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

7 May 2010

Dear Minister

Our respective organisations congratulate the Australian Government, Dr Hawke and the expert panel, on a timely and thorough review of the *Environment Protection and Biodiversity Conservation Act* 1999 ("EPBC Act") released in October last year and titled *The Australian Environment Act – Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* ("Report" hereafter).

Whilst we are in strong support of many of the key reforms outlined in the Report, we also have significant concerns.

Many other recommendations could be supported if they were strengthened or clarified.

Below are responses to key recommendations and counter-recommendations that we all agree are critical to improve the operation of the Australian Government's primary piece of environmental legislation.

This is not an exhaustive list, however, and many of our organisations will be providing more detailed submissions in addition to this joint submission.

1. We strongly support Ecosystems of National Significance ("ENS" Rec. 8)

1.1. The Australian Government has committed to a stronger focus on ecosystem protection, recognising the importance of conserving land/seascape scale ecological functions and processes.

1.2. We agree that ecosystem protection is fundamental to meeting Australia's international obligations under the Convention on Biological Diversity ("CBD"). Without ecosystem scale conservation, species by species conservation will always have limited prospects for success.

1.3. We agree with the Report's observation that currently ecosystems are protected under the Act only if they "happen to occur within areas protected for other reasons" (4.19) or overlap threatened ecological communities.

1.4. We therefore strongly support the Report's recommendation 8 to recognise Ecosystems of National Significance as a new Matter of National Environmental Significance ("MNES") under the EPBC Act.

1.5. We strongly support criteria (a) to (i) for defining ENS.

1.6. In particular, we strongly support the inclusion of criterion (h) "it is a climate change refuge of national significance", since protecting climate change refuges is a necessary part of preventing biodiversity loss under climate change. We urge the government to task the already established National Climate Change Adaptation Research Facility (NCCARF) with identifying such refuges.

1.7. We note however that criterion (f) "it is significant in building a comprehensive, adequate and representative system of habitat types in Australia" appears to miss the point that "comprehensive, adequate and representative" refers to Australia's existing commitment under the CBD to establish a comprehensive, adequate and representative National Reserve System. We recommend this criterion be amended to read (f) "it is significant in building a comprehensive, adequate and representative national reserve system"

1.8. We propose in addition, a new criterion for an ENS that it comprises a large wilderness or natural area still largely free of degradation, with close to natural levels of ecosystem function.[1]

1.9. We support Criterion (a) "it has high comparative biological diversity, within its ecosystem type", but also propose that specific mention be made in this criterion to centres of endemism and biodiversity hotspots.

1.10. We support criterion (b) "it provides critical nationally important ecosystem functions", but we also note that particular keystone species can also provide "critical nationally important ecosystem functions". Accordingly we propose widening the list of MNES beyond ENS and threatened species, to include keystone species or species of national ecological significance. This would greatly assist in achieving a whole of landscape approach to biodiversity conservation.

1.11. We support Report para. 4.67, "However, if ecosystems of national significance are not included as a new matter of NES, wetlands of national significance should be protected as a matter of NES under the Act alongside wetlands of international significance."

[1] The term "wilderness" is not used here in anyway to imply denial of the long presence and connection of Indigenous people to their country, and their native title rights. To the contrary, it merely means areas free of modern development. All groups consider that the remaining wilderness areas in Australia are the direct result of many millennia of "looking after country" by Indigenous Australians. The term "wilderness" as we use it here today is intended to acknowledge and value the deep history of "looking after country" by Indigenous Australians.

2. We propose the National Reserve System as a additional MNES

2.1. A major gap in the EPBC Act is that it covers conservation areas declared under earlier conventions, but has no specific provisions for actual protected areas declared pursuant to the Convention on Biological Diversity (CBD), other than Commonwealth Reserves. The IUCN is clear that areas declared under the conventions on World Heritage, Ramsar and Man and the Biosphere are not necessarily "protected areas" that meet the IUCN definition.[2]

2.2. The National Reserve System (NRS) comprises protected areas whose national environmental significance has already been formally recognised by all jurisdictions. However, such protected areas are not covered by the protections of the EPBC Act against significant impacts from actions taken either within or adjacent to the protected areas, unless it happens to coincide with one of the properties mentioned above (2.1).

2.3. CBD protected area commitments should be given a clear legislative basis in the EPBC Act rather than remaining a program. The EPBC Act should have as a purpose developing the NRS as a consistently protected and well managed system of protected areas across all jurisdictions and tenures. This would greatly assist in achieving a whole of landscape approach to biodiversity conservation.

2.4. We note that some areas in the NRS may be considered ecosystems of national significance under proposed criterion (f). Quite independently of that, we consider that any protected areas in the NRS, whether or not they are individually recognised as ENS, should be treated as MNES.

2.5. We propose the inclusion of protected areas within the NRS as matters of National Environmental Significance under the EPBC Act, whereby significant impacts on those areas trigger the operation of the Act, as well as new provisions in the EPBC Act to provide for development of a national management framework and standards to provide for consistent protection and management of all NRS protected areas.

3. We support mandatory identification of Critical Habitat, but oppose termination of the Register (Recs 12(1) & 12(2))

3.1. We support Report recommendation 12(1) "require the identification of critical habitat for listed threatened species at the time of listing" with the caveat that lack of sufficient data with which to identify critical habitat should not be a reason to delay listing of a threatened species. We consider it reasonable to provide at most a 12 month grace period within which critical habitat must be identified following listing of only those species for which habitat data are insufficient at the time the threatened species is listed.

3.2. We strongly oppose Recommendation 12 (2) "discontinue the Register of Critical Habitat once information about critical habitat has been included in listing documentation."

3.3. We note that many critical habitats have already been identified through recovery plans and only await formal inclusion on the Register, which only has five critical habitats at present. Rather than weaken already weak critical habitat protection the government should amend the Act to improve effectiveness of the Critical Habitat Register and to strengthen protection given to critical habitats on the Register and identified through Recovery Plans and Conservation Advice in all jurisdictions.

3.4. Critical Habitat listing works over and above listing the species itself. Evidence from actual species trend data in the US suggests that listing of critical habitat has halted or reversed threatened species declines. This relates to the fact that under

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[2] p.38ff in Dudley, N. (Editor) (2008). *Guidelines for Applying Protected Area Management Categories*. Gland, Switzerland: IUCN. x + 86pp.

the US *Endangered Species Act* critical habitat is defined as habitat needed for the species to recover, and so includes not only areas of habitat currently occupied but also suitable habitats not presently occupied that the species will need to re-occupy as its population recovers and expands to the point it can be delisted. This definition is particularly valuable in dealing with the shifting of habitats under climate change. Formal critical habitat designation or listing is mandatory under the US Endangered Species Act. It should also be mandatory here.

3.5. To ensure critical habitat works in an effective way under the EPBC Act, we propose that the Act be amended to:

3.5.1. require identification and formal listing of critical habitats on the Register upon species listing, or if data are presently insufficient, within 12 months of a species being listed

3.5.2. define critical habitat more precisely as those areas currently occupied and other areas currently unoccupied but found to be critical for the species to recover to the point it can be delisted

3.5.3. ensure that a significant impact on critical habitat would be specifically recognised in the Act as being a significant impact on the species itself.

3.5.4. provide for periodic review to take account of changing needs due to climate change and any other relevant changes including improved data.

3.6. We also consider that the proposed ENS criterion Rec. 8(g) "it provides habitat critical to the long-term survival of a significant number of threatened species listed under this Act;" whilst welcome, is not sufficient to provide for critical habitats for all species.

4. We support Strategic, Regional Environmental Assessments with critical caveats

4.1. We recognise that Strategic Environmental Assessments (SEAs) can better take into account cumulative impacts of multiple projects on MNES, and avoid the piecemealing of impacts to insignificance.

4.2. However we are very concerned that SEAs to date have been rushed and have locked in poor ecological outcomes for decades. We have serious reservations about the widespread use of them on other than a pilot basis until rigorous empirical auditing proves that they actually produce beneficial biodiversity outcomes.

4.3. SEAs must allow the time and resources to ensure the detail and complexity of ecological issues are thoroughly considered and allow for changes to be made if new information emerges. Being strategic and efficient is not just about streamlining decisions, it is principally about protecting ecosystems and the environment generally and guiding and controlling development so that unacceptable impacts on the environment are avoided.

4.4. Approval powers need to remain vested in, and directly exercised by, the Commonwealth.

4.5. We strongly support the creation of a call in power for 'plans, policies and programs' that *may* have or materially contribute to a significant impact on a MNES. This would improve the ability for the Commonwealth to pre-empt threats to MNES early in development processes and to better deal with cumulative impacts. At present the Commonwealth has to wait for a jurisdiction to initiate a request for an SEA.

4.6. A zoning scheme should be an outcome of an SEA, based on uncertainty levels to identify:

4.6.1. Areas where specific types of actions may proceed without further assessment, unless new information comes to light post-assessment.

4.6.2. Areas where specific types of actions need project-level approval

4.6.3. Areas where specific types of actions are prohibited

4.7. Because of the scale of their potential effects, SEAs must have a more rigorous level of assessment than individual projects and incorporate at a minimum the steps and process outlined in Report Recs 24-27.

4.8. SEAs must have clear legislated provisions which ensure transparency of decision making and adequate public participation including a minimum 60 day public exposure and feedback period (Report recs. 43-46).

4.9. Regional/bioregional assessments may have additional value, particularly for regions/ecosystems which span multiple jurisdictions. Good models exist such as the Victorian Environment Assessment Council (VEAC). The proposed independent Environment Commission could play a similar role and should have the power to undertake bioregional assessments, via panels or council under a staged and rigorous assessment process which we propose should be:

4.9.1. Undertaken by an independent panel/ experts or council;

4.9.2. Have clear mandate and resources to access and communicate best science;

4.9.3. Have a clear process for consultation: such as discussion paper, draft recommendations and final report, all with specified public consultation periods and a requirement for a statutory response from government and a formal tabling in parliament of the response.

5. We strongly support National Environmental Accounts (Rec 67)

5.1. Comprehensive, reliable, quantitative data on the functioning of our environmental systems is necessary to achieve the objectives of *Australia's Future Tax System* which among other things, urges government to "ensure that settings within the tax and transfer system do not unintentionally produce adverse environmental incentives or conflict with the broader environmental goals of other policy measures."

5.2. The loss of species and ecological services has had and, with climate change, will continue to have very large economic impacts that are unaccounted for under current arrangements and the currently very deficient baseline data.

5.3. Therefore, we <u>strongly support</u> Recommendation 67 for development of a system of national environmental accounts.

5.4. We also <u>support</u> the sub-recommendation that the Australian Bureau of Statistics (ABS) is an appropriate agency to manage national environmental accounts under a nationally standardised framework for data collection, coordination, reporting and auditing.

6. We support wider access to justice, transparency and merits review (Recs 43-46, 50-53)

6.1. We <u>strongly support</u> Report Recommendations 50-53 regarding public interest litigation and costs and also support reinstatement (Rec 48) and expansion (Rec 49) of merits appeals to controlled action and/or assessment decisions.

6.2. We <u>support</u> Recs 44 - 46 to improve transparency under the Act, provided public consultation periods are amended to a minimum of 28 days.

6.3. We <u>support</u> the recommendations aimed at improving decision-making, in particular Rec. 43.

7. We support recommendation 23 on Invasive species

7.1. We strongly support Recommendation 23(1) which offers the potential to address one of the biggest gaps in environmental law - the "unconstrained movement" of thousands of invasive or potentially invasive species within Australia

7.2. In addition, we urge the government to seek COAG agreement on a consistent risk-based approach to sale and movement (as for imports and for vertebrate pest species, via a 'permitted list' approach) and for national regulation of invasive species threatening biodiversity using s301A of the existing EPBC Act. We point out that Section 301A can already be used to list and regulate species already recognised as threats of national significance – Weeds of National Significance and Key Threatening Processes.

7.3. We strongly support Recommendations 23(2-3) to provide "foresighting" capacity to identify and address threats before they become established.

8. Biodiversity provisions

8.1. We have strong reservations about a national biodiversity banking scheme and the use of biodiversity offsets. If an action has a significant impact on a MNES then it should not be approved, rather than attempts made to offset the impacts in ways that are uncertain and unreliable. The scientific literature shows that offsetting schemes have generally not met their aspirations in practice. We oppose general adoption of offsets until empirical research on pilot programs proves they actually result in improved species recovery through the course of normal operation.

8.2. We agree with the Report that listing decisions should exclude any socio-economic considerations.

8.3. The Threatened Species Scientific Committee and Minister already have overly broad discretion in accepting public nominations to list species by determining priority assessment list in sections 194G(2)(d) and 194K, and we propose that these relevant 2006 amendments be repealed.

8.4. We likewise strongly oppose the amendments the Government has tabled for some CMS Appendix II species to exempt recreational fishers from offence provisions. These amendments will exempt take of these species from reporting requirements and do not actually implement the Report Rec. 17 for exemptions only there is a requirement for management measures to ensure take is not detrimental to the species.

8.5. We support recommendations for emergency listings for species and communities, threat abatement advice at listing, and flexibility in criteria for Key Threatening Process listings (KTPs) and Threat Abatement and Recovery Plans, but only if justified ecologically.

8.6. We strongly support treatment of vulnerable ecological communities as MNES to enable Commonwealth intervention before ecological communities reach the "edge of the cliff."

9. We oppose weakening of Fisheries provisions

9.1. We caution against streamlining or aggregating provisions under Parts 10, 13 and 13A as they apply to different jurisdictions with exemptions for different levels of offence (for example Part 13 deals with take of individuals of listed species in Commonwealth waters whereas Part 10 deals with the ecological sustainability of fisheries more generally).

9.2. We object to any weakening of the current criteria and standards to a lowest common denominator that would apply in all situations, for example that just deals with general ecological sustainability and not the impacts of the take of individual animals as now applies under Part 13.

9.3. Instead we recommend that the current criteria and standards be strengthened.

10. Heritage provisions

10.1. At present the focus of the EPBC Act on avoidance of significant impact is not consistent with Australia's obligations under the World Heritage Convention, which requires Australia to maintain or improve the heritage values of properties, not merely avoid negative impacts.

10.2. Analogous to critical habitat, both the heritage values and the specific areas which protect those values both need specific protection under the Act.

11. We support an interim Greenhouse trigger (Rec. 10)

12. We support stronger audit mechanisms for regional forest agreements RFAs (Rec. 38).

Yours sincerely

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