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PO Box 6100
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Dear Sir/Madam,

Re Senate Environment and Communications Reference Committee - Inquiry into the effectiveness of threatened species and ecological communities' protection in Australia

I would like to make some comments on the matters referred to this Committee based upon my professional experience as a practising lawyer and as a senior academic at Monash University (where I teach taxation law and environmental law). I recently contributed to a comprehensive review of all existing environmental impact assessment processes in Australia which made various recommendations for reform based upon best international practice (with Monash colleagues Dr Gavin M. Mudd, Dr Ruth Lane, and Ms Melanie Impey). Many of the findings in that paper are highly relevant to the matters before this Inquiry. I also have an interest in environmental law reform as a former member of the executive committee of the National Environmental Law Association. This submission expresses only my personal views and is not provided on behalf of any of the aforementioned organisations or my co-authors.

I would like to add that in my view this Inquiry is of the utmost importance to the future of environmental law in Australia as there are currently many forces at work that are in the process of dismantling decades of hard won gains. To put it bluntly, Australia has now reached the embarrassing position where timber cutters are in charge of forest protection and coalminers are in charge of inland waters and coral reefs. The protection of threatened species is a crucial litmus test for the success of Australian environmental management in general, and there are many fundamental weaknesses in the current regulatory framework that need to be urgently corrected.

This submission will briefly mention the key problems noted in other submissions, then briefly outline existing State and Federal species protection law, before concluding with some broad suggestions for reform.

Key points in other submissions

In the course of preparing this submission I have perused most of the other submissions posted online and have noted the following recurring themes:

- Every single submission is greatly concerned about serious failures in protection of threatened species and ecological communities in Australia. Collectively they provide numerous examples of such failures across the full spectrum of Australian bio-regions.
- Several stand-out threats are repeatedly mentioned:
    - clear-felling of native forests (verified in particular by expert opinion from Professor David Lindenmayer)
    - rapid expansion of the coal and gas industry (particularly infrastructure developments adjacent to the Great Barrier Reef), and
    - feral predators and other invasive species
- COAGs proposed hand-back of EPBC Act project approvals to the States would be a huge backward step. In particular the forestry and mining threats strongly indicate that State governments cannot be trusted to adequately protect threatened species.
- Many submissions revealed a widespread a lack of commitment by the various government agencies charged with protecting threatened species and ecosystems at both State and Federal levels.

The current environmental law framework

In the period of rapid economic growth following World War 2, catastrophic harm arising from industrial incidents such as Love Canal, Minimata, Exxon Valdez and Bhopal led to the widespread acceptance of a new range of environmental laws that specifically regulated:

- industrial pollution and hazardous waste licensing schemes;
- threatened species protection; and
- environmental impact assessment processes for major new projects.

This first phase of environmental laws has been reasonably successful in addressing local 'point source' industrial pollution problems over the last few decades. More recently, the growths of global trade, commodity exports and resource intensive lifestyles have contributed to a new range of more fundamental environmental problems characterised by biodiversity loss and natural resource depletion (or 'unsustainable' development). The 2005 Millennium Ecosystem Assessment reported that many of the drivers of biodiversity loss have been amplified by globalisation, particularly habitat change (including deforestation), modification of waterways, loss of coral reefs, climate change, invasive species, overexploitation and pollution (MEA 2005, Biodiversity Synthesis at p 8). Our existing environmental laws have struggled to prevent these problems and better strategies are urgently required.

State Government role

Industrial pollution and waste is regulated in all Australian States through an independent 'watchdog' agency. In Victoria the Environment Protection Authority has this role under the *Environment Protection Act* 1970 (Vic). However the traditional focus of the EPA is pollution in and around major cities. The EPA does not take a strong interest in broader scale regional activities such agriculture, fishing,

forestry and mining, which may be more likely to harm threatened species (and the EPA lacks resources to closely monitor regional activities).

The States also have specific laws protecting threatened species, such as the *Flora and Fauna Guarantee Act* 1988 (Vic), which provides identification and categorisation of species at risk, and 'action statements' or recovery plans to protect and re-build threatened populations. However the agencies enforcing this legislation are poorly resourced and often have their own internal conflicts of interest. Many submissions to this Inquiry provide specific examples of incomplete and/or unimplemented action statements. The position has been aggravated by competition policy reforms were widely adopted by State governments in the 1980s and 1990s. These reforms introduced fundamental change in the governance of natural resource uses including the privatisation of many former State owned enterprises, outsourcing of compliance monitoring responsibilities and a broad shift to industry self regulation. Despite this radical change in governance arrangements, endangered species laws have continued in similar form, based on an outdated vision of close government supervision that no longer exists.

Threatened species protection is particularly weak in areas subject to logging activities carried out Regional Forestry Agreements, where action statements and recovery plans seem to be completely ignored. Under the RFAs vast areas of bio-diverse state forest were earmarked for clear felling. The failure of to observe species protection plans under RFA arrangements is clearly demonstrated in recent public interest litigation against VicForests. In the Environment East Gippsland v VicForests [2010] VSC 335, the Supreme Court of Victoria found that VicForests approved clear felling activities at Brown Mountain without conducting threatened species surveys, where the coupes in question were a shown to contain several endangered species, including the Long-footed Potoroo. VicForests claimed it was not their responsibility to do so, suggesting that this was their common practice in all logging operations. In MyEnvironment v VicForests [2012] VSC 91 it was found that VicForests continued clear felling in Leadbeaters Possum habitat in contravention of an F&FG Act action statement even after the Black Saturday bushfires had destroyed two out the last three known LBP habitat areas. A recent Victorian Auditor General's Office Report has severely criticised the effectiveness of compliance activities associated with forestry in the Victorian Department of Primary Industries and the Department of Sustainability. (The Sectaries of both departments have accepted the findings and recommendations of that report). Massive wildfires have destroyed large swathes of the Victorian forest estate over the last decade. There is also evidence that clear felling mature forests creates drier forests more susceptible to wildfire. This clearly raises a 'force majeure' situation, which justifies re-assessment and restriction of RFA access to forests. Another fundamental defect in the RFA arrangements is that logging has detrimental impacts upon water catchments and carbon sequestration whilst increasing greenhouse emission – a new deal must be reached which protects a wider range of ecological services – not just woodchips.

Recommendations on State threatened species protection:

(i) provide more resources for completion and implementation of F&FG Act action statements and species recovery plans;
(ii) ensure that high levels of compliance monitoring is maintained for agencies like VicForests notwithstanding competition policy reforms.
(iii) get rid of RFAs and impose restrictions on access to mature forests;

(iv) prohibit clear felling, and monoculture plantations on both public and private land;
(v) ensure timber companies follow F&FG Act species protection plans.

Environmental impact assessment *may* be required under State legislation as part of development approval processes. In Victoria this may be required under the *Environment Effects Act* 1978 (Vic) and the *Planning and Environment Act* 1987 (Vic). However the Planning Minister has discretion to approve major projects without assessment (and regularly does so, eg. The North–south Sugarloaf pipeline, the Dual Gas power station). Where an assessment is undertaken the scope and quality is highly variable, and quite often the project is a 'fait accompli' in the eyes of proponents and key government agencies, before environmental assessments are carried out. For instance, the billion dollar gas extraction boom in Queensland has resulted in a rush of project approvals *before* any serious attempt was made to assess impacts upon ecosystems associated with the Great Artesian Basin and the Great Barrier Reef (much to UNESCOs annoyance). And it is not just biodiversity impacts that are undervalued but also severe ongoing impacts upon traditional farming and tourism industries. The recent book by Tim Bonyhady and Andrew Macintosh 'Mills Mines and Other Controversies' provides a series of comprehensive case studies from all States and Territories, showing how recent project approval processes have failed to protect threatened species and other environmental values. Submission 4 to this Inquiry by Alan Stephenson of the Australian Native Orchid Society, provides valuable insights on how data collection practices used by project proponents are inappropriate for many threatened species. In his experience threatened species surveys and reports provided by consultants are often highly superficial or incompetent. There have also been recent media reports of proponents shopping around for favourable expert opinions and requesting amendments to unfavourable reports.

Even where strong data on adverse impacts to threatened species is obtained, there is a prevailing mindset that these intangible 'costs' carry little weight against the relatively huge economic gains to be derived from a major development project. This attitude indicates a very poorly developed value system that bears scant regard to the interests of future generations. This type of superficial cost-benefit analysis is highly discredited yet it is continually used to justify questionable project approvals (see Kelman 1981 'Cost benefit analysis an ethical critique' *AEI Journal on Government and Society Regulation* (January/February 1981) PP. 33—40.).

Recommendations on State impact assessment processes:

(i) make the State impact assessment process mandatory where appropriate significant environmental impact criteria are satisfied;
(ii) ensure so far as possible that all necessary threatened species data is recorded and in the public domain before a project is contemplated; and
(iii) ensure that the relevant threatened species data is provided by independent experts, not consultants engaged by proponents.
(iv) introduce a more ethical approach to decision making which recognises the limitations of cost benefit approaches.

The Federal Government role

The national 'flagship' legislation for protection of threatened species is the *Environment Protection and Biodiversity Conservation Act 1999 (Cth).* This Act was designed to implements the environmental protection commitments that Australia has made under a wide range of treaties and conventions, including the Biodiversity Convention and others relevant to endangered species such as the World Heritage Convention, Ramsar Wetlands, Migratory Species, and the Law of the Sea. The EPBC Act adopts two broad strategies; firstly, an assessment and approval process for actions that may cause significant impacts upon certain matters to be protected under international treaties (and some that are solely of Commonwealth concern) and secondly, a range of biodiversity protection measures including 'listing' of threatened species and ecosystems, establishment of protected areas and certain statutory remedies for breaches of the Act. Whilst much emphasis is placed upon approvals and assessment process, it is arguable that the extensive but little used biodiversity protection measures in this Act are of far greater importance.

The EPBC Act appears to be very comprehensive, but it has an extraordinary range of important omissions and exemptions. The absence of a greenhouse trigger for EPBC Act assessment is particularly relevant to threatened species protection, as there is growing evidence of important climate related impacts on species distribution. Another major weakness from a threatened species point of view, is the exemption of forestry activities carried out under Regional Forest Agreements (RFAs). The logic behind the exemption was that State forestry agencies would protect threatened species through Special Protection Zones and other measures. In *Brown v Forestry Tasmania* [2006] FCA 1729 the Federal Court found that in fact no such protection was being provided in forestry activities at Wielangta (nor presumably anywhere else in Tasmania). This led to a farcical amendment to the RFA so that threatened species protection was no longer required but would be deemed to occur! It is also apparent that many of the conservation requirements of RFAs can be easily avoided. In some cases special protection zones that were agreed when RFAs were first introduced have been varied over time to allow logging of protected areas as other coupes have been exhausted.

One of the practical problems with EPBC Act assessments is that much of the information required by the Federal Minister to assess impacts upon endangered species originates from work hastily completed by consultants engaged by project proponents and/or State government regulators, and the ultimate quality of the information is influenced by the objectives of those parties. Ideally this type of information should come from independent research carried out over a much longer term (as suggested above under State threatened species protection measures). The EPBC Act itself requires that the precautionary principle should be a paramount consideration.

Perhaps the most fundamental weakness is that the EPBC Act does not *mandate* protection of threatened species and other the matters of environmental significance, but merely requires them to be taken into account by decision makers (which means they are often discounted and/or outweighed by shorter term economic development considerations).

It is of great concern that there are continuing calls for further weakening of the biodiversity protection framework under the guise of removal of 'green tape'. The

current COAG proposal for EPBC Act powers to be further delegated to the States is certainly not in the best interests of threatened species protection given the track record of most States in recent years. To the contrary, there is a need for stronger Federal supervision, based upon renewed commitment to international obligations and the principles of ecologically sustainable development, until State governments lift their game. The focus on Federal regulation to protected species is important. Australia as a nation has a responsibility to protect its unique biodiversity as part of the common heritage of humankind. Regrettably, a wide range of State governments from both Labor and the Liberal-National Coalition sides have failed dismally on this front. Whilst Federal administrative arrangements are often less than perfect, there are successful precedents from corporations law and consumer law which show that Federal coordination can work very effectively to reduce regulatory duplication and 'green tape'.

Recommendations on the Federal Government role:

(i) include as a new matter of national environmental significance any matter having significant climate change implications through greenhouse emissions or changes to carbon sequestration ('a greenhouse trigger');
(ii) remove the RFA exemption;
(v) ensure so far as possible that all necessary threatened species data is recorded and in the public domain before a project is contemplated;
(vi) ensure that the relevant threatened species data is provided by independent experts, not consultants engaged by proponents;
(vii) decision makers should make protection of threatened species and other matters of NES their *primary* consideration, not just one of a range of factors that can be outweighed by purely economic considerations; and
(viii) EPBC Act assessment and approvals powers should not be delegated to State governments unless the States establish and maintain fully resourced world best practice environmental protection laws.

General conclusion

In the longer term, Australia needs to truly embrace ecologically sustainable development. This would require a comprehensive national system to accurately identify and value the threatened species and other ecological values at risk from all commercial activities (not just new projects). A new national body informed by independent expert evidence should carry out this task, and be given strong regulatory powers to drive fundamental changes in sectors that are currently operating in an unsustainable manner. This body would need to be very well resourced to redress many past ills, which could be achieved in a revenue-neutral manner through restructuring of Federal State fiscal relations based upon complementary environmental tax reforms.

Thank you for the opportunity to make this submission. I would be happy to elaborate upon any of the above if the Committee wishes.

Wayne Gumley
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