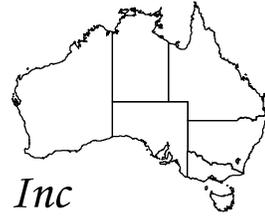


*National  
Parks  
Australia  
Council Inc*



*...working together for nature conservation area*

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Dear Dr Hawke

Thank you for the opportunity to comment on the EPBC Act and its operation over the past nine or so years. The National Parks Australia Council is the peak body for National Parks Associations of Australia and we welcome this process because of our deep concerns about the capacity of the Act to perform its stated role. In this paper we are interested in discussing fundamental changes to the legislation which we think are necessary in order to properly protect the environment and Australia's biodiversity. Attachment A details our comments against the headings of the Discussion paper you provided

NPAC represents many thousands of members with widely varied interests in conservation ranging from bushwalking and camping to long term involvement in campaigns to protect and conserve Australia's natural values, including its biodiversity, its unique landscape values and its role in international conservation.

Our members are concerned that, despite assurances that the EPBC Act is an effective and protective mechanism, it is failing to protect our national biodiversity in the face of threats from urban development, tourism, agriculture, forestry, recreation and climate change. In the words of one of our long term campaigners, Ms Anne Reeves OAM, "My conservation history goes back to the days of lobbying the Whitlam government for EIS and participation in the very first Inquiry (Redcliffe) and subsequently Kakadu uranium mining . My disappointment is that failure of political will, limited resources, and undermining by exploitation interests mean that while we have won some battles, we have generally lost the war against ongoing biodiversity decline .The current promotion of 'economic activity' to address recession ludicrously fails to dialogue with the current overwhelming threats of climate change - whether we can dent this I don't know."

In other parts of the community, the EPBC Act has created a false sense of security that the mere existence of an endangered species is sufficient to stop development. Because of campaigns to limit the impact of environmental concerns on development proposals and continuous statements by business and union leaders about threats to jobs from environmental lobbyists, most people believe that merely finding a listed species will instantly halt a proposed development. It is only when their own community is involved that they learn the grim reality about the EPBC Act.

More disturbingly, the Act has also been proven ineffectual when confronted by deliberate destruction of areas of national environmental significance. These apparent acts of wanton selfishness are explained by the perpetrators as being justified because the EPBC Act places restrictions on land use for no immediate human purpose and in order to protect plants and animals which have little or no relevance to humans. It is not surprising that those seeking to implement the EPBC Act must tread cautiously at times when it is charged with protecting legless lizards, earless dragons and button wrinklewort.

NPAC has made several submissions to the Senate which are publicly available though the Senate committee website. However, we would be happy to provide an electronic or hard copy to this enquiry should you wish it. In addition Attachment B summarises our suggested changes to current legislation which we have recommended to the Senate committee as going some way towards improving the existing Act.

### **Reconciling conflicting systems**

To be fair, the EPBC Act attempts to do the impossible: reconcile artificial human systems of land tenure and ownership with the complex interactions of the natural world. The Assessment and Approvals and the Biodiversity provisions of the Act in particular attempt to arbitrate between the 19<sup>th</sup> century concepts of legal ownership of property and associated property 'rights' and an international responsibility to ensure the survival of endangered species. The Act does not mediate at all well in fact, leaning heavily towards a role in which it limits the responsibilities of property owners and managers in conservation of endangered species and gives official sanction to explicit actions which endanger the survival of specific species and whole ecological systems.

The introduction of the EPBC Act occurred in a political and economic context in which farming, forestry and fishing communities were vociferously opposed to any imposition of environmental limitations on their rights; and mining, tourism and land development interests were aligned with union and political interests in emphasising the creation of job opportunities and economic growth from development. Not much has changed in the ten years since then except that much of this expected economic benefit and job creation to local communities has proven illusory. Strangely enough this has led to calls to lessen, not tighten, environmental controls over development in environmentally sensitive areas such as national parks, from these same communities and business interests.

### **Priority of commercial interests**

This underlying tension between development and conservation is expressed in the Act through a number of different ways including:

- the emphasis given to speedy approvals which we have covered thoroughly in our submission to the Senate committee;
- the difficulty in listing endangered species and ecosystems, again covered in the Senate committee submission; and
- the lack of retrospectivity in any of the listing or assessment processes covered under the Act.

In this last issue, a lack of retrospectivity, we see clearly how the Act is hampered in protecting endangered species and ecosystem. Because Australia has no

comprehensive classification or mapping of its widely diverse ecological systems, it is often only when a development is proposed for an area that resources are directed to protecting it. Yet any listing processes which may come out of this cannot be taken into account in the Assessment and referral process for the original application.

A recent case in Victoria illustrates the issue clearly. A unique sponge community found at the Port Phillip heads would be threatened by the Channel Deepening project in Port Phillip Bay. According to the Australian Faunal data base 115 species were unique to the community and scientists believe the geographic location of the community in terms of longitude, temperature and currents meant that the community, would be found nowhere else in the world. However, the Department of Environment, Water, Heritage and the Arts on the 27th of August informed VNPA that its nomination for listing of the ecological community has not been put forward by the Scientific Community because the committee found that the national extent of this community was not clear, especially in regard to other sponge gardens. With this in mind, the Committee has recommended that the department undertake further investigations of the likely national extent. Once these investigations are undertaken they would re-examine the nomination in October 2009.

Regardless of whether or not the community is successfully listed under the Act the community will not be protected from the impending threat of dredging. The 2006 changes to the Act ensure that once a project is referred under the EPBC Act, the Act cannot be used retrospectively if a species is listed after the referral.

In the case of the sponge community they only became threatened when dredging was proposed and were therefore nominated by VNPA for protection under the Act. However, regardless of whether the nomination is successful or not the activity posing the threat cannot be stopped and the Act.

Against this background, the very existence of the EPBC Act is a minor miracle and something to be celebrated. It might seem churlish to be critical of the gains it has made, in particular establishing as a principle of law that landowners are responsible for not destroying endangered species which occur on their property. However, we must face the fact that the Act fails in its objectives and purpose because it operates only at this very limited level of the human construct of property ownership, it does not operate at all effectively in the real world of vast, interlocking and complex natural systems.

The solution to this impasse may lie in the fact that the EPBC operates within a context of other well established legal constraints on land use, eg local and state planning restrictions, restrictions on mining and mineral rights and provision for compulsory acquisition by governments. These restrictions relate to allocation of land use within broader plans for human use and occupation of land. Thus we see that the EPBC Act could be made much more effective and politically acceptable if it also operated within the context of similar broad planning mechanisms for the natural and ecological values of our land and water.

### **New principles required for the Act to operate effectively**

We suggest there are some underlying principles which should be applied to a revised version of the EPBC Act:

1. A revised Act would set out carefully the relationship of the EPBC Act to existing restrictions on land ownership and examine how these restrictions can be applied in the context of the much broader, interconnected natural systems within which individual land ownership occurs
2. The burden of proof currently operating in the Assessment and Approvals sections of the Act must be reversed, particularly in areas of known high biodiversity values; for example, any alteration of land use must prove of value to conservation as opposed to being of value to human use.
3. The current practice of considering only the listed species or ecosystems which has triggered the Act should be replaced with a system which classifies all areas of Australia according to established ecosystems. Assessment then would be undertaken against the broader impact of the proposed action on the operation of the ecosystem as well as on the listed species.

Impediments to such an approach usually revolve around jurisdictional rights and responsibilities. However, the Commonwealth has been prepared to address the complexity of States' jurisdictional rights under the National Water Initiative, and the same level of Commonwealth leadership is called for here. What is needed here is a national cultural shift similar to that which has occurred with the water crisis which has seen a wide public acceptance of the need for radical and urgent change.

### **1. The relationship of the EPBC Act to existing land ownership principles and laws**

The purpose of Federal legislation is supposed to be to arbitrate where there is conflict between individual rights and the public good. Instead the EPBC Act protects property rights above environmental responsibility and international obligation. It places the burden of action on self assessment and referral, steadfastly ignoring the reality that it is human impact on the landscape, including human induced climate change to be a consideration which is placing most species at risk of extinction. Black cockatoos were hunted almost to extinction in Western Australia to protect the wheat crops; cropping and grazing has reduced Yellow Box Woodland along the NSW tablelands to less than 1% of its former range and further incursions into existing woodland occur every day through land development and land use change from grazing to cropping. Land developers continue to lay waste to endangered Bangalay Sand Forest with impunity in order to build employment in coastal NSW communities. Governments, as the largest land managing authorities in Australia are not exempt from this exploitative approach either. The Victorian government bulldozed fire trails through habitat critical to the survival of the endangered Leadbeater's Possum to allay public fears of bushfires.

An excellent example of the priority given to land ownership over environmental responsibilities is the issuing of licences to shoot flying foxes in NSW to protect fruit crops. Flying foxes are a listed species under the EPBC Act but the right of a landowner to harvest a fruit crop is held to be of a higher order of value. In fact most fruit producers have moved to the far more effective method of protecting trees from all marauders by netting their orchards so that the right to kill an endangered species is exercised in the main by those who cannot afford to net their crop. In such cases the economic rationale for environmental vandalism is as thin as the ethical rationale.

Apart from allowing incremental individual damage to the environment, this priority for private ownership rights over wider land use issues ignores the necessity of landscape

solutions to environmental issues. However, the Australian public has moved on, now accepting that we are facing critical water shortages, loss of soil fertility and the invasion of feral plants and pests which require whole-of-country solutions, not piecemeal actions of individuals or even individual governments. The EPBC Act in its basic principles and its operations no longer reflects this public acceptance of limiting private rights to achieve a sustainable future.

In the spirit of allowing a land owner this overriding control over his property, the Act ignores neglect and failure to take an action to prevent the loss of an endangered species. For example, in 2008 the Commonwealth, through the Department of Defence, failed to control kangaroo grazing on its Belconnen property in the Act, putting at risk listed plant and animal species. The EPBC Act could not be invoked because it did not recognise failure to take an action – in this case culling kangaroos – as cause for a referral. The Act should make clear that owners have a duty of care to inform themselves of environmental values of their property and an obligation to take no action which would endanger listed species. Failure to properly manage for protection of environmental values generally, including taking action where needed to protect an endangered species, should also be made culpable.

While mining, forestry and farming lobby groups claim the Act imposes an undue burden on property owners, the fact is that the EPBC Act fails to take any meaningful place in the suite of planning regulations which we accept as normal at the local and State level. In addition, local and State authorities devote substantial resources to land use planning and to their approvals processes but the administration of the EPBC Act is underfunded to the point where it has become a mere cipher for a truncated approvals process with little capacity to refuse applications. Local and State governments recognise their role in restricting land development and changes in land use to protect the public good but the Federal Government, with all its international obligations, has frequently appeared to have hidden behind the principle of protecting property rights to avoid its responsibilities.

Specific provisions should restore some balance to the Assessment and Approvals process such as:

- The Preamble to the Act should clearly state that it places restrictions on land title and land use and that it imposes responsibilities on land owners for the environmental health of their land in much the same way legislation imposes legal responsibilities for public risk, water conservation and prevention of soil erosion. It should state openly and definitively the responsibility of land owners and managers to protect and conserve endangered species and ecosystems without any prevarication and give due warning of the responsibilities of land owners including a duty of care to take action to prevent further loss.
- The Ministerial discretion which is a marked feature of the current Act should be reduced with the replacement of “may” by “must” in specific instances as noted in Attachment B.
- Third party involvement in the Referral and Approval processes should be facilitated as noted in Attachment B.
- The Act should automatically trigger an environmental assessment for any greenfields site or where there is a significant change of land use, for example grazing to cropping or land fill on an old quarry site.
- It should require a referral where a land owner, including the Commonwealth, is not taking action necessary to protect a listed species.

- Ignorance of environmental values of land should be explicitly excluded as reason to mitigate fines or punitive actions should action or inaction of a landholder lead to increased threat to a listed species.

## 2. Reversal of the burden of proof

The Act currently provides a mechanism whereby a landowner or manager who is aware that an action could threaten a listed species or community must notify the Department and apply for permission to take that action anyway. Members of NPAC have remarked that the current EPBC Act is in fact a “Development Approvals Act”. The Act operates under an assumption that speedy **decision making** for site specific approvals is the most appropriate response when existence of a listed species triggers the assessment system. However, the emphasis is on a quick simplistic **approvals process** so as not to inconvenience developers. It is hard to see the justification for this approach, given the difficulty of getting species listed under the EPBC Act in the first place. An amended Act should reverse this so that, where listed species and ecological communities are known to exist the assumption is made that an approval will have to be lengthy, well documented and difficult to obtain.

Specific provisions which could be made to amend the Act include:

- The Act should be expanded to enable a moratorium to be placed on areas which are essential to the survival of a listed species or ecosystem (see discussion below on classification of Australia’s natural areas). The moratorium may permit continuation of existing use if that is not a threatening process but gives proper notice that no further development or change in land use will be permitted.
- The Act could be altered to require that any proposed development should show an overriding and clearly definable public or social good which cannot be met in any other way, when such a development impacts on a listed species.
- The Act should impose on the land owner (or land manager where it is publicly administered land) timeframes and responsibilities similar to those imposed on the government for the Approvals process for responses and actions.
- The Act needs to be able to protect species and eco-systems which are actually in danger, not just those which are on the official list. The Act should enable the listing as “notifiable” of any species which are reported to be at risk of extinction in peer-reviewed scientific journals.
- Exemption for Regional Forest Agreements should be removed from the Act.

## 3. Assessment on broad ecological classifications

As we become more conscious of the richness of our native ecosystems, we are discovering the paucity of our attempts to protect them. The WWF report “Building Nature’s Safety Net 2008” is among many reports which provide evidence that biodiversity in Australia is actually declining. This report finds that, as a nation, we are failing to meet our own goals in conserving our biodiversity including key target such as:

- a. seven of Australia’s 85 identified bioregions will have less than 2% of their land area in protected areas.
- b. Investment in management of protected areas declined in real terms on a per hectare basis over the four year period 2002/2003 to 2006/2007.
- c. All states and territories except Tasmania and the ACT report that they will not meet the target of having a representative sample at least 80% of regional ecosystems in protected areas.

d. A freshwater protected area system for Australia is still in its infancy.

Attempting to protect individual species or even individual locations of an endangered ecological system is very similar to putting a few sandbags on a river bank to stop a flood: the threat merely moves around and overwhelms it. Although there are remarkable instances of iconic species such as the Wollemi pine surviving in remote locations which can be protected in isolation, many scientists argue that even here it is the many thousands of hectares of natural bush surrounding the specific location which protects its unique features. With climate change altering so much of our landscape, governments are working hard to establish large corridors and connected landscapes which will allow movement of species in response to altered climate. Without recognition in the EPBC Act that this landscape connectivity is a fundamental principle of conservation, the Act becomes impotent.

The big drawback to a landscape approach to conservation is that it appears too difficult to establish a national classification of landscapes and ecological systems which would be sufficiently robust to survive the legal processes to which it would be subjected. The bioregional provisions of the Act are an attempt to set up such an operation but it has proven time consuming and unwieldy. However, in the past ten years there has been a significant parallel process to establish a documented National Reserve System (NRS) which “represents the collective efforts of the states, territories, the Australian Government, local government, indigenous and private landholders and non-government organisations to develop, formally establish and effectively manage a national system of protected areas.” (Consultation draft of Australia’s Strategy for the National Reserve System, Department of the Environment, Water, Heritage and the Arts.) The NRS consists of national parks, public reserves, indigenous land and privately owned and managed land all of which has been selected as holding key conservation and biodiversity values and is sequestered in one form or another from development. It would provide a satisfactory first step in enabling the EPBC Act to operate on a landscape scale specifically:

- An amended EPBC Act could define the NRS as having special status under the Act and set specific provisions for assessment of changes to land use within the larger landscape systems identified.
- A second step would then be to provide for additions to this category of land by application from interested parties, thus enabling a systemic construction of established landscape values against which non-conservation use of land would be measured.
- In addition the Act should establish a requirement that any proposed actions should refer to the broader landscape context and any declared protected areas or landscape zones.
- Subsequent reviews of the EPBC Act could build on this approach to establish over time a clear and comprehensive land classification system which gives land developers the certainty they want and protects the complex interactions of flora and fauna across the landscape scale as climate changes impact on their survival.

Attachment A to this document outlines some of the mechanisms which could be put in place to drive these changes, including the establishment of an independent body to conduct the listing process and map and define Australia’s biodiversity and apply this to a national biodiversity assessment system. Because of the economic downturn, the Federal Government is spending huge sums building new infrastructure. It would be

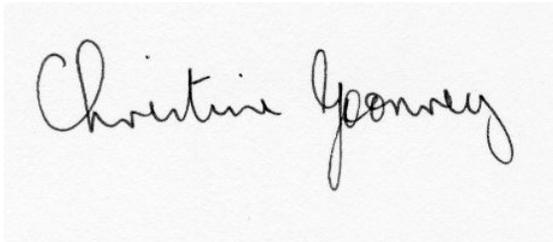
highly appropriate to use some of this money to bring together scientists and the community to map the natural values of our country as a sound platform in which to build our future conservation strategies.

The options which this review can consider are quite limited:

- It can recommend cosmetic changes to undo some of the damage done to the efficacy of the Act in the 2006 amendments. We have noted some of the more important of these in Attachment B.
- It can draft an outline of an Act which establishes a comprehensive, national approach to protection of biodiversity and environmental protection for the foreseeable future. It would also give certainty and clarity to businesses, unions and politicians.

Thank you for the opportunity to contribute to the Independent Review. We would be happy to expand upon the points we have raised in further discussions. I can be contacted directly by phone on 02 6231 8395 or email: [cgoonrey@grapevine.com.au](mailto:cgoonrey@grapevine.com.au).

Yours sincerely

A handwritten signature in black ink that reads "Christine Goonrey". The signature is written in a cursive style with a large, looped 'G'.

Christine Goonrey  
President