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Dear Dr Hawke

Thank you for the opportunity to comment on the EPBC Act and its operation over the past nine or so years. The National Parks Australia Council is the peak body for National Parks Associations of Australia and we welcome this process because of our deep concerns about the capacity of the Act to perform its stated role. In this paper we are interested in discussing fundamental changes to the legislation which we think are necessary in order to properly protect the environment and Australia's biodiversity. Attachment A details our comments against the headings of the Discussion paper you provided

NPAC represents many thousands of members with widely varied interests in conservation ranging from bushwalking and camping to long term involvement in campaigns to protect and conserve Australia's natural values, including its biodiversity, its unique landscape values and its role in international conservation.

Our members are concerned that, despite assurances that the EPBC Act is an effective and protective mechanism, it is failing to protect our national biodiversity in the face of threats from urban development, tourism, agriculture, forestry, recreation and climate change. In the words of one of our long term campaigners, Ms Anne Reeves OAM, "My conservation history goes back to the days of lobbying the Whitlam government for EIS and participation in the very first Inquiry (Redcliffe) and subsequently Kakadu uranium mining . My disappointment is that failure of political will, limited resources, and undermining by exploitation interests mean that while we have won some battles, we have generally lost the war against ongoing biodiversity decline .The current promotion of 'economic activity' to address recession ludicrously fails to dialogue with the current overwhelming threats of climate change - whether we can dent this I don't know."

In other parts of the community, the EPBC Act has created a false sense of security that the mere existence of an endangered species is sufficient to stop development. Because of campaigns to limit the impact of environmental concerns on development proposals and continuous statements by business and union leaders about threats to jobs from environmental lobbyists, most people believe that merely finding a listed species will instantly halt a proposed development. It is only when their own community is involved that they learn the grim reality about the EPBC Act.

More disturbingly, the Act has also been proven ineffectual when confronted by deliberate destruction of areas of national environmental significance. These apparent acts of wanton selfishness are explained by the perpetrators as being justified because the EPBC Act places restrictions on land use for no immediate human purpose and in order to protect plants and animals which have little or no relevance to humans. It is not surprising that those seeking to implement the EPBC Act must tread cautiously at times when it is charged with protecting legless lizards, earless dragons and button wrinklewort.

NPAC has made several submissions to the Senate which are publicly available though the Senate committee website. However, we would be happy to provide an electronic or hard copy to this enquiry should you wish it. In addition Attachment B summarises our suggested changes to current legislation which we have recommended to the Senate committee as going some way towards improving the existing Act.

Reconciling conflicting systems

To be fair, the EPBC Act attempts to do the impossible: reconcile artificial human systems of land tenure and ownership with the complex interactions of the natural world. The Assessment and Approvals and the Biodiversity provisions of the Act in particular attempt to arbitrate between the 19th century concepts of legal ownership of property and associated property 'rights' and an international responsibility to ensure the survival of endangered species. The Act does not mediate at all well in fact, leaning heavily towards a role in which it limits the responsibilities of property owners and managers in conservation of endangered species and gives official sanction to explicit actions which endanger the survival of specific species and whole ecological systems.

The introduction of the EPBC Act occurred in a political and economic context in which farming, forestry and fishing communities were vociferously opposed to any imposition of environmental limitations on their rights; and mining, tourism and land development interests were aligned with union and political interests in emphasising the creation of job opportunities and economic growth from development. Not much has changed in the ten years since then except that much of this expected economic benefit and job creation to local communities has proven illusory. Strangely enough this has led to calls to lessen, not tighten, environmental controls over development in environmentally sensitive areas such as national parks, from these same communities and business interests.

Priority of commercial interests

This underlying tension between development and conservation is expressed in the Act through a number of different ways including:

- the emphasis given to speedy approvals which we have covered thoroughly in our submission to the Senate committee;
- the difficulty in listing endangered species and ecosystems, again covered in the Senate committee submission; and
- the lack of retrospectivity in any of the listing or assessment processes covered under the Act.

In this last issue, a lack of retrospectivity, we see clearly how the Act is hampered in protecting endangered species and ecosystem. Because Australia has no

comprehensive classification or mapping of its widely diverse ecological systems, it is often only when a development is proposed for an area that resources are directed to protecting it. Yet any listing processes which may come out of this cannot be taken into account in the Assessment and referral process for the original application.

A recent case in Victoria illustrates the issue clearly. A unique sponge community found at the Port Phillip heads would be threatened by the Channel Deepening project in Port Phillip Bay. According to the Australian Faunal data base 115 species were unique to the community and scientists believe the geographic location of the community in terms of longitude, temperature and currents meant that the community, would be found nowhere else in the world. However, the Department of Environment, Water, Heritage and the Arts on the 27th of August informed VNPA that its nomination for listing of the ecological community has not been put forward by the Scientific Community because the committee found that the national extent of this community was not clear, especially in regard to other sponge gardens. With this in mind, the Committee has recommended that the department undertake further investigations of the likely national extent. Once these investigations are undertaken they would re-examine the nomination in October 2009.

Regardless of whether or not the community is successfully listed under the Act the community will not be protected from the impending threat of dredging. The 2006 changes to the Act ensure that once a project is referred under the EPBC Act, the Act cannot be used retrospectively if a species is listed after the referral.

In the case of the sponge community they only became threatened when dredging was proposed and were therefore nominated by VNPA for protection under the Act. However, regardless of whether the nomination is successful or not the activity posing the threat cannot be stopped and the Act.

Against this background, the very existence of the EPBC Act is a minor miracle and something to be celebrated. It might seem churlish to be critical of the gains it has made, in particular establishing as a principle of law that landowners are responsible for not destroying endangered species which occur on their property. However, we must face the fact that the Act fails in its objectives and purpose because it operates only at this very limited level of the human construct of property ownership, it does not operate at all effectively in the real world of vast, interlocking and complex natural systems.

The solution to this impasse may lie in the fact that the EPBC operates within a context of other well established legal constraints on land use, eg local and state planning restrictions, restrictions on mining and mineral rights and provision for compulsory acquisition by governments. These restrictions relate to allocation of land use within broader plans for human use and occupation of land. Thus we see that the EPBC Act could be made much more effective and politically acceptable if it also operated within the context of similar broad planning mechanisms for the natural and ecological values of our land and water.

New principles required for the Act to operate effectively

We suggest there are some underlying principles which should be applied to a revised version of the EPBC Act:

1. A revised Act would set out carefully the relationship of the EPBC Act to existing restrictions on land ownership and examine how these restrictions can be applied in the context of the much broader, interconnected natural systems within which individual land ownership occurs
2. The burden of proof currently operating in the Assessment and Approvals sections of the Act must be reversed, particularly in areas of known high biodiversity values; for example, any alteration of land use must prove of value to conservation as opposed to being of value to human use.
3. The current practice of considering only the listed species or ecosystems which has triggered the Act should be replaced with a system which classifies all areas of Australia according to established ecosystems. Assessment then would be undertaken against the broader impact of the proposed action on the operation of the ecosystem as well as on the listed species.

Impediments to such an approach usually revolve around jurisdictional rights and responsibilities. However, the Commonwealth has been prepared to address the complexity of States' jurisdictional rights under the National Water Initiative, and the same level of Commonwealth leadership is called for here. What is needed here is a national cultural shift similar to that which has occurred with the water crisis which has seen a wide public acceptance of the need for radical and urgent change.

1. The relationship of the EPBC Act to existing land ownership principles and laws

The purpose of Federal legislation is supposed to be to arbitrate where there is conflict between individual rights and the public good. Instead the EPBC Act protects property rights above environmental responsibility and international obligation. It places the burden of action on self assessment and referral, steadfastly ignoring the reality that it is human impact on the landscape, including human induced climate change to be a consideration which is placing most species at risk of extinction. Black cockatoos were hunted almost to extinction in Western Australia to protect the wheat crops; cropping and grazing has reduced Yellow Box Woodland along the NSW tablelands to less than 1% of its former range and further incursions into existing woodland occur every day through land development and land use change from grazing to cropping. Land developers continue to lay waste to endangered Bangalay Sand Forest with impunity in order to build employment in coastal NSW communities. Governments, as the largest land managing authorities in Australia are not exempt from this exploitative approach either. The Victorian government bulldozed fire trails through habitat critical to the survival of the endangered Leadbeater's Possum to allay public fears of bushfires.

An excellent example of the priority given to land ownership over environmental responsibilities is the issuing of licences to shoot flying foxes in NSW to protect fruit crops. Flying foxes are a listed species under the EPBC Act but the right of a landowner to harvest a fruit crop is held to be of a higher order of value. In fact most fruit producers have moved to the far more effective method of protecting trees from all marauders by netting their orchards so that the right to kill an endangered species is exercised in the main by those who cannot afford to net their crop. In such cases the economic rationale for environmental vandalism is as thin as the ethical rationale.

Apart from allowing incremental individual damage to the environment, this priority for private ownership rights over wider land use issues ignores the necessity of landscape

solutions to environmental issues. However, the Australian public has moved on, now accepting that we are facing critical water shortages, loss of soil fertility and the invasion of feral plants and pests which require whole-of-country solutions, not piecemeal actions of individuals or even individual governments. The EPBC Act in its basic principles and its operations no longer reflects this public acceptance of limiting private rights to achieve a sustainable future.

In the spirit of allowing a land owner this overriding control over his property, the Act ignores neglect and failure to take an action to prevent the loss of an endangered species. For example, in 2008 the Commonwealth, through the Department of Defence, failed to control kangaroo grazing on its Belconnen property in the Act, putting at risk listed plant and animal species. The EPBC Act could not be invoked because it did not recognise failure to take an action – in this case culling kangaroos – as cause for a referral. The Act should make clear that owners have a duty of care to inform themselves of environmental values of their property and an obligation to take no action which would endanger listed species. Failure to properly manage for protection of environmental values generally, including taking action where needed to protect an endangered species, should also be made culpable.

While mining, forestry and farming lobby groups claim the Act imposes an undue burden on property owners, the fact is that the EPBC Act fails to take any meaningful place in the suite of planning regulations which we accept as normal at the local and State level. In addition, local and State authorities devote substantial resources to land use planning and to their approvals processes but the administration of the EPBC Act is underfunded to the point where it has become a mere cipher for a truncated approvals process with little capacity to refuse applications. Local and State governments recognise their role in restricting land development and changes in land use to protect the public good but the Federal Government, with all its international obligations, has frequently appeared to have hidden behind the principle of protecting property rights to avoid its responsibilities.

Specific provisions should restore some balance to the Assessment and Approvals process such as:

- The Preamble to the Act should clearly state that it places restrictions on land title and land use and that it imposes responsibilities on land owners for the environmental health of their land in much the same way legislation imposes legal responsibilities for public risk, water conservation and prevention of soil erosion. It should state openly and definitively the responsibility of land owners and managers to protect and conserve endangered species and ecosystems without any prevarication and give due warning of the responsibilities of land owners including a duty of care to take action to prevent further loss.
- The Ministerial discretion which is a marked feature of the current Act should be reduced with the replacement of “may” by “must” in specific instances as noted in Attachment B.
- Third party involvement in the Referral and Approval processes should be facilitated as noted in Attachment B.
- The Act should automatically trigger an environmental assessment for any greenfields site or where there is a significant change of land use, for example grazing to cropping or land fill on an old quarry site.
- It should require a referral where a land owner, including the Commonwealth, is not taking action necessary to protect a listed species.

- Ignorance of environmental values of land should be explicitly excluded as reason to mitigate fines or punitive actions should action or inaction of a landholder lead to increased threat to a listed species.

2. Reversal of the burden of proof

The Act currently provides a mechanism whereby a landowner or manager who is aware that an action could threaten a listed species or community must notify the Department and apply for permission to take that action anyway. Members of NPAC have remarked that the current EPBC Act is in fact a “Development Approvals Act”. The Act operates under an assumption that speedy **decision making** for site specific approvals is the most appropriate response when existence of a listed species triggers the assessment system. However, the emphasis is on a quick simplistic **approvals process** so as not to inconvenience developers. It is hard to see the justification for this approach, given the difficulty of getting species listed under the EPBC Act in the first place. An amended Act should reverse this so that, where listed species and ecological communities are known to exist the assumption is made that an approval will have to be lengthy, well documented and difficult to obtain.

Specific provisions which could be made to amend the Act include:

- The Act should be expanded to enable a moratorium to be placed on areas which are essential to the survival of a listed species or ecosystem (see discussion below on classification of Australia’s natural areas). The moratorium may permit continuation of existing use if that is not a threatening process but gives proper notice that no further development or change in land use will be permitted.
- The Act could be altered to require that any proposed development should show an overriding and clearly definable public or social good which cannot be met in any other way, when such a development impacts on a listed species.
- The Act should impose on the land owner (or land manager where it is publicly administered land) timeframes and responsibilities similar to those imposed on the government for the Approvals process for responses and actions.
- The Act needs to be able to protect species and eco-systems which are actually in danger, not just those which are on the official list. The Act should enable the listing as “notifiable” of any species which are reported to be at risk of extinction in peer-reviewed scientific journals.
- Exemption for Regional Forest Agreements should be removed from the Act.

3. Assessment on broad ecological classifications

As we become more conscious of the richness of our native ecosystems, we are discovering the paucity of our attempts to protect them. The WWF report “Building Nature’s Safety Net 2008” is among many reports which provide evidence that biodiversity in Australia is actually declining. This report finds that, as a nation, we are failing to meet our own goals in conserving our biodiversity including key target such as:

- a. seven of Australia’s 85 identified bioregions will have less than 2% of their land area in protected areas.
- b. Investment in management of protected areas declined in real terms on a per hectare basis over the four year period 2002/2003 to 2006/2007.
- c. All states and territories except Tasmania and the ACT report that they will not meet the target of having a representative sample at least 80% of regional ecosystems in protected areas.

d. A freshwater protected area system for Australia is still in its infancy.

Attempting to protect individual species or even individual locations of an endangered ecological system is very similar to putting a few sandbags on a river bank to stop a flood: the threat merely moves around and overwhelms it. Although there are remarkable instances of iconic species such as the Wollemi pine surviving in remote locations which can be protected in isolation, many scientists argue that even here it is the many thousands of hectares of natural bush surrounding the specific location which protects its unique features. With climate change altering so much of our landscape, governments are working hard to establish large corridors and connected landscapes which will allow movement of species in response to altered climate. Without recognition in the EPBC Act that this landscape connectivity is a fundamental principle of conservation, the Act becomes impotent.

The big drawback to a landscape approach to conservation is that it appears too difficult to establish a national classification of landscapes and ecological systems which would be sufficiently robust to survive the legal processes to which it would be subjected. The bioregional provisions of the Act are an attempt to set up such an operation but it has proven time consuming and unwieldy. However, in the past ten years there has been a significant parallel process to establish a documented National Reserve System (NRS) which “represents the collective efforts of the states, territories, the Australian Government, local government, indigenous and private landholders and non-government organisations to develop, formally establish and effectively manage a national system of protected areas.” (Consultation draft of Australia’s Strategy for the National Reserve System, Department of the Environment, Water, Heritage and the Arts.) The NRS consists of national parks, public reserves, indigenous land and privately owned and managed land all of which has been selected as holding key conservation and biodiversity values and is sequestered in one form or another from development. It would provide a satisfactory first step in enabling the EPBC Act to operate on a landscape scale specifically:

- An amended EPBC Act could define the NRS as having special status under the Act and set specific provisions for assessment of changes to land use within the larger landscape systems identified.
- A second step would then be to provide for additions to this category of land by application from interested parties, thus enabling a systemic construction of established landscape values against which non-conservation use of land would be measured.
- In addition the Act should establish a requirement that any proposed actions should refer to the broader landscape context and any declared protected areas or landscape zones.
- Subsequent reviews of the EPBC Act could build on this approach to establish over time a clear and comprehensive land classification system which gives land developers the certainty they want and protects the complex interactions of flora and fauna across the landscape scale as climate changes impact on their survival.

Attachment A to this document outlines some of the mechanisms which could be put in place to drive these changes, including the establishment of an independent body to conduct the listing process and map and define Australia’s biodiversity and apply this to a national biodiversity assessment system. Because of the economic downturn, the Federal Government is spending huge sums building new infrastructure. It would be

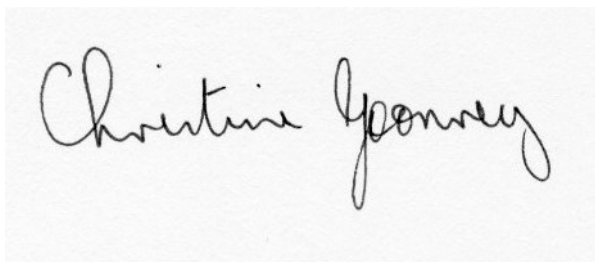
highly appropriate to use some of this money to bring together scientists and the community to map the natural values of our country as a sound platform in which to build our future conservation strategies.

The options which this review can consider are quite limited:

- It can recommend cosmetic changes to undo some of the damage done to the efficacy of the Act in the 2006 amendments. We have noted some of the more important of these in Attachment B.
- It can draft an outline of an Act which establishes a comprehensive, national approach to protection of biodiversity and environmental protection for the foreseeable future. It would also give certainty and clarity to businesses, unions and politicians.

Thank you for the opportunity to contribute to the Independent Review. We would be happy to expand upon the points we have raised in further discussions. I can be contacted directly by phone on 02 6231 8395 or email: cgoonrey@grapevine.com.au.

Yours sincerely

A handwritten signature in black ink on a light-colored background. The signature reads "Christine Goonrey" in a cursive, flowing script.

Christine Goonrey
President

National Parks Australia Council

Submission to the Independent Review of the EPBC Act

Attachment A

Comments against specific issues raised in the Discussion Paper

Scope of the Act

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?

No, the objects of the Act do not enshrine an active conservation and protection of biodiversity, and do not enable an active government role in the protection of environmental matters of national significance. By using words like 'promote' and 'provide for', the Act limits the Commonwealth government's role to that of the traffic cop rather than an active protection role. The objects of the Act should be altered so that:

- Section 3(1)(a) and (ca) read 'to protect the environment...' and 'to protect and conserve heritage' respectively
- 3 (1) (b) should be altered to read 'to allow ecologically sustainable development through the conservation and ecologically sustainable use of natural resources only where the action can be justified by improved environmental outcomes' ;
- 3 (c) should read 'to ensure the conservation of biodiversity'
- 3 (e) should read 'to protect and manage..'

(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?

- No, the principles of ESD are quite remarkable in what they have left out. They do not address the cumulative effects of loss of habitat or other conditions necessary for listed species to survive. There is no reference to the interconnectedness of species and systems and the need to protect and keep viable sufficient areas and complexities of systems which threatened species rely on for survival. They also fail to address protection of threatened species and eco-systems which have not yet been listed. The EPBC Act definition should be updated taking account other more useful definitions such as the NSW Protection of the Environment Act.
- In keeping with the precautionary principle, the definition of ESD should be expanded to include a 'cease and desist' principle which states that, where there are threats of serious or irreversible environmental damage from activities which have, or are likely to have a significant impact on a matter of national environmental significance, the action

must be prevented (where they are proposed) or halted immediately where it has commenced;

- They should specify that “improved valuation, pricing and incentive mechanisms” apply to valuing and pricing environmental values, not just lost commercial and production values;

(c) Are the existing matters of national environmental significance (NES) appropriate? Do you think that there should be any additional matters of NES, and if so, how should such matters be framed?

- An additional matter of NES which should be added is the connectivity of habitat necessary to the survival of endangered species. This can be done by adding to the section on listing, management, protection and conservation of threatened species and ecological communities, an additional category, eg areas essential to the movement of endangered species between known habitats or essential to the health of known habitats of endangered species and to World Heritage, properties, National Heritage places and Ramsar wetlands and to habitat of international migratory species covered under agreements such as CAMBA, JAMBA but also those species which migrate internally eg the life cycle of the Bogong moth.

(d) Is the definition of an ‘action’ in the Act appropriate?

- No, the provisions removing government policy or program or government decision to issue a governmental authorization or award a grant should be removed.

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

- The Act does not allow proper consideration of interaction between species and ecosystems. Provision should be made to enable consideration of the local and bioregional impacts not just on the listed species but also on the ecosystem within the listed species exists. More important even than these considerations should be the capacity under the Act to refer also to cumulative impacts.

(f) Does the test of significance, in the context of actions having a ‘significant’ impact on a matter of NES, operate effectively in practice? If you think that there should be another test, what should it be?

- The test of significance is applied only to impact on listed species. It is not applied to the proposed action with the end result being that an ill conceived, even frivolous development or land use change can be given greater priority than conservation of a listed species.
- Provision should be made in the Act for a proposed action to have to provide substantial evidence that the action has a social or economic purpose which is sufficient to warrant the threat to the listed species.

Assessment and Approvals

Q2 Does the public understand their responsibilities under the Act to refer proposed actions to the Minister?

- No. The government has failed to ensure that the general public and particular sections of industry, development, agriculture and fisheries are fully aware of their responsibilities and of the type, description and nature of endangered species and ecosystems which are covered by the Act. In addition, inadequate policing and prosecution under the Act have re-enforced the advantages of maintaining ignorance by those who suspect they may have to make a referral for a proposed action. (Victorian grasslands example where areas notified by [public signs were still ploughed under but no prosecutions followed.]

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

- The referral process is heavily weighted to approving actions speedily (in the words of the Act) despite the fact that by their very nature they impact on endangered species and ecosystems.

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?

- Most definitely not. The methods of assessment are weighted towards speedy approval of the proposed action in keeping with the overall emphasis of the Act and the government documents such as the Second Reading Speech for amendments to the Act in 2006. Information about the process and the proposed actions is held very tightly by the developer and the government ostensibly to protect commercial-in-confidence information. In principle, all documents relevant to the Referral and Assessment process should be publicly available on the Department's website.

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

- No. Public participation and transparency is markedly absent from both provisions of the Act and its operation. Provisions of the Act give the proponent of an action the capacity to hinder public comment for example by failing to make documents available electronically or in a timely manner. The test to acquire standing in a public action to oppose an application operates to exclude people who have no direct economic interest in an action but who could provide significant information about the wider implications of a proposed action.

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?

- No, existing bilateral agreements operate to simplify the approvals process not prevent damage to the environment. On the whole they operate at the lowest common

denominator, so that the influence of the Commonwealth's international obligations are watered down to meet local economic and political priorities.

Q7 Are there further opportunities to harmonise the Act with other State and Territory legislation, planning and approval processes?

- To date such attempts have seen the federal Government contract out its environmental responsibilities to other jurisdictions in order to avoid taking direct responsibility for difficult decisions. Any further attempts to harmonise with State and Territory legislation should see the EPBC Act assume a leadership role in keeping with its national and international obligations to protect the broad, interacting ecological, geological and riparian systems.

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?

- No, as it stands the Act does not have the capacity to take into account cumulative impacts nor impacts over regions. The bioregional provisions have not been fully tested and are of doubtful value as they stand because they are based on economic, jurisdictional and human use identifiers, not environmental interactions. The Act should establish processes to identify and nominate regions and interlinked ecosystems of high biodiversity value where any alteration of use or proposed development was prohibited.

Biodiversity

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

- No, the Act is not protecting Australia's biodiversity effectively or adequately. The Act enables speedy approval for developments, change of use and modification to areas which support endangered species and eco-systems. The onus of proof in the existing system of approval needs to be reversed: no approvals should be made unless they show an overwhelming social or economic benefit which sufficiently offsets the environmental loss and which is accompanied by adequate and enforceable provision to minimize the projected loss.

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

- The current processes for nominating threatened species etc are structured to keep listings to a minimum. In contrast to processes to ensure speedy approval of any proposed actions in any area, the listing process substantially limits listing proposals in other areas, operates only on an annual basis and requires substantial and highly accurate scientific justification. The process for nominating threatened species is designed to minimize the number of species accorded this special protection. In no

other area of government regulation would a bureaucratic process so cumbersome, time consuming and limited in scope be accepted.

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?

- Rather than continuing to pursue the onerous and creaky listing process, the current level of threats to Australian biodiversity requires urgent action. The Act should establish an independent, professional body devoted to making a comprehensive assessment of Australia's threatened species and ecosystems and charged with full responsibility to produce an authoritative list of endangered species and ecosystems protected under the Act within three years of its formation.

Q12 What matters should the Minister consider when deciding whether to list a threatened species or ecological community?

- The Minister should not be deciding whether to list a threatened species or ecological community. An independent, professional body should be authorised to carry out this function. This body should be authorised to consider only documented scientific evidence. Economic or social values should not be a consideration. In deciding whether to list a species or community this body should be able to take into account future factors such as likely impact of climate changes and should be able to refer to human induced factors such as increased market demands eg for housing or wheat which would provide commercial imperatives for destroying critical habitat.

Q13 Are the categories of threat appropriate?

- No, the categories rely too heavily on individual species reaching critical levels and do not recognize – and hence protect - the role of broader ecological communities in providing buffer zones and opportunity for endangered species to move according to changes in climate or other circumstances.
- Categories should be expanded to include the broader factors which enable the survival of endangered species. For example, remnant trees linking forest or woodland habitats for endangered birds are not currently protected but provide passage through hostile open areas for these birds and hence increase their survival rates.

Q14 Are there opportunities to reduce duplication between the Commonwealth and State and Territory listing regimes or do overlaps between the regimes provide significant protection for threatened species and ecological communities?

- The current system acknowledges a hierarchy of listing which recognizes local extinctions or threat of extinctions and this is important to the building protection of endangered species at all levels. State and Territory listings should continue but reference between the different levels should be more easily facilitated so that falls in local occurrences should automatically trigger greater national protection.

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

- Given the current lack of action on recovery plans for endangered species, the most pressing factor is for adequate funding, an area beyond the Act's control unless it imposes on the Federal Government penalties for failure to comply with its own Act.

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

- No, the current planning regime is piecemeal, under-funded and hostage to commercial interests, particularly land development, forestry and farming.

Q17 Are there opportunities to improve the co-ordination between the Commonwealth and State and Territory recovery regimes? If so, what might these be?

- There is no doubt that State and Territory governments are prepared to undertake many of the operations of the EPBC Act if they are funded to do so and are able to exercise their own discretion to follow local priorities. Experience in other major areas of Commonwealth/State relations shows that this is never a satisfactory way of meeting Federal obligations and leads to waste of money, time and endless political point scoring. If the Commonwealth of Australia has legal obligations, it should simply assume the responsibility for them and not contract them out, merely to satisfy some fiscal objective.

Q18 Are the provisions of the Act for the protection and recovery of threatened species and ecological communities, migratory species, listed marine species and cetaceans effective? What alternative approaches might be available?

- No. As a start the precautionary principle listed in Section 3A should also be re-stated in positive terms: "if there are threats of serious and irreversible environmental damage, scientific evidence as to the likely impact should be accepted as sufficient reason to take an action." This would enable listing of species which are threatened by processes such as climate change whose specific effects are as yet unknown.
- Compliance provisions should include provisions similar to those of other regulatory regimes such as AQIS, including search and enter provisions. Annual reporting of the exercise of such provisions should include an assessment of the environmental damage discovered upon exercise of such powers and the extent of training and support for compliance officers.

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?

- No. The Act needs to include production of carbon emissions as a trigger for the Assessment and Approvals process.
- In addition, likely future impact of climate change should be included as a factor in the listing process as outlined above under Q18.

International Movement of Wildlife

Q20 Does the Act currently provide appropriate regulation for the sustainable use of wildlife and international wildlife trade?

- No comment

Q21 Do you think that current assessment and decision-making processes for the listing of specimens suitable for live import could be refined and simplified?

- As a general principle, extreme caution needs to be exercised at all levels when contemplating live import of any exotic species. We already have quite extensive regulations regarding the importation of food which even allows personal body searches. It is important to extend such caution to the importation of live species which represent an even greater risk of long term damage to our unique environment.

Q22 What are your views on the effectiveness and utility of wildlife trade management practices under the Act? Do you have any suggestions about how the system could be improved?

- No comment

Q23 Are the arrangements between the Commonwealth and the States and Territories for managing the domestic movement of exotic and native wildlife effective and appropriate?

- Given that feral pests do not pay attention to borders or artificial changes in jurisdiction, the Commonwealth needs to exercise its leadership role in preventing the spread of exotic plants, fish and animals across State and Territory borders.

Q24 Does the Act provide appropriate provisions to ensure that Australia complies with its obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES)?

- There has been very little attempt to properly resource the monitoring or reporting on our international obligations in recent years. Legislative provisions can only go so far in encouraging a sound approach to meeting our international obligations but insofar as they can impose deadlines for reporting and noting in Parliament of unmet obligations, these should be put in place.

Protected Areas

Q25 What factors should the Minister have regard to when making a decision on heritage listing?

- We accept that this listing process brings additional financial responsibilities upon the Commonwealth and so has to be approached cautiously.

Q26 What are your views on the process for nominating and listing Commonwealth Heritage and National Heritage places?

- The current system is overly directive and controlled too closely by Ministerial fiat. An open nomination process might be more onerous but with early screening of unviable nominations, would build stronger community involvement in the process and ownership of the outcomes.

Q27 What are your views on the effectiveness and utility of Commonwealth heritage strategies and management plans for protecting World, National and Commonwealth Heritage values?

- Listing does not seem to improve the funding for such areas, nor does it increase its protection from development or from threatening processes. In fact there is an increasing tendency to translate World, National and Commonwealth Heritage listing into financial advantage eg through permitting increased tourism developments to accommodate the increased visitors which the listing is presumed to attract. This devalues the very qualities leading to the listing and serious concerns have been expressed by some of our members that listing through this process is in fact to be avoided for rare and sensitive areas which cannot tolerate increased visitation.

Q28 Given that the protection and conservation of Australia's heritage is shared between the different levels of government, are there any improvements in the current legislative arrangements that would be of benefit?

- No comment

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?

- These provisions lie at the core of the rationale for the EPBC Act and exemplify its failures. The lack of a successful prosecution for reckless and deliberate bulldozing of wetlands in northern NSW has undermined public confidence in the Act, as has the failure to insist on any restoration. Failure of appropriate links between jurisdictions and their legislative provisions have resulted in dramatic decline even of listed Ramsar sites such as the Macquarie Marshes due to excessive extraction of water upstream.

Q30 What are your views on the effectiveness of the operation of the provisions for Commonwealth Reserves and the utility of management plans for those reserves?

- The overall reluctance of the Federal Government to properly resource management of these areas is a major hurdle for their good management. The legislative provisions however, retain the emphasis on human usage which is such a marked characteristic of the rest of the Act and do not sufficiently emphasise the management of these reserves for their natural values. The Act should make it clear that nature conservation takes precedence over all other activities in reserves.

Indigenous Involvement

Q31 Are there opportunities to harmonise legislative provisions for the protection of indigenous heritage values? If so, how?

- The Act has failed to protect indigenous sites such as the Burrup Peninsula from desecration and destruction so we would have to say whatever legislative provisions are supposed to be protecting indigenous heritage values, they are not working!
- Opportunities to harmonise legislation usually is code for weakening protection of environmental and heritage values by going to the lowest common denominator so we would have to treat such a proposition with extreme caution.

Q32 Does the Act adequately support Indigenous involvement in the preparation of management plans for Commonwealth reserves? If not, what improvements could be made?

- Again, legislative provisions can establish the requirement for proper action and in the case of Joint Boards of Management this appears to be the case.

Q33 Do the processes under the Act facilitate the involvement and cooperation of Indigenous people as owners of knowledge of biodiversity?

- No, processes under the Act rely indigenous people proving specific interest in or title over areas affected by a proposed action. In practice they have little status and their contribution to sound decision making is severely curtailed.
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Q34 Does the Act make adequate provision for Indigenous tradition to be taken into account in decisions made under the Act?

- No, the Act relies heavily on land title and pre-determined listing of values as the predetermining factors in joining an action. There is very little provision for action or decision based on cultural values or knowledge of indigenous communities. For example, the Act fails to recognize the significance of various species to indigenous communities over and above their endangered status

Compliance and Enforcement

Q35 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?

- The provisions for monitoring, evaluation and follow-up in the Act have not been sufficiently tested to be able to assume their efficacy or otherwise. The administration of these provisions of the Act has been virtually non-existent. This is a particularly serious situation given the number of Controlled Actions approved with conditions. Legislation will not address this serious shortcoming in the Act, only political will and public responsibility.

Q36 Are the offence and civil penalty provisions appropriately framed to encourage compliance with the Act?

- Again, these provisions have not been sufficiently implemented to be able to rely on or criticise them. In addition the provisions are undermined by the level of Ministerial discretion allowed which in itself is leading to failure of the Act.

Q37 Does the Act contain a sufficiently comprehensive and appropriate range of enforcement mechanisms? Are those mechanisms capable of deterring and responding to contraventions of the Act?

- See comments above.

Decision-Making Under the Act

Q38 As the primary decision maker under the Act, is the level of discretion provided to the Minister for the Environment, Heritage and Arts appropriate?

- Ministerial discretion in legislation is a necessary element which provides a suitable level of flexibility to allow governments to respond to unforeseen circumstances. However, in the EPBC Act it is applied in circumstances which are readily foreseeable, such as failure to comply with a direction or undertaking. So the level of Ministerial discretion undermines the operation of the Act and subjects the ordinary decision-making processes covered by the Act to political pressure. Ministerial discretion has been applied consistently to undermine the enforcement and penalty provisions of the Act.
- We strongly recommend that the level of Ministerial discretion in the Act be severely curtailed.

Q39 Are the roles of the various Committees established under the Act appropriate for meeting the objects of the Act?

- Given the lack of transparency around the operation of the various committees, we are unable to comment.

Q40 Does the Act provide sufficient guidance for decision makers in their consideration of uncertainty when making decision under the Act? If not, how should the Act deal with uncertainty?

- Risk assessment is a highly developed science and widely accepted as a mean of dealing with uncertainty across business and community life. It is strange indeed that the EPBC Act, alone among legislative instruments, demands certainty to the extent it does. The proposed scientific body referred to elsewhere in this submission would be very capable of implementing a risk management model which would address uncertainty according to the following principle:
 - The Act should impose an obligation on the Commonwealth to act as well as prevent action by others to protect listed species when uncertainty as to outcome or

effect is tempered by such scientific evidence as to enable a reasonable person to assume the risk of loss or damage is real.

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?

- The Act is firm in preventing and avoiding adequate opportunity for external input and scrutiny by establishing such strict conditions on any person or organisation wishing to take part in any process, by assigning to the Minister such large powers of Ministerial discretion and in preventing external judicial review of decisions.
- There is a complete lack of transparency right from the first lodgment of a notification of an action.
- The periods for public consultation are restrictive and operate to exclude all but the most persistent.

Q42 Should there be more scope for merits review under the Act? Would the disadvantages of this process – in terms of costs and delays – be outweighed by the advantages?

- Without a proper merits review process, the operation of the Act is beyond the capacity of the legal system to ensure that administrative decisions are correct and the best that could have been made on the basis of the relevant facts. Coupled with the level of Ministerial discretion in the current Act, it is no surprise that the Act is seen so generally to be failing in its purpose.
- Restoring a proper merits review process also has a broader, long-term objective of improving the quality and consistency of the decisions of primary decision-makers as well as enhancing the openness and accountability of decisions made by government.
- Seen in this context, the costs and delays it would incur would be outweighed by the better decision making and greater protection of environmental values.

Q43 Should a separate body be established to make certain decisions under the Act? If so, what kind of body should be established and what decisions should be entrusted to it?

- An independent scientific body should be created under the Act to firstly establish a comprehensive classification of Australia by ecological systems and to set out the lines of connectivity between ecological communities required to maintain their health. It should also be responsible for listing, as part of this process, areas where there is a presumption of ecological value sufficient to declare these areas subject to development only where there can be proven to be improved ecological outcomes. Thirdly this body would be responsible, again as part of the national survey process, for listing endangered species and ecological systems for specific consideration under the Act.

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

- The Act should be reviewed against statistical data assessing the state of Australia's biodiversity and heritage and the level of protection afforded listed species. An annual report to Parliament should also include data on monitoring and evaluation follow-up to Controlled Actions as well as prosecutions and restorations made under court orders.

National Parks Australia Council

Submission to the Independent Review of the EPBC Act

Attachment B

List of Recommendations to the current EPBC Act

Part 1

- a) *Amend the objectives of the EPBC Act so that Section 3(1)(a) and (ca) read ‘to protect the environment...’ and ‘to protect and conserve heritage’ respectively*
- b) *3 (1) (b) should be altered to read ‘to allow ecologically sustainable development through the conservation and ecologically sustainable use of natural resources only where the action can be justified by improved environmental outcomes’ ;*
- c) *3 (c) should read ‘to ensure the conservation of biodiversity’*
- d) *3 (e) should read ‘to protect and manage..’*

Part 2

2.1

- a) *The period for public comment at the controlled action determination stage should be extended to 15 business days*
- b) *The period for public comment at the assessment stage should be increased to at least 30 business days irrespective of the mode of assessment and the option for the Minister to extend the period for more complex referrals retained.*
- c) *Where an action is referred directly as a controlled action the referral documentation should be available on the DEWHA website.*
- d) *At the impact assessment stage the relevant documentation and assessment reports should be loaded onto the DEWHA website, (EPBC Regulations 2000 - Reg 5.02 already require that the information must be provided in a form that is readily able to be published on the internet) as is the case with referral documentation, so that it is easier for the public to access the information and provide comments, rather than having to obtain the information through the proponent.*
- e) *Public comments at the assessment stage should be made directly to the Minister.*

2.2

- a) *Amend the Act to provide a clearer assessment process including provisions or regulations that clearly state the types of actions to be assessed in the various methods and clear requirements of what must be done under each of those methods.*
- b) *Section 76 of the Act should be amended so that instead of providing that the Minister may request the person proposing to take the action to provide specified information relevant to making the decision the Minister ‘must’ request and consider the necessary further information.*
- c) *Once a method of assessment has been determined for a particular action the decision cannot be altered so as to impose a less onerous environment assessment.*

- d) *The use of 'Accredit Assessment Process' should be very limited if not removed. At a minimum it must be subject to clear guidelines and standards for its use and the process must be explicitly described in the notification document.*
- e) *Remove 'referral documentation' as an assessment option.*

2.3

- a) *Subsection (2) of Section 527E should be omitted so that the Minister is required to consider both the direct and indirect consequences of the action and no further artificial limitations are imposed on what can be considered.*
- b) *The Minister should be required to consider the 'Potential impacts' of an action. This could be done by inserting a subsection (1)(c) 'the event or circumstance is a potential consequence of the action'*

2.5

- a) *Remove the discretionary element of Section 74A and compel the Minister to refuse to accept the referral if there are reasonable grounds for believing that it is part of a larger action. Alternatively the legislation could prohibit a proponent from undertaking any subsequent undisclosed actions that could have been reasonably contemplated at the time of the referral, or requiring the minister to assess any subsequent referrals as if they were part of the first. This could be done through an amendment to Section 75 altering the Ministers consideration when making a decision or as an amendment to Section 74A.*

2.6

- a) *Considerations in the Section 75 determination should be expanded to include;*
 - *impact of key threatening process*
 - *cumulative impact*
 - *bioregional plan*
 - *conservation agreements.*
- b) *Section 75 also needs to clarify that impacts (either direct or indirect) which are not subject to the assessment and approval process (for example because they are covered by a bioregional plan or Ministerial declaration) but do impact on MNES must be considered.*
- c) *Section 75(2)(b) should be removed.*
- d) *Section 136 should be amended to mandate the consideration of public comments made during the controlled action and assessment stages of the process.*

2.7

- a) *Amendments be made to remove exemptions or potential exemptions from the referrals, assessment and approval process for;*
 - *Bilateral agreements (Section 29)*
 - *Bioregional plans (Section 37)*
 - *Conservation Agreements (Section 37M)*
 - *Ministerial declarations (Sections 32 and 158)*
 - *Regional Forestry Agreements and regions (Section 38 RFAs / Section 40 Forestry Regions).*

2.8

- a) *Conditions on the use of offsets should be included in the Act or Regulations rather than as part of an unenforceable policy document.*

2.9

- a) *The ANAO recommendation to accredit Commonwealth agencies to monitor compliance be implemented and extended to include State and Territory authorities, for example the various environment protection authorities across the country. This would require funding to be paid by the Commonwealth for the additions services but we believe this would be a very cost effective way of ensuring compliance.*

2.10

- a) *Omit 'approval of actions' from Section 44(c)*
- b) *Remove Section 158A*
- c) *Amendment to Section 78(1) is required to make it clear that timeframes for compliance cannot be extended unless the proponent can demonstrate exceptional circumstances and demonstrate that no negative impact has occurred on a MNES.*
- d) *Discretionary powers in the Act need to be restricted and a tighter decision making process established. A standard for apprehended bias should be inserted to prevent what can be seen as development favouritism as well as the availability of merits review as a further means of ensuring robust decision making.*

Part 3

3.1

- a) *Existing limitations on judicial review in the EPBC Act should be removed.*
- b) *Merits review be available for all decisions made under the EPBC Act.*

3.2

- a) *Judicial standing for matters arising under the EPBC Act be extended to all those who have made submissions during the decision making process or have a demonstrable interest in the protection of or involvement in the conservation of the environment, heritage or the specific area alleged to be threatened by the action.*

3.3

- a) *A provision equivalent to the former Section 478 should be inserted into the Act.*

3.4

- a) *Costs protection and the clear guidelines for the award of costs be inserted into the Act.*

Part 4

4.1

- a) *Re-insert requirement that the Minister take all reasonable steps to ensure that the lists are kept up to date.*
- b) *Listing decisions should be made by the Threatened Species Scientific Community not the Minister.*

4.2

- a) *Listing decisions should be made by the Australian Heritage Council not the Minister.*

Part 5

- a) *Climate Change be included in the EPBC Act as a matter of national environmental significance.*
- b) *Limits be set on the amount of greenhouse gases an action can emit or cause to be emitted.*
- c) *A requirement be inserted into the Act compelling the Minister to consider the climate change implications of an action and it's contribution to Australia's greenhouse gas emissions.*