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EUROBODALLA SHIRE COUNCIL

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18 December 2008

Independent Review of the EPBC Act  
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Dear Madam/Sir

**INDEPENDENT REVIEW OF THE *ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999***

Thank you for the opportunity to provide a submission to the independent review of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

Eurobodalla Shire Council notes that the *EPBC Act* is a complex piece of legislation and that in Council's experience the State Legislation, *Threatened Species Conservation Act 1995*, is the primary legislation for biodiversity conservation on the South Coast. This report is limited to Council's experience with the referral process and observations of its general operation and effectiveness. Comments are provided on the following areas of concern and statutory processes:

- ***The Listing Process***

The current listing process is not working and needs urgent amendment.

There is a lack of knowledge and general awareness of the EPBC Act generally by the community and Council staff. This is demonstrated by the very low referral rate coming from the South Coast area. Duplication of State listed species and non-alignment with State listed species has led to confusion both for the community and Council. The listing process relies on public nominations – so unless dedicated people or groups drive this, critical species or communities may not be included in the lists of the Act.

A further issue in relation to listing is Section 189B which gives the Minister discretion to allow the Scientific Committee assessments to be made public. If the Minister does not exercise his/her discretion then the Scientific Committee assessments and advice remain confidential until a listing is made. This secrecy is unnecessary and may prevent the Scientific Committee from receiving information or advice which may impact on its decision to list or not list a species or an ecological community.

Previously there was a requirement in the Act that the Minister take all reasonable steps to ensure that the lists are kept up to date. This should be reinserted to help ensure that we fulfil our international obligations to list and protect threatened species.

- ***Triggering the Act***

The Eurobodalla does not have any World Heritage areas, listed critical habitats or Ramsar wetlands. Therefore, this Act would only be triggered in the case of significant impact on a nationally listed threatened species and/or impact on Commonwealth land. Matters of national environmental significance subject to the EPBC Act within the Eurobodalla region are: 56 threatened species, 46 migratory species, 1 Critically Endangered Ecological

Community, 62 listed marine species and 37 places on the Register of National Estate, (historic/indigenous/natural)

In this regard the EPBC Act to date has had very little direct impact in the Eurobodalla Shire area.

- **Transparency**

Amendments to the EPBC Act were passed in 2006 which work to limit public input by making it difficult for individuals and organisations to take out a legal injunction in relation to alleged breaches of the EPBC Act. This was the result of 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. These amendments should be revisited.

A further significant problem with the assessment process is that it is done through the proponent rather than the Department. The Act presently provides that public comment be forwarded to the proponent who in turn provides a summarised version of submissions to the Minister along with the details of the methods proposed to address the issues raised. The Minister should consider the full and detailed range of public comments as delivered by those who wrote them rather than a summarised version prepared by someone with a vested interest in the outcome. This would improve transparency and inspire greater public confidence in the process.

Discretionary powers in the Act need to be restricted and a tighter decision maker process established. A standard for apprehended bias should be inserted to prevent what can be seen as development favouritism as well as the availability of merits review as a further means of ensuring robust decision making.

- **Public participation**

The current periods for public comment and the process for making those comments should be amended to allow for greater community participation and input. At both controlled action and impact assessment stages there is a need to extend the time periods for public comment. Referral documents are often complicated and lengthy and it is essential that the community be given adequate time to thoroughly evaluate the impacts of the proposed action, engage in the process and write constructive and relevant submissions to the Minister.

Public exhibition requirements need to be clarified better in the Act in relation to exhibition times and newspaper advertisements in the regional and state/national newspapers. While DEWHA provide information on proposals on their website once a referral is made, very limited documentation relating to assessments, is included on the site - interested parties having to seek access to reports through the proponent. The inclusion of this information would improve data accessibility and encourage participation.

- **Compliance**

DEWHAs resourcing capabilities in regard to enforcing the Act must be questioned especially in relation to compliance, monitoring and auditing. Non-compliance and monitoring issues appear to be major weaknesses in the administration of the *EPBC Act*, with many examples across the country of the Departments apparent unwillingness to enforce the provisions of the Act.

Finalising compliance and enforcement guidelines and strengthening compliance networks with other levels of government and non government organisations, together with a more timely and effective approach to potential breaches of the Act, would assist in enhancing compliance and enforcement action. Monitoring and enforcing compliance with the requirements of the Act is crucial to its effective operation.

- ***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. While each individual development may not be considered a “significant impact”, holistic examination reveals their cumulative significance to be pronounced. Given that it relates to matters of ‘National Environmental Significance’ (NES) the Act should require assessment of the cumulative impacts at a regional scale.

Although not directly affecting the Eurobodalla Shire area to date, the issue of staged referrals is also of particular concern. In this manner, the objects of the Act may be circumvented as assessing actions in stages means the cumulative impact of a project may not be recognised. A way to address this issue could be to remove the discretionary element of Section 74A and compel the Minister to refuse to accept the referral if there are reasonable grounds for believing that it is part of a larger action. Alternatively the legislation could prohibit a proponent from undertaking any subsequent undisclosed actions that could have been reasonably contemplated at the time of the referral, or requiring the minister to assess any subsequent referrals as if they were part of the first.

- ***Ecologically Sustainable Development (ESD) and Climate Change***

The promotion of ecologically sustainable development through the conservation and ecologically sustainable use of natural resources is one of the Objects of the EPBC Act. Despite this, the Act has produced unclear and narrow definitions of what are national environmental issues.

The lack of an effective trigger for projects involving major greenhouse gas emissions is a gap which requires further consideration given that the Government has now signed the Kyoto Protocol. Climate change should be included in the EPBC Act as a matter of national environmental significance. Given the seriousness of global warming, consideration should be given to listing greenhouse gas emissions as a necessary consideration either separately or in the context of ESD. Similarly, where relevant, Sea Level Rise scenario/s should be given consideration in the assessment process.

The design and implementation of the current EPBC Act makes it difficult for the Act to address climate change. Specifically the ‘significant impact’ test has proved a real obstacle given that even very large amounts of greenhouse emitted as a result of any single action in Australia will be ‘a drop in the ocean’ on the world stage. It is important here that actions be considered in respect of Australia’s emissions and obligations rather than in terms of total world emissions.

- ***Alignment and assessment***

Alignment of State, Federal and bioregional plans has the potential to address cumulative impacts and threatening processes, and to help the implementation of recovery plans. In order for these plans to be effective they should be prepared or accredited by the Threatened Species Scientific Committee and requirements inserted in the Act that require the Minister not to make decision inconsistent with the plans.

It is alarming to note that in the majority of cases, assessment officers from DEWHA process referrals and assessments on the basis of information supplied by the proponent (who has a

vested interest in the proposal) and rarely even go on-site to investigate referred projects. It is the experience of Eurobodalla Shire and other south coast Councils, that on the few occasions there has been contact with DEWHA officers, field based assessment capability and regional knowledge of flora and fauna was limited. A reliance on this assessment process and limited resourcing does not instil faith in the EPBC Act to protect matters of NES.

- ***Financial***

Increased alignment of funding priorities with EPBC Act interests ensure that matters of national environmental significance have an appropriate proportion of NRM funding invested in them, for example recent Caring for Country and Threatened Species Network grants. This should also serve to encourage further listing of species, communities and heritage items under the EPBC Act with groups and organisations seeking to further their eligibility for Federal Funding.

Another financial consideration is the issue of costs in relation to the EPBC Act. There is no clear rule about when costs will be ordered against public interest litigants attempting to use the EPBC Act to protect the environment. Costs protection and the clear guidelines for the award of costs should be inserted into the Act.

The EPBC Act is a potentially powerful piece of legislation that can satisfy many of Australia's international environmental obligations. Unfortunately the Act has weaknesses that allow contravention of these obligations. Further the inconsistency with State legislation results in duplication and confusion.

The suggestions discussed in this report on how the Act can become more capable of achieving its environmental objectives, have been corroborated with other south coast Councils, the Environmental Defenders Office and Nature Conservation Council.

I hope you find these comments constructive. Should you require any further information or wish to discuss any aspect of this submission, please do not hesitate to contact Paula Pollock on 4474 7449.

Yours faithfully



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