

The National Environmental Law Association and ANU College of Law

Twenty Years of the EPBC Act – looking back, looking forward

29 March 2019, China in the World Theatre, ANU

REFLECTIONS ON THE HAWKE REVIEW

Peter Burnett, ANU College of Law (formerly, Head of Regulatory Reform Taskforce, Dept of Environment)

Peter is an Honorary Associate Professor at the ANU College of Law, where he researches Australian environmental policy and law. His current research interests include the reform of environmental impact assessment and the role of environmental accounting in policy integration. Before coming to the ANU, Peter held a number of senior executive positions in the federal Environment Department, most recently in 2011-2012 as a First Assistant Secretary leading a Regulatory Reform Taskforce. Peter recently completed his PhD, studying Australian environmental policy, especially Ecologically Sustainable Development (ESD).

1. Hawke Review: Integrated package of 9 core elements:

- redraft & streamline: an **Australian Environment Act**
- **Environment Commission** - project approvals, strategic assessments, bioregional plans
- **invest in better regulatory system**: national environmental accounts, skills development, policy guidance, and spatial information
- **streamline approvals**: early engagement in planning; more strategic assessments, bioregional planning & approvals bilateral agreements
- Environment Reparation Fund and national 'biobanking' scheme
- Environment Commission: environmental performance audits, inquiries
- **new MNES**: ecosystems of national significance, interim GHG trigger
- more **transparency**, more **access** to courts for public interest litigation
- **foresight reports** to help manage emerging environmental threats.

2. Review outcomes

- Overall, Government **supported**: streamlining, strategic approaches, new MNES for ecosystems, national standards/harmonisation, markets
- But **rejected**:
 - strengthening RFA compliance and interim GHG trigger (immediately)
 - transferring power to new independent agencies or Courts
 - any loss of control over revenue
- Initial funding incremental – strategic assessments, cost recovery
- Early national streamlining through COAG led to 'one stop shop' Mark I
- Major EPBC amendment Bill deferred to next Parliament, lapsed - Departmental budget cut to cover loss of forecast revenue!

3. Policy questions for future reform

To frame objects, scope & major elements of a reformed Act, and ensure effective implementation, need to address significant policy questions:

1. What are we trying to achieve?

- Act doesn't define ESD, only *principles* of ESD

- formal statements of policy either dated or unhelpful
 - a goal well defined is a goal half achieved
2. *How to allocate roles & responsibilities between Cth & States?*
 - IGAE & COAG Heads of Agreement dated & under-implemented, some splits sub-optimal for policy, esp. biodiversity
 - unilateral action makes cooperation difficult
 3. *How to ensure cooperation between jurisdictions?*
 - financial carrots? Prospect of unilateral action?
 - independent Cth agency? (States tend to work with these, eg BoM, CSIRO)
 4. *How to regulate exercise of discretion to ensure conformity with goals?*
 - mandatory considerations not enough
 - conformity to environmental plans?
 - specific decision-rules, eg no clearing of critical habitat?
 5. *How to ensure Act is funded commensurate with its goals?*
 - Budget offset rules likely to prevail unless election commitment or crisis

SESSION 1. PROJECT-BASED ASSESSMENTS

Dr Rebecca Nelson, Melbourne Law School

Dr Rebecca Nelson is a Senior Lecturer at Melbourne Law School. She currently leads an Australian Research Council-funded project that aims to analyse and evaluate environmental and natural resources laws regulating cumulative environmental effects in Australia and internationally. In 2014 she was named the Law Council of Australia's Young Environmental Lawyer of the Year for her contribution to water law and environmental law. Dr Nelson holds a doctorate and Masters in law from Stanford University and Bachelors degrees in environmental engineering and law from the University of Melbourne.

Recommendation 1. Require cumulative effects assessments for *all* projects assessed under national environmental law, supported by detailed policy guidelines

Rationale: under the EPBC Act, the current approach of including cumulative effects assessments only in relation to coal seam gas and coal mine developments under the water trigger leaves all the other MNES vulnerable to uncontrolled incremental environmental change. Requiring cumulative effects assessments is now a staple of EIA law globally: the EPBC Act is a serious laggard. Detailed policy guidance is needed to make sure assessments achieve minimum standards. Current practice of cumulative assessments under the water trigger suggests patchy implementation.

Recommendation 2. Require proponents to share management plans and data related to project assessment and ongoing monitoring in a public, standardised, centralised way

Rationale: Cumulative effects assessments cannot effectively be undertaken without better access to environmental information. An enormous amount of information is already collected by project proponents (and others), but it is almost impossible to use because of the way it is collected and (not) shared publicly. Management plans also often contain important controls on projects under secondary consent arrangements, but are not subject to the same approval and transparency requirements as assessment documents. These data and management plans are not only key to the feasibility of good cumulative environmental effect assessment, but key to proponents' accountability to the public. To enable best use of the data, it should be provided by proponents in a standardised way to a centralised, online government repository.

Recommendation 3. Link formal statutory reporting on environmental conditions (eg SoE) to process for expanding triggers for project-based assessments under national environmental law

Rationale: Statutory reporting on the condition of the environment, such as State of the Environment (SoE) reporting, often notes increasing cumulative impacts in relation to diverse elements of the environment. This type of reporting often is not linked to any statutory requirement for government to take action in response. Project-specific environmental data (Recommendation 2) should feed into SoE reporting, and adverse findings in SoE reporting should, in turn, spur formal consideration of the need to expand regulatory triggers (MNES) under national environmental law, to allow an adequate response to cumulative effects through project-level controls (Recommendation 1).

Jess Feehely, National Environmental Law Association

Jess is President of the National Environmental Law Association and Co-Consulting editor of the Australian Environment Review. She previously worked for 14 years as Principal Lawyer at EDO Tasmania before recently taking up a research position with the Tasmania Law Reform Institute.

Recommendation 1. Additional MNES triggers (+ reinstate requirement for regular review)

- Climate trigger
- Land clearing
- Extension of water trigger

Recommendation 2. Remove RFA exemption

Recommendation 3. Clarify scope of governmental authorisations

Recommendation 4. Limit operation of particular manner decisions

- Avoid adaptive management conditions
- Do not defer to less rigorous State-based assessments
- Where comprehensive suite of particular manner conditions required, should be assessed as a controlled action

James Trezise, Australian Conservation Foundation

James is a Policy Analyst at the Australian Conservation Foundation based in Canberra. His work is focussed on biodiversity and water policy and national environmental law reform. He has previously held environmental policy and regulatory roles in the Australian Public Service.

Recommendation 1. Outcomes, standards, limits and thresholds specified in law

Recommendation 2. Federal EPA to administer a national assessment and compliance regime

Recommendation 3. A national environment commission to set standards

Recommendation 4. Merits review and third party enforcement rights

SESSION 2. CONSERVATION, BIOREGIONAL PLANNING & OFFSETS

Professor Helene Marsh, Chair, Threatened Species Scientific Committee

Helene Marsh is a marine conservation biologist with 40 years' experience in research into species conservation, management and policy with particular reference to tropical coastal and riverine megafauna, especially marine mammals. She is a fellow of the Australian Academy of Science and the Australian Academy of Technological Sciences and Engineering and her research has been recognised by awards from the Pew Foundation, the Society for Conservation Biology and the American Society of Mammalogists. The policy outcomes of her research include significant contributions to the science base of the conservation of dugongs in Australia and internationally at a global scale (IUCN, UNEP, Convention for Migratory Species) and by providing advice to the governments of some 14 countries. Helene chairs the Australian Threatened Species Scientific Committee, a statutory committee that makes recommendations to the federal Minister for Environment. She is past President of the international Society of Marine Mammalogy, Co-chair of the IUCN Sirenia Specialist Group and is on the editorial boards of Conservation Biology, Endangered Species Research and Oecologia. Helene is very proud of the accomplishments of the 56 PhD candidates that she has supervised to graduation, all of whom have taught her a lot. See <https://research.jcu.edu.au/portfolio/helene.marsh>.

Recommendation 1. Expand the role of Bioregional Plans

Recommendation 2. Strengthen the process for creating such plans

- So they are more substantial and robust as part of a strengthened package of strategic measures to conserve protected matters at a range of appropriate scales.

Recommendation 3. Change the terminology from 'Bioregional Plans' to 'Regional Plans'

Recommendation 4. Allow the Commonwealth to unilaterally develop Regional Plans; and

Recommendation 5. Ensure that the process for delineating a region for the purpose of the Act is flexible

Professor Phil Gibbons, ANU Climate Change Institute

Philip Gibbons is an Associate Professor at The Australian National University. Phil has previously worked assessing impacts of logging operations on threatened species and developing the NSW Native Vegetation Regulation and EPBC Act offset calculator. Phil's current research agenda is to work out how we can achieve no net loss of biodiversity in the face of continuing development. Phil also teaches biodiversity conservation at the Fenner School of Environment and Society and is always looking for inspiring guest lecturers!

Recommendation 1. Establish a public register of approvals

- that collates key information from assessments and offsets will provide greater transparency and information that can be used to improve and streamline the assessment process over time.

Recommendation 2. Explicit guidelines on averted loss and additionality.

- These are required to implement offsets in a way that delivers consistent decisions and outcomes that will improve or maintain environmental outcomes.

Recommendation 3. Do not approve until offset identified

- Offsets are a means not an ends. Whether a proposal can be offset should be a key consideration in decision-making, yet it is common practice to approve proposals under the EPBC Act prior to the offset being identified.

Recommendation 4. Holistic reform must accompany legislative reform.

- The fundamental drivers of land clearing in Australia are economic. The impacts of legislative reforms are often short-lived in this space. We need a holistic strategy to reduce demand for clearing in our economy for there to be enduring biodiversity improvements that span changes in government.

Rachel Walmsley, Director of Policy and Law Reform, EDO NSW

Rachel Walmsley is the Policy and Law Reform Director at EDO NSW. She has over 15 years experience working on public interest environmental law and policy in Australia and overseas. Rachel is a member of the Australian Panel of Experts on Environmental Law (APEEL), and was formerly a Co-Consulting Editor of the Australian Environment Review and Chair of the Australian Committee for IUCN, and currently also guest lectures in environmental law.

Recommendation 1. Effectively address land clearing as major threat to biodiversity

- include a land clearing trigger for project assessment; require assessments and approvals of clearing to meet a clear 'conserve or enhance' standard (ie, not just 'no net loss' based on the use of dodgy indirect offsets); invest in connectivity conservation (both through making NRS actually CAR and private land conservation).

Recommendation 2. Address climate change

- include a GHG trigger for project assessment; build mandatory climate considerations (for both mitigation and adaptation) into relevant decision, strategic assessment and bio regional planning processes throughout the Act;

Recommendation 3. Cumulative impacts

- Acknowledge that individual assessment and approval decisions are made in the context of cumulative impacts in an area and require proponents to demonstrate how projects meet clear standards eg- how the project will 'conserve or enhance' biodiversity, have a neutral or beneficial impact on water, are within the national carbon budget for GHG emissions etc; and strengthen bioregional planning to ensure healthy, productive and resilient landscapes.

Recommendation 4. Require independent objective decision-making, through objective decision-making criteria (less discretion)

Recommendation 5. Require independent objective decision-making, through independently appointed and accredited consultants

Dr April Reside, UQ Centre for Biodiversity and Conservation Science

April is scientific advisor for the Black-throated Finch Recovery Team, member of Birdlife Australia's Research and Conservation Committee, and Postdoctoral Research Fellow at the Centre for Biodiversity and Conservation Science at the University of Queensland. April's research focusses on vertebrate ecology to inform conservation. Her current postdoc at the University of Queensland investigates the condition of subtropical woodland bird communities. Previously, April focussed on the role of refuges for conserving threatened species, the impact of climate change on biodiversity, and strategies for climate change adaptation. This work has been used to inform spatial conservation planning that accounts for climatic refugia. April's other work focusses on threatened species recovery, which has led her to a greater focus on conservation policy to improve outcomes for imperilled species. April is a scientific advisor for the Black-throated Finch Recovery Team, Birdlife Australia's Research and Conservation Committee and Threatened Species Committee.

Recommendation 1. Genuine protections for threatened species habitat

- that actually prevent habitat loss.

Recommendation 2. Assess impacts to threatened species in the full context in which this species exists

For example, how much habitat it has lost, how much habitat it still has, how much habitat it requires; and the other projects that are also planned that would impact the species (cumulative impact of multiple projects). The current procedure around defining 'significant impact' is missing the bigger picture and leads to approval of development projects

Recommendation 3. Offsets need to be demonstrably working before destruction of threatened species habitat is permitted.

Background: Black-throated finch (BTF), like many threatened species, are suffering habitat loss through a 'death by a thousand cuts' scenario. In a recent study¹ we found over 700 projects were referred under the EPBC that overlapped with where BTF habitat would have potentially been in the year 2000. Only 1 project was rejected on the grounds it would pose a 'clearly unacceptable' risk to BTF. More than half ($n=410$) were approved as "not controlled action". BTF habitat is constantly under threat from mining, housing developments, agriculture, road upgrades and solar farms; and habitat loss continues despite regulatory oversight. The vast majority of these projects are approved, many without any compensatory requirements for BTF. The projects that are approved with requirements to offset the lost habitat have offset and management plans that are far inadequate to mitigate severe declines of BTF. To prevent the extinction of the BTF, genuine limits to habitat loss must be enforced. If offsets are deemed necessary, substantial evidence that the offsets genuinely offset the population reduction of BTF elsewhere is needed before more habitat can be lost.

See: Reside, A.E., Cosgrove, A.J., Pointon, R., Trezise, J., Watson, J.E.M., Maron, M., 2019. How to send a finch extinct. *Environmental Science & Policy* 94, 163-173.

SESSION 3. STRATEGIC ASSESSMENTS

Carolyn Cameron, Cameron Strategy / EIANZ

Carolyn Cameron has over 40 years experience in environmental and strategic planning as an academic, consultant and public sector manager for state and national governments. More recently Carolyn was a Senior Executive with the Commonwealth Department of Environment, leading teams to undertake strategic environmental assessments and regional sustainability planning across the country. Since 2015 she has been a senior consultant, working as Cameron Strategies, on complex environmental management projects, applying her skills in policy analysis and interpretation for state governments and the Great Barrier Reef Marine Park Authority.

Recommendation 1. Expand the role of strategic assessments and bioregional plans so that they are used more often

Recommendation 2. Strengthen the process for creating these plans and undertaking these assessments, so they are more substantial and robust

Recommendation 3. For 'bioregional plans'

- change the terminology from 'bioregional plans' to 'regional plans'
- allow the Commonwealth to unilaterally develop regional plans on appropriate 'landscape scales'
- ensure that the process for delineating a region for the purpose of the Act is flexible

Recommendation 4. For strategic assessments:

- specify mandatory required information for strategic assessments
- insert an 'improve or maintain' test for the approval of a class of actions in accordance with an endorsed plan, policy or program
- enhance provision for public engagement
- create a 'call in' power for plans, policies and programs likely to have a significant impact on matters of National Environmental Significance and amending the term 'action' to incorporate these plans, policies or programs
- Enable minor variations to a PPP without consultation (after determination of amendments to assessed impact) and major variations - with public consultation

Peter Hemphill, Open Lines Consulting

Peter is a consultant who specialises in the EPBC Act and strategic assessments. He founded Open Lines in 2010 and has worked on many of the EPBC Act strategic assessments around Australia. His company is currently preparing the impact assessment report for the Western Sydney Strategic Assessment. Before consulting, Peter worked for the Commonwealth Environment Department where he was involved with assessments and approvals under the EPBC Act.

Recommendation 1. Make the process truly strategic

- SEAs should not be scaled up versions of site by site assessment
- SEAs should be strategic and deal with the spatial and temporal scale of the projects
 - For example they should:
 - Properly consider development alternatives
 - Understand past and future environmental trends
 - Provide for flexibility in implementation

Recommendation 2. Provide stronger focus on conservation planning

- The process should look at the hard question of what is the best conservation outcome
- The process of conservation planning should be improved and formalised
 - For example conservation planning should:
 - Use the best available tools
 - Engage better with experts

- Engage better with the community

Recommendation 3. Make the process faster

- Strategic assessments take too long
- There is too much effort on low risk issues and not enough on the issues that really matter
- The Act should provide for processes and timeframes to get them really focused and speed them up
- The capacity of regulators should be improved.

SESSION 4. COMPLIANCE, ENFORCEMENT & INSTITUTIONAL ARRANGEMENTS

Professor Andrew MacIntosh, ANU College of Law

Professor Andrew Macintosh is the Director of Research at the ANU Law School. He has degrees in law, economics and environmental management and is an expert in environmental policy and regulation. He is the Chair of the Emissions Reduction Assurance Committee, a member of the National Greenhouse Gas Inventory User Group, a Director of the Port of Newcastle and Sydney Desalination Plant, and was previously an Associate Member of the Climate Change Authority. He teaches environmental law and policy and has published widely on environmental impact assessment and the EPBC Act.

Recommendation 1. Increase resources, and develop sustainable funding model for administration of EPBC Act, including compliance and enforcement

Recommendation 2. Increase spatial data capabilities

- along the lines of Clean Energy Regulator

Recommendation 3. Increase transparency in compliance and enforcement activities

- along the lines of NSW DPE

Recommendation 4. Tripartism

- give responsible third parties a seat at the compliance and enforcement table

Lou Dargan, Head of Strategic Litigation, Grata Fund

Recommendation 1. Merits review of EIA/approvals process decisions

Recommendation 2. Third party enforcement rights

Dr Hanna Jaireth, Australian Panel of Experts on Environmental Law

Dr Hanna Jaireth has a longstanding interest in the law and politics of sustainable development. She chaired the EDO (ACT) management committee in 2012–14 and has served on the NELA board since 2010. As a member of APEEL (2014-17) Hanna wrote on environmental democracy with Dr Bruce Lindsay. Hanna is on two law journal boards, and has volunteered with IUCN Commissions since 1996. She currently works for the NSW Government. She is presenting in a private capacity and expressing her personal views.

Recommendation 1. Establish a National Environment Protection Authority

- Need for independent regulator
- The current NEPC system is ineffective
- 2017-18 Vic EPA reforms a model
 - Triggers for Cth pre-emptive regulatory intervention through audit/oversight processes
 - Data from priority 2 reform helpful - regional environmental plans, government, citizen-science & corporate M&E reports

Recommendation 2. Establish a national & regional or IBRA-based participatory monitoring & reporting initiative & engage stakeholders & public with nature nationally

- NRM & biosecurity requires SMART coordinated strategic regional planning & engagement in partnership with stakeholders, informed by sustainability principles e.g. PC, *Transitioning Regional Economies Report (2017)*
 - For large companies EMSs, sustainability plans with targets e.g. for GHGE reduction, circular economy targets, & annual reporting of env performance data
- Ecological data collection & intra & intergenerational opportunities in education, health & well-being, ecological rehabilitation

Recommendation 3. Innovate with ADR & within the AAT & the Federal Court of Australia to create specialist environmental law rules & procedures

- Prevention: all Government agencies to develop stakeholder engagement, ADR plans

- Uniform liberal standing provisions
- Need more merits review/multi-disciplinary EDR
 - NSW L&E Court outstanding: UNEP Green tribunals report (2009/2016)
- Cth has announced FedCrt investment to strengthen capacity for corporate prosecutions – welcome – but need broader reform

Other recommendations

- **Report on and respond to trends (environmental accounts)**