

## Submission to the Independent review of the EPBC Act 1999

Please consider the points raised in our earlier submission to the Senate Inquiry into the EPBC Act as part of the independent review of the EPBC Act (attached) We have added a few comments in response to some specific questions in the discussion paper which are not discussed in the senate submission.

We have not had the time to re-write a new submission for the review, and we hope that this is a suitable compromise.

### **Q1 What are your views on the following aspects of the Act:**

#### **(a) Are the objects of the Act appropriate to the Commonwealth's role in environment protection and management?**

The objects outlined in Section 3 are appropriate but fairly imprecise. In particular the object of ecologically sustainable use of natural resources, while perhaps being 'promoted' by the Act, seems to have had little impact on decisions made under the Act. (The use of water, soil and energy resources are particularly good examples.)

Promoting intergenerational equity with respect to preserving or improving the state of the natural environment and biodiversity left by one generation to the next should be raised from being one of the principles of ESD to being one of the objects of the Act. This is a cultural norm with deep roots in many societies, particularly traditional indigenous Australian societies, which is not specifically promoted elsewhere in Australian legislation. We believe that there are many long term social, economic and ecological benefits which would flow from having this very simple traditional cultural ideal integrated into the legal consideration of 'actions' of potential environmental significance. The very simple guiding question to consider under the Act then becomes "will this action leave the natural world in a better state for the next generation?"

#### **(b) Are the principles of Ecological Sustainable Development (ESD) appropriate to the Commonwealth's role in environment protection and management? Does the legislation provide an adequate framework to guide ESD decisions made under the Act?**

The wording and fairly specific interpretation of the precautionary principle as it is stated in the Act is not protective enough. If there is significant scientific uncertainty about the consequences of an action which poses a threat of serious or irreversible environmental damage, then the action should not be approved under the Act.

#### **(d) Is the definition of an 'action' in the Act appropriate?**

There is at least one case where the exclusion of "*government decisions to issue a governmental authorisation from the definition of an action*" has had consequences which are likely to result in significant adverse impacts on MNES. The specific case was the 2006 decision that the increased water extraction from Obi Obi Creek (in South East Queensland) which would result from the operation of the Northern Pipeline Interconnector Stage 1 was not an action under the EPBC Act because it was part of an authorised water allocation. In this case, the allocation had been granted many years prior to the knowledge of the existence of MNES in Obi Obi Creek. The water subject to the authorisation had never been extracted in the past, and all scientific evidence available at the time of the project referral clearly indicated that actually taking the full water allocation via the pipeline would have significant impacts on a number of EPBC species listed as endangered and critically endangered under the EPBC Act. This pre-existing authorization for a water allocation which had never been taken should not have been able to be used to exempt the action of greatly increasing the level of actual water extraction from Obi Obi Creek from an assessment under the EPBC Act.

**(e) What kind of impacts should be considered under the Act? Does the Act adequately encompass not just direct but also indirect impacts?**

There are examples where a large suite of inter-related actions may have landscape-scale impacts on a locality or region, yet only one or two may be deemed as 'actions' under the EPBC Act. We discussed the case of the various 'water-grid' projects in the Mary River Catchment in our senate submission. An extraordinary example is where the impacts of Stage 1 of the proposed Traveston Crossing dam are being assessed under the Act, yet the impacts of the water off-take works, pump stations and connecting pipelines required to deliver the water are not subject to the current assessment being conducted under the Act because they are regarded as separate projects by the proponent. Similarly, the impacts of Stage 2 of this project are not yet being assessed under the Act, although it is clearly recognised in all State planning documents, and the works proposed for Stage 1 will allow the operation of the dam at Stage 2 capacity with very little modification. None of these other projects are feasible without Stage 1 of the proposed dam and are clearly consequential actions. However, because the impacts of these actions are not being considered in the assessment of this project the true extent of the social, economic and environmental impacts of the decision whether or not to approve Stage 1 of the project under the Act are obscured from the assessment process.

**Q3 Are appropriate projects being referred for approval? Does the referral process meet the objects of the Act?**

See response to Q 1e

**Q4 Do you think that the Act contains an effective hierarchy of environmental assessment approaches, ranging from assessment on referral information to assessment by public inquiry? Are the methods of assessment providing the required information for informed approval decisions?**

The assessment of projects in which a State Government is the effective proponent should not be conducted under a bilateral agreement with that same State Government, because it creates an untenable conflict of interest between the role of the state as the project proponent and its role as the accredited assessor under the EPBC Act. These cases should automatically be assessed by a Commonwealth process which is totally independent of the proponent. (See senate submission)

**Q5 Does the Act provide appropriate scope for public participation and transparency in the assessment and approval process under the Act?**

Notification of referrals and calls for public comment should be advertised more widely than the EPBC website. Perhaps the proponent should be required to advertise invitations for public comment by a sign at the project site and via a public notice in the media within the affected communities.

**Q6 Does the Act operate effectively in conjunction with State and Territory planning and environmental impact legislation? Are existing bilateral agreements achieving the objects of the Act?**

See response to Q4

**Q8 Does the use of strategic approaches, such as strategic assessments and bioregional plans, provide opportunities for streamlining Commonwealth involvement in environmental issues? Do such approaches provide an appropriate means for dealing with cumulative impacts?**

These approaches may help with dealing with cumulative impacts, but we have not seen them applied to regions where we have experience. The difficulties with dealing with cumulative impacts seems to be a very weak point in the application of the Act to date.

**Q9 Does the Act provide an effective regulatory framework for the conservation of Australia's biodiversity? If not, what improvements could be made?**

It would be more effective to focus biodiversity conservation towards the conservation of specific habitats and local ecosystems which support important and diverse communities of species, rather than having such a strong focus on individual species. That way you also automatically protect all the species and ecosystem processes, including the ones that you don't know about yet.

**Q10 What are your views on the process for nominating threatened species, ecological communities and key threatening processes?**

Slow and under-resourced.

**Q11 Given the length of time required for the assessment of nominations, should the Act allow for the emergency listing of species and ecological communities which may be threatened (similar to the provisions for the emergency listing of National Heritage places)? Would the advantages of this be outweighed by the financial and administrative costs?**

Perhaps newly-discovered species should be automatically protected under the Act as soon as they are scientifically described. When their conservation status is determined they could be taken off the list of protected species if this can be scientifically justified. This is an appropriate application of the precautionary principle.

**Q15 What factors should be considered in setting priorities for recovery planning?**

In order of priority:

1. *Retention* of existing high quality habitat, populations and linkages,
2. *Rehabilitation* of existing damaged habitat, populations and linkages,
3. *Re-creation* (expansion) of new habitat, populations and linkages.

The intention to create environmental offsets by the rehabilitation or re-creation of new habitat should not be allowed to be considered as a mitigation strategy for actions which create certain losses of existing high-quality habitat. (An application of the precautionary principle).

**Q16 Does the planning regime support the effective recovery of threatened species and ecological communities?**

The planning regime in the Act is not always successfully integrated into State and regional-based development and planning schemes. For example, recent water infrastructure planning in Queensland is actively destructive of threatened species and ecological communities. The well-documented loss of aquatic biodiversity in the Burnett River is a prime example.

**Q19 Does the Act provide an appropriate legislative framework for addressing climate change and other emerging pressures in the context of environmental protection and biodiversity conservation? If not, how can such matters be considered when making decisions under the Act?**

The application of the precautionary principle should be greatly strengthened, with particularly high priority being given to freshwater aquatic and riparian ecosystems, alpine ecosystems, high-altitude tropical and subtropical forest ecosystems and shallow-water marine ecosystems.

**Q29 What are your views on the effectiveness of the operation of the provisions for Ramsar wetlands and the utility of management plans for those wetlands?**

An assessment of changes to freshwater flows and water quality needs to form part of the assessment procedure required for all projects which have impacts on Ramsar wetlands.

**Q35-37 Does the Act provide for the appropriate follow-up of environmental assessment and approval decisions, including the monitoring, evaluation and auditing of actions? If not, what other actions could be taken?**

While there are appropriate provisions in the Act for monitoring, auditing and enforcement of the conditions placed on approvals granted under the Act, there seems to be evidence of these not being effectively enforced. This particularly seems to be the case for large projects undertaken by large, wealthy and politically powerful proponents. (See senate submission)

**Q41 Does the Act provide the appropriate opportunity for external input and scrutiny of decisions made under the Act? Is there sufficient transparency? Are the periods for public consultation adequate?**

Much of this seems to be at the Minister's discretion. See response to Q5.

**Q44 What is an appropriate framework for assessing the performance of the Act? Do you have particular issues that should be considered during the review?**

The review could possibly combine a overall statistically-based approach which quantifies measurable outcomes under the Act (numbers of approvals, types of conditions placed on approvals, prosecutions, species listings, nominations for listings, surveys of stakeholders with experience in the operation of the Act etc.), with some meticulous in-depth investigations and analyses of a few well-documented case studies which test the boundaries or illustrate certain aspects of the Act. Neither approach on its own would be sufficient to inform a satisfactory re-write of the Act.

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### **Submission to the Senate inquiry into the operation of the *Environment Protection and Biodiversity Conservation Act 1999***

We have been professionally involved in land management, ecology and conservation issues for more than 25 years, acting in the roles of scientist, educator, public servant, landholder, primary producer and community activist at different times throughout that period. We have written a number of submissions on EPBC matters both privately and on behalf of our employers and community groups. We would like to comment briefly on each of the matters raised in the terms of reference for this inquiry using specific examples from our personal experience. We would also like to add some comments on the use of bilateral agreements under the Act

#### **Specific comments on the Terms of Reference**

##### ***Auditing of Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999;***

The EPBC approval with conditions that we wish to comment on is the approval of the Paradise Dam on the Burnett River in Queensland. This is a case where a number of State imposed conditions were placed on the approval of the project, along with several additional Commonwealth approval conditions. When it was abundantly clear to the community that these approval conditions had not been met, a federal audit was conducted of this project which demonstrated clear non-compliance with a number of Federal conditions, and the mysterious creation of a new determination of 'partial compliance', which is not referred to in the Act.

The audit did not extend to any of the State conditions applied to the approval of the project, yet it is apparent that the federal conditions were imposed on the assumption that the State conditions would also be in force and implemented. In fact, several of the State conditions have also not been effectively implemented - but these were not considered at all in the Federal compliance audit.

In spite of the penalties applicable under the Act for such deliberate and blatant non-compliance, no punitive action has been taken under the Act against this proponent. This sends a clear message to the same proponent and others involved in similar projects in the future that the EPBC Act is simply an administrative hindrance, and has no real teeth or consequences when it comes to enforcement.

***Lessons learned from the first 10 years of operation of the EPBC Act in relation to the protection of critical habitats of threatened species and ecological communities, and potential for measures to improve their recovery;***

Our overall impression is that the EPBC Act is seen by project proponents merely as a time-consuming and expensive nuisance that unnecessarily hinders their desired business activity. They generally expect to be able to negotiate, deal, promise, mitigate and buy their way through to an eventual approval, irrespective of the level of impact of the project.

This also seems to be the culture within government, with assessment staff faced with an exploding workload, often working in a highly politicized and stressful environment (eg Gunn's pulp mill in Tasmania, Traveston Crossing Dam in Queensland). It seems that at the governmental level the aim is to negotiate an outcome where the project will be able to proceed, nominally in an ecologically sustainable manner, with the minimum of fuss. Not approving a project generally creates a fuss, which makes everybody's working life more difficult and stressful. The statistics bear this out, showing that only a miniscule percentage of proposed actions have ever been refused under the Act.

Wealthy and powerful proponents (such as State Government owned or supported corporations) have considerable power in this process, and can gain approval for projects which are clearly not ecologically sustainable, on the basis of negotiations, deals, unproven mitigation promises, well-crafted spin and pork-barreling of potential opponents. Projects that a smaller individual business would not be able to gain approval for are assumed to be capable of eventual approval if proposed by one of these larger, more influential proponents.

A relevant illustration is where recreational fishers were refused permission to stock 20 saratoga per year in Lake MacDonald (Cooroy, Queensland) because of the risks posed to the Mary River Cod (an endangered EPBC listed species), in a decision that was upheld after appeal in the Qld fisheries tribunal. Yet, a few short years later the powerful State proponent for the proposed Traveston Crossing dam is behaving as if the EPBC approval of that project is a *fait accompli*, in spite of it directly destroying 12 of the 18 known cod holes in the main trunk of the Mary River. One would have to ask which of these actions poses the greatest risk to the survival of this endangered species supposedly 'protected' by the EPBC Act.

***The cumulative impacts of EPBC Act approvals on threatened species and ecological communities, for example on Cumberland Plain Woodland, Cassowary habitat, Grassy White Box Woodlands and the Paradise Dam;***

Often it is difficult to assess the overall impact on an ecosystem of a number of actions by a number of proponents. Even when it is clear that an ecosystem is under threat from a number of past actions and current processes, proponents understandably focus on the marginal impacts of their particular project, often pointing out that the marginal impacts of their proposed action are small compared to the existing stresses being placed on the ecosystem.

However, the "straw that breaks the camel's back" analogy applies here. A proponent adding their "straw" to a particular environmental "load" may not be able to accurately assess the load already being carried by that camel, and may justifiably point out that their straw is not much of a marginal load for the camel to carry.

We believe that in ecosystems where there is already a level of stress recognized by listings under the EPBC Act, the crucial deciding factor should simply be the directional change in the sustainability of the threatened populations, communities and ecosystems influenced by the proposed action. Any action for which the proponent cannot clearly demonstrate an improved outlook for the listed MNES being impacted should not be approved under the Act. This would considerably simplify the largely unsuccessful attempts at quantifying the cumulative impacts of a variety of actions on this matters. The assessment test would simply be - 'will this proposed action result in an improved state for the MNES being considered in the assessment'.

To labor the camel analogy, if a particular ecological 'camel' is already recognized as being threatened, then approval should only be given to projects that don't place *any* more straws on it's back.

At the moment, proponents of large inter-related actions know the inherent difficulties in assessing cumulative impacts across a number of different actions and proponents. They actively partition large interrelated proposals (which are conceived and planned for by the proponent as part of an overall integrated strategy) into a series of smaller actions, all assessed separately under the EPBC Act.

An example of this is the suite of new water infrastructure proposals for the Mary River in Queensland, specifically planned for as one integrated proposal under the SEQ water strategy, yet deliberately broken into a number of separate actions for the purposes of assessment under the EPBC Act. These actions are :

- the Northern Pipeline Interconnector (NPI) Stage 1 (referred, not required to be assessed)
- the NPI Stage 2 (undergoing EIS process under EPBC)
- Traveston Crossing Dam (TCD) Stage 1 (undergoing EIS process under EPBC)
- TCD Stage 2 (flagged in all planning documents, not requiring assessment yet)
- Northern Regional Pipeline and water offtake works for Traveston Crossing Dam. (Unknown proponent, required to connect TCD to the the NPI)

These projects are planned as a clearly connected and totally integrated suite of actions impacting on the same set of MNES in the Mary River, yet they have been divided into a set of smaller actions, being undertaken by nominally different proponents by the one overarching proponent. This greatly hinders the effective assessment of the cumulative environmental impact of the overall plan. It is important to note that the calculation of predicted economic returns, the planning and design of all these actions was undertaken in a wholly integrated manner, yet the assessment of environmental impact of this suite of actions under the EPBC Act has been deliberately sliced and diced into a number of completely separate assessments.

***The effectiveness of responses to key threats identified within the EPBC Act, including land-clearing, climate change and invasive species, and potential for future measures to build environmental resilience and facilitate adaptation within a changing climate;***

Our observations with respect to the effectiveness of the Act are that, although it is a critically important piece of legislation and has made some significant progress in some matters, it has clearly been insufficient to halt the generally continuing decline in Australia's biodiversity. In fact, the rate of loss of biodiversity over the ten years of operation of the Act has continued to accelerate. In addition, the Act has no legislative power over actions on grounds of their likely contribution to adverse climate change, and this must be seen as a significant restriction to it's ability to protect Australia's environment and biodiversity generally.

***The effectiveness of Regional Forest Agreements, in protecting forest species and forest habitats where the EPBC Act does not directly apply;***

Based on consultation with a wide range of landholders in the course of our employment, our comment on the RFA process is that insufficient heed was taken of the specific management knowledge of affected landholders on the issues of effective forest management. The process tended to alienate many land managers who would otherwise have been valuable allies in the sustainable management of forests and conservation of important remnant ecosystems if the initial process had been handled more sensitively.

We believe that the creation of national parks and conservation areas that resulted from the RFA process has not been supported by sufficient on-ground management resources to ensure the maintenance of the conservation values for which they were created. Our personal experience relates to an adjoining property to our own with very high ecological values which was changed from a forestry area to National Park via the RFA.

Although forestry workers and local landholders had taken a long-term interest in preserving this particular area, no attempt was made to engage with local people in the formulation of management plans or the assessment of the biodiversity values. Insufficient funds have been allocated to the management of this area, and the area is now in decline, threatening the loss of integrity of a significant remnant as a direct consequence of the land tenure change under the RFA.

***The impacts of other environmental programmes, eg EnviroFund, GreenCorps, Caring for our Country, Environmental Stewardship Programme and Landcare in dealing with the decline and extinction of certain flora and fauna; and the impact of programme changes and cuts in funding on the decline or extinction of flora and fauna.***

We believe that community-based programmes are the essential ingredient for achieving on-ground change in the management of Australia's ecological resources. In our opinion, the amount of volunteer and landholder time, effort and capital contribution, and the willingness of professional staff to work passionately for comparatively low wages and little or no job security has been completely undervalued at all levels of Government. Indeed, community-based organizations are often perceived as a hindrance by government because they often insist on the proper application of the EPBC Act and partake in troublesome public comment.

Having said so, the creation of several new layers of bureaucracy lying between the funding sources and the on-ground implementation of the programmes like those mentioned has not seen the most efficient use of scarce resources in past years. The current funding situation is particularly uncertain and undesirable. It is most inappropriate for government bodies such as CSIRO to be placed in direct competition against community based groups for access to short-term 'junk food' environmental funding like "Karing for Country" (KFC). State and federal bodies should be sufficiently funded to be able to function effectively and securely in their own right.

If active community involvement in measurable on-ground action is not financially supported, then all the fine words enshrined in legislation like the EPBC Act are just a means of creating more work for the burgeoning army of highly paid environmental consultants and bureaucrats who read and write each others' greenwash cut and pasted from their last 1000-page EIS. This will not achieve real change in attitudes and practice in environmental management and future generations will not thank us for this sort of behaviour.

***The application of bilateral agreements***

In general, the assessment of major projects by means of bilateral agreements with the relevant State Government is a sensible procedure, which should lead to efficient use of resources in assessing projects where the State and Federal governments have overlapping jurisdiction and a common interest in furthering the aims of the Act.

However, in cases where the proponent has strong links to the State Government (eg. a wholly government-owned corporation), there is a clear and undeniable conflict of interest in the State Government operating in the simultaneous roles of proponent and assessor under a bilateral agreement. In the case of Queensland, State infrastructure projects being delivered under the State Development and Public Works Organization Act are assessed by the State Coordinator-General. By tradition, the Coordinator General is also the Director of the Department of Infrastructure. In this case, the same individual is placed in the ethically untenable position of being the person with the responsibility for delivering the project for the state at the same time as being charged with the 'neutral' assessment of the project under the EPBC Act on behalf of the Commonwealth. We believe that this is a fatal flaw in the use of bilateral agreements as the Act now stands.

We hope that these comments can contribute in some way to the improved operation of the Act in the future.

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