Friends of the Earth Melbourne
PO Box 222
Fitzroy 3065

312 Smith St
Collingwood 3066

Ph: 03 9419 8700
Fax: 03 9416 2081

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Submission paper to the Senate inquiry on the Environment Protection and biodiversity conservation Act (1999)

Submitted to:

Committee Secretary
Senate standing Committee on Environment, Communications and the Arts
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Friends of the Earth (FoE) Melbourne is part of FoE Australia and FoE International. This organization is a federation of independent local groups working for a socially, equitable and environmentally sustainable future.

Friends of the Earth Melbourne welcomes the opportunity to make a submission regarding the Senate Inquiry on the Environment Protection and Biodiversity Conservation Act (Cth) *1999* ("EPBC Act").

In Australia, many laws exist to protect our environment but one of the most Important is the EPBC Act.
The EPBC Act has been in operation for 8 years during which it has contributed to some positive outcomes. However, the effectiveness of the Act seems to be tarnished by several negative aspects.

In fact, the Senate itself acknowledges the continuing decline and extinction of a significant proportion of Australia's unique plants and animals. Furthermore accelerating climate change will exacerbate challenges faced by Australian species. To address this, the EPBC must urgently be reformed Act to enforce provisions that protect the environment.

The new Labor government has ensured it will focus on environmental protection. The Prime minister has admitted that Australia has a "national and international responsibility to the next generation to do everything it could to counter the threat of climate change"[1]. The ratification of the Kyoto Protocol on December 2007 was followed by the government's assurance to introduce a climate change trigger in the Act.

This commitment needs to be reinforced and expanded to the areas covered by the Act and not only to the greenhouse gas emissions issue.

Our key recommendations will relate to:

- Matters of national environmental significance (MNES): introduction of new MNES
- Addressing the indirect and cumulative impacts
- Improving the wilderness protection

[1] http://www.smh.com.au/news/environment/i-can-unite-the-world-on-climate-says-rudd/2007/12/04/1196530678978.html

1. Matters of national environmental significance: introduction of new MNES

A. Greenhouse Trigger

Though the new Labor government has ratified the Kyoto protocol, a *greenhouse gas emissions trigger* is still missing from the EPBC Act.
We do know that Australia is deeply dependent on coal and has the highest greenhouse gas emission per capita of any country in the world. We emit 25% more than the United States and double than most of the countries in the European Union. According to the OECD[2], Australia's emissions of sulphur, nitrogen dioxide and nitrous oxides are among the highest in the OECD.

The effects of Climate change in Australia are exacerbated by the fragmented nature of legislation and the inaction of the government.
It is time to meet the EPBC Act's objectives and purposes by implementing the present triggers and creating new ones.

The Act has failed to provide protection to the Environment and especially failed to counter climate change issues. The absence of a climate change trigger as a matter of national environmental significance has been largely criticized. The ratification of the Kyoto protocol and the other greenhouse initiatives conducted by the government must be supported by corresponding triggers and enforcement mechanisms in the EPBC Act if they are to be effective in addressing climate change.

Two recent EPBC Act referrals challenged Federal Court decisions concerning large mining projects. The Wildlife Whitsunday case[3] is the first legal challenge against the Australian government for failing to consider the effects of global warming on the environment[4] when assessing the impacts of the mines under provisions of the EPBC Act. The Isaac Plains and Sonoma coal Projects involved the open cut coal mines that are expected to produce, respectively 18 tonnes and 30 millions tonnes over the next 15 years. The Sonoma project alone is roughly equivalent to 16% of Australia's greenhouse gas emission[5].

The Wildlife Preservation group submitted that the Minister failed to consider the adverse impact of the greenhouse gas emissions. It was argued

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[2] Organisation for Economic Co-operation and Development.
[3] Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment& Heritage & Ors [2006] FCA 736 (15 June 2006)
[4] http://www.edo.org.au/edotas/newsletter/bulletin22.pdf
[5] Chris McGrath, *Review of the EPBC Act*.
http://www.environment.gov.au/soe/2006/publications/emerging/epbc-act/index.html#foot39ref

that coal would largely be burnt in coal-fired power stations producing greenhouse gas contributing to global warming.
Both referrals were determined not to be controlled actions despite the fact that these projects deal with large amount of greenhouse gas emissions.
However, another case should be taken into account when discussing the introduction of a greenhouse gas trigger.
In 2004, the Australian conservation foundation (ACF) objected to the planning scheme amendment on the basis of greenhouse gas emissions. ACF then sought judicial review of the exclusion of the impacts of emissions from the assessment of the impacts of the expansion of the coal mine[6].

The Victorian Civil and Administrative Tribunal decided that the environmental effects of greenhouse gas emission caused by the use of coal in electricity generation was a relevant matter to be considered under the Victorian law. In his decision, Justice Morris clearly acknowledged the similarity of the environmental impact assessment approaches required under both the EPBC Act and the Victorian Planning and Environment Act (1987).

Recommendation for a Greenhouse gas emissions trigger:

Thus, we recommend the creation of an efficient greenhouse gas emissions trigger under Part 3. The Act should trigger, as a matter of national environmental significance, any further assessment of development producing over 100,000 tonnes of CO^2 equivalent per year.

B. Land clearing

Climate change can also be addressed by unifying the legislation on *land clearing*.
Most of the legislation which directly regulates land clearing, is to be found at a State and Territory level. As a consequence, there is no uniformity between the different legislation at the Federal level. The federal Government[7] believes that the EPBC Act has achieved legal successes through record penalties for illegal land clearing activity. In reality the EPBC Act only considered this action in its Section 40 (Part 4) regarding the forestry operation. Moreover, since April 2001 the EPBC Act has listed land clearing as a “key threatening process” but without any concrete effect in practise.

[6] A commentary on the case by Barnaby McIlrath at the Environmental Defenders' Office.
[7] http://www.environment.gov.au/epbc/publications/pubs/2006-amendments-brochure.pdf

The 2001 State of Environment (SoE) Report[8] recognised that native vegetation clearing is one of the most important issues affecting the conservation of biodiversity in Australia.
As a result, land clearing should be targeted as a matter of national environmental significance under the Act because it has a great impact on several areas including climate change, threatened species, ecological communities and water.

According to Dr Clive McAlpine of the University of Queensland "new research show that 150 years of land clearing has added significantly to the warming and drying of eastern Australia. More than 70.000 hectares of native vegetation have been approved for clearing across the Northern Territory since 2002.

Scientists predict clearing and then burning this vegetation would cause about 10 Million tonnes of greenhouse gas pollution. Moreover, recent figures from the federal government National's Greenhouse gas Inventory (2006) showed that land clearing produced more than 1 Million tonnes of greenhouse emissions in the Territory. Furthermore, Tasmania has one of the highest rates of land clearing in the developed world, with more than 100,000 hectares of native forest being converted into plantation in the last 10 years.

Land clearing has serious impacts on native fauna and flora populations including threatened species and endangered species and ecological communities. It is estimated that 12 Million animals died in the Northern Territory as a consequence of vegetation clearing. For every 100 hectares of bush destroyed, between 1,000 and 2,000 birds die from exposure, starvation and stress. Nearly half our mammal species are either extinct or threatened with extinction as a result of land clearing, habitat destruction and other threats[9].

As for the issue of water, land clearing is responsible for erosion, sedimentation of waterways and poor water quality. According to scientists, salt will poison over 17 million hectares of Australian farmlands by the year 2050. As trees and native vegetation are bulldozed and cleared, water, once used by native plants, rises through the soil bringing with it ancient salt deposits. This salinity reduces soil and farm productivity, and seeps into rivers and water supplies[10].

[8] Australian State of the Environment Report 2001, (Theme Report) (CSIRO publishing, Melbourne) P.44-57 and 97-100.
[9] http://www.bushheritage.org.au/natural_world/natural_world_land_clearing
[10] *ibid.*

Recommendation for a land clearing trigger:

Thus, we recommend, a land clearing trigger under the EPBC Act that covers clearing of land over 100 hectares in any two years period. This trigger must apply to any area of native vegetation, which provides habitat for listed threatened species and ecological communities. Moreover, environmental impact assessment should be conducted in relation to land clearing activities.

C. Water

Despite the risk that surrounds Australia's unique biodiversity, the major natural resources are not adequately protected.
Water is a precious and finite resource essential to any kind of life on earth but lately water scarcity is a serious issue in Australia – the driest continent on earth.

The protection of water has failed because of the unwillingness of the Authorities to impose efficient usage limits on water (groundwater, surface water, rivers). Over-extraction and poor water management are responsible for the decline of wetlands in Australia. The National Audit and State of the Environment reports show extensive and continuing degradation of Australia's rivers and estuaries, mostly resulting from recent developments.

Existing water planning, land use planning, and development assessment frameworks are not adequately protecting Australia's freshwater ecosystems[11].
Thus, there is a need to restore a healthy ecological situation regarding rivers and wetlands by managing water extraction.

The EPBC Act contains provisions regarding wetlands protection. Part 3 Division 1 (matters of national environmental significance) and Part 15 (protected areas), Division 2 (wetlands of international importance) give power to the Commonwealth to designate "wetlands" for inclusion in the Ramsar Convention list. The Ramsar definition of wetland applies to both flowing water (rivers and stream) and shallow marine waters. When an area is designated, actions that are likely to have a significant impact are prohibited unless specific authorisations or exemptions apply. However, we have observed the Commonwealth reluctance to use these protective provisions.

Rivers and groundwater are connected. When we extract water from a river's groundwater supply, we diminish that river's flow, even though the effect

[11] Richard T. Kingsford & Jon Nevill, *Scientists recommend a systematic expansion of freshwater protected areas in Australia.*

may not be noticed for some time[12]. As a matter of fact, water systems should be protected as a matter of environmental and national significance. The existing MNES, such as Ramsar wetlands and place of national heritage, are not providing enough protection for rivers and wetlands of national importance (WWF).

Recommendation for a water extraction trigger:

Thus, we recommend, that extraction of surface and groundwater resources over 10.000 Megalitres, which is likely to have a significant impact, should trigger assessment under the Act.

D. Public participation

Public participation is used through consultation but also through judicial processes to ensure the environment protection. The EPBC Act provides for some public participation but this is insufficient. Instead of improving this mechanism, the Act has been adding obstacles.
In fact, the recent amendments to the EPBC Act have removed Administrative Appeals Tribunal review rights and the protection afforded by the 'no undertaking as to damages[13]' provision (former Section 478 of the Act). As a consequence, the removal of section 478 is likely to cause the failure of an application for an interim or interlocutory injunction. Moreover, the EPBC Act has no *merits review system* unlike the Victoria's planning system where the VCAT is able to review, on their merits, decisions made by Councils to issue (or not to issue, or failing to issue) planning permits[14].

The public participation is also compromised by the risk of an adverse cost order. It means that the claimant, who loses must bear the cost of the winning defendant or any third party. Cost rules need to be changed to balance out the disparity of resources between parties often found in environmental cases.

Recommendation for public participation:

We recommend, the incorporation of a *protective cost order* in the Act, which can enable a Court to make an order affirming that the claimant will not (regardless of the outcome), be required to pay the costs of the defendant or any third party.

[12] Evan, R. (2007) *The impact of groundwater use on Australia's Rivers, Land and Water Australia*, Sinclair Knight Merz (SKM).
[13] Godden and Peel, *the EPBC Act: Dark sides of virtue.*
[14] Andrew Walker. *The EPBC Act, an overview*, 2006.

This rule, which is used in England and Wales, has an important role in environmental litigation. "The advantage of such an order is that it eliminates the uncertainty regarding potential future liability for costs which may otherwise deter a potential challenge"[15].

Costs protection and costs certainty should be available to individuals and NGOs bringing environmental public law cases where those cases satisfy a public interest and merits test. Depending on the circumstances, the cost protection may vary and result in each party paying for its own costs.
Public participation can also be improved by giving a large access to information (eg. preliminary documents, public environmental reports) through internet.

2. Addressing the indirect and cumulative impact issue

Environmental law litigations and commentators have raised the issue of indirect and cumulative impacts when conducting Environmental Impact Assessment (EIA) under the EPBC Act. It was recognised from the inception of EIA that many of the most devastating environmental effects may not result from direct impacts from individual projects, but from the combination of effects from existing developments and individually minor effects from multiple developments over time[16].

Section 1508.7 of NEPA[17] (1969) defines cumulative impact as:

> "The impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions. (…) Cumulative impacts can result from individually minor but collectively significant actions taking place over a period of time".

As a result, commentators such as Gary D. Meyers strongly supported the integration of a cumulative impact analysis in all environment impact assessment and at all levels[18].

In fact, the EPBC Act does not take into account the indirect and cumulative impacts and only requires that a person must not take an action that has, will have or is likely to have a significant impact on a matter of national environmental significance without approval from the Minister. For example,

[15] A. Ryall 'Access to Justice and EIA directive: the implication of the Aarhus Convention', in J. Holder (ed.), *Environmental assessment: Law, policy and custom.*
[16] http://ec.europa.eu/environment/eia/eia-studies-and-reports/volume1.pdf
[17] The National Environmental Policy Act, United States.
[18] Gary D. Meyers, *Biodiversity protection in Australia in the 21st Century: where to from here?*

the outcome of the *Paradise dam* case was the grant of an approval for the construction of a dam whereas it was likely to have consequences on a listed threatened species.

However, recent legal cases opened the door to a new interpretation of the terms « action » and « all adverse impacts » under the Act.
The *Nathan dam* case[19] has enabled a key principle to emerge on the scene where the legislation is silent.

The case involved a proposal for the construction of an 880 000 megalitre dam near Taroom on the Dawson River in central Queensland, which was designed to facilitate agricultural production and development in the region including 'cotton ginning' and 'expansion of the existing cotton growing industry'[20]. The issue was to determine the scope to be considered when looking at the approval requirement under the Act and whether indirect impacts should be assessed.

At first instance, Kiefel J (Federal court, 2003) held that "when assessing the impacts of a proposal under section 75 of the EPBC Act, the *Minister must consider all adverse impact* the action is likely to have".
On appeal the Full court (2004) upheld Kiefel J's decision and considered that the expression "all adverse effects in section 75(2) of the Act include the indirect consequences of an action and may include the results of acts done by person other than the principal actor" (§52).

According to the full court "it is sufficient (…) to indicate that 'all adverse impacts' includes each consequence which can reasonably be imputed as within the contemplation of the proponent of the action, whether those consequences are within the control of the proponent or not" (§57).

This solution is only the result of a progressive approach, which started in cases like *Booth*[21] that attempted to extend the scope of environmental impact assessment. In this case, Branson J indicated that the Act's notion of impacts on 'matters of national environmental significance' would not be limited to 'direct' impacts in the sense of the physical consequences of activities undertaken within the boundaries of a protected area[22].

The decisions point to the Act's weaknesses where approvals are based on assessments, which only consider an action in isolation from other (future, past, present) actions.

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[19] (2003) FCA 1463, *Queensland Conservation Council Inc v. Minister for Environment and Heritage*. (2004) 139 FCR, Full federal Court.
[20] Lee Godden and Jacqueline Peel, *The Environment Protection and Biodiversity conservation (Cth) 1999 : Dark sides of virtue*. Legal studies research paper n° 262.
[21] *Booth v. Bosworth* (2001) 114, FCR 39
[22] *Id.* Godden and Peel.

Recommendation for indirect and cumulative impact:

It is urgent to integrate the indirect and cumulative impacts within the EPBC Act. This acknowledgement is necessary even though the difficulties in assessing indirect impacts are real. The EPBC Act needs to determine acceptable limits and establish a reasonable scope for the environmental assessment.

3. Improving the Wilderness protection

A. Ministerial discretion

We noted that most of the Act relies on the ministerial discretion. For example, the 2006 amendment enabled the Minister to "revoke, vary or add condition to an approval in circumstances, if three conditions are satisfied:

- there must be a significant impact
- This impact must be greater than the one identified in assessing the action
- It must be necessary for the minister to revoke, vary or add condition.

Rachel Baird[23] commented on the 2006 amendments and underlined the risk that could arise from the Minister's discretion power. She recommended that **a full environmental assessment should be carried out before approval**.
The Minister can use his discretion in the Wilderness sphere as the preparation of **wildlife conservation plans** (Section 285-300A) depends on his discretion rather than being compulsory.
The Minister has a large influence on the protection of *Listed threatened species and ecological communities*. He or she can use their discretion to accept or refuse the listing of species, ecological community, threatened species and critical habitat for the survival of these species.

« Watering down objective listing processes based on sound science by adding a big dose of ministerial discretion is not in the interest of threatened species conservation » says Andreas Glanznig, WWF-Australia's Senior Policy Adviser.

[23] Rachel Baird, *Forecast amendments to the EPBC Act: time to revisit corporate due diligence* (2006).

Recommendation for nomination of species:

As a result, we recommend that the scope of the Minister's discretion be reviewed. Less discretion should be given to the Minister and more influence offered to the public or scientific committees.

To ensure an effective protection of the environment and its endangered species, the Act should require inventories to facilitate decision-making. These inventories must be update on a regular basis fixed by the Act to avoid excessive delay.

Section 185[24]**,** which requires the Minister to keep the EPBC Act schedule of threatened ecological communities up to date and to assess all the ecological communities on state and territory lists for EPBC Act protection, should be reinstated. In fact, threatened species account for a significant number of referrals under the Act. As a result some action may be found to be *not controlled action* where there may be a significant impact occurring on a threatened specie or ecological community[25].

Threatened species protection is also diminished by **section 194F (c)** of the Act which prevents renomination of species previously rejected under section 191. This restriction introduced by the 2006 Bill is challenging, especially when new scientific evidence comes to light. **The EPBC Act must ensure the effectiveness of the nominations and listings processes by repealing provisions which fail to protect the biodiversity.**

National Heritage listing

The EPBC Act now provides for places to be nominated for listing on the National Heritage List, which gives partial protection through the requirement for an environmental impact assessment. The criteria for listing a place on the National Heritage List are set out in regulation 10.01(a) of the EPBC Regulation. Again, the Minister has the ultimate discretion in determining whether a place should be listed, after following the process set out in sections 324C and 324R of the EPBC Act, which outline a public consultation process[26].

[24] Nature Conservation council of NSW – *Submission to EPBC amendments Act Inquiry* (2006) : [The Amendments bill 2006 has repealed section 185] this wipes the assessment of 500 threatened ecological communities from consideration by the SC. While this may lighten the administrative burden and ease political pressure regarding controversial listings, it is heavy handed, arbitrary and environmentally problematic.

[25] Ian Lee. *Report on the effectiveness of the EPBC Act and climate change*, 2008.

[26] Andrew Walker, *The EPBC Act – An overview* (2006).

B. Regional Forest Agreement

The regional forest agreement exempts any forestry operation taken in accordance with the RFA (Section 38 of the Act)[27]. As a result, the operation will be exempt from carrying out an Environmental impact assessment under the EPBC Act.

The recent *Wielangta case*[28] is a good illustration of the issues linked to the RFA system. In this case, Senator Bob Brown was alleging that the forestry operations and proposed operation in the Wielangta State forest were prohibited in the absence of approval by the Commonwealth Environment Minister under the Act. The Senator also claimed that the forestry operations have had, and will have, a significant impact on species such as the wedge-tailed eagle, the swift parrot and stag beetle.

The 19th of December 2006, the Federal Court held that forestry operations were not conducting in accordance with the RFA and as a result, an exemption from the requirement for an approval under the EPBC Act no longer applied.

This case shows the risk of exempting certain actions from the EBPC Act when they don't strictly comply even with the requirements of a Regional Forest Agreement. The consequences of non-compliance have a direct effect on habitat loss and listed threatened species.

The new section **75 (2B)** which commence the 19th of February 2007 provides that, when assessing whether an action is a controlled action for the purposes of the Act, the minister must not consider the adverse impacts of certain forestry operations conducted under a RFA.
According to the EDO, the limits on Ministerial discretion is unwarranted. It is artificial in the extreme to excise certain potential real impacts of a proposal because of an artificial (policy-derived) exemption [29].

Adverse impacts of forestry operations in RFA regions may well damage matters of national environmental significance, (nationally-listed threatened species). Hence, **such adverse impacts ought not be exempt from EPBC Act EIA as currently under s 75(2B)[30].**

At a fundamental level, Friends of the Earth rejects the RFA process as a mean to provide any adequate protection to environmental and biodiversity values. To date, Australia's Regional Forest Agreement process has not been successful in integrating the ecological and consultative imperatives required to produce sound outcomes for environmental and biodiversity protection. The Tasmanian RFA is a case in point, having overlooked data errors in the

[27] It provides that Regional Forest Agreement forestry operations are exempt from the approvals regime established by the EPBC Act.
[28] Brown v. Forestry Tasmania (No4), 2006 FCA 1729.
[29] EDO, *Submission on the Environment and Heritage legislation Bill* (No1), 2006.
[30] Tom Baxter, Barrister and Solicitor of the Supreme court of Tasmania and High Court of Australia.

information generation phase; ignored a number of major recommendations of the nationally agreed baseline JANIS criteria; and rejected meaningful consultation with non-industry stakeholders.

This has undermined the credibility of forest management around Australia, and specifically in Tasmania where forest biodiversity protection has been traded off in exchange for increased woodchip exports. The RFA process has been roundly criticised by community and environment groups, scientists and other stakeholders for its failure to protect threatened and endangered species and forest biodiversity. This has been proven in abundant science detailing the impacts of current national industrial forestry and wood chipping processes on forest biodiversity.

Recommendation for Regional Forest Agreement:

The EPBC Act should be remedied to address this serious loophole in federal threatened fauna and flora protection, which allows industrial forestry sweeping exemption from the legislation, intended to provide environmental protection and biodiversity conservation. Forestry operations should be assessed under a federal framework and be submitted to the EPBC Act.

C. « Actions which are lawful continuations of use of land etc. »

Under the EPBC Act, any activities that may have a significant impact upon matters of national environmental significance should be referred to the Minister for the Environment and Heritage for assessment and approval. However, the EPBC Act allows for some exemptions to the assessment and approval provisions.

Sections 43B of the EPBC Act exempt certain actions from the assessment and approval provisions of the EPBC Act. It applies to lawful continuations of land use that started before 16 July 2000, the date of commencement of the EPBC Act. As a result, new listings of threatened animal or plant species or ecological communities or national heritage places would not affect the application of exemptions to activities that are covered by the exemptions.

However, the exemption won't apply when an action results in the "enlargement, expansion or intensification of use" and when there is a change in the location or in the nature of the activities[31].
Section 43B covers many situations but does not take into account the changes that may appear on the Environment itself.

[31] Section 43B (3) of the EPBC Act.

Recommendation for section 43B of the EPBC Act:

As a consequence, we recommend the introduction of a provision that allows a party to challenge "the lawful continuation of use" where:

- Environmental circumstances have changed in a way that will increase the impact of the action.

- New scientific information is available.