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19 December 2008

The Secretariat  
Independent Review of The EPBC Act 1999  
GPO Box 787  
Canberra ACT 2601  
Australia

**A SUBMISSION FOR THE REVIEW OF THE *ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999***

Dear Secretariat

Please accept the following submission from the Sunshine Coast Regional Council for consideration as a part of the Commonwealth Government's review of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC). **It should be noted however that given the timeframes associated with the submission period the following contribution has not been endorsed by the Sunshine Coast Regional Council and are the views of the officers within Council's Environment Branch.**

**Background**

In March 2008 the Noosa Council, Maroochy Shire Council and Caloundra City Council were amalgamated, as a part of the Queensland State Government's local government reforms, to form the Sunshine Coast Regional Council (SCRC). The SCRC area is one of the fastest growing local government areas in Australia and nationally recognised as a biodiversity 'hot spot'.

As planning authorities local governments rely on *effective and useable* planning legislation. Along with regional planning schemes, state and federal environmental protection legislation is paramount to achieving ecologically sustainable development and genuine biodiversity conservation across our landscapes. The SCRC believes that, through this amendment process, there is a real opportunity for the Commonwealth Government to effect meaningful change to Australia's environmental and biodiversity conservation legislation, particularly as it relates to threatened species and ecological community protection, and partnering at a local government level.

Current indicators at a state and regional level suggest that biodiversity is declining at an unprecedented rate. The current ineffective implementation of the principles of ecologically sustainable development through existing environmental protection, natural resource management and planning legislation is effectively facilitating development to the detriment of biodiversity protection and conservation.

## COMMENTS

### Role of Commonwealth Government

The Commonwealth Government, through an amended EPBC Act, ought to play a more integral role in the way the state and local governments achieve environmental protection and biodiversity conservation. The Auditor-General, Performance Audit (Audit Report No.31 2006-07) recognises and acknowledges an opportunity for the Commonwealth (and State) Government to partner with key local governments in high priority regions of Australia to ensure that matters of National Environmental Significance (NES) are considered earlier in the planning process. This may involve more effective referral mechanisms, enforcement and compliance measures (e.g. implementation of recovery plans). Perhaps the Commonwealth Government could investigate instituting a program that assists state and local governments in the on-ground implementation of an amended Act. Obviously these actions will have resource and administration implications however, as was suggested by the Performance Audit, there may be scope for providing assistance to state and local governments through a range of programs such as the Natural Heritage Trust funding.

### Integrated Planning Act 1997 QLD Bilateral Agreement

Over the last few years, the Queensland Government have entered into three bilateral agreements inserting Environmental Impact Statement (EIS) provisions and developing an accredited EIS process into three Queensland statutes for the purposes of the Environmental Protection and Biodiversity Conservation Act 2000 (Cth).

Under the *Integrated Planning Act 1997* (IPA) Bilateral Agreement, the Commonwealth Minister for the Environment Act determines that the proposal is a controlled action under the EPBCA and refers it to the State Government. The Department of Infrastructure and Planning Chief Executive determines if it has a sufficient level of State Interest and notifies the Commonwealth of its intentions. If the Chief Executive decides to proceed under the IPA EIS provisions the process is as follows;

- CE develops draft terms of reference, and release them for public consultation;
- CE considers any submissions and provides the final TORs to the proponent;
- The proponent develops a draft EIS and submits it to the CE for approval;
- The proponent publicly notifies the approved EIS and the CE receives any submissions. The assessment manager, referral agencies and the Commonwealth Environment Department must make a submission;
- CE assesses submission and directs proponent to make changes to the EIS as required; and
- CE prepares a report with their recommendations and forwards it to the Commonwealth Minister for their consideration in making a decision under the EPBCA.

The process outlined above significantly compromises the checks and balances that were originally imbued in the legislation prior to the bilateral agreements. The majority of referred proposals and controlled actions within Queensland to date have been either a State Government Department, effectively a state agency (e.g. energy, water or telecommunications provider), or a third party implementing a component of a State plan. The Commonwealth need to ensure that there isn't a conflict of interest and the quality of a process where the proponent and the assessor are not one and the same.

### **Regulation of actions that may have a significant impact on matters of NES**

The SCRC argues that the EPBC Act definition of Matters of National Environmental Significance (MNES) actually inhibits the Commonwealth's ability to implement our national and international obligations. It is noted that Australia is a signatory to a plethora of international environmental agreements, from the broad ranging e.g. the *Convention on Biological Diversity 1992* to agreements dealing with specific processes e.g. CITES, or individual groups of species such as whales however, the implementation of these agreements ranges from relatively good (e.g. CITES) to partial (the RAMSAR Convention) to almost non-existent.

As mentioned earlier the 2006 EPBC Act amendments have acted to expedite development approvals at the expense of scientifically rigorous environmental impact assessments. The relevant Minister has until recently not exercised the right to refuse development applications and relying on attaching conditions and management plan requirements to approvals has limited benefit to the EPBC Act's stated intent of protecting biodiversity.

With regard to referrals, assessments and approvals, we propose that The Inquiry should note the findings of the National Audit Office Report No 31 and recommend that the Government:

- Take appropriate action to address the deficiencies noted therein;
- Adequately resource the Department of Environment, Water, Heritage and the Arts to carry out its functions;
- Reinstate S185;
- Reinstate scientific public process of nomination and listing;
- Consider nominations only on conservation status;
- Set a maximum timeframe of 2 years for assessing nominations;
- Seek public consultation on priority assessment list; and
- Provide public access to nomination information.

Public consultation should be compulsory regarding proposed conditions attached to approvals. Similarly, third party rights to challenge referrals, assessments and approvals must be improved and protected and public interest litigants must be given adequate protection from punitive cost orders. Appropriate specific recommendations are contained in Section 2.2 of the submission from The Australian Network of Environmental Defender's Offices (ANEDO):

We recommend that:

- All referral information should be published for public scrutiny and comment;
- Any financial contributions attached to approvals should be directed to conservation &/or rehabilitation projects directly related to the development project;
- New listings should be enabled to impact on approved actions, especially where the approved project is an actual or potential threat to the newly listed species; and
- Commercial in Confidence provisions should not apply to referral and assessment information.

The Act does not currently account for cumulative impacts. The definition of 'population' should be amended to mean the population that occurs *at the site and adjacent areas*. This would avoid the possibility of destruction of the local population (which would not currently be considered 'significant' unless it impacted on the regional population). Population data is often inaccurate, with assumptions often being overly optimistic (with regard to population size). Likewise the effect of cumulative impacts is overlooked when considering local and regional populations, this has been particularly obvious in approval of clearing permits in the brigalow communities of Queensland's Bowen Basin. The Act should be amended to ensure that the cumulative impacts on a species population or area are accounted for, rather than the current approach which looks at individual development proposals in isolation.

Furthermore, the "harm minimisation" strategy of the Act is entirely inadequate because it assumes a level of detrimental impact associated with each development. The Act should take heed of the principles of ESD by aiming to *maintain* and *enhance* the health, diversity and productivity of the environment and by fully integrating the precautionary principle into the assessment framework.

The Act regulates matters that have national or even international importance; however the actions that are being regulated and the impacts that occur as a consequence actually occur at the local level. The ability of the Commonwealth to assess, monitor and enforce these matters in anything approaching an effective manner is severely compromised by the fact that this is done remotely by a central agency. This could be improved through the following measures:

- Committing adequate staff and resources on the ground;
- Developing a service delivery model that consolidates Commonwealth - Local Government ties and better utilises the proximity of and local knowledge and expertise contained within Local Government;
- Providing a trigger within the assessment process to require formal notification about the referral be provided to the Local Government in which the proposed action is to occur and relevant State Government agencies; and
- Providing a mechanism to enable third party notification about proposals requiring referral.

#### **The proponent pays for an EIS and may set parameters**

It should not be the role of a project proponent to clearly set out site values, impacts of the proposal and the measures and monitoring needed to ameliorate their actions.

It is recommended that the Commonwealth consider the following:

- Legislate basic components of EIA and EIA processes – include scope and type of information and documents, provide proforma, develop regulatory process for dilatory responses;
- Set national standards in relation to qualifications and competencies for environmental consultants and practitioners; and
- Ensure separation of proponents and assessment managers.

#### **Protection of threatened species and ecological communities**

The Act states that the protection of Listed threatened species and ecological communities are considered to be one of seven matters of National Environmental Significance (NES). The process of nominating and listing threatened species and ecological communities; compliance and enforcement of potential offences; and the implementation of recovery plans causes significant uncertainty, particularly at a local government level.

The Auditor-General's Performance Audit highlights that the vast majority of the species listed are 'carry-overs' from the previous legislation and the current requirements for listing species or ecological communities under the act are slow, long-winded, with substantial backlogs. This is seriously undermining the adoption of the precautionary principle and in some cases accelerating the loss of biodiversity, particularly at a regional scale. Perhaps the Commonwealth could consider adopting a similar process to listing species under Queensland's *Nature Conservation Act* by providing for emergency interim protection orders (cf S102 of Queensland *Nature Conservation Act* 1992).

### **Recovery Plans**

There is a requirement under the Act to review all recovery plans (for threatened species and ecological communities) every five years. The Australian Network of Environmental Defender's Offices highlight that of the 56 recovery plans due for review, from the past 5 years, only one was completed. We believe this is not acceptable. Currently, the requirement for a recovery plan concerning 'actions' associated with listed species is at the discretion of the Minister. We believe that it should be mandatory for any referral that has an impact on listed species, irrespective of mitigating measures proposed, to undertake a recovery plan of some magnitude (effectively an offset for acceptable damage). Furthermore, any decision to revoke such a plan must be transparent and allow for public comment. Wildlife conservation plans should be strengthened by:

- Making the preparation of such plans compulsory not discretionary;
- Requiring Commonwealth agencies to implement these plans on Commonwealth land;
- Requiring Commonwealth agencies to act consistently with these plans instead of '...taking reasonable steps to act in accordance...'; and
- Conduct a review with a full public report of all recovery plans that have exceeded their statutory timeframes.

Likewise development of abatement plans for key threatening processes should be compulsory, not at the Minister's discretion.

### **Consideration of other matters**

It is preferred that the Act place more emphasis on decreasing the adverse effect on any environmental value, including biodiversity or ecological integrity. Currently, the focus is on very specific issues, to the exclusion of all else. The review is an opportunity to evolve the Act to confront the challenges of climate change, population growth and rapid development on the coast. In many respects, the reactive approach of the Act to issues such as threatened species and ecosystems, results in limited maintaining of remnants in already degraded ecosystems. It is vital that the Act take a proactive approach and also recognise the critical importance of healthy and abundant ecosystems in maintaining biodiversity and providing ecosystem services such as carbon sequestration that are certainly matters of national environmental significance.

That the EPBC Act works in isolation of the effects of climate change further demonstrates the ineffectiveness of the current definition of Matters of National Environmental Significance (MNES). For example, as recently as November 2007 a Departmental Officer stated, *'the processes linking specific additional greenhouse gas emissions to potential impacts on matters protected by Part 3 of the EPBC Act are uncertain and conjectural.'* (Affidavit of Mark Flanigan). This is despite the fact that at the time there was sufficient weight of scientific evidence to remove any doubt that climate change was a reality and that anthropogenic greenhouse gas emissions are major contributing factors.

We recommend that new MNES triggers be developed to address greenhouse gas emissions, land clearing and water extraction.

Land clearing and invasive alien species are recognised as the two greatest threats to native species and ecosystems. Although State laws on land clearing are sometimes poorly enforced there is still a significant amount of 'lawful' clearing, e.g. SLATS data released by the Queensland Govt in August 2008 showed 375 000 ha of land was cleared in 2005-2006. There is a role for the Commonwealth in assessing significant clearing proposals and this justifies an amendment to the Act to include a land clearing trigger such as that suggested by ANEDO:

- A trigger for the clearing of more than 100 ha of native vegetation in any two year period;
- A trigger for clearing of any native vegetation which is a listed ecological community or which provides habitat for listed threatened species; and
- A schedule of activities that would trigger the Act regardless of the area proposed for clearing (e.g. major coastal developments).

There is a strong case for regulation of invasive species under the EPBC Act to unify the approach to this significant threat to biodiversity. It is recommended that the Commonwealth develop a list of non-native species which threaten or are likely to threaten biodiversity and regulate the trade in those species. (as per the report *Turning Back The Tide*). We support the further recommendations contained in the Invasive Species Council submission. We also commend and support the submission of ANEDO for specific recommendations to achieve the proposed amendments.

Thank you for the opportunity to provide comment and look forward to the review having positive outcomes on Australia's principle commonwealth environmental legislation.

Yours sincerely

A handwritten signature in black ink, appearing to read 'S. Skull', written over a faint grid background.

DR. STEPHEN SKULL  
MANAGER, ENVIRONMENT BRANCH