SMS
SPECIES MANAGEMENT SPECIALISTS INC

ABN: 43.231.914.455

PO Box 390 Belconnen
ACT 2616 Australia
tel +61 2 6258 3428
fax +61 2 6259 8757
email: hank.jenkins@consol.net.au
website: www.speciesms.org

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Secretariat
Independent Review of the EPBC Act
Department of the Environment, Water, Heritage and the Arts
CANBERRA ACT 2601
Phone: 1800 003 513
Email: epbcreview@environment.gov.au

EPBC ACT REVIEW

I attach for your evaluation our analysis of the provisions of the EPBC Act together with an assessment, in our opinion, of the extent to which present administration of the legislation has contributed to achieving the objects of the Act.

The assessment undertaken by Species Management Specialists has been restricted to Part 13A of the Act as well as its application by the Commonwealth Government to fulfil Australia's obligations under the Convention on International Trade in Endangered Species of Wild Fauna and Flora.

Species Management Specialists would like to take this occasion to express our appreciation in being given the opportunity to contribute to the review of this important piece of Commonwealth legislation. If required, we remain available to explain or expand on any particular element of our submission.

Robert W G Jenkins AM
President

SPECIES MANAGEMENT SPECIALISTS INC

The Environment Protection and Biological Conservation Act 1999 Commentary and Recommendations

Approved and Submitted by
Robert W G Jenkins AM[1]

1. Introduction

The requirement of Section 522A of the EPBC Act 1999 for the Minister to cause an independent review of the administration of the Act in order to assess the extent to which the legislation is achieving its objectives provides an important and timely opportunity to address a number of issues that have changed substantially within the international arena over the last decade (or longer) but which remain largely unchanged under the operation of the EPBC Act 1999.

These issues concern increasing recognition that conservation goals can be achieved through sustainable use and that adaptive, rather than prescriptive, management is the best way to generate the expert knowledge needed to conserve species and the habitats upon which they depend. The adoption of the *Addis Ababa Principles and Guidelines on Sustainable Use* by the CBD, the IUCN World Conservation Congress reflect general acceptance by the international community of the need to change its strategic thinking with respect to factors influencing the sustainability of wildlife uses. Despite opposition by Australia, these Principles and Guidelines were also adopted by the Conference of Parties to CITES as a means of assisting Party States to implement Article IV provisions of the Convention and determine whether or not a particular use of an Appendix-II listed species was detrimental to the survival of that species in the wild.

The comments provided below are confined principally to Part 13A of the Act that relate to international movement of wildlife and Australia's implementation of both CITES and the CBD. Some observations are made on the wisdom of underpinning approaches to the regulation of imports and exports of wild plants and animals on narrow and somewhat outdated principles and views about nature and its value to society. This submission focuses on the relationship between two specific provisions and the objects of Part 13A [Section 303BA]:

i) stricter domestic measures [Section 303CB], and
ii) prohibition on commercial exports of live native vertebrates other than fish [Section 303DG(3)].

Additional comments are provided on other aspects of the Act as these relate to the conservation of biological diversity and overall utility of the legislation.

2. General

The effectiveness of "bundling" all Commonwealth legislation on conserving biodiversity into a single Act is seriously undermined by ideological contradictions and legislative inconsistencies, ultimately created by

[1] Robert Jenkins was formerly employed with the Commonwealth Ministry of Environment and was responsible for administering the *Wildlife Protection (Regulation of Exports and Imports) Act 1982*. He also served as the Oceania Representative on the CITES Animals Committee from 1989-2000 and Chair of the Committee from 1992-2000. During his term of office on the CITES Animals Committee and subsequently as a private consultant, Mr Jenkins has collaborated with and assisted government agencies of numerous countries in formulating and implementing management systems for sustainable of wild species

policy differences in the approach to biodiversity conservation and sustainable use of specific taxa. For example, the Australian Government has a long-standing, well enunciated and vigorously defended policy of opposing commercial whaling and pursuing all appropriate actions to maximize the total protection of whales (as reflected in Chapter 5, Part 13, Division 3 of the Act). The elevation of cetaceans to iconic species in one chapter of the Act has no basis in science and is directly contradictory to the approach taken with respect to other aquatic and terrestrial species elsewhere in the legislation. Similar contradictions may be found in the differential treatment of plants, invertebrates and species that are subject to commercial fisheries versus other vertebrate native species.

In its application to species that are subject to commercial fisheries, the EPBC Act simply requires the Minister to review and approve the management arrangements, following which the species (a fishery) is listed as a Wildlife Trade Operation for a specific period and subsequently included on the list of exempt species. The extent to which applying the EPBC Act to fisheries has contributed to the sustainability of those fisheries is not known. Conversely, commercial operations involved in harvesting and exporting native plants, invertebrates, mammals, birds, reptiles and amphibians are potentially subject to a variety of "management programs" that are also approved for a specific period of time. But these species, once approved, are <u>not</u> included on the list of exempt species. A further distinction is made between native plants and native animals (see Section 4 below).

The philosophical opposition to commercial use and export of live non-fisheries vertebrates has created a serious logical inconsistency in the manner in which stricter domestic measures have been applied. This concerns the manner in which the Act deals with the types of exports and imports that constitute non-commercial transactions. Sections 303FC-FF prescribe the conditions to satisfy research purposes (Section 303FC), education purposes (Section 303FD), exhibition purposes (Section 303FE) and conservation breeding purposes (Section 303FF). In order to satisfy these sections of the legislation, exports cannot be for primarily commercial purposes.

The special case of the Australian Freshwater Sawfish (*P. microdon*) represents a particularly troubling example of inconsistency in the manner in which the Act has been applied. In its consideration of a proposal to include the genus *Pristis* spp. in Appendix I of CITES, the 14th meeting of the Conference of the Parties (the Hague, 2007), at the request of Australia, agreed to amend the proposal by placing the Australian population of *P. microdon* in Appendix II of the Convention with the following annotation *"for the exclusive purpose of allowing international trade in live animals to appropriate and acceptable aquaria for primarily conservation purposes".* Exports of live specimens of *P. microdon* are permitted for exhibition purposes in accordance with Section 303FE of the Act. In this respect, the intent of Subparagraph 303FE(1)(b) is somewhat confusing and potentially problematic.

Exports of live specimens of the Freshwater Sawfish (*Pristis microdon*) have been approved as non-commercial exports for exhibition purposes even though specimens are sold and the operations involved in exporting these species are managed as commercial enterprises. The adoption of poorly conceived domestic measures that exceed those required by CITES has resulted in a nonsensical scenario where exports have been approved for commercial operations on the basis that they (exports) constitute non-commercial transactions. Notwithstanding the non-commercial nature of the purpose of the export (*i.e.* exhibition), from the viewpoint of the company supplying the specimens, the actual exports represent a commercial transaction. Live specimens are collected from the wild for subsequent sale and export to "appropriate and acceptable" aquaria overseas. It is not clear what constitutes an "appropriate and acceptable" recipient aquarium. In reality this type of export transaction is no different to that which has been permitted for another Appendix-II listed native fish species. Commercial exports of first generation cultivated live specimens of the Australian lungfish (*Neoceratodus forsteri*) are permitted as an *Approved Small Scale Wildlife Trade Operation* in accordance with the provisions of Section 303FN of the Act. When the EPBC Act prohibits commercial exports of live native mammals, birds, reptiles and amphibians (see Section 4 following), it is inconsistent and troubling that the legislation permits commercial exports for non-commercial purposes of *P. microdon* and *N. forsteri* both of which are listed as "Vulnerable Species" pursuant to Section 178 of the Act.

The complexity of the legislation is clearly beyond the capacity of the Department to administer and it doubtful whether the amount of bureaucracy associated with administering the provisions of the Act and its Regulations have improved the conservation of biological diversity in Australia or elsewhere. Various sections of the Act (Sections 303CK, 303DJ and 303EQ) require the Minister, as soon as practicable, to establish Registers of applications and decisions. Regulation 9A-06 specifies the types of information that are required to be recorded in these Registers. Furthermore, the Act requires that these Registers are made available on the internet (for public scrutiny). Although the departmental website contains some information on exempt species and various operations that have been approved, there does not appear to be a Register of applications for permits or related decisions as required by the legislation.

Recommendations:

Commonwealth legislation controlling the use of wildlife should promote rather than hinder conservation of wild species through sustainable use and complement, wherever possible, natural resource conservation legislation of the States and Territories.

Sections 303FC - FF should be amended to remove the unrealistic requirement that exports for research, education, exhibition and conservation breeding cannot be commercial. Determination whether or not a transaction is for primarily commercial purposes should reflect Article III of CITES and be restricted to imports of Appendix-I listed species.

Presently disparate elements of the Act should be fragmented into separate, stand-alone legislation in order to reduce the present complexity of the legislation and facilitate greater understanding, and hence compliance, by user groups.

The departmental website should be re-structured and re-designed to make navigation to the desired information site more explicit and user friendly.

3. Stricter Domestic Measures

As reflected in Section 303BA(a), Part 13A of the Act is the principal legal instrument by which Australia implements the provisions of CITES and discharges its obligations as a Party to the Convention. Although Article XIV of the Convention enables Party States to adopt stricter domestic measures, this does not mean that Australia is obliged to exercise its rights to implement such measures.

It is by no means clear how the present regulation of exports and imports of specimens of CITES-listed species contributes to achieving Section 303BA (c), which seeks: *"to promote the conservation of biodiversity in Australia and other countries"* (emphasis added). Indeed, Section 303CB which enables the Minister to "independently alter" species' listings as well as the quantity and range of specimens that have been agreed upon by the Conference of the Parties to CITES (see below) for what essentially amount to domestic political purposes is not consistent with Object 303BA (c) as it relates to "other countries".

"The Minister must not make a declaration under subsection (1) unless:

(a) the modification has the effect of treating a specified specimen that is included in Appendix II to CITES as if the specimen were included in Appendix I to CITES; or
(b) the modification has the effect of broadening the range of specimens included in a specified Appendix to CITES in relation to a specified species; or
(c) the modification has the effect of decreasing a quantitative limit in relation to the export or import of a specimen; or
(d) the modification has the effect of treating a specified specimen that is not included in Appendix I, II or III to CITES as if the specimen were included in Appendix I to CITES; or
(e) the modification has the effect of treating a specified specimen that is not included in Appendix I, II or III to CITES as if the specimen were included in Appendix II to CITES."

The manner in which the foregoing stricter domestic measures have been exercised under the EPBC Act with respect to certain listings has not assisted other countries in conserving their biodiversity. There are several Appendix-I listed species for which the Conference of the Parties, at the request of the range State(s) concerned, has adopted conservative annual export quotas for the express purpose of enabling community-based conservation programs based on trophy hunting programs to be implemented (*e.g.* African elephant, leopard, cheetah, lion and markhor). These programs have been developed and implemented with the approval (by consensus) of the Conference of the Parties to the Convention. The progress of these programs is reported regularly to the Convention Secretariat and the Conference of the Parties. They are demonstrably sustainable and effective conservation strategies in the countries where they are being applied. Nevertheless, the Commonwealth Government does not permit Australian nationals to import any trophies of Appendix-listed species as personal effects. Furthermore, the EPBC Act continues to list the African elephant (*Loxodonta africana*) as an Appendix I species even though the populations of the species in South Africa, Botswana, Zimbabwe and Namibia have been transferred to Appendix II with annotations that permit international trade in ivory and hides. Implementation of stricter domestic measures to prohibit the importation of CITES-listed trophy specimens appears to be based on an ideological opposition to the use of trophy hunting as a conservation tool. The apparent refusal to assist a country in applying a particular management regime unless it is ideologically acceptable to the Minister directly contradicts one of the objectives of Part 13A of the Act *"to promote the conservation of biodiversity in other countries".*

Section 303FU of the Act on Approved Commercial Import Programs represents another stricter domestic measure of questionable merit. It is not immediately apparent how the imposition of this requirement on commercial imports contributes to promoting biodiversity conservation in foreign countries. This provision mirrors a similar provision in the *US Endangered Species Act 1973* that was used to prohibit exports of kangaroo and saltwater crocodile products into the US market until such time as management of these resources by Australian governments satisfied US-determined standards. In reality Section 303FU does little to ensure on-ground conservation. Rather, it can be seen as arrogant and a domestic trade measure.

Notwithstanding the foregoing negative conservation affects of imposing certain stricter domestic measures for reasons that are not adequately explained, there appear to be contradictions in the provisions of the Act that prescribe the process by which certain stricter domestic measures can be imposed.

Section 303CA requires the Minister to publish a list of CITES species. The list must include all species from time to time included in any of Appendices I, II and III to CITES and *"must not include any other species"* (Subsection 303CA(3) emphasis added). Subsection (4) of Section 303CA requires; *"for each species included in the list there is to be a notation".* Furthermore, Subsection (8) requires that; *"a notation in the list is to be consistent with CITES"*. However, the following Subsections 303CB (d) and (e) concerning stricter domestic measures (see above) enable the Minister to modify the list of CITES species by declaring a specified specimen not included in either Appendix I, II or III of CITES to be treated as if the specimen were included in Appendix I or Appendix II respectively. The ability of the Minister to unilaterally modify CITES annotations would seem to be contrary to Subsection 303CA(4) of the Act.

Finally, although Article XIV of the Convention enables Party States to adopt stricter domestic measures, the provisions of Section 303CB, that enable the Minister to unilaterally take stricter domestic measures, are not consistent with the cooperative nature of CITES or the principles contained in the Preamble to the Convention (see Attachment 1).

Recommendation:

Section 303CB of the Act should be amended to:

i) accurately reflect decisions and Appendix listings adopted by the Conference of the Parties to CITES;
ii) remove the apparent contradiction with the provisions of Section 303CA; and
iii) remove the ability of the Minister to unilaterally apply stricter domestic measures without adequate consultation with, and support of, the affected range State(s).

4. Live Native Mammals, Birds, Reptiles and Amphibians

The current prohibition on the commercial export of live native mammals, birds, reptiles and amphibians for commercial purposes, as reflected in Section 303DG(3) of the Act represents another element of wildlife trade in which the Commonwealth Government has adopted very strict (and restrictive) measures on the basis that such prohibitions support conservation of the wild resource. The differential treatment of live plants, fish and invertebrates by the legislation is not warranted and has no scientific justification or conservation benefit. Rather, this provision perpetuates a long-standing policy that appears to have been driven by animal welfare concerns with no basis in conservation. These prohibitions do not, in and of themselves, contribute to promoting the conservation of the species concerned. As such they do not contribute to achieving one of the fundamental objects of the Act. Not only do such prohibitions devalue species, but also they promote resource wastage and have a profoundly negative affect on implementing alternative conservation strategies based on conferring an economic value to natural habitats. Rather than permitting affected landowners to benefit financially from the presence of abundant species, in the absence of any possibility of establishing a wild capture-export program, State or Territory crop protection permits are regularly issued for the destruction of large numbers of "pest" species (*e.g.* parrots and cockatoos) in both tropical and temperate Australia.

Commonwealth legislation, such as the EPBC Act, that purport to address and promote conservation of native biodiversity do little to complement State/Territory legislation. Programs directed to conserving threatened species and habitats may well require actions that confer an economic value on these resources that enables them to compete more effectively with other forms of productive land use (*e.g.* agriculture). The

continued refusal by the Minister to approve trophy hunting of problem[2] saltwater crocodiles as an integral element of the management program for the species in the Northern Territory is perplexing and has no scientific or conservation basis. The Act contains sufficient safeguards to enable conservation management programs to be implemented that encompass the export of live specimens for commercial purposes.

Indeed, persisting with such blanket prohibitions in the face of continuing demand for Australian native fauna on the international market simply promotes ongoing smuggling and illegal trade in live native fauna. In the absence of replacing or satisfying demand from legal sources, the prohibition of any commodity simply promotes illegal trade. In the case of Australian wildlife, illegally exported founder stock (or surplus offspring of stock originally provided to overseas zoological collections that has subsequently been sold) are now used to captive breed Australian wildlife species in a raft of different countries. Even a cursory examination of wildlife trade magazines and journals demonstrates that many countries (except Australia) are benefiting from the use of Australian biodiversity.

Recommendations:

Section 303DG(3) of the Act should be amended to remove the prohibition on the commercial export of live specimens of native mammals, birds, reptiles and amphibians;

Present inconsistencies in the manner in which Part 13A of the Act regulates commercial exports of different taxonomic groups are without any scientific or conservation basis. The Act should be amended accordingly to remove these (and other) inconsistencies to achieve a uniform approach to the commercial use and export of all native species.

5. Conclusions

The precise meaning of the Section 3(c) objective "*to promote the conservation of biodiversity*" is unclear. There is currently no mechanism to quantitatively assess changes in the conservation status of biodiversity or the extent to which any such changes (positive or negative) may be attributed to the administration of Part 13A of the Act. As a consequence, the ability of the present independent review (as required by Section 522A of the Act) to establish whether this fundamental object of the Act has been (is being) achieved is problematic. Invariably, the nature of submissions received is determined by the philosophical position of the author(s) on the subject matter. Individuals and organizations ideologically opposed to the use of wild animals and plants are never satisfied with anything less than a total prohibition on all forms of consumptive use. Conversely, there are those whose interests lie in there being minimal controls on the use of wildlife.

Although there may be some "presentational" logic to be found in the decision to "bundle" all Commonwealth environmental legislation into a single Act, the result is an extremely voluminous piece of law that is complex in the extreme to interpret correctly. In terms of administering and implementing the provisions of the Act, there is questionable relationship between its different Parts. The numerous references to related provisions within the same Part that, in order to correctly interpret the legislation, require repeated referral to sections often located many pages removed from the provision of immediate interest. From the standpoint of compliance by the public, Part 13A of the Act is not user friendly.

The manner in which Part 13A of the Act has been structured reflects an underlying philosophy that commercial use of wildlife is inconsistent with the principles of nature conservation. While a "cause and affect" relationship often exists between unregulated use of wildlife and population declines of the wild resource, there is no basis in science or conservation to justify the underlying philosophy that properly regulated sustainable use of wild species has a negative impact on the wild resource. To the contrary, the ability of local communities and landowners to derive an economic benefit from the use of wildlife, by conferring an economic value on natural habitats that enables them to compete with other forms of land-use, has the potential to create conservation incentives.

In summary, there is no evidence immediately apparent to Species Management Specialists to suggest that the operation of the Act over the past ten years has contributed positively to the conservation of biological diversity in Australia or elsewhere. The resource conservation problems that confronted Australia in 1999 remain largely unabated to the present time. Indeed, on the basis of its operation over the last decade, there

[2] Problem crocodiles are very often large post-reproductive males that have been displaced from the population by younger and stronger males. As a consequence, such animals make no contribution to the wild population, are generally not good candidates for captive breeding and farming and represent a significant cost for management. Limited trophy hunting of problem crocodiles represents a positive use of large crocodiles with significant associated economic benefits.

is little confidence that the EPBC Act is adequately or appropriately provisioned to deal with the biodiversity conservation issues that will arise as we move into the 21st Century.

The views expressed and the recommendations contained in this submission may be perceived as radical, however achieving sustainable conservation of renewable resources in the 21st Century will require the ability to apply a range of strategies, tailored to suit particular species and locations. The EPBC Act represents one tool in the "conservation tool-box". As presently written, Part 13A of the EPBC Act is too restrictive and does little to promote effective conservation of native biodiversity outside the network of protected areas. In the case of indigenous people living on remote homelands where opportunities for economic development are limited, the case for permitting and facilitating the development of wildlife-based export industries is compelling.

…… END

Convention on International Trade in Endangered Species of Wild Fauna and Flora

Signed at Washington, D.C., on 3 March 1973

Amended at Bonn, on 22 June 1979

The Contracting States,

Recognizing that wild fauna and flora in their many beautiful and varied forms are an irreplaceable part of the natural systems of the earth which must be protected for this and the generations to come;

Conscious of the ever-growing value of wild fauna and flora from aesthetic, scientific, cultural, recreational and economic points of view;

Recognizing that peoples and States are and should be the best protectors of their own wild fauna and flora;

Recognizing, in addition, that international co-operation is essential for the protection of certain species of wild fauna and flora against over-exploitation through international trade;

Convinced of the urgency of taking appropriate measures to this end;

Have agreed as follows:

…… etc