PETER ROBINSON PLANNER
PO BOX 4751 CAIRNS
QUEENSLAND 4870
PH (07) 4041 5118
FAX (07) 4041 5113
p.robinson@iig.com.au

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The Secretary
The Senate Standing Committee on Environment, Communication and the Arts.
P.O. Box 6100
Parliament House
Canberra ACT. 2600.

Re: The Australian Senate Inquiry into the Operation and Effectiveness of the Environmental Protection and Biodiversity Conservation [EPBC] Act 1999.

Dear Sirs

The EPBC Act is problematic and does not serve the greater community well. This is a sentiment often expressed by all four groups who are involved in the processes set out in the Act. The groups include:

* The community especially conservation groups.
* Proponents – those that would propose and carry out projects but are subject to scrutiny under the Act.
* Consultants – those who commonly assist proponents in managing applications under the Act and
* The officers of the Department of Environment who process applications under the Act.

Lack of Certainty

One of the biggest problems is the lack of certainty in the interpretation and application of the Act. Community groups criticise the outcomes of applications because they seem to be inconsistent and proponents have the same problem.

When seeking guidance from Departmental officers as to how certain applications or issues will be treated, it is possible to get two or more different opinions from two or more different officers or, what is equally frustrating, no opinion or any guidance at all.

The Act speaks of significant adverse impacts of matters of National Environmental Significance but gives no real and certain guidance or definition as to what "significance" means. Experience indicates that significance is a subjective concept largely in the mind of the individuals processing the application.

When the Department makes a decision that a matter is a Controlled Action because it is deemed to have a significant impact on an area e.g. World Heritage or a species e.g. cassowary, no objective reason or measure is given as to what that impact is nor are the criteria provided by which it is determined to be significant.

For example I have been told by one DoE officer administering the EPBC Act that cassowary are endangered species. One of the significant modes of mortality for

cassowary is traffic – collisions with cars. Any additional traffic in an area will cause increased risk of cassowaries being hit by cars. A new duplex dwelling in a township (in this case Mission Beach) will increase traffic and this is likely to be considered a significant adverse impact on a threatened species.

The lack of published definitions and objective criteria for the determination of particular impacts and their degree of significance makes application of the Act unworkable, vague and open to bias.

Transparency

The Department apparently holds a vast amount of information that they refer to and use when assessing applications. Officers of the Department will not make this information available to applicants and their consultants, or presumably to the public, so there is no way of knowing whether the information used in the application process is accurate, timely, relevant or complete.

This degree of secrecy further complicates the determination of accurate and objective criteria by which applications will be assessed and makes it virtually impossible for individual applicants to work towards a solution that they know will be acceptable to the Department.

This lack of transparency pervades much of the application/assessment process.

There are no Codes against which the applications are to be assessed – certainly none that are published.

- The Department will not tell an applicant who the assessing officer is and therefore a consultative dialogue cannot be established that can work towards an acceptable outcome.
- Similar applications in similar circumstances are seen to have different outcomes with no apparent explanation and
- There is no independent review of the decision.

Apparent Bias

Details of applications can be discussed with different officers of the DoE resulting in different advice about the same application.

Without published assessment criteria, personal agendas may be given more weight than the supporting information prepared by relevant experts that may accompany an application.

There appears to be instances where officers ignore, and even say they will ignore, objective, properly researched information by consultants that they acknowledge to be experts in the field when that information or advice runs contrary to the outcome they are trying to achieve. In the alternative officers have ascribed values to land that, on the face of mapping prepared by State Governments (essential habitat mapping) it is demonstrated the land does not have. This is done because they "feel" the mapping is probably not correct.

Review

The lack of transparency, objectivity and reference to objective, published Codes and criteria works against all parties in the process not just applicants.

The reasons that these undesirable features of the system have proliferated and why the system can be procedural and intellectually corrupted lies in the fact that there is no review process to ensure that the actions of Departmental officers and the assessment process is carried out rigorously and objectively.

It is not sufficient to say that the application process is subject to judicial review and that ensures its effectiveness, fairness and a good outcome. Judicial review simply ensures that the assessing officers and decision makers had reference to all reasonably relevant information.

Judicial review does not resolve a situation where, even though the assessing and deciding officers have available to them all information, they come to an improper decision because of personal bias, political pressure or other reason.

My experience is in Queensland where decisions regarding Development applications and related approvals including Environmental approvals such as those issued under the EPBC Act are subject to scrutiny in the Planning & Environment Court.

An applicant or a third party such as a community or environmental group can take the decision maker to the Planning & Environment Court if they believe that conditions attaching to an approval are unreasonable or not relevant to the application made or that the decision to approve or refuse is wrong.

The system is not onerous or financially oppressive as the vast majority of decisions do not get appealed. The reason decisions do not get appealed is that they are properly made taking into account all the relevant facts and circumstances and applying objective criteria, reasoned assessment and there is an absence of bias or capriciousness.

The reason this happens is that assessing officers and decision makers know that their decision could be appealed and if they do not do the assessment properly against objective criteria or if they exhibit bias or prejudice they will fail on appeal and lose professional credibility.

Like all other aspects of an administrative system the court provides a system of checks and balances; a system absent in the EPBC Act.

While my perspective is one of a consultant assisting land owners and applicants obtain approval for projects I am convinced from discussions with community groups and environmental groups that they are equally dissatisfied with the lack of transparency, the variability in decisions and the absence of an appeal system that effectively allows a decision to be reviewed on merit, not just procedural issues.

The existing system facilitates, if not encourages corruption of the decision making process – not necessarily corruption on the basis of financial gain but by the application of personal or political philosophies, biases and prejudices held by the assessing and deciding officers.

I am sure that environmental groups in the Mission Beach area such as C4 would say that prior to December 2007 the EPBC Act was administered in such a way that far too much Development was allowed and upon conditions that were too lenient. From January 2008 it appears that Departmental officers have a philosophy (openly stated by one) that all Development at Mission Beach should be shut down.

Nothing happened in the physical world at Christmas 2007 that changed Mission Beach

in any way that should change the outcome of decisions under the EPBC Act. Maybe assessing officers who sought to apply their own personal philosophies are emboldened by the election of a new government, maybe there are other reasons – there is no way of telling. It is clear to all participants that there was a marked change in the application of the Act as well as real and potential outcomes at about that date.

This is wrong for all concerned.

The only way that stability and objectivity can be ensured is if there is a process whereby decisions made under the EPBC Act can be appealed, not administratively, but on fact, circumstance and merit to an independent body such as a Court.

If there is a fear, politically, that appeal by or through a court process will exclude environmental groups from the process then the Act can include provisions in similar terms to those in the Queensland Integrated Planning Act where each party is responsible for payment of its own costs. By this mechanism the winning party cannot claim costs against the losing party. This will remove the biggest fear of community and environmental organisations - that if they take on an appeal and lose they will be hit with enormous costs run up by the applicant.

It is equally inappropriate to remove all costs from either party as this inevitably leads to a situation were individuals and organisations that act philosophically rather than objectively, irresponsibly use the court system to frustrate development that may otherwise be in the community interest.

While the Queensland system in relation to costs may not be perfect, it is workable, largely fair and represents an appropriate model to be applied to the EPBC Act.

Summary

The Act has not served the community well in the past or presently. Community and environmental groups believe it failed – evidenced by many of the submission made to this enquiry.

While the method of application of the Act has or appears to be swinging in the opposite direction, this is no better.

The best way of ensuring applications are treated fairly, assessed on their merits and subject to an appropriate degree of intellectual rigour is to ensure there a merits based Appeal process available.

Thank you for considering this submission

Peter Robinson