Review of the *Nature Conservation Act 1980* (ACT) by the ACT Department of the Environment, Climate Change, Energy and Water

Submission by the Commonwealth Department of Sustainability, Environment, Water, Population and Communities

Introduction

The Commonwealth Department of Sustainability, Environment, Water, Population and Communities (DSEWPaC) supports efforts to ensure the continuing efficacy and relevance of the ACT *Nature Conservation Act 1980* (NC Act) and welcomes the opportunity to make a submission to the review of this legislation being undertaken by the ACT Department of the Environment, Climate Change, Energy and Water (DECCEW). This submission addresses select questions posed in the *Review of the Nature Conservation Act 1980 Discussion Paper*, released by the ACT Government in November 2010 as well as providing some general comments from the perspective of DSEWPaC.

Among other things, DSEWPaC submits that it supports proposed reform of the NC Act by the ACT Government where that reform would have the objective of ensuring species listing categories are more closely aligned with those set out in the Commonwealth *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), where this is achievable and provided this is undertaken in such a way that maintains the clarity and intent of such listings under the NC Act and EPBC Act respectively.

The Commonwealth also notes that the discussion paper proposes that NC Act wildlife and licensing requirements be incorporated into strategic assessments made under the EPBC Act. DSEWPaC's view is that the inclusion of State or Territory legislative requirements into strategic assessments is a complex proposal and would require careful consideration on a case-by-case basis.

Lastly, this submission also provides suggestions regarding how the NC Act's penalty regime might be improved, particularly in relation to the appropriateness of current penalties under the NC Act and the use of strict liability provisions. In addition, DSEWPaC believes it may be beneficial to incorporate more civil penalty provisions into the NC Act to ensure a broader range of compliance and enforcement options are available. Similarly, the overall effectiveness of the NC Act's compliance and enforcement regime would be enhanced by expanding the search and seizure powers afforded to Conservation Officers under that Act. DSEWPaC also supports the broad objective of enhanced cooperation between the Commonwealth and relevant ACT authorities in relation to common objectives and enhanced operational effectiveness.

Response to Questions Posed by the Discussion Paper

Should the definitions and listing categories in the NC Act and the EPBC Act be better aligned?

DSEWPaC broadly supports the objective of promoting greater alignment between species listing and classification under the EPBC Act and under section 38 of the NC

Act. However, DSEWPaC notes that it is important to ensure it is clear that categories set out under the NC Act are regional rather than national in focus and as such are only reflective of the status of a species within the ACT rather than across Australia. This is necessary in order to ensure it is apparent to members of the public why the content of the lists are not aligned in instances where, for example, a species is a listed threatened species under the EPBC Act because it is threatened at a national level, but is not subject to a declaration under the NC Act because it is abundant in the ACT.

The Commonwealth further recognises however there may be some natural limitations to the degree to which any listings might be aligned consistently across both regimes both for legal reasons as well as the general fact that the Commonwealth and ACT regimes have developed over time in different contexts and in response to different objectives and challenges.

Further comments related to means by which DSEWPaC sees alignment of Commonwealth and ACT processes, as well as mechanisms for reducing duplication for stakeholders, are discussed further below as general comments against the final question addressed in this submission.

What are your views on including licensing provisions as part of strategic assessments to deliver maintained or improved biodiversity across a planning area?

The Commonwealth broadly supports the enhanced use of strategic assessments under Part 10 of the EPBC Act as a means of addressing impacts of development in a more strategic manner while at the same time streamlining the requirements of both the Commonwealth and ACT legislation. To this end this facility represents a means by which to enhance efficiencies in the regime, including with respect to reducing the regulatory burden on proponents.

In particular, it is suggested on page 20 of the discussion paper that the inclusion of NC Act wildlife and licensing requirements be incorporated into strategic assessments made under section 146 of the EPBC Act. The concept of including ACT legislative requirements in a strategic assessment is a complex one that will require careful consideration, including in regards to what exactly this proposal would entail.

In short, the strategic assessment process under Part 10 of the EPBC Act is designed to allow the Commonwealth to assess the impacts of actions taken under a policy, plan or program and, once that assessment is complete, for the Commonwealth Minister to consider endorsing that policy, plan or program prior to considering whether to issue an approval for actions to be taken under it. An approval given following a strategic assessment may be for single actions or for actions falling within a class of actions set out in the approval. This approach allows the Minister to consider approving all of the actions taken under the policy, plan or program quite broadly and subject to certain conditions thereby avoiding the need for persons taking the actions to have to refer them separately under the EPBC Act for individual assessment and approval by way of the ordinary case-by-case approach that would otherwise be required under Parts 7, 8 and 9 of the EPBC Act.

This raises two issues in relation to the interaction of the EPBC Act and ACT legislation in the context of strategic assessments. Firstly, there would be a need to

consider any implications of a proposal that requires the Commonwealth to consider endorsing ACT legislative requirements, or a document in force under, or that derives certain effect from, ACT legislation (as opposed to requirements set out in a policy document for example). Secondly, further considerations may arise from the fact that the EPBC Act does not provide an express mechanism by which a policy, plan or program may be varied or amended after it has been endorsed by the Commonwealth Minister and this is broadly consistent with the policy objective that the Commonwealth Minister will have certainty about the content of any such policy, plan or program, including what exactly are the actions to be taken under it as well as what the impacts of those actions are on matters protected by the EPBC Act (i.e. matters of national environmental significance).

Therefore while the Commonwealth feels there may be value in entrenching certain ACT requirements by way of a joint process such as a strategic assessment there are some largely practical implications that may arise. For this reason it is difficult to assess the degree to which this approach would be viable other than on a case-by-case basis in relation to any proposed strategic assessment. DSEWPaC therefore submits that a dialogue around these issues would be an important first step if this is an approach that the ACT Government wishes to pursue.

Are the current options and penalties with the NC Act adequate? If not, what could improve them?

Are the levels of penalties available under the NC Act appropriate?

The two questions above are closely linked, as they both relate to the overall effectiveness of the NC Act's contravention provisions. As such, they will be considered together.

It is not practical to comment on the all current penalties within the NC Act without undertaking a comprehensive benchmarking exercise across the equivalent legislation in other jurisdictions. Furthermore, it is difficult to equate many of the penalties contained in the NC Act with Commonwealth legislation such as the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the EPBC act), as the latter addresses specific issues of national environmental significance, some of which involve threshold issues relating to 'significance' itself.

Whilst some NC Act penalties are robust and compare well with their equivalents in other jurisdictions, it appears that a number of offences would nevertheless benefit from increased penalties in line with evolving environmental imperatives and public expectations (for example, in relation to the lighting of fires in reserves).

DSEWPaC's experience is that the practical, day-to-day enforceability of a contravention provision may be just as important as the size or severity of the penalty. Therefore, as a general proposition and in DSEWPaC's view, environmental offences and civil penalty provisions should have the following characteristics.

- Effective deterrence value, which means they are:
    - sufficiently serious so as to deter non-compliance;

- benchmarked against equivalent provisions in contemporary legislation in other jurisdictions; and
- Applicable to both individuals and organisations.

- Enforceability, which means:
  - the elements of the contravention are clear and conducive to allowing non-compliance to be proven; and
  - the legislative provisions are clearly drafted and the terms used are not ambiguous or equivocal.

Is there a case for the expansion of strict liability offences under the NC Act? If so what sort of offences?

While there is a trend toward strict liability environmental offences in other jurisdictions, these typically relate to pollution offences which involve a clear and significant environmental risk, and are justifiable under the considerations listed on page 26 of the Discussion Paper. The Commonwealth experience is that it is more difficult to prescribe strict liability offences (for other than minor and routine infringement notice type offences) where the risks associated with non-compliant behaviour are less tangible.

It is noted that several NC Act offences in relation to land clearing are already strict liability offences. However, DSEWPaC suggests that the ACT consider the merits of expanding strict liability offences to the extent contemplated in the Discussion Paper. If strict liability cannot be achieved for all elements of the offence it may be worth exploring the possibility of strict liability for individual offence elements. This approach has been used in relation to knowledge of a species *threatened* status for offences under Part 3 of the EPBC Act.

Discussion paper question: is it appropriate for the NC Act to contain civil penalties similar to those used in other jurisdictions? If so, to which matters under the NC Act could these most usefully apply?

DSEWPaC's view is that it would be appropriate for the NC Act to contain further civil penalty provisions, and that these would best be applied where:

- large fines are likely to act as a deterrent to non-compliant behaviour;
- the non-compliant behaviour lends itself to some form of restitutional or alternative remedy; and/or
- criminal prosecution may not be readily achievable (e.g. where the criminal standard of proof would be difficult to meet).

In DSEWPaC's view, there is clear utility in attaching civil penalty provisions to offences relating to vegetation clearing. However, it may also be useful to adopt civil penalty provisions in relation to the liability of executive officers of bodies corporate, as has been done in the context of Part 17, Division 18 of the EPBC Act.

Note that civil penalty provisions should be used to complement equivalent offence provisions. DSEWPaC's experience, as well as feedback from other jurisdictions

received via the *Legal Practice Cluster* of the Australasian Environmental Law Enforcement and Regulators neTwork (AELERT), confirms that there is significant utility in legislation prescribing a mix of offences and civil penalty provisions - particularly where offences provide for imprisonment. While civil penalty provisions provide financial-based deterrence and are often the most practical way of achieving cost-effective, timely and relevant environmental C&E outcomes, in some instances the risk of imprisonment is the only means of achieving effective deterrence. Thus, the two regimes tend to be complementary in terms of striking an appropriate balance between effective deterrence and the ability to achieve day-to-day compliance outcomes. Part 3 of the EPBC Act provides examples of parallel criminal offence and civil contravention provisions.

Relative advantages and disadvantages of offences and civil penalty provisions include the following:

Contravention Type	**Potential advantages**	**Potential disadvantages**
Offences	• Potential for imprisonment or a criminal conviction can be a real and meaningful deterrent to individuals. • Given the potentially serious consequences of conviction for the accused, offences may allow a regulator to use them as leverage in some instances to secure remedies which may be more appropriate in addressing the harm done and the other circumstances of the breach.	• The higher burden of proof (namely that of 'beyond reasonable doubt') is required to secure a conviction. • Imprisonment is limited in application to natural persons, not corporations.
Civil penalty provisions	• Typically prescribe larger fines than offences (financial incentive to comply). • They typically lend themselves to: o securing environmental outcomes in the public interest (e.g. restitutional remedies); and o the sanctioning of organisations (e.g. bodies corporate) in addition to individuals. • They are subject to a lower burden of proof than criminal prosecutions (namely on the balance of probabilities).	• Fines can sometimes be viewed by the regulated community as operating costs to be factored into their budgets simply as a cost of doing business. • If other party has significant financial resources, it can prove expensive to secure a final court result. • They can sometimes be perceived by the community as "soft" in comparison to criminal offences.

The other advantage of civil penalty provisions is that they facilitate a broad spectrum of response options (including remedies and sanctions) for the regulator to use in the event of non-compliance with the Act. This provides greater flexibility to achieve a tailored response

The DSEWPaC view is that contemporary environmental legislation should ideally facilitate the following agency responses, some of which should be in the form of remedies expressly listed in the Act:[1]

[1] While it is acknowledged that the three categories of *administrative, civil* and *criminal* responses are often blurred they are used here for convenience.

- **Administrative sanctions**
  - cautions and educational messages
  - formal advisory or warning letters requiring future compliance
  - infringement notices
  - varying, or imposing further conditions on permits, licences or approvals
  - suspending, revoking or cancelling permits, licences or approvals
  - retaining bonds or securities lodged as a condition of permits, licences or approvals, to remediate any harm caused by a violation
  - directed audits
  - conservation or other agreements to compensate for the contravention or to prevent future contraventions
  - enforceable undertakings
  - Ministerial orders to correct a contravention, and
  - forfeiture of items (e.g. illegal specimens).

- **Civil Remedies**
  - large fines, to deter non-compliance with the legislation
  - injunctions, to prevent certain actions from being taken or continuing
  - court orders requiring certain actions to be taken, such as:
    - payment of damages
    - repair and mitigation of environmental harm, or
    - actions necessary to conserve the environment.

- **Criminal Penalties**
  - fines, and/or
  - imprisonment.

DSEWPaC's experience in enforcing Part 3 of the EPBC Act has indicated that there is significant utility in negotiated outcomes (such as enforceable undertakings and restorative remedies), which can offer the following advantages:

- A far more flexible and tailored range of remedial options than are normally available through formal court orders. In the environmental context this can include repairing or mitigating environmental damage.
- They can include a preventative element – for example, requiring the other party to implement a compliance system or improve their practices and procedures.
- The potential to obtain a timely and cost-effective regulatory outcome, whilst avoiding unnecessary up-front involvement in alternative compliance or enforcement avenues which may be protracted, resource-intensive or unable to best address the harm caused (e.g. prosecution or litigation).
- An early resolution can be achieved through which corrective action, offsets or mitigation of harm caused can be undertaken in a timely manner so as to achieve maximum effect.
- In the event of non-compliance with an enforceable undertaking, the regulator is not required to prove the original contravention to the court – only that the other party has not done what it undertook to do.

Discussion paper question: Are the current powers of search and seizure under the NC Act adequate?

Even if its contravention provisions are updated, the NC Act's overall effectiveness will also be contingent on ensuring regulators are equipped with sufficient powers to effectively monitor compliance and investigate breaches. These functions are typically carried out by agency officers appointed under the Act ('authorised officers'). In other jurisdictions these officers tend to be called *inspectors, wardens* or *rangers*, and under the NC Act they are termed Conservation Officers.

The NC Act currently prescribes very limited powers of search and seizure for Conservation Officers (when compared to the Commonwealth context, they appear to have similar powers to park rangers). It is difficult to reconcile the gravity of some NC Act offences and the quanta of the associated penalties (e.g. for land clearing causing serious harm) with the limited powers afforded to these officers.

It is therefore suggested that authorised officers under the NC Act (or at least those with significant compliance and enforcement responsibilities) be adequately equipped with appropriate powers, which may include the following:

- The power to require a person to provide information or produce documents;
- The power to issue infringement notices for minor offences;
- The power to enter and inspect premises with consent;
- The power to do certain things during inspections and searches (e.g. take photographs and samples, mark specimens etc);
- The power to enter and search premises under a warrant, for the purposes of:
    - monitoring for compliance with the Act ('monitoring warrant'), or
    - searching for evidence of a suspected contravention ('search warrant').
- The power to seize things:
    - as evidence of a contravention, or
    - because the item is illegal to possess and is subject to forfeiture.
- The power to search persons, goods and baggage under appropriate circumstances.

Discussion Paper Questions: Are there further reforms required to better integrate Commonwealth and ACT nature conservation law?

There are no obvious further legislative reforms required to promote integration between Commonwealth and ACT environmental laws. However, the legislative arrangements currently in place between the Commonwealth and ACT may provide an opportunity for greater integration in relation to cooperative and aligned environment protection efforts. This could be effected through increased sharing of data and information about the state of protected matters.

The existing assessment bilateral agreement between the Commonwealth and the ACT made under Part 5 of the EPBC Act and entered on 4 June 2009 essentially allows the Commonwealth Minister to accredit certain ACT environmental impact

assessment processes (namely assessment by environmental impact statement under the ACT *Planning and Development Act 2007*) to be used in place of an EPBC Act process where assessment is required under both Commonwealth and ACT legislation. This reduces duplication and streamlines project assessment for proponents as well as ensuring that the Commonwealth Minister is given enough information about an action taken in the ACT in order to decide whether to approve or refuse the taking of the action under Part 9 of the EPBC Act.

This agreement provides for general principles of cooperation with respect to such assessments as well as agreed principles regarding the consistent setting of conditions to environmental approvals and cooperation in enforcing those conditions (see for example clauses 19-10 of the agreement). The bilateral agreement also provides for the transfer of information and data relating to the assessment of environmental impacts under the respective Acts (see for examples clauses 27-28 of the agreement).

While a degree of information sharing and collaboration already exists between the Commonwealth and the ACT in relation to protected matters, there may be opportunities to better integrate and align environment protection activities. This might be achieved by further reducing the duplication of data collection in relation to protected matters in the ACT, working towards greater alignment in condition-setting, and by making condition-monitoring data available to all relevant government entities at both Commonwealth and ACT levels.

There may also be scope for greater collaboration at the operational compliance and enforcement level, particularly where a single action may constitute a breach under both ACT and Commonwealth environmental legislation. In such cases DSEWPaC and DECCEW could undertake joint investigative activities or aim to maximise the sharing of relevant information to the maximum extent permitted by law.

Greater integration could also be promoted through the sharing of corporate knowledge in relation to environmental legal issues. This might be achieved through participation by DSEWPaC and DECCEW and other relevant ACT authorities in information sharing forums, such as the AELERT *Legal Practice Cluster*, which meets several times per year and focuses on sharing knowledge with a view to facilitating better prosecutorial and legislative reform outcomes.

DSEWPaC would welcome the opportunity to enter into discussions with DECCEW and other relevant ACT authorities around the potential for collaboration in these areas.