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YOUR REF:

18 December 2008

Independent Review of the EPBC Act  
GPO Box 787  
CANBERRA ACT 2601

Dear Sir/Madam

**Independent Review of the Environment Protection and Biodiversity  
Conservation Act 1999 (EPBC Act)**

Thank you for the opportunity to provide comment as part of the independent review of this Act. It is Council's experience that the *NSW Threatened Species Conservation Act 1995* (TSC Act) is currently the primary legislation for biodiversity conservation on the NSW south coast

Council notes that the *EPBC Act* is a complex piece of legislation that is beginning to have an increasing impact in our area. This submission is limited to Council's experiences with the Act's referral process and observations of its general operation and effectiveness.

**Issues for Consideration**

a) **Triggering the Act**

The *EPBC Act* is triggered by 'actions' that have the potential to impact upon matters of National Environmental Significance (NES) or on Commonwealth land.

The Act defines an 'action' as including a project, development, activity or series of activities.

The *EPBC Act* would normally be triggered at the development application stage, which usually occurs after or sometimes at the same time as the rezoning process. The timing of the referral in relation to the land use planning process is a risk management issue for the proponent and/or planning authority to consider. That is, any effort or resource expended on the proposal prior to the referral would be at risk if the proposal was subsequently refused or significantly modified under the *EPBC Act*. For this reason, an early referral was prudent for the Heritage Estates rezoning process that Council is currently involved in.

Generally, it is our experience that a referral early in the development process is likely to produce better outcomes and provide greater certainty for the proponent. To help achieve this it is recommended that:

*The definition of "action" be revised to explicitly include the rezoning process or other earlier "paper transactions" in substantial development proposals.*

b) **Cumulative impacts**

Under the *EPBC Act*, unrelated developments that may impact on critical habitat are assessed separately without consideration of their combined threat to local or national biodiversity. This is inconsistent with the Australian Governments push for 'regional planning' through the Catchment Management Authorities. This issue is not unique to Commonwealth legislation. The NSW State legislation is also ill-equipped to deal with the issue of cumulative impacts. While each individual development may not be considered a "significant impact", their cumulative impact can be very significant.

In this regard, the Heritage Estates example is located in the narrow neck of land that links Booderee National Park on the southern peninsula of Jervis Bay and larger areas of habitat to the north and west of the Bay. Stockland's Vincentia development is located approximately 1km further to the north. Booderee National Park is within Commonwealth land and the Park has voiced concerns that development in this isthmus will have a negative cumulative impact on biodiversity in the Park.

Impact on Commonwealth land was one of two *EPBC Act* triggers for the Heritage Estates, but was not for the Stockland Vincentia development. The other trigger for both proposals was impact on threatened species and ecological communities. As a result the Heritage Estates assessment process has been more involved (assessment by PER) and has had a far greater focus on the cumulative impacts (in the context of Booderee National Park) than the Stockland development (assessment on Preliminary Documentation). This has contributed to a perception in the community of inequity in the decision-making process for these two proposals and also additional resource requirements on the Heritage Estates proposal that Council is managing on behalf of the affected landowners.

To avoid perceptions of inequity, it is recommended that:

*Where a referral relates to a matter of 'National Environmental Significance' (NES) the Act consider requiring assessment of the cumulative impacts at a regional scale.*

c) **Public Environment Report Process**

This process involves the Minister preparing guidelines and the proponent preparing a draft Public Environment Report (PER) that is published and made available for public comment. Any public comments are submitted to the Minister along with a report from the Secretary of DEWHA, to assist the Minister in making a decision.

The *EPBC Act* specifically states that the Minister must consider the following:

*'matters relevant to any matter protected by a provision of Part 3 that the Minister has decided is a controlling provision for the action; economic and social matters.'*

It is Council's experience in the Heritage Estates example that the social and economic matters were not included as a requirement in the Public Environment Review guidelines. This caused confusion over what needed to be included and was a cause of some public criticism when the draft PER was exhibited. Economic and social issues need to be established upfront and included in the PER guidelines.

In hindsight, this situation could have been avoided if social and economic issues were established and included in the PER guidelines. It is therefore recommended that:

*Relevant social and economic issues be established and included in the PER guidelines.*

d) **Public participation and transparency**

The Act provides opportunities for public participation in the different assessment processes. The minimum period for public comment on draft PER's 20 business days and longer periods can be specified, as was the case for the Heritage Estates example (minimum of 30 business days).

The Heritage Estates draft PER was exhibited for more than three months. DEWHA required it to be re-exhibited because the original exhibition period did not strictly align with the first newspaper advertisement. The following comments are made as a direct result of this experience.

- i. Public exhibition requirements need to be clarified better in the Act, specifically in relation to exhibition times and newspaper advertisements in the regional and State/National newspapers
- ii. Inadequate resourcing and discontinuity with project staff in DEWHA contributed to the non-compliance of the original exhibition period

- iii. A wider range of issues was raised during the extended exhibition period. Based on this experience, the minimum period for public comment on draft PER's is considered to be insufficient for effective public consultation. The use of extended exhibition periods should be considered for complex/controversial projects.

DEWHA provide information on proposals on their website once a referral is made to allow progress of proposals to be tracked through the assessment process. The Heritage Estates section of the website does not currently include the final PER guidelines or any subsequent information such as exhibition advertisements or the draft PER. The website would be a more useful resource if all information relating to the *EPBC Act* assessment was included.

Amendments to the *EPBC Act* were passed in 2006. These changes work to limit public input by making it more financially risky for individuals and organisations to take out a legal injunction in relation to alleged breaches of the *EPBC Act*. This is achieved by the repeal of a section of the Act which prohibited orders for security for costs against parties seeking preliminary injunctions under the Act.

The *EPBC Act* amendments also reduced the scope for appeals against Ministerial decisions. Ministerial power and discretion were increased but accountability decreased. In addition to reducing public input, the *EPBC Act* amendments reduced the input of scientific advisory bodies in favour of Ministerial discretion. It is recommended that:

*These amendments be revisited and the terms and nature of public exhibition requirements be clarified.*

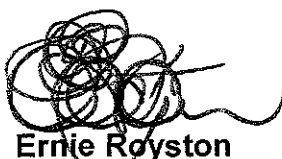
e) **Compliance**

Council questions whether DEWHA is adequately resourced to ensure compliance with the Act. Non-compliance and monitoring issues appear to be major weaknesses in the administration of the *EPBC Act*.

Thank you for the opportunity to provide a submission on this important review and I hope you find these comments constructive.

Should you wish to discuss Council's submission future please contact Elizabeth Dixon, Strategic Planning Group on (02) 4429 3320. Please quote Council's reference 13045-03.

Yours faithfully



**Ernie Royston**  
Director, Strategic Planning