

Inquiry into the operation of the Environment Protection and Biodiversity Conservation Act (EPBC Act)

Submission from Margaret Blakers, Green Institute, September 2008¹

The backdrop to this inquiry is the Commonwealth's overwhelming failure to take responsibility for Australia's environment, either legislatively or through policy, and evidence of catastrophic decline and degradation. For example

- o Climate change is impacting on the environment, land use decisions are accelerating climate change but the Commonwealth has given itself no legislative power to act, even after ratifying the Kyoto Protocol.
- o Biodiversity is widely accepted to be in crisis at every level from genetic to species to landscape, but there is no systematic measurement or reporting. State of the environment reporting, on this and other facets of the environment, lacks systematic, rigorous, quantified and continuous assessment.
- o The Commonwealth is complicit in allowing native forest logging to drive species towards extinction.
- o The Murray Darling Basin is in a parlous state through over-allocation of water, drought and lack of action to protect even those elements where the Commonwealth has clear responsibility including Ramsar wetlands and threatened species.
- o Major developments such as Gunns proposed pulp mill and the Sugarloaf Pipeline are only partially assessed by the Commonwealth because its jurisdiction is limited to 'matters of national environmental significance', and holistic assessment is precluded.

Radical reform is needed. This Senate inquiry precedes the required independent Review of the EPBC Act, which must be undertaken before July 2010. As well as drawing its own conclusions about the operation of the EPBC Act, the Senate inquiry should also recommend issues to be included in the terms of reference for the Review and investigations to precede it. This submission highlights just a few of many critical aspects.

1. Commonwealth responsibility

Australia has signed and ratified international agreements on climate change, biodiversity, Ramsar wetlands, World Heritage, migratory birds and other environmental matters but the Commonwealth government has failed to sheet home in legislation its acceptance of the responsibility flowing from these international commitments. Instead, the EPBC Act is characterised by wide ministerial discretion and lack of specific responsibility. Its objects 'provide for' protection of the environment and ecologically sustainable development, which, following the Full Federal Court in the Wielangta case, means 'put in place a system' not 'actually protect' the environment. Exemptions through Regional Forest Agreements -- and in the future bilateral agreements, accredited management arrangements and the like -- enable the

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Commonwealth to hand responsibility to others, with enforcement entirely at the discretion of the parties to the agreement.

Climate change is the most far-reaching and critical environmental disaster facing Australia and the world but neither the UN Framework Convention on Climate Change nor the Kyoto Protocol have been domestically enacted. As matter of urgency, the EPBC Act should be amended to make actions causing emissions (not net emissions) exceeding 25 000 t CO₂-e controlled actions.

More broadly, the EPBC Act should be amended or replaced with legislation that

- o clearly establishes the Commonwealth's responsibility for environmental matters where Australia has signed and ratified international agreements;
- o limits ministerial discretion;
- o triggers a comprehensive impact assessment process when one or more matters of national environmental significance cause an action to be designated a controlled action.

2. Climate change, biodiversity and biocarbon

Any serious strategy for avoiding dangerous climate change must protect the carbon stored in native vegetation. Native forest clearing and logging account for more emissions annually than the transport sector (over 90 Mt CO₂-e in 2006). Restoration and enhancement of native vegetation carbon stores, together with soil conserving forms of agriculture, can sequester large amounts of CO₂ over time, compensating for some of the emissions debt from past clearing and land degradation.

Recent research by ANU scientists shows that the eucalypt forests of south-eastern Australia store, on average, three times more carbon than previously recognised, reaching extraordinary densities in the ash forests of Victoria and Tasmania.² Logging and clearing destroy these 'green' carbon stores which cannot be replaced in any relevant time scale, given the global imperative to turn the corner on emissions within the next decade. All existing native vegetation with the potential to act as a permanent carbon store – resilient, self-reproducing and adaptive – has value and should be protected.

The EPBC Act, famously, ignores climate change. The best path would be stand alone climate legislation for land-based sectors, incorporating a complete package of measures including

- o an end to broadscale native forest logging and clearing,
- o transition measures for affected industries and workers,
- o a *REDD Plus* scheme to provide for the long term protection of Green carbon stores, including the establishment of a very large *REDD Plus* Fund.³

In the short term, the EPBC Act should be amended urgently to incorporate a trigger making land clearing and native forest logging controlled actions for the purpose of limiting greenhouse

² Mackey, B et al, 2008, *Green carbon. The role of natural forests in carbon storage*. ANU E Press. epress.anu.edu.au

³ See Blakers, M, 2008, *Biocarbon, biodiversity and climate change. A REDD Plus scheme for Australia*. Green Institute Working Paper 3. www.greeninstitute.com.au

gas emissions. The trigger level should be emissions exceeding 25 Kt CO₂-e or 10 hectares of clearing on a parcel of land over a five year period, whichever is the lesser.

3. Regional Forest Agreements (RFA) and the Wielangta Forest case

The Wielangta Forest case, *Senator Bob Brown v Forestry Tasmania*, is the most extensive legal test so far of Regional Forest Agreements and the EPBC Act. The trial of the case involved 33 days of fact-finding evidence in the Federal Court. Justice Shane Marshall concluded that logging in Wielangta Forest is having a significant impact on three listed endangered species: the Tasmanian Wedge-tailed Eagle, the migratory Swift Parrot and the Wielangta Stag Beetle. He also found that Forestry Tasmania ‘manipulated evidence’ in the trial. His analysis took into account the cumulative impact of forestry operations on the species, the international conventions which underpin the EPBC Act and promote recovery not just survival, and the fact that the CAR (comprehensive, adequate and representative) reserve system does not protect any of the three species.

The Full Federal Court, on appeal, said RFAs did not have to protect the species ‘in fact’, merely to establish a system. They went further, stating that an RFA represents a compromise between employment and forestry on the one hand and the environment on the other. There was no guarantee that the environment, including endangered species, would not ‘suffer’ as a result of logging.

Then Prime Minister Howard and Tasmanian Premier Lennon changed the wording of the Tasmanian RFA to circumvent the Wielangta decision. Instead of saying that the State agrees to protect endangered species, it now reads that the Commonwealth and the State agree that they are protected. As a result of the goal posts being moved, the High Court, in a 2:1 decision, refused special leave to appeal the Full Federal Court interpretation. That leaves the situation as follows –

- o forestry operations in RFA regions are immune under the EPBC Act, irrespective of whether they are pushing species towards extinction or causing other environmental harm;
- o only the Commonwealth can enforce RFAs (the public have no rights);
- o cumulative impacts should be considered when assessing whether an action is a controlled action (other than for RFA forestry operations);
- o there is no final judgment on whether the obligation under the EPBC Act is actually to protect a species or merely to put in place a system, having in mind Australia’s obligations under international conventions.⁴

RFAs, as a mechanism for environmental protection, are discredited. In the face of climate change, they are an anachronism. They should be abandoned.

Note. Timber Communities Australia claims that the Wielangta Forest case ‘confirms that the strict provisions of the RFAs provide protection for threatened and endangered species’. In fact it does the exact opposite. Justice Marshall’s findings of fact in relation to the significant impact of logging on the three endangered species were not overturned by the Full Federal Court.

⁴ See the summary of legal and factual issues in the Wielangta Forest case in the enclosed brochure

4. Biodiversity

Who ultimately is responsible if a species or a community goes extinct?

Take the endangered Swift Parrot as an example. It is a migratory bird, found only in Australia, with an estimated population of about 2000 adults (1000 breeding pairs). In winter it lives in south-eastern mainland Australia, feeding on nectar, highly mobile, and dependent on a succession of suitable resources for survival. Much effort, not least by volunteers, has gone into monitoring its movements and protecting its winter habitat.

Meanwhile, in Tasmania, Forestry Tasmania is logging and destroying the Swift Parrot's breeding habitat, which is largely confined to remaining hollow-rich old growth forests in a narrow strip along the south-eastern coast. Forestry Tasmania is shielded by the RFA. The Commonwealth, now identified by the court in the Wielangta Forest case as the sole arbiter of whether the RFA is being correctly implemented, refuses to intervene. The most recent 'recovery plan' was prepared in 2002, expired in 2005 and is badly out of date. It is quite possible that a large proportion of the surviving population could be wiped out in a single logging operation, because the birds breed semi-colonially. In 2006, a logging operation on Bruny Island probably destroyed nests, nestlings and even adults before it was halted.

If the Swift Parrot becomes critically endangered or extinct, who is to blame?

Under the Convention on Biological Diversity, Australia is committed to achieve, by 2010, 'a significant reduction of the current rate of biodiversity loss at the global, regional and national level as a contribution to poverty alleviation and to the benefit of all life on earth'. Australia will have to report on its progress; at the moment, an accurate report would be an embarrassment.

Biodiversity conservation in Australia is piecemeal and ineffectual. Climate change, and recognition of the importance of native vegetation as a permanent carbon store, requires a complete paradigm shift. Biodiversity is the key to permanence, providing resilience, capacity to adapt, and self-regeneration. All native vegetation, existing or capable of restoration and enhancement, has irreplaceable value, not only for carbon storage, but also for biodiversity and water conservation. The Commonwealth should take charge, set up a Biodiversity Commission and oversee a complete overhaul, with substantial funding from the *REDD Plus* scheme, in native vegetation protection, including major investment in research.

5. The web page

The EPBC Act web page is difficult to navigate and lacks transparency. The public notices are only partially searchable; formal documents relating to public notices have to be individually opened to identify what they are; it is impossible to obtain aggregated information about aspects of the Act. It is almost impossible, short of checking every entry in the data base, or trawling through the aggregated statistics, to find what decisions have been made or to analyse the performance of the Act. The web page claims that 'the EPBC Act has been designed to provide for both a high level of public involvement in decision-making and an open and transparent system that allows public scrutiny of decisions made'. The web page should be upgraded urgently to make good on this commitment.

6. EPBC Act review

The EPBC Act is to be reviewed before July 2010. The Senate inquiry should take the opportunity to recommend the parameters for the formal review and ensure that necessary information is collected and published beforehand.

The formal review has to be independent. It should also be public, carried out with ample opportunities for public input, funded to enable community groups to participate, and strategic in approach. The Law Reform Commission may be an appropriate body to undertake the review, assisted by independent environmental experts.

7. Recommendations

Recommendation 1. The Committee should either commission its own research, or ensure that information is published before the EPBC Act Review starts, on the following matters --

- o an analysis of all the international environmental instruments to which Australia is party, identifying who in Australia has legal power or responsibility for implementing the international commitment, and how that responsibility has been exercised since 2000 (including whether measures of performance exist or are publicly reported);**
- o a species by species analysis of RFA priority species, to determine whether they have been significantly impacted by forestry operations;**
- o an assessment of Australia's progress in relation to the 2010 biodiversity target;**
- o a review of ways to measure and monitor biodiversity value with a view to adopting a national standard for biodiversity accounting;**
- o a report on each of the matters of national environmental significance, reviewing the effectiveness of the EPBC Act in relation to it;**
- o an analysis of commonwealth and state expenditure on each of the matters of national environmental significance, year on year since 2000; and**
- o a review of Commonwealth involvement in and expenditure on R&D relating to environmental protection since 2000.**

Recommendation 2. Amend the EPBC Act to

- o clearly establish the Commonwealth's responsibility for environmental matters where Australia has signed and ratified international agreements;**
- o limit ministerial discretion;**
- o trigger a comprehensive impact assessment process when one or more matters of national environmental significance cause an action to be designated a controlled action;**
- o introduce a greenhouse gas pollution trigger of 25 Kt CO₂-e;**

- o in the case of native vegetation clearing or logging, introduce a trigger of 25 Kt CO₂-e emissions (not net emissions) or impacts on an area exceeding 10 ha on a parcel of land within five years, whichever is the lesser;
- o repeal Division 4 of the EPBC Act (the RFA exemption).

Recommendation 3. The Commonwealth should legislate for a *REDD Plus* scheme, including a very large *REDD Plus* fund (similar to the Future Fund or the Building Australia Fund), to eliminate greenhouse gas emissions from land-based sectors and promote carbon recapture and permanent sequestration in native vegetation and soils.

Recommendation 4. The Commonwealth should legislate for a Biodiversity Commission responsible for overseeing biodiversity conservation in Australia, including eliminating emissions from clearing and logging native vegetation, advising on *REDD Plus* expenditure, monitoring performance, and advising on research priorities.

Recommendation 5. The Commonwealth should be asked to clarify whether it (i) accepts Justice Marshall's finding that logging Wielangta Forest will have a significant impact on the Swift Parrot, Wielangta Stag Beetle and Tasmanian Wedge-tailed Eagle; (ii) endorses the Full Federal Court finding that RFAs do not have to protect endangered species 'in fact' and that they provide no guarantee that endangered species will not 'suffer' as a result of logging; and (iii) accepts that it is essential to address the cumulative impact of actions on threatened species?

Recommendation 6. The Commonwealth should be asked to identify who, specifically, is responsible for the survival and recovery of the Swift Parrot, and what action is being taken to protect its Tasmanian breeding habitat from logging and clearing?

Recommendation 7. The Department should be asked to upgrade its web page urgently so that it is a modern, accessible, fully searchable, up-to-date and useful tool.

Attachments

Blakers, M, 2006, *Biodiversity Summit 2006: Proceedings*. Green Institute, Lawyers for Forests

Wielangta Forest Landmark Trial – brochure and legal summary