

Please attach the following **one-page summary** to your submission.

**Comments on the Interim Report for the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act)**

**Summary**

**Name of author/organisation: Malcolm Mars**

**Date: 30 July 2009**

(date of your submission)

**Which chapter(s) of the interim report are you commenting on?**

(e.g. Chapter 11: Heritage)

**3, 4, 6, 7, 8, 15, 19, 20**

**Key points of submission**

(please identify up to three main priorities or focal points of your submission):

Additional triggers required for NES

Operation of Regional Forest Agreements to be included within scope of EPBC Act

The Precautionary Principle must take priority over every other provision of the Act

**References** (if possible, include a bibliography of any documents you may wish to make available)

Internet links are included in my submission

**Confidentiality statement:**

Note that all submissions unless otherwise indicated will be published on this website. You **MUST** indicate on your submission if you wish for your submission not to be published. If you wish for your submission to not be published please mark your submission as 'Confidential'. You should note that even if your submission is not published, the title of your submission and the name of the submitting organisation or individual will be published on the web site. If you wish to not have your details published please contact the Secretariat before making a submission. Contact details from of individuals making submissions will be limited to name, suburb and State/Territory.

**Do you want this submission to be treated as confidential?**

(please state 'yes' or 'no') No

These comments **do not** contain personal information of a third party individuals. The third party individual **consents/does not consent** (*delete or strike out that which is not applicable*) to the publication of their information.

I welcome the release of the comprehensive and well balanced Interim Report in review of the EPBC Act and wish to comment on some of the key issues as follows:

Analysis of the Summary of Public Submissions confirms that the Act has failed to protect the environment as intended and should therefore be significantly strengthened and extended.

### **Additional Triggers**

As highlighted in the Review, additional triggers should be introduced for the following new matters of national environmental significance:

**Land clearance of native vegetation** as identified in Chapter 7 and recommended by the Senate Committee. The report identifies that land clearance reduces biodiversity, increases salinity, reduces water quality and exacerbates climate change. Air quality is also reduced due to burnoffs and in particular high intensity forest “regeneration” burns which sterilise the ground to make way for new plantations. It should also be noted that offset schemes do not contribute to biodiversity if they comprise monoculture plantations which are often alien and also water and chemical dependant. Furthermore, the emission of greenhouse gases arising from land clearance is not covered by the Carbon Pollution Reduction Scheme.

**Greenhouse gas emissions** as identified in Chapter 8. This would operate by setting a threshold of emissions over a certain period such as the life scale of a project. The suggestion of specifying an upper limit over which construction of a project should be prohibited is welcome and should be adopted. The suggestion that this should be aligned with the Carbon Pollution Reduction Scheme, or vice versa depending on which legislation is introduced first, is also sensible.

**Ground and surface water extraction** as identified in Chapter 8 This should include interception, storage and diversion for irrigation purposes over a specified threshold and would prevent man-made disasters such as the degradation of the Murray-Darling Basin. This is also particularly important from a Tasmanian perspective given Premier David Bartlett’s “vision” to “turn Tasmania into the food bowl of Australia” by delivering “more than 210,000 additional megalitres of water per annum for irrigation by 2014” together with previously mooted plans to export water to the mainland.

<http://www.media.tas.gov.au/release.php?id=27420>

**Wetlands of national importance** as identified in Chapter 8. Extending the protections afforded under the EPBC Act using the ANZECC criteria would bring a considerable proportion of Australia’s wetlands and water resources under the welcome ambit of the Act.

**Aerial spraying next to watercourses** should also be considered as this has the potential to severely impact upon our drinking water quality and cause harm to threatened species by toxic chemicals including many which are banned in Europe under more progressive legislation.

**A discretionary “catch all” trigger** should also be introduced for matters of national environmental significance which do not currently fall into the listed classifications. This would allow matters to be proposed by the public for referral such as the laying of thousands of 1080 laced poison baits throughout Tasmania by the Fox Eradication Tax Force:

<http://www.dpiw.tas.gov.au/inter.nsf/WebPages/LBUN-5K46YA?open>

It could also be used to cover the introduction of GMOs in States where these are permitted as suggested in clause 18.50 of the Review.

### **Chapter 3 - Scope of Environmental Impact Assessment under the EPBC Act**

The scope of the Act should be extended as identified in Chapter 3 to cover impacts on the whole environment as these are often omitted in State approval processes. For example the fast tracked assessment process for Gunns Pulp Mill failed to assess the impact on local air and water quality, social and indigenous heritage issues amongst many others. It is even more important that this is covered when State Governments legislate to extinguish all public rights of appeal as per section 11 of the Pulp Mill Assessment Act:

[http://www.austlii.edu.au/au/legis/tas/num\\_act/pmaa20074o2007294/s11.html](http://www.austlii.edu.au/au/legis/tas/num_act/pmaa20074o2007294/s11.html)

This is further compounded by proposed changes to the Tasmanian State planning laws which will allow the Planning Minister to call in projects for assessment by a 3 person panel, can override all local planning laws and only be appealed at huge financial cost through the Supreme Court:

[http://www.justice.tas.gov.au/landuseplanning/planningsystemreview/draft\\_bill](http://www.justice.tas.gov.au/landuseplanning/planningsystemreview/draft_bill)

#### **Chapter 4 - Environmental Impact Assessment**

The approval conditions require to be strengthened so that commencement of a project should not be allowed until all primary conditions relating to an approval have been complied with. In the specific case of Gunns Pulp Mill it is inexplicable that construction can be commenced before fundamental hydro dynamic modelling over 12 months relating to toxic effluent has even been started let alone analysed.

Social and environmental impacts should be assessed on the basis of a net cost benefit analysis rather than by benefits only which are generally based upon optimistic and unsubstantiated figures in favour of the proponent. This process involves a systematic evaluation of the impacts of a regulatory proposal, accounting for all the effects on the community not just the immediate or direct effects, financial effects, or effects on one group. It emphasises, to the extent possible, valuing the gains and losses from a regulatory proposal in monetary terms. The Australian Government is committed to the use of cost-benefit analysis (CBA) to assess regulatory proposals to encourage better decision making as per the Government's Best Practice Regulation Handbook (2007):

<http://www.finance.gov.au/obpr/docs/handbook.pdf#page=135>

As highlighted in the Review, the restricted timeframes for public comment are unfair given that there are various provisions in the Act which allow proponents to extend timeframes.

#### **Chapter 6 - Forestry**

It is not surprising that the operation of Regional Forest Agreements (RFAs) has received so much criticism from both public submissions and the Senate Inquiry given the lack of transparency and accountability of such operations due to their self regulation and exemption from the EPBC Act.

Although the RFAs are currently intended to achieve conservation outcomes, I whole heartedly concur with the Review's findings that "the Commonwealth does not have monitoring, compliance and enforcement mechanisms in place to determine if the RFAs are achieving these objectives; this in turn may have implications for how well the objects of the EPBC Act are being achieved in RFA regions."

It is extremely revealing and concerning that submissions made by the forest industries misrepresent the findings of the Wielangta case by asserting that the RFAs themselves provide protection for threatened species under the EPBC Act. This is confirmed by the Senate Committee's findings which are supported by the Review and detailed in clause 6.49 of the Review.

Furthermore public confidence in the RFAs has been severely diminished by the autocratic amendment made to clause 68 of the Tasmanian RFA on 23 February 2007 which was clearly meant to circumvent Judge Marshall's decision in Senator Brown's favour.

The wording of the amendment clearly dilutes the State's requirement to protect threatened species by seeking to establish that the CAR Reserve System itself protects rare and threatened fauna and flora species.

It is also of great concern that Forestry Tasmania recently sought to bypass the EPBC Act by seeking to exempt referral of the Tarkine Loop Road under the pretext that it was covered by an RFA:

<http://www.abc.net.au/news/stories/2009/03/20/2521363.htm>

The "ways forward" suggested by the Review in clauses 6.113 to 6.118 will go some way towards restoring positive environmental outcomes although not as comprehensively should the exemption for forestry operations taken in accordance with an RFA be removed from the Act.

In particular, greater Commonwealth oversight is required such as by a truly independent expert based RFA Scientific Committee as outlined in clause 6.93 of the Review. This is particularly important given that the forest industry is self regulated and the public are denied entry to State forests due to the establishment of exclusion zones.

Additionally, improved public input and consultation as outlined in clause 6.117 of the Review would also improve confidence in the operation of RFAs.

At the very least, a mechanism should be inserted allowing for forest operations to be suspended and independently assessed under the provisions of the EPBC Act, should a credible suspected breach of the RFA be reported.

## **Chapter 15: Biodiversity – Marine and Fisheries**

As noted in Clause 15.70 of the Review it has been argued that States/Territories and the Commonwealth have failed to come to arrangements which would allow regional marine plans to cover all marine waters (i.e. including state jurisdictional coastal waters) and it has been suggested that a mechanism for integrating ocean policy (exclusively Commonwealth at present) with coastal zone policy (primarily State and Territory at present) should be created.

By way of example, the Tasmanian State Government pre-empted the Final Recommendations Report issued by the RPDC in respect of the Inquiry into the establishment of marine protected areas within the Bruny Bioregion by publicly stating that it would not implement any changes that harm the fishing industry. This has resulted in the establishment of a Marine "Protected" Area which permits recreational and commercial fishing:

<http://www.dpiw.tas.gov.au/inter.nsf/WebPages/PCOX-7CU7DE?open>

The Government's arbitrary decision totally undermines the whole concept of MPAs which are meant to help ecological sustainability and protect biodiversity and may also breach Australia's international obligations under Commonwealth law. This anomaly should be corrected under overriding provisions of the EPBC Act.

## **Chapter 19: Governance and Decision-making**

In accordance with the thoughts expressed in public submissions the Precautionary Principle must take priority over every other provision of the Act and the wording of the Act should be amended accordingly.

The onus should be made on the proponent to prove beyond reasonable doubt that their proposals will have no significant environmental impact rather than individuals and small grass roots based community organisations having to prove they will cause harm. This is particularly important given the advantage that proponents normally have in the way of vast financial and staffing resources at their disposal.

As discussed in clauses 19.116 to 19.1120 of the Review the word “should” has to be replaced by “must” in order to make the provisions of ecologically sustainable development mandatory rather than just recommendatory.

I concur with the Senate Committee and many public submissions that the discretionary powers given to the Environment Minister should be reduced, made more transparent by demonstrating decisions in detail and subjecting decisions to independent review.

A further matter of concern is that decisions appear to be made by Cabinet on the grounds of political expedience rather than on environmental outcomes determined by the Environment Minister himself. This is evidenced by Peter Garrett's comments relating to Government policy in respect to the recently announced approval of a new uranium mine at Four Mile in South Australia:

<http://www.abc.net.au/pm/content/2008/s2625743.htm>

## **Chapter 20: Review Mechanisms under the and Access to Courts**

I agree with the recommendations of the Senate Committee in relation to merits review under the EPBC Act that consideration be given to expanding the scope for merits review in relation to ministerial decisions under the Act, particularly in relation to whether an action is a controlled action, assessment decisions and decisions on whether a species or ecological community is to be listed under the Act.

I also agree with the concerns about the 2006 amendments and concur with the need to reinstate and expand the right to appeal the merits of key ministerial decisions under the Act.

The cost of challenging decisions through the Courts is prohibitively expensive and the cost alone acts as a deterrence which is not in the public interest.

With regard to the suggestions raised in the submissions identified in clause 20.133 I consider that the proposal for establishment of a litigation fund or Commonwealth funded legal aid would be the preferred option, followed by application to the court at the beginning of a case for a public interest costs order.

## **Additional Information**

A major review, published in the journal [Conservation Biology](#), highlights destruction and degradation of ecosystems as the main threat to species in the southern hemisphere. The report claims that in Australia agriculture has altered or destroyed half of all woodland and forests and around 70% of the remaining forest has been damaged by logging. Loss of habitats is behind 80% of threatened species. The review's findings have been widely reported including in the UK:

<http://www.guardian.co.uk/environment/2009/jul/28/species-extinction-hotspots-australia>

<http://www.abc.net.au/news/stories/2009/07/29/2639694.htm?site=news>

## **Conclusion**

I wish to commend the Review Panel for the quality and thoroughness of the Review which provides an excellent basis for establishing improved environmental outcomes in line with the spirit of the EPBC Act.

It is vital that sufficient financial resources are made available by the Federal Government to ensure that these outcomes are achieved.

I trust that my comments will be taken on board and look forward to the issue of the Final Report.

Regards

Malcolm Mars MRICS

**M C**  
**Chartered Quantity Surveyor**

**TAROONA TAS 7053**

**Website [www.mcmarsqs.com.au](http://www.mcmarsqs.com.au)**

**Specialising in Tax Depreciation for Property Investors**

---

---