An Update on the EPBC Act Reviews

By Wayne Gumley[1]

Two separate reviews of the EPBC Act have been conducted over the last 18 months. This article provides an outline of the objectives of each inquiry and the key findings made to date.

1. The Senate Standing Committee Inquiry

The first inquiry concerned a wide range of matters referred to the Senate Standing Committee on Environment, Communications and the Arts on 18 June 2008.The Senate Committee completed the inquiry in two separate Reports. Its First Report released on 18 March 2009, concentrated on the following key issues:[2]

- The scope of the Act (chapter two);
- The referral, assessment and approval process (chapter three);
- Agreements and coordination between governments and agencies (chapter four);
- Threatened species and ecological communities (chapter five); and
- Community and stakeholder engagement (chapter six).

The Recommendations of the First Report were as follows:

1. The committee recommends that the objects of the Act be amended to remove the words 'to provide for' from section 3(1)(a) and 3(1)(ca).

2. The committee recommends that the appropriateness of a greenhouse trigger under the Act and the nature of any such trigger, should it be required, be carefully considered in light of the findings of the independent review and in the context of the government's overall response to climate change, in particular the CPRS.

3. The committee recommends that, having regard to the conclusions of the review of the *National Framework for the Management and Monitoring of Australia's Native Vegetation* currently underway, and in light of advice from the Threatened Species Scientific Committee, the government should consider including a land clearing trigger in the Act.

4. The committee recommends that the government give urgent consideration to increasing the resources available to the department in the areas of assessment, monitoring, complaint investigation, compliance, auditing projects approved under Part 3, and enforcement action.

5. The committee recommends that the department undertake regular evaluation of the long-term environmental outcomes of decisions made under the Act, and that the government ensure agency resources are adequate to undertake this new activity.

6. The committee recommends that the Independent Review of the EPBC Act and / or the ANAO examine the effect of existing bilateral agreements on the quality of environmental assessments of matters of national environmental significance. The committee suggests that particular regard be given to the transparency of, public engagement in, and appeal rights in relation to assessments performed under a bilateral agreement, compared to the conditions that would have existed had the assessment been performed under the EPBC Act.

7. The committee recommends that the government review the interaction between the EPBC Act and the Fisheries Management Act in relation to the conservation of fish species and relevant assessment processes.

8. The committee recommends that the process for nomination and listing of threatened species or ecological communities be amended to improve transparency, rigour and timeliness. Changes that should be considered include:

   - Either requiring publication of the Scientific Committee's proposed priority assessment list or reducing ministerial discretion to revise the priority list under section 194K; and
   - Reducing the maximum period allowed for an assessment under section 194P(3).

9. The committee recommends that government policy regarding the use of 'offsets' for habitat conservation state that the use of offsets:

   - is a last resort;

1 Senior Lecturer in Law, Monash University, and National Editor of the *National Environmental Law Review*.

2 The First Report of the Senate Committee can be found at: http://www.aph.gov.au/senate/Committee/eca_ctte/epbc_act/report/index.htm

- must deliver a net environmental gain; and
- should not be accepted as a mitigating mechanism in instances where other policies or legislation (such as state vegetation protection laws) are already protecting the habitat proposed for use as an offset.

10. The committee recommends that consideration be given to expanding the scope for merits review in relation to ministerial decisions under the Act, particularly in relation to:

- whether an action is a controlled action,
- assessment decisions; and
- decisions on whether a species or ecological community is to be listed under the Act.

The committee recommends that the independent review examine this possibility in the first instance, and that the process of consideration should include consultation with the Administrative Appeals Tribunal.

The Second and Final Report of the Senate Committee was released on 30 April 2009. It dealt with the interaction between the EPBC Act and Regional Forests Agreements (RFAs).[3] It made only one recommendation as follows:

> The committee notes that the Minister for Environment has formally asked the Independent Review of the EPBC Act to consider the findings and recommendations of this inquiry (see letter 13 March 2009). Accordingly the committee recommends that the Independent Review consider the findings in this report and recommend proposals for reform that would ensure that RFAs, in respect of matters within the scope of Part 3 of the EPBC Act, deliver environmental protection outcomes, appeal rights, and enforcement mechanisms no weaker than if the EPBC Act directly applied.

2. The Independent Review of the EPBC Act (the Hawke Review)

The other inquiry, which is described as the 'Independent Review', has been initiated pursuant to s 522A of the EPBC Act, which requires the Act to be reviewed every 10 years. The Minister for the Environment, Heritage and the Arts commissioned Dr Allan Hawke to conduct this review on 31 October 2008. One thing that distinguishes this review from the Senate Inquiry is that it is being conducted by a panel of experts. Dr Hawke is himself a distinguished Commonwealth Government leader with qualifications in science, and he is supported by the Honourable Paul Stein AM who has been a judicial officer in various New South Wales courts, including the Land and Environment Court, the Court of Appeal and the Supreme Court; Professor Mark Burgman, Professor of Environmental Science and Director of the Australian Centre of Excellence for Risk Analysis at the University of Melbourne; Professor Tim Bonyhady, Director of the Australian Centre for Environmental Law and the Centre for Climate Law and Policy at the Australian National University; and Rosemary Warnock, former CEO of BP (Castrol) Asia Pacific.

The Independent Review released a comprehensive 391 page Interim Report on 29 June 2009.[4] A Final Report is to be delivered to the Minister by 30 October 2009. The Minister must then table the final report in Parliament by early February 2010. The Interim Report provides a landmark examination of the framework of the Act and major concerns raised in the numerous submissions. Some of the more significant observations in the Interim Report are presented in the remainder of this article.

Objectives of the EPBC Act

Chapter 2 of the Interim Report deals with the Commonwealth role and EPBC Act objectives. It discusses a wide range of general aspects of the Act including the various international obligations and constitutional arrangements. With regard to the objects of the EPBC Act, the Interim Report notes:

> "2.64 At this stage, it is important to note that the objects of the EPBC Act do not have a singular focus on the protection of the environment. Object (b) of the Act is 'to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources'. This means that it is not the purpose of the Act to halt all actions that are likely to have a significant impact on protected matters, nor is it to allow actions with adverse environmental impacts to be taken with no redress for those impacts – a balanced approach must be taken."

3 The Senate Committee's Second and Final Report is available at: http://www.aph.gov.au/senate/committee/eca_ctte/epbc_act/final_report/index.htm
4 The Interim Report of the Independent Review can be found at: http://www.environment.gov.au/epbc/review/publications/interim-report.html

Scope of impact assessment

Chapter 3 considers the scope of environmental impact assessment under the Act, noting proposals for the addition several new matters of national environmental significance, including climate change, water, land clearance, genetically modified organisms, invasive species, vulnerable ecological communities, additional ecological habitat related matters, and more. Some of these proposed new matters are covered in detail in separate chapters (Ch 6 Forestry, Ch 7 Land clearance, Ch 8 Climate Change, Ch 9 Water issues). This chapter also gave consideration to the 'significant impact' threshold, and stated the view that:

> "3.75 ... The review considers that the concept of significance should be retained under the Act. 'Significance' is a threshold measure which determines whether the EPBC Act applies. In the absence of a measure like significance, the Act would be triggered for all proposed actions likely to have any impact on a matter of NES. This would be unworkable in practice and would seriously change the relationship between the States and the Commonwealth. But, as discussed elsewhere in this review, the adoption of a 'specified activity' or 'designated development' approach within the Act's triggers would diminish reliance on the 'significance' test and create much greater certainty as to what is covered by the Act."

The Interim Report also commented on some adverse effects of the Minister being limited to considering impacts on protected matters, not the whole environment, when deciding whether a proposed action is a controlled action:

> "3.99 While this original intent was an effort to clearly define the Commonwealth's role in environmental matters, experience over the last nine years since the Act commenced would seem to suggest that this limitation on what the Minister can consider may not be the best approach for the environment. Major projects are often assessed through a narrow environmental lens by the Commonwealth because of the limited nature of the matters of NES under the EPBC Act."

EIA processes

Chapter 4 deals with the process of environmental impact assessment under the Act. The Interim Report noted that there may be merit in new measures to increase the referral of controlled actions; improve the quality of referral and assessment documentation; and allow for better disclosure of reasons for decisions. It also noted that arrangements for EIA under the Act are quite prescriptive, and could perhaps be simplified and streamlined:

> "4.113 The capacity to informally change the scope of a referred project during assessment was raised in the *Blue Wedges Case*, where the Federal Court confirmed that proposed actions referred under the EPBC Act can change between the referral and assessment stages, as the project evolves, without the EIA process having to start again.[5]
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> ...
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> 1.115 The key question is what changes should be allowed — and what changes are so great that the process should have to start again. In the *Blue Wedges* case, Heerey J looked at how the action was described in the referral documentation. It had been described as a project 'to deepen the shipping channels at Port Phillip Heads, in Port Phillip Bay and the yarra River and its approaching channels'; the way in which the project had changed since referral was examined. In this case, Heerey J found that the project continued to be one for channel- deepening and held that it remained the same action.[6]
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> 1.116 While this finding may be correct as a matter of law, it is arguably unfortunate as a matter of policy — a change resulting in what is likely to be significantly different adverse environmental impact should mean that the project is not regarded as the 'same action'. Procedural benefits, such as capacity for public comment on the changed action would arise if such projects required re-referral."

The Interim Report also considered that current methods for assessment were generally appropriate, but it suggests there could be greater use of public inquiries and panel-type arrangements. It also noted a need for the Act to deal better with cumulative impacts, notwithstanding that project-by-project assessment should remain a core feature of the Act. The interim report considered broadening of the EIA process to deal with cumulative impacts, and

5 *Blue Wedges v Minister for the Environment, Heritage & the Arts* [2008] FCA 8.
6 *Blue Wedges v Minister for the Environment, Heritage & the Arts* [2008] FCA 8, para [59] (per Heerey J).

recognised the importance of a 'regulatory mix'. It also provided case studies from the United States, Canada and New Zealand. It concluded:

> "4.270 The implementation of project-specific cumulative impacts assessment in other jurisdictions has not been particularly successful in practice. Issues associated with this assessment include that cumulative impact assessment increases uncertainty and expense in decision-making. Cumulative impact assessment also has unfair consequences for third parties, whose capacity to undertake development is limited by existing impacts in the landscape."

The use of landscape approaches to address cumulative impacts is considered in Chapter 10, Strategic Assessments and Bioregional Planning.

Exemptions for prior authorisation and continuing use

Chapter 5 deals with the prior authorisation and continuing use exemptions provided under sections 43A and 43B. Prior authorisation was raised as a particular concern in relation to mining activities where significant environmental impacts could continue under leases issued for lengthy periods of 20-30 years without needing to comply with the EPBC Act.[7] The recent ANAO Report has suggested that these exemptions might explain the dearth of referrals from the agricultural sector, particularly in relation to land clearing. Under s 43B the continuation of a use does not include 'an enlargement, expansion or intensification of use'. The Interim Report invited further comments on the value of clarifying this terminology.

Exemption for Regional Forest Agreements

Chapter 6 considers the exemption under s 38 for forestry activities carried out in accordance with Regional Forest Agreements (RFAs). The Interim Report notes that RFA exemption is a highly contentious and opinions are polarised. One key problem is a lack of comparable, accessible information by which to judge the outcomes of RFAs, due to lack of a standard regulatory framework across RFA regions. Both the Senate Inquiry and this Interim Report provided detailed discussion of the *Wielangta case*.[8] The Interim Report noted:

> "6.48 Representatives of the forestry industry claimed that the Wielangta cases 'affirmed that the Regional Forest Agreements provide adequate protection for forest species and habitats in accordance with the provisions of the EPBC Act'.[9] Timber Communities Australia suggested that:
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> > The Wielangta case provides a thorough examination of the effectiveness of the EPBC Act in ensuring that endangered species are protected during forestry operations...The Wielangta case also confirms that the strict provisions of the RFAs provide protection of threatened and endangered species.[10]
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> 1.48 These, with respect, do not appear to be fair representations of the legal situation. The committee notes that the Full Court did not determine that the Tasmanian RFA provided adequate protection of threatened species. On the contrary, the court commented, in relation to clause 68 of the RFA:
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> > The question is whether cl 68 does require the State to [in fact] protect the species... In our view it does not. Clause 68 does not involve an enquiry into whether CAR effectively protects the species. Rather it is the establishment and maintenance of the CAR reserves that constitute the protection.
> >
> > The verbiage of cl 68 supports this view. The State does not agree "to protect the priority species listed in Attachment 2 (Part A)". It agrees to protect them "through the CAR Reserve System".[11]"

The Interim Report made the following concluding observations on the RFA exemption:

> *"Ways forward*
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> 1.113 This review is inclined to agree with the Senate Committee's finding that:
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> > Regional Forest Agreements have been a step forward in attempts to manage conflict over forest use in Australia, and

7 The scope of s.43A was discussed in *Minister for the Environment and Heritage v Greentree* (No 2) [2004] FCA 741 , where part of the farmers' defence to clearing vegetation on a Ramsar site rested on prior authorisation of their activities under s.43A of the EPBC Act.

8 *Brown v Forestry Tasmania (No 4)* [2006] FCA 1729

9 Mr Allan Hansard, Chief Executive Officer, National Association of Forest Industries, *Committee Hansard*, 18 February 2009, p.9, Senate Committee Report.

10 Senate Committee Report, Submission 7 (Timber Communities Australia), p.5.

11 *Forestry Tasmania v Brown* [2007] FCAFC 186.

have been a vehicle for advancing both knowledge of Australia's forest ecosystems, and management strategies for those forests.[12]

1.114 However, submissions to this review have raised real doubts about whether positive environmental outcomes are being achieved under RFAs. To this end, this review agrees with the Senate Committee's finding that there is a need to improve the transparency and accountability of forestry operations under RFAs and thus better assess the implementation of environmental protection under RFAs, consistent with the objects of the EPBC Act.

1.115 RFA requirements for conservation actions in production forests need to be monitored, measured and reported on in a timely and accessible way. The Commonwealth should also retain a power to 'turn off ' Division 4 of Part 4 of the EPBC Act in cases where there has been non-compliance with an RFA.

1.116 This chapter has also suggested other approaches for improving the transparency and operation of RFAs. These include:

- increasing independent scientific oversight;
- allowing greater Commonwealth oversight and capacity for compliance and enforcement; and
- enforcing the existing requirement of RFA reviews and strengthening performance audit arrangements.

1.117 Another option for improving the accountability of RFA forestry operations may be increasing opportunities for public comments. This could involve:

- establishing a system for public notification of new forestry operations occurring under Forest Management Plans and requiring a period for public comment on the nature and extent of new operations, similar to referrals under the EPBC Act. The State regulator would ideally show that these comments had been taken into account when finalising the plan;
- strengthening the requirement to seek public comments as part of reviews of RFAs. The reviewer would ideally demonstrate how any comments had been taken into account when making any recommendations;
- establishing a formal system where members of the public could provide new information about matters of NES to the State regulator, such as if the extent or breeding sites of a species was greater than found on existing maps. This could then place a requirement on the State regulator to undertake adaptive management practices, as outlined above; and
- as noted above, strengthening opportunities for third party notification of breaches of an RFA.

1.118 Strengthening public input and consultation would help the RFAs meet the vision of the NFPS that 'forest management is effective and responsive to the community'.[13] It would also inform the requirement for continuous improvement.

Re-negotiating RFAs

1.119 Each RFA will sunset after 20 years. The agreements then need to be re-negotiated, although this may take place before the end of the 20-year period. Most RFAs contain provisions for re-negotiation to be considered as part of the third five-year review process. While the original agreements were based on a comprehensive regional assessment, it is not clear whether new agreements will rely on the old assessment or require a new round of assessments, consultation and negotiation. Considering that many of the comprehensive regional assessments were undertaken before the EPBC Act was in force, that there have been subsequent additions of matters of NES (such as heritage), and that there is a greater understanding of the implications of climate change and other pressures and threats, it is reasonable to suggest that new assessments take place.

1.120 If the justification for Part 3 not applying to RFA forestry operations is that the RFAs provide for a valid alternative accreditation process and/or already effectively manage forest values based on the comprehensive regional assessments, then the RFAs will need to provide better information to demonstrate that effective conservation outcomes for protected matters are being achieved and improve methods of monitoring, assessing and enforcing these conservation outcomes.

1.121 While the RFAs are currently intended to achieve conservation outcomes, the Commonwealth does not have monitoring, compliance and enforcement mechanisms in place to determine if the RFAs are achieving these objectives; this in turn may have implications for how well the objects of the EPBC Act are being achieved in RFA regions."

12 Senate Committee Second Report, para [1.101].

13 DAFF, *National Forest Policy Statement* (1992), available at http://www.daffa.gov.au/rfa/publications/nfp-statement at 10 May 2009, p.3.

Land clearance

Chapter 7 considers land clearance under the EPBC Act. The Chapter notes that land clearance is one of the greatest threats to Australian biodiversity according to the 2002 and 2006 State of the Environment Reports, yet the EPBC Act has had little effect to reduce land clearance rates to date. The Interim Report considered by way of example a specific land clearing trigger suggested by ANEDO:

> "7.26 While adoption of an ANEDO-type approach of setting numerical thresholds would provide certainty for proponents, this approach could potentially cover a very broad range of actions are likely to already be regulated under existing State or Territory frameworks and could thereby lead to unnecessary duplication of existing State or Territory processes. This would also represent a significant expansion of the Commonwealth's role. The adoption of such a trigger would also be a departure from the original architecture of the Act which was based on an 'impact triggers' approach rather than a 'specified activity' approach. The Explanatory Memorandum to the Act noted that the mechanisms for Commonwealth involvement in environment protection prior to the EPBC Act were:
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> > developed in an ad hoc and piecemeal fashion. Accordingly, the various Acts are not integrated within an appropriate conceptual framework. This limits the ability of the existing legislation to secure good environmental outcomes in an efficient manner.[14]
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> 1.26 But arguably the impact triggers approach also has its drawbacks – failing to cover actions which cumulatively, if not individually, are of national environmental significance. Whether land clearance is a matter of NES to be regulated in the EPBC Act is a significant point of contention – currently, it is conceptualised by the Act as a process, not a matter protected. As noted elsewhere in this report, one the great attractions of moving to a specified activity approach is that it may avoid the indeterminacy – and subjectivity – of the significant impact test."

Climate change

Chapter 8 considers the potential for the EPBC Act to address mitigation of climate change via a 'greenhouse trigger', and adaptation to climate change through changing impact assessment and biodiversity protection measures. The Interim Report noted two competing views:

> "8.45 It was argued in submissions that the lack of a greenhouse gas trigger was a major shortcoming in the Act, as climate change is a significant threat to biodiversity and the objects of the Act are to allow for biodiversity protection and environmental conservation. This does not recognise that the threat of climate change is fundamentally different to the other threats to biodiversity. This is due to the long lag time between emission and impact; the strongly cumulative nature of the impacts and the global dimensions of the problem; and the need for major economic and environmental reforms, and probably societal reforms, to achieve adequate mitigation. Therefore it may not be appropriate to treat climate change mitigation under the same legislation as that controlling threats to biodiversity; alternatively, it may be argued that climate change is of such significance that it should be addressed in its own piece of legislation, not just as part of the EPBC Act.
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> 8.46 Conversely, climate change is a national issue with potentially national-scale impacts on biodiversity and the environment in general. It needs national-scale and uniform responses. The argument that 'if climate change is not a matter of national environmental significance, what is?' has considerable power."

The Interim Report also noted that the relevance of a 'greenhouse trigger' depends on the implementation of the Australian Government's proposed Carbon Pollution Reduction Scheme (CPRS), and whether a trigger would be complementary to the CPRS. The Interim Report concluded that there is a need to develop better systems to protect biodiversity in general, in light of the additional pressure of climate change. A number of proposals for this purpose are covered throughout the report, eg strategic assessments and bioregional planning at Chapter 10.

Water

Chapter 9 discussed issues related to the use of inland waters and whether a general 'water extraction' trigger should be added to matters of national environmental significance. It also considered possible triggers based on wild or natural rivers, and inland aquatic environments and interactions with other schemes for protection of inland waters (eg Ramsar) and the need for regulatory exemption in cases of emergency.

14 Explanatory Memorandum, *Environment Protection and Biodiversity Conservation Bill 1999*, p.6.

Threatened species and ecological communities

Chapter 12 considered the EPBC Act framework for protection of vulnerable species through listing of threatened species and ecological communities. Submissions raised many anomalies in the listing process including:

- lack of transparency in the nomination and listing process,
- the use of a conservation theme (which tended to focus on large iconic species),
- the limited 6 to 12 week period for making nominations each year,
- lack of a requirement to consider the precautionary principle,
- removal by the 2006 amendments of the requirement for lists of threatened species to be kept up to date,.
- the requirement for a 'priority assessment list' when considering nominations (which could be based on commercial or economic considerations rather than conservation status),
- the need for an 'emergency' or 'transitional' listing power in the Act,
- lack of alignment between Commonwealth and State and Territory lists which can result in inconsistencies and duplications,
- the perceived level of Ministerial discretion in decision-making for listing threatened species and ecological communities, and
- inadequacy of international lists adopted for migratory species.

Other issues

Many more issues connected with the above topics and other aspects of the EPBC Act are considered in other chapters of the Interim Report. In particular Chapter 10 covers Strategic Assessments and Bioregional Planning, Chapter 11 covers Heritage, Chapter 13 covers Biodiversity Conservation, Recovery Planning and Threats Management, Chapter 14 covers Protected Areas, Chapter 15 covers Biodiversity – Marine and Fisheries, Chapter 16 covers Access to Biological Resources and Chapter 17 covers Indigenous Information and Involvement under the EPBC Act. These further issues are beyond the scope of this paper.

Conclusion

The purpose of this paper has been to provide an overview of the outcome of the two recent reviews of the EPBC Act; namely the Senate Standing Committee Inquiry, and the Interim Report of the Independent Review Panel. It is hoped this paper will provide a useful guide to the forthcoming Final Report of the Independent Review. The importance of the Final Report and its recommendations is likely to be very substantial. Given the strong credentials of the Review Panel, the comprehensive nature of the report, and the valuable guidance of the Senate Inquiry, these recommendations are likely to provide the primary basis for reform to the EPBC Act for many years to come.

One point that has emerged quite clearly from these two reviews is that the EPBC Act is that after almost 10 years of operation, the case for further reform of this Act is compelling. There is now a considerable body of practical experience and case law which justifies the widespread unrest that is evident in many of the numerous submissions. This should be little surprise if one recalls that the EPBC Act originated out of a political compromise embodied in the 1992 *Inter-governmental Agreement on the Environment.* Following the spirit of that agreement, the drafters of the Act had a brief to narrow the role of the Federal Government in environmental matters. However that aim has always been at odds with the evolving nature of environmental problems, the natural progress of Australia's numerous commitments under international environmental treaties and external factors such as globalisation and the general intensification of resource use. It was also out of step with the cross-boundary nature of many Australian environmental problems. For instance, recent Federal interventions on climate change and the Murray Darling Basin shows that the continued exclusion of climate change and water use from the list of matters of 'national environmental significance' is unrealistic to say the least.

The two reviews have also identified numerous procedural weaknesses in the Act which undermine both the ultimate goal of environmental protection and the critical factor of public confidence. Some of the notable defects identified include:

- a lack of statutory priority for the principles of ecologically sustainable development, which undermines all other measures.
- determining what is a controlled action by reference only to certain prescribed matters, which undermines a holistic approach to decision making, and provides a clumsy and inadequate basis for dividing Federal and State responsibilities.
- determining what is a controlled action by reference to the vague concept of a 'significant impact' to which is difficult to apply to diffuse and cumulative problems. For instance climate change, the greatest ever threat to biodiversity of all, is not directly covered.
- inadequate assessment of controlled matters due to the operation of bilateral agreements which delegate responsibility back to State and Territory governments (which have often already approved the same project under planning laws).
- the exemption for Regional Forest Agreements which makes the systematic destruction of many of our largest and most bio-diverse natural ecosystems valid for several decades without scrutiny or accountability to the public.
- inability to deal with clearly unacceptable activities sanctioned by prior authority and continuing use exemptions – eg mining, land clearing and intensification of agriculture.
- poorly designed and restrictive processes for listing threatened species and lack of resources for research to support expansion of lists.
- inadequate mechanisms for review of project assessment and approval decisions, with a general lack of merits review whilst wide discretionary powers and broad exemptions making judicial review very difficult. As a consequence community stakeholders are put to great expense in running public interest litigation to make up for lack of mechanisms for effective stakeholder participation.

Perhaps the most damning criticism of all is a simple reflection upon the number of controversial major projects that have survived the application or non-application of the EPBC Act impact assessment measures over the last ten years with little modification. Notable instances in Victoria alone include the Port Phillip Bay Dredging, The North South Pipeline, the Wonthaggi Desalination Plant, and Hazelwood Coalmine extension. Readers from other states can no doubt add many more to the list.