Coalition Senators' Additional Comments

For a major piece of legislation that has sought to establish a significant presence for the Australian Government in issues of environmental protection and conservation the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) remains relatively new. This is especially so when compared with the majority of similarly significant taxation, finance or legal measures, though not unusual in the environment field.

Coalition Senators make this observation because we accept it is important to review the ongoing effectiveness and efficacy of this legislation. That occurred in 2006, when amendments to the Act were made to address numerous areas of concern, and is happening again at this point in time through an independent review of the Act (required at regular intervals under section 552A of the Act) that was commissioned by the Minister for the Environment, Heritage and the Arts, the Hon Peter Garrett AM MP, on 31 October 2008 and is due to report by 31 October 2009.

However, Coalition Senators are firmly of the opinion that such reviews – particularly when conducted after just the first ten years of operation and less than four years after significant amendments – and any subsequent changes to either the Act or its implementation by the Government must firstly focus on improving the operation of the Act to meet its objectives, rather than significantly widening its scope or application. We are strongly of the view that the more recent changes of 2006 should not be overturned without clear evidence of their failure.

We also note a bias of viewpoint in the direction of this report. While we recognise this is a critically important piece of environmental legislation – indeed it was introduced by the former Coalition Government – statements made in isolation about "whether reform might result in better environmental protection outcomes" (paragraph 3.3 of the majority report) without any mention of the potential to improve the operation of the Act for applicants or proponents demonstrate a one-track focus. To operate successfully in Australia's national interest this Act must be balanced.

Coalition Senators are supportive of some of the practical recommendations made in the majority report of this Committee and welcome the passionate contributions of the many witnesses who gave evidence to this inquiry, but we believe that some other recommendations proposed would increase the costs and complexity of the scheme whilst placing undue impediments on development and economic investment within Australia. Accordingly, we have addressed a number of the issues and recommendations contained in the majority report below.

Objects of the Act

The majority report recommends that the words 'to provide for' be deleted from sections 3(1)(a) and 3(1)(ca) of the Act. We note that the majority of discussion on this matter centres on the case of *Brown v Forestry Tasmania* and the interaction of the verb 'provides for' in both the EPBC Act and the *Regional Forest Agreements Act 2002* (RFA Act).

However, the committee decided to address the particular issues of interaction between the EPBC Act and RFA Act in a separate report to be provided to the Senate in April; a point that is detailed at 1.30 of the majority report. Coalition Senators believe this recommendation pre-empts the findings of this second report and reserve our position on this matter until more fulsome consideration to this issue has been given.

In particular, Coalition Senators are concerned that the issues that arise from *Brown v Forestry Tasmania* may relate more to the effective enforcement of Regional Forest Agreements than any objects of the EPBC Act. We would be especially reticent to see a situation where a duplication of assessments, requirements or enforcements could apply to the forestry industry across both the EPBC Act and RFA Act. These matters require closer examination to avoid potentially costly consequences and deliver the most effective environment outcome before the objects of the EPBC Act are amended in the recommended way.

New 'triggers'

Recommendations 2 and 3 of the majority report propose further consideration of new 'triggers' – impacts that would be considered as matters of national environmental significance and therefore require assessment and approval under the Act. Specifically, a greenhouse trigger and a land clearing trigger are canvassed.

Coalition Senators are firmly against the imposition of a 'greenhouse trigger'. While we believe that every effort should be made to reduce Australia's greenhouse emissions as rapidly as economically, technologically and socially feasible, we do not believe that this is an appropriate mechanism by which do so.

Considering the greenhouse emissions of just one project in isolation is no way to manage or shape Australia's overall emissions management and would be of less than negligible impact on global emissions, as identified by the National Parks Australia Council:

> even very large amounts of greenhouse emitted as a result of any single action in Australia will be ‘a drop in the ocean’ on the world stage.[1]

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1 National Parks Australia Council Inc, *Submission* 93, p. 36.

Worse than this, Coalition Senators believe that the inclusion of greenhouse emissions as a potential trigger for assessment under the EPBC Act could prove to be a driving force in carbon leakage to other countries. It is precisely at this stage of investment planning and approval that projects will be most likely to consider development offshore, potentially in countries where other policy parameters and business processes could lead to higher levels of emissions than would have occurred in Australia.

The National Association of Forest Industries (NAFI) indicated that such a proposal would result in undue complexity, when the Government's primary greenhouse emissions reduction policies are being pursued through totally different mechanisms:

> Already the government's objectives in relation to its obligations under the Kyoto protocol and its eventual successor are being manifested in the CPRS legislation. To have a trigger under the EPBC Act for yet another layer of examination, assessment and approval between Minister Garrett and Minister Wong is not necessarily a healthy situation in terms of efficient regulation.[2]

Coalition Senators are more open to the arguments surrounding a 'land clearing trigger'. However, we would need to be convinced that the inclusion of any such trigger would result in greater certainty for proponents or applicants and not result in a reduction of access to existing prime agricultural land. Any further consideration of this recommendation by the Government must include appropriate consultation with all relevant stakeholders, especially representatives of land users.

Compliance and Outcomes

Coalition Senators support Recommendations 4 and 5, especially as they relate to investigation, compliance, auditing and enforcement measures. To be relevant and apply equally across the community laws need to be effectively policed and enforced. There is no point applying all manner of conditions to an approval or accepting a range of undertakings if those conditions or undertakings are never monitored.

For example, Coalition Senators themselves have been highly critical of the proposed North-South or Sugarloaf Pipeline to convey water from the Goulburn River to Melbourne, which itself was the subject of a conditional approval by Minister Garrett last year. The water savings upon which the Government assures us the operation of this pipeline are contingent, along with other conditions imposed, must be properly audited and assessed to maintain even the slightest modicum of community acceptance for this project.

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2 Mr Shane Gilbert, Strategic Advisor, National Association of Forest Industries, *Committee Hansard*, 18 February 2009, p. 10.

Some improvements in this area of enforcement have been noted at 3.30 of the majority report. However, more does need to be done to ensure the expensive processes employed by all stakeholders to obtain approvals are not wasted for lack of enforcement.

We also note the concerns highlighted in 3.23 of the majority report from diverse stakeholders like the Australian Conservation Foundation and the Minerals Council of Australia (MCA) that it is difficult to determine whether the Act is "in fact delivering environmental protection outcomes". Confidence in the long term benefits of the Act is important and further assessments that provide more detail than that contained in the 2006 *State of the Environment Report* would be welcome to improving confidence in the merits of the Act.

The range of powers and tools

The Act provides for a range of tools and mechanisms that can be employed by government to achieve its objects, such as strategic impact assessments, listing of threatened species and the preparation of recovery plans, in addition to those aspects that specifically relate to the assessment of individual projects. The majority report highlights a number of witnesses who sought increased use of these measures, especially as they can be used to address cumulative impacts, or criticised what they saw as the limited use of them to date.

Coalition Senators hope that the independent review will give more fulsome consideration to the merits of these measures, the impediments to their effective deployment by the department, their impact on environmental, economic and social outcomes and the proposals made by the majority report in Recommendation 8.

The diverse concerns of organisations such as the MCA, Australian Network of Environmental Defender's Offices and National Farmers Federation about the application of 'offsets' policies for habitat conservation make the development of a clear policy in this area essential. Such an outcome should improve the certainty for all stakeholders and, in doing so, minimise costs and delays. However, Coalition Senators are unwilling to be as prescriptive about the content of such a policy as the majority report is at Recommendation 9 and would urge wide consultation with relevant parties prior to its finalisation.

Bilateral agreements

Coalition Senators welcome Recommendation 6. The risk of State Governments operating in "the simultaneous roles of proponent and assessor" as outlined in 4.10 of the majority report does have the potential to undermine public confidence in the system established by this Act.

Currently the South Australian Government is undertaking Environmental Impact Statements in regards to the construction of a weir near Wellington towards the end of the River Murray and the possible admission of seawater into the Ramsar wetlands of Lake Alexandrina and Lake Albert. The South Australian Government is the applicant or proponent of these highly controversial proposals and its suitability to assess their environmental impact has already been called into question.

Commonwealth agencies and duplication

Coalition Senators also welcome Recommendation 7, which seeks to address duplication concerns raised by the Commonwealth Fisheries Association and the Australasian Fisheries Management Authority regarding the duplication and lack of integration between the EPBC Act and the *Fisheries Management Act 1991*. This is similar to the potential duplication that Coalition Senators wish to avoid in relation to the EPBC Act and RFA's or other matters.

Coalition Senators also recognise the specific concerns of the Department of Defence in regard to adherence to the Act as a Commonwealth agency. The repetition described by defence and the impact of "prescriptive rather than performance based"[3] conditions on approvals warrant further inspection by both the independent review and the Government.

Merits review

Though not opposing consideration by the independent review, Coalition Senators are concerned about the impact of expanding the scope for merits review as suggested in recommendation 10 of the majority report.

It is clear from the majority report itself that decisions made under the Act are often contentious and can infrequently, if ever, make all parties happy:

> It is clear from submissions that stakeholders are sometimes dissatisfied with individual decisions. Sometimes this is because they believe those decisions give insufficient weight to environmental protection. In other cases, there are stakeholders dissatisfied because they believe economic or social benefits were not given sufficient emphasis.[4]

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3 Office of the Secretary and Chief of the Defence Force, *Submission 67*, p. 67.

4 Majority Report, paragraph 3.68

This does make this area a potentially litigious one. Yet it is also an area of policy that requires levels of certainty and timeliness. Coalition Senators would encourage moves towards greater transparency in decision making rather than avenues that could increase the potential for appeal and therefore the delays that may be experienced.

Senator Simon Birmingham
Senator for South Australia

Senator the Hon Judith Troeth
Senator for Victoria

Senator Fiona Nash
Senator for New South Wales