



3 November 2006

Dr Ian Holland  
Secretary  
Senate Environment, Communications, Information Technology and the Arts  
Committee  
Department of the Senate, PO Box 6100  
Parliament House, Canberra ACT 2600

**By email: [ecita.sen@aph.gov.au](mailto:ecita.sen@aph.gov.au)**

**Senate Inquiry into the  
Environment and Heritage Legislation Amendment Bill (No1) 2006**

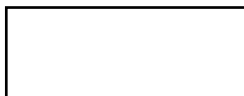
Dear Dr Holland

We welcome the opportunity to comment on the proposed changes to the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC).

The Wilderness Society (TWS) is a national, community-based, environmental advocacy organisation whose purpose is to protect, promote and restore wilderness and natural processes across Australia for the survival and ongoing evolution of life on Earth.

Please find attached our comments on the Bill, prepared in haste due to the short period allowed for public input.

Yours sincerely



Alec Marr  
National Campaign Director

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# **Submission to the Senate Inquiry into the provisions of the Environment and Heritage Legislation Amendment Bill (No1) 2006**

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## **1. *The Wilderness Society (TWS)***

The Wilderness Society (TWS) is a national, community-based, environmental advocacy organisation whose purpose is to protect, promote and restore wilderness and natural processes across Australia for the survival and ongoing evolution of life on Earth.

## **2. *Summary***

TWS believes there is a need for strong national environmental legislation to ensure the Federal Government can fulfil its national and international obligations to protect the environment. We do not believe the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC) delivers this responsibility and the proposed amendments further undermine an already flawed legislative model.

For example, to date the EPBC is failing to deliver environmental outcomes. Till June 2005 the only significant environmentally damaging action stopped by the EPBC was the protection of world heritage values by the refusal to approval electric fencing around a property located next to the World Heritage site – known as the flying fox case.

We have a number of concerns regarding the proposed amendments. The changes are described as ‘streamlining, simplifying and strengthening’ existing regulatory arrangements in order to refine existing mechanisms of the Act. Yet they go much further than that and if enacted will give the Federal Government even more scope to evade its environmental responsibilities.

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Some of the amendments will in fact streamline administrative aspects of the EPBC – however such streamlining is a bit meaningless when there is so much scope for avoiding responsibility for existing matters of national environmental significance and the big gaps in matters ‘triggered’ by the Act – major greenhouse action being the most obvious example.

When the EPBC was introduced one of our major concerns was the number of ways in which provisions of the Act could be avoided by creating ‘exemptions’ or via Ministerial discretion. Unfortunately the proposed amendments provide further scope for Ministerial duck weaving and avoiding of environmental responsibility across the already limited matters of national environmental significance.

For example the amendments provide capacity for the Minister to exempt actions affecting most matters of national environmental significance from environmental assessment if a bioregional plan is in place. Yet the requirements for a bioregional plan are flimsy and afford no assurance of environmental protection. The amendments also provide other avenues for avoiding Commonwealth responsibility.

One of the few strengths of the original Act was that it embraced a number of administrative law rights giving some capacity for third party civil enforcement. However the proposed amendments significantly diminish these existing provisions. One example being the various amendments that remove scope for third party review of decisions made under the Act.

The EPBC has now been in operation for just over six years. The Act requires an independent review be undertaken within the first ten years to consider the operation of the Act and the extent to which its objects have been achieved. While there have been a number of audit and review processes none have looked at both the operational and environmental outcomes of the Act. Therefore we recommend the Act not be amended until an independent review has been undertaken which considers:

- the extent to which the Act is achieving its objectives of protecting the environment;
- operational and management aspects of the Act; and
- whether the Act fulfils the federal government’s national and international environmental obligations and responsibilities.

***Recommendation:***

***The Wilderness Society recommends the Act not be amended until an independent review has been undertaken within the context of considering the extent to which the Act is achieving its objectives.***

### **3. Performance of the EPBC to date**

The Wilderness Society has not had time to do a complete assessment of the capacity of the Act to deliver environmental outcomes.

However TWS is disappointed that the only environmentally damaging action stopped by the EPBC has been the protection of world heritage values by the refusal to approve electric fencing around a property located next to the World Heritage site in the flying fox case.

We also have concerns that a number of environmentally damaging actions have been approved, for example, the Meander Dam in Tasmania; or have serious flaws in designation, as with the proposal for Gunns Ltd's northern Tasmanian pulp mill where wood supply was deemed by the Minister to be not assessable.

In other cases we are concerned that the conditions placed on approvals are not sufficient to mitigate environmental damage.

We also note the commentary of other groups on the effectiveness of the legislation in achieving environmental outcomes. For example:

*“There seems to be a reluctance to use the powers under the EPBC Act given to the Minister to refuse developments. Instead, all major developments have been approved, mostly with extensive conditions. Many of these conditions require the further provision of management plans before actions can commence. However, it is yet to be seen whether such management plans will actually prevent harm to the threatened and migratory species they are designed to protect, or appropriately safeguard against damage to World Heritage values. Similarly, there is no guarantee that attaching conditions will be sufficient to effectively protect the environment.”*

***Environmental Defenders Office, May 2005<sup>1</sup>***

*“The EPBC is a legal instrument fully capable of meeting modern day environmental management needs, it is clear to us that the Commonwealth has failed miserably to live up to the EPBC's immense protective potential.”*

***Humane Society International July 2005***

*“In many key areas, there has been a serious failure to implement critical provisions of the Act that would substantively improve biodiversity protection and coherent environmental impact assessment. Where commendable protective measures have been taken, all too often they have been undermined or nullified by exemptions or wholly inadequate implementation procedures.”*

***Humane Society International July 2005***

*“In almost all areas, the regime has failed to produce any noticeable improvements in environmental outcomes. The activities that pose the greatest threat to the Act's 'matters of national environmental significance' are rarely being referred to the Minister and, when they are, the Minister is not taking adequate steps to ensure appropriate conservation results. In five years, the EAA provisions have been responsible for stopping only two activities out of potentially thousands and the conditions that have been imposed on developments under the regime have largely been ineffectual, unenforceable or a mirror of those already imposed under other processes.”*

***The Australia Institute July 2005***

#### **4. Review of the EPBC**

The EPBC has been in operation for just over six years. The Act [s522a] requires an independent review be undertaken within the first ten years and thereafter at least once every ten years. The review is to consider the operation of the Act and the extent to which its objects have been achieved.

While there have been a number of audit and review processes<sup>2</sup> none meet all three of the legislative requirement of s522a – independence, consideration of operational aspects and consideration of environmental outcomes.

All have focussed on operational aspects. While efficiency and administrative arrangements are important, a key question still needs to be whether the legislation is serving its object of ensuring environmental outcomes. As above we have a number of concerns in this regard.

The explanatory memoranda for the proposed amendments justify the lack of consultation by saying that the operations of the Act have involved a continuous dialogue with persons who have either been involved with or have an interest in its operation”.<sup>3</sup> However this is not an independent or transparent process, particularly given concerns that the amendments are driven by the interests of industry rather than to deliver environmental outcomes.

***Recommendation:***

***The Wilderness Society recommends the Act not be amended until an independent review has been undertaken within the context of considering the extent to which the Act is achieving its objectives.***

#### **5. Matters of national environmental significance**

In considering these amendments we place them in the context of the already limited scope of the EPBC.

The Commonwealth has clear powers to act to protect the environment. However, the EPBC currently restricts Commonwealth responsibility to just six matters of national environmental significance – threatened species, migratory birds, World Heritage, Ramsar sites, Commonwealth marine areas and nuclear actions – and to actions significantly affecting the environment on Commonwealth land or actions of Commonwealth agencies.

Further, even when environment assessment and approvals are ‘triggered’ Commonwealth consideration is limited to just those impacts relating to the matter of national environmental significance rather than all environmental impacts. Plus there are a myriad of ways in which the Commonwealth can exempt itself (see section 7 below).

There are six additional matters that should automatically be subject to Commonwealth environmental assessment and approvals including:

- forest activities – forests, whether part of RFA regions or not, should be subject to Commonwealth environmental impact assessment, as they contain more than half the country’s terrestrial biodiversity;
- projects with significant greenhouse gas emissions;

- water allocation decisions;
- land clearing;
- national heritage, and
- projects which receive Commonwealth funding.

It is also vital that the Commonwealth has a ‘call in power’ to be used where a project is considered to be having a significant impact on the environment.

In addition, TWS believes certain activities should not take place and therefore simply be listed as prohibited activities. Examples of prohibited activities could include:

- nuclear activities – nuclear power generation, research reactors, enrichment or reprocessing facilities, uranium mining or milling, nuclear waste facilities;
- coal fired power generation;
- developments involving the release of genetically modified organisms;
- certain developments in National Parks; and
- development likely to affect world heritage properties or the values of world heritage properties.

In summary, national environment legislation should reflect the existing broad powers under the Constitution for the Commonwealth to intervene to protect the environment in an unfettered manner.

## **6. Review of triggers**

Amendment 85 removes [s28A]<sup>4</sup> of the Act which requires the Minister to review and report every five years on environmental matters that may properly be regarded as being of national or international significance that should be ‘trigger’ Commonwealth environmental assessment and approvals.

The first review was undertaken in 2005 and to date the Minister has not reported on outcomes of the review, although required to do so.

Also, earlier on in 2000, arising from the Democrats GST / EPBC deal of 1999 the then Environment Minister Senator Hill released proposed regulations to incorporate some large scale greenhouse actions. The regulations were not introduced.

To date no new matters of national environmental significance have been added to the EPBC.

There is still scope for additional matters of national environmental significance to be added by regulation [s25] and of course the Act can be amended to add additional items but the failure to date to include additional triggers highlights the weakness of the current Act.

## **7. Exemptions and ministerial discretion**

One of our main concerns with the original EPBC was the many and varied ways the Commonwealth could ‘exempt’ itself out of its national environmental responsibilities.

These exemptions combined with wide ranging scope for Ministerial discretion meant right from the start that its practical application in protecting the environment was uncertain. It allows environmental decision making to be subject to political decision-making rather than based on sound scientific environmental management.

The EPBC already provides numerous ways the Commonwealth Environment Minister can avoid involvement in environment assessment and approval.

The proposed amendments significantly increase the number of ways in which the Minister can avoid its national environmental assessment and approval responsibilities. A key example is the proposal for exempting Commonwealth environmental assessment and approvals if a bio-regional plan is in place.

## **8. Bio-regional plans**

Amendment 122 gives the Minister capacity to ‘exempt’ [declare] most actions potentially affecting matters of national environmental significance from environmental impact assessment provisions if a ‘bioregional plan’ is in place.

The criteria for bio-regional plans are extremely weak and effectively afford no assurance of environmental protection for matters of national environmental significance.

The Minister cannot make an exemption if he/she considers the action will have ‘unacceptable or unsustainable impacts on the matter of national environmental significance, although this is not well-defined [proposed 37B(3)].

Capacity to revoke the ‘exemptions’ granted to actions undertaken within bioregional plans is extremely limited [proposed s37k] and allows for the action to continue if it had started before the revocation – ie can only stop future actions. Nor is there scope for Commonwealth enforcement.

Amendment 352 clarifies that bio-regional plans are not legislative instruments. Therefore despite giving away Commonwealth approvals, there is no scope for Parliamentary scrutiny and limited requirements for public input into bio-regional plans.

## **9. Conservation agreements**

Amendment 122 gives the Minister capacity to ‘exempt’ [declare] most actions potentially affecting matters of national environmental significance from environmental impact assessment provisions if a ‘conservation agreement’ is in place. As above the criteria and processes surrounding conservation plans are weak.

## **10. Third party enforcement and review**

Traditionally there have been three key barriers to civil enforcement: standing; costs; and liability for damages if the case fails.

Environmental and planning law is relatively young and is evolving to meet new expectations – so, on balance the law relating to civil enforcement is generally becoming more open. For example, in November 2003 the Queensland Government introduced amendments to their *Nature Conservation Act 1992* allowing standing to the public, providing established environment groups capacity for ‘judicial review of decisions and removal of costs as a significant barrier.

TWS supports third party enforcement rights as a key part of good environment and planning legislation. Third party rights provisions under the EPBC are inadequate for a number of reasons including:

- standing should be available to any person to bring an action under the legislation; and,
- ruling out security for costs in all cases.

That said the EPBC did embrace a number of administrative law rights giving some capacity for third party civil enforcement. For instance it included: standing for interested persons and specifically excludes requiring security of costs as a requirement of seeking an interim injunction.

The proposed amendments significantly diminish these existing provisions. In particular the amendments remove the provision ruling out security for costs as a requirement for seeking an interim injunction and remove scope for third party review of many Ministerial decisions.

To override these limited rights sets an extremely worrying precedent. In contrast, the law relating to third party rights should be enhanced to provide for open standing; costs should not provide a substantive barrier; and there needs to be effective capacity for review of the merits of decisions as well as administrative review.

Liberal third party enforcement processes – where in place – have not opened a floodgate of litigation and their existence and occasional use have value in ensuring compliance with environmental laws and in testing environmental best practice.

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<sup>1</sup> Australian Network of Environmental Defenders Offices *Possible New Matters of National Environmental Significance under the EPBC Act 1999* 2 May 2005  
[http://www.edo.org.au/edonsw/site/pdf/mnes\\_review.pdf](http://www.edo.org.au/edonsw/site/pdf/mnes_review.pdf)

<sup>2</sup> Department of Environment and Heritage *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) Administrative Guidelines on Significance 2003* <http://www.deh.gov.au/media/dept-mr/dp30jul03.html> and Australian National Audit Office *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999* 2003  
<http://www.anao.gov.au/website.nsf/publications/0c8eb3b7d50a315aca256d010018981c>

<sup>3</sup> Explanatory Memorandum page 17

<sup>4</sup> 28A Identifying extra matters to be protected by this Part

(1) Every 5 years after the commencement of this Act, the Minister must cause a report to be prepared on whether this Part should be amended (or regulations made for the purposes of section 25) to prohibit or regulate additional actions that have, will have or are likely to have a significant impact on environmental matters that may properly be regarded as being of national or international significance.

(2) The following must be taken into account in preparing the report:

- (a) environmental matters that are properly regarded as being of national or international significance;
- (b) the adequacy of existing legislation and administrative measures of the Commonwealth, the States and the Territories to prevent significant impacts on those matters;
- (c) the principles of ecologically sustainable development;
- (d) Australia's international obligations;
- (e) the objects of this Act;
- (f) the matters (if any) prescribed by the regulations for the purposes of this paragraph.

(3) Before preparation of the report begins, the Minister must publish in accordance with the regulations (if any) an invitation for persons to comment, within a specified period, on the matters to be covered by the report.

(4) Before preparation of the report is completed, the Minister must cause to be published in accordance with the regulations (if any):

- (a) a draft of the report; and
- (b) an invitation to comment on the draft within the period specified by the Minister.

(5) The Minister must publish the report.

(6) To avoid doubt, this section does not affect the operation of section 25.