

## **Submission by the North Coast Environment Council to the Senate Inquiry into the EPBC Act and its performance.**

NCEC wish to recognise the value of the Clarence Environment Council submission on the disgraceful events at Shannon Creek and the comprehensive coverage by the Environmental Defenders Office of the complete EPBC Act.

While we have adapted some of the EDO format headings we in no way imply their agreement with our submission.

### **1. Scope and application of the EPBC Act**

The EDO notes in their draft submission that:

The most recent State of the Environment Report 2006 reached the sobering conclusion that “...*biodiversity continues to be in serious decline in many parts of Australia*,”<sup>1</sup> and the Terms of Reference for the Inquiry states:

- (1) “The Senate notes the continuing decline and extinction of a significant proportion of Australia’s unique plants and animals, and the likelihood that accelerating climate change will exacerbate challenges faced by Australian species.”

### **NCEC Comment**

#### **Climate Change**

It is blatantly apparent that the Garnaut proposed cuts to emissions at 10% are a concession to the business sector and the major polluters and will do little to halt the increase in global warming and we can expect alarming increase in Climate Change effects which will impact seriously upon biodiversity. There will be impact upon the populations of already listed EPBC species and the number and type of species which will need to be added to the list as their range and habitat are changed along with their previous food and water sources.

There will need to be adaptability in relevant compilation of both the list of species but also the populations, threatening processes and recovery plans.

#### **Development**

The biggest threat to EPBC species in NSW apart from Climate Change is NSW State Government policy. This includes BioBanking, Biodiversity Certification, the Planning Reforms, the Planning Strategies, the weakening of the Land and Environment Court and the NVA, PNF and Plantation codes and the SEPPs which are all developer–friendly pieces of legislation or policy allowing increased clearing of habitat.

Despite all the platitudes, assurances and spin the biodiversity values in NSW continue to plummet.

It is up to the Federal Government and EPBC to rein in the excesses of the lemma-Sartor years with over-ruling legislation under the EPBC Act.

### **Industry specific exclusions, such as forestry operations under Regional Forestry Agreements, that are failing to protect biodiversity in our high value forest regions.**

The exemption for forestry operations in RFA regions from the EPBC Act 1999, in north-eastern NSW, should be removed because the RFA is grossly ineffective in protecting forest species and forest habitats (including habitats for numerous nationally-listed species).

The RFAs are inadequate, and the exemption inappropriate, for the following reasons:

1. Climate change was not considered as part of the RFA – forest habitats now face grave new threats in the form of increased temperatures, reduced streamflows, more severe bushfires, and the increased spread of invasive species.

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<sup>1</sup> *State of the Environment Report 2006*, Department of Environment and Heritage, Canberra. Available at: <http://www.environment.gov.au/soe/2006/index.html>.

2. Private forests were not assessed as part of the RFA, but were only used as context for the public land assessment process. However, almost 50% of timber logged in north-eastern NSW is thought to come from private land and the environmental regulation that applies is totally inadequate and far inferior to public land. Logging on private land is undoubtedly causing substantial impacts on nationally-listed species, especially because no threatened species assessments or surveys are required prior to logging. Over 400 private logging approvals covering more than 83,000 hectares have been approved for logging on private land over the last 14 months.
3. The north-eastern RFA did not produce a Comprehensive, Adequate or Representative reserve system, even by the NSW Governments own standards and targets. The conservation targets of almost all nationally-listed fauna species (including iconic endangered species such as the Spotted-tailed Quoll, Hastings River Mouse and Giant Barred Frog) and many nationally-listed flora species were not achieved through the RFA – substantial additional conservation action is still required to meet minimum benchmarks.
4. The north-eastern RFA has been very badly implemented. Reviews and annual reports have not been conducted, and key agreements and milestones have either been breached or not implemented – particularly as they relate to World Heritage values and sustained yield estimates of timber volume.
5. NSW laws that control logging, which are referred to as the mechanism to deliver ‘ecologically sustainable management’ under the RFA, are not adequate – environmental protection provisions are often breached and compliance and monitoring is very poor. The community no longer has third party appeal rights to enforce environmental legislation relating to forests on public land.
6. The RFA did not deliver a sustainable timber industry – the committed timber volumes were based on a timber model which considerably over-estimated available yields, and which was based on severe over-cutting for 20 years with substantial short-falls thereafter in order to achieve the volumes set down in wood supply contracts.

## **2. Assessment and approval regime**

- Examples of actions where robust assessment and approval processes drawing upon independent scientific advice and comprehensively assessing the direct, indirect and cumulative impacts on all aspects of the environment would have prevented serious damage.

### **NCEC comment.**

Ecological consultants around the world move in a pool of sharks. The developers in each area hold the key to employment and it is naïve to think that there is not potential for influence upon ecologists. Most ecologists will tell you privately of consultants who repeatedly obtain jobs with certain developers and supply compliant reports.

There is not even a need for overt bribery when such a report is produced and that consultant’s name is passed around the pool of developers who offer employment to that consultant rather than to an honest consultant.

There is no whistle blower protection either for a consultant who protests another study if he is replaced and a second study commissioned. There is also the spectre of legal action if such a protest causes the developer expense or refusal of the DA.

NCEC have proposed the following motion on consultant employment to the Annual Conference of the NSW Nature Conservation Conference in October. We recommend the intent to The Federal Government.

Motion for NCC Annual Conference 2008

MOVED BY:  
The North Coast Environment Council

**MOTION: THAT THE NATURE CONSERVATION COUNCIL OF NSW**

Write to the Minister for Climate Change, Environment and Water requesting that:

- The NSW government agencies continue to employ on an equitable basis and guarantee whistle blower protection where possible for consultants who choose to speak out on principle.

- Ecologist employment be from a pool of ecologists appointed by DECC according to qualifications and experience suited to the particular field in case, and paid not directly, but by developer contribution to a DECC fund. The product to be peer reviewed and unacceptable efforts to result in removal from the pool.
- That a peer mentoring practice be applied which will ensure the necessary experience can be attained by newly trained ecologists.

#### BACKGROUND NOTES:

Everybody involved with threatened species conservation, development applications and consultants' reports appreciates the problem of compromise. This motion attempts to break the nexus between consultants and developer.

What follows is but one example of why this motion needs to be carried.

There is a DA from Department of Lands for a resumption of mining at the North Shore quarry at Port Macquarie to obtain stone for the breakwall nearby. The quarry was closed in the 80's amid threats of joint action by the residents within 800 metres suffering damage to their properties and mental well-being from blast effects.

Since that time the quarry has filled with water from the natural spring in the pit and Green and Golden Bell Frog has moved in.

The Dr Arthur White POM (2006) nominated this colony of the 4 surviving colonies in the decimated Port Macquarie population as the most deserving of effort and recommended breeding ponds outside the main forage and drought refuge pond (gambusia).

The Project Manager appointed by CMA NR to position the breeding ponds was deliberately disregarded by DoL and the ponds were placed 750 metres away in a dry, sandy environment. The ecological consultant, Mark Graham, stood up and made the following statement. As you can see he may never work for the government again and it is unlikely he will be in demand by developers if he is recognised as a consultant with principles. He and others like him in the system need our help. Here is his statement: (This could be read at the meeting?)

"The artificial breeding ponds for the Green and Golden Bell Frog were constructed well over 750m north of the North Shore Quarry site in drier coastal vegetation that lacked the wetland vegetation habitat values that exist within the Quarry precinct. This was entirely due to the position adopted by two sections of the Lands Department (namely the Ports section at Newcastle and the Taree Lands office) who refused to allow construction of the ponds at the site specifically recommended by Dr Arthur White.

Four suitable sites were identified at the Quarry, none of which would have created difficulties for operation of the Quarry. It is highly doubtful that any real benefits to the Green and Golden Bell Frog population present at the North Shore will result from the installation of the ponds a considerable distance from the known habitat present at the Quarry. It is of immense concern that the Lands Department is proposing substantial modifications to the known habitat present at the Quarry, particularly the proposal to heavily impact the water bodies present at the site."

I am sure that you will also find it of great interest that, despite leaving several messages to negotiate an outcome for the benefit of the frog population present, the consultants to the Department of Lands never returned my calls. The whole project was a debacle that reiterated to me the appalling disfunctionality and lack of professionalism of the Department of Lands and highlighted their inability to manage biodiversity on lands under their management.

### 3. Public participation

Where we saw a need for enhancement of the scope for meaningful public participation in EPBC Act processes by increasing public consultation periods and reinstating and expanding the right to appeal the merits of key decisions.

- In the North Shore quarry DA by the Department of Lands there was protest by a number of residents in the vicinity because they were afraid of damage to their homes through blasting as had happened before. Only some residents affected had been notified by Council. It was only by coincidence that a resident appealed to an environmental campaigner for help that the most important colony in the Port Macquarie population of the Green and golden Bell frog came to light.

Under current practice there is no compulsion to notify environmentalists of such issues and it was only by this accident that the frog became an equal concern in this DA controversy which has been taken up at local and state government level .

There is no effective trigger for notification to the EPBC process.

- At the Macquarie Gardens DA at Port Macquarie there were complaints about the narrowness of the notification by Council of residents who were affected. There were residents affected outside the immediate vicinity who complained vigorously but more importantly there was again no notification of environmentalists or ngos who had more idea about EPBC issues.

The environmental studies were described by Council as inadequate and there were serious issues with the amount of effort which turned up only 5 of 22 species predicted as likely to inhabit the area. It is thought Green and Golden Bell Frog and Hastings River Mouse (also discovered at lower above sea levels) are likely EPBC candidates.

Once again Council have not invoked the EPBC Act at this stage and it may be left to residents or environmentalists to take legal action or request the Minister do something.

#### **Where you or your group were not game to pursue a result because of fear of losing a judgement on costs.**

The two DAs above may require legal action but people and groups should not be required to invest money in protection of the EPBC Act process. In this increasingly litigious age where developers are using court action to punish or frighten protesting groups or individuals the Gunns case is a classic example.

Where most of the Gunns' case has been dismissed it has still caused years of stress threatening individuals' mental state, family life and partnerships and the security of their property.

If any group or individual pursues in court the purposes of the EPBC Act with a reasonable case then the Federal Government should support those people doing their job for them with immunity from prosecution by the other party and pay the court costs.

### 4. Resources and enforcement

- Where you found there was a need for the Federal Government to implement and enforce the Act involving a need for quicker and more thorough listing, conduct threat recovery processes and enforce compliance.

#### **Example 1**

At Port Macquarie on the Mid North Coast of NSW the Department of Lands has lodged a DA with Port Macquarie Hastings Council to reopen a stone quarry. During the eighties this quarrying was discontinued amid threats of class action over damage to homes in the area from blasting.

Since that time the Green and Golden Bell Frog listed as Vulnerable under EPBC and Endangered under NSW TSC Act moved in and occupied the pit filled by a natural spring.

A Plan of Management for the depleted Port Macquarie population declared this colony the most viable and recommended investment in breeding ponds. The NR CMA and WCA supplied the funds and a respected ecologist, Mark Graham , with extensive frog experience was appointed project manager. Graham suggested 4 consecutive sites near the quarry as per the POM. Each in turn was refused by the DoL. The consultants refused to take phone calls from the project manager and sited the plastic ponds 750 metres away in a dry sandy area. With blasting that cracks walls outside the supposed 150 m buffer zone and with the large amount of daily draining of the pond it is unlikely the frog will survive.

Threats in the Port Macquarie area include development and clearing of habitat, traffic, cats, Cane Toad and the usual chemical/virus type problems affecting frogs generally. This is a colony without the majority of those effects and should be saved but:

### **Sections 68-70**

There does not seem to be an automatic, mandatory trigger for enactment of the EPBC Act. The NSW DECC who would be the most able judge can advise of problems with the DA and its possible impact from the consultant's own report by its experts off site but the decision for EIS, SIS or EPBC request is up to the Planning officer without, necessarily, environmental expertise at the local council to act as a state agent.

The Minister can call it into EPBC if he knows about it but the developer is unlikely to volunteer his DA at the expense of an SIS level study and possible refusal.

A member of the public can request the minister to take action but has to have the courage and money to do that.

As developers become increasingly litigious nominating a DA and losing might be risky and therefore detrimental to nominated species.

### **Example 2**

At Port Macquarie on the Mid North Coast of NSW there is a DA for the Macquarie Gardens development for what is alleged to be defined legally as a "Caravan Park" with 40 caravan sites and 100 "movable homes" connected to sewer in a gated community for around 1000 over 55 yr people. There are many social issues and has been initially refused but the proponent is making another bid with adjustments.

The environmental study has been described in many respects by the council who is consent authority as inadequate. It involves SEPP 14, 44 and 71 an EEC and floodplain with no provision for Climate Change effects. It has desalination and STP proposed.

Of 22 potential threatened species under the TSCA 5 have been declared by the proponents consultant's report which is considered unsatisfactory and although under-scrubbed does not have a previous study.

It is problematical what EPBC listed species could be or have been in the area which is within 5 km of the North Shore GGBF population and the Limeburners Nature Reserve and Wilderness area yet again Council have not invoked the EPBC Act.

### **Example 3**

The Koala is a national icon recognised as vulnerable in NSW and under threat from clearing of habitat, removal of corridors and therefore genepool variation, attack by dogs, car strike, disease, and Climate Change effects on foodtrees and leaf suitability .

There is a need to re-examine the status of these and many other animals and plants as clearing remains unchecked and Climate Change effects compound the other problems.

## **5. Examples where biodiversity loss and failure to prepare for Climate Change were an issue.**

As mentioned previously the clearing of habitat advances without let up and State Government legislation compounds it.

Examples include the blanket biodiversity certification of the Western Sydney Cumberland Plain forest and legislation framed specifically to avoid losing in court on grounds of a complete lack of SIS study. BioBanking in itself is inherently flawed as it cannot achieve the "maintain or gain" outcome when it specifically achieves clearing of habitat.

Despite warnings from experts like Brunkhorst at UNE about the need to stop concentrating new development on the coast in areas of high biodiversity and significant farmland, the Planning Strategies are designed to clear habitat by "development with constraints" on the coast of NSW.

The Planning Reforms are designed to take away the protection of democratically elected local government, their LRP and DCPs, council staff control and access to the Land and Environment Court through creation of developer-biased Panels.

The State Government in NSW has done very little at all on Climate Change. The only mention of Climate Change in all the above policies is an occasional mention in the acronym DECC and the Minister for Climate Change, Environment and Water. Nowhere else.

The cave-in to business by the Garnaut and Rudd program will ensure the effects on biodiversity are magnified as we reach tipping point.

## **6. Examples where you feel national listing would be enhanced by state considerations. eg If the animal is rated endangered in NSW but only vulnerable or not listed under EPBC.**

A perusal of each state' threatened species lists should give reason for reassessment of the EPBC list because if they are not on it already they soon will be with habitat clearing and Climate Change.

**7. Instances where the Minister failed in judgement due to lack of scientific knowledge or other reasons.**

Shannon Creek is the classic example of all parties favouring development at any environmental cost and refusing to accept responsibility for dramatic impacts on biodiversity, some of which is unknown anywhere else on the planet.

If ever there was an example of the failure of EPBC this is it.