

**A SUBMISSION TO THE REVIEW SECRETARIAT FOR
ENVIRONMENT PROTECTION & BIODIVERSITY CONSERVATION ACT 1999
ON BEHALF OF THE STATE OF VICTORIA**

8 January 2009

SUMMARY

An independent review of the operation of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC) is required within ten years of its commencement. The Victorian Government welcomes the opportunity to comment on the effectiveness and efficiency of this Commonwealth legislation, and its impact on Victorian jurisdiction.

This Victorian Government submission is framed to address the Terms of Reference of the review. It comments on key areas of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC) that are of importance to the State of Victoria. These are as follows:

- 1. Effectiveness of the EPBC in delivering its stated Objects**
 - a. Legislative model provided by the EPBC
 - b. Consideration of cumulative impacts under the EPBC
 - c. Biodiversity protection & environmental outcomes
 - d. Patterns of investment
 - e. Monitoring of the effectiveness of the EPBC
 - f. Climate change considerations

- 2. Efficiency of the EPBC in implementation of its objectives**
 - a. Accreditation of Victorian processes and decisions
 - b. Regulatory burden
 - c. Legislative transparency

- 3. Improving implementation of the EPBC**
 - a. Clearer criteria
 - b. Consistency with other legislation
 - c. Concordance between Commonwealth and State listing of threatened species and communities
 - d. Nomination procedure for listing threatened species and communities

INTRODUCTION

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC) is the fundamental Commonwealth legislative instrument for meeting Australia's international treaty obligations. This submission focuses on three key aspects of the EPBC:

1. its effectiveness in achieving its stated objectives;
2. the efficiency with which it achieves these objectives; and
3. Improving implementation of the EPBC.

This Victorian Government submission was developed by the Department of Sustainability and Environment in consultation with the Department of Premier and Cabinet (DPC), Department of Primary Industries (DPI) and the Department of Planning and Community Development (DPCD). Consultation with these agencies was made in line with advice from the Department of Premier and Cabinet.

1. EFFECTIVENESS OF THE EPBC IN DELIVERING ITS STATED OBJECTS

Legislative Model

In 1997, the Commonwealth, State and Territory governments concluded the *Heads of Agreement on Commonwealth and State Roles and Responsibilities for the Environment* (the HoA). This Agreement was intended to amend the 1992 *InterGovernmental Agreement on the Environment* (IGAE) and sought to further clarify the Commonwealth's interests in environmental protection in relation to those of State and Territory governments.

While HoA includes a commitment to increased compliance by Commonwealth departments, statutory authorities, agencies, business enterprises and tenants with relevant State environment and planning laws (Clause 7), this has never been effected. Consequently, the Commonwealth clearly needs a system of legislation to control the activities of its instrumentalities and actions that occur on its land and waters. In addition, it requires a means to govern both its direct (nuclear actions) and indirect (international treaty obligations) constitutional responsibilities.

The EPBC was the Commonwealth Government's implementation of the HoA and consolidated a range of disparate Commonwealth Acts using the Commonwealth's agreed interests in seven key issues as matters of national environmental significance (NES), which would trigger Commonwealth Government involvement in any project or process. The EPBC was a major step forward in improving the clarity and certainty of the Commonwealth's legislative controls on activities with environmental impacts or potential impacts.

The EPBC includes extensive provision for the Commonwealth to accredit State government legislation as sufficient to cover its interests for matters of NES. This would allow Commonwealth to administer controls only where necessary to complement State systems where these do not adequately protect matters of NES. Were such an approach taken in the administration of the EPBC there would be a considerable reduction in duplication of processes, improved clarity and potentially also much more effective environmental protection.

Unfortunately, to date the Commonwealth has been reluctant to give fully recognise State programs, and has provided accreditation only of a very limited sort to State environmental assessments processes. Very circumscribed accreditation of decisions has also been provided in a couple of cases. This is a systematic limitation to the way the EPBC has been administered, rather than necessarily with the EPBC itself.

This issue is particularly clearly illustrated in the areas of biodiversity protection and fisheries management. Biodiversity protection cannot be effectively achieved through piecemeal control of project-by-project approvals, but this is the model upon which the Commonwealth currently relies. Similarly, it is not possible to implement an effective fisheries control regime through export approval licences, but this remains the Commonwealth's currently preferred tool (noting that there is some ambiguity in the way that environmental, social and economic objectives are considered in parts of the Act, with respect to fisheries). This results in:

- ineffective biodiversity conservation;
- unnecessary uncertainty for industry; and
- extensive administrative burden, for industry, State and Commonwealth governments.

These issues are explored in more detail below. Victoria would advocate the increased use of accreditation by the Commonwealth through the development of strategic assessments. This would enable the Commonwealth to use its resources most efficiently to protect matters of NES where they were not being effectively protected by other means.

The goals of the EPBC are very ambitious and its effectiveness is limited by the scale of funding currently provided to implement it. Genuine accreditation of State processes which could create a seamless system for environment and biodiversity protection would also increase the efficiency with which available funds are used.

Cumulative Impacts

The EPBC does not deal well with cumulative impacts on matters of NES and this is particularly marked in the case of listed threatened species and communities. It is also potentially problematic for RAMSAR wetlands and World Heritage areas. This shortcoming results from the project-by-project decision making model of the legislation, which does not comprehend spatial or regional controls.

The addition of provisions in the EPBC for development of strategic plans and precinct plans is useful, but the Commonwealth has been slow to use the flexibility these provide.

One major advantage of this strategic assessment approach is that it allows for consideration of cumulative impacts along coherent ecological and bioregional boundaries, and allows for more even-handed and consistent assessment of environmental impacts in decision making. Such an approach also lends itself well to the use of environmental offsets and trading as a means of maximising the efficiency with which environmental resources are used, and thresholds to limit long-term environmental degradation.

The Commonwealth should also make greater use of thresholds, developed with consideration of genetic and metapopulation conservation principles as a way to ameliorate the effects of cumulative impacts on both species and communities.

Strategic assessments also provide a very effective means for accrediting the decisions of other governments, within a clearly defined scope of agreed principles and objectives.

Biodiversity Protection & Environmental Outcomes

Where there has been a breach of the EPBC, the Commonwealth has effectively followed up with enforceable undertakings or conservation agreements that engage with the State. Onsite inspections to ensure implementation of mitigation actions have also been regularly undertaken.

Penalties are sufficiently severe to deter breaches of the EPBC by individuals, but it is yet to be determined whether penalties are sufficient to deter companies. The Commonwealth should consider whether application of penalties could be extended to companies and/or their directors, responsible for requesting actions that constitute breaches of the EPBC, as is the case for Occupational Health and Safety laws.

Section 134 of the EPBC provides for conditions that may be put on an approval granted under the EPBC. A provision for the conditions of an approval to be recorded on the title of a piece of land, perhaps in the form of a covenant, could provide an important enforcement tool that could be used under the EPBC. This would further enhance the enforcement capacity of the EPBC.

Patterns of Investment

The environmental benefit of investment can vary greatly according to the shape of investment.

For example, two possible scenarios for investing the same sum of money may involve:

- i. large, short-term injections of funds; versus
- ii. small (relatively) annual expenditure over the long-term.

These two investment patterns may have quite markedly different levels of environmental effectiveness. An understanding of these differences is particularly pertinent to the management of threatening processes, and listed threatened species and communities. The Investment Framework for Environmental Natural Resources¹ which is currently used to assess *Caring for Our Country* grant applications may provide a structure within which to make these assessments and improve the effectiveness of investment.

¹ Pannell, D.J. and Roberts, A.M. (2008). INFFER: Investment Framework For Environmental Resources, version 1, INFFER Working Paper 0802, University of Western Australia

Monitoring the effectiveness of the EPBC

Ultimately an assessment on the EPBC's effectiveness pivots on evidence that the conditions of matters of NES are improving, or at least not deteriorating. This review would be better placed to evaluate performance of the EPBC against its objectives if quantitative monitoring data were available on matters of NES. For example, it would be useful to have an evaluation of the performance of threat abatement plans and the extent of biodiversity gains that may result from application of these plans. This short-coming was identified in the National Auditor General's Report (2003), which recommended a national system should be established to monitor the effectiveness of the EPBC into the future.

Victoria has extensive environmental monitoring data sets and would be happy to discuss improved data collection and sharing with the Commonwealth. Victoria is currently re-considering its ongoing data collection programs, as a component of its long term policy development on land health and biodiversity.

Climate change considerations

Climate change policy is developing rapidly around Australia at present. The Victorian Government, and other states, are focussing on adapting to the impacts of climate change and adjusting to carbon pricing introduced through the *Carbon Pollution Reduction Scheme* (CPRS). In the Victorian context, this is recognised and policy is being developed through the Land and Biodiversity in a time of Climate Change white paper, the Climate Change Green and White paper and the proposed Climate Change Bill.

Mechanisms designed to reduce carbon emissions need to be closely scrutinized to ensure they complement the CPRS. Once a 'cap' is set under the CPRS, there is no environmental benefit to be gained from assessing greenhouse gas emissions associated with a proposal, as reducing the emissions associated with that proposal will just make emissions 'permits' available for other polluters. Therefore the Victorian Government is opposed to the introduction of a climate change trigger for a controlled action on the basis that it will duplicate regulation imposed by the CPRS.

Consequently, the Victorian Government would not support the incorporation of climate change considerations into the EPBC that pre-empts other state and Commonwealth processes underway. Consideration of a greenhouse gas emissions trigger should be taken up with the States specifically before a decision is made.

2. EFFICIENCY OF THE EPBC IN IMPLEMENTATION OF ITS OBJECTIVES

The Victorian Government would welcome more comprehensive Commonwealth accreditation of its environmental protection processes and decisions. In addition, there are a number of more minor areas in which the operation of the EPBC could be clarified and streamlined.

Accreditation of Victorian Processes and Decisions

The proposed Bilateral Agreement with Victoria accredits the Victorian EES – EIS process under the *Environment Effects Act 1978*, the Advisory Committee and Planning Permits process under the *Planning and Environment Act 1987*, the Works Approval process under the *Environment Protection Act 1970*, and the Panel process under the *Water Act 1989*. It does not accredit Victorian decision maker's decisions with respect to approvals; and consequently there is duplication of decisions at Commonwealth and State levels. Accreditation of State decisions would improve regulatory efficiency between the States and Commonwealth, and provide a greater degree of certainty for proponents.

Where there is a joint EIS-EES, the Commonwealth Minister for Environment can only make a decision on an approval once the recommendation from the State Minister for Planning has been received. This process potentially adds a few months to each approval process. Given that both ministers make a decision on the basis of the same EIS-EES document, and one would reasonably expect consistent decisions from both ministers, this delay seems somewhat unnecessary.

Regulatory Burden

In its current form the EPBC places significant administrative burdens on both state governments and industries. This is particularly evident in the areas of biodiversity and fisheries management.

Commonwealth approvals of individual fishery management plans remain valid for a maximum of only five years and many arrangements are reviewed much more frequently. State governments bear major costs in the preparation and review of fishery management plans and the seafood industry experiences costs in uncertainty.

While frequent review may be necessary in the case of at-risk fisheries, Victoria would advocate a more risk based approach to determining the need for review of management plans.

We would further note that the export licence is a very blunt instrument for fisheries management, especially given there are large domestic seafood markets, many species are cross jurisdictional, and fishing sectoral boundaries and Victorian commercial fisheries are relatively small and diverse in terms of fishing methods and species. A strategic assessments approach (as outlined above) may be much more effective as a means of safeguarding marine biodiversity and Victoria would seek to discuss this potential further with the review team.

As state governments hold most environment monitoring data, applications for the approval of Controlled Actions under the EPBC also involve major demands on State government resources. In many cases, these processes coincide with similar assessments by the States, but differ sufficiently to require additional work.

For example, responsibility for managing import/export permits for wildlife requires that the States have a management plan for the designated wildlife group, which meets Commonwealth

requirements. Without these State management plans the Commonwealth would be obliged to deal with import/export approvals on a case by case basis.

Similarly, Commonwealth export licence approvals for fisheries place obligations on State governments which are not always consistent with the Commonwealth – State legal framework or State government priorities.

The requirement for these processes and their attendant time frames can make it difficult for the Victorian Government to provide timely responses on critical issues. Furthermore, the unpredictability of the timelines around these processes have unintended economic implications on developing industries and businesses.

Legislative Transparency

The interpretation of the EPBC is a quite challenging as its structure is complex and this has been compounded by several sets of amendments in recent years. This makes it difficult for individuals to understand their responsibilities and rights under the EPBC, and so more clarity would be desirable.

The onus to refer an action rests with proponents who are responsible for the initial assessment as to whether an action may have a 'significant impact' on a matter of NES. The review should consider whether referrals are dealt with effectively under the EPBC, with respect to rates of compliance. There may be some means of helping proponents to comply with the EPBC at an early project stage.

In addition, where there are Guidelines under the EPBC, there should be a transparent public process for their development, making, amending and repeal. Affected government, community and industry groups should be formally notified. This is a basic requirement of transparent public administration.

3. IMPROVING IMPLEMENTATION OF THE EPBC

Clearer criteria

Criteria for defining thresholds in ecological communities need to be established based on principles that provide protection of the majority of a remaining community. With an increasing number of listed communities, this issue is likely to increase in the future.

At present, the Prior Authorisation and Continuing Use Exemptions (Sections 43A & 43B) have no term of expiration under the EPBC. The Victorian Government recommends that these provisions are reviewed to provide criteria under which the exemption may expire (e.g. uses that may have lapsed for a long period of time, or uses that involve complete removal of native vegetation).

Consistency with other legislation

The Victorian Government suggests that as part of this review process, the Commonwealth undertake a broadly based review of the treatment of biodiversity assets in other Commonwealth legislation to ensure that all Acts are consistent with the principles outlined in EPBC. A review of this nature would also identify where there are perverse incentives that lead to environmental harm, or where disincentives arise for bodies/groups undertaking positive environmental actions that promote biodiversity.

Where issues requiring conflicting environmental management coincide, improved integration of management actions would ensure that perverse outcomes do not arise. Conflicting environmental management can arise within matters of the EPBC, or between the Commonwealth and Victorian Government agencies. For example, EPA Victoria requires a nitrogen load reduction to Port Phillip Bay to maintain the health of the bay environment, but the EPBC requires the maintenance of nutrients to the RAMSAR listed Western Treatment Plant foreshore at the south end of the bay.

Concordance between Commonwealth and State Listing of Threatened Species and Communities

Victoria acknowledges the Commonwealth's recent efforts to investigate methods of aligning the EPBC and State threatened species lists. This has the potential to significantly reduce duplicated effort in this area. Further consideration should be given to harmonizing listing and conservation management (recovery) planning processes between the States and Commonwealth for species listed both nationally and at the State level. Victoria is happy to discuss potential for streamlining this process.

For example, Commonwealth recognition of State listing processes, particularly for species endemic to Victoria and situations where adjacent States (covering the entire distribution of a species) have listed that species with the same or very similar conservation status (e.g. as would be the case for the Plains Wanderer *Pedionomus torquatus* which is listed as Vulnerable by the Commonwealth, Endangered in NSW and SA, and Critically Endangered in Victoria). In addition, the Commonwealth could also streamline the nomination process by recognition of a State's adjustment to the conservation status of a species.

Nomination procedure for listing Threatened Species and Communities

The transparency of the process for nominating and listing threatened species and communities should be increased. Further, the nomination process is very rigid and could be made faster and more flexible. Victoria is happy to discuss potential for streamlining this process.

The Victorian Government would support provisions for emergency listing of species and threats (such as invasive species); however, any provisions for emergency listings should include a clear and transparent process which includes opportunities to review or appeal the listing.

The current approach to defining ecological communities, identified for nomination, does not align well with contemporary practices (e.g., Communities that are defined using dominant tree species, such as that for White Box-Yellow Box-Blakely's Red Gum Grassy Woodland and Derived Native Grassland). Consequently, areas that should be identified as part of a listed community are omitted, resulting in poor protection overall protection of that community. This shortcoming is particularly evident during preliminary assessments under the EPBC when confusion as to the status of a proposed work site results in poor environmental or economic outcomes. The recommended alternative is to classify these communities based on a nationally recognised and accepted floristic analysis.