



Submission to the Independent Review  
of the *Environment Protection and  
Biodiversity Conservation Act 1999*

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## Summary of Major Recommendations

### **Recommendation 1:**

The EPBC needs to have the objective of actually protecting the environment and conserving biodiversity.

### **Recommendation 2**

The EPBC should establish clear bottom lines which guarantee environmental protection and conservation of biodiversity.

### **Recommendation 3**

Given the extent of the climate and environmental crisis, in establishing environmental bottom lines, the onus of proof in the Act should be reversed so that only actions which can be shown to have no significant impact on matters of national environmental significance should be contemplated.

### **Recommendation 4**

Regional planning, strategic assessment and other assessment, approval and planning tools which take a whole of landscape or environmental processes approach should be developed within the Act - with strong, enforceable environmental bottom lines - to move the focus away from individual actions/species and towards ecological processes and cumulative impacts on those processes.

### **Recommendation 5**

The scope of the EPBC needs to be enlarged by adding increased triggers for Commonwealth action, including triggers related to:

- climate change,
- water extraction,
- land clearing,
- wilderness protection and
- landscape scale matters.

### **Recommendation 6**

The nature of the triggers in the Act should be changed so that once the EPBC is triggered, the Commonwealth has responsibility for and power over all environmental impacts.

### **Recommendation 7**

Any climate change trigger should take account of the cumulative impacts of greenhouse gas emissions.

### **Recommendation 8**

To the extent that a climate change trigger is developed for assessment of individual projects, the trigger should be that any development that produces over 25,000 tonnes of CO<sub>2</sub> equivalent (gross) per year is a matter of national environmental significance.

### **Recommendation 9**

Industry exemptions from the EPBC assessment and approval process unnecessarily limit the scope and effectiveness of the EPBC and the exemption for forestry operations conducted under RFAs should be removed.

**Recommendation 10**

Should the exemption from EPBC assessment and approval for RFA forest operations remain in the Act, then (at a minimum) additions should be made to s42 adding to the exceptions to the RFA exemption. The s42 additions should include operations that are: (d) the subject of a Federal Court finding that the RFA and the operation itself does not protect listed threatened species, communities or migratory species; or (e) part of RFA forestry operations where the gross carbon emissions from any company, contractor or commercial entity's operation exceeds 25,000 tonnes per year.

**Recommendation 11**

Consideration should be given to re-establishing an independent body with broad ranging responsibilities for heritage protection, education, research and promotion.

**Recommendation 12**

Transparency in decision making needs to be built into heritage assessment decisions and ministerial discretion removed.

**Recommendation 13**

Australian law should reflect the obligations set out in the World Heritage convention and protect both the values which make these places special as well as the places themselves.

**Recommendation 14**

Regardless of the IUCN categorization, the primary purpose of a Commonwealth protected area must be to protect the environment. All other goals and activities should be subservient to that purpose.

**Recommendation 15**

Regardless of the reason for proclamation, once proclaimed Commonwealth parks must protect all environment values within reserves.

**Recommendation 16**

The EPBC should explicitly recognise the right to procedural fairness for the community, and ensure that timelines are adequate to enable meaningful community participation.

**Recommendation 17**

Anyone with standing under the EPBC should be able to seek a review of the merits of key decisions made under the Act, including decisions as to:

- whether an action is a controlled action (ie. subject to the EPBC),
- approvals of actions,
- listing of threatened species and communities,
- heritage listings.

**Recommendation 18**

An Environment Division of the Federal Court should be established to begin to build up the expertise to deal with the merit reviews of environmental issues.

**Recommendation 19**

To ameliorate the cost burden on community groups and individuals acting in the public interest to protect the environment, the EPBC should:

- establish a litigation fund to fund important legal challenges under the Act (as per NSW fund);
- incorporate clear provisions for orders that each side bear their own costs; or capping costs, or no costs awards against applicants should bona fide public interest challenges lose in court;
- reinstate the original s478 provisions preventing the Federal Court from requiring undertakings for damages as a condition for granting interim injunctions.

## Introduction

The Wilderness Society Inc (TWS) is an independent, self-funded non-profit organisation that seeks to protect, promote and restore wilderness and natural processes for the ongoing evolution of life on earth. Established in 1976 to protect the Franklin River in Tasmania, TWS has since played an important role in many of Australia's most important and effective environment campaigns, including the protection of the Daintree, Shelburne Bay, Kakadu, Ningaloo Reef, Victorian and South Australian mallee wilderness and the forests of south eastern Australia.

The Wilderness Society is grateful for the opportunity of making a submission to this Review. As one of Australia's leading environment advocacy organisations, we want to see strong federal environmental laws that ensure the protection of biodiversity and key ecological processes. We are alarmed by the ongoing and increasing threats to our environment, including most obviously those caused or exacerbated by climate change. We are concerned that the EPBC, in its current form, is not up to the task of addressing these threats and protecting our natural environment.

In May this year, a number of Australia's leading environment groups wrote to the Minister for Environment, Heritage and the Arts calling for fundamental reform of the EPBC. A copy of the letter is attached here as Appendix 1. The Wilderness Society was a signatory to that letter, and this submission gives more detail to many of the issues raised in that letter.

Most of TWS's experience of and engagement with the EPBC Act is in relation to project assessment and approvals and heritage issues. In its 8 year history, only a handful of environmentally damaging actions have been stopped under the EPBC. Many more have been approved. When The Wilderness Society recently challenged the fast-tracked approval process for Gunns' Tamar Valley pulp mill, the Federal Court found that the EPBC did not require procedural fairness and natural justice for the community and allowed a corporation to effectively process shop, but it did not allow the Commonwealth to consider the impact on forests of the largest pulp mill in the Southern Hemisphere.<sup>1</sup> Regardless of the rights or wrongs of the mill, this finding (upheld on appeal<sup>2</sup>) points to major flaws in the EPBC.

The recent Senate Committee Inquiry into the operation of the EPBC found a great lack of public confidence in the Act. Approximately 75% of relevant non-government submissions<sup>3</sup> to the Inquiry were critical of the EPBC. Of these 64 submissions, 26 explicitly stated that the EPBC had failed, was inadequate or irrelevant in particular situations, and a further 15 said it was generally a failure, inadequate or irrelevant. These responses clearly show the need for a far-reaching reform of the Act.

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<sup>1</sup> *The Wilderness Society Inc. v The Hon. Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCA 1178.

<sup>2</sup> *The Wilderness Society Inc. v The Hon. Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCAFC 175.

<sup>3</sup> "Relevant submissions" excludes the 6 government department and agencies (which were technically valuable, but reflect government policy not community concerns), 3 confidential submissions and about 15 submissions which did not deal with the EPBC. The figure of 64 does not include about 10 submissions which wanted forests protected, but did not explicitly relate this to the EPBC.

Given the need for fundamental reform of the EPBC, this submission focuses on key issues with the architecture of the Act rather than on detailed clauses or reform of arrangements under the Act. Most of the comments below will relate to the Term of Reference 2(a) – the operation of the Act generally; while some comments also relate to other Terms of Reference as indicated in the title of those sections.

## Objects, structure and the need for environmental bottom lines

### *Includes comment in relation to Term of Reference 2(b)*

The first and most obvious problem with the EPBC, which colours all its operations, is that the *Environment Protection and Biodiversity Conservation Act 1999* does not require the protection of the environment or the conservation of biodiversity. This is evident in the formal objects of the Act and in the numerous places where the Minister has absolute discretion to *not* act to protect the environment or conserve biodiversity.

Section 3 of the EPBC outlines the objects of the Act, including, crucially, to “*provide for the protection of the environment...*” [s3.1(a)] and to “*provide for the protection and conservation of heritage*” [s3.1(ca)]. As was confirmed in the recent Wielangta Forest case, “providing for protection” is different from actually protecting – all that is required is to “provide for” is that prescriptions are put in place to deal with a problem, even if (as in the Wielangta case) those prescriptions do not actually protect the environment.<sup>4</sup>

Similarly, s3(1) (b) and (c) set objects to “promote ecologically sustainable development...” and “to promote the conservation of biodiversity...”. This promotion does not *require* ecologically sustainable development or the conservation of biodiversity, just that they be promoted.

In total, according to s3, the EPBC promotes, provides for, assists, recognises, strengthens, adopts, enhances and includes various things, but does not actually protect or require protection of anything.

Various of the Acts which the EPBC replaces were much more prescriptive. For instance, S13(1) of the World Heritage Act 1983 banned damaging activities on world heritage properties without the Minister’s consent, and that consent required the Minister to have regard to “*only to the protection, conservation and presentation*” of the property [s13]. By contrast the EPBC only deals with significant impacts on world heritage values and allows the Minister discretion to approve damaging actions and in considering this the Minister is required to take account of social and economic factors as well as environmental protection [EPBC s136.1(b)].

To the extent that the EPBC is assumed to be about protecting the environment, any reporting against Term of Reference 2(b) is likely to be difficult and potentially misleading because “achievement” of objects may not actually amount to environmental protection.

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<sup>4</sup> See *Brown v Forestry Tasmania* (No 4) [2006] FCA 1729; and *Forestry Tasmania v Brown* [2007] FCAFC 186, para 72-73, 80 and 92.

**Recommendation 1:**

***The Review should note the problems with the Objects of the EPBC and recommend that the Act have the objective of actually protecting the environment and conserving biodiversity.***

The wording of the Objects of the Act flow through and colour the rest of the legislation and the operations conducted under it. The result is that there are often no environmental bottom lines.

This applies, among other things, to:

- The process for assessing and approving actions which impact on matters of national environmental significance (NES) where there is no requirement to protect those NES matters [indeed s136.1(b) requires that in approving an action, social and economic issues need also to be considered];<sup>5</sup>
- The process for assessing and adding to the National Heritage List where even the decision as to what to assess (as well as the decision as to whether to add a property to the List) is based on Ministerial discretion not on an independent review of heritage values;
- The Bilateral Agreements mandating state assessment processes which have no minimum environmental standards which must be met;
- The listing of threatened species/communities which (since the 2006 amendments) is not required to be kept up to date (hence the current backlog of unprocessed nominations).<sup>6</sup>

In terms of the assessment and approval of actions which will impact on NES matters, timber company Gunns Ltd's counsel said it best in the Lawyers for Forest challenge to the decision to approve the pulp mill: "the Minister has absolute discretion in approving a project – there are a number of things that the Minister must take account of, but no criteria for environmental protection that had to be met."<sup>7</sup> Indeed, Gunns' counsel noted that the whole logic of the Act, the only reason it is triggered in relation to a proposed development, is if there will be a negative impact on an NES matter – so the Act accepts and is premised on damage to the environment.

**Recommendation 2**

***The EPBC should establish clear bottom lines which guarantee environmental protection and conservation of biodiversity.***

For The Wilderness Society this highlights a fundamental problem with the approach of the Act – its logic is the wrong way around. The approach is largely one based on assessments and approvals of one-off activities and the mitigation of the impact of those activities. (Similarly, the listing and protection of threatened species generally

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<sup>5</sup> This is in contrast to some of the Acts which preceded the EPBC where, for instance, s13(1) of the *World Heritage Act 1983* required the Minister to have regard to "only to the protection, conservation and presentation" of the world heritage properties.

<sup>6</sup> In this context, we endorse the analysis in Section 1 of the IFAW submission.

<sup>7</sup> From notes taken by Greg Ogle of Gunns' counsel, Graeme Uren, 18 July 2008, *Lawyers for Forest v Minister for Environment, Heritage and the Arts & Anor*, VID 1112 of 2007.

implies that those species are treated separately<sup>8</sup>). Yet, the natural environment simply does not work that way. Conservation biology shows the connectedness of natural processes and, given the extent of the biodiversity crisis (loss of habitat and species and cost of recovery), TWS believes that protection of the environment should be the bottom line and the onus of proof in the Act should be reversed. To take climate change as the example, “does this project have a significant adverse impact on climate change” is simply the wrong question to ask. The question should be, “given the reality and threat of climate change, can this project show that it will have no significant impact<sup>9</sup> on climate change?” – and if not, it should not be approved.

### **Recommendation 3**

***Given the extent of the climate and environmental crisis, in establishing environmental bottom lines, the onus of proof in the Act should be reversed so that only actions which can be shown to have no significant impact on matters of national environmental significance should be contemplated.***

The individual project and individual species approach also makes it much harder to deal with the cumulative impacts of human actions on the environment. Again, the most obvious example is climate change – the cumulative impact of human caused carbon emissions, yet even when the issue is considered in EPBC assessment, both courts and decision makers have not always dealt with cumulative impacts properly.<sup>10</sup>

The Moorlarben Coal Mine provides another example of a failure to deal with both biological complexity and cumulative impact. White box woodlands which exist near the mine are recognised by the EPBC as a critically endangered ecological community. They are recognised as being highly vulnerable and valuable both for the plants they contain as well as their role in supporting populations of EPBC listed threatened fauna, such as the Swift Parrot and Regent Honeyeater.<sup>11</sup> Yet this recognition of the *absolute* value of the remaining areas does not appear to be reflected in the approval of the expansion of the Moorlarben Coal Mine (2007/3297).<sup>12</sup> This was the third approved development in the Mudgee area likely to have significant impacts on White Box - Yellow Box - Blakely's Red Gum Grassy Woodlands and Derived Native Grasslands.

<sup>8</sup> On this point we note the submission to the Senate EPBC Inquiry of the Environment Institute of Australia and New Zealand where the number one reason the majority of its professional members surveyed said the EPBC was not working was the emphasis on species rather than on biodiversity (structure, function, composition).

<sup>9</sup> We note that in their submissions to the Senate EPBC Inquiry, other environment groups have raised issues with the operational definition of significant impact, and we would welcome a review of that, but it does not change the structural point we make here.

<sup>10</sup> For example, in a judgment in relation to the Wonthaggi desalination plant, Justice Heerey endorsed a decision making process which specifically ignored the cumulative impact of human activity on climate change. *Your Water Your Say Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 670 at para 15.

<sup>11</sup> S. Prober, K Thiele and E Higginson, (2001), "The Grassy Box Woodlands Conservation Management Network: Picking up the pieces in fragmented woodlands" *Ecological Management and Restoration* 2 (3)179-188.

<sup>12</sup> Approval decision at <http://www.environment.gov.au/epbc/notices/assessments/2007/3297/approval-decision.pdf>

The Moolarben decision itself does not recognise the cumulative effect of other approvals for development of this critically endangered community. Further, the conditions attached, including the use of offsets and re-vegetation do not address the absolute nature of the problem of loss of further area of the very scarce good condition and mature remnants of this community. In this case, any loss was a substantial loss and could not be “offset”. Such cases of repeated compromise outcomes accumulate to deliver substantial impacts on species and communities that are theoretically given the highest level of protection.

These examples and our concern noted above that any project by project, species by species approach is ill-suited to dealing with cumulative impacts, leads TWS favour regional and strategic assessment approaches, *but only if there are strong environmental bottom lines*.

We recognise the current development of the strategic assessment approach in the Kimberley and we are watching this closely as approach of looking at landscape scale environmental management is certainly good in theory. However, if there are no environmental bottom lines (as in the Regional Forest Assessments), then the strategic assessment approach will not only not take account of cumulative impacts, it will license the destruction of biodiversity.

#### **Recommendation 4**

***Regional planning, strategic assessment and other assessment, approval and planning tools which take a whole of landscape or environmental processes approach should be developed within the Act - with strong, enforceable environmental bottom lines - to move the focus away from individual actions/species and towards ecological processes and cumulative impacts on those processes.***

## **Scope and application**

### ***Includes comment in relation to Term of Reference 2(c)***

The EPBC was drafted based on existing environmental legislation and was limited by the constitutional powers of the Commonwealth as then understood. The “triggers” for Commonwealth action are those issues where the Commonwealth was seen to have constitutional responsibility. In addition, there are a number of exemptions from the operation of the Act, most notably, forestry operations covered by Regional Forestry Agreements. As the May joint letter of the various environment groups to the Minister notes, these severely limit the operation and effectiveness of the Act, particularly in terms of assessment and approval of actions. The existing list of matters of National Environment Significance is not comprehensive both because it does not include all matters, and because some matters are explicitly excluded as triggers for EPBC assessment.

The most obvious failing here is the lack of a trigger to consider impacts on greenhouse gas emission and climate change. There is clearly now constitutional power to add this pursuant to Australia’s signing of the Kyoto Protocol, but other environmental issues would still remain outside the Act. For instance, in relation to Gunns’ controversial pulp mill, the Minister constantly pointed out that he could not consider air pollution issues, odour emissions, greenhouse issues, water or forest

impacts. Given that the sheer size of the proposed mill (if it is built) and the potential implications for forestry, carbon pollution and sequestration, and the local community, there is a clear problem in scope of the EPBC.

When the EPBC was first introduced, it was clearly contemplated that more triggers would be added over time.<sup>13</sup> To date, no new triggers have been added. While recognising all of the above as matters of National Environmental Significance is important, fixing the scope of the Act may not be as simple as adding more triggers. The triggers may still not cover all environmental impacts (leaving a duplicated or fractured environmental assessment process) and some may not have an explicit head of Commonwealth power under external treaties. TWS sees three possible ways forward (within the notion of triggers – although as above, this framework can only be supported if the logic of the triggers is reversed).

1. **Additional triggers** could be added to give the Commonwealth power to act on matters like climate change, water, wilderness protection and landscape scale impacts.
2. **Revamped trigger** mechanism so that once the Act was triggered, the Commonwealth would have power to assess all environmental impacts.
3. **An umbrella trigger** could also be added using the Commonwealth's constitutional power to make laws with reference to corporations, thus allowing the EPBC to cover any environmental impact of a trading corporation.

The first proposal (that additional triggers are needed) is simply impossible to argue against if there is to be a meaningful role for the Commonwealth in environmental protection. The second would better reflect the connectivity of natural processes in the environment and give a more consistent and wholistic assessment process (rather than having some aspects of a project assessed at the state level and some at the federal level). The third would give the Commonwealth a clear mandate for environmental protection and this scheme has been used in industrial relations.<sup>14</sup> We believe that the protection of the environment is no less a national issue and no less important than industrial relations, but we also recognise that the proposal is not without political and philosophical problems.

### **Recommendation 5**

*The scope of the EPBC needs to be enlarged by adding increased matters of National Environmental Significance and therefore triggers for Commonwealth action, including triggers related to:*

- *climate change,*
- *water extraction,*
- *land clearing,*

<sup>13</sup> “Robert Hill also understood the need for the EPBC Act to evolve to consider new triggers for environmental protection. In 1999, when discussing the act’s triggers, he stated that: ‘... it will be an evolving situation reflecting community attitudes and what really is seen as the best and most appropriate mix at the time,’” Anthony Albanese, *Hansard*, 30 October 2006 on the Environment and Heritage Legislation Amendment Bill (No.1) 2006

<sup>14</sup> The Commonwealth’s “corporations power” as was used in introducing Work Choices and was found by the High Court to be constitutional. *New South Wales v Commonwealth* [2006] HCA 52; 81 ALJR 34; 231 ALR 1.

- *wilderness protection*, and
- *landscape scale matters*

### **Recommendation 6**

*The nature of the triggers in the Act should be changed so that once the EPBC is triggered, the Commonwealth has responsibility for and power over all environmental impacts.*

## **Notes on specific additional Triggers**

### **Climate change**

As noted above, the lack of recognition of greenhouse gas emissions and climate change as a matter of National Environmental Significance is a fundamental problem with the EPBC. Given previous Labor Party comments on the need for a climate change trigger,<sup>15</sup> we assume that the government will be looking to introduce such a trigger. Again, any climate change trigger which only works in the current framework of individual projects will be limited in its effectiveness, and should be altered to take account of the cumulative impacts of greenhouse gas emissions. The threshold for recognition as a matter of National Environmental Significance should be consistent across government programs and our recommended threshold is drawn from the Garnault Green Paper.

### **Recommendation 7**

*Any climate change trigger should take account of the cumulative impacts of greenhouse gas emissions.*

### **Recommendation 8**

*To the extent that a climate change trigger is developed for assessment of individual projects, the trigger should be that any development that produces over 25,000 tonnes of CO<sub>2</sub> equivalent (gross) per year is a matter of national environmental significance.*

### **Water Extraction**

Given the plight of the Murray-Darling Basin and stresses on rivers across the country (stresses which will be exacerbated by climate change) any project which extracts more than a certain threshold of water should be deemed a matter of National Environmental Significance. In this context, we note that the Australian Network of Environmental Defenders Offices (ANEDO) suggested to the Senate PEBC Inquiry that abstraction of surface and groundwater resources over 10,000 megalitres was a matter of national environmental significance and should trigger the Act.

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<sup>15</sup> National Platform and Constitution 2007, Australian Labor Party, Chapter 9 No 24, p 137 'Labor will introduce a climate change trigger in the Environment Protection and Biodiversity Conservation Act so that major new projects are assessed for the climate change impact as part of any environmental assessment process.' See also the Senate Standing Committee on Environment, Communications, Information Technology and the Arts minority report of Labor and Australian Greens senators, *Environment Heritage Legislation Bill (no.1) [Provisions]* at pg 70; Peter Garrett, (6 April 2005), *Australia after Kyoto*, Speech to the Sydney Institute; Anthony Albanese, *Hansard*, 30 October 2006 on the Environment and Heritage Legislation Amendment Bill (No.1) 2006.

## Land Clearing

Land clearing has historically been one of the destructive environmental practices in terms of loss of habitat, water and soil quality and landscape connections. Controlling land clearing is also now a critical part of reducing Australia's greenhouse gas emissions. It is clearly a matter of National Environmental Significance.

TWS notes that their submission to the recent Senate Inquiry into the EPBC, ANEDO recommended a three land clearing triggers, namely

- Clearing of native vegetation over 100ha in any two year period;
- Clearing of native vegetation which provides habitat for listed threatened species or communities, or listed critical habitat;
- A schedule of activities that would trigger the Act regardless of the hectares proposed to be cleared (for example, major coastal resort developments).

## Wilderness Protection

The protection of wilderness is a crucial to maintaining biodiversity in Australia.<sup>16</sup> While the concept of wilderness has come under attack as being a cultural construct, the National Wilderness Inventory and the wilderness protection legislation in NSW and South Australia define wilderness in a way which does not imply and is not based on terra nullius, or a lack of acknowledgement of Indigenous occupation, ownership or impact on the land. Viewed as a continuum in relation to impact of industrial society, protection of wilderness remains not only key to preserving biodiversity and assisting in adaptation to climate change, it is also able to be operationalised as a trigger for the EPBC Act. At its simplest level, the National Wilderness Inventory could be used as a base and any activity which impacted by a significant amount or reduced wilderness value below a particular threshold would become a matter of national environmental significance.

## Landscape scale matters

While most matters of National Environmental Significance are discreet – impacts on particular species, places or things, nature does not operate in a compartmentalised way. Conservation biology is clear that protection of biodiversity and natural areas depends on a series of landscape scale processes (eg. species movement and dispersal, existence of refugia, hydroecological impacts, predator relations, etc<sup>17</sup>) and these may not always be picked up in the narrow triggers of the Act.

## Exemptions

Industry exemptions under the EPBC narrow the operational scope of the EPBC and impact on the ability to protect matters of National Environmental Significance. The Regional Forestry Agreements (RFAs) are the main example here and we believe that they have failed to protect biodiversity.

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<sup>16</sup> Brendan Mackey, Rob Lesslie, David Lindenmayer, Henry Nix and RD Incoll, *The Role of Wilderness in Nature Conservation: A report to the Australian and World Heritage Group Environment Australia*, School of Resource Management and Environmental Science, Australian National University, July 1998 at <http://www.environment.gov.au/heritage/publications/anlr/rolewild.html>

<sup>17</sup> M. E. Soulé, B. G. Mackey, H. F. Recher, J. E. Williams, J. C. Z. Woinarski, Don Driscoll, W.C. Dennison, and M. E. Jones, "The Role of Connectivity in Australian Conservation", *Pacific Conservation Biology*, December 2004.

Large scale clearfelling and burning of forests continues most notably in Tasmania and Victoria with significant impacts on resident forest species. In June 2007 The Wilderness Society and the Huon Valley Environment Centre produced a detailed report on threats to Tasmania's World Heritage Values from (RFA) logging operations which noted threats from:

- loss of wilderness quality,
- loss of visual quality,
- impacts on rare and endangered species,
- fire escape,
- weed and disease incursion, and
- risk from increased human access.
- the impact of forestry operations on world heritage values and the World Heritage Area.<sup>18</sup>

These types of impacts are a concern in all high conservation area forests, but if they can't be controlled in and around World Heritage areas where the EPBC has a direct role (because of s42), there is little confidence in the environmental credentials of either the EPBC or the RFA.

The clearest example of the failure of the RFAs to protect forest species is the Wielangta forest where, after an extensive inquiry, the Federal court found that the measures put in place to protect relevant threatened species would not actually protect those species.<sup>19</sup> The Full Court Appeal did not challenge this finding, but simply found that "all that was required was that the RFA establish a structure or policy framework which facilitates or enables the creation or maintenance" of a system to protect species – in this case, a CAR Reserve System and management prescriptions.<sup>20</sup> The fact that neither the management prescriptions nor the CAR system actually protect the relevant species was not deemed relevant. This finding in relation to the operation of the EPBC is simply embarrassing.

The failure of the RFA to protect threatened species was confirmed in the amendments to s68 of the Tasmanian RFA which simply proclaimed by fiat (rather than by any scientific understanding) that the CAR system protected the species – thus further removing the real threats to endangered species from the jurisdiction of the EPBC.

We also note that the RFAs were not designed to, and did not take account of climate change – either the greenhouse emissions of forest harvesting, or the impact on the carbon stored in old growth forests.<sup>21</sup> Even if one accepted that forestry operations

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<sup>18</sup> The Wilderness Society and the Huon Valley Environment Centre, *A statement of threats to World Heritage Values from logging in Tasmania: A response to state party report WHC-06/30.COM/7B*. The report is available from TWS if the Senate Committee needs it.

<sup>19</sup> *Brown v Forestry Tasmania* (No 4) [2006] FCA 1729

<sup>20</sup> *Forestry Tasmania v Brown* [2007] FCAFC 186, para 72-73, 80 and 92.

<sup>21</sup> A recent report from Australian National University researchers suggests that the amount of carbon stored in old growth forests is many times more than originally calculated and that logging is therefore a significant carbon loss event. See Brendan G. Mackey, Heather Keith,

should be exempt from the EPBC because they are covered by the RFA processes, the climate change impacts of forestry operations are not covered and should not be exempt. Furthermore, if climate change were simply added as a trigger alongside the other triggers, then forestry would continue to enjoy this exemption so even then, the climate change impacts of forestry would not be covered.

### **Recommendation 9**

***Industry exemptions from the EPBC assessment and approval process unnecessarily limit the scope and effectiveness of the EPBC and the exemption for forestry operations conducted under RFAs should be removed.***

While Recommendation 9 represents our primary position on the RFA exemptions in the EPBC, if the exemption were to remain then at a minimum the exemption itself should be circumscribed to take account of some of the failings of the RFA. Paragraph 42 of the EPBC already provides that a number of exceptions where the general RFA exemption does not apply. This could be expanded to include where there is a proven failure to protect species, or where the greenhouse gas trigger would be brought into play if it were not for the exemption for RFA forest operations.

The wording of the changes to the EPBC will need to be carefully considered but we recommend using the threshold and the focus on gross rather than net emissions based on the logic of the recommendations of the Garnaut Green Paper for emissions trading. As other industries can not use offsets to account for their carbon emissions so it is important to focus on ‘harvesting’ operations (which is a great net carbon loss event) rather than on all forestry operations (which includes the planting and management of trees). Given the relative inefficiency of carbon sequestration and storage in plantation and regenerated forest compared to old growth forests, the gross emissions figure is clearly most appropriate. Further, because climate change impacts are the great exemplar of cumulative impacts, the assessment should be based on the cumulative impact of forest ‘harvesting’ – not on any single forestry operation.

### **Recommendation 10**

***Should the exemption from EPBC assessment and approval for RFA forest operations remain in the Act, then (at a minimum) additions should be made to s42 adding to the exceptions to the RFA exemption. The s42 additions should include operations that are:***

***(d) the subject of a Federal Court finding that the RFA and the operation itself does not protect listed threatened species, communities or migratory species; or***

***(e) part of RFA forestry operations where the gross carbon emissions from any company, contractor or commercial entity’s operation exceeds 25,000 tonnes per year.***

## Heritage Issues

Heritage listing and protection is an important aspect of the EPBC. Our heritage listing and protection regime should reflect and enhance our national sense of self and ensure icon-clad protection for the places we hold most dear.

The current Federal heritage system was established in 2004, its elements and operations set out in amendments to the *Environment Protection and Biodiversity Conservation Act* (EPBC) in 2002 and 2006.

While in opposition the ALP criticized the EPBC's Heritage system. Labor identified five criticisms of the original Heritage legislation in 2002. They are:

1. The Australian Heritage Commission which had a broad range of functions was replaced by the Australian Heritage Council, which is only an advisory body.
2. The narrowing of the definition of actions which trigger heritage consideration.
3. The politicization of the heritage process. The decision to list a place shifted from being an independent, technical, merits based decision by the Australian Heritage Committee to one that lies with the Minister for the Environment and Heritage.
4. The reduction of heritage protection with the shift of protection for 'a place and its associated 'values' to simply 'the values of the place'.
5. The failure of the government to transfer Commonwealth places on the Register of the National Estate to the new Commonwealth Heritage List <sup>22</sup>

The Wilderness Society particularly endorses issues 1, 3 and 4.

### **An Independent Heritage Body**

The Australian Heritage Commission was an independent body with responsibility not only to identify heritage but to promote and protect it. This delivered a much less politicized heritage list as well as a strong, independent advocate for heritage. It was disbanded by the EPBC and replaced it with a ministerial advisory body, the Australian Heritage Council.

As former Federal Environment and Heritage Minister, Tom Uren wrote, "The nation has the Australian Broadcasting Corporation as an independent body in relation to broadcasting and communications. We have the Reserve Bank on monetary matters and the economy. It is imperative that we have an independent authority on heritage and environment issues."<sup>23</sup>

### **Recommendation 11**

***Consideration should be given to re-establishing an independent body with broad ranging responsibilities for heritage protection, education, research and promotion.***

<sup>22</sup> Based on speeches by Gillard and Snowden, 12 November 2002 'Environment and Heritage Legislation Amendment Bill (No. 1) 2002, second reading, Hansard

<sup>23</sup> Uren, T, *Heritage Body Should be above Party Politics*, Canberra Times., 13 August

### **An independent listing process**

Ministerial discretion is built into every stage of the National Heritage listing process. After amendments in 2006, the government is no longer required to assess all community NHL nominations: only those recommended by the Australian Heritage Council. There is no transparency about the process for these decisions. The minister can approve or edit the assessment recommendations of the council. After the assessment the minister can once again intervene to approve or reject heritage listings.

### **Recommendation 12**

*Transparency in decision making needs to be built into heritage assessment decisions and ministerial discretion removed.*

### **Protection of place and values, not just values**

After an international debate in the late 90s, *The Operational Guidelines for the Implementation of the World Heritage Convention* endorsed protection of not only the values for which a World Heritage site is listed but the integrity of the site itself.<sup>24</sup>

Currently the EPBC provides protection only for the values for which our Natural Heritage and World Heritage sites are listed, not the actual sites themselves. This approach can be dangerously reductionist. It makes no sense to allow a mine in the centre of the Daintree Rainforest because the forest type where the mine site is proposed is not listed as part of the World Heritage nomination. It is the entirety of that place which makes it special and protecting its integrity is essential.

Australian law should reflect the obligations set out in the World Heritage convention and protect both the values which make these places special as well as the places themselves.

### **Recommendation 13**

*Heritage protection should reflect obligations set out in the World Heritage convention and protect both values and places.*

## **Park Management**

We note the concerns about the Kakadu National Park and the lack of high level wilderness protection expressed by the Colong Foundation in its submission to the Senate EPBC Inquiry. These concerns highlight what is for us the critical issue in park management – that protected areas need to have the protection of the environment as the priority and purpose of the park. This should be clear in the legislation, and management plans should give clear guidance as to how this objective is to be reached. All other park uses, including tourism and public access, should be subservient to the primary conservation purpose. In this sense, the multiple use approach should be clearly constrained – even in IUCN category 6 parks (which were never intended to provide industry access to all areas of a park).

One of the authors of this submission, Dr Greg Ogle, was a member of the Great Australian Bight Marine Park Consultative Committee during the life of the first

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<sup>24</sup> *The Operational Guidelines for the Implementation of the World Heritage Convention*, paragraphs 77-78 and 87-95

management plan. The first management plan's objectives were unclear and limited, and the park did not properly protect the environment, not least because the multiple land/sea use framework by definition provides for industrial uses which are incompatible with protection of the environment. The Benthic Protection Zone (BPZ) in the park is the most obvious example. While bottom trawling is prohibited, it is really the only benefit of a section of park preserved explicitly to protect the benthos but which allows mining on that very benthos.

Even in its conservation strategies, the first GAB plan was limited in that it was too narrowly focused. The plan focused on the charismatic mega-fauna for which the Park was declared, rather than on a wholistic approach to protecting the park. This was improved in the second management plan, but as with the comments above about the connectivity of nature, any approach to park management which simply attempts to focus on particular species is bound to fail. Similarly, the focus on the benthos in the BPZ does not consider water column interactions with species which inhabit the benthos.

#### **Recommendation 14**

*Regardless of the IUCN categorization, the primary purpose of a Commonwealth protected area must be to protect the environment. All other goals and activities should be subservient to that purpose.*

#### **Recommendation 15**

*Regardless of the reason for proclamation, once proclaimed Commonwealth parks must protect all environment values within reserves.*

### ***Public participation***

The EPBC recognizes the importance of public participation in environmental regulation by mandating consultation processes and through section 487 which gives individuals and environment groups who have operated for 2 years standing to challenge a decision under the Act. These are welcome provisions, but our experience has been that there are still a range of resource and legislative barriers to full public participation.

Given that the Federal Court has found that the public has no right to procedural fairness beyond the processes mandated in the Act,<sup>25</sup> there is a need to increase the mandatory public consultation periods. This is particularly important where community groups and individuals may be vitally interested in actions under the EPBC but work and business commitments limit their time – eg. a 10 day consultation period may only give people who are not professional environmentalists a few late nights and a weekend to get all the information and make a submission.

#### **Recommendation 16**

*The EPBC should explicitly recognise the right to procedural fairness for the community, and ensure that timelines are adequate to enable meaningful community participation.*

<sup>25</sup>

*The Wilderness Society Inc. v The Hon. Malcolm Turnbull, Minister for the Environment and Water Resources* [2007] FCA 1178.

## **Merits Review**

Given the level of environmental crisis, it is important that the Minister gets key decisions right. It is not enough just to know that the decisions have been made according to the law if the result is the destruction of the environment. The basis for challenging decisions under the Act needs to be expanded by allowing merits reviews of key decisions. Currently major decisions like approvals of environmentally damaging projects are only subject to judicial review. In practice this means that as long as the reasons for a decision are carefully written so that they tick all boxes and are not irrational, decisions are very difficult to challenge – even where they may lead to major environmental damage.

A related issue arises from this as to the appropriate forum for such legal review. Some states have specialist environment courts and a similar arrangement at a Federal level would be preferable to having merits review in the existing lists in the Federal Court or the Administrative Appeals Tribunal. However, as a less resource intensive option or a first step, it may be appropriate that an Environment Division within the Federal Court be established to deal with EPBC matters.

### **Recommendation 17**

*Anyone with standing under the EPBC should be able to seek a review of the merits of key decisions made under the Act, including decisions as to:*

- *whether an action is a controlled action (ie. subject to the EPBC),*
- *approvals of actions,*
- *listing of threatened species and communities,*
- *heritage listings.*

### **Recommendation 18**

*An Environment Division of the Federal Court should be established to begin to build up the expertise to deal with the merit reviews of environmental issues.*

## **Costs**

The costs of legal challenges provide enormous barriers for full public participation in the environment protection regime. Pro bono assistance is limited and the costs of briefing a properly resourced team may be around \$100,000 per case (not counting appeals).

In addition, and perhaps more of a disincentive to public interest litigation is the spectre of being liable for the other side's costs if you lose. This could be \$200,000 - \$300,000 in the first instance, and the same again on appeal. And this all assumes that the litigation is not stifled by an order for security for costs, or undertakings for damages for interim injunctions (the latter being ruled out of the original EPBC, but opened up by the 2006 amendments to s478).

The community has benefitted from challenges to EPBC decisions both in terms of getting better environmental outcomes and in being able have greater confidence in the decision making process. Individuals and community groups should not have to

bear heavy financial burdens and risks for acting in the public interest in bringing such cases.<sup>26</sup>

### **Recommendation 19**

*To ameliorate the cost burden on community groups and individuals acting in the public interest to protect the environment, the EPBC should:*

- *establish a litigation fund to fund important legal challenges under the Act (as per the NSW fund);*
- *incorporate clear provisions for orders that each side bear their own costs; or capping costs, or no costs awards against applicants should bona fide public interest challenges lose in court;*
- *reinstate the original s478 provisions preventing the Federal Court from requiring undertakings for damages as a condition for granting interim injunctions.*

## ***Resources and Enforcement***

Since its inception, the processes mandated under the EPBC have been chronically under-resourced resulting in backlogs in processing and assessing threatened species listings, and there have been only a couple of successful prosecutions under the Act. The resourcing problem is most clearly evident in the 2006 amendments to the Act. The original Act required the Minister to keep threatened species lists up to date, but with lack of resources this proved impossible so instead of the government finding more resources, the Act was changed to ‘relieve’ the obligation to keep the lists up to date. This is simply the most obvious example of a chronic problem of under-resourcing, and underpinning this, a lack of political will.

It seems incredible given the level of threats to key species and critical habitats, and the overarching social, economic and environmental threat posed by global warming, that there should be a lack of political will and resources to protect the environment. We therefore again draw the Committees’ attention to the recommendations of the letter from a range of major environment groups to Minister Garrett of 23 May 2008, and the call for the government to:

- Devote a level of resources to implementation and enforcement of the EPBC Act commensurate with the consequences for the nation of allowing environmental degradation to continue on its current path; and
- Utilise these resources to expedite a range of critical actions including assessment, listing and threat recovery processes and to enforce compliance with the Act generally.

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<sup>26</sup>

A fuller account of the issues around costs and public participation can be found in a recent article: Chris McGrath (2008) “Flying foxes, dams and whales: Using federal environment laws in the public interest,” in *Environmental and Planning Law Journal*, Vol 25, pp 324 -359.

## **APPENDIX 1: Environment Groups letter to the Minister**

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Joint Environmental NGO Letter of Support for Reform  
*Environment Protection and Biodiversity Conservation Act 1999 (Cth)*

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The Hon Mr Peter Garrett AM MP  
Minister for the Environment, Heritage and the Arts  
PO Box 6022  
House of Representatives  
Parliament House  
Canberra ACT 2600

23 May 2008

Dear Minister

### **Reform of the EPBC Act**

We write to jointly express our strong support for substantive reform of the *Environment Protection and Biodiversity Act 1999* (Cth) (**EPBC Act**) in furtherance of the Government's electoral commitments, and in pursuit of opportunities that may be highlighted through the statutory independent review process under the Act.

As you will be aware, the "Australia State of the Environment 2006" report reached the sobering conclusion that "...*biodiversity continues to be in serious decline in many parts of Australia.*" We believe that improving the EPBC Act this year presents a unique opportunity to arrest this decline and to implement measures that will protect Australia's irreplaceable ecosystems and wildlife for generations to come.

While each of our organisations will make more detailed submissions in the course of the statutory review and other processes, we wish to take the opportunity at this stage to convey our joint support for a significant strengthening of the EPBC Act. In particular, we are supportive of broad reform around the following four key issues:

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

- Utilise current opportunities for Federal-State reform to broaden the range of matters that are regarded as having national environmental significance ("NES"), thereby meeting community expectations about an appropriate role for the Commonwealth in protecting the environment.
- Repeal industry specific exclusions, such as forestry operations under Regional Forestry Agreements, that are failing to protect biodiversity in our high value forest regions.

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

- Effectively regulate actions that may impact upon matters of NES through robust assessment and approval processes that draw upon independent scientific advice and comprehensively assess the direct, indirect and cumulative impacts on all aspects of the environment.
- Utilise current opportunities for Federal-State reform to substantially improve assessment processes and repeal the potential for EPBC Act approvals to be delegated.

## **3. Public participation**

- Enhance 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.
- Acknowledge the valuable contribution to EPBC Act interpretation and enforcement made by civil society by removing the significant barriers posed by the risk of orders for security for costs or for costs following the event.

## **4. Resources and enforcement**

- Devote a level of resources to implementation and enforcement of the EPBC Act commensurate with the consequences for the nation of allowing environmental degradation to continue on its current path.
- Utilise these resources to expedite a range of critical actions including assessment, listing and threat recovery processes and to enforce compliance with the Act generally (including conditions attached to approvals).

As foreshadowed, our organisations will be making more detailed submissions in relation to these issues in due course.

In the meantime, we would be pleased to discuss them further with you or your Department.

Yours sincerely



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Don Henry  
Executive Director  
**Australian Conservation Foundation**




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Jeff Smith  
Director  
**Environmental Defender's Office (NSW)**



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Michael Kennedy  
Director  
**Humane Society International**



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Alec Marr  
National Campaign Director  
**The Wilderness Society**



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Dr Raymond C. Nias  
Conservation Director  
**WWF**



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Steve Shallhorn  
Chief Executive Officer  
**Greenpeace Australia Pacific**



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Cate Faehrmann  
Executive Director  
**Nature Conservation Council of NSW**



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Graeme Hamilton  
Chief Executive Officer  
**Birds Australia (Royal Australasian Ornithologists Union)**



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Susan Liddicoat  
Acting Director  
**Conservation Council of WA**



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Matt Ruchel  
Executive Director  
**Victorian National Parks Association**



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Mark Wakeham  
Campaigns Director  
**Environment Victoria**

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Trish Harrup  
Director  
**Conservation Council SE Region Canberra**