



**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* (“EPBC Act”)**

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Introduction

The Inland Rivers Network (“IRN”) is a coalition of environment groups and individuals concerned about the degradation of the rivers, wetlands and groundwaters of the Murray-Darling Basin. It has been advocating for the conservation of rivers, wetlands and groundwater in the Murray-Darling Basin since 1991. Member groups include the Australian Conservation Foundation; the Nature Conservation Council of NSW; the National Parks Association of New South Wales; Friends of the Earth; Central West Environment Council; and the Coast and Wetlands Society.

IRN appreciates the opportunity to comment on the Inquiry into the operation of the *Environment Protection and Biodiversity Conservation Act 1999* (“EPBC Act”). The submission focuses specifically on the value and importance of freshwater areas as an essential aspect within the protected area system, and highlights the need to substantially enhance freshwater protection to enable the system to be more appropriate and effective. The EPBC Act has responsibility for protecting Ramsar listed wetlands and migratory bird species that rely on inland wetland areas

To this end, IRN will generally address points relating to the effectiveness of the EPBC Act to protect significant inland wetland and river systems, public participation issues and concerns with assessment processes under the Act.

1. New “triggers” required

Water, nationally significant wetlands and wild rivers

The ongoing crisis affecting the Murray Darling Basin, highlights the need for a far more proactive and national approach to managing Australia’s water resources and the sensitive ecosystems that depend upon them.

Significant water actions

The major extraction, diversion or interference with rivers or other ground or surface water resources likely to have a significant impact upon aquatic or groundwater dependent ecosystems should be subject to comprehensive EIA and approval under the A&A regime. To the extent necessary, quantitative thresholds for certain uses should be set in light scientific evidence as to the appropriate level for the particular location taking into account needs of the relevant ecosystems and affected communities.

Wetlands

- The existing trigger covering wetlands of international importance (recognised under the Ramsar Convention) should be extended to enable the listing of High Conservation Value freshwater environments on the basis of specified nationally significant criteria. This would implement commitments under the Ramsar Convention that require the wise use of all wetlands (see www.ramsar.org/wurc/wurc_index.htm)
- The development and implementation of management plans for all listed wetlands and HCV areas
- Expansion of definition of wetland to be the definition contained within the Ramsar convention, which includes instream pools and channels.
- Extend the trigger to enable the listing of nationally important freshwater climate refuge areas ?

Wild rivers

ANEDO’s 2005 study on possible new triggers under the EPBC Act, outlined the case for Commonwealth protection of Australia’s wild river systems through a “wild rivers” trigger for the A&A regime. IRN considers that such a trigger, in combination with existing listing mechanisms under the biodiversity conservation provisions of the EPBC Act, would play an important role in a more strategic and coordinated approach to conserving these national resources and the ecosystems that depend upon them.

2. Improvements to and implementation of existing triggers

Improve existing triggers

There are several improvements that need to be made to existing triggers under the EPBC Act to enable it to achieve its objectives and meet Australia’s international treaty obligations, including:

- Protect the integrity of sites not just certain “values”: existing triggers in relation to World Heritage and Ramsar sites should operate on the basis that they protect the integrity of the sites rather than certain enumerated values alone.
- Broaden the threatened ecological communities and species triggers to capture “vulnerable” and not just “endangered” communities as well as “conservation dependent” species.¹
- Broaden the migratory species and threatened species triggers to recognise that the habitat of migratory species, and threatened species and ecological communities is a critical part of their survival.
- Broaden the interpretation of “action” under the Ramsar wetland trigger to recognise that a range of cumulative and water extractions detrimentally affect Ramsar wetlands.

3. Indirect and cumulative impacts

IRN considers an important addition to the EPBC Act to include a legislated requirement to take into account all environmental impacts including **indirect and cumulative impacts**, the precautionary principle and elaborate in more detail the “social” and “economic” matters that must currently be taken into account under section 136 of the EPBC Act.¹ In short, EIA processes conducted under the EPBC Act would prescribe a more sophisticated approach to triple bottom line cost/benefit analysis.

4. Merits review

In light of the need for improved assessment and decision making processes under the EPBC Act, IRN considers that it should be amended to facilitate merits review of key decisions under the EPBC Act – including key controlled action and “listing” decisions under Parts 7 to 9 and 13 of the EPBC Act.

5. Public participation

Threat of adverse costs orders, orders for security for costs and undertakings for damages

Under current rules, costs generally “follow the event” ie. at the conclusion of court proceedings, an award can be made that the unsuccessful party bear both its own legal costs plus the costs of other parties to the litigation. Furthermore, a party to litigation may apply to the court, and be granted, an order requiring the applicant to provide

¹ The need for cumulative impact assessment to be explicitly mandated is highlighted by a number of cases brought under, and numerous critiques of, the EPBC Act (See Godden L. and Peel J. (2007) n 8 pp.128-131; ANEDO n (2005) p.6; ANEDO “*Amendments to the Environment Protection and Biodiversity EPBC Act 1999 (Cth)*” Letter to the Minister for the Environment Heritage and the Arts, 7 March 2008 p.5 For a critique of the retrograde definition of “impact” included in section 527E of the EPBC Act under the 2006 amendments see Godden L. and Peel J (2007) n 8 p.128.

security for that party's costs or (in the case of an application for an interlocutory injunction) an undertaking for damages.

The threat of these orders operates as a powerful disincentive to individuals and organisations wishing to challenge decisions made under the EPBC Act or apply for an injunction to enforce it. Individuals or community organisations face financially ruinous orders for costs in the event that they lose expensive proceedings conducted in the Federal Court of Australia.²

IRN supports the recommendations of a recent submission made by ANEDO to the Minister for the Environment Heritage and the Arts, which calls for amendments to the EPBC Act to:

- allow the court to consider granting an order that each party to a proceeding bear the own costs;
- allow the court to consider granting a **protective costs order** to an applicant confirming that the applicant will not have to pay the costs of other parties to the proceedings;
- provide explicit recognition for **maximum costs** orders under which a public interest litigant can apply to the court for an order prescribing the maximum costs exposure of the parties;
- prevent a party to proceedings under the EPBC Act from applying for an order for security for costs against a public interest applicant; and
- reinstate the prohibition upon the Federal Court requiring applicants for interlocutory or interim injunctions to provide an undertaking for damages as a condition of granting the injunction.ⁱⁱ

Financial resources

Third parties have played and will continue to play a central role in compliance and enforcement activities since commencement of the EPBC Act. In most cases, third parties including individuals and community and national environmental non-government organisations have done so in the face of significant financial risk.

The important contribution made by these groups to enforcement and application of the EPBC Act should be acknowledged by establishing Federal government funding in the form of legal aid to litigation conducted under the EPBC Act in the public interest.

Timing of responses to referrals to EPBC Act.

² This occurred in *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch v Minister for the Environment and Heritage* [2006] FCA 746

The process of notification of referrals and the 10 day turn around for response needs to be extended to a timeperiod that is more adequate for constructive public participation in commenting on the impacts of projects submitted for referral.

6. Bilateral Agreement with NSW Government

On 20 December 2006 the then Minister for Environment and Water Resources, gave notice that the Commonwealth of Australia had entered into a bilateral agreement with New South Wales.

The bilateral agreement allows the Commonwealth to delegate to NSW the responsibility for conducting environmental assessments under the EPBC Act and, in certain circumstances, the responsibility for granting approvals under the EPBC Act. This agreement has the effect of delegating the assessment of EPBC Act matters of National Environmental Significance within the assessment process specified under Part 3A of the NSW Environmental Planning and Assessment Act 1979 (Major Projects).

This planning process in NSW is highly unsatisfactory for the protection of matters of National Environmental Significance under the EPBC Act. The bilateral agreement has led to the loss of important ecosystems and habitats because of inadequate environmental assessment requirements under Part 3A of the EP&A Act. There should be an investigation into ensuring the bilateral agreements deliver conservation outcomes that are compatible with the objectives of the EPBC Act.

ⁱ Section 18 EPBC Act

ⁱⁱ ANEDO “*Amendments to the Environment Protection and Biodiversity EPBC Act 1999 (Cth)*” Letter to the Minister for the Environment Heritage and the Arts, 7 March 2008