



Australian Property Institute

17<sup>th</sup> December 2008

Independent review of the EPBC Act 1999  
GPO Box 787  
Canberra ACT 2601

Dear Sir,

**Re: Independent review of the Environment Protection and Biodiversity Conservation Act 1999**

Dear Sir,

This submission constitutes a response to the invitation from the Independent Review being undertaken by Dr Allan Hawke of the operation of the Environment Protection and Biodiversity Act 1999 (EPBC), as set out in the Terms of Reference attached to the invitation of 31 October 2008.

The overall need for a review of the EPBC is supported by the Australian Property Institute (API) and the following comments and recommendations have been framed to respond to the Terms of Reference:

## RESPONSE

The API notes that the Minister for the Environment, the Hon Peter Garrett MP has stated (SMH 1 November 2008) in commissioning the review of the EPBC that the seven triggers for referral may be increased by the inclusion of a "greenhouse" trigger as part of the process.

The Institute is concerned that the inclusion of an additional trigger will lead to a significant number of development applications being referred to the Commonwealth for determination, resulting in an indefinite time frame for resolution of those development applications. Nevertheless, it is recognised that there is a growing body of case law dealing with the propriety of development in an environment of increasing climatic change, and legislative change flowing from the ratification by the Commonwealth Government in December 2007 of the *Kyoto Protocol* will necessarily occur in both Commonwealth and State jurisdictions.

It is clear that amendments to the EPBC and the *Environmental Planning and Assessment Act 1979* (NSW) will be necessary if the Independent Review recommends an enlargement of referral figures to include "greenhouse" matters.

Further, the foreshadowed introduction in 2009 of a Carbon Pollution Reduction Scheme (CPRS) suggests that climate change and natural resources issues in planning and development controls will be critical. Much carbon sequestered in Australia will be in the land, primarily in plantations, and soil. There has never been in Australia's history a free standing property right in carbon separate from land, and it is uncertain how the foreshadowed CPRS will deal with this new land based right.

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**Gail Sanders** Executive Officer

New South Wales established in 1999 a limited sequestration scheme known as "forestry rights", which are dealt with in ss87A, 88AB(1) and 88EA *Conveyancing Act* 1919 (NSW), but these rights are clumsy and do not offer the necessary security for purchasers of high value carbon rights.

Where a carbon offset under the CPRS is supported by a land-based carbon property right, the existing planning and development controls in the State jurisdictions appear to be wholly inadequate to provide protection for these rights in vegetation and/or soil. This is an important issue in the view of the API, as carbon in the form of living wood fibre or organic matter in soil is not envisaged in Australian property law which does not separate vegetation and soil from basic land ownership. It is problematic how the EPBC and subsequent State legislation will respond to this issue, and it is the view of the API that significant amendments will be necessary to facilitate a timely response in statutory land use controls, which must be complimentary to the developing international trading regime.

It is of concern to the API that a "greenhouse" trigger in the EPBC could unwittingly increase the determination times for significant and major development applications in NSW, unless a succinct definition of "greenhouse" is included in any subsequent amendment of the EPBC, and that a mandatory timeframe for determination is also included in any referrals.

The Institute has been pleased to provide the above submission and would be grateful for the opportunity to provide further amplification to the Independent Review when public hearings are held in 2009. The New South Wales Divisional Executive Officer Ms Gail Sanders (telephone 92991811) can be contacted once the Independent Review has a timetable established for hearings.

The Chair of the Institute's Government Liaison Committee Mr John Sheehan will be providing the further amplification to the Independent Review, and will be able to answer any questions that may be raised in response to the above submission by the API.

Yours sincerely



Chris Egan

President