

## Submission to the EPBC Act review

[EPBCReview@environment.gov.au](mailto:EPBCReview@environment.gov.au)

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Any review of the EPBC must begin with acknowledgement that our laws designed to protect the environment are not resulting in improvement or even protection. Virtually all indicators, except perhaps air quality, are in decline. The laws aren't working and even a cursory familiarity with the EPBC suggests that its deficiencies are both structural and political. Some of the largest failings are failing of will, interest, understanding and some are the results of systemic failings in the regulatory regime. Changes to the EPBC must attempt to address both these problems.

- 1 **ESD:** The ESD principles of section 3A are not implemented and are poorly integrated into the Act.
- 2 **Matters of National Environment Significance:** The structure of the environmental approvals/matters of national environment significance is workable, however, there are a number of omissions. Greenhouse gas emissions, broadscale landclearing, forests and invasive species should all be included. The Act should recognize that it is the Commonwealth's role to coordinate and ensure the protection of biodiversity at a national scale. It currently fails to do that. It does not have a national scope simply because it designates a matter as national. One of the disappointments of the Act has been that it hasn't driven change, hasn't addressed the mechanisms that drive destruction at a national scale. Greater intervention is needed I know that is politically unpalatable in the age when government is handmaid to industry, but without it, the EPBC will simply be an end of pipe futility like most environmental legislation in most states.
- 3 **Emerging Technologies:** The EPBC should also include assessment of emerging technologies that have the potential to cause harm. In particular, genetically engineered plants, nanotech released into the environment and synthetic biology, which has the potential to cause enormous environmental and species disruption. This would require a new section allowing the Department of Environment to scan, assess and 'call-in' emerging technologies prior to specific action proposals. Call-in would require that users of the technology must then refer their actions prior to use or release in the environment. For instance, genetically engineered plants should never have been released in Australia without EPBC processes being triggered.
- 4 **Bilaterals.** It is deeply concerning that bilateral agreements have been reached with the States allowing the continued use of antiquated and poor legislation with an even poorer history of implementation. I am not familiar with most bilaterals but any process that validates the Queensland State Development Public Works Planning and Organisation Act indicates a problem.

- 5 **Referrals:** One of the biggest structural failings of the EPBC Act is referral of a matter under the EPBC occurs only when it is known or likely that significant impacts will occur. An analysis is needed of the extent to which there is a failure to refer and the impacts of those failures.
- a. Despite the precautionary principles present in the objects of the Act, the referral provisions are not precautionary at all. They are particularly weak where uncertainty is high and for new and emerging technologies. For instance, there has never been a referral for a genetically engineered plant. Significant impacts cannot be shown because there has been no assessment of the impacts of GE plants on any Australian ecosystem. The selling of GE seeds could certainly be considered an action, but it is extremely difficult to determine whether there is a risk of significant impacts to MNES. The test of significance does not work well in cases where uncertainty exists (most cases).. In part it is because it is a conclusory concept not a threshold one. It excludes uncertainty. This is a good example of the ESD principles not being embedded in the Act. Uncertainty results in no referral. I'd recommend an addition to the 'significant impacts' provision. For instance, referral must occur if significant impacts or if it is not possible to determine the nature, scope or scale of the impacts. This would result in a significant broadening of referrals (which I suspect the Dept of Environment doesn't want) but it would also drive better regional, bioregional and SOE reporting as proponents would begin to demand that this broader contextual data be available (see #10 below on SOE)
  - b. . Similarly, nanotechnology travels below the radar with no referrals and substantial presence in the environment with unknown impacts. There are now over 600 commercial products containing nanotech and no referral has occurred.
  - c. The current limit on who can refer needs to be amended to allow open referrals. Any interested party should be permitted to refer a proposed action. The arguments against such a provision will be similar to those that have been made historically in response to open standing proposals floodgates have not opened.
  - d. Referral is extremely difficult as required for actions that are a series of actions. For instance, genetically modified canola was approved for release everywhere in Australia without a single analysis of a single ecosystem impact by the Office of the Gene Technology Regulator. Referral under the EPBC should have occurred (the EPBC Act still applies even if approvals have been granted by the OGTR). However, I am aware of a local council looking to refer the matter and they had a number of difficulties. They couldn't determine what is the action that should be referred each on-farm planting that may be relevant? The possibility of it being grown anywhere? The sale of seed? They were concerned at the national scale of the problem and that they had only limited expertise to assess potential impacts. While the EPBC does not

prevent referral of a national issue by a local council, a mechanism is needed to make clear that national scale referral can occur. Open referral would make this less of a problem. It should be noted that with many of the grand technological solutions being proposed to 'solve' climate change such as iron filings being dumped in the sea this type of national action will become increasingly relevant under the EPBC.

- e. The scope of referrals is too narrow. Some of the obvious matters of national environment significant that should be included in the Act are forests, land use and climate change.

6 **Reductionism:** The Act continues to rely on application driven responses meaning a reductionist and fragmented approach to protecting species, habitats and ecosystems. While there are provisions allowing strategic approaches they are not mandatory and as usual with discretionary matters, they are not implemented. The fragmented approach isn't working. The EPBC needs to become better at sitting within a broad strategic context. It cannot consider individual projects (or components of bigger projects) unless it is doing so with accurate data and trends regarding the region in which the action is taking place. The lack of context and the individualized nature of the EPBC means that individual actions will be assessed in a kind of ecological isolation. This needs to change otherwise we will continue to get slow deaths of a thousand cuts. Mandatory ecosystem assessment and regional planning must underpin the Act and the assessment of any proposed action. I would also suggest that this be linked to State of the Environment reporting. In other words, the EPBC needs to set out an SOE structure that informs the EPBC approval/decision making processes and ensures that there is SOE reporting that is meaningful (ie the data collected is relevant), consistent, and most importantly contains trigger-response standards and thresholds. Once regional status of ecosystems and habitats is determined and monitored, a proposed action within that region can be assessed on both its local and distal impacts (using the same methodologies in assessment) in order to allow a more accurate determination of the likely effects of an action. I would recommend a review of the predictive and ecological value of data provided in individual assessments.

7 **Development approvals:** The EPBC has tended to involve itself in major coastal development proposals only to the extent that there is a matter of national environmental significance. It tends to result, at best, in conditions being imposed on the development that would not otherwise have been imposed. If the EPBC is only going to be an end of pipe act, then it will fail to protect anything. I note in Chris McGrath's review of the EPBC (<http://www.environment.gov.au/soe/2006/publications/emerging/epbc-act/index.html>) that he cites the imposition of conditions on major developments as positive outcomes under the EPBC as seen by staff. Other accomplishments that are noted are court cases resulting in penalties for breaches or prevention of killing of species. These are good outcomes,, but they are not the type of major accomplishment that is needed from the EPBC (it should also be said that NGOs forced to take the Minister to court for poor decisions and winning does not demonstrate the strength of the EPBC but its weaknesses). Once again, if we begin with the major environmental indicators (eg water quality, land use, soil health, habitat extent and health, species loss etc), we are rapidly going in the wrong direction. The EPBC is being used to

tinker at the edges of poor state decisions that's not nearly good enough. Far more pro-active, protective work needs to be done, even if it offends the powers that be.

- 8 **Agriculture and land use:** Agriculture is the single biggest source of environmental damage in the country and the second largest source of greenhouse emissions. . Loss of habitat, invasives, overuse of fertilizer, over-use of chemicals and poor water practices use are common problems in agricultural areas. The EPBC must begin to address the impacts of agriculture.
- 9 **Project description and cumulative and distal impacts:** Cumulative and distal impacts are not addressed well under the current Act. The Act begins to fail at the description stage. For instance, with the Port Hinchinbrook development , the development assessed was only stage 1, despite publicly stated plans for subsequent stages. In fact, based on advice from the Commonwealth, the proponent removed an element of his stage 1 application told that it would not be approved. It was submitted later after stage 1 was built and was approved because it was then assessed individually as though stage 1 was an existing feature of the landscape not a part of the same project. Cumulative impact assessment must begin on-site and must include a full assessment of all stages planned or considered. Any new stage should require a new EIS. With the Nelly Bay Harbour development, only construction impacts were assessed, not the operational impacts. In both cases there was no assessment of trends, developments, threats etc elsewhere in the region that might affect the environment. While including specific provisions relating to cumulative and distal impacts in the Terms of Reference is fine, the Act itself needs to be clear that cumulative, distal and synergistic impacts on and off site must be assessed. Once again, decent state of the environment processes could overcome these problems.
- 10 **Degraded site argument:** Explicitly prevent the use of the 'degraded site' argument ie that a site is already damaged (either due to the proponent or some other proponent) and therefore it has no values and development is less of a problem. Both Port Hinchinbrook and Nelly Bay Harbour were approved in part under such a degraded site argument, allowing a lesser standard of assessment even though in both cases the degradation had occurred as part of the development proposal. The obvious implication for those seeking to undertake an action is degrade the site and your chances of approval improve. The Act could include provisions that require consideration of rehabilitation in the event of actions on degraded land and analysis of the ecological values that such rehabilitation could acquire. Rehabilitation needs to become part of the fabric of the Act recognized and supported as a good.
- 11 **EIS:** I would strongly urge a review of environmental impact assessments. The review should look at a) the predictive accuracy b) ecological accuracy c) extent to which outcomes conformed to promised actions (not quite the same as predictive accuracy) d) strength of data collection and analysis methodologies. A few case studies would be helpful. There are numerous examples where the EIS/EIA is extremely poor and essentially little more than a promotional document. There is substantial evidence that studies paid for and produced on behalf of proponents are far more likely to arrive at conclusions supporting the action. They are not independent, reliable and they do not have any credibility in the broader community. In addition to the review, I'd suggest that the EIS establish some arms-length from proponents. EIS can only be done by accredited organizations. The consultant is selected randomly

from a pool of those able to do the particular work needed. Payment is made by proponent into a pool. A certain percentage of EISs should be subject to real peer review and this forms the basis for ongoing accreditation.

- 12 **State of the Environment Reports:** State of the Environment Reports (s 562) desperately need desperate improvement and far better integration into the Act itself and decision-making processes. SOE fails currently on numerous counts inconsistency of data collected, inconsistent reporting methods, inconsistent indicators, poor indicators, lack of independence in reporting, failure to act on reports, failure to integrate trigger-response thresholds into the Report and a need for real time reporting not a state of despair every 5 years. SOE if done well can provide the broad context needed in determining likely impacts of actions and in terms of ensuring rapid responses to triggers should deterioration be detected. The SOE should be a living document. It should identify the status of agreed and critical indicators. Those must be consistent across all states and must be collected using the same methodologies. Trigger/response standards must be implemented ensuring that when species are in decline, water quality is worsening etc that intervention occurs. It may be worth considering amending the Act to allow thresholds reached under SOE to be MNES (or some other mechanism that allows intervention). Proposed actions then will not be considered in isolation but in a broader context. Updating of SOE should be as 'live' as possible on the EPBC website. EIS requirements should be based on both context contained in SOE reports and utilize methodologies accepted in SOE. This allows linkages to be made and greater detail and resolution in SOE as well as more reliable data in the EIS. If the EPBC doesn't begin to assess and take actions in a broad ecological context, it will become irrelevant.

## **Biodiversity**

- 13 The threatened species provisions are not working. They utterly fail to be precautionary in almost every respect listing of species, KTPs, responding to listingIt is an entirely reactive (and underfunded) system that waits until far too late to intervene. Extinction and decline rates are in something of freefall. Restricting intervention to listed species ensures that decline of a species or habitat does not trigger intervention if at all until extremely late. The current Commonwealth disaster of Christmas Island should be reviewed and examined it exemplifies the failure of the EPBC to protect species or habitat or to deal pro-actively with development and habitat loss. The comments on SOE reporting could be used as the basis for monitoring species and habitat condition. Designations for both species and habitat should include 'in decline'- meaning that there must be interventions to reverse the decline regardless of numbers. I would suggest a listing and analysis of all habitats and their condition (again SOE can do this). Key threatening processes needs to be improved (ie listing needs to be facilitated) and controls imposed. The reluctance to list processes that are obviously a significant part of the problem (eg landclearing, trawling) needs to be reversed. This recalcitrance is clearly political, suggesting the need for mandatory listing of KTP, removing political discretion when it's poorly used. I'd suggest an independent panel determine those processes that the largest

threat to biodiversity and those be included in the Act. Perhaps the panel needs to be statutory (and independent) and is responsible for proposing KTPs.

- 14 **The process of listing threatened species on the schedules takes too long.** Staff in the Threatened Species Unit have been reporting a backlog of nominations for listing on the threatened species schedules for several years. The backlog doesn't seem to clear. However, recognising species in decline is the first step towards facilitating their recovery in a timely manner. Provide more resources to the TSU to firstly remove the backlog, and then maintain a manageable backlog. The Threatened Species Advisory Committee could be expanded (to say 3-4 times its size) so that there were several alternative members to review each case, and thereby the workload of each member could be reduced by 3-4 times. A way should be sought to overcome the limitation that the committee only reports to the minister once per year after its annual meeting, a very inefficient practice in today's technological world.
- 15 **The bureaucratic process behind nominations for threatened species deters nominations contributed from the community:** Recently the department introduced a 'nomination period' of 6 weeks or 12 weeks was introduced for nomination of threatened species. This is a brief window in the year during which nominations will be accepted by the department. Whilst this might help the departmental staff manage their workload, it also means that potential nominators must be aware of the narrow window and plan carefully to meet it. If they miss it the nomination must wait 12 months before entering the 1-year assessment process with its 2-year backlog. I am aware of a nomination that was first made in late 2006, the nominator was advised that his nomination had been accepted some 6 months later, he has not heard from the department since, and in December 2008, the nomination has not yet been for public review. Remove the bureaucratic red tape from the process of accepting and reviewing nominations. Provide a process that recognizes and values the contributions of scientists who make the effort to formally advise the government of specific technical matters administered under the Act that need urgent attention. This is a typical example of the lack of precaution in the implementation and design of the Act. Perhaps, an expedited initial assessment needs to occur (more or less like the standards used in criminal indictments), where one only needs to establish a prima facie case for protection. Once the prima facie case is made the species is protected pending complete assessment. These initial assessment must be made with 12 weeks of the application being submitted.
- 16 **Who can nominate threatened species?** The Department's legal staff have expressed the opinion (tentatively at least) that Departmental staff are unable to nominate threatened species. Apparently this is because the Act does not specifically identify departmental staff. There seems no logical reason to prevent anyone from making a nomination provided nominations are vetted properly. Amend the wording to exclude no one, whether it is intentional or unintentional.
- 17 **The list of migratory bird listed under the Act is confused and in need of revision:** Whilst this list is dictated by the content of international treaties, it is nevertheless ambiguous. It sends a message that the department does not know what it is doing. For instance, the Bonn Convention includes all species of the family Muscicapidae. Whilst this is a rather dubious 'ball-park' inclusion in the first place, a further problem extends from the definition of Muscicapidae. Currently there are

virtually no species in the family that occur in Australia. However, by older taxonomic definitions, it includes thrushes (now Turdidae) and Australia's flycatchers, monarch-fly-catchers, wagtails, Drongos and Magpielarks (Now Monarchidae). The advice from the department website includes some but not all of these latter species, in a completely inconsistent way. Likewise does the inclusion of all species in the family Accipitridae include those in the families Falconidae and Pandionidae or not? There are also some species on the migratory list (e.g. Swift Parrot and Regent Honeyeater) that are endemic to Australia and have no role in international treaties. Many species are listed several times under several different names. The confusion sends a message out daily that the Department doesn't care and / or is not competent enough to manage the concept. Revise the list and get it right for once.

- 18 **The list of marine species listed under the Act is confused and in need of revision:** It is in a similar state to the list of Migratory birds, partly for the same reasons, partly for different ones. The listing of forest birds as marine whilst many seabirds and almost all fishes are not listed as marine is simply a joke on the Department that is seen regularly and repeatedly by people working in environmental impact assessment. The message it sends and the fix that is needed are the same as for the migratory list.
- 19 **The EPBC Protected Matters Database Search is inconsistent:** This is a very important tool for EIA. However, it is incomplete and inconsistent to the point that it appears as an amateur effort. For instance a search of a given location might identify a third of the migratory species that occur there. It might identify 2 species of Hawks from the family Accipitridae when about perhaps 15 species occur.
- 20 **Recovery Plans are not prepared in a timely fashion:** The Act requires the preparation of Recovery Plans by the Minister within specific time frames of the species being listed (depending on the category of the listing). The Department has many times failed to support the Minister in this process.
- 21 **The lack of funding for Recovery Plans is dysfunctional:** Whilst the Act requires the preparation of Recovery Plans and their revision on a regular basis, it does not require that they are implemented. Therefore the Government funds the preparation and revision of Recovery Plans but does not fund their implementation. Why spend taxpayer money preparing plans that are not to be implemented, and then spend more funds revising them for another period without implementation? Funding the implementation of recovery plans would be a good way of stimulating the economy, because most of the money would be spent several times over on transport, equipment and services in rural and remote areas and cottage industries. More importantly it would make a substantial contribution to conserving Australia's dwindling biodiversity for future generations of Australian voters.
- 22 **Section 13 does not protect threatened species when circumstances change:** Certain phosphate mining leases were granted on Christmas Island under federal legislation in the 1990s, prior to the EPBC Act. It emerged in 2005 that a mining company intended to clear vegetation on one of those leases, some 15 years later. In the meantime, the Christmas Island Pipistrelle had gone from not listed to Critically Endangered. The particular lease to be cleared happened to be the last stronghold of the species. Good science documented the status of the Pipistrelle and likely impacts

that would occur if mining proceeded (virtual extinction of Australia's most endangered mammal). The Act was apparently powerless to protect the species and its habitat. Fortunately for the Pipistrelle and the reputation of the federal Government, WA legislation was invoked to prevent the removal of secondary forest and thereby prevent mining (so far). Ironically, the Pipistrelle is on the verge of extinction largely due to mining and the indirect impacts associated with it. In this case the Act was proven to be toothless, and clearly it needs to be patched, .

Jeremy Tager

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