

17 September 2008

The Secretary
The Senate Standing Committee on Environment, Communications and the Arts
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Minister,

Re: Inquiry into the operation of the *Environment Protection and Biodiversity Conservation Act 1999*

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

The Nature Conservation Council of NSW is the peak environment organisation in NSW. We work closely with 130 member groups, local communities, government and business to ensure a positive future for our environment. We strongly support the submissions made by the Australian Network of Environmental Defender's Offices (EDO)¹, Humane Society International (HSI) and the Total Environment Centre (TEC).

We feel that the EPBC Act is a potentially powerful piece of legislation that can satisfy many of Australia's international environmental obligations. Unfortunately the Act has weaknesses that allow contravention of these obligations. The Act is also underused. Here we make a number of suggestions on how the Act can become more capable of achieving its environmental objectives.

Areas that are of critical concern to the Nature Conservation Council are highlighted below.

1 Legislation Weaknesses

There are a number of weaknesses in the EPBC Act that we feel need to be addressed.

1.1 Cumulative Impacts

The EPBC 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

¹ ANEDO (2006) Submission on the *Environment and Heritage Legislation Amendment Bill (No. 1)*. 27 October 2006. & ANEDO (2008), *Environment Protection and Biodiversity Conservation Act 1999: Recommendations for Reform*.

matters of national significance². While each individual development may not be considered a “significant impact”, holistic examination reveals their cumulative significance to be very pronounced³. This is particularly relevant to Cumberland Plains Woodland which while listed as a Threatened Ecological Community continues to be degraded. The impact of cumulative development has also been applied to water resources⁴. This problem was also acknowledged by the ANOA⁵.

We recommend introducing an assessment process into the EPBC ACT that requires the cumulative impacts of all developments in an area to be considered holistically.

1.2 Merits Review

Introducing an independent merits review would help public interest litigants to promote good decision making while increasing transparency, integrity and rigour of process.⁶ This would allow decisions to be made on the merits of each individual case. We strongly support the provision and repeal recommendations made by the EDO⁷ on this matter.

1.3 Exemptions

There are many exemptions in the legislation which do not abide by the Act’s objectives. The Nature Conservation Council is particularly concerned with the exemptions in sections 38 Regional Forest Agreements (RFA) and sections 43A-B Lawful Continuations. We are also concerned by the exemptions that can be made at the Minister’s will (section 158). RFAs enable forestry operators to bypass/ignore threatened species and ecological community protection provisions⁸ and with land clearing unavoidably linked to biodiversity, we feel that these exemptions are unacceptable⁹. Many agricultural ventures are lawful continuations that are often exempted from the Act. Agriculture has a long history of lawful business prior to 2000 and through s43A-B the Act allows harmful, long term practices to continue irrespective of increasing environmental impacts¹⁰. The Act also ignores the impact lawful continuations may have on newly threatened species and communities¹¹.

We strongly agree with HSI and recommend that the exemptions for RFAs be removed. We also recommend that provisions are created to ensure lawful continuations are finally held accountable for the impacts they have upon Australia’s biodiversity and matters of national significance.

1.4 Section 185

The Nature Conservation Council and Humane Society International believe s185 of the Act should be reinstated. The 2006 Australian State of the Environment Report (2006

² 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.

³ Chapple, S. ‘The Biodiversity and Conservation Act, 1999 (Cth): One Year Later,’ (2001) 18 EPLJ 6.

⁴ Nelson, R. ‘Legislation for ICM: advancing water resources sustainability?’ (2005) 22 EPLJ 96.

⁵ ‘Referrals, Assessments and Approvals under the *Environment Protection and Biodiversity Conservation Act, 1999*, Auditor-General Performance Audit Report No. 38, ANAO, 2002-2003.

⁶ McGrath, C. ‘Flying foxes, dams and whales: Using federal environmental laws in the public interest’, (2008) 25 EPLJ 324.

⁷ ANEDO (2008), *Environment Protection and Biodiversity Conservation Act 1999: Recommendations for Reform*.

⁸ Chapple, S. ‘The Biodiversity and Conservation Act, 1999 (Cth): One Year Later,’ (2001) 18 EPLJ 6.

⁹ 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.

¹⁰ Nelson, R. ‘Legislation for ICM: advancing water resources sustainability?’ (2005) 22 EPLJ 96.

¹¹ Nelson, R. ‘Legislation for ICM: advancing water resources sustainability?’ (2005) 22 EPLJ 96.

SoE) claimed the EPBC Act had a positive trickle-down effect on state and territory legislation. As federal legislation overrides state legislation¹² we feel that this benefit is ultimately superfluous. The reverse flow is more important and better achieves the objectives of the Act. Reinstating s185 would encourage state and territory listed ecological communities to be swiftly incorporated into the Act without ceding any power to the state and territory governments.

1.5 Heritage Property and Values

Section 12 of the EPBC Act specifies that a person must not take an action that will have a significant effect upon only the *values* of a declared World Heritage property; yet incorporating the actual *property* into the Act would facilitate better protection of these heritage areas. To comply with the World Heritage Convention, the Act needs to protect World Heritage property against all impacts (not just significant ones). The current Act appears to contravene Australia's World Heritage obligations¹³. This potentially leads to the Act being inapplicable as an 'external affair'¹⁴ and thus unconstitutional¹⁵.

2 Expanded Triggers and New Listings

EDO submissions have suggested that greenhouse gas emissions, land clearing, dioxins, water extraction, wild rivers and wilderness areas be provided for under the Act.¹⁶ We agree with this proposal.

2.1 Land Clearing, Greenhouse Gases and Climate Change

The Federal Government's EPBC Act has produced an unclear and narrow definition of what are national environmental issues.¹⁷ Land clearing is strongly linked to biodiversity loss, salinity and poor water quality¹⁸ but it is not recognised in the Act. Similarly the lack of an effective trigger for projects involving major greenhouse gas emissions is a massive gap in the EPBC Act¹⁹. Despite the 2006 SoE acknowledging climate change as a reality, the Howard Government was clearly reluctant to let environmental issues (even those regarding greenhouse gases) stand in the way of business interests²⁰. We are optimistic that the Rudd Government's ratification of the Kyoto Protocol indicates it will be more sympathetic to climate change objectives. We recommend that land clearing and greenhouse gas emissions are provided with adequate triggers in the Act.

2.2 Rivers as matters of *National Heritage*

The last of Australia's wild rivers must be listed as matters of *National Heritage*. The poor management of the Murray-Darling suggests significant river systems cannot be best protected at a state level. The listing of large river systems that transcend state and territory borders as *National Heritage* would allow for better environmental management.

¹² Bates, G. (2006) *Environmental Law in Australia 6th Edition*, LexisNexis, Butterworths Sydney.

¹³ Haigh, D. 'Australian World Heritage, the Constitution and international law' (2005) 22 EPLJ 385.

¹⁴ *Constitution of Australia*, s 51 (29).

¹⁵ Haigh, D. 'Australian World Heritage, the Constitution and international law' (2005) 22 EPLJ 385.

¹⁶ reviewed in: McGrath, C. 'Swirls in the stream of Australian environmental law: Debate on the EPBC Act,' (2006) EPLJ 165.

¹⁷ Gumley, 'Calls for New Matters of National Environmental Significance,' *National Environmental Law Review*, Autumn, 2005.

¹⁸ Bates, G. (2006) *Environmental Law in Australia 6th Edition*, LexisNexis, Butterworths Sydney.

¹⁹ McGrath, C. 'Swirls in the stream of Australian environmental law: Debate on the EPBC Act,' (2006) EPLJ 165.

²⁰ Macintosh, A. & Wilkinson, D. 'Evaluating the success or failure of the EPBC Act; A response to McGrath' (2007) 24 EPLJ 81.

3 Public Comment and Political Will

The Nature Conservation Council is in concurrence with the submission made by the EDO on the topic of public participation as transparent public participation is one of the best means by which environmental issues can be handled objectively and fairly. The EPBC Act's objectives are often prey to a lack of political will.

3.1 Public Participation

There are a number of factors preventing greater public participation in the administration of the EPBC Act. The EDO identifies standing and the costs of litigation as hurdles for public involvement. The costs associated with litigation are often prohibitive for many public interest groups. We agree with the suggestions made by the EDO regarding merits review and reiterate the comment made earlier in this submission (1.2).

The Threatened Species Scientific Committee has rejected some nominations because the information and descriptions they contained were inadequate or insufficient²¹. While we acknowledge nominations should be made in an organised and consistent manner, we feel that demanding such a high standard disables the lay person's ability to participate. We recommend that nominations are no longer rejected on such grounds.

3.2 Political Will

Initially, the listing process worked effectively and true to the Act's intentions. In the first year, the Minister listed four ecological communities and subsequently ignited strong opposition from the farming lobby.²² Since then the number of new listings has been reduced to a trickle and it has been suggested^{23,24} that the Minister has a conflict of interest: to fulfil ministerial obligations under the Act while not offending the constituency. It has been suggested that an independent statutory body is created to alleviate this potential burden from the Minister²⁵. We support this notion as it would allow environmental issues to take an unobstructed front seat.

The Nature Conservation Council acknowledges the recent priority assessments announced regarding threatened species and habitats. This was a welcome change and we look forward to prompt and positive outcomes from these assessments. These announcements should be followed by further proactive listings and assessments.

3.3 Timeliness of Priority Assessment

²¹ for example: *Six key threatening processes of rivers and streams*, <http://www.environment.gov.au/biodiversity/threatened/ktp/streams.html> (accessed 11.09.08)

²² Benyon, N. Kennedy, M. A& Graham, A (2005) 'Grumpy Old Greenies - lament waiting lists, wasted opportunities and wayward pork barrelling in Australia's biodiversity programs,' presented at Environmental Defender's Office National Conference, May, 2005.

²³ Macintosh, A. & Wilkinson, D. 'Evaluating the success or failure of the EPBC Act; A response to McGrath' (2007) 24 EPLJ 81.

²⁴ McGrath, C. 'Swirls in the stream of Australian environmental law: Debate on the EPBC Act,' (2006) EPLJ 165.

²⁵ Macintosh, A. & Wilkinson, D. 'Evaluating the success or failure of the EPBC Act; A response to McGrath' (2007) 24 EPLJ 81.

We agree with HSI that the priority assessment timeline is too long. While the scientific rigour described in SoE 2006 is commendable, we believe that the precautionary principle should be more widely applied for communities and species that are critically endangered.

3.4 Funding

The 2006 SoE measured the EPBC 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-compliance²⁶. The ANAO believes non-compliance and monitoring issues are major downfalls in the administration of the EPBC Act²⁷. These issues must be addressed by establishing better funding to the Department of Environment, Water, Heritage and Arts²⁸. Further funding cuts will result in a reduction of enforcement and a subsequent erosion of the Act's power²⁹.

For the reasons described earlier public funding must also be re-established for public litigation (3.1)³⁰ and accelerated priority assessment.

4 Better Science

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 evenness³¹. Biodiversity may even be extended to genetic diversity, evolutionary potential and ecosystem function.³² Key aspects of scientific biodiversity (such as ecological processes and interrelationships) have simply not translated into the law of the EPBC Act³³. This needs to be addressed so that our legislation achieves Australia's international commitments to all aspects of biodiversity, and not just threatened species and communities. This can be translated by expanding the criteria by which the TSSC may assess nominations.

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-organisms³⁴ and it is these small, cryptic life forms that make up the vast majority of the world's species biodiversity. Protecting a wide range of ecological communities would also benefit many of these species.

²⁶ Macintosh, A. & Wilkinson, D. 'Evaluating the success or failure of the EPBC Act; A response to McGrath' (2007) 24 EPLJ 81.

²⁷ 'Referrals, Assessments and Approvals under the *Environment Protection and Biodiversity Conservation Act, 1999*', Auditor-General Performance Audit Report No. 38, ANAO, 2002-2003.

²⁸ Benyon, N. Kennedy, M. A& Graham, A (2005) 'Grumpy Old Greenies - lament waiting lists, wasted opportunities and wayward pork barrelling in Australia's biodiversity programs,' presented at Environmental Defender's Office National Conference, May, 2005.

²⁹ C. McGrath, *Enforcement, Politics and the EPBC Act*, a paper presented at a Queensland Environmental Law Association seminar in Brisbane, Australia (30 July 2001)

³⁰ McGrath, C. 'Flying foxes, dams and whales: Using federal environmental laws in the public interest', (2008) 25 EPLJ 324.

³¹ reviewed in: Dawson, F. 'Analysing the goals of biodiversity conservation: scientific, policy and legal perspectives' (2004) 21 EPLJ 6.

³² 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

³³ Dawson, F. 'Analysing the goals of biodiversity conservation: scientific, policy and legal perspectives' (2004) 21 EPLJ 6.

³⁴ 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.

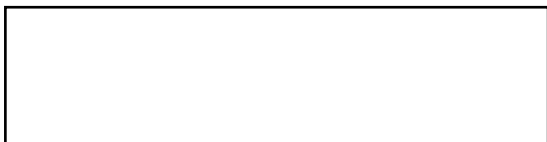
Conclusion

The 2009 review of the EPBC Act is an opportunity for making important reform. These reforms can remove weaknesses and failings while incorporating those insights gained since the commencement of the Act. There is opportunity to meet the lofty aspirations that have become jaded through the Act's disuse.

It is time for the Rudd Government to improve upon the previous administration's non-committal approach that has seen the existence of so many threatened species and communities become increasingly fragile.

If you have any questions on this matter please contact Faith Flanigan, Outreach Coordinator, on (02) 9279 2466 or fflanigan@nccnsw.org.au.

Yours sincerely



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