the Scientific Committee – in my experience although many nominations as first submitted were deficient, in many instances the basis for a case could be discerned and the Committee would return the nomination either to the nominator, or to other potentially relevant experts, with suggestions for further work. I would regard this as a more effective way of identifying conservation issues than rejecting nomination on technical grounds related to the Regulations.

I would regard provision for emergency listing as being necessary. Under the NSW *Threatened Species Conservation Act* such a provision exists – it is used only rarely but is valuable if a newly discovered species is clearly subject to an imminent threat (some such discoveries are only made because of fieldwork associated with a planned proposal).

I am strongly of the view that decisions as to listing need to be completely separate from any consideration of such a listing. Listing reflects the status of a community or species, this

would then need to be taken into account in the approval process. If social and economic considerations prevent listing this would be extremely regrettable and inappropriate. Listing, of itself does not automatically mean that any proposal having an impact on the listed item will be refused – rather there will be Ministerial discretion to balance conservation against social and economic issues.

When it comes to the listing of communities it seems to me that the Commonwealth has already stepped onto the slippery slope. The condition of a stand is incorporated into community listings so that the listing will only apply to stands in better condition.

In NSW, since the decision by Pearlman J in *Plumb v. Blacktown City Council* [2002] NSWLEC 223. it has been clearly established that the process of identification of communities is separate from consideration of significant (I have discussed this question elsewhere see Preston, B. J. and Adam, P. (2004) Describing and listing threatened ecological communities under the *Threatened Species Conservation Act 1995* (NSW): Part 2. 21 EPLJ 372 and in Adam P (2009 in press) Ecological communities – the context for biodiversity conservation or a source of confusion? AJNRLP.)

The difficulties with the Commonwealth Approach are seen in the case of Blue Gum High Forest, a critically endangered ecological community under both State and Commonwealth schedules. It is critically endangered because so much has been lost and what is left is degraded and fragmented. However, because most stands are degraded and fragmented they do not fall within the Commonwealth listing, whereas all stands are included within the NSW listing.

The difference between the NSW and Commonwealth approaches has arisen in *Murlan Consulting Pty Limited v. Kuring-gai Council and John Williams Neighbourhood Group Inc.* [2007] NSWLEC 374 and, on appeal, *Murlan Consulting Pty Limited v. Kuring-gai Council and Anor* [2007] NSWLEC 704 and discussed by Taylor, M.P. (2008) Legislative and policy challenges for the protection of biodiversity and bushland habitats: An evidence-based approach. Paper presented at the EPL Conference October 2008.

It is difficult to assess condition by a single ranking; much will depend on the context of individual stands. Even though stands are degraded they may still be recoverable, they may be habitat for species which are threatened and they may provide propagules for rehabilitation projects.

I can understand why the Commonwealth may wish to limit the scope of listings; the Department does not have the resources for making the detailed site specific assessments. Nevertheless listings such as the EPBC listing of Blue Gum High Forest contribute little to the protection of an entity which is clearly of high conservation concern.

In relation to ecological communities the assessment of status criteria are based on the IUCN criteria for species. It is worth pointing out that currently the IUCN does not have criteria for

communities or ecosystems, and while the species criteria may be of assistance, communities and species are conceptually different and species criteria are not necessarily a substitute for developing community criteria.

One particular issue for community listings is that there is no agreement amongst ecologists, nor guidance in the legislation, as to what hierarchical level of community listing should be applied to (the Russian Doll problem – see Preston, B .J. and Adam, P. (2004) Describing and listing threatened ecological communities under the *Threatened Species Conservation Act 1995* (NSW): Part 1. 21 EPLJ 250)

My view is that no hard and fast rule can be made, and in each case will need to be considered on its merits.

The NSW legislation differs from the EPBC Act in providing for the listing of populations. This endangered population concept has merit and I would suggest that consideration be given to its incorporation in the listable categories under the EPBC Act.

Question 14

Although there are frequent calls for the standardisation of schedules in my view this is not necessarily desirable. The conservation of biodiversity is assisted by the listing of species at the limits of range within a particular state or territory, even though across the entire range of the species it does not qualify for listing at the national level.

Question 15

The term ‘recovery planning’ is locked in place internationally and it is too late to change, but I would have preferred a more neutral ‘conservation planning’. Recovery planning has the connotation that the object is removal from the schedule. For some entities this may be justifiable and appropriate, but for many cases we are never going to be able to delist (for example, the Wollemi Pine, however widespread it becomes in cultivation will always be endangered in the wild, although this does not remove the requirement to, as far as possible, take action to minimise threats).

In terms of benefitting the maximum number of species I would give high priority to threat abatement while recognizing that individual species may have specific needs that will require to be addressed. Rather than recovery plans for individual species, where possible combined plans for suites of species with similar attributes would offer efficiencies.

Question 18

Without long term research we cannot know how effective the provisions of the Act have been. We can measure outcomes in terms of what is listed and how many recovery plans have been prepared, but whether this has advanced the objects of the Act is a different, and more difficult, matter.

Question 19

Measures available under the Act provide mechanisms which could be used to address Greenhouse impacts, but this would be aided by inclusion of Greenhouse impacts on the list of matters of NES. Measures to reduce Greenhouse outputs will require whole of government approaches involving a wide range of legislation.

Chapter 4

Australia has long been one of the most active participants in CITES. While there would undoubtedly be matters where administrative improvements could be made, on the whole I see the mechanisms working well, although changes elsewhere in CITES will impact on what happens in Australia.

Heritage Matters

Recently the Productivity Commission has reported on aspects of heritage conservation. I regard the report as one of least convincing outputs of the Commission. Despite the lack of available hard data the Commission was happy to reach conclusions, more it would seem, on the basis of a particular ideology than on fact. Debate on the cost/benefits of the heritage conservation regime will continue but hopefully it can become better informed. A recommendation from this current Review to collect and analyse data on the economic consequences of listing would be desirable.

The Register of the National Estate

One of the innovations flowing from the Hope Report was the Register of the National Estate (RNE). However, when the heritage regime was revised by the previous government the RNE was mothballed. One of the reasons for not continuing to add to the RNE was a belief it was too large, and that a much smaller National List should be the focus of Commonwealth involvement.

At the time I made submissions supporting the RNE, and I would still be of that view. There is no reason why a heritage list should be confined to some predetermined size. What society considers as heritage is made up of many components, and while some components are so clearly exceptional that they stand on their own in most cases the individual elements are like pieces of a jigsaw puzzle so that the whole is greater than the sum of the parts (I would concur with the sentiment recently expressed in relation to the proposed demolition of a heritage listed building by Roseth S.C. and Sullivan, A.C. in *David Road v Hornsby Shire Council* [2008] NSWLEC1461 – ‘the fact that this property is not the most significant heritage place in the Shire does not justify its demolition. All places of local significance contribute to the overall richness of the Shire’s heritage’ (at 31)).

Related to this more expansive view of heritage I would also express concern about the ‘shrink wrapping’ approach to determining the boundaries of listings. Adequate curtilages or

buffers are needed. Recently there has been a listing of the High Country on the National List, but this listing applies only within the boundaries of existing conservation areas, without apparent consideration of the importance of views of the landscape both from within the listed area and from the surrounds looking to the listed areas.

One of the reasons given for moving towards a short National List was that both state and local government maintain lists of local and regional significance. Attempts to impose a hierarchy of significance, when it is the aggregate of areas which collectively define heritage, are inappropriate, and additionally there is merit in having a list compiled on a consistent basis by an independent body. Listing by both local and state governments are often affected by political and other consideration which limits the comprehensiveness of their lists. Heritage lists are works in progress, as circumstances and perceptions of heritage values change, but that has been and always will be, the case.

There has been an unfortunate perception that heritage applied to built and cultural matters and was separate from biodiversity values. This has never being part of the original concept of the Hope Report and I would hope that listing of landscapes will come to be recognised as a vital tool in biodiversity conservation, with the potential for protecting connectivity across landscapes.

Question 25

My views here would be the same as for listing of threatened species and communities. Listings should be based only on heritage considerations, and not be contaminated by extraneous considerations of social and economic matters, although once listed the actions taken in response will necessarily involve considerations including social, economic, and political matters.

Question 26

The process of listing for the National List is lengthy, and it is not immediately apparent why it takes so long.

Question 28

Although heritage protection and conservation are responsibilities of all levels of government there are currently differences in emphasis and approach. While there would be merit in greater integration and co-operation there would probably need to be a separate review/inquiry just to deal with this issue.

Question 29

One of the important features of the NES trigger for Ramsar wetlands is that it applies beyond the boundaries of the site *per se*, so that activities in catchments which could impact on the wetlands can be addressed.

Ramsar listing has not been a noticeable factor influencing planning decisions in Botany Bay which have affected the Towra Point Ramsar site. While most of these decisions were taken prior to the EPBC Act, I would still expect that when push comes to shove development interests would prevail. Were Towra Point to be in a non-urban estuary outcomes might be different, but Towra and Blue Gum High Forest perhaps exemplify the problems of maintaining conservation values in the face of powerful economic interests.

Chapter 7

The compliance and enforcement obligations are broad. A major issue will clearly remain the availability of resources; unless there is a substantial increase in staff, or there is an ability to delegate some functions to state and local government functions will necessarily be applied selectively. In deciding which matters to pursue one of the objectives should be to create examples which if given sufficiently high profile could act as deterrents.

Chapter 8

The procedures are well established although in relation to Q38 it might be argued that the potential discretion of the Minister is too broad – particularly in relation to determining ‘significant impact’.

In relation to the application of the precautionary principle this has been raised as an issue in litigation in several jurisdictions, so that there is now a considerable body of case law to assist interpretation and application of the principle. (In this regard the judgement in *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133, although dealing with matters outside the scope of the EPBC Act provides one of the most accessible interpretations).

General Comments

I have not commented on Chapter 6, as these issues are outside my direct experience, but I recognize that engagement with indigenous communities will be essential for successful biodiversity conservation over much of Australia. It is also clear that in some respects indigenous perspective on biodiversity (for example in relation to some introduced flora and fauna) are different from those held in the non-indigenous community. Resolving these differences will be challenging.

In relation to many of the questions which ask, in different ways, for opinions of the success of the Act the difficulty is that data to reach conclusions are not readily available. I would hope that the necessary studies to address measurement of success can be carried out.

The issues which the EPBC Act seeks to address are many and increasing in both severity and complexity. If, as I hope, the Review reaffirms the validity of the Act’s objects there will remain the problem of adequacy of resources – financial, personnel, and information. At a

time when the calls on government funding will grow, it is nevertheless both necessary and appropriate to recognize that to conserve Australia's biodiversity and natural, historical, and living cultural heritage will require greater resources than have, to date, been available. More partnerships between government and landholders, industry, and conservation groups will be necessary, but the growth of co-operative measures will not remove the need for a real increase in government funding.