# REVIEW OF THE EPBC ACT [1]

by Dr Allan Hawke

***Introduction***

The Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (the EPBC Act) was provided to the Australian Government on 30 October 2009.[2] When releasing the report on 21 December 2009, the Government commented on just 2 of its 71 recommendations. The recommendations for an interim greenhouse gas emission trigger as a matter of national environmental significance, and a review of the EPBC Act's provisions concerning Regional Forest Agreements (RFAs) were not agreed.[3] I remain hopeful, however, that the Review will lead to increased clarity, efficiency and effectiveness in managing Australia's environment through our national legislation.

This article touches on key review findings relevant to biodiversity conservation.

The scope of the 10-year review which I was appointed to undertake in October 2008 was determined by s 522A of the EPBC Act. I was asked to assess the operation of the Act and the extent to which its objects had been achieved. I was also asked to examine the appropriateness of current matters of national environmental significance under the Act, and the effectiveness of biodiversity and wildlife conservation arrangements. The review was to have regard to key Australian Government policy objectives including:

- to promote the sustainability of Australia's economic development to enhance individual and community well-being while protecting biological diversity and maintaining essential ecological processes and systems
- to work in partnership with the states and territories within an effective federal arrangement
- to facilitate delivery of Australia's international obligations
- to reduce and simplify the regulatory burden on people, businesses and organisations, while maintaining appropriate and efficient environmental standards in accordance with the Australian Government's deregulation agenda
- to ensure activities under the EPBC Act represent the most appropriate, efficient and effective ways of achieving the Government's outcomes and objectives consistent with expenditure review principles.

My review was greatly assisted by an expert panel, comprising:

- Professor Tim Bonyhady – Director of the Australian Centre for Environmental Law and the Centre for Climate Law and Policy at the Australian National University
- Professor Mark Burgman – Adrienne Clarke Chair of Botany and Director of the Australian Centre of Excellence for Risk Analysis at the University of Melbourne
- the Hon. Paul Stein AM – former judicial officer in various New South Wales courts from 1983 to 2003, including the Land and Environment Court, the Court of Appeal and the Supreme Court
- Ms Rosemary Warnock – former CEO of Castrol Asia Pacific and more recently CEO of the Clean Energy Council.

1 Presented as a keynote address to the National Environmental Law Association Conference, University House, Australian National University, 21 October 2010; updated in minor respects

2 The report is available at: http://www.environment.gov.au/epbc/review/index.html

3 Australian Government, Minister for the Environment, Heritage and the Arts, the Hon Peter Garrett MP, Media Release PG/407, Release of the Hawke Report, 21 December 2009, http://www.condaminecatchment.com.au/index.php?option=com_content&view=article&id=110:admin&catid=1:latest&Itemid=119

I also want to thank Mark Flanigan and his secretariat colleagues from the Environment Department for their dedication, professionalism and commitment, which was reflected in the quality and timely delivery of the final report.

***Public consultation***

The Review provided numerous opportunities for public input which provided an invaluable contribution to the depth and rigour of our thinking and an insight into community understanding of the legislation.

The first stage of the public consultation process coincided with the Review's commencement on 31 October 2008 through release of a discussion paper which led to 220 submissions.

The second stage involved a series of targeted face-to-face meetings during March to May 2009 around Australia. That led to an interim report in June 2009 which drew 119 responses.

I also consulted with the three statutory bodies that have an advisory role under the EPBC Act:

- the Australian Heritage Council
- the Indigenous Advisory Committee
- the Threatened Species Scientific Committee.

Submission were received from a range of stakeholders, and public comments broadly supported the Act: 32% were from environmental NGOs, 21% from other NGOs such as industry bodies, 13% from local, state, territory and Australian Government bodies, 8% from research groups and academics, and 5% from interested individuals.

Consultations with professional bodies, including the legal profession, were crucial to the Review. A series of workshops explored issues in greater depth, helping the Review to focus on current challenges under the EPBC Act and identify opportunities for improvement.

***Positive features of the current Act***

The EPBC Act, which commenced in July 2000, repealed the *Environment Protection (Impact of Proposals) Act* 1974 (Cth) and merged four other Commonwealth statutes:

- the *Endangered Species Protection Act 1992*
- the *National Parks and Wildlife Conservation Act 1975*
- the *World Heritage Properties Conservation Act 1983*
- the *Whale Protection Act 1980*

into a single overarching framework for national environmental regulation.

The changes wrought by commencement of the EPBC Act were far reaching. For the first time, there was a national approach to environmental protection, and just as important, the Environment Minister was placed at the centre of decision-making for matters of national environmental significance.

My report recognises many positive features that should be retained, including:

- clear identification of the matters of national environmental significance
- the Environment Minister's role as the key decision-maker
- public participation provisions
- explicit consideration of social and economic issues

- statutory advisory mechanisms
- a strong compliance and enforcement regime.

The EPBC Act is, however, a product of its time. The Review considered the new information acquired through the experience of government, industry and the community in the EPBC Act's operation over the ten years since its commencement, the new and emerging issues affecting our environment, and developments in science, technology and policy. Taking these into account, my findings identify significant opportunities to modernise Australia's national environmental regulation framework.

The core elements of my proposed reform package are to:

- rename the EPBC Act the Australian Environment Act and redraft it to reflect better the Commonwealth's role with streamlined arrangements
- establish an independent Environment Commission to advise the government on project approvals, strategic assessments, bioregional plans and other statutory decisions
- invest in the building blocks of a better regulatory system such as national environmental accounts, skills development, policy guidance, and acquisition of critical spatial information
- streamline approvals through earlier engagement in planning processes with more effective use and greater reliance on strategic assessments, bioregional planning and approvals bilateral agreements
- set up an Environment Reparation Fund and national 'biobanking' scheme
- provide for environmental performance audits and inquiries by the Environment Commission
- create a new national environmental significance matter for 'ecosystems of national significance', and introduce an interim greenhouse trigger
- improve transparency in decision making and provide greater access to the courts for public interest litigation
- mandate the development of foresight reports to help government manage emerging environmental threats.

My report is divided into two parts. Part 1 provides a high level summary for opinion leaders and lists the 71 recommendations. Part 2 deals with the issues in greater depth, setting out the reasoning behind each recommendation. There are also around 150 findings that are advisory in nature interspersed throughout the text of Part 2.

***Modernising the Act***

Many people, including members of the legal profession, find the EPBC Act hard to navigate. The Act was intentionally drafted with large sections of text repeated in an endeavour to make it easy to understand. The result, however, is legislation that is lengthy, unnecessarily complex, often unclear and in some areas, overly prescriptive.

I recommend repealing the current Act and replacing it with a new Australian Environment Act. Redrafting should deliver simplification and clarity, while ensuring the substance of many existing provisions do not change. This will encourage public participation, provide best practice regulation and reduce the regulatory burden on those impacted by the Act.

Some of your legal colleagues were instrumental in formulating recommendation 2 which proposes a clarification of the EPBC Act's objects to sharpen its focus. As part of giving the new Australian Environment Act a much clearer sense of direction, the Act will have a primary object to protect the environment through the conservation of ecological integrity and nationally important biological diversity and heritage through applying the principles of ecologically sustainable development.

The proposed objects are intended to ensure the Australian Government's focus for environmental matters is on nationally important biodiversity and heritage, while recognising that the Commonwealth does not and should not act in isolation in managing the environment. The Commonwealth should take a leadership role in protecting matters of national

environmental significance, but protection of these matters requires the cooperation of all levels of government and the broader community.

***National approach***

The Commonwealth's role in a national system should be one of leadership, as a champion of the national interest and standard-setter in environmental management. Five processes define how this role can be operationalised in an efficient and non-duplicative manner:

- harmonisation – the Commonwealth should harmonise its practices with state and territory regimes to the extent possible
- accreditation – the Commonwealth should focus on accreditation of state and territory processes that meet requisite Commonwealth standards
- standardisation – the Commonwealth should facilitate uniform regulatory systems between the states and territories
- simplification – the Commonwealth should provide streamlined environmental impact assessment (EIA) processes
- oversight – the Commonwealth should engage in performance monitoring of accredited systems.

***Landscape scale and whole of ecosystem approaches***

I turn now to the case for implementing whole of ecosystem protection.

Protection of biodiversity at an ecosystem level is at present limited to those that happen to occur within areas protected for other reasons:

- World Heritage areas
- National or Commonwealth Heritage places
- wetlands of international importance
- Commonwealth national parks or marine areas.

Terrestrial ecosystems outside protected heritage places, listed wetlands and Commonwealth national parks are only protected indirectly if a proposed action triggers an assessment because of the likelihood of a significant impact on a threatened species or ecological community.

Many of Australia's ecosystems are in continuous decline, or at serious risk from a broad range of threats, including climate change and cumulative landscape-scale impacts, and particularly habitat loss and invasive species. The scientific consensus is that these threats can best be addressed through a landscape scale approach to biodiversity conservation. This involves taking a holistic approach, with the aim of maintaining resilient ecosystems that perform their ecological function and provide essential ecosystem services.

This imperative is recognised in recommendation 8 – that the EPBC Act should provide for the protection of ecosystems of national significance. Criteria for listing an ecosystem of national significance should be focused on the 'nationally significant ecological value' of the ecosystem.

***Greenhouse gas trigger***

A substantial number of submissions argued for, or against, the establishment of a greenhouse gas trigger under the Act. At the time of the Review, the Carbon Pollution Reduction Scheme (CPRS) was envisaged by the Government as the primary

mechanism to tackle Australia's carbon emissions. In light of political uncertainty about the CPRS and the stated urgency in starting to tackle Australia's carbon trajectory, I proposed a two-part complementary approach:

- first, that the Government implement an interim greenhouse trigger under the Act, to be introduced as soon as possible by way of regulation, to sunset upon commencement of the CPRS
- second, a requirement to consider cost-effective climate change mitigation opportunities as part of strategic assessments and bio-regional planning processes.

The use of regulation to insert a greenhouse gas trigger into the Act was my preferred option, because of the then stated need to act quickly. New matters of national environmental significance can be inserted into the EPBC Act, either by amendment of the legislation, or through prescription in the regulations. Such a trigger would ensure that emissions-intensive developments properly consider and implement low cost abatement solutions in their construction and operation.

I proposed a trigger threshold of at most 500 000 tonnes of carbon dioxide equivalent emissions per annum, noting that previous triggers considered by both major political parties have recommended such thresholds.

In relation to recommendation 10's proposal for a greenhouse trigger, the Government said that it favoured a market-based system to reduce greenhouse emissions and if the CPRS were passed there would be no need for a greenhouse trigger to be introduced, even as an interim measure. What would happen if the CPRS did not pass was studiously avoided and since then the politics have become even more diabolical. You would also be aware of the associated nuclear power dilemma.

***Regional Forest Agreements***

One of the most contentious issues during consultations involved RFAs under the Act – those 20 year plans whereby the Commonwealth and a state or territory government agrees on the long-term management and use of forests in a particular region. The RFA mechanism was designed to deliver the conservation and sustainable management of Australia's native forests, as well as certainty of access to forest resources for the timber industry. The Commonwealth and State Governments progressively signed 10 RFAs between 1997 and 2001.

To avoid duplication and uncertainty when the EPBC Act was passed, the Parliament accepted that the EPBC Act should not apply to actions taken in compliance with an RFA. This means that individual forestry operations undertaken in compliance with RFAs do not need to be referred for individual assessment under the EPBC Act.

Notwithstanding the benefits of RFAs, there is significant community concern that the environmental outcomes from RFAs are not being delivered. Public submissions to the Review were critical of the content and administration of the RFAs, as well as the limited mechanisms to ensure RFA forestry operations are compliant and best practice.

My Report canvassed an agreed approach between environmental groups and forestry operators to redress the shortcomings. Recommendation 38 on RFAs was the second recommendation on which the Government commented at the time of releasing the Report.

Given the RFA provisions of the EPBC Act operate more akin to a licence with authorisation issued on the terms outlined in the RFA, rather than an exemption, the Commonwealth should ensure compliance with RFAs. Like other sectors, retaining the social licence to operate often requires not only doing the right thing, but being accountable and able to demonstrate it. A key issue of concern in my Review was that the current process for review and auditing RFAs is neither independent nor transparent, and more importantly, in many cases, required reviews are not being undertaken.

Long-term sustainability of the forests and forest industry require this to be rectified. Accordingly, my Report recommended that the current mechanisms for RFA forest management should be retained, conditional on better, more independent systems of performance assessment, compliance and enforcement. This would ensure the terms of the RFAs are

implemented and the desired outcomes achieved. If they are not being met, then in my view the full protections of the EPBC Act should apply to forest activities.

When releasing my report, the Government said that it was committed to retaining the Act's RFA provisions as they currently stood, and committed to working with state governments to improve the review, audit and monitoring arrangements. This would include their timely completion, clearer assessment of performance against environmental and sustainable forestry outcomes, and a greater focus on compliance in the intervening years. Moreover, the Government stated its intention to use upcoming RFA renewal processes to improve the achievement of these outcomes. Having regard to all of this, the Government rejected the mechanisms proposed in recommendation 38. I look forward to seeing what happens there.

***Environmental impact assessment***

Many recommendations focus on ensuring that the Australian Government's involvement in environmental regulation reflects its role in the Federation. In particular, the recommendations seek to ensure Commonwealth interventions are strategic in nature and effective in protecting matters of national interest. While there is scope for extension of the Commonwealth's role in some circumstances, the option of attempting to cover the whole field in environmental regulation is neither appropriate nor realistic.

Submitters raised concerns that the EIA regime of the EPBC Act does not adequately address the cumulative impacts of multiple actions, because it only considers project-by-project impacts.

In practice, consideration of cumulative impacts and ecological resilience is best achieved through explicit consideration of landscape-scale effects in bioregional plans and strategic assessments, rather than through case-by-case approaches.

To this end, my Report proposes a combination of regional approaches and assessment tools to improve the Commonwealth's ability to engage on a landscape scale. These include:

- expanding the role of strategic assessments and bioregional plans so that they are used more often
- allowing the Commonwealth to unilaterally develop regional plans
- creating a 'call in' power for plans, policies and programs likely to have a significant impact on matters of national environmental significance.

The current strategic assessment process requires the person or agency responsible for a plan, policy or program to enter an agreement to undertake the assessment. The effect of this is that the Australian Government is unable to undertake the strategic assessment unless invited to do so by the responsible person or agency.

I recommend the EPBC Act be amended to include a 'call in' power for plans, policies or programs likely to have a significant impact on protected matters. I also recommend that the Commonwealth have the power to undertake bioregional assessments unilaterally.

One of the main attractions of the bioregional planning mechanism is that it allows the Australian Government to create an integrated framework for Commonwealth interests at a regional scale. Ideally, the Commonwealth would develop bioregional plans in collaboration with the states and territories to meet both national and state environmental requirements and provide the maximum environmental, social and economic benefit.

An area for streamlining identified in the Review involves increased accreditation of state, territory or Commonwealth systems where they are assessed to meet the requirements of the EPBC Act adequately.

While strategic assessments are an effective tool with the potential to deliver significant benefits if broadly applied, project level assessments will still need to continue under the EPBC Act in regions not covered by strategic assessments or bioregional plans, for some time. As such I also considered opportunities to improve the Act's EIA regime for individual

projects.

***Merits review***

The original Act allowed for merits review of a limited range of decisions made by the Minister or a delegate. The 2006 amendments removed the ability to seek merits review of any decisions made by the Minister.

Arguments were put forward in submissions both for and against extending merits review to ministerial decisions, and in favour of expanding the types of decisions open to merits review. On balance, my recommendation 48 proposes that the 2006 amendments concerning merits review be reversed.

Merits review has never been available for any of the key decisions about environmental impact assessment and project approvals made under the EPBC Act. The weight of submissions received by the Review was in favour of an expansion in the scope of merits review to all decisions, or at the very least, key decisions under the Act. I concluded that project approval decisions made under s 133 of the Act should not be open to merits review, but should remain open to judicial review.

I also considered whether those decisions that are preliminary to the project approval decision under s 133 – namely, the controlled action decision and the assessment approach decision – should be open to merits review. Opening the controlled action and assessment approach decisions to merits review should provide greater transparency and accountability.

The current system is predicated on proponents being able to get a quick answer as to whether their project falls under the EPBC Act. Merits review would slow down this part of the process and undermine the role of the Minister as the elected decision maker.

Noting both the potential costs and benefits associated with merits review of controlled action and assessment approach decisions, I recommended the Government give further consideration to this issue.

*Conclusion*

My covering letter forwarding the Review to the Minister noted ANU survey results showing the economy and the environment as the two dominant problems facing the nation, with 56% of respondents saying that the Government is doing too little in protecting the environment.

Undertaking the Review of the EPBC Act demonstrated the very real challenges ahead of us to that end.

The Independent Review Report identifies significant opportunities for enhanced regulatory and environmental outcomes under a new Act.

I look forward – as I am sure you do – to the Government's response to my recommendations and hope that the two rejected summarily in 2009 might be revisited in the light of subsequent events.