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Committee Secretary
Senate Standing Committee on Environment, Communications and the Arts
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Sent by email to: eca.sen@aph.gov.au

Dear Sir or Madam

Submission to the Inquiry into the operation of the *Environment Protection and Biodiversity Conservation Act 1999*

Summary

In this submission I have identified three significant legal impediments to the effective operation of the environmental assessment regime in the EPBC Act that warrant attention in your review of the Act. They are:

- The inability of community members to make referrals to the Minister.
- The limited scope of environmental matters that the Minister may consider under section 136.
- The accreditation of dysfunctional State processes by the Minister.

I have recommended the following changes be made to the EPBC Act to overcome these above impediments:

- Those community members with rights to bring an injunction or seek judicial review under the Act should have the right to refer actions to the Minister.
- Section 136 of the Act should be amended to allow the Minister to consider any and all environmental impacts (just as the Minister can consider any and all social and economic impacts) when deciding whether or not to approve a controlled action.
- Part 3 of the EPBC Regulations should be amended to strengthen the requirements that the Minister must be satisfied about before entering into a bilateral agreement, and the EPBC Regulations must be amended to prescribe the standards for an individual assessment regime to be accredited. Currently no such standards are prescribed despite the EPBC Act foreshadowing them in section 87(4).

My background and expertise

I worked as a lawyer with law firm Freehills from March 2003 until September 2006 specialising in environmental law, including advising on environmental assessment processes in Victoria and Tasmania. During that time I also volunteered as a casual lawyer with the Victorian Environment Defenders Office.

I am currently undertaking a PhD in environmental law and environmental studies, and I am teaching environmental law at the Australian National University. I am researching Australian environmental assessment laws and processes, particularly within the context of the Channel Deepening Project and the

Sugarloaf Pipeline Project in Victoria. I teach environmental law as part of the ANU College of Law subject offerings.

It is on the basis of this expertise and research that I make this submission, which focuses solely on legal aspects of the environmental assessment process within the EPBC Act.

Relevant terms of reference

In making my submission I am responding in part to the following terms of reference of your review:

> "*b.* *lessons learnt from the first 10 years of operation of the EPBC Act in relation to the protection of critical habitats of threatened species and ecological communities, and potential for measures to improve their recovery;*
>
> *c.* *the cumulative impacts of EPBC Act approvals on threatened species and ecological communities, for example on Cumberland Plain Woodland, Cassowary habitat, Grassy White Box Woodlands and the Paradise Dam;*
>
> *d.* *the effectiveness of responses to key threats identified within the EPBC Act, including land-clearing, climate change and invasive species, and potential for future measures to build environmental resilience and facilitate adaptation within a changing climate;*"

In my view, three legal limits within the environmental assessment regime of the EPBC Act have diminished and continue to diminish the capacity of the law to protect critical habitats and ecological communities, to assess cumulative impacts, and to restrict the effectiveness of responses to key threats identified within the EPBC Act. I discuss these limits in turn.

Inability of community members to make referrals

The referral process and the protection received by referring actions under the Act (an action referred and found not to be a controlled action is effectively exempt from injunction or 'prosecution') should, in theory, mean that there is a tendency of proponents of developments to over-refer. This has, to some degree, occurred. When practising as a lawyer I would advise clients to refer projects to the Minister under the Act as a risk minimisation strategy. Other environmental lawyers advised in the same manner.

Over-referral is not evident in all industries, however, especially in those industries that operate on relatively small scales by small businesses and where industry participants do not have ready access to environmental managers and are not advised by lawyers with expertise in environmental law. Agriculture and fisheries are two such industries identified by Macintosh and Wilkinson (Macintosh, A and Wilkinson, D (2005) 'EPBC Act – the case for reform'. *The Australasian Journal of Natural Resources Law and Policy.* 10(1): 139). Farming and fishing are not the only types of development not being referred. Small tourism activities, water extraction activities and small sized construction activities have all been brought to my attention as not being referred despite the activities taking place in or close to protected areas or significant habitats.

One notable problem with small scale developments of these types not being referred despite their potential for significant impacts on matters of national environmental significance is that cumulative impacts on protected species and habitat simply cannot be assessed. The Department does not have the full picture of activity occurring within a region or the full extent of threatening processes operating on protected matters.

Certain projects have been brought to my attention by community groups concerned about the impacts of the individual projects on their region as well as the potential cumulative effects of further future developments. Unfortunately, there is no avenue for such community members to make a referral to the Minister under the EPBC Act for these projects to be assessed; or at the very least for the Department to be put on notice about the current degrading activities occurring in a region for the purpose of ongoing or future cumulative assessments.

The absence of such referral rights ignores the important compliance role that communities could play in referring matters to the Commonwealth. These same community groups could bring injunctive

proceedings at the Federal Court. They have the right to do this under the Act. These rights are supposedly a guarantee of community participation and a protection of third party rights. They are, however, illusory rights. The Federal Court is inaccessible, costly, and a frightening prospect for community groups who have seen recently unsuccessful community groups be required to pay the legal costs of the Commonwealth. A right to refer a matter would be a far greater guarantee of participation in the Commonwealth's environmental assessment process.

There should be no concern about an inundation of referrals given that the system is already serviced by a compliance branch that investigates claims of breaches of the Act, including the failure of proponents to refer projects. Based on a recent experience assisting a community group this compliance process was too long, opaque and objectively partial. If the community group had been able to refer the offending action, then they would have been able to make public submissions, would have seen the defence of the response of the proponent and would have been able to request reasons for any not-a-controlled-action decision of the Minister.

In order to ensure that any right of the community to refer matters is not abused, it would be sensible to restrict the right to the same parties that are able to initiate an injunction or seek judicial review of the Minister's decision – that is any person affected or with standing under the broadened standing provisions under the Act.

The limited scope of section 136

Section 136(1) of the EPBC Act requires that the Minister, when deciding whether or not to approve an assessed action, to consider any and all social and economic impacts of the action. However, the Minister is only required to consider any and all environmental impacts insofar as they relate to a controlling provision of the EPBC Act (so if the Minister earlier decides that an action is likely to have a significant impact only on migratory species and no other matter of national environmental significance, then the Minister is only required to consider the environmental effects on migratory species).

Section 136(5) then prohibits the Minister from considering any other environmental matter (so again, the Minister could not consider the impacts of the project on non-migratory species even if the impacts are likely to be greater on those other species).

It is anomalous and disingenuous for an environmental assessment law to restrict the environmental matters that may be considered by the Minister in such a way while at the same time allowing the Minister to consider broad and systemic impacts on society and the economy.

The splintering of the environment in the way that section 136 requires also ignores the complexity and interdependency of ecosystems and habitats and also fails to respond to the Commonwealth's international law obligations to conserve biodiversity. This is a matter that has been explored by EIANZ in its submission.

Two projects where the limitations in section 136 led to defective Commonwealth assessments were in the Channel Deepening Project and the Gunns Pulp Mill Project. In both projects the most important environmental matters for the project could not be considered by the Commonwealth (in the Gunns case non-Commonwealth marine area impacts and in the Channel Deepening case impacts on non-protected species or areas and beyond Commonwealth land). Rather, the Commonwealth was restricted to investigating the environment in a fractured manner.

The Channel Deepening Project emphasised this particular failure of the EPBC Act. In that case Commonwealth matters were separated and assessed in isolation from other impacts. They were subject to a separate report, and not synthesised with other matters that were being prepared for the State assessment.

At a minimum section 136(5) of the EPBC Act must be repealed to give the Minister the ability to consider additional environmental matters where they are relevant and in order for the Minister to consider biodiversity, habitat and ecological community impacts in a systematic way. More preferably section 136 should require the Minister to consider all and any social, economic and environmental matters. There

are no constitutional law reasons for the Act to limit inquiry of environmental matters while providing broad powers to inquire into economic and social matters. To the extent that the Act depends on the external affairs power, once an assessment has been initiated under the Act, environmental considerations could be very broad and still be proportionate and adapted to the objectives of the treaty that the EPBC Act is attempting to give effect to. Arguably, the considerations must be broad to give proper effect to the objectives of the treaty given the advancement of ecological knowledge about the interconnectedness of aspects of our environment.

The accreditation of dysfunctional State processes

As alluded to above, the Commonwealth does not always receive an appropriate assessment by accrediting a State assessment process. In the Channel Deepening Project this was certainly the case. In the Gunns Pulp Mill Project the accredited process was not even completed. Extraordinarily, the Minister recently accredited a process that does not exist in Victorian law for the Sugarloaf Pipeline Project. In that process community input was restricted and the terms of inquiry too narrow for the purpose it was put (the inquiry did not look into social and economic matters, which the Minister must consider under section 136 of the EPBC Act).

Disappointingly the Commonwealth has entered bilateral agreements with New South Wales and Tasmania (two States I am most familiar with) to accredit processes that are not explicit, highly discretionary (with State decision makers understandably charged with exercising their discretion in the interest of the State and not the Commonwealth), and that do not guarantee public community involvement.

The consequence of the Commonwealth accrediting dysfunctional State assessment regimes is that matters of highest concern to the Commonwealth and the community, including protecting biodiversity and responding to ecological threats, are not guaranteed to be systematically and transparently assessed as part of the process.

The Commonwealth must demand more from the States and should be more critical in evaluating State processes before assessing them. Under the bilateral agreement process the States must give certain commitments. A more productive approach would be for the Commonwealth to set out (as the law facilitates) a set of standards that all assessment regimes in the country must follow. If States cannot provide assessments of those standards then the Commonwealth could consider taking power to undertake combined Commonwealth and State environmental assessments away from the States.

Part 3 of the EPBC Regulations should be amended to strengthen the requirements that the Minister must be satisfied about before entering into a bilateral agreement. A set of standards could be set. Further, the EPBC Regulations must be amended to prescribe the standards for an individual assessment regime to be accredited. Currently no such standards are prescribed despite the EPBC Act foreshadowing them in section 87(4) of the Act.

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I hope you find this submission helpful in your deliberations. Please contact me if you require any clarification of the points, views or suggestions that I have made.

Yours sincerely

Brad Jessup
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ANU College of Law