



The United Bird Societies of South Australia Inc.

An affiliate of the Avicultural Federation of Australia Incorporated.

Executive Officer

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Patron

His Excellency
Rear Admiral Kevin Scarce AO CSC RANR
Governor of South Australia

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

Dear Dr. Hawke

Thank you for the extension of time and the opportunity to provide comment on the review of *The Environment Protection and Biodiversity Conservation Act 1999*.

(A) Who are we?

The United Bird Societies of South Australia (**UBSSA**) is an incorporated body which represents bird keepers in South Australia. All known Bird Clubs within South Australia - numbering 30 - are affiliated with UBSSA.

The UBSSA is managed by a Council of 9 persons elected by the affiliated Clubs. A Councillor must be a member of an affiliated Club to be eligible for appointment to the Council. Regular meetings (as well as Special Meetings when required) of delegates from affiliated Clubs are held where issues of concern, policy directions and information distribution issues are considered.

It can be seen from this very broad outline that UBSSA is the primary avian body in South Australia and is the appropriate body to develop and submit submissions on behalf of South Australian bird keepers.

The UBSSA has been functional for 30 years and over that time has developed good working relationships with authorities in South Australia where common sense approaches to issues have generally resulted in favourable outcomes for all parties. We are justifiably proud of that record.

We understand and accept that the Review will be looking at aspects of the EPBC Act which are beyond our range of interest and capacity to contribute in any worthwhile manner. For example, our bird keeping interest is a minute part of the overall scope of the Act and we feel that we are not qualified to offer comment on the following items in the Terms of Reference:

- 2 a *the operation of the EPBC Act generally;*
- b *the extent to which the objects of the EPBC Act have been achieved;*
- c *the appropriateness of current matters of National Environmental Significance*

We would however wish to submit some points of concern regarding **Exotic Birds** under the item:

- 2 d *the effectiveness of the biodiversity and wildlife conservation arrangements.*

(B) The National Exotic Bird Registration Scheme (NEBRS)

Background

The following statement, inter alia, appears in the departmental website:

“What is legal possession of exotic birds?”

Anyone in possession of an exotic (non-native) bird that is listed under the Convention on International Trade on Endangered Species of Wild Fauna and Flora (CITES) or is not listed in Part 1 of the list of specimens suitable for live import under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) must be able to demonstrate the legal origin of specimen/s.

The EPBC Act regulates the possession of illegally imported species, including CITES listed species and regulated live specimens. The National Exotic Bird Registration Scheme (NEBRS) was established in 1996 and was discontinued in 2002. Since the closure of NEBRS bird keepers have been responsible for maintaining records or other evidence that an exotic bird in their possession has been legally obtained.”

The department raised concerns about smuggling issues and the recording of exotic birds in Australia again in 2005. From discussions it became obvious that the department held expectations that bird keepers were keeping records of breeding and trading exotic birds.

When NEBRS was closed in 2002 the department, by its own subsequent admission, has conceded that it **failed to notify** holders of exotic birds (and consequently any new holders of exotic birds after 2002) of the need for such holders to maintain *“records or other evidence that an exotic bird in their possession has been legally obtained.”*

Consequently, there exists a 6 year period from January 2002 until February 2008 where acquisitions, sales and any other movements of exotic birds may not have the supporting records now demanded (and in our view retrospectively demanded) by the department.

This is particularly the case for those persons who became owners of exotic birds for the first time during that 6 year hiatus period. Many exotic birds were bred and traded within that 6 year period and it is now quite unreasonable and impossible for all bird owners to be able to comply with the departments requirements as currently enunciated.

We refer to birds bred and traded during this 6 year period as being ***“black hole birds”***.

The EPBC Act Part 13A refers to the traceability of bird ***species***. The department operated the former NEBRS arrangement with required identification being at species level and in most cases not even ***sub-species*** were required to be separately recognised in the NEBRS requirements.

Since the revival of departmental interest in exotic bird recording from 2008, a new recording system has been promulgated in consultation with industry representatives but the department now requires ***individual birds*** to be traced back to the NEBRS records.

This is a farcical requirement on at least two counts:-

firstly, that no requirement ever existed under NEBRS arrangements for ***individual birds*** to be traceable and,

secondly, the 6 year gap in recording at the ***species*** level make the requirement un-workable even at a species level – let alone at the individual bird level.

We believe that in order to establish sensible non-varying reporting requirements, it is important to define reporting needs and to incorporate minimum requirements into legislation to avoid such difficulties arising from change in departmental administrative staff and their attitudes.

The very nature of public service operations requires frequent staff movements through out the governmental system. We believe the industry should be protected to the greatest extent possible from the impact of these systemic changes over which we have no influence but which can be significantly affected by.

Whilst UBSSA has, and continues to openly oppose smuggling of wildlife into this country, there appears no feasible option but to incorporate a “starting line” into the Act – i.e. a fixed date which provides an unambiguous (to all parties) point of time for species to be recognised as being in Australia and which, therefore, should be appropriately recorded henceforth.

Depending upon the date nominated, we recognise that nominating a fixed date may effectively provide an amnesty to specimens which could have been smuggled into the country during the 6 year period in question but it would provide a legislated base for the future.

What should that date be? We believe there are two options to consider:

- (i) The date of NEBRS cessation - January 2002.

As at that point in time, a schedule of species known to be in Australia was prepared and was accepted by the department and other parties, including UBSSA, as being a comprehensive list. The understanding thereafter was that if a species was not on that schedule then such species was deemed to have been introduced into Australia subsequent to the cessation of NEBRS. There was room for negotiating with the department should special circumstances be evident.

The nomination of January 2002 as being the focal date has distinct advantages considering the availability of the schedule of birds known to be in Australia at that point of time.

What becomes a significant problem is the “black hole birds” referred to above.

Many innocent bird keepers are holding birds that currently cannot be *individually* traced but the *species* held were included in the January 2002 schedule. Some of these bird keepers may not have been in the hobby in January 2002 and as such were unaware of any recording requirements of the department – as we all were – in respect of exotic birds. The real impact of this is considered under the following Section of this submission - “Reverse Onus of Proof”.

Subject to other considerations under “Reverse Onus of Proof” January 2002 is our favoured option.

- (ii) The date of proclamation of amendments to the EPBC Act in the future e.g. 1 July 2010.

We believe that the designation of a date into the future would give notice to smugglers to bring in birds until that date when all birds then in Australia would then be declared “legal” - i.e. almost advising them to bring in as many birds as they are able before that date.

This is not a favoured option.

Recommendations

The UBSSA makes the following recommendations regarding the management and recording of exotic birds.

1. That an amendment be made to the EPBC Act to provide a specific focal date for the purpose of assessing the legality of exotic species of birds in Australia.
2. That the date proclaimed under Recommendation 1. above be the date upon which NEBRS ceased to function - i.e. January 2002.

3. That the schedule of exotic birds known to be in Australia at the cessation of NEBRS in 2002 be enshrined into the EPBC Act as the benchmark list for exotic birds that may be legitimately held in Australia.
4. That an exotic birds reporting guideline statement be included in a revision of the EPBC Act and that the outline parameters of such statement be prepared on a realistic data base for species reporting and prepared in consultation with birdkeeper representatives.

(C) Reverse Onus of Proof

The EPBC Act contains “reverse onus of proof of ownership” provisions. We understand that this provision is not unusual in legislation generally and whilst we accept the concept in principle, we wish to draw the Review Panel’s attention to difficulties that arise for our bird keepers.

In part (B) above reference is made to “black hole birds” which are exotic birds which have been bred and / or traded during a period from January 2002 until February 2008 – a period when recording the movement of exotic birds was not maintained after the department closed the National Exotic Bird Registration Scheme (NEBRS). The department failed to advise bird keepers of the ongoing need to maintain proper records and it only became apparent in 2005 that such a requirement still existed.

A bird keeper may conceivably be unable, with the best of effort, to now produce documental evidence of proof of his ownership of birds. This of course puts his birds liable to seizure under Sections 444A to 444H of the Act.

We believe there is a case for a review of the seizure provisions of the Act when it is possible that the failure of the department to adequately inform bird keepers of the departmental requirements has been a factor in the owner’s inability to produce documentation to the satisfaction of the departmental officers.

In addition to the possibility of unfairness of seizures when considering all factors, the return of birds to rightful owners under section 444D appears to be an exercise beyond the capacity of most bird keepers to achieve. Failure to take action within 30 days of seizure (section 444A) or within 30 days of notice being given under section 444B of the Act results in automatic forfeiture of the birds.

Section 444 (4) sets out that in the result of a bird keeper being unable to continue an action against the seizure – the birds are forfeited to the Commonwealth.

With limited resources to fight the department in Court where we assume the department can draw upon sufficient resources for their purpose the bird keeper will be forced to abandon recovery attempts and be forced to forfeit his birds.

The department would only have to appeal an unfavourable (to them) Court decision to cause the bird keeper another round of expense and thus soon be bereft of resources to fight. Forfeiture then is the only outcome.

It is possible to imagine a situation whereby an Administration function in the department has made it very difficult for clients but the Enforcement function can only act in accordance with the written provision of the Act – even if scenarios have been dubiously created by Administration inadequacies.

We are concerned that there appear to be limited processes available whereby reviews of individual situations can be undertaken other than by going directly into a Court process.

The uncertainty associated with ownership of exotic birds has resulted from the departments' unsatisfactory communication of its reporting requirements back in 2002 at the cessation of NEBRS. In our view the overall scenario regarding proof of ownership of exotic birds is so muddled that it has now become essential for a mediation process to be established with an independent arbiter in order that individual situations can be assessed. Such a facility should be an option available to bird keepers upon call before being forced into Court procedures to establish ownership rights.

The following recommendation is offered with the intent to reduce the immediate impact of the "reverse onus of proof" principle upon exotic bird keepers under the EPBC Act without impacting upon the principle across the Act generally. We believe the suggested arbitrary procedure needs to be included in the Act to establish a defined clarity for all parties.

Recommendation

It is recommended that the EPBC Act be amended to include an optional intermediate independent arbitration function available upon call to bird keepers to consider all circumstances relating to the seizure of exotic birds by the department.

Once again, we thank you for the opportunity to comment on this review. If there is any further information or clarification we can provide please do not hesitate to contact us.

Yours sincerely

Brian Reichelt

Brian Reichelt
Executive Officer
The United Bird Societies of South Australia Inc.
18th January 2009