

Additional Comments from the Australian Greens

Introduction

The Environmental Protection and Biodiversity Conservation Act was intended to be Australia's key environmental legislation, enacting our commitments under the Convention for the Conservation of Biological Diversity to "*achieve by 2010 a significant reduction of the current rate of biodiversity loss*"¹ as well as other international commitments ratified by the Commonwealth – including World Heritage, Ramsar wetlands, and migratory birds. Crucially, the EPBC Act "...represents the only comprehensive attempt in the history of our federation to define the environmental responsibilities of the Commonwealth".²

While the majority committee report and our additional comments can and should consider the framing, implementation and relative effectiveness of particular provisions within the EPBC Act, the ultimate test of this legislation as a whole must be the measure of its success in actually conserving biodiversity and protecting our environment.

Unfortunately to date it has not achieved this outcome. Biodiversity loss is continuing at an alarming rate across Australia, and the rate of loss of species and ecological communities shows no sign of slowing. As the State of the Environment report states: "*...biodiversity continues to be in serious decline in many parts of Australia*".³ On this key measure of the broader success of the EPBC Act it is clear that it has not delivered on its promise "*to provide for the protection of the environment*".⁴ Native vegetation continues to be cleared at an alarming rate, the interception and over-extraction of surface and groundwater is creating an environmental and social disaster in the Murray Darling Basin and elsewhere, invasive plants and animals continue to devastate natural systems, over-fishing threatens the health of our oceans and the ongoing viability of our fisheries, and climate change presents an unprecedented threat to biodiversity – yet the EPBC Act seems apparently incapable of assisting the government or empowering the community to act to prevent this tragic loss of diversity.

The context of the EPBC Act

In considering the relative success or failure of the EPBC Act, it is clear that the Act does not operate in isolation, and its effectiveness will be limited to an extent by the nature and adequacy of the institutional arrangements that support its implementation. Many of the concerns and criticisms aired by witnesses to the committee inquiry were

¹ UN CCBD www.cbd.int/2010-target/

² Second Reading speech on the introduction of the EPBC Act 1995.

³ Australia State of the Environment report 2006.

⁴ Objects of the EPBC Act, Part 1 Chapter 1 Section 3(1)(a).

focused on the inadequacy of the administrative arrangements and resources that support the Act's implementation – particularly in relation to environmental research, monitoring and assessment; compliance and enforcement; and public participation.⁵

There is a high level of community concern about the manner in which the structure and implementation of the EPBC Act has effectively bureaucratized the protection of the environment and the conservation of biodiversity – producing a moribund box-ticking approach that fails to protect the environment or deliver a timely assessment regime.⁶ Ultimately this results in an Act that purports to cover a comprehensive range of conservation issues and commitments, but which in practice "... largely divests the Commonwealth of actual responsibility for environmental protection".⁷

When considered in these broad terms the EPBC Act fails to enact our international conservation commitments. It limits Commonwealth responsibility for biodiversity to listed threatened species and communities and migratory species. It limits Commonwealth assessment of developments and threatening processes to a narrow focus on their direct impacts on relevant matters of national environmental significance, rather than enabling comprehensive assessments and consideration of cumulative impacts. It reduces the Commonwealth's commitment to protecting World Heritage, National Heritage and Ramsar Wetlands to protecting the identified 'values' of these places while failing to protect the places themselves.⁸

The Australian Greens support the general direction of the majority committee report, but believe that its analysis of the limitations of the EPBC Act and the inadequacy of its implementation does not go far enough in considering the manifest failure of the EPBC Act to actually protect and conserve biodiversity and our environment – nor do its recommendations.

The recommendations of the majority committee report identify and address some serious shortcomings with the EPBC Act (for instance, in relation to a greenhouse trigger; resourcing assessment, monitoring and compliance; merits review of ministerial decisions; and nomination and listing of threatened species). We are concerned however that a number of the recommendations are neither strong enough nor sufficiently targeted to solve the problems discussed in the report. In addition, we are also concerned that there are a number of significant shortcomings of the EPBC Act that are not addressed in the recommendations, which are listed in the last section on this report.

The Greens also remain concerned that many of the opportunities to be proactive on environmental protection and biodiversity conservation offered by the EPBC Act have

⁵ Submissions by HSI, ACF, WWF, TWS, WPAA, IFAW, ISCI EIANZ among others.
Also the combined environment groups submission to the EPBC Act review.

⁶ op.cit.

⁷ Dr Marg Blakers, Green Institute submission to the EPBC Act review, p 2.

⁸ Dr Marg Blakers, Green Institute submission to the EPBC Act review.

failed to be realised – due to a combination of sustained chronic under-funding and insufficient political will.

Climate Change

Climate change in particular presents an unprecedented challenge to environmental protection and biodiversity conservation that it would seem the Commonwealth is not legislatively prepared to tackle. While the Rudd Government is introducing an emissions trading framework to tackle industry carbon emissions, the proposed framework does not include any mechanism to arrest emissions from vegetation clearing, logging of native forests or degradation of remnant ecosystems.⁹ Perversely this system allows for the voluntary inclusion of carbon sequestration in plantation forestry, but fails to account at all for the significantly higher levels of green carbon sequestered in native forests and woodlands, or the emissions resulting from the logging or clearing of these forests or woodlands.

Any simple cost-benefit analysis of the economics of emission abatement must clearly show that preventing land clearing is one of the most cost-effective means of reducing carbon emissions, and that the cost of replacing or offsetting the green carbon sequestered in native ecosystems is such that it makes it effectively irreplaceable over relevant timeframes. The EPBC Act, however, fails to provide a mechanism to tackle the problem of land clearing (except where it impacts directly on threatened species or ecological communities) and is incapable of playing a role in contributing to the pressing issue of climate change by protecting green carbon stores. If anything, the approach taken by the EPBC Act implicitly assumes that clearing, logging and land degradation will continue to take place and is acceptable provided that listed threatened species and ecological communities are protected.

The impacts of climate change on native ecosystems necessitate an urgent reappraisal of our approach to biodiversity and ecosystem conservation. The threat of climactic shifts means that landscape connectivity is critically important. This is particularly important for highly biodiverse native remnants in a fragmented landscape, as we see for instance in the wheat belt landscape of the biodiversity hotspot of south-western WA. Increasing climactic variability and extreme climate events also mean that managing for ecosystem and species resilience, diversity and function need to be paramount. We need a new paradigm in environmental management.

Given the high costs of reducing carbon emissions and the irreplaceable nature of the green carbon sequestered in native ecosystems it is clear that we need to prioritise the protection of existing ecosystems and that developed countries such as Australia should be looking to stop clearing, seeking to effectively conserve their remaining native ecosystems, and looking at ways to measure and manage green carbon. The EPBC Act is not capable of taking on this task and it is arguable that we in fact require a paradigm shift in our approach to biodiversity conservation to do so. While the Greens advocate the inclusion of a climate change trigger for MNES within the

⁹ Estimated to have accounted for over 90 million tonnes of CO₂-e in 2006, Blakers, M 2008, *A framework for carbon accounting and emissions reductions*, Green Institute.

existing EPBC Act and the proactive use of its planning powers to more effectively address the threats posed by climate change to biodiversity and native ecosystems, we also believe that ultimately a more effective outcome would be to replace the EPBC Act with a much more effective and robust framework.

Improving the EPBC Act

It is difficult to do justice to the depth and range of analysis provided to the committee inquiry and also the submissions to the Independent Review of the EPBC Act¹⁰ by community conservation groups and non-government organisations. These organisations and individuals have raised a number of issues of particular concern that are listed below. Given the short time frame available for writing these additional comments it is not possible at this stage to discuss these problems in detail, so we have confined ourselves to listing the issues of particular concern and making some key recommendations to address them.

We note that this is in effect an interim report on this inquiry, with the second part of this inquiry with a specific focus on Regional Forest Agreements reporting on 24th April 2009. To this end we will refrain from discussing the issues associated with RFAs in these additional comments and also hope to address the key concerns listed below in more detail.

The Australian Greens believe that the volume and detail represented in this wide range of submissions provides a good indication of the extent of community engagement and concern with issues of biodiversity conservation and environmental protection. Many of these groups have actively engaged in the public processes for the listing of threatened species and ecological communities over the years, and to this end we are both disappointed and concerned by the amendments to the EPBC Act under the Howard Government that reduced the scope for public participation.

We are particularly concerned by:

- The broad ministerial discretion allowed in the direction of and decision making within the Act.
- Exemptions to the protections offered under matters of national environmental significance.
- The devolution of commonwealth responsibility and decision-making through approved bilateral agreements with states and territories (without a requirement of similar levels of assessment or protection).
- The removal of the right to challenge ministerial decisions on their merits in 2006.
- The 2006 changes to the Act that undermined the listing of threatened species, threatened ecological communities, key threatening processes and heritage places.

¹⁰ Independent Review of the EPBC Act 1999, DEWHA.
<http://www.environment.gov.au/epbc/review/index.html>

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- The lack of a statutory timeline to ensure the prompt assessment and listing of threatened species, ecological communities, key threatening processes and heritage places.
 - The lack of any requirement that the Minister ensures lists are kept up to date.
 - The lack of consideration of climate change, water extraction and interception, land clearing, migratory fish and vulnerable ecological communities as matters of national environmental significance.
 - The lack of a mechanism to recognise cumulative impacts under MNES.
 - Failure to effectively use the Strategic Assessments provisions under the Act to proactively undertake bioregional planning and pre-emptively address the problem of cumulative impacts.
 - Lack of requirement for public consultation in regional strategic assessment processes.
 - Lack of a requirement that the minister comply with a bioregional plan (rather than simply '*...have regard for...*').
 - A lack of guidelines to ensure where strategic assessment takes place there is no diminution of or exemption from environmental impact assessment processes.
 - The lack of effective protection of species and ecological communities listed as threatened under EPBC.
 - The under-resourcing of threat abatement and recovery plans.
 - Inappropriate use and over-use of environmental 'offsets' in MNES approval processes under EPBC (threatened species or communities and critical habitats are not 'replaceable').
 - The focus of limited resources and effort on assessment and approval processes.
 - Lack of utilisation and resourcing of the EPBC provisions for:
 - conservation agreements
 - covenants
 - critical habitat protection
 - bioregional plans
 - recovery plans
 - wildlife conservation plans
 - threat abatement plans.
 - The lack of threat abatement plans for land clearing or climate change.
 - The absence of any effort to systematically develop bioregional plans for all of Australia's IBRA bioregions.
 - The restrictions on public participation including the length of public consultation periods and the lack of a legislative timeline for a response from the Minister.
 - The limitations of 'priority assessment' on public nominations of threatened species and ecological communities, heritage places and key threatening processes.

- The disincentive to public participation in EPBC Act interpretation posed by the risk of orders for security costs and the threat of costs following a court action.
- The need to reinstate and expand the right to appeal the merits of key ministerial decisions.
- The move away from mandatory recovery planning for threatened species or communities in the 2006 amendments.
- The need to require that recovery plans are sufficiently resourced, implemented, monitored and enforced to ensure that species or communities actually recover.
- The failure to list critical habitats on the EPBC Register of Critical Habitats despite their being identified as critical to the survival or recovery of threatened species or communities in recovery plans.

Recommendations

Objects

- **Strengthen the Objects of the Act to require the conservation of biodiversity and the protection of the environment ... by replacing the words 'to promote the conservation of biodiversity' with 'to conserve biodiversity' in section 3(1)(c) ... and removing the words 'to provide for' from sections 3(1)(a) and 3(1)(ca)**

Triggers

- **Add a Greenhouse Trigger for Matters of National Environmental Significance for major new greenhouse gas emitting projects AND require all decision making under the EPBC Act to explicitly consider climate change**
- **Add a Water Extraction, Interception and Use trigger for MNES for activities involving ground water and surface water interception and/or extraction**
- **Add a Broadscale Land Clearing trigger for MNES for major new vegetation clearance proposals**
- **Add a Migratory Fish trigger for MNES for species listed under Annex 1 of the UN Convention for the Law of the Sea**
- **Add a Vulnerable Ecological Community trigger under MNES¹¹**

Cumulative Impacts

- **Amend the Act to require assessments of environmental harm take into account cumulative and indirect impacts**
- **Publish administrative guidelines outlining how the government will take into account cumulative impacts in referral, assessment and approval processes**

Strategic Assessments

- **Publish guidelines for Strategic Assessments**
- **Require public consultation**

Ministerial Discretion

- **Amend the EPBC Act to limit ministerial discretion so that approvals cannot be given to activities which cause significant impact to threaten species or ecological communities, to National, Commonwealth and World Heritage or Ramsar sites**
- **Prevent the use of environmental 'offsets' in relation to MNES**

¹¹ Detailed discussion of trigger thresholds is contained in the HSI, WWF, TCT, ACNT 2005 submission to the Commonwealth Government.

Planning and Proactive Use

- **Better utilise and provide greater resources for the use of proactive measures under the EPBC Act including recovery plans, threat abatement plans, wildlife conservation plans, bioregional plans, conservation zoning, covenants and conservation agreements**
- **Develop a threat abatement plan for climate change**
- **Develop a threat abatement plan for vegetation clearance**
- **Strengthen bioregional planning provisions to require public consultation**
- **Amend the EPBC Act to require the Minister to comply with bioregional plans (rather than simply 'have regard for')**

Public Participation

- **Increase public consultation periods**
- **Reinstate and expand the right to appeal the merits of key Ministerial decisions**
- **Remove the threat of orders for security for costs and for costs following court action**
- **Include a statutory timeline for response to all public nominations of threatened species and ecological communities, heritage places and key threatening processes**

Regional Forestry Agreements

- **Repeal the exemption for RFAs so that they are required to ensure the conservation of threatened species, ecological communities and critical habitats**

Note that issues with RFAs will be covered in more detail in the subsequent part of this inquiry and we expect to include additional recommendations on these issues in our subsequent report.

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Australian Greens Whip

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Australian Greens