Nature Conservation Council of NSW
The voice for the environment since 1955

Level 2, 301 Kent Street, Sydney NSW 2000
Ph: 02 9279 2466 **Fax:** 02 8026 8301
Email: ncc@nccnsw.org.au
Web: www.nccnsw.org.au
ABN: 96 716 360 601

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Independent Review of the EPBC Act
GPO Box 787
Canberra ACT 2601
Australia
epbcreview@environment.gov.au

Dear Dr Allan Hawke,

Re: **Independent review of the *Environment Protection and Biodiversity Conservation Act 1999***

Opening Comments:

The Nature Conservation Council of NSW (**the Nature Conservation Council**) welcomes the opportunity to comment on the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**the Act**).

The Nature Conservation Council is the peak environment organisation in NSW. We work closely with 120 member groups, local communities, government and business to ensure a positive future for our environment.

As Australia's major piece of federal environmental legislation, the Act is potentially very powerful, and represents an improvement upon previous legislation. The Act takes Australia closer to the fulfillment of its many international environmental obligations. However there are a range of weaknesses in the Act and its implementation that reduce Australia's ability to fulfill these obligations. The continued environmental degradation and loss of biodiversity in Australia is testament to the partial effectiveness of the Act. The Independent Review of the Act is therefore an opportunity to improve upon the conservation of Australia's unique natural heritage. Here we outline a number of areas of concern and potential improvements that need to be considered in the review of the Act.

1. **Scope of the Act** (Q1)

Objects of the Act and whether they are appropriate to the Commonwealth's role in environment protection and management (Q1a)

<u>The Commonwealth's role in environment protection and management</u>

We believe that the Commonwealth's role in environmental protection and management should be expanded as the potential threat of climate change increases. We recommend that the Review should give consideration to whether the Act has the capacity to adapt to the potential rate of climate change. This is especially important given that some climate change impacts may become a reality at the time that the next review of the Act is due

(in 2018). For example, "by 2020, significant loss of biodiversity is projected to occur in some ecologically rich sites, including the Great Barrier Reef and Queensland Wet Tropics".[1]

The terms of reference for this Review do not appear to include the possibility of a wholesale revision of the Act in order to address climate change. On that understanding we have provided specific suggestions for more inclusion of climate change mitigation strategies. We would also like to take this opportunity to make some observations about adaptation issues – based upon the national conference on Biodiversity and Climate Change 'Saving a Sunburnt Country: the challenges of species adaptation in a heating land' that we hosted in November 2008:

- it appears that the traditional approach of conservation – where efforts have been made to preserve individual species in specific areas/landscapes does not address the fact that it is very difficult to predict how species and ecosystems will respond to climate change
- the national conservation approach may need to change to thinking about how opportunities can best be provided for as many different species as possible to survive climate change

In light of these observations it is important to begin a public discussion about broad changes to our national conservation approach that may be necessary to address the reality of climate change.

One suggestion for commencing this discussion would be that the Review provides an early recommendation that the Biological Diversity Advisory Committee (**BDAC**) has its terms of reference and membership updated (to include experts on biodiversity and climate change), and meets frequently in order to give input to the Review with respect to biodiversity and climate change. This input may be able to be included in the Review outcomes to the extent permitted by its terms of reference.

Once the results of the Copenhagen climate change negotiations are known the new BDAC may be able to recommend a process for making up to date projections about emissions and their potential impacts on biodiversity.

Such a committee may also need to consider the need for more frequent review of the Act.

<u>Objects of the Act</u>

The objects of the Act should be strengthened. We strongly recommend that the word 'ensure' should be used for subsections (a) – (ca). For example where the object is to 'provide' or 'promote' this should be changed to 'ensure' the protection of the environment.

Matters of National Environmental Significance (Q1c)

The Act as it currently stands is limited by the listed Matters of National Environmental Significance (**MNES**), as there are some significant gaps that prevent effective

[1] Intergovernmental Panel on Climate Change, 'Climate Change 2007 Synthesis Report', p.50 http://www.ipcc.ch/ipccreports/ar4-syr.htm (viewed 28 January, 2008)

Commonwealth engagement in environmental issues.[2] Some recommended new MNES are outlined below:

Climate Change and Greenhouse Gases

The lack of an effective MNES for projects involving major greenhouse gas emissions is a massive gap in the Act.[3] Despite the Australian Governments *State of the Environment Report (2006)* (**SoE)** acknowledging climate change as a reality, the former Howard Government was clearly reluctant to let environmental issues (even those regarding greenhouse gases) stand in the way of business interests.[4] We remain optimistic that the Rudd Government will be more sympathetic to climate change objectives. However the continuing approval of high-emission developments such as coal mines and aluminium smelters without adequate consideration of greenhouse gas emissions is a testament to the failure of the Act to regulate the impact of emissions. For example, the Moolarben Coal Mine proposal in NSW (EPBC 2007/3297) was approved by the Commonwealth with inadequate attention given to greenhouse gas emissions.

Land Clearing

Similarly, land clearing results in biodiversity loss, salinity and poor water quality[5], as well as greenhouse gas emissions but it is not adequately recognised in the Act. Although land clearance is included in the list of Key Threatening Processes (**KTPs**) this has not been sufficient to stem the significant rate of legal and illegal land clearing occurring across Australia. This is a grave concern, as land clearing was identified as the largest pressure on biodiversity in the SoE 2006. The Australian Network of Environmental Defender's Offices (**ANEDO**) suggested a three part land clearing trigger in their submission to the Senate Inquiry into the operation of the Act in September 2008. The Nature Conservation Council supports this recommendation.

Water Extraction

Australia's water crisis is becoming increasingly urgent under prolonged drought, the likely impacts of climate change and the dire health of the Murray Darling Basin. This needs to be more adequately reflected in the Act. A water trigger for developments that are likely to have an impact on groundwater or river systems, and developments involving the use of large volumes of ground or surface water would help to ensure the health of Australia's river and groundwater systems. This could also be used more proactively to allow the release of environmental flows to areas in need.

Invasive Species

The Nature Conservation Council recommends the adoption of an invasive species trigger in order to improve Australia's management of invasive species. Currently invasive species are addressed through KTPs and Threat Abatement Plans. Yet some developments, such as plans of graziers to plant a range of invasive pasture plants can proceed without assessment despite the threats such actions pose to MNES. We agree

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[2] Gumley, 'Calls for New Matters of National Environmental Significance,' (2005) *National – Environmental Law Revue*, Autumn

[3] McGrath, C. 'Swirls in the stream of Australian environmental law: Debate on the EPBC Act,' (2006) EPLJ 165.

[4] Macintosh, A. & Wilkinson, D. 'Evaluating the success or failure of the EPBC Act; A response to McGrath' (2007) 24 EPLJ 81.

[5] Bates, G. *Environmental Law in Australia 6th Edition* (2006) LexisNexis, Butterworths Sydney.

with ANEDO's previous recommendation to the Senate Inquiry into the operation of the Act in September 2008 that an invasive species trigger be adopted.

Indirect Impacts (Q1e)

It is a significant flaw of the Act that it does not adequately address indirect impacts or cumulative impacts. The *Minister for the Environment and Heritage v Queensland Conservation Council Inc* (2004) 139 FCR 24; [2004] FCAFC 190; 134 LGERA 272 (the Nathan Dam Case) did show that there is some scope for consideration of indirect impacts under the EPBC Act, when it was found that the potential impacts of cotton irrigation were indirect impacts of the dam.[6] However, this protection is currently not strong enough to guarantee sufficient consideration of indirect impacts. For example, in the *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch v Minister for the Environment and Heritage & Ors* [2006] FCA 736 (Isaac Plains and Sonoma Coal Projects Case), it was ruled that adverse impacts from the burning of coal produced by the projects did not pose a significant threat to MNES. Hence the Act is yet to provide protection from cumulative impacts of activities such as the burning of coal, despite links to climate change.

Exemptions

There are exemptions in the legislation which do not abide by the Act's objectives. The Nature Conservation Council is particularly concerned with the exemption in section 38m Regional Forest Agreements (**RFA**). RFAs enable forestry operators to bypass or ignore threatened species and ecological community protection provisions[7] and with land clearing unavoidably linked to biodiversity loss, we feel that these exemptions are unacceptable.[8] We strongly urge that the exemptions for RFAs be removed.

2. Decision Making Under the Act

Ministerial Discretion (Q38)

The Nature Conservation Council is concerned that for the best environmental outcomes to be achieved under the Act there is too much reliance upon the discretion of the Minister. Public confidence in the decision making process of the Minister would be augmented by reducing the scope for the exercise of the Minister's discretion – thereby guaranteeing that environmental considerations can be seen to be paramount. There are instances where the public has had cause to question how the Minister's discretion is being used. For example, in the *Wielangta Forest* Case the Commonwealth intervened to argue for an exemption of Regional Forest Agreements from the Act, downplaying the importance of the associated environmental impacts.[9]

Merits Review (Q42)

The Nature Conservation Council would hope that the Act will be revised to provide more scope for merits review under the Act. We recommend that all decisions made by the Minister under the Act should be reviewable on their merits.

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[6] McGrath, C. 'Federal environmental laws consider direct and indirect impacts of an action' (2006) accessed from http://www.envlaw.com.au/nathandam6.pdf (viewed 14/12/08)
[7] Chapple, S. 'The Biodiversity and Conservation Act, 1999 (Cth): One Year Later,' (2001) 18 EPLJ 6.
[8] Macintosh, A.'Why the Environment and Biodiversity Conservation Act's referral, assessment and approval process is failing to achieve its environmental objectives,' (2004) 21 EPLJ 288.
[9] Godden, L. & Peel, J. 'The Environment Protection and Biodiversity Conservation Act 1999(Cth): Dark Sides of Virtue' (2007) *Melbourne University Law Review*: 31 pp106-145

3. Assessments and Approvals

Public Participation and Transparency (Q5)

The Nature Conservation Council believes it is very important for the standing provision (section 487) to be retained in its current form. Despite this provision giving the right to challenge decisions under the Act to relevant individuals and environmental organisations, it is difficult for such groups to litigate because the usual rule as to costs is a significant barrier. We agree with ANEDO's recommendations made in their submission to the Senate Inquiry into the operation of the Act in September 2008, including 'a retention of the current standing provisions made in the Act, and 'the incorporation of provisions that alleviate adverse costs upon potential environmental public interest litigants'.

The Threatened Species Scientific Committee has rejected some nominations for listing of species or communities due to the fact that information and descriptions contained in nominations were inadequate or insufficient.[10] While we acknowledge nominations should be made in an organised and consistent manner, we would recommend that where a nomination has been rejected for the reasons listed above, environment community groups or other interested parties should be given guidance on how they can submit a more appropriate nomination.

Bilateral Agreements (Q6)

Any further development of approval bilateral agreements would not be consistent with the principle that the Commonwealth is responsible for matters of national environmental significance. There is a risk that this type of approval process could be influenced by political agendas within individual states.

Strategic Assessments and Cumulative Impacts (Q8)

The Act fails to address the cumulative impacts of developments being assessed. Unrelated developments that may impact one critical habitat are assessed separately without consideration of their combined threat to local or national biodiversity and matters of national significance.[11] While each individual development may not be considered a "significant impact", holistic examination reveals their cumulative significance to be very pronounced.[12] This is particularly relevant to Cumberland Plains Woodland which while listed as a Threatened Ecological Community continues to be degraded.

While Strategic Assessments and bioregional plans hold the potential for the greater inclusion of cumulative impacts, this is yet to be shown. There is also the risk that such mechanisms focus more on avoiding the need for separate approvals than upon cumulative impacts, and hence lead to poor environmental outcomes. The requirements for Strategic Assessments as outlined under Part 10 of the Act are not specific enough about the approval process, and so do not guarantee adequate scientific assessment. The majority of Strategic Assessments to date have been Fisheries assessments, and there is concern that these have been subject to industry pressure. For example, the Southern Bluefin

[10] for example: *Six key threatening processes of rivers and streams*, http://www.environment.gov.au/biodiversity/threatened/ktp/streams.html (viewed 11.09.08)
[11] Macintosh, A.'Why the Environment and Biodiversity Conservation Act's referral, assessment and approval process is failing to achieve its environmental objectives,' (2004) 21 *EPLJ* 288.
[12] Chapple, S.'The Biodiversity and Conservation Act, 1999 (Cth): One Year Later,' (2001) 18 *EPLJ* 6.

Tuna Fishery was approved in February 2008 despite previous advice from the TSSC that the Southern Bluefin Tuna be listed as endangered.[13]

The review therefore needs to examine how to ensure that Strategic Assessments are based upon robust and comprehensive environmental assessment. Clarification is needed on length of accreditation of instruments, public participation, and revocation of approval, as well as how to ensure that large projects do not slip through loopholes without environmental impact assessment. Strategic assessments should also be included in the list of decisions in which the precautionary principle must be considered (section 391).

Offsets

The current rate of use of offsets as part of the approvals process (section 134) is unacceptable and the Nature Conservation Council believes that offsets need to be eliminated, or at least dramatically reduced and defined. There is little scientific evidence of the success of offsets, and there are numerous case studies indicating the shortcomings and short-term planning of offsets. Moreover, the idea that impacts upon unique species and areas can be offset is deeply concerning, and contravenes the first object of the Act to 'provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance' (section 3(1)(a)).

4. Biodiversity

A Framework for Biodiversity Conservation (Q9)

While the conservation of endangered and threatened species is a vital part of biodiversity conservation, the Nature Conservation Council is concerned that the Act is unduly limited to a focus upon individual species. The inclusion of threatened ecological communities and key threatening processes does allow for a somewhat broader concept of biodiversity to be addressed. The numbers of threatened species and communities are not the only indicator of biodiversity. The science may also define it as species richness, species endemism, abundance and evenness.[14] Biodiversity may be extended to genetic diversity, evolutionary potential and ecosystem function.[15] Key aspects of scientific biodiversity (such as ecological processes and interrelationships) have simply not translated into the law of the Act.[16] The Act places a heavy emphasis on large, charismatic, threatened species conservation. There is a very low listing rate of invertebrates, non-vascular plants and micro-organisms[17] and it is these small, cryptic life forms that make up the vast majority of the world's species diversity. The review therefore needs to explore more holistic approaches to biodiversity conservation.

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[13] Southern Bluefin Tuna (*Thunnus maccoyii*) Advice to the Minister for the Environment and Heritage from the TSSC on Amendments to the list of Threatened Species under the *EPBC Act 1999*, 7 September 2005, http://www.environment.gov.au/biodiversity/threatened/species/southern-bluefin-tuna.html (viewed 5/1/09)

[14] reviewed in: Dawson, F. 'Analysing the goals of biodiversity conservation: scientific, policy and legal perspectives' (2004) 21 *EPLJ* 6.

[15] Williams PH, Gaston KJ and Humphries CJ, "Do Conservationists and Molecular Biologists Value Differences in Organisms in the Same Way?" (1994) 2 *Biodiversity Letters* 67 at 70

[16] Dawson, F. 'Analysing the goals of biodiversity conservation: scientific, policy and legal perspectives' (2004) 21 *EPLJ* 6.

[17] Macintosh, A. 'Why the Environment and Biodiversity Conservation Act's referral, assessment and approval process is failing to achieve its environmental objectives,'(2004) 21 *EPLJ* 288.

One way a broader concept of biodiversity could be enacted would be to allow for the listing of keystone species. For example, the list of marine species (section 248) does not include any commercially targeted sharks, which are very important keystone species of marine ecosystems in Australia and further afield. If more keystone species such as sharks can be protected under the Act, Australia would be showing great leadership in both marine and terrestrial conservation.

An emphasis upon protecting functional ecosystem processes would also help to approach biodiversity in a more holistic manner. This would be especially important under the challenges of climate change, whereby functional ecosystems will be most resilient to changing climate and threats such as from invasive species. Protecting a diversity of habitats at multiple scales, rather than focussing upon individual species, has also been identified as an important strategy for maximising resilience to climate change.[18]

The use of adaptive management principles under the Act should also be explored by the review. This would bring the Commonwealth into line with best practice recommended by conservation biology and natural resource management approaches.

Listing Processes (Q10, 11)

While the listing process has effectively allowed for the listing of a large number of threatened species and communities, the Nature Conservation Council is concerned that political pressure can impede the listing of some species and communities. For example, in 2006 the Orange Roughy was listed as conservation dependent, a classification that gives no legal protection, due to pressure from the fishing industry. The listing of four ecological communities in the first year of the Act also ignited strong opposition from the farming lobby.[19] Since then, the number of new listings has been reduced to a trickle. The review should explore ways of reducing this political pressure, such as transferring decision making power to the Threatened Species Scientific Committee (**TSSC**).

The Nature Conservation Council is concerned about the inconsistency of listing approaches between terrestrial and marine species. In practice the different standing given to marine species has made it more difficult for marine species to be listed, partly due to pressure from the fishing lobby. This inconsistency should be rectified by making the listing process the same for both marine and terrestrial species.

The timeframe for decisions upon listing of new species or communities also needs to be examined by the review. At the moment, the process is taking too long, and a tighter timeframe, such as two years, should be included in the Act. For example, the Orange Roughy was nominated in June 2003, and a final decision was repeatedly delayed until December 2006.[20] Under the amendments of the Act made in 2006, decisions can now be delayed for up to five years. Such delays are unacceptable for species and communities that are likely to be in urgent need of protection or may become in need of protection if a development project (subject to the Act) is underway.

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[18] Dunlop, M.'Conserving biodiversity under climate change- reassessing objectives' (2008) Paper presented to conference, *Saving a Sunburnt Country? The challenge of species adaptations in a heating land* November 2008

[19] Benyon, N. Kennedy, M. A& Graham, A 'Grumpy Old Greenies – lament waiting lists, wasted opportunities and wayward pork barrelling in Australia's biodiversity programs,' (2005) presented at Environmental Defender's Office National Conference, May, 2005.

[20] Humane Society International 'Minister Delays Protection for Orange Roughy' (2006) Tasmanian Conservationist, Number 306.

Also, provision for emergency listings, such as exists under the NSW *Threatened Species Conservation Act*, should be made under the Act. This would be valuable for providing a fast response to new discoveries, events or disasters.

In order to assess nominations in a more timely manner, the Department of Environment, Water, Heritage and the Arts (DEWHA) and the TSSC need to be provided with additional resources. The precautionary principle should be more widely applied to ensure that incomplete knowledge does not delay the protection of species that are likely to be endangered.

The use of 'conservation themes' for each assessment period is a concern to the Nature Conservation Council. While this may encourage nominations from areas and ecosystems under particular threat, such as rivers and wetlands, it could also increase the chance of threatened species slipping through the gaps, or being delayed in the listing process. With the criteria for listing already specified by the EPBC Regulations, these conservation themes seem to be superfluous to the listing process, and merely a filter to reduce the number of nominations received. This again illustrates the need for more resources to be allocated to the listing process. The themes also place a significant limit upon the involvement of the public and the scientific community in the listing process.

Recovery Planning (Q18)

In our submission to the EPBC Amendments Act Inquiry of 2006, we expressed our concern about sections 267 and 269AA , under which recovery plans and threat abatement plans are no longer compulsory. These are vital tools for preserving biodiversity, and making them compulsory again would provide much more adequate protection for threatened species and communities.

Whether the Act provides an appropriate legislative framework for addressing Climate Change and other emerging pressures in the context of environmental protection and biodiversity conservation (Q19)

The new challenges that climate change will pose to biodiversity conservation constitute one of the most important issues that need to be addressed by the review of the Act.

As already discussed, the inclusion of a greenhouse MNES trigger is vital for expanding the Act to mitigate climate change. The adoption of protection of ecosystem functions and the use of adaptive management principles may also help to respond to the challenges of climate change.

Under climate change, invasive species are likely to be an either greater threat than they are now[21], and so this increases the imperative for the Act to adequately deal with invasive species. This is discussed further below.

Invasive Species

One of the major shortcomings of the Act has been a failure to adequately regulate the threat posed by invasive species. The Invasive Species Council outlined the inadequacies of the Act in this area in their submission to the Senate Inquiry into the operation of the Act in September 2008. The Nature Conservation Council shares their concerns, including:

[21] Low, T.'Climate Change and Invasive Species: A Review of Interactions' (2008) *Biological - Diversity Advisory Committee*, http://www.environment.gov.au/biodiversity/publications/pubs/interactions-cc-invasive.pdf (viewed 15/12/08)

- Import of exotic species into Australia: large numbers of invasive species are allowed into the country because they are already here, even though the continued import of these species exacerbates the existing problems they cause. Another problem is the automatic approval of new variants of species that are already present. This ignores the possibility that different variants are likely to have different invasive potential.
- Regulation of invasive species in Australia: there needs to be more federal coordination of invasive species regulation, as responsibility currently falls mostly to State agricultural departments, who have major conflicts of interest in relation to many invasive species, such as pasture plants. Section 301 of the Act already gives the federal government the capacity to regulate the trade and use of a list of invasive species. This power needs to be expanded upon, with regulations for its implementation.
- Management of environmentally harmful invasive species: although many invasive species are listed as key threatening processes (KTPs), there are many gaps. For example, no weeds are listed as KTPs, despite the huge threat they pose. Most Threat Abatement Plans for invasive species are in need of greater funding and improved implementation.

5. Indigenous Involvement (Q31-34)

It is important that this review of the Act investigates ways to increase the involvement and recognition of Indigenous people in decision making and management. The Centre for Aboriginal Economic Policy Research emphasizes the importance of Indigenous involvement:

> 'Indigenous people play a crucial role to the success of the EPBC Act. Indigenous ecological and local knowledge combined with scientific practice are essential tools in the sustainable management of much of remote Australia. This role is likely to grow owing to the challenges posed by climate change, the scarcity of fresh water resources, and associated biodiversity issues.'[22]

The Nature Conservation Council supports the above statement and any steps towards increasing indigenous involvement in conservation.

6. Compliance and Enforcement (Q35, 37)

The 2006 SoE measured the Act's effectiveness by the number of times the Act had been used. It has been suggested that the Act's effectiveness could also be measured by the low refusal rate, the unusually low number of referrals and the widespread non-compliance.[23] The Australian National Audit Office has found in the past that non-compliance and monitoring issues are major downfalls in the administration of the Act[24]. These issues must be addressed by establishing better funding to the DEWHA.[25] Further

[22] Altman, A., & Kerins, S.'Submission to the Senate Standing Committee on Environment, Communications and the Arts inquiry into the operation of the Environment Protection and Biodiversity Conservation Act 1999' (2008) *Centre for Aboriginal Economic Policy Research*: No. 13
[23] Macintosh, A. & Wilkinson, D.'Evaluating the success or failure of the EPBC Act; A response to McGrath' (2007) 24 EPLJ 81.
[24] 'Referrals, Assessments and Approvals under the *Environment Protection and Biodiversity Conservation Act, 1999*', Auditor-General Performance Audit Report No. 38, ANAO, 2002-2003.
[25] Benyon, N. Kennedy, M. A& Graham, A 'Grumpy Old Greenies – lament waiting lists, wasted opportunities and wayward pork barrelling in Australia's biodiversity programs,' (2005) presented at Environmental Defender's Office National Conference, May, 2005.

funding cuts will result in a reduction of enforcement and a subsequent erosion of the Act's power.[26]

7. A framework for the review (Q44)

The Nature Conservation Council commends the Commonwealth's commitment to review and reform of the Act. We look forward to seeing a review which takes our concerns into account and has a strong focus upon good environmental outcomes and principles of ecologically sustainable development while drawing upon comprehensive scientific research and public input.

Yours sincerely,

Cate Faehrmann
Executive Director

[26] McGrath, C. *Enforcement, Politics and the EPBC Act* (2001) a paper presented at a Queensland Environmental Law Association seminar in Brisbane, Australia (30 July 2001)