



**Conservation Council
of South Australia Inc**

**Senate Inquiry into the operation of the
*Environment Protection and Biodiversity
Conservation Act (1999)***

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Opening Comments:

The **Conservation Council of South Australia (CCSA)** welcomes the opportunity to make comment to the Senate Inquiry. We maintain that the *Environment Protection and Biodiversity Conservation Act (1999) (EPBC Act)*, if adequately supported and appropriately amended, could be a powerful instrument for tackling the environmental issues that confront our nation today, including the global threat of climate change.

Since enactment, we believe the *EPBC Act* has not been given opportunity to achieve its full potential. Lack of political will to fully implement, utilise and resource the legislation has been a fundamental flaw in the meaningful operation of the *EPBC Act*. Legislative amendments which have reduced the scope of protection and recovery obligations and allowed greater discretionary Ministerial power, compromise the ability of the legislation to deliver on its' objectives. Misuse of bilateral agreements, which are potential mechanisms to improve intra-state environmental performance, will result in further corrosion of the ability of the legislation to deliver environmental benefit. In its purest form the legislation holds great opportunity for reform, if the political will exists to wield it.

To be a relevant and holistic piece of environmental legislation the *EPBC Act* must also be broadened to take account of threats not currently recognised in the Act. Without provision to account for cumulative impacts on Matters of National Environmental Significance (MNES), evidence suggests further decline of these entities will occur and the Act will fail to deliver on its objectives. Without a mechanism to explicitly account for the exacerbation of climate change by a particular activity, and the impact on MNES (eg. Great Barrier Reef) other national initiatives to tackle this global problem will be undermined. An election commitment of the incumbent Federal government was to include a 'greenhouse trigger' in the Act allowing for the recognition and accounting for the serious implications of climate change exacerbation on MNES, and we call for this to be enacted with due haste.

The above statements are intended to provide context for preceding comments, which are arranged under the Inquiry Terms of Reference.

Terms of Reference

(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.

(2) The following matters be referred to the Senate Environment, Communications and the Arts Committee for inquiry and report by 27 November 2008:

The operation of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) and other natural resource protection programmes, with particular reference to:

a. the findings of the National Audit Office Audit 38 Referrals, Assessments and Approvals under the *Environment Protection and Biodiversity Conservation Act 1999*;

The findings made eight key recommendations. For brevity, these recommendations will not be repeated (see original document), but will be commented on where necessary.

Recommendation 1: Agree

Conservation, management, recovery and resilience building of our marine environments are key national challenges. Listing of both marine species and threatened ecological communities (TECs) under the Act, if accompanied by (preferably) Recovery Plans would be of benefit in protecting our globally significant marine life. At present, listing of these entities is severely restricted due to the large knowledge gaps in marine science. However, listing of marine species and TECs could catalyse research to address the significant knowledge gaps that exist about marine ecological functioning by stimulating funding opportunities and researcher interest. Non-commercial marine species, in particular, are poorly represented by contemporary research and a mechanism to enable this essential knowledge gathering could be provided by listing. Such information will have significant implications for marine park networks and also for the necessary move towards ecosystem based fisheries management.

Recommendation 2: Agree

However the review and update of existing listings to be inline with State/Territory lists must not prioritised over new listings. Instead, the two processes must occur with equal imperative.

Recommendation 3: Agree

Notwithstanding potential difficulties in defining ecological communities, they can be a more meaningful unit of protection, and often encompass a range of threatened species.

Recommendation 4: Agree

(b) However, restriction of recovery plans to 'priority' species and ecological communities is questionable. Listed species and communities have already displayed conservation priority, to become listed in the first instance.

(c) Obviously where recovery teams or experienced individuals with appropriate capability exist for a species or TEC, pursuing and resourcing the development of Recovery Plans through these established networks/collectives/intellectual wealth is preferable to outside contractors.

Recommendation 5: Agree

A reporting and management system which captures not just on ground outputs, but attempts to track more intangible outcomes such as attitudinal changes, as well as documenting the barriers to recovery could be fashioned to fit and feed the state of environment reporting, and be periodically analysed to improve recovery activity.

Reporting can be an unnecessary administrative burden which can detract resources from recovery actions. A system which is able to be integrated with existing reporting structures, for example where recovery efforts are undertaken with Natural Resource Management (NRM) funding, or other state/national grants schemes, would be most efficient. The information obtained could be of pivotal relevance to other national processes, such as carbon accounting (if carbon emissions were required to be considered under the Act).

The potential here is great, a pilot project scoping the need, utility and structure would be a worthwhile activity. In the least, a scoping project could produce recommendations for States/Territories to streamline and standardise internal reporting requirements.

Recommendation 6: Agree**Recommendation 7: Agree**

(a) & (b) Promoting compliance alone is highly unlikely to resolve all non-compliance issues and must be paired with a willingness to undertake enforcement actions when necessary (Macintosh and Wilkinson 2005).

The Act provides a great opportunity to raise the standard of internal State/Territory environmental conservation, management and recovery. An important component of compliance with the Act is for State/Territory legislative process to be reflective of the objectives and regulations of the EPBC Act, such that proponent and stakeholder responsibilities are clear at each step of assessment and management hierarchies. Bilateral agreements must not be allowed to work in the opposite direction where the objectives and requirements of the EPBC Act are insidiously undermined by incompatible State processes resulting in a form of sanctioned non-compliance. Integration between Federal and State process will promote compliance at the local level.

Carrying through to the local level, and establishing direct relationships with key local governments would be of great value. It is important, that where Recovery Teams and community groups exist, they are also integral components of this relationship, and indeed many Recovery Teams will themselves have sought and established a connection with local government previously.

(c) State Environment Departments have mapping units and any mapping exercise to be supported must be a joint exercise between the local government and the relevant State Department, to ensure the manner in which the information is collected, adheres to State standards. Again, scoping for the involvement of local Recovery Teams and community groups in this exercise is essential.

Recommendation 8: Agree

(b) Reporting requirements for proponents are desperately needed. These requirements must be designed to detect both sub- and super- significant impact. Further, a requirement for an action plan if negative impact to the MNES is detected is necessary. Monitoring the impact of a

development, with no plan of amelioration or at least minimisation of continuing impact is only half of the process.

b. lessons learnt from the first 10 years of operation of the EPBC Act in relation to the protection of critical habitats of threatened species and ecological communities, and potential for measures to improve their recovery;

Comments in relation to recommendations 8, point b:

- Few critical habitats have been registered.
- The requirement to map critical habitat has been a barrier to its listing because few programs have the resources to adequately survey and map species existing range.
- By its definition critical habitat 'excludes' (a greater level of protection is applied where technically no further activity is allowed in the area) and without far greater survey resources Recovery Teams are understandably hesitant to define exclusion areas where there is so little certainty, particularly with the stakeholders.
- Protection of *potential critical habitat*, important for building resilience and providing for long term recovery, is yet to be implemented and the importance of this still has low resonance in Australia
- The provisions to list and vary protection for TECs across tri-condition classes are perceived to be offering less protection for TECs under the Act, particularly as most high priority TECs are in poor condition. The approach means that postage stamp sized areas are afforded the greatest protection while the areas where restoration is possible, often found at larger scales and are critical to recovery are not. *By not protecting these areas the Act fails to address the fundamental challenges of remnant expansion and fragmentation.*
- The provisions to list and vary protection for TECs across tri-condition classes may discouraged some groups from nominating TECs
- Scope to incorporate TECs recognised by States/Territories under EPBC should be investigated fully. The removal of the requirement to review State/Territory TEC lists creates a risk that many eligible communities not identified through public nominations will not be considered for listing.
- Greater investment in development of TEC Recovery Plans is needed to *provide leadership through demonstration*, the technical issues associated with planning for TECs are also a barrier and national technical forums to work through some of these issues would welcomed.
- While there are issues associated with the protection of critical habitat for listed species, many species are yet to be listed, or have their status updated since the adoption of the Act. Reinvigorating the species National Action Plans and Conservation Overviews to review against the EPBC listed species would be of benefit, particularly for identifying significant gaps, such as marine or invertebrate species. Furthermore, working with State/Territory listing processes and clarifying the link between the advice relating to reviewed status in Recovery Plans and EPBC lists would be useful to address, also as part of the improvement of Federal and State integrated implementation of the Act.
- Local and State government planning, environmental valuation and assessment, and environmental law must be raised to the EPBC Act level, and decisions that are made at a state level affecting a listed entity must be made in the context of EPBC Act objectives and requirements.
- In conjunction with State and Territories, recovery efforts need to be removed from 12 monthly funding schedules to provide greater security to undertake long-term recovery actions
- The email notification system for public notices was recognised as an important mechanism for meaningful public involvement in the operation of the Act (McGrath

2006), and the loss of this system due to funding shortages we believe is a backwards step for proactive community engagement on behalf of the Australian Government.

Significant Impact

In many instances, application of significant impact criteria to the assessment of development impacts on a listed MNES fails to provide protection from further decline, which is what the Act was created to deliver. Holistic, adaptable, flexible and yet still scientifically robust guidelines to this significance test are required. Outstanding issues that require consideration are briefly highlighted below with an example which will pull together the issues and recommendations presented here.

Defining significance: Administrative guidelines do exist for defining significant impact, and these are necessarily generic. Where guidelines have been developed for a specific MNES, results have not always been beneficial (examples in McGrath 2006). Neither of these approaches has had capacity to truly address the issue of determining and therefore avoiding, significant impact. Instead the answer may lie somewhere on the spectrum between highly generic and highly specific guidelines. A particular entity has a unique ensemble of threats and requirements for sustenance and recovery. Where a Recovery Plan exists, or in the very least Conservation Advice, particular recommendations exist as to the management and recovery of the MNES. Significant impact must be considered and defined in the *specific context* of these recognised threats or recovery requirements of the entity in question. For example, for a dispersal limited species for which connectivity of habitat is recognised as an essential requirement for species recovery, any decrease in local habitat connectivity, regardless of how small, could be considered significant. However the findings would be different for a highly mobile species using the same habitat.

Showing significance: Even with a clear understanding of what constitutes significant impact to a particular MNES, showing this will occur as a result of a given action is hard due to the intrinsic complexity of ecological systems. In theory, it is just as difficult to show that no or sub-significant impact will occur. Unfortunately experience with the referral, public comment and approval process reveals an apparent bias towards assuming minimal impact, with a 'beyond all reasonable doubt' approach to showing otherwise. The complex nature of our environment is not generally amenable to simple yes and no answers, and makes the application of environmental law particularly problematic (Houck 2006). The precautionary principle was created to account for this very issue, and recognised in the Act as a component of ecologically sustainable development. Significant impact under the Act must account for imperfect knowledge and if questions regarding the impact on vital processes and resources recognised in a Recovery Plan or Conservation Advice (see Defining significance above) cannot be sufficiently answered one way or another; a precautionary approach must be taken.

Future significance: The likelihood of a proposed action to compromise the recovery potential of a MNES must be factored more realistically into the assessment of significant impact. Of course, this consideration at times will be difficult, but is however necessary if we are truly working towards recovery of our MNES. Where a Recovery Plan exists, the activities required for recovery will have been articulated to some extent (depending on state of knowledge, with acquisition of greater knowledge being a recovery action in itself) and priority sites may have been identified. Considering the proposed action in terms of the potential impact it may have on priority recovery activities, and critical sites, will introduce an element of the necessary strategic decision making required for recovery.

Cumulative significance: The inability to consider cumulative impacts on a MNES under the Act has been recognised as a flaw dating from the enactment of the legislation. So much so, this Inquiry has specifically sought feedback here, and we welcome the willingness of the new government to make the long-overdue exploration. The consideration of cumulative impacts would intersect with all components of a significance assessment, including how significance is defined, how significance is shown and determining impacts on recovery potential. Recognition of cumulative impact will not mean the end of development, but instead the beginning of more inventive, creative, holistic and effective mitigation activities, moving us from the narrow site based mindset, to the desperately needed landscape-scale, resilience building way of achieving truly ecologically sustainable development and environmental recovery.

Cumulative significance is an essential consideration in the context of atmospheric carbon accumulation and climate change and the required greenhouse trigger.

Disjunct significance: State and Federal (EPBC) environmental policies do not wholly align in either objectives or the required criteria of consideration for the assessment of activities that may affect a MNES. The importance of reflective State and Federal legislation, policies and management actions in providing for the successful operation of the Act has been commented on throughout this submission. Ideally, State legislation would reflect that required by the Act, however until that is the case, effort is required for State authorities assessing a proposed action under State law to be aware of, and actively considering EPBC requirements. Also, proponents must be aware that State approval may not necessarily mean Federal approval. Additionally, when an action is assessed under the EPBC Act, State approval cannot be assumed as a proxy for Federal approval (due to this disjunct in legislative objectives) and therefore the proposal must be assessed independently of State rulings. Similarly, bilateral agreements must not be entered into unless the State legislation is equal to or better than the EPBC Act in terms of objectives and requirements.

Conditional significance: The application of tri-state condition classing to the protection of TECs under the Act is a stark legislative regression from environmental conservation reform. We maintain that this amendment must be rescinded. However while such condition classing exists, no form of conditional significance rating can be applied to TECs that were listed prior to the amendment when assessing the impact of a proposed action. Until the TEC has been subject to a scientifically robust process for determining appropriate condition classes, any application of that criterion could be of great detriment in terms of current and future status of the TEC, and may well be a contravention of this legislation, because the classing cannot be retrospectively applied. Condition is a summation and assessment of a complex suite of TEC attributes (component species requirements, landscape processes, ecosystem services etc.) and requires careful consideration.

Monitoring for significance: Recommendation 8 of the NAO recognises the need for rigorous reporting of monitoring efforts for approved actions. Once approval is given, if monitoring is required both of the impacted entity and of any activities decreed for mitigation, a benchmark 'significant impact' is necessary. Additionally, if significant impact is detected at some future instance, what are the next steps? Is the action halted? Is there another mitigation plan? Where conditions of approval are set, and impacts are to be monitored, some kind of reporting, significance trigger and mitigation planning are required.

Example:

The Mount Lofty Ranges Southern Emu-wren (MLRSEW; *Stipiturus malachurus intermedius*) is listed as endangered and the Swamps of the Fleurieu Peninsula (FPS) are listed as a critically endangered TEC under the Act. The MLRSEW has outgoing (1999-2003) and incoming (2006-

2011; currently under review with DEWR) Recovery Plans. The FPS do not have a Recovery Plan, but are recognised in the MLRSEW Recovery Plans and have had a number of information and management documents produced detailing FPS status, threats, ecological components and management requirements by the MLRSEW FPS Recovery Teams (eg. Duffield & Hill 2002; MLRSEWFPS RT 2006) and SA State Government (eg. Harding 2005).

EPBC Referral 2007/3457 by the State Department of Transport, Energy and Infrastructure (DTEI) requested the expansion from a dual lane to a 3 lane road dissecting 2 networks of FPS occupied by the MLRSEW, and was approved under the EPBC Act.

The potential impacts to the MLRSEW were a net loss of occupied habitat and of connectivity at a priority site, key threats to the survival and recovery of the species (MLRSEW FPS RT 1999; in prep.). To the FPS, the result will be a loss of net area and an increase in fragmentation, also recognised as key threatening processes and detrimental to long term survival and recovery (Duffield & Hill 2002; MLRSEW FPS 2006).

The relative impact magnitude and issues of scientific uncertainty obscured and influenced the consideration of potential significant impact. For the MLRSEW the directly affected individuals consisted of between 3-5 % of the total remaining population (this does not account for estimates of indirect impacts on further reaching demographic processes). Connectivity between the dissected patches could only be stated as likely, not definitely, based on long term monitoring of the population networks either side of the road and evidence of MLRSEW ability to cross a hard barrier such as a dual lane road. It could not be shown one way or the other that connectivity existed, and therefore was assumed absent.

Approval to clear the area of FPS was obtained first according to the *South Australian Native Vegetation Act 1991*. The area in question was described as a very small component of the remaining FPS community and in degraded condition due to a significant blackberry infestation. An environmental offset including the transference of tenure of some adjacent FPS to the conservation system and revegetation with FPS species along the roadside and affected area was agreed to. The State process could not consider other vital components of the community such as the peat substrate which takes many hundreds of years to accumulate in FPS (Bickford 2001).

Given the uncertainty surrounding significant impact, and the other important social considerations for expanding the road, a compromise in the form a passageway under the new road was proposed by the Recovery Program, and supported by the State Departments of Environment and Heritage (DEH) and Water, Land and Biodiversity Conservation (DWLBC). The specially designed passageway would provide opportunity for safe MLRSEW dispersal, as well as propagule transference for FPS floristic species, and population flow for other swamp invertebrate and aquatic vertebrate species. The passageway was rejected, based largely on economic reasoning.

In this instance, the net habitat loss for an endangered species and TEC was not deemed significant, despite the potential perpetuation of key threats. Scientific uncertainty surrounding connectivity led to the assumption of no connectivity, rather than adopting an ecologically precautionary response. A superficial classification of 'degraded' was applied to the swamp community based on only one condition indicator (weed infestation), and condition inappropriately influenced the decision making process. State processes were not able to account for all aspects of an ecological community and the Federal decision took the lead from the State rather than building on it. The proposed mitigating action which was a compromise aimed at accounting for much of the uncertainty in the impact assessment, was

rejected. In this example we see a number of common issues associated with the assessment and accounting for significant impact under the Act which require clear Federal leadership.

c. the cumulative impacts of EPBC Act approvals on threatened species and ecological communities, for example on Cumberland Plain Woodland, Cassowary habitat, Grassy White Box Woodlands and the Paradise Dam;

The provisions to list and vary protection for TECs across condition classes are perceived to be offering less protection for TECs under the Act particularly for cumulative impacts at landscape scales.

Given the objective of the Act the opportunities for EPBC to address cumulative impacts lie with the development of guidelines, education and the provision to accredit appropriate State/Territory legislation and development assessment processes through bilaterals, in theory leading to a higher national standard. Few guidelines have been developed and the few in place have been challenged because of the opportunity they present to establish in effect best practice. The scope to develop additional guidelines accounting for cumulative impacts in the decision making process must be encouraged.

Education over and above the operation of the Act and associated with specific nominations has been limited with the exception of excellent work undertaken by groups such as the Threatened Species and Marine and Coastal Community Networks (TSN and MCCN). For the most part the bilaterals negotiated to date have led to streamlining of processes but have had questionable impact on raising the standards for protection for MNES and accountability of approval processes and subsequent conditions or offsets. This is an opportunity lost and South Australia's recent bilateral is a case in point.

d. the effectiveness of responses to key threats identified within the EPBC Act , including land-clearing, climate change and invasive species, and potential for future measures to build environmental resilience and facilitate adaptation within a changing climate;

There is limited coordinated implementation of Key Threatening Process (KTP) Threat Abatement Plans (TAPs) at a State or regional NRM scale. However TAPs provide a useful tool for identifying priorities and approaches and opportunities for greater cooperation must be pursued.

Removing the mandatory requirement to develop TAPs associated with KTP listings has been an opportunity lost to catalyse and coordinate many landscape scale threats primarily at the root of species decline.

There are a number of nationally significant threats that have not been listed under EPBC despite their recognition in a suite of national biodiversity policy documents. For instance all KTPs identified in the Australian Terrestrial Biodiversity Audit of 2002 should be investigated for their suitability for inclusion in the EPBC lists, particularly given likely climate change impacts. Some have been nominated but not listed for reasons permissible under the Act but this is still questionable given the impetus that listing might provide.

e. the effectiveness of Regional Forest Agreements, in protecting forest species and forest habitats where the EPBC Act does not directly apply;

Unable to comment due to no experience with the operation of these Agreements.

f. the impacts of other environmental programmes, eg EnviroFund, GreenCorps, Caring for our Country, Environmental Stewardship Programme and Landcare in dealing with the decline and extinction of certain flora and fauna; and

Despite their status within respective bilateral agreements, coastal/marine species and habitats, shorebirds and strategic threat abatement and species recovery in most State/Territories have been under-funded.

The NRM regional delivery has provided a series of additional barriers to species recovery by breaking up the range of species into regional patches often with distinct administrative arrangements and priorities. Additionally the reduced funding to these institutions is likely to result in funding cuts to species programs and significant declines in capacity and momentum across the country.

Biodiversity conservation has not been a high priority for all NHT funded regions and where it has been a priority the level of investment for species has been generally less than 10%. This will be challenged hopefully through the listing threatened species and ecological communities as one of the Australian Government's six priorities.

NRM regional delivery has done little to contribute to the identification of species/TECs under threat and not listed. Few NRM regional programs identify reviewing species status or nominations as activities under their plans or recovery for listed species that have had little attention previously. Of Recovery Plans being implemented, most are funded at minimum capacity to achieve their objectives. In South Australia, many have been receiving around a quarter of the funding required.

Local funding streams such as Envirofund and TSN Community Grants have provided a valuable source of funds for species/TEC work much of it on-ground or capacity building. These funding streams have been taken up by community groups who have found it difficult to obtain funding through the regional stream. These funding instruments also allowed projects to be undertaken more easily at cross-regional scales. Equivalent opportunities under Caring for our Country will be vital to build on this.

g. the impact of programme changes and cuts in funding on the decline or extinction of flora and fauna.

As stated earlier the NRM regional delivery has provided a series of additional barriers to species recovery. Species conservation has often been seen as an optional extra, and has been the last activity area to be funded and the first to be dropped if funding arrangements change. Local funding streams, such as Envirofund and TSN Community Grants, and national streams such as the Regional and National Competition Components of NHT, and Weeds of National Significance programs, were vital for keeping some of these important programs progressing. A fast, rather than transitional, disruption of funding (for example the abrupt change to Federal NRM funding with incoming Government) to these institutions where Recovery Programs have worked hard to engage, is likely at this point to result in funding cuts to species programs and significant declines in capacity and momentum across the country.

The impact of uncertain funding to program capacity and stakeholder momentum cannot be overstated and valuable time and resources are at risk unless delays and uncertainty are not minimised. Species programs have the capacity to leverage significant funds but without ongoing core investment cannot realise this capacity. Removal of species programs from a 12-monthly funding cycle to a system more supportive of undertaking the necessary long term and strategic activities necessary for species recovery is essential.

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