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Environment Protection and Biodiversity Conservation Act

A Five Year Assessment

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The opinions presented and conclusions drawn remain the responsibility of the authors.

Summary

When the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) was passed in June 1999, the Federal Government and several environment groups promised it would revolutionise the Commonwealth's involvement in environmental issues and improve conservation outcomes. The World Wide Fund for Nature Australia went as far as calling it 'the biggest win for the environment in 25 years' (WWF 1999). It is now five years since the EPBC Act commenced and the evidence suggests the Act has fallen well short of these expectations.

This paper analyses whether the environmental assessment and approval (EAA) process under the EPBC Act is fulfilling its environmental objectives. In particular, it considers whether:

- there has been any improvement in the condition of the environmental issues covered by the EAA regime;
- the activities that are threatening the environmental issues covered by the EAA regime are being appropriately regulated;
- the lists of threatened species, threatened ecological communities and national heritage places, which are linked to the EAA regime, have been appropriately maintained;
- the Commonwealth has taken adequate steps to ensure people comply with the EAA regime; and
- the bilateral agreements have resulted in improvements in state and territory environmental laws and reduced unnecessary duplication.

In almost all areas, the regime has failed to produce any noticeable improvements in environmental outcomes. The activities that pose the greatest threat to the Act's 'matters of national environmental significance' are rarely being referred to the Minister and, when they are, the Minister is not taking adequate steps to ensure appropriate conservation results. In five years, the EAA provisions have been responsible for stopping only two activities out of potentially thousands and the conditions that have been imposed on developments under the regime have largely been ineffectual, unenforceable or a mirror of those already imposed under other processes.

The failure of the EAA regime is illustrated by the statistics on land clearing. When the EPBC Act was passed, the groups that supported the legislation suggested it would help in the 'fight against landclearing' (Beynon 1999). But since the EAA regime commenced, the annual clearing rates in Queensland have actually *increased*. This is notwithstanding the fact that the areas with the highest clearing rates contain several matters of national environmental significance.

Despite overwhelming evidence of widespread non-compliance, the Commonwealth has taken only two enforcement actions in relation to the EAA regime in five years. The first was dismissed at the committal hearing while the second resulted in the imposition of substantial civil penalties on a farmer and company based in northern

New South Wales. The successful civil action, which has become known as the Greentree Case, was hailed by the Federal Government and certain environment groups as a victory for the environment. One long-time supporter of the EAA regime even suggested the case was evidence that '(t)he times, they really are a'changin'' (Graham 2003a). This upbeat assessment of the events failed to recognise that the Commonwealth bungled the case. Evidence of illegal clearing by the defendants was given to the Commonwealth approximately ten months before the case was initiated and 80 per cent of the clearing occurred while the Commonwealth was trying to negotiate a settlement with the defendants. This type of case management does not engender confidence that the Commonwealth is committed to improving compliance.

The administration of the lists that are linked to the EAA regime has also been unsatisfactory. Numerous species and ecological communities that are eligible for listing as threatened have not been listed for what appear to be political reasons. For example, no commercial marine fish species has been listed, despite the fact that the evidence suggests that a number (including the southern bluefin tuna) meet the listing criteria. Similarly, in the five years since the Act commenced, the Minister has listed only ten ecological communities when the available evidence suggests the total number of threatened terrestrial ecosystems and ecological communities alone is in the vicinity of 3000. There are strong grounds for arguing the Minister is in breach of his statutory duty to 'take all reasonably practical steps' to maintain the lists of threatened species and ecological communities appropriately.

John Mulvaney (a former member of the Australian Heritage Commission) has suggested that the National Heritage List has become a 'political plaything' (Mulvaney 2005). In a year and a half only 13 places have been listed and it appears the Minister is avoiding making listing decisions that could upset the Coalition's core constituents and is using the listing process to score political points against state Labor governments. Rather than the new heritage regime being a 'major advance' over previous Commonwealth heritage laws (Graham 2003b), it appears to be little more than an exercise in political marketing.

Finally, supporters of the EPBC Act made much of the notion that the bilateral agreement process could be used to 'leverage' improvements in state and territory environmental laws. Only four assessment bilateral agreements have been signed and none of them has resulted in anything other than minor changes to state and territory processes.

On the basis of the available evidence, it is hard to describe the EAA regime as anything other than a waste of time and money. Industry has been forced to shoulder large compliance costs, and somewhere between \$55 million and \$150 million of taxpayer funds have been spent on the regime. The environmental return on this investment has been negligible. While governments legitimately regulate industry in pursuit of social and environmental objectives, they should ensure society receives value for money. In this case, since the EAA regime commenced, the condition of Australia's natural and cultural heritage has continued to decline and the EAA provisions have not made a noticeable contribution to stopping or reversing this trend.