



CONSERVATION COUNCIL
OF WESTERN AUSTRALIA INC.

The Secretariat
Independent Review of the EPBC Act 1999
GPO Box 787
CANBERRA ACT 2601

19 January 09

RE: INDEPENDENT REVIEW OF THE EPBC ACT 1999

Please find attached a submission prepared by the Conservation Council of Western Australia to the above review.

Thank you for the opportunity to comment on the Review.

Yours Sincerely

Piers Verstegen
Director



CONSERVATION COUNCIL

OF WESTERN AUSTRALIA INC.

SUBMISSION TO THE 2008 INDEPENDENT REVIEW OF THE EPBC ACT 1999

INTRODUCTION

The Conservation Council (WA) is the states peak body for community-based environment groups. It represents 95 affiliate organisations covering a diverse range of environmental interests.

PERFORMANCE OF THE EPBC ACT IN WESTERN AUSTRALIA

Lack of Environmental Monitoring

CWA submits that it is impossible to assess the effectiveness of the EPBC act as well as numerous other policy and legal instruments aimed at environmental due to the absence of information on 'real world' ecological outcomes.

The effectiveness of conditions placed on projects granted approval by the Commonwealth under the EPBC Act are essentially unknown as there is no effective strategic or post-approval project-related monitoring. This includes the protection of threatened and migratory species, threatened communities, wetlands of international importance, national heritage and world heritage areas. This is partially the result of the dependence on State Governments to monitor the status of the environment and the populations of threatened or migratory species and partly the result of the failure to set 'outcomes-based' Ministerial Conditions.

Similarly, it is impossible to make an informed comment on the effectiveness of environmental funding programs such as GreenCorps, Caring for Country, Environmental Stewardship, Landcare and so on because there has been no accessible assessment of the biophysical outcomes of this expenditure in relation to management objectives.

The National Audit 2008 Audit Report ('The Conservation and Protection of National Threatened Species and Communities', 2006-7. Performance Audit, Australian National Audit Office 2007) did not address the real world, bio-physical outcomes from the application of the EPBC Act, instead focusing on 'administrative' efficiency.

Recommendation:

The Commonwealth Government undertake a through scientific Australia-wide environmental assessment process to establish baseline information, and then conducts regular (at least every 3 years), thorough published scientific audits against this baseline.

Failure to Protect Threatened Species

What we do know in Western Australia is that EPBC Act has been ineffective in preventing the accelerated loss of threatened species habitats in the South-West Region, particularly for the Ring-tailed Possum and Carnaby's Black Cockatoo. It has also been ineffective in protecting one of the nation's most important refuges for threatened medium-weight range mammals on Barrow Island or to protect the nesting habitat of Flat-backed Turtles from the same offshore gas development. The consequences of cumulative habitat loss on threatened species populations in the south-west of the State have not been monitored or quantified, but it is likely that many species have become more threatened due to the cumulative impact of numerous small decisions under the EPBC Act.

An area where the Commonwealth has had some effective influence over the State has been through forcing the strategic environmental assessment of WA fisheries using the *Wildlife Protection (Regulation of Imports and Export)* provisions which were incorporated as Part 13A of the EPBC Act. Unfortunately the long-term value of the Sustainable Fisheries Assessments is likely to be compromised by the lack of monitoring, verification and review capacity.

At this stage CCWA cannot identify any specific examples of the EPBC Act having changed the risk profile for threatening process such as land-clearing (which is probably accelerating in WA invasive species or climate change in this State).

Use of Offsets

The offsets applied to some of these projects are unlikely to have any material impact on the populations of threatened species. Some measures such as the translocation program for Ring-tailed Possums are known to have failed. Offsets appear to be the main instrument the Commonwealth is applying to mitigate impacts on threatened species. CCWA submits that this is a fundamentally unsustainable approach to environmental protection and that offsets must be seen as a measure of last resort only.

Recommendation:

The Commonwealth Government adopt a decision-making hierarchy for the protection of environmental assets which places offsets as a policy tool of last priority only.

Constitutional Basis for Environmental Protection

CCWA notes that the Commonwealth Government is constrained by the powers available to it under the Australian Constitution which is at times poorly suited to effective control and governance of environmental impacts.

CCWA notes that the Howard Government exercised a broad interpretation of the Constitution in non-environment related areas, notably its use of the corporate affairs power in relation to decisions and legislation on industrial relations.

There is likely to be considerably more scope for Commonwealth intervention in biodiversity conservation and other environmental management issues that has been seen to date.

CCWA submits that there is a strong case for significantly increased Commonwealth involvement in environmental matters under broadly interpreted constitutional powers. The need for this intervention derives from numerous examples of failure by States and Territories to adequately protect the environment, including as a result of a reluctance to bring to bear effective policy instruments to protect the environment and / or to allocate sufficient resources to environmental protection and restoration.

Recommendation:

Where greater levels of environmental protection or more effective governance of threatening processes is likely to result, there is a strong case for significantly increased Commonwealth Government intervention under broadly interpreted constitutional powers.

Scope of the Act

There are a number of areas where State-based approaches to environmental matters have been clearly inadequate to meet national objectives and international obligations.

Although the State's control land use planning and natural resource management in their jurisdictions, it may be beneficial if the Commonwealth conducted strategic (technical) assessments of the sustainability of the natural resource management regimes in each of the bio-regions. This would be a far more rigorous approach than the inter-subjective 'scattergun' methodology for NRM that has developed around NHT funding.

The exemption from the EPBC Act of actions under Regional Forest Agreements needs to be removed due to the failure of these agreements to protect biodiversity (see analysis in CCWA submission to the Senate Inquiry on the EPBC Act).

Recommendations

The exemption from the EPBC Act of actions under Regional Forest Agreements should be removed due to the failure of these agreements to protect biodiversity

New matters of national significance should be incorporated into the Act, including

- ***Greenhouse emissions for any action exceeding a defined threshold***
- ***Water extraction, particularly where catchments and resources straddle State boundaries,***
- ***Actions involving land – clearing over prescribed thresholds.***
- ***Actions involving the introduction of genetically modified organisms.***
- ***Commonwealth marine species in State waters.***

Assessments and Approvals

Assessments under the EPBC Act lack the transparency and accountability available under Western Australian State environmental protection legislation. In general there is little interaction between the agency and respondents with respect to the conduct of an assessment and no Ministerial accountability until it is too late and a decision has been made.

Recommendation

Assessment and approval processes under the EPBC Act should be improved by;

- a) Opening the process to 3rd party referrals to ensure the Commonwealth is made aware of potentially threatening actions.*
- b) Conducting an open formal risk-assessment process to determine which proposals should be deemed 'controlled actions' and for what Matters of National Significance (MNS).*
- c) Opening the process to 3rd party appeals against controlled action determinations.*
- d) Publishing the outcomes of bilateral and scoping negotiations with respect to the assessment of MNS.*
- e) Publishing the Departmental advice to the Minister.*
- f) Opening the process to 3rd party appeals against the Departmental advice.*
- g) Removal of the threat of court costs on community organizations as a major disincentive to challenging Ministerial decisions in the Federal Court.*

Protection of Biodiversity

The unfortunate reality is the rate of environmental degradation in Australia is rapidly overcoming our knowledge of biodiversity and ecological processes and the rate at which species are becoming threatened will outstrip any listing process. The listing process does little more than create a 'threatened species industry'. Even where there are recovery plans in our experience their implementation has either been under-resourced or not resourced at all.

The basic unit for biological conservation is the local inter-breeding population, not species on a continental scale. Conservation action needs to take place at the landscape / ecosystem scale. The ultimate consequence of rapid climate change is that the vast majority of species will become threatened and the rest will potentially become pests.

Faced with these realities the EPBC Act should perhaps take a different approach. This might involve the strategic bio-diversity assessment of each of the nation's terrestrial and marine bio-regions. The outcomes for these strategic biodiversity assessments could be over-arching (i.e. binding on the States), measurable, ecological objectives that would increase the probability of protecting all the biodiversity in each region and ecosystem function. This is probably the only viable approach to nature conservation in a climate change world.

Recommendation:

The Commonwealth Government consider undertaking a process of strategic biodiversity assessment of each of the nation's terrestrial and marine bio-regions to establish measurable, ecological objectives for the protection of ecosystem function, with outcomes binding on State and Territory Governments.

Protected Areas

The identification and design of the protected area system should be based on strategic biodiversity assessment (see Biodiversity).

Compliance and Enforcement

The compliance and enforcement capacity of the Commonwealth within the States has clearly been negligible. Even where cases had a strong probability of succeeding there has evidently been no political will to pursue them. Under those circumstances there is clearly no reason why any proponent should take the EPBC Act seriously and most don't.

Compliance and enforcement depends on setting technically sound (measurable), auditable and legally enforceable outcomes-based Ministerial Conditions. Few such conditions on EPBC Act approvals appear to meet those requirements. Long-term compliance and enforcement bilaterals need to be developed with the States pursuant to all bilateral assessments.

Recommendation:

Long-term compliance and enforcement bilaterals should be developed with the States pursuant to all bilateral assessments.

Summary of Recommendations

- 1) ***The Commonwealth Government undertake a thorough scientific Australia-wide environmental assessment process to establish baseline information, and then conducts regular (at least every 3 years), thorough published scientific audits against this baseline.***
- 2) ***The Commonwealth Government adopt a decision-making hierarchy for the protection of environmental assets which places offsets as a policy tool of last priority only.***
- 3) ***Where greater levels of environmental protection or more effective governance of threatening processes is likely to result, there is a strong case for significantly increased Commonwealth Government intervention under broadly interpreted constitutional powers.***
- 4) ***The exemption from the EPBC Act of actions under Regional Forest Agreements should be removed due to the failure of these agreements to protect biodiversity***
- 5) ***New matters of national significance should be incorporated into the Act, including:***
 - a) ***Greenhouse emissions for any action exceeding a defined threshold***
 - b) ***Water extraction, particularly where catchments and resources straddle State boundaries,***
 - c) ***Actions involving land – clearing over prescribed thresholds.***
 - d) ***Actions involving the introduction of genetically modified organisms.***
 - e) ***Commonwealth marine species in State waters.***

- 6) *Assessment and approval processes under the EPBC Act should be improved by;*
- a) *Opening the process to 3rd party referrals to ensure the Commonwealth is made aware of potentially threatening actions.*
 - b) *Conducting an open formal risk-assessment process to determine which proposals should be deemed ‘controlled actions’ and for what Matters of National Significance (MNS).*
 - c) *Opening the process to 3rd party appeals against controlled action determinations.*
 - d) *Publishing the outcomes of bilateral and scoping negotiations with respect to the assessment of MNS.*
 - e) *Publishing the Departmental advice to the Minister.*
 - f) *Opening the process to 3rd party appeals against the Departmental advice.*
 - g) *Removal of the threat of court costs on community organisations as a major disincentive to challenging Ministerial decisions in the Federal Court.*
- 7) *The Commonwealth Government consider undertaking a process of strategic biodiversity assessment of each of the nation’s terrestrial and marine bio-regions to establish measurable, ecological objectives for the protection of ecosystem function, with outcomes binding on State and Territory Governments.*
- 8) *Long-term compliance and enforcement bilaterals should be developed with the States pursuant to all bilateral assessments.*