



Hydro Tasmania
the renewable energy business

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Secretariat to the Independent Review of the EPBC Act
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To whom it may concern:

Independent Review of the Environment Protection and Biodiversity Conservation Act 1999

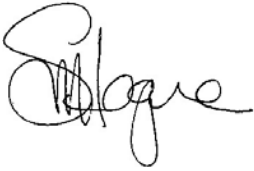
Thank you for the opportunity to make comment on the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*. Please find attached a combined submission on the issues and questions contained within the Discussion Paper and other related matters from Hydro Tasmania and Roaring 40s. The submission is structured around the chapters presented in the Discussion Paper which have relevance to the electricity generation and supply industry in Tasmania.

Hydro Tasmania is the largest renewable energy generator in Australia, and is internationally recognised for its expertise in renewable energy. Hydro Tasmania continues to make a major contribution to the production and growth of renewable energy and reduction of greenhouse gas emissions, including through global wind energy developer Roaring 40s (a joint venture company between Hydro Tasmania and China Light and Power) and with a Consulting business providing expertise internationally.

Roaring 40s is a joint venture company between Hydro Tasmania and the CLP Group, and is a leading renewable energy business in Australia. As part of a major growth strategy Roaring 40s has established itself as the leading international wind developer in China as well as having on-going operations in India. Roaring 40s is principally a wind energy developer and manages the entire spectrum of the project life cycle, from project development and construction through to ongoing operation and maintenance.

We appreciate having the opportunity for involvement in the review and would like to be kept informed of any information about the findings of the review as this becomes available.

Yours sincerely



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Roaring40^s
T H I N K I N G E N E R G Y

General Comments

Ensure transparency in decision making and details of bilateral arrangements. Avoid duplication of assessment processes between the Commonwealth and the State. On large projects this seems to work well but there are delays on small projects and developers need more clarity around processes for maintenance activities.

Chapter 1 Scope of the Act

Additional Matters of National Heritage – 'Greenhouse Trigger'

The Commonwealth Government has previously investigated the introduction of a greenhouse trigger under the EPBCA through the release of a consultation paper on the possible application of a trigger in 1999, a model trigger design in May 2000, and a draft regulation released on 16 November 2000. The Minister for Environment and Heritage subsequently wrote to State and Territory environment Ministers inviting them to comment on the draft regulation in accordance with the consultative processes required by s25 of EPBCA.

Under the previous draft regulation, the EPBCA would be triggered by major new developments likely to result in greenhouse gas emissions of more than 0.5 million tonnes of carbon dioxide equivalent in any 12 month period. This threshold was at the time equivalent to approximately 10% of the average annual increase in Australia's total greenhouse emissions.

In light of the Commonwealth Governments Mandatory Renewable Energy Targets (MRET) announced in 2001, it would seem appropriate any threshold triggers are significantly lower than those identified in the previous draft regulations and should be integrated to reflect change in the MRET targets over time.

Any project exceeding the trigger threshold or of a prescribed development type would require approval under the Act and be subject to an environmental impact assessment process. Where a bilateral agreement is in place, the assessment of projects would generally be carried out by the State government under an accredited process.

Assessments would address greenhouse issues such as the extent of likely emissions and whether the project design represents 'best practice' from a greenhouse perspective. The EPBCA assessment and approval process would ensure that environmental, economic and social factors are taken into account. Effects on international competitiveness and

regional development would therefore be factored into the process. The delivery of any net greenhouse benefits, such as through the adoption of new technology, would also be considered.

Chapter 2 Assessment and Approvals

Significant Impact Assessment

Having regard to *EPBC Act Policy Statement 1.1 - Significant Impact Guidelines, 2006*, present guidance on what constitutes a significant impact is not considered to be prescriptive enough to base a sound decision not to refer many 'actions'. Recent experience has identified a continuing confusion around significant terminology with the Significant Impact Guidelines.

Whilst it is appreciated that key terms, including the significant impact criteria outlined in the Principal Guidelines are intended to provide general guidance only and are not intended to be exhaustive or definitive, it is considered that some terms would benefit from clearer definition. Importantly, some definitions appear to be overly legalistic in nature rather than scientific and hence do not provide objective thresholds against which developers can examine impacts against or acceptable approaches to quantify predicted impacts. The following terms and concepts are highlighted by way of example:

- Page 12 – 'In the box entitled "What is habitat critical to the survival of a species?" it is unclear what is meant by the phrase "long term evolutionary development". The terms appear to be extremely broad and impossible to define (as in many cases it may not be known), hence they provide little guidance to a developer.
- Page 14 – 'The explanation of the phrase "ecologically significant proportion"' provides a developer with little guidance as it offers no quantifiable thresholds and hence leaves the determination to a subjective appraisal. It would be more useful if a process or processes to identify a significant proportion were described. In the case of potential impacts on species of fauna it would be more useful to couch the assessment in terms of ecological impacts to the species. For example, if a population viability analysis (PVA) had been undertaken on a species, it would be possible to quantify the mortality rate at which a change in the status of a species would occur.

However, the ability to do this will be limited for many species, as it is likely there are insufficient relevant data to run a PVA for many species. Secondly, it assumes that impacts to the species are understood. If a PVA is unavailable, an assessment of available ecological data can provide some guide.

- Page 15 –'under the heading "Wetlands of international importance" –'this section is predicated on a great deal of understanding about ecological systems, which rarely exists. Even in the best studied systems, the interactions between various components are often extremely complex and not well understood. Hence, this section appears unrealistic;
- Page 16 –'the phrase "substantial adverse effect"' requires further elaboration.

It is also considered that the discussion in relation to listed threatened species and ecological communities, migratory species and wetlands of international importance would benefit from the use of examples of an impact that would constitute a significant impact for the purposes of the EPBCA (as is provided for in the case of World heritage properties and places on the national heritage list).

Sphere of Influence

More significantly, the decision in *Minister for the Environment and Heritage v Queensland Conservation Council Inc* [2004] FCAFC 190 (Full Federal Court, 30 July 2004) means that the Minister must consider a broad range of possible adverse impacts, which in turn will complicate the process for gaining approvals for actions under the *Environment Protection and Biodiversity Conservation Act 1999*.

The ruling had the effect that the Commonwealth had to consider the potential downstream impacts of irrigated agriculture and other developments arising from a proposed 880,000 megalitre dam in Central Queensland, significantly expanding the Commonwealth powers under the *Environment Protection and Biodiversity Conservation Act 1999*.

The Federal Court's broader view of impacts has obvious implications for the scale, speed, extent, cost and certainty of the assessment process under the EPBC Act.

It's not clear from the decision where the line should be drawn in an assessment of impacts. If a proponent has to consider indirect impacts of a proposal, which may be outside the proponent's control, how does the proponent know which impacts need not be considered and how does the proponent know what level of assessment of those impacts (uncertain as they may be) is required? It is also relevant to consider that it might not be possible to obtain the information necessary to determine an impact (e.g. if the impact location involves another developer/proponent or is not known). The Court's emphasis on the facts of each case and reluctance to set a clear test means there is no clear set of rules to guide proponents. Many proponents will no doubt take a more conservative line to minimise the risk of legal challenge, and include an extremely broad range of possible consequences of their proposals in their assessments. Those who don't will now run a greater risk that any Ministerial decisions based on their assessments may be declared invalid.

Much rides on the nature of the "impacts" considered. Once the Minister has decided that a proposed action is a "controlled action", the Minister must choose one of five specified approaches to be used for assessing the relevant impacts of the action. The Minister's choice will be influenced by the nature of the likely impacts and the controlling provisions that the Minister considers is appropriate, and ultimately whether to grant or refuse approval to conduct the controlled action.

Existing Use Rights

Recent experience in determining the need or otherwise for a referral to the Commonwealth under the EPBC Act has highlighted the potential vagaries of the s.43A and s.43B of the Act as they relate to Actions with prior authorisation.

While S.43A of the Act allows for actions that have been authorised by a specific environmental approval prior to the commencement of the EPBC Act to continue, it remains undetermined if activities relating to the maintenance of those actions are able to continue as if they had been subject to the same environmental approval.

Similarly, as generators of Hydro electricity draw down water from lakes in Tasmania and across Australia to generate hydro-electricity, there is potential for extended drought to see such lakes approaching their normal minimum operating levels. The drawing down of lakes may also be required to undertake periodic maintenance and inspections. In doing

so, we understand the continued extraction of water from these diminished water resources may have the potential to impact upon protected matters.

In light of these concerns, it is considered that a definition for maintenance of existing actions should be developed, and/or would benefit from the use of examples of an impact that would constitute maintenance as it relates to 'prior authorisation for the purposes of the EPBCA (as is provided for in the case of World heritage properties and places on the National Heritage List, *EPBC Act Policy Statement 1.1*).

Offset

The concept of the provision of offsets for significant impacts on matters of national environmental significance that are not capable of being fully mitigated is broadly supported. That said, there is a concern that any policy developed is:

- certain in its application with clearly stated and achievable objectives;
- principled;
- outcomes-based, yet considers the practicability and cost of potential offsets;
- not overly prescriptive (eg. embraces conservation covenants, land management agreements, rehabilitation works, off-site activities, research, provision of funds or in kind contributions to community groups);
- applied equitably both within and between industries and types and scales of development;
- supported by mechanisms to ensure that the assessment, application and performance of offset measures is transparent and that learnings and any precedents are captured;
- supported with sufficient Departmental resources to ensure that offsets are monitored, reviewed and enforced effectively;
- supported with sufficient Departmental resources to ensure that offsets are effectively and efficiently implemented and link with existing State and Commonwealth initiatives;
- capable of readily incorporating and responding to new information; and
- consistent with similar policy and legislative requirements at State level.

In some cases, the nature of the residual impact of a proposal will be relatively certain (e.g. the loss of a certain number of hectares of vegetation community of a known condition). However, in many cases, potential residual impacts will be less certain (e.g.

potential mortalities resulting from bird strikes with wind turbines). Offsets must be capable of proceeding despite this uncertainty, however, there must also be flexibility so as to permit a reassessment of the magnitude of an offset required in the presence of new information.

It is considered critical that there is consistency between offset packages negotiated with State and Commonwealth agencies where dual approvals are required. It is also desirable that the quantum or broad objective of any offset is articulated by the Commonwealth at the time of granting an approval (and in the approval instrument itself), rather than making offsets the subject of an environmental management plan to be submitted at a later date. Proponents require certainty as to the cost of offsets up front and the opportunity to challenge the quantum of any offset required, should it be perceived to be excessive or uncertain. Likewise, in the interests of transparency, it is important that the public are aware of the nature of the offset to be provided by the proponent at the time of the approval being granted, rather than it being the subject of negotiations 'behind closed doors'.

Chapter 3 - Biodiversity

Listing of threatened species and ecological communities

The present framework for the listing of threatened species and communities through an ongoing process of an annualised call for nominations and the development of priority listing is generally considered to work well. However, this does not provide for circumstances in which a species or ecological community is placed under significant and immediate threat of actual harm.

Given the ever increasing impact of human intervention and climate change on the wider environment and natural processes, it is considered that the present process by which threatened species and communities are listed is potentially inadequate. In this respect, it may be appropriate for the introduction of an emergency listing procedure similar to that for the inclusion of places in the National Heritage list: emergency procedures under section 341JK-JQ, provided there is transparency in process and implications.

Amendment of Listings

While it is agreed that the process that is now in place to determine if the threatened status of species (and sub-species) is robust, it is considered that there are some historical listings that should be re-evaluated. Some of the decisions about when a sub-species is defined or listed have arguably been subjective and have occurred in the absence of robust scientific process. Given the improvements in scientific processes, we believe that the opportunity exists to more regularly review and amend lists (s.184) to determine if some of these divisions (or new splitting) and listings are justified. This is particularly the case when a sub-species is or is not listed as threatened.

Threatened Species Recovery Plans

While it is acknowledged that the establishment of Threatened Species Recovery Plans under the EPBCA is a successful approach to the protection and management of Threatened Flora and Fauna, a significant concern is that the mandatory review of such plans is a fixed term of not longer than 5 years (s.279(2)). As the success or otherwise of a Recovery Plan may be determined on a significantly shorter time frame than the mandatory review, it is considered that either an annual reporting or biennale review in relation to recovery plans would be beneficial to ascertain the ultimate success of a Plan and act as a trigger for required variation.

In parallel with more regular reviews of Recovery Plans under s.279(2) of the Act, it is considered that Recovery Teams would benefit from regular reviews of achievements and outcomes against the Recovery Plans. This could involve the establishment of detailed Key Performance Indicators against which the objectives and outcomes can be evaluated for success. Further, we believe the make-up of teams needs to have a high emphasis placed on scientists with experience in wildlife/flora research and management, rather than laypersons with limited knowledge and skills in the principles of wildlife management.

Chapter 5 Protected Areas

National Heritage Places

Hydro Tasmania have recently been involved in an attempted 'emergency listing' of the Lake Margaret Power Station as a National Heritage place. As the owner and operator of

this power station, Hydro Tasmania's principal concern in relation to this listing was the process by which the emergency listing occurs. In particular, the lack of transparency in relation to procedures including notification of the owner/land manager, assessment, opportunity for public comment.

The vagaries around listing process and stakeholder engagement have also been seen in the general nomination procedure of National Heritage places such as the Tarkine Conservation area in north west Tasmania. The nomination of this area has undergone public consultation and was recently elevated to the priority list. However, in this process key stakeholders and owners of assets within this area, such as Hydro Tasmania were not actively engaged at an early stage (i.e. during the original nomination).

The Act needs to better acknowledge the differences between the listing of National Heritage Places and Threatened Species or Ecological Communities. Typically proposed National Heritage places will have particular significance for a land holder or group of land holders within a defined geographical environment, whereas the locations of Threatened Species or Ecological Communities are not necessarily so well defined. To this end, the listing of National Heritage places has the potential to greatly affect land owners, and stakeholders with a direct impact on existing statutory rights and ongoing commercial operations.

The procedures for the listing of National Heritage places and the emergency listing procedures are broadly similar in their notification to owners and occupiers (s.324JH(5)(a)(i), and s.324JL(3)(b)(i))

The primary point at which land owners and occupiers are notified of nominations is after the places have been elevated to the *finalised priority assessment list* and an assessment is undertaken by the Australian Heritage Commission (s.324JH(5)(a)(i)). This notification is effectively after a nominated place has been subject to the invitation of public comment on the finalised priority assessment list (s.324JG). Similarly, the emergency listing procedure requires that owners and occupiers are notified once the place has been emergency listed (s.324JL(3)(b)(i)).

In doing so, this does not provide for a considered, or adequate consultation process in relation to the preservation of Heritage Places, by denying key stakeholders adequate opportunity and notification to comment on the assessment process.

We would recommend that the procedure for the nomination and emergency listing of National Heritage places require that, upon nomination, all land owners and occupiers be notified of the listing.

Similarly, with multiple layers of Heritage listings across Australia protecting many of the same places, there would appear to be an opportunity for greater consistency between State and National lists in addition to the development of bilateral agreements between the Commonwealth and States that would allow for assessment of controlled actions at a State level.

Automatic Listing of World Heritage Areas to the National Heritage

On the 21st May 2007 the Commonwealth Government determined that 16 world heritage listed properties should be included in the National Heritage List for those values that the World Heritage Committee had identified the properties as having.

This list included the Tasmanian Wilderness World Heritage Area. As a World Heritage Area containing extensive assets relating to the generation and transmission of electricity, the effective automatic elevation of this area as a National Heritage place is likely to have further and significant impacts on the operation and maintenance of these facilities. In the elevation of this area as a National Heritage place, the Commonwealth is required to, as soon as practicable, make a written plan to protect and manage the National Heritage values of each place (s.324S). As yet, there has been no notification or engagement with relevant stakeholders that this process is to proceed in the near future. While the area is currently subject to a Management Plan in respect of the values relating to its listing as a World Heritage Place, there has been no comment as to the adoption of relevant parts of this existing plan, or modification of this plan to incorporate the consideration as a National Heritage place (s.324V).

As with the Tasmanian Wilderness World Heritage Area Management Plan, these documents have the potential to significantly impact the day to day statutory rights to operate and maintain assets within these areas. It is for this reason we believe that a more open and transparent approach to the listing of National Heritage Places and the development of Management Plans needs to be instituted within the EPBC Act.

Chapter 6 - Indigenous Involvement

Assessment

As with many aspects of National Heritage places discussed previously in this submission, it is considered that there is great scope for the development of a consistent approach to the assessment of National Heritage places, and in this case, places and artefacts of indigenous significance.

Over the last five to six years most States and Territories have either recently introduced new legislation surrounding the management and protection of matters relating to Aboriginal heritage, or are intending to do so within the foreseeable future. With many of these Acts having similar structure and approach to assessment and management, now would appear an opportune time to investigate the development of a consistent approach to the assessment of indigenous heritage through the establishment of bilateral agreements with the States.

Management Plans

The present arrangement for the preparation of Management Plans for Commonwealth Reserves (s.368), allows for indigenous involvement through the general prescription of public notification through daily newspapers throughout Australia inviting comment on draft documents from the Chair or Chairperson of any land council for any indigenous peoples in the reserve(s.368(c)(ii)).

However, while this provides an opportunity to comment on a draft document, it does not necessarily follow that this has adequately supported indigenous involvement in the preparation of a management plan. To provide for an adequate level of involvement, the content of a management plan for a Commonwealth reserve (s.367) should require mandatory involvement of any relevant indigenous groups at the earliest stage of drafting. This would allow for a more holistic understanding of indigenous community values in relation to a place or region and the interaction and relationship between indigenous peoples and the environment, as required by the objectives of the Act. Greater emphasis needs to be placed on developing a co-operative approach to the protection and management of indigenous values.

Indigenous knowledge of Biodiversity

We would like to indicate our support for the continued involvement and cooperation of indigenous people as owners of knowledge of biodiversity under the EPBC Act.. This is currently demonstrated through the mandatory requirement for the role and interest of indigenous people in Wildlife Conservation Plans (287(3)(e)) and Threat Abatement Plans (271(3)(e)). Within both of these sections, and the wider objectives of the Act, the role and interests of indigenous people in the conservation of Australia s biodiversity is both acknowledged and required.

This is most significantly reinforced in the Objectives of the Act which specifically state,

(f) to recognise the role of indigenous people in the conservation and ecologically sustainable use of Australia s biodiversity; and

(g) to promote the use of indigenous peoples knowledge of biodiversity with the involvement of, and in co-operation with, the owners of the knowledge.

Similarly, the continued consideration of Indigenous tradition in the decision making processes within the Act is supported and should be maintained. This can be seen in s.258(3)(c) where the Minister must not issue a permit in relation to listed marine species unless satisfied that:

(c) the specified action is of particular significance to indigenous tradition and will not adversely affect the conservation status of the listed marine species concerned;

While this does place a caveat on the conservation state of a listed marine species it also allows for the consideration of indigenous values and traditions in the decision making process.

This is replicated in regard to listed migratory species under s.216(3)(c), and listed threatened species under s.201(3)(c).

Chapter 7 – Compliance and Enforcement

Monitoring Activities

Past experience with approvals under the EPBC Act has raised particular concerns with conditions of approval requiring monitoring regimes that have no demonstrable

environmental benefit, or are punitive rather than actually providing a net environmental gain.

A more sound approach to the development of these conditions would be one that adopts a standard scientific approach where the objectives of such requirements are clearly defined and considered. Equally important is an assessment of whether it is feasible to achieve these objectives (some studies that have been required can never meet their objectives due to unavoidably small sample sizes), and that when objectives are met the study either ceases or is altered to achieve newly defined objectives (along the lines of the principles of adaptive management).

The same principle applies to management actions that are required. The objectives should be articulated and the action should then be carefully considered whether it can achieve the stated objectives. It is also important that a sound evaluation be made of the action once in place to determine if it achieves the stated objectives. If it doesn't, the action should be reconsidered. Therefore, the basis to the approach is evidence-based management. We believe this is far more preferable to the drafting of conditions than those based on largely subjective and poorly considered requirements.

Chapter 8 – Decision Making under the Act

Decision Making

While the present role of decision making lies primarily with the Minister and extends from the determination of referrals, assessments, management plans, priority assessment lists and the like, such determinations are made in light of advice from relevant Government agencies. Similarly, the assessment criteria and terms of reference upon which the advice to the Minister is made, is robust and considered to allow for sound decision making in relation to matter of National Environmental Significance.

Notwithstanding this assessment framework as the basis for Ministerial decision making, the Act may be better served by the introduction of a peak scientific panel to undertake the decision making functions of the Minister upon the assessment of controlled actions. This would allow for the reinforcement of an overarching environmental protection assessment body that is at arms length of Government.

Transparency

As identified earlier in this submission, one of the key issues raised is the lack of transparency as it relates to the nomination, assessment and listing procedures of National Heritage places. While these procedures are generally replicated for other matters of National Environmental Significance, it is considered that the Act does not adequately identify the differences between species protection and property protection that may have multiple stakeholders (not necessarily landowners) and issues relating to asset management and operational rights under State Legislation.

It is for these reasons that we believe all land owners and relevant stakeholders should be notified at the earliest possible stage of the nomination process, by allowing for meaningful engagement to ensure that the best possible conservation outcomes can be achieved.

Additional Matters

The recent emergence of new technology in renewable energy has highlighted some of the potential deficiencies and uncertainties regard the EPBC and the assessment of previously unidentified development. In particular, the development of offshore energy generation through offshore wind farms or wave and tidal(current) generators has raised significant concern as to how these may be treated under the EPBC Act.

Typically the development in offshore environments make the assessment of likely impacts particularly difficult as it can involve a significant number of matters of NES, and to a certain extent has been recognised in the preparation of the Policy Statements under the Act. Currently there are two specific industry guidance s for offshore development, *2.1 Offshore Seismic Operations* and *2.2 Offshore Aquaculture*. While they do not purport to provide an exhaustive list of the issues that would need to be considered in relation to offshore development of the seabed and associated impacts, they do provide a general guidance on the issues to be encountered and the advice on significant impact criteria.

It is for these reasons that we believe the development of further industry guidance for offshore renewable energy facilities would be highly beneficial to these emerging industries.

Offshore Development – 'A Simplified Approach

Further to the development of new renewable energy technologies in offshore locations, it is considered that the industry would benefit greatly from a single defined assessment process led by the Commonwealth.

As described earlier, it is likely that the broad scale development of offshore locations is highly likely to require assessment of as a controlled action under the EPBCA. In addition, such projects will also require the assessment of development impacts by the State for those development within State Waters and any onshore components cabling, transmission, transformers etc). In so doing, the complexity of the approval framework through two approval processes (varying from state to state) for such development is likely to present as a significant barrier to potential developers of this technology.

Combined with the fundamental importance of developing new renewable energy resources for a low emission future, it is considered that a mechanism (bilateral agreement) by which the Commonwealth is able to undertake a full and complete assessment of such development is essential. The introduction of such a mechanism would allow for certainty of process which is crucial to facilitating the development of such industries, and would also prevent the politicisation at a Local or State Government level.