



12 December 2008

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

Dear Madam/Sir

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

Firstly, I would like to thank you for the opportunity to provide comment for the purpose of this independent review. It is member Councils experience that the state legislation (*Threatened Species Conservation Act 1995* (TSC Act)) is the primary legislation for biodiversity conservation on the south coast.

The *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) is the Australian Government's central piece of environmental legislation

The Southern Councils Group notes that the *EPBC Act* is a complex piece of legislation. This report is limited to Member Councils experiences with the referral process and observations of its general operation and effectiveness.

It is acknowledged that the *Environment Protection and Biodiversity Conservation Act 1999* covers three main areas.

- *Biodiversity Protection* - The main tool used is the listing and management of threatened species and ecological communities.
- *Protected Areas* - These include areas such as World Heritage sites and Commonwealth-administered National Parks.
- *Environmental Impact Assessment (EIA)* - this involves the assessment and approval of:

**Issues for Consideration**

**Assessing forestry operations**

Forestry activities are excluded under RFA exemption; this has been contentious in the past and is contentious in the South East coast. If this exemption remains there is a need to ensure the RFA process includes stronger requirements to consider environmental impacts, with stronger controls.

Southern Councils Group

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### **The Listing Process**

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 can lead 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 lists

Care needs to be taken with the listing of Endangered Ecological Communities (EECs) at the federal level to ensure that there are clear delineations between EECs listed in the State and Federal legislation. Recent confusion arose in the Wollongong local government area over upland swamp communities, where the definition of Montane Peatlands and Swamps listed under the TSC Act overlap somewhat with those listed under the EPBC Act – Temperate Highlands peat Swamps.

This matter required technical assistance with DEWHA representatives who were not familiar with our local plant communities and could provide limited support to resolve the matter. To resolve this issue three options could occur:

1. Regional DEWHA representatives could be available to assist in the field with such matters.
2. Clearer delineation in the EECs needs to be made in the listing to distinguish differences between similar communities listed in State and Federal legislation.
3. *EPBC Act* EEC listings should equate the communities to local vegetation map units (just as is done for TSC Act listings).

### **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 goes against the Australian Governments push for 'regional planning' through the Catchment Management Authorities. This issue is not unique to Commonwealth legislation, largely 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.

The state legislation also needs attention. Under the current bilateral agreement significant impacts are determined using section 5a of the *Environmental Planning and Assessment Act*. Cumulative impacts need to be included in the impact assessment. This could be done by:

- Amending s5a *EPA Act* to include cumulative impact assessment
- Placing additional requirements on applicants to assess cumulative impacts in addition to *EPA Act* requirements.

### **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 EPBC Act would normally be triggered at the development application stage, which usually occurs after or 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 to consider. That is, effort 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.

Generally, a referral early in the process is likely to produce better outcomes and provide greater certainty for the proponent. To help achieve this, the definition of "action" could be revised and explicitly include the rezoning process.

### **Public Environment Report Process**

This process involves the Minister preparing guidelines and the developer 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:

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

In the experience of some Councils, 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. In future, economic and social issues need to be established and included in the guidelines.

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

Factors to be taken into account by the Minister also include the principles of ecologically sustainable development. 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.

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, consideration should be given requiring consideration of Sea Level Rise scenario/s.

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

### **Public Participation and Transparency**

The Act provides opportunities for public participation in the different assessment processes. The minimum period for public comment for draft Public Environment Report is 20 business days and longer periods can be specified.

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.

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. In the case of the Heritage Estates site, it does not currently include the final PER guidelines or any subsequent information such as exhibition advertisements or the draft PER. The site 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. These amendments should be revisited.

### **Compliance**

Southern Councils Group 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*.

I hope you find these comments constructive.

Yours sincerely

A handwritten signature in black ink, appearing to be 'Debby Lenson', written over a horizontal line.

Debby Lenson  
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Chair Southern Councils Group Natural Resource Managers Committee