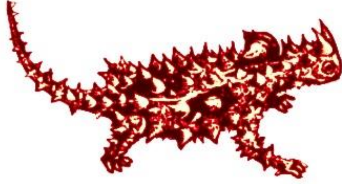

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ALEC Submission on the 10 year review of the *Environment Protection and Biodiversity Conservation Act 1998 (Cth)*

The Arid Lands Environment Centre (ALEC) is central Australia's peak environmental organisation that has been advocating for the protection of nature and ecologically sustainable development of the arid lands since 1980. ALEC's mission is 'healthy futures for arid lands and people' and as such, we are involved in a wide range of conservation activities including; supporting indigenous-led conservation programs, natural resource management projects, engaging in environmental impact assessment processes and contributing to policy and law reform.

As a community-based environmental organisation we work closely with a range of stakeholders and support public engagement in decision making. We are involved in conservation programs providing administrative and volunteer support. This means ALEC is well acquainted with the key arid zone issues that fall within the ambit of the Environment Protection and Biodiversity Conservation Act (the Act). ALEC is well placed to provide a constructive submission on this review of the Act and outline key recommendations that are necessary to improve the effectiveness of the current framework, particularly as it relates to the Northern Territory.

This submission will begin by outlining the current strengths of the Act and key provisions that should be retained. It then proceeds to a discussion of limitations and weaknesses in the current Act followed by outlining specific governance issues. We then identify key recommendations that are necessary to improve the effective operation of the Act. Following on from this it will outline specific examples from the Northern territory where the Act has not been properly utilised and is not achieving environmental outcomes. The submission will also directly answer the discussion paper question throughout; these are noted in the footnotes.

1. Strengths of the current Act

There are several key strengths of the current act that are worth reiterating. These provisions should be retained in the Act.

Firstly, ALEC as well as a broad coalition of organisations maintains that the nuclear trigger is working effectively to prohibit unacceptable nuclear actions. Further, the referral trigger is acting as an effective safeguard to direct appropriate EIA of these actions. Such actions have broad consequences for Australia as a nation and should remain the remit of the Commonwealth.

We note that there is considerable lobbying from industry to remove this trigger and the general ban on nuclear power. The Australian public and a broad coalition of environmental organisations remain resolutely opposed to the development of a nuclear industry in Australia. There is no reduction in the level of threat posed by nuclear actions and there are several uranium mining sites that continue to cause legacy contamination issues. The nuclear trigger must be retained as the Commonwealth is uniquely placed to manage these issues.

We support the ongoing role of the Commonwealth in managing issues that impact on matters of national environmental significance (MNES), including all the current referral triggers. The Commonwealth has the necessary infrastructure to address these issues and must continue to play a role in EIA for MNES. This role is critical when the proponent of an action is a state or territory jurisdiction that is simultaneously undertaking the EIA for that action.

The EPBC has supported the beneficial growth of Indigenous Protected Areas and their role in delivering conservation programs. IPAs are widely acknowledged to be an effective model to deliver environmental outcomes as well as social, cultural and economic benefits.

2. Weaknesses and limitations of the Act

First and foremost, ALEC submits that the Act in its current form is fraught with limitations, weaknesses and has led to innumerable regulatory failures. It has effectively failed to achieve the fundamental purpose of environmental protection and biodiversity conservation. This is demonstrated by the immense body of scientific literature which demonstrates ongoing decline across the major indicators of environmental health and no apparent decrease in the rate of extinctions.[1] The Act was not able to prevent the extinction of three vertebrate species this century.[2]

However, this is not to say that we do not recognise the critical importance of a piece of environmental legislation enabling the Commonwealth government to regulate critical environmental issues. Indeed, the Commonwealth is uniquely placed to address MNES and is positioned with appropriate resources to direct the future of Australia's environmental objectives and programs. In its current state it is falling short of achieving its potential - due to the underutilisation of available instruments - while also proving powerless to regulate major environmental challenges.

The Act must be replaced, if not substantially amended in order to play its intended role in arresting the decline in biodiversity and limit the impacts of the most pressing environmental challenges today and into the future. Without substantial amendment the Commonwealth will be unable to prevent the ongoing extinction of species and coordinate the protection of MNES.

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[1] https://soe.environment.gov.au/theme/biodiversity

[2] Woinarski *et al*, "The contribution of policy, law, management, research and advocacy failings to the recent extinctions of 3 Australian vertebrate species" (2016) *Conservation Biology*

a. **The Act facilitates development at the expense of environmental protection and the ability to prevent extinction; most environmental indicators continue to decline.[3]**

Of the projects that have been referred for assessment under the Act and continued through to a decision, only 18 were refused approval between 2000 and 2015 compared to 806 that were approved.[4] An approval rate of 96.2% suggests that the assessment framework is effective in facilitating development. There is little to demonstrate that unacceptable environmental impacts are prevented or limited by the approval process. We therefore maintain that the Act does not pose an unreasonable burden on development and businesses. In its intention to achieve a 'balance' of considerations in EIA processes, the environment is clearly coming out second best.

Considering the above approval rate, ALEC does not support the use of automatic approvals or exempt approvals for low risk proposals.[5] There is ample evidence to suggest actions are not being referred despite cumulatively exacerbating the threats posed to listed species and habitats. There is no justifiable basis to reduce the level of rigour and accountability under the EIA.

The Act urgently needs to be amended to incorporate clear 'no go' provisions from the outset. This will provide proponents with certainty and avoid years of rigorous assessment only to be refused at the end when the project was never acceptable. An upfront 'no go' provisions would provide certainty to business and prevent projects from occurring if they pose unacceptable impacts. The Act must acknowledge that there are certain actions that pose such impacts. This could be outlined with prescriptive criteria including outright prohibitions in ecologically sensitive zones.

Biodiversity continues to decline in Australia, the Act is not being applied to assess stresses or actions that are significantly impacting biodiversity. All environmental indicators continue to decline, particularly in the Northern Territory, according to the most recent comprehensive score card on environmental condition.[6] Further, the most recent 2016 State of the Environment report outlines a range of issues that are contributing to the ongoing decline in environmental condition and ecological integrity. It notes the role of policy and law in contributing to this downward trajectory. Significant amendments are required in order to create a governance framework whose primary function is environmental protection. As it currently exists, the Act does not establish such a framework. We submit that this review should draw from the wealth of information supplied to the Senate inquiry into Australia's Fauna Extinction, particularly the question relating to the effectiveness of the EPBC Act.

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[3] This section is intended to address question 7,

[4] Department of Environment and Energy data, analysis by Guardian Australia: https://www.theguardian.com/environment/2015/aug/12/australia-has-denied-environmental-approval-to-just-11-projects-since-2000

[5] Our response to question 15.

[6] https://theconversation.com/a-major-scorecard-gives-the-health-of-australias-environment-less-than-1-out-of-10-133444

There is no evidence demonstrating EIA processes are addressing the major environmental threats or stressors in a coordinated or strategic manner. A key weakness in the EIA process to manage threats is the absence of a clear best practice approach to strategic assessment and the ability to properly evaluate cumulative impacts during EIA. The piecemeal approach species protection in environmental impact statements means that threats are evaluated in isolation removed from the ecological realities of complex environmental systems. The Act does not enable an assessment of ecological integrity or environmental health more broadly which is a key driver of extinction. This is exemplified in the failure of the Act to prevent the loss of significant areas of critical habitat for threatened and endangered species. A significant portion of high impact actions such as land clearing critical habitat have not been scrutinised by the Act.[7] The Act is simply failing to be applied when needed.

For this reason, we would support expanding Commonwealth responsibility under the Act to address landscape scale threats and expand habitat management but not at the expense of species specific protection. Nonetheless the review should recommend amendments that would expand the EIA process beyond species specific protections.

b. The Act fails to outline a nationally coordinated approach to conservation and restoration that can achieve measurable positive environmental outcomes

Many organisations are resolute in the recommendation that the Commonwealth is properly placed to provide a coordinated and strategic approach to developing national environmental goals and objectives. Without such a normative structure that outlines objectives and goals for the entire nation, there is little to evaluate the effectiveness of the actions of state and territory jurisdictions and Commonwealth programs against. This absence of a feedback mechanism undermines accountability. The Act should be capable of establishing national plans to set benchmarks and targets that can direct the development of policy beyond electoral cycles.

Central to a national strategy should be the principles of restoration and rehabilitation. We support amendments to the Act which would enable it to promote restoration and rehabilitation in addition to conservation and protection.[8] Restoration can be promoted through the EIA process as conditions of approval as well as actions within recovery plans and threatened species programs.

We maintain that non-binding policy and regulation has not proven effective in achieving environmental outcomes. We oppose self-regulation as a regulatory tool to achieve conservation and biodiversity outcomes. There are no incentives that could encourage community confidence in self-regulation; we maintain there is simply no community confidence because it is not an effective instrument of environmental regulation at the Commonwealth level.[9]

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[7] Ward *et al,* "Lots of loss with little scrutiny": the attrition of habitat critical for threatened species in Australia" (2019) *Conservation Science and Practice* Volume 1, Issue 11, November 2019.
[8] Question 11.
[9] Question 18.

c. Accredited NT environmental laws when they were woefully inadequate

Northern Territory environmental laws are not consistent with best practice standards and have been acknowledged as some of the weakest in Australia.[10] In the cast of the NT, the bilateral assessments have effectively abrogated responsibility by devolving EIA authority and accredited deficient laws.

Past investigations into the adequacy of threatened species and planning laws demonstrates that jurisdictions are not meeting adequate standards of protection, particularly in the Northern Territory.[11] The Act needs to be amended to ensure that inadequate and inferior EIA and conservation laws in state and territory jurisdictions are not effectively accredited through the bilateral assessment program. We submit that the current bilateral framework has not led to the improvement of NT conservation laws or environmental assessment regimes. Until there are clear processes in place to encourage the lifting of environmental standards, the bi-later assessment process will continue to approve projects that have not been adequately scrutinised. We do not support any broadening of the accreditation powers under the Act.[12]

We oppose the use of approval bilateral agreements as the Commonwealth must retain approval authority for MNES especially in situations where the jurisdiction is simultaneously the proponent and assessor. This submission will examine specific examples of where the bilateral assessment has prevented a proper and thorough scrutiny of projects that pose significant environmental impacts in the Northern Territory.

There needs to be clear processes for the accreditation of environmental laws and policies of states and territories. This could be especially beneficial for offsets policies which have cross border implications. The Northern Territory has limited capacity to develop comprehensive and robust offset and biodiversity conservation policy and could benefit from the capability of the Commonwealth in developing best practice standards. Offset frameworks should be improved by creating additional enforcement mechanisms to ensure proponents deliver on their legal commitments.[13] We note the NT example of poor offset compliance from the Inpex- Icthys project as the proponent is years behind in delivering on their offset requirements.[14] This also shows a lack of capacity to coerce compliance with approval conditions.

d. The Act has proven incapable of proactively addressing the major threats to biodiversity.

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[10] Howey, K. (2017). The Northern Territory's environmental assessment laws - development, land rights, and the entanglements of history. *Australian Environment Review, 32*(1), 9-14.

[11] "An Assessment of the Adequacy of Threatened Species and Planning Laws in All Jurisdictions of Australia" (2012) Prepared by the Australian Network of Environmental Defenders Office for the Places You Love Alliance.

[12] Our response to question 17.

[13] Question 24

[14] https://www.abc.net.au/news/2018-08-31/inpex-nt-government-marine-conservation-project-behind-schedule/10183368

The Act is currently incapable of addressing and managing the most pressing environmental challenges in Australia. Key threatening processes including climate change and land clearing are not being scrutinised at a Federal level. This is a key gap in the environmental protection framework that needs to be urgently rectified.

A key complicating factor here is weaknesses in the operation and administration of the Act. What appears as bureaucratic inertia has prevented the full utilisation of proactive management strategies, such as the listing of critical habitat. To date there have been only five listings of critical habitat under the Act, with the most recent in 2005.[15] There is clear evidence to warrant additional listing yet the Commonwealth has repeatedly refused well substantiated requests to expand the listings of critical habitat to protect threatened species.[16] This indicates a failure to take an ecosystems-based approach to conservation biology and a failure of departmental rigour to base such decisions on the best available science. Further, the regulatory instruments that are available such as penalties are limited in their effectiveness as they are only applicable to Commonwealth land.

There are significant delays in the listing of key threatening processes and proposals to add additional threatening processes are often refused. There are validly held concerns that industry influence is preventing listing of some threatening processes if they have economic benefits. We say this knowing that it is difficult to conclusively know why proposals are often refused because of an acute lack of transparency in decision making process regarding the listing of threatening processes.

3. Governance[17]

It is often acknowledged that, to the detriment of the environment, the framework is excessively process oriented rather than outcome focused. While we acknowledge there are some difficulties in setting prescriptive outcomes, the Act should be amended to include more detail on evaluating outcomes and ensuring compliance with objectives and conditions established through the EIA process. We oppose any move away from setting prescriptive standards and recommend that the review looks at opportunities to reduce discretion in decision making processes, particularly the development of recovery plans. Further the lack of adequate resourcing for environmental programs, inadequate data management and limited long term monitoring are all contributing to ongoing declines in ecological health and biodiversity.

The Act should play a great assurance and compliance role by developing clear and consistent guidance and strong instruments to compel compliance with key provisions of the Act, particularly conditions of approval. The EIA process could be amended to provide greater certainty and prevent unacceptable

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[15] https://www.environment.gov.au/cgi-bin/sprat/public/publicregisterofcriticalhabitat.pl

[16] https://www.theguardian.com/environment/2018/mar/06/australia-has-1800-threatened-species-but-has-not-listed-critical-habitat-in-10-years

[17] Our response to question 20; there should not be a tradeoff between improving decision making processes and strengthening accountability and transparency.

harm by including upfront guidance on projects and clear early stage guidance on acceptability criteria. Fines are limited as a regulatory tool to prevent breaches of the Act and are often disproportionate to the seriousness of the harm caused.[18]

The inappropriate level of discretion afforded to decision makers must be reduced to strengthen accountability and transparency by imposing duties on decision makers. The following need to be duties under the Act:

- Recovery plans and threat abatement plans need to be mandatory and include specific and enforceable timeframes.
- The exercise of authority or functions under the Act must be consistent with the objects of the Act.
- Duty to consider the role of environmental restoration and enhancement alongside prevention, mitigation and offsetting.
- Decisions makers must apply the principles of ESD and demonstrate how they have been integrated in the decision making process.

a. Extinction inquiry

There is a critical lack of transparency and accountability regarding the decision-making processes under the Act. The decision making processes under the Act are opaque and there is little justification provided limiting the legitimate ability of the public to scrutinise or critique decisions.

A strong accountability measure could be the use of extinction inquiries. We support widespread calls from the Australian Conservation Foundation and Environment Defenders Office Australia to establish an inquiry process into an extinction that is mandated by the Act. This review should consider the role of an inquiry to determine the causes of extinction that would inform policy and legal responses.

This issue goes to the heart of accountability under the Act. Without clear lines or accountability in the event of extinction there is no opportunity to modify conservation programs and misses a vital opportunity to learn about more effective prevention measures. In the unfortunate but likely event of further extinctions the Act should direct an inquiry into the causes of that extinction with the findings to inform policy and regulatory reform. The extinction of a species is a catastrophic event and the Australian public have a legitimate expectation to understand how that extinction has occurred and how the Commonwealth will act to prevent them from reoccurring.

b. Political influence

There are ample examples of excessive political influence in the EIA processes under the Act. This is partly due to the excessive discretion afforded to decision makers during EIA but there are also limited safeguards to guarantee the independence of decisions and the assessment process. Successive

[18] https://www.abc.net.au/news/2019-08-14/inpex-pfas-environment-animals-at-risk-darwin-harbour/11412180

amendments to the Act which have replaced duties with discretion render the Act vulnerable to inappropriate influence. The Commonwealths' intervention into the approval of the McArthur River mine, despite a court upholding a finding of unacceptable impact is a key example. The last-minute approval of the Yeelirrie uranium proposal just prior to the previous Australian Government's caretaker period is another example of concerning political influence, with information accessed through FOI process demonstrating a problematic lack of independence and impartiality.[19] As an absolutely minimum safeguard, the Minister must be prohibited from granting a project approval if it causes extinction.[20]

For this reason, we are supporting calls for the establishment of an independent national Environment Protection Authority to conduct independent EIA as in the state and territory jurisdictions. The review should be cognisant of the vulnerability of the decision-making process to political influence which has degraded public confidence in the operation of the Act and the integrity of decisions. The Act requires more instruments to guarantee adequate levels of transparency and accountability.

c. Access to justice[21]

Enabling the community to engage in environmental decision making is crucial for a healthy system of environmental governance and acts as an incentive for robust decision making. One key mechanism to improve accountability under the Act is to strengthen review rights by including merits review for certain decisions.

The standing for judicial review should be also be expanded to enable impacted communities and the general public to bring an action to ensure decisions are made according to law and apprehend breaches. This will act as a disincentive to corrupt and biased decision making. Broadening review powers will not have a significant impact on economic development as the vast majority of environmental decisions are not made under the Act.
There are several more mechanisms which should be considered in supporting public access to these review avenues. These include:

- Prohibit orders for security for costs in public interest matters.
- Prohibit the making of protective costs orders, particularly concerning injunctions that could prevent the occurrence of significant environmental harm.

[19] The Australia Institute, "FOI: "Adani may have been negligent"" (2017) https://www.tai.org.au/sites/default/files/FOI%20Briefing%20-%20Adani%20may%20have%20been%20negligent.pdf

[20] https://www.watoday.com.au/national/western-australia/minister-approves-wa-uranium-mine-despite-extinction-threat-20170117-gtt2cm.html

[21] We understand community engagement to be a key part of access to justice. This section is our response to question 20.

It is worthwhile highlighting at this point that we contend the implication in the discussion paper that access to justice and environmental regulation places unnecessary delays on development. We acknowledge there is scope to reduce duplication, but it must be remembered that of all resource projects assessed by the Act only three have been refused approval. There is also no evidence to suggest an overreach of the Act, on the contrary research demonstrates actions are often not referred to the Act and major environmental impacts are not being scrutinised. This is particularly apparent for the agricultural industry where major land clearing applications are not assessed at the Commonwealth level.

d. Environmental impact assessment

Project level EIA is inherently limited in its ability to deliver environmental outcomes. We support the development of best practice standards and guidelines for strategic assessment. However, strategic assessment should not replace project level impact assessment.[22] The Act could prescribe strategic assessment that includes:

- Strong legislatively enshrined standards including clear decision making criteria and science based methods
- Clear guidance on how to undertake cumulative impact assessment across landscapes such as bioregions and catchments.
- Comprehensive oversight authority with powers to conduct independent audits and verify compliance.

The Act could be utilised to improve national standards that will encourage consistency with best practice environmental protection. This could be delivered by identifying a clear process for accreditation of assessment processes that are linked with strict national standards. The Commonwealth could play an assurance role for offsets policy. The Commonwealth is uniquely placed to implement offsets policy and ensure they are properly delivered according to best practice conservation science in all jurisdictions. This would also provide policy and regulatory support for smaller jurisdictions with limited capacity to develop environmental policy that is scientifically robust.

The Act should include a modernised definition of Ecologically Sustainable Development (ESD) and implement a framework to facilitate ESD more effectively. This review is an opportunity to clarify the key principles of ESD and outline how they could be more effectively implemented by decision makers, particularly the precautionary principle. Major projects are being approved despite there being a significant degree of uncertainty regarding the magnitude and occurrence of significant environmental impacts, including but not limited to compliance with rehabilitation requirements, acid mine drainage and the loss of critical habitat for culturally specific species. The precautionary principle is not being applied as intended.

[22] Our response to question 13.

Through the EIA process the Commonwealth becomes the holder of valuable information regarding significant listed species and habitat and threatening processes. There is no coordinated systemic approach to managing that data following the completion of an EIA. There should be a process to manage this information and ensure that it is distributed to other departments and organisations. This data should be publicly available to inform conservation organisations and other groups who are actively involved in biodiversity conservation.

There is an urgent need to establish a national Environmental Protection Authority (EPA) to undertake EIA and compliance functions at the Commonwealth level. Without this body the Commonwealth is not able to undertake properly independent EIA and ensure that decisions are guarded from political interference.

4. The case for reform and key proposed amendments

This review should consider comprehensive reform of the entire framework rather than piecemeal adjustments. Only substantial amendments to the entire framework will be capable of addressing the identified flaws and weaknesses in the framework.

ALEC supports the development of a dynamic framework of environmental governance that establishes a range of regulatory instruments to achieve improved environmental outcomes. While we acknowledge the role of innovative approaches to conservation such as private land conservation, we fundamentally oppose any move to reduce regulatory requirements. We note there is no evidentiary basis to support the removal of regulatory instruments to improve environmental outcomes.[23] Self-regulation is not considered an appropriate regulatory response to address key threatening processes and will not achieve better outcomes. Self-regulation is linked with deteriorating environmental outcomes.

ALEC supports a reframing of the Act to shift towards a model focused on environmental outcomes rather than process oriented while maintain a wide array of instruments and levels of regulation. Another significant failure of the current framework has been its inability to develop a practical framework that delivers improved environmental outcomes. This is due to the limited ability of the Act to prescribe outcomes and objectives, develop implementation processes and an effective framework to monitor and enforce compliance with standards. We support a greater role for the Commonwealth in setting environmental standards and outcomes.[24]

The Commonwealth should play a greater role monitoring and assurance role, especially as they relate to the implementation of national standards, programs and guidelines. It is not appropriate to prioritise the reform of certain sections at the expense of others. This review must be integrated and holistic. The entire framework should be evaluated according to best practice environmental policy and scientific understanding. There should be an evidence-based approach to identifying the weaknesses and

[23] Question 5.
[24] Question 10.

strengths of the Act. Environmental assessment and biodiversity conservation are intrinsically linked; focusing on one would not achieve integrated reform.

a. Expand the triggers of matters of national environmental significance.[25]

The list of matters of national environmental significance (MNSE) is deficient and undermines the capacity of the Act to address the most pressing environmental challenges; including climate change, land clearing and the cumulative impact of actions. The list should accordingly be extended to capture key threatening processes and enable the Act to address the underlying imperatives to prevent extinction. We recommend including the following additional MNES:

- Expand the water trigger to include actions that will impact the water resources in shale formations. This is consistent with the findings from the Northern Territory Scientific Inquiry into Hydraulic Fracturing. Without this trigger a major impact on water resources of national significance will be inadequately scrutinised.
- Climate change trigger that mandates a referral when an action reaches a certain threshold level of greenhouse gas emissions. Without this trigger the Act will be unable to play a role in managing the key threats posed by climate change.
- Landscape scale biodiversity impacts
- Ecosystems of national significance
- Significant water resources
- Land clearing
- Vulnerable ecological communities
- Indigenous Protected Areas

ALEC does not support further devolution of Commonwealth power to the state or territory governments for responsibility on MNES.[26] MNES should remain the purview of the Commonwealth who are uniquely placed and appropriately resourced to evaluate the impact on these issues. Further, ensuring the Commonwealth retains responsible for MNES ensures there is independence in the EIA process on these issues where a Territory government is the proponent of an action while also assessing that action.

b. Indigenous culture and heritage[27]

Current processes that genuinely incorporate indigenous knowledge and values into the EIA framework are widely acknowledged to be lacking. Indigenous knowledge is routinely disregarded in the EIA process and does not play a key role in informing and directing environmental outcomes. This needs to be addressed in the review and we support an investigation into ways to meaningfully integrate local indigenous knowledge and engage in genuine engagement and consultation that is consistent with

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[25] Our response to question 1, 4, 7 and 14.
[26] Our response to section 13.
[27] Our response to question 19.

Australia's international responsibilities under the United Nations Declaration on the Rights of Indigenous People. The principle of free prior and informed consent must be built into the engagement and access to justice provisions of the Act to support indigenous people playing a determinate role in the EIA of actions on their country.

The current EIA framework is unable to recognise, value and incorporate indigenous knowledge as it doesn't currently fit neatly into the narrow ambit of EIA processes based on western science. A potential solution to this could be modelled off other jurisdictions that have develop processes to recognise and value indigenous knowledge that is determinative of values and objectives within the EIA process.

We recommend considering the New Zealand approach to cultural health assessments. Environmental and cultural health is interrelated and the Act must explicitly acknowledge this relationship. The Environmental and Cultural Health index is able to integrate indigenous knowledge as it is built on a framework of values that are informed by local knowledge and language rather than a traditional western scientific paradigm of environmental management.[28] It will only be possible to integrate indigenous knowledge beyond tokenistic gestures if the EIA framework can accommodate complementary conceptual models of environmental health. A reformed approach would be able to integrate environmental parameters to capture the interactions between disciplines, such as cultural and environmental values.

Indigenous knowledge and values could be integrated by adding additional threatened species listing criteria based on the cultural significance of the species. Local indigenous groups should be capable of nominating a species for protection due to cultural values in addition to ecological values.

c. Objects

The objects of the Act need to be reviewed and amended to refocus the operation of the Act towards the primary functions of environmental protection and the prevention of extinction. The lack of an explicit commitment to the prevention of extinction has contributed to an inadequate biodiversity framework that failed to prevent the extinction of three vertebrate species this century.[29] We endorse amending the primary object of the Act in accordance with the proposal from the Environmental Defenders Office of Australia (DOA):

The primary object of this Act is to protect Australia's environment, its natural heritage and biological diversity including genes, species and ecosystems, its land and waters, and the life-supporting functions they provide.

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[28] https://www.mfe.govt.nz/sites/default/files/cultural-health-index-for-streams-and-waterways-tech-report-apr06.pdf

[29] Woinarski *et al*, "The contribution of policy, law, management, research and advocacy failings to the recent extinctions of 3 Australian vertebrate species" (2016) *Conservation Biology*

To provide further assurance that the Act will be interpreted in order to further environmental protection and the conservation of ecological integrity we propose that the following secondary objects are also inserted into the Act. This is our endorsement of the secondary objects proposed by the EDOA.

(a) ***to provide national leadership and partnership on the environment and sustainability, and to achieve ecologically sustainable development;***

(b) ***to recover and prevent the extinction or further endangerment of Australian plants, animals and their habitats, and to increase the resilience of native species and ecosystems to key threatening processes;***

(c) ***to ensure fair and efficient decision-making; government accountability; early and ongoing community participation in decisions that affect the environment and future generations; and improved public transparency, understanding and oversight of such decisions and their outcomes;***

(d) ***to recognise Aboriginal and Torres Strait Islander peoples' knowledge of Country, and stewardship of its landscapes, ecosystems, plants and animals; to foster the involvement of these First Australians in land management; and expand the ongoing and consensual use of traditional ecological knowledge across Australia's landscapes;***

(e) ***to fulfil Australia's international environmental obligations and responsibilities; in particular to take all steps necessary and appropriate to achieve the purposes of the following international agreements (among others):***

- ***the World Heritage Convention;***
- ***the Convention on Biological Diversity;***
- ***the Ramsar Convention on Wetlands of International Importance;***
- ***the Bonn Convention on the Conservation of Migratory Species of Wild Animals***
- ***the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);***
- ***the United Nations Declaration on the Rights of Indigenous Peoples;***
- ***the United Nations Framework Convention on Climate Change (as applicable to emissions reduction and carbon management under the Act); and***
- ***special bilateral or multilateral conservation agreements (including agreements with Japan, China and the Republic of Korea to protect migratory birds in danger of extinction).***

(f) ***to recognise and promote the intrinsic importance of the environment and the value of ecosystem services to human society, individual health and wellbeing.***

5. Northern Territory case studies

The Act is not recognised by communities in central Australia as being capable of addressing key threatening processes and is seen as playing a limited role in encouraging greater scrutiny of high impact proposals. This section outlines key examples of regulatory failures in the NT.

a. Mining

The approval of several major mining proposals for the Northern Territory highlights current issues in the bi-lateral assessment process. Despite the NT EPA acknowledging severe environmental impacts from these mining proposals, they have been granted conditional approval under a legal framework that has since been replaced. The NT government has acknowledged the regulatory framework concerning the environmental impacts of mining is deficient and dated, yet through the bi-lateral process they were effectively accredited. This is a clear failure of the Act to compel jurisdictions towards higher quality environmental protection.

The Mt Peake mining proposal in central Australia is noted to have permanent consequences to cultural and water values. This project has not undergone a thorough assessment through the Federal EIA process preventing critical oversight of the impacts to culturally significant species and vital groundwater resources. The NT EPA found that through mine dewatering thousands of culturally significant trees would be impacted and that this impact was considered unacceptable by the Central Land Council as the representative body for the local Aboriginal landowners and traditional owners.[30] The bilateral process has therefore accredited an assessment that has disregarded cultural concerns and contravenes of the wishes of local Aboriginal people. It highlights a failure to properly integrate local indigenous knowledge.

The Commonwealth approval of the McArthur River mine illustrates the problematic extent of political influence in the EIA process. The EIA process should be a scientifically rigorous and independent process free from political intrusion. As such protections are not adequately guaranteed in the Act, the Commonwealth was able to approve this mine and several amendments that have had severe environmental consequences. The unacceptable impacts of the project were acknowledged by the NT EPA through the EIA process:

> "The Environment Minister found the PER addressed some earlier concerns, however, broadly, it failed to demonstrate that MRM could conduct the mine without significant, irreversible and unacceptable impacts on the McArthur River environment."[31] The Federal government intervened: "In September 2006, Prime Minister John Howard wrote a letter to the Northern Territory Chief Minister, 'urging' her to approve the expansion of the mine. On 20 September 2006, the Federal Environmental Minister announced his approval for the expansion of the mine under the EPBC Act."[32]

This blatant failure of independent EIA demonstrates the urgent need to review the Act to refine decision making processes that are vulnerable to political influence.

b. Buffel grass

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[30] NT EPA Assessment report 85 at page 36.

[31] http://classic.austlii.edu.au/au/journals/IndigLawB/2008/6.html

[32] As above.

The failure to list buffel grass (Cenchrus ciliaris spp) as a key threatening process under the Act is a key example the limitation of the framework to address a key factor in the decline of biodiversity across the arid and semi-arid interior of the continent. Buffel grass is widely acknowledged across industries and organisations to pose a monumental risk to a wide range of species throughout the arid zone. Buffel grass is a transformer weeds causing changed fire regimes which is acknowledged as a significant pressure on 35 mammal species and 22 near threatened species.[33] The impact of altered fire patterns on mammal species in the Northern Territory cannot be understated.

Since the unsuccessful nomination in 2012, the evidence continues to build on the severe impacts on the grass on ecological integrity and biodiversity. Buffel grass has drastically altered fire regimes and outcompetes native grasses which limits habitat for threatened bird and mammal species. Due to the systemic lack of transparency it is not clear why this well substantiated and compelling nomination was refused and we can only surmise that the economic value of the grass to the pastoral industry prevented it being listed as a key threatening process. The failure to list the species also flies in the face of numerous indigenous ranger groups that work to manage the scourge daily.

This example of political influence in the decision making under the Act highlights the failure of the Act to promote independent and impartial decisions based on sound science. The review must be mindful of this weakness which is a primary contributing factor of the Act's failure to address arguably the greatest risk to biodiversity in the arid lands.

c. Pastoral industry

The Act has not played an effective role in addressing the environmental impacts of agriculture. Using land to graze animals is the single greatest land use in Australia yet actions are rarely if at all referred to the Act for actions undertaken by this industry. The pastoral industry is responsible for significant land clearing and habitat degradation, but this is not being monitored or managed at a Federal level.

The Act should be reviewed to explore policy instruments that would enable effective Federal oversight of agricultural activity and evaluate cumulative landscape scale threats to biodiversity that result from intensive activity on the pastoral estate. Buffel grass and the pastoral industry was assessed by the NT government has having the greatest on biodiversity decline in the NT.[34]

6. Conclusion and key recommendations

The Arid Lands Environment Centre welcomes the opportunity to comment on this landmark review of the Environment Protection and Biodiversity Conservation Act. As detailed in this submission we urge this review to address the key shortcomings of the Act and make recommendations that include:

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[33] https://soe.environment.gov.au/sites/default/files/soe2016-biodiversity-launch-version2-24feb17.pdf?v=1488792935 at page 44.

[34] Price *et al* "Review of Threats to Biodiversity In the Northern Territory" (2008) https://denr.nt.gov.au/__data/assets/pdf_file/0004/255073/2008PriceO.DruckerA.Edwards.G.WoinarskiJ.SaalfeldK.FisherA.andRussell-SmithJ.pdf

1) The objects of the Act should be amended as listed above in accordance with the proposal from the EDOA

2) A national EPA should be established to provide critical independence to the EIA process.

3) Amendments should be made throughout the Act to centre indigenous knowledge where relevant and ensure compliance with our international obligations under the UNDRIP, especially FPIC. Bioregional planning on land under the *Aboriginal Land Rights Act* (NT) and the *Native Title Act* need to be directed by the relevant Aboriginal corporations and land owners.

4) The Act should include a modernised definition of Ecologically Sustainable Development (ESD) and implement a framework to facilitate ESD more effectively.

5) An extinction inquiry process should be established to review the circumstances leading to the extinction of species listed in the Act. The findings should inform policy and regulatory reform.

6) Access to justice provisions must be strengthened by introducing merits review and expanding standing for judicial review.

7) The MNES list for referral triggers must be expanded to enable the Commonwealth to manage the most pressing environmental challenges. The MNES triggers should be expanded in accordance with the EDOA proposal and our recommendations above.

8) The Act should outline and embed guidelines for best practice strategic assessment.

9) Improve transparency and accountability by removing discretion and introducing duties as listed above.

10) Re-negotiate the bi-lateral assessment agreement between the NT and Commonwealth government to ensure compliance with robust national criteria. Bi-lateral approval processes should be removed.

11) Amend the Act to integrate the principles of restoration and rehabilitation as key factors to be considered in the EIA process.

12) Enable the Act to develop nationally consistent environmental goals and standards that includes a long term vision, with measurable interim targets, to improve environmental health in Australia.

The Act is not fit for purpose and is failing to manage the most pressing environmental challenges of our time. Without replacing the Act or substantially amending it in from its current form, it will remain ineffective in achieving its underlying purpose to deliver positive environmental outcomes and prevent the ongoing decline in species throughout Australia.

Many of the critical observations in this submission have been known to government for many years. This review represents a prime opportunity to acknowledge the extensive scientific and environmental expertise on the operation of the Act and deliver a framework of Commonwealth environmental protection that genuinely values and protects the ecological systems that support and sustain the Australian economy and way of life.