

Calls for New Matters of National Environmental Significance

By Wayne Gumley

Introduction

Section 28A of the *Environment Protection and Biodiversity Conservation Act 1999* ('the EPBC Act') requires a review every 5 years of the adequacy of the existing matters of national environmental significance prescribed under the Act. Accordingly, on 1 April 2005, the Secretary to the Federal Minister for Environment and Heritage called for public comment on the possible addition of new assessment triggers under the Act. A number of submissions have been made in response to this call. The next step in the process will be the release of a discussion paper for further comment later this year. Two organisations that have publicized their submissions are the Australian Network of Environmental Defender's Offices and the Australian Democrats. This paper summarises the main recommendations made in those two submissions, in order to highlight the types of amendments being proposed. The recommendations are supported by detailed analysis of Australia's international obligations, principles of ecologically sustainable development and the existing legislation. This more detailed analysis is not reproduced here but it can be viewed in the original submissions.¹

The Australian Network of Environmental Defender's Offices

The ANEDO submission firstly notes some of the broader problems with the *EPBC Act*, as a context for the operation of the triggers.

It notes that there seems to be a reluctance to use the powers under the *EPBC Act* given to the Minister to refuse developments. Instead, all major developments have been approved, mostly with extensive conditions. Many of these conditions require the further provision of management plans before actions can commence. However, it is yet to be seen whether such management plans will actually prevent harm to the threatened and migratory species they are designed to protect, or appropriately safeguard against damage to World Heritage values. Similarly, there is no guarantee that attaching conditions will be sufficient to effectively protect the environment.

The submission then comments on some key operational issues that are limiting the effectiveness of the Act include the following:

- There is currently no assessment of the cumulative impacts of development.
- Practice to date has shown that there are real issues concerning access to relevant information.
- Public exhibition periods do not cease during the Easter or Christmas holiday periods under the *EPBC Act*.
- The DEH has a policy of not releasing assessment reports that are provided to the Minister until after a decision has been made on an approval.
- The Commonwealth has rarely used its powers to intervene and effectively attach conditions to planning approvals.

Further general issues which ANEDO offers to provide further comment on (outside the scope of this review) include:²

- RFA Exemptions;

1 See 'Review of matters of National Environmental Significance' Submission from the Australian Democrats (May 2005), available at http://www.democrats.org.au/docs/2005/AD_sub_to_RMNES.pdf

2 Please refer to "*Further Strengthening of the EPBC Act 1999 and Regulations – A Proposed Set of Amendments*" February 2002, Submitted by the ANU Australian Centre for Environmental Law, Australian Conservation Foundation, Birds Australia, Conservation Councils of South Australia, NSW and Western Australia, Environs Australia, Humane Society International, National Parks Associations of NSW and Queensland, National Parks Australia Council, Tasmanian Conservation Trust, The Wilderness Society, Whale and Dolphin Conservation Society, Wildlife Preservation Society of Queensland, and the Worldwide Fund for Nature (The "Combined Groups' Submission 2002")

- Bilateral agreements;
- Clarification and extension of the definition of 'action';
- public involvement in the Referral process and Choice of Assessment;
- Considerations to be taken into account and the transparency of the Assessment process;
- Bioregional Plans being mandatory and binding;
- Access to biological resources, biodiscovery and benefit sharing;
- A full review of the wildlife trade regime under Part 13A, including exemptions; and
- Review of compliance and enforcement provisions.

Current Matters of National Environmental Significance

Part Two of the submission examines the seven current MNES and recommends how they could be amended to ensure better environmental outcomes, and more effective implementation of Australia's international obligations. The recommendations under each existing trigger are as follows:

1. World Heritage

In relation to World Heritage properties, the section should operate on both the *outstanding universal value* and preservation of the integrity of the properties listed under the Convention, rather than consideration of particular listed values as currently.

Furthermore, the Act should be amended to facilitate implementation of the World Heritage Convention's Operational Guidelines.

The Australian World Heritage management principles should be considered potential actions under the Act and should be rewritten as to operate on the *outstanding universal value* and preservation of the integrity of the World Heritage properties.

An additional mechanism to strengthen the trigger would be to include a schedule of designated developments which would require an environmental assessment. These could include mines, resorts and airports, adventure and joy flights in, around and over World Heritage properties if these actions impact upon the *outstanding universal value* and preservation of the integrity, rather than simply on a list of world heritage values mentioned in the listing statement for the area in question.

A definition of World Heritage property should be inserted in the dictionary to the Act, and Section 12 be amended to ensure protection arising from the Act is comprehensively property-based, rather than values-based.

2. National Heritage

We encourage the Government to actively list more national heritage places as a priority on the National Heritage List and Commonwealth Heritage List. Both Lists should trigger the MNES provisions. It is inadequate to rely solely on the National Heritage List, when many significant sites are on the Commonwealth Heritage List and do not currently attract the necessary assessment and protection. We submit all places listed on the current Register of the National Estate be listed so as to benefit from the 2004 provisions.

3. Wetlands of international importance

ANEDO submits that the current trigger should be expanded beyond wetlands of international importance, to include wetlands of *national* importance, for example, those listed in the *Directory of Important Wetlands in Australia*. It is essential that these wetlands, already recognised and listed as nationally important, receive commensurate protection as a matter of national environmental significance.

4. *Listed threatened species and communities*

ANEDO submits that the current trigger be extended to include categories which are now dealt with by the Act. These include ecological communities that are in the categories 'vulnerable', 'near threatened' and 'conservation dependent'; and 'near threatened' species. Currently only communities in the categories of 'critically endangered' and 'endangered' are covered.³

More generally, we submit that the Act should be strengthened by providing more information about species and communities to allow for better decision-making. For example, that the Act require inventories for threatened species to not only identify and state the abundance of relevant species, but also to identify range, habitat, critical habitat, and corridors where known. Furthermore, a minimum timeframe should be included, for example, 2 years, within which the Minister must decide whether to list threatened ecological communities gazetted under s185.

With regard to plan making, provisions relating to wildlife conservation plans (ss285-300A) should be strengthened: first, to make the preparation of wildlife conservation plans compulsory, rather than at the Minister's discretion; second, to require Commonwealth agencies to act in a manner consistent with wildlife conservation plans, rather than just taking reasonable steps to act in accordance with wildlife conservation plans (s286); and third, to require Commonwealth agencies to implement wildlife conservation plans in Commonwealth areas (as required for recovery plans – see s269). Similarly, once a key threatening process is listed, the development of a threat abatement plan for that key threatening process should be compulsory, and not at the discretion of the Environment Minister.

With regard to critical habitat, a formal process for public nominations of 'critical habitat', including timeframes within which listing decisions must be made (as per the threatened species nomination process) should be established. The Act should also be amended to provide a mechanism for automatic consideration of critical habitat identified in Action Plans for listing in the register, analogous to the section 185 'bulk listing' provisions for ecological communities. A minimum timeframe of 2 years should be established, within which existing recovery plans (ie recovery plans that were made before 16 July 2000) must be revised to identify critical habitat (as required for new recovery plans under *EPBC Regulation 7.11*), which must in turn be considered for listing on the critical habitat register (under *EPBC Regulation 7.09*)

ANEDO also recommends that provision is made for emergency interim protection orders to be made in relation to critical habitat. An example of where such an order would be appropriate is Mission beach in North Queensland. Currently there are several proposed developments in cassowary habitat that are not being declared controlled actions (as the areas are not large). An interim protection order could allow the impacts to be more properly assessed before incremental loss significantly affects the cassowary population.⁴

5. *Listed migratory species*

The trigger should be further strengthened by including the highly migratory species listed in Annex I of United Nations *Convention on the Law of the Sea* in the list of international agreements dealing with migratory species in Section 209 (3) of the *EPBC Act*. The species in Annex I should be considered Matters of National Environmental Significance, as is the case for all the other migratory species listed on international agreements to which Australia is a signatory.

6. *Nuclear actions*

ANEDO submits that section 22(1) should be extended. A revised list should include the following:⁵

- nuclear actions relating to military facilities, operations and exercises,
- mining or processing of Australian fertile and fissile materials including uranium and minerals sands,
- transportation of radioactive materials and products, including spent nuclear fuel, or radioactive products arising from reprocessing, and
- irradiation of foods and other products for human use or consumption.

3 Similarly, species in the categories of 'conservation dependent' and 'near threatened' should be included in the Part 13 offence provisions for taking and killing species

4 This would be consistent with for example, the Victorian *Flora and Fauna Guarantee Act*, which provides for interim protection for threatened species and ecological communities between nomination and listing. The killing of the Grey-headed Flying Foxes in Melbourne's Botanic Gardens while the species was being considered for *EPBC Act* listing, is an example of the need for such an amendment

5 See also the Combined Groups' submission 2002 *op cit*

7. Marine environment

This trigger should be comprehensive in its coverage to ensure the best environmental outcomes for Commonwealth marine areas, and consequently the trigger should be extended to include State and territory managed fisheries operating in Commonwealth marine areas, unless those fisheries are appropriately accredited.

The provisions for the accreditation of fisheries management regimes (for example, bycatch action plans) need to be strengthened to include strict and comprehensive criteria to be met prior to accreditation; extensive public consultation prior to accreditation; and 2 yearly reviews and audits of accredited management regimes.

Furthermore, the list of marine species under s250 should be amended to include shark species such as basking, whale and blue sharks and others. This would help prevent recreational shark killing in Commonwealth waters.

New matters

Part Three of the EDO submission proposes six New Matters of National Environmental Significance as follows:

1. Greenhouse trigger

[A] greenhouse gas emission trigger that recognises any development that produces over 100,000 tonnes of CO₂ equivalent per year as a matter of national environmental significance.

This could be supplemented by provision for all projects on a designated development list (including expansion of existing projects and significant land use change, including significant land clearing and motorway projects) to trigger the approval provisions. This would ensure the trigger was more comprehensive in capturing diffuse emissions.

2. Land clearing

A comprehensive trigger would require three main alternative elements. First, a trigger for the clearing of native vegetation over 100 ha in any two year period; second, a trigger for the clearing of any area of native vegetation which provides habitat for listed threatened species or ecological communities, or listed critical habitat; and third, a schedule of activities that would trigger the Act regardless of the hectares proposed to be cleared (for example, major coastal resort developments).

3. Dioxin and the Stockholm Convention on persistent organic pollutants

Amend Part of the *EPBC Act* to add a new matter of national environmental significance to capture: "Process identified under Annex C of Stockholm Convention, as set out in Schedule X".

4. Water extraction

ANEDO recommends that a trigger be included in Part 3 for abstraction of surface and ground water resources over 10,000 megalitres which is likely to have a significant impact on aquatic or groundwater-dependent ecosystems.

As noted, the focus of the trigger should be on major development projects in the Murray Darling Basin (using MDBC Agreement as the basis for power to Act). Criteria for assessing impact should be based on interference with rivers caused by major works (such as dams over a certain size); the extraction or diversion of volumes of water over a certain amount of that are likely to impact upon compliance with the MDBC cap.

5. Wild rivers

The *EPBC Act* should include a wild rivers trigger and list freshwater areas that meet relevant criteria. This would need to coordinate with world heritage sites and Ramsar wetlands listings.

Wild rivers to be listed and protected include:⁶ Archer River system; Coleman River system; Ducie River system; Fraser Island streams; Gregory (Nicholson basin); Hinchinbrook-Island streams; Holroyd River

6 For further detail see Submission by the EDO, The Wilderness Society, and the Queensland Conservation Council 2004

system ; Jacky Jacky Creek; Jardine River; Jeannie River; Lockhart River; Morning Inlet streams; Olive and Pascoe Rivers Settlement Creek system; Staaten River; Stewart River; Watson River; and Wenlock River.

Natural rivers include: Annan River; Black River; Bulloo River; Cooper Creek; Curtis Island streams; Daintree River system; Diamantina & Georgina Rivers; Elliott River; Embley River system; Flinders River system; Gilbert River system; Leichhardt River; Maranoa River; Mitchell River system (excluding upper Mitchell); Moreton Island streams; Nicholson River; Norman River; Normanby River system; O'Connell River; Paroo River; Sandy Creek; Shoalwater Creek; Stradbroke Island streams; Styx River; and Whitsunday Island streams.

6. Wilderness

The *EPBC Act* should require wilderness areas, defined as NWI 12+ lands that are within formal reserves, to be new matters of national environmental significance.

The Australian Democrats Submission

1. Underlying principles

The Australian Democrats submission firstly referred to some of the underlying Principles of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC), particularly two clauses under Section 3A of the Act;

(b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation

(d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making

The submission started by urging the Minister for Environment and Heritage, and more widely the Government in general, to exercise the power available through the EPBC with these clauses in mind. The Democrats call on the Government to adhere, at all times, to seek to govern within the limits of our ecosystems and with regard to long-term goals of ecological sustainability.

2. Greenhouse

Secondly, the Democrats noted the previous Prime Ministerial commitment to treat greenhouse emissions as a Matter of National Environmental Significance, contained in the 1999 GST agreement between the Australian Democrats and the Howard

Government. Given that existing commitment, the Australian Democrats call on Minister Campbell to ensure any review of the MNES turns its attention in the first instance to the need for a greenhouse trigger under the Act, along the following lines:

Greenhouse Action - Any new action expected to emit over 100,000 tonnes of carbon dioxide or equivalent in any 12 month period, or exceeding 25 megatonnes of carbon emissions over the longest period of time over which the action may generate emissions. Such actions include Commonwealth and State government projects and policies, such as changes to fuel excise levels and development of electricity generating infrastructure.

3. Coastal development

Democrats noted that large areas along the Australian coastline are being lost to inappropriate developments, often over sand dunes, in areas prone to flooding and over important fish nurseries. Coastal development also displaces delicate coastal ecosystems and places coastal communities at greater risk of suffering damage through storm-surges and predicted increases in sea level as a result of climate change. The Democrats believe that the addition of coastal development as a MNES would enable broader oversight on the development of coastal areas, such as those between the Wet Tropics World Heritage Area and the

Great Barrier Reef, where the cumulative impact of residential and commercial development is predicted to result in “death by a thousand cuts” for the region’s biodiversity and tourism resources. The proposed coastal trigger is as follows:

Coastal Development –

- (a) *Development or sale of any area of Commonwealth land within an area identified as coastal zone, including coastal waters and those areas landward of the coastal waters where there are processes or activities that affect the coast and its values, or*
- (b) *or development of 5ha or more previously undeveloped coastal land, including coastal waters and those areas landward of the coastal waters where there are process or activities that affect the coast and its values, with consideration of the cumulative impacts of other existing and planned development and with reference to any other relevant matter of National Environmental Significance.*

4. Water - use, extraction and damming

The submission notes that management of Australia’s water resources have lately become a much higher priority for governments, as many of our cities face water restrictions, our aquifers are increasingly important for the development and stability of regional communities, and our productive farm land struggles under widespread irrigation and damming regimes. The Democrats believe the EPBC referrals process may be an appropriate centralised process through which application can for new water use proposals can be lodged, recorded, made public and, as required, environmentally assessed. The recent report of the Senate’s Rural and Regional Affairs Committee *Inquiry into Australian Forest Plantations – A review of Plantations for Australia: The 2020 Vision*, was also mentioned in support of such a trigger, which would be structured as follows:

Water Resources –

- (a) *damming of surface water and retention of rainfall involving the construction or operation of a dam with a crest height of more than 10 metres, or smaller cumulative damming projects on the same water course with impacts equal to or exceeding a single dam with a crest height of more than 10 metres*
- (b) *extraction or diversion from the water cycle, including use of aquifer, surface or rainfall water resources of any amount exceeding 100,000 megalitres per annum, assessed within the context of existing catchment extractions in order to ensure adequate water remains in water cycle for health and continued evolution of regional and downstream biodiversity.*

5. Broadscale land clearing

Given the problems and delays surrounding listings of ecological communities, and of critical habitats for both threatened species and ecological communities, and of the threat posed to Australia’s environmental values by continued and uncontrolled broadscale landclearing, the Democrats believe it is necessary to simplify operation of the EPBC with a recognisable benchmark above which clearing of native vegetation is considered a controlled action:

Broadscale Land-clearing

The clearing of any vegetation, regardless of its age, where more than 70% of species are considered native, and where the area to be cleared exceeds

- (a) *100 ha in any two year period, or*
- (b) *20ha in any two year period where vegetation to be cleared may provide habitat for any listed threatened species or endangered or vulnerable ecological community, or have relevance to any other matter of national environmental significance, or that is recognised as critical habitat*

6. Forestry Activities

The Democrats also wish to draw the attention of the government to work of the Senate’s Rural and Regional Affairs Committee, in particular the comments of Committee Chair Senator Aden Ridgeway regarding the regulatory framework surrounding forestry activities and the EPBC Act, who commented “The Democrats believe much of the controversy surrounding Tasmanian forestry activities may have been avoided, and may be avoided in the future, should robust and publicly transparent environmental standards have been both set and met by foresters.

... As a result, the Democrats recommend that Tasmanian forestry, and forestry activities in all other states, should be assessed under the Federal regulatory framework and must not be exempt from the provisions of the Environment Protection and Biodiversity Conservation Act 1999.” Accordingly the Democrats have proposed a new trigger for plantation forestry projects as follows:

Plantation forestry –

The establishment of plantation forests on areas greater than

(a) 100 ha in any two year period, or

(b) 20ha in any two year period where vegetation to be cleared may provide habitat for any listed threatened species or endangered or vulnerable ecological community, or have relevance to any other matter of national environmental significance, or that is recognised as critical habitat regardless of prior land use, to be assessed for cumulative impacts on biodiversity, water resources and soil development within the context of catchment areas.

The War on Weeds - issues at the international interface +

By Elisa Arcioni*

Introduction

Weeds threaten biodiversity and have a detrimental economic impact on Australia’s agricultural industries. In order to address the problems posed by weeds, prevention and management is required. This is the “strategic approach” established in national policy. This article focuses on the former aspect, prevention, and the specific issue of preventing invasive plant species entering Australia. Movement of plant species around the world is not a new phenomenon. Trade in plants has a long history, stretching back thousands of years.¹ However, such trade can introduce harmful species into a country. Therefore, just as trade emerged in the past, so did the notion of quarantine, to protect a country, its people, environment and economy, from risks posed by foreign species. With the push for free trade around the world, a tension has emerged between removing trade barriers and protecting a country from invasive species. That tension is explored here. Australia’s quarantine system is explained, as well as a major criticism made of it. Attention is then turned to international trade law, to the extent that it affects Australian quarantine measures. Finally, some comments are made with respect to the effect of bilateral trade deals on Australia’s attempts to prevent weed problems.

National Weeds Strategy

The strategic approach to weeds in Australia is set by the *National Weeds Strategy*,² adopted in 1997, following incidental mention of weeds as an environmental problem within a number of earlier government policy documents.³ The Strategy establishes that prevention and management are essential to the control of weed problems in Australia. In general terms, weed management is the responsibility of land occupiers,⁴ with the States and Territories having the primary regulatory role.⁵ However, with respect to preventing

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* Faculty of Law, University of Wollongong Email arcioni@uow.edu.au

1 See Richard Mack, “Trade routes for commerce in plants or pathways for invasive species? The dualism of international commerce”, *Fourteenth Australian Weeds Conference* (2005), 72. With respect to Australia, it has been suggested that trade of plant species took place prior to British colonisation, by Indigenous Australians trading with the Macassans to the north of the country. Richard Groves, *Recent Incursions of Weeds in Australia 1971-1995* (CRC for Weed Management System Technical Series No 3, 1998), p 8.

2 Agriculture and Resource Management Council of Australia and New Zealand, Australian and New Zealand Environment and Conservation Council & Forestry Ministers, *The National Weeds Strategy a strategic approach to weed problems of national significance* (rev ed, March 1999). This Strategy is currently under review by the Australian Weeds Committee.

3 See for example, *The National Strategy for the Conservation of Australia’s Biological Diversity* (1996), pp254-256.

4 Agriculture and Resource Management Council of Australia and New Zealand, Australian and New Zealand Environment and Conservation Council & Forestry Ministers, *The National Weeds Strategy a strategic approach to weed problems of national significance* (rev ed, March 1999), p 25.

5 The primary legislation is *Noxious Weeds Act 1993* (NSW), *Catchment and Land Protection Act 1994* (Vic), *Land Protection (Pest and Stock Route Management) Act 2002* (Qld), *Agricultural and Related Resources Protection Act 1976* (WA), *Animal and Plant Control (Agricultural Protection and Other Purposes) Act 1986* (SA), *Weed Management Act 1999* (Tas), *Weed Management Act 2001* (NT), *Land (Planning and Environment) Act 1991* (ACT).