

27 October 2006

Secretary, Senate Environment, Communications, Information Technology and the
Arts Committee
Department of the Senate
PO Box 6100
Parliament House
Canberra ACT 2600
Australia

Dear Secretary

Environment & Heritage Legislation Amendment Bill (No. 1) 2006

1. Outline

This submission is made by Associate Professor, Dr Lee Godden and Ms Jacqueline Peel, Senior Lecturer from the Faculty of Law at the University of Melbourne. Both authors are specialists in the field of environmental law and have researched and written extensively on issues of environmental impact assessment [EIA], including the provisions of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) [EPBC Act].

The following submission provides some background, contextual information on the EPBC Act and the current Bill before addressing three proposed amendments which we urge should not be accepted if the Act is to maintain – as promised – ‘protection for Australia’s important biodiversity and heritage’ and ‘strong environmental outcomes’ (Second Reading Speech, p. 3). These amendments relate to:

- The impact assessment process and, in particular, the insertion of a narrow definition of environmental ‘impact’ in s 527E (Item 783, Expl. Memo);
- The removal of ‘no undertaking as to damages’ protections for civil society actors seeking to enforce the EPBC Act by way of injunctions (Item 763, Expl. Memo); and
- Amendments to s 528 directed to the clarification of the definition of ‘environment’ and, specifically, the inclusion of social, economic and cultural values within that definition (Expl. Memo, p. 7).

While these amendments may appear minor on their face, in fact they represent a major substantive change to the scope of the EPBC Act. They have the potential to reorient the EIA process under the legislation to make it less comprehensive, less transparent and to increase the role of Ministerial discretion.

2. Rationale of the Amendments

The *Environment & Heritage Legislation Amendment Bill (No. 1) 2006* makes a large number of amendments to the existing *Environmental Protection and Biodiversity Conservation Act 1999* (Cth) [EPBC Act]. The second reading speech, explanatory memorandum and related material indicate that the rationale of the amendments is to

make the EPBC Act more efficient, effective, to allow for more strategic approaches and to provide greater certainty in decision-making (Expl. Memo, p. 2). These changes to the operation of the Act are to be made without weakening the protection for biodiversity and heritage.

3. Context of Existing EPBC Impact Assessment Provisions

The EPBC Act outlines a defined number of ‘matters of national environmental significance’ [MNES] which act as ‘triggers’ for the operation of the Commonwealth assessment and approval processes under the legislation. The MNES triggers include; declared world heritage properties; National Heritage places; declared wetlands of international importance; nationally listed threatened species and ecological communities; and several other criteria including actions on or in relation to Commonwealth land. Currently, for one of the MNES triggers to be enlivened, there must be an identifiable ‘action’ that has, will have or is likely to have, a ‘significant impact’ on the MNES or, in the case of actions involving Commonwealth land or Commonwealth agencies, on the ‘environment’. Clearly then **the scope of the term ‘impact’ is critical to the operation of the assessment components of the Act**, as in effect, it sets the potential spatial, temporal and environmental limits where the assessment of impact needs to be considered.

However, the crucial concept of ‘(likely) significant impact’ is not defined by the EPBC Act. The absence of a definition of ‘significant impact’, either in the EPBC Act or indeed in most other EIA legislation, is not surprising given that determinations on this matter will be heavily influenced by the particular facts at hand, which will vary from case to case. Accordingly, development of the concept of significant impact has been left principally to the explication of the courts, where the meaning has been construed on a case-by-case basis. The reasoning behind this approach appears, in part, to have been premised upon the difficulties in providing a generic definition that could apply to the diverse circumstances in which ‘actions’/ projects take place. **Any a-priori definition may unduly limit the range of possible circumstances in which the Act may apply.** By contrast, a series of Federal Court cases have elaborated upon the meaning of ‘(likely) significant impact’ pursuant to the EPBC Act, (for example: *Booth v Bosworth* [2001] FCA 1453, *Minister for Environment & Heritage v Queensland Conservation Council (Nathan Dam)* [2004] FCAFC 190).

4. Direct and Indirect Impacts

An issue which has emerged in the course of judicial determinations of ‘significant impact’ is the extent to which ‘indirect effects’ are caught by the notion of impact under the Act. Many MNES triggers relate to protected areas with defined boundaries (e.g. world heritage properties, National Heritage places, Ramsar wetlands). The EPBC Act could potentially operate within fairly narrow limits were ‘impact’ to be construed as restricted to ‘direct’ impacts. ‘Direct’ impacts here would refer to immediate physical effects felt within the protected area (e.g. cutting down trees in a world heritage area). On the other hand, the potential coverage of the Act will expand to the extent that interpretation of the concept of ‘impact’ embraces notions of ‘indirect impact’, generally expressed by reference to the concept of ‘sufficient nexus’. Increasingly, it is recognised that the concept of environment signifies a holistic, integrated and pervasive system. To regulate effectively for the protection of

biodiversity and heritage in this context requires a sophisticated and comprehensive definition of impact that can encompass the complexities of the system. The **moves to incorporate consideration of indirect impacts are necessary ones to give due acknowledgment to the expansive definitions of ‘action’ and ‘environment’ under the Act and to ensure that the assessment process retains sufficient flexibility to address a diverse range of circumstances** consistent with the legislation’s guiding principles of ‘ecologically sustainable development’ [ESD].

4.1. Defining Impact

The proposed s 527E inserts a legislative definition of impact that draws a distinction between the direct and indirect impacts of an action. In many ways this is an arbitrary distinction ignoring the holistic conception of what constitutes an environment. In addition, we submit that any attempt to determine the meaning of impact in a legislative manner is not likely to provide a greater degree of certainty to the EIA process, nor will it necessarily promote efficiency in the operation of the Act.

We note that the definition of impact, and in particular s 527E (2), which seeks to clarify the notion of indirect impact, draws heavily on models and concepts derived from tortious /negligence areas of law. In this area of law, there have been numerous attempts to define conclusively, key concepts such as ‘substantial (or effective) cause’, ‘reasonable foreseeability’ of risk and harm and remoteness of damage. The Australian courts have wrestled with the scope of such legal definitions in their application to factual circumstances. Tests in negligence law such as ‘not far fetched or fanciful’ have come and gone as a semantic aid to gauging risk without producing an instrumental certainty of either definition or application. In particular, tortious concepts were developed in a period characterised by a relatively narrow scientific view of causation and risk. In many instances these legal concepts predate major scientific advances in the knowledge of the environment and the effects of human activity upon ecosystems – developments which have highlighted the variability, complexity and inherent uncertainty of ecological processes.

Thus to import terms and models from the tortious field of law into EIA runs the risk of producing greater uncertainty by imposing ambiguous concepts developed in another area of law. In addition, this approach ignores the considerable jurisprudence already developed by the courts in the application of well-established tests such as ‘(likely) significant impact’, including in the case of *Nathan Dam*. Consequently, in our submission, **it would be better to retain the existing judicial interpretation in relation to ‘impact’, which has developed within a more holistic conception of environmental impact and can be explicated on a case-by-case basis.**

4.2. Legislative Tests for Indirect Impact

Alternatively, if a new legislative definition of ‘impact’ is preferred, then we suggest that consideration be given to modifying the proposed s 527E. There are two principal bases for our concern.

First, in relation to s 527E (1) (b), the proposed definition of indirect impact imports the idea of ‘substantial cause’. The notion of a substantial cause is predicated upon narrow, determinative views of causation. This approach is inconsistent with

emerging scientific understanding which emphasises the indeterminate and diffuse nature of causation and risk. We suggest that the concept of ‘sufficient nexus’, used in the existing case law, provides a definitional terminology more consistent with prevailing scientific understanding of causation and the need for a precautionary and holistic approach to EIA.

The need for an approach which does not focus only on isolating a single definitive cause of an event but instead looks to the cumulative outcome is crucial when considering ‘indirect impact’. Typically, issues of indirect impact will arise in the context of major projects with potentially wide-ranging and diverse effects. Thus it is crucially important to provide a comprehensive scope for the operation of the assessment process. Such an approach will best achieve the objectives of the amendments in adopting a strategic assessment process which will, ‘put in place measures to enable developers to avoid impacts on the matters of national environmental significance protected by the Act’ (Expl. Memo., p. 2). The many deficiencies of the impact assessment process in effectively gauging long-term environmental impacts are well documented in the scientific and professional literature (e.g. Thomas and Elliott, 2005). These deficiencies will be exacerbated if an unduly circumscribed concept of indirect impact is adopted in the EPBC Act.

It is therefore our submission that **the concept of ‘substantial cause’ should be removed from s 527E (1) (b)**. The section should be **redrafted to reflect the view that an event or circumstance is considered an indirect consequence of the action if such action was a contributing cause of that event or circumstance**. We believe qualifications which can be effected by s 527E (2) will be adequate to preclude trivial or minimal indirect consequences being caught within the definition.

The second basis of concern with the proposed definition of impact relates to s 527E (2). The definition is extremely cumbersome, requiring a large number of hurdle requirements to be met to satisfy s 527E (2). Again, this model of linear causation is out of step with scientific understanding and operates to produce a very narrowly constructed concept of indirect impact. In particular, we suggest the idea that a primary action needs to facilitate a secondary action (see s527E (2)(e)) is unduly restrictive and suffers from similar limitations to those outlined in relation to ‘substantial cause’. We suggest also that the need to meet the test that both the secondary action and the consequential event or circumstance must be either within the contemplation of the primary person or a reasonably foreseeable consequence (ss 527E(2)(f), (g)) places a high evidentiary burden upon a party seeking to establish environmental impact.

It is therefore our submission that **the number of hurdle requirements in s 527E(2) be reduced to ease the evidentiary burden on those asserting an indirect impact**. Further, the possibility of a non-linear model of primary/secondary actions and consequential events and circumstances should be included within the requisite section.

Moreover, the idea that the secondary action and consequential event and circumstance must be within the contemplation of the primary action taker is self-serving for the developers who will be carrying out the assessment process. The test, rather than requiring proponents of actions to scope broadly for potential impacts in

their strategic planning for the activity, appears to promote a narrower approach. If an event or circumstances is not taken into account i.e. does not fall within the contemplation of the primary action taker then this formulation indicates that it cannot be caught by the definition of indirect impact. Surely, a test which operates to narrow the contemplation of environmental effects (i.e. strategic planning) by a proponent is not consistent with best-practice EIA; nor is it consistent with the animating principles of ESD under the Act.

It is therefore our submission that **the requirement that the secondary action and/or event circumstance be within the contemplation of the primary person be deleted from ss 527E (2) (f),(g)**. The test is unduly subjective and operates against the promotion of strategic assessment and planning.

5. Removal of ‘no undertaking as to damages’

An important enforcement tool currently provided by the EPBC Act is the capacity for any ‘interested person’, including environmental civil society groups, to seek an injunction to prevent breaches of the Act (s 475). Such applications supplement the enforcement activity carried out by the Department of Environment and Heritage, and play an important role in ensuring the accountability of developers for the environmental consequences of their actions on MNES. Environmental groups and other community members, however, rarely have the necessary resources to meet demands for an undertaking as to damages, which is the conventional legal prerequisite for issue of an interim injunction. An undertaking as to damages requires a demonstration that the applicant has the funds to compensate the other party fully for interim losses if, when the matter goes to full trial, the applicant’s claims of environmental damage are not upheld. Even where environmental groups have very strong claims of environmental harm to put before a court, many are reluctant or unable to do so if required to give an undertaking as to damages. In this respect, s 478 of the EPBC Act – preventing the Federal Court requiring such an undertaking in applications for interim injunctions – facilitates enforcement of the Act by environmental groups.

The proposed removal of the ‘no undertaking as to damages’ provision in s 478 is, in our submission, **likely to affect, adversely, the enforcement strength of the legislation**. It also **sends a message that the government is not supportive of greater transparency and accountability for development proponents under the Act**; a message at odds with the guiding ESD principles of the legislation.

Moreover, we would submit that no justifiable reason for the amendment can be advanced on the grounds of improving efficiency of the EIA process. In practice, very few applications for injunctions are brought by environmental groups and community members because the costs of litigation are prohibitive for most groups. For example, the Federal Court may impose costs orders on unsuccessful applicants, requiring them to pay their opponents often considerable, legal fees. For already resource-poor environmental groups this means that enforcement action in the Federal Court under the EPBC Act will be reserved for those cases where creditable groups believe there is a very strong case of environmental harm. **The already limited capacity for environmental groups to aid in EPBC Act enforcement should not**

be further handicapped by removing protections like the ‘no undertaking as to damages’ provision.

6. Definition of environment

The constituent components of the term ‘environment’ are central to delimiting the ambit of the EPBC Act and the context for its operation. The current definition contained within s 528 of the EPBC Act reflects the need to incorporate natural, cultural and social elements within any holistic conception of ‘environment’ by including biophysical elements as well as the aesthetic and cultural attributes of areas. The proposed amendments seek to give greater emphasis to the application of social, economic and cultural aspects of heritage values.

The heritage values of a place are identified in s 528 as one of the four ways in which the meaning of ‘environment’ may be interpreted. In Australian environmental history, the issue of defining heritage value has been a fraught one. Over time though, there has been an acceptance of the need for an integrated and balanced perspective to assessing heritage values. In part, this has been driven by international developments where concepts such as cultural landscapes, which incorporate the biophysical and social aspects of a place, have gained international recognition. The proposed amendments, rightly point to the need for a similar perspective which takes account of the social, economic and cultural aspects of the heritage values of a place. Nonetheless, the interpretation of heritage values must sit within a broader contextual approach which also considers the other components of the ‘environment’ identified within s 528 of the EPBC Act. Any assessment of heritage values thus must be consistent with the overarching objectives of the EPBC Act which relate to the principles of biodiversity protection and ecological sustainability. Therefore while we endorse a broadly-conceived approach to defining the heritage values of places, we would consider that such assessments need to duly acknowledge the vulnerability of ecological processes to human impact and the need to ensure adequate protection for them. **Accordingly, we suggest consideration should be given to the insertion of a sub-section to the s 528 definition of environment which reflects the need to retain a balance between biophysical and social and cultural values.**

7. Summary

In summary we submit that:

- The proposed amendments relating to legislative definitions of impact and indirect impact are –
 1. largely unnecessary and will not promote certainty in the operation of the Act;
 2. unhelpful as they will simply introduce more ambiguity, for example, in relation to what is a ‘substantial cause’; and
 3. unjustifiably prioritise ‘development interests’ over ecological sustainability, which instead demands the kind of holistic assessment process initiated by the Federal Court's *Nathan Dam* decision.
- The removal of ‘no undertaking as to damages’ protections on applications for injunctive relief by civil society groups:
 1. may decrease the enforceability of the Act’s requirements;

2. reflect adversely on the government's commitment to greater transparency and accountability of development actions under the Act; and
 3. are unnecessary as there are already overwhelming financial pressures on environmental groups to ensure that enforcement actions are only brought in the most worthy of cases.
- The proposed additions to the definition of environment while providing a welcome enhanced emphasis on the social, economic and cultural aspects of heritage places also need to retain a balanced approach which promotes the goals of biodiversity protection and ecological sustainability.

We thank the Senate Committee for the opportunity to provide comments on the *Environment & Heritage Legislation Amendment Bill (No. 1) 2006*.

Yours faithfully,

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