

22nd April 2012

Mr Peter Ridgeway
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By email: angela.langdon@bigpond.com

Dear Peter and Angela,

Advice regarding Commonwealth's responsibilities and role in the approval of the new Blue Mountains Local Environment Plan (LEP)

1. You have requested advice on the Commonwealth's powers, responsibilities and obligations, including any approval, assessment or consultation requirements in terms of any proposed new Blue Mountains Local Environmental Plan ("LEP").

Advice in Summary

2. In summary, we are of the opinion that the new Blue Mountains LEP is not an "action" under the *Environmental Protection and Biodiversity Conservation Act* 1999 ("EPBC Act") which requires Commonwealth approval. We have outlined other ways that the EPBC Act manages and regulates World heritage areas for your assistance.

What is an action?

3. It is important to note that Part 2 of the EPBC Act only regulates actions that significantly impact or are likely to significantly impact on matters of national environmental significance. For example, s 12 of the EPBC Act says a person must not take an "action" that has or will or is likely to have a significant impact on the world heritage values of a declared World heritage property.
4. The EPBC Act does not expressly define the term "action". Rather, it provides a statement of what an action may include in section 523(1) of the EPBC Act and then identifies what an action is not in section 524 of the Act. Therefore, the starting point for an interpretation of the term will be its ordinary meaning. The Macquarie Dictionary defines the word action as "being the process or state of

acting or being active¹. With this in mind, we are of the opinion that the term will connote some form of physical activity that will result in change.

5. Section 523(1) of the Act qualifies the meaning of an action stating that an action includes:

- (a) a project; and
- (b) a development; and
- (c) an undertaking; and
- (d) an activity or series of activities; and
- (e) an alteration of any of the things mentioned in paragraph (a), (b), (c) or (d).

6. The EPBC Act expressly states that an action does not include a decision by a government body to grant a governmental authorisation to another person to take an action, or to provide funding by way of a grant².
7. The words “project”, “development”, “undertaking” and “activity” are also not defined in the EPBC Act. Therefore, in terms of statutory construction, it can be assumed that they will take their ordinary meanings. In this regard, the Macquarie Dictionary contains the following relevant definitions:

project *n* 1. something that is contemplated, devised, or planned; a plan, a scheme, an undertaking.

development *n* 1. the act process or result of developing; 2. a developed state, form or project etc..

undertaking *n* 1. the act of one who undertakes any task or responsibility. 2. a task, enterprise, etc.. undertaken.

activity *n* 1. the state of action, doing ... 3. A specific deed or action

8. The meaning of the word action, in the context of section 523 of the EPBC Act, has not been judicially considered. However, in the case of *Queensland Conservation Council Inc v Minister for Environment and Heritage* [2003] FCA 1463 (**QCC case**) Keifel J at para 9 stated that “an ‘action’ is defined in **wide terms** by s 523...”. In the QCC case the Court was considering the impacts of the construction and operation of a proposed dam on the downstream Great Barrier Reef World Heritage Area. Both the parties and the Court accepted that the action being considered in that instance included the *operation* and maintenance of the Dam and the *on-going regulation of the downstream flow*. Similarly in the cases of *Booth v Bosworth* (2001) 117 LGERA 168 the Federal Court accepted that the operation of electric grids (as distinct from their construction) constituted an action for the purposes of the EPBC Act.

¹ The Macquarie Dictionary further defines ‘action’ as meaning: ‘n: 2. something done; 3 habitual or usual acts, conduct; 4. energetic activity; 5. an exertion of power or force.’

² Sections 524 and 524A EPBC Act

9. A further matter which we consider supports a wide interpretation of the term action is the amendment of the EPBC Act to include section 74A, which provides:

“(1) if the Minister receives a referral in relation to a proposal to take an action by a person, and the Minister is satisfied the action that is the subject of the referral is a component of a larger action the person proposes to take, the Minister may decide not to accept the referral....”

10. The incorporation of section 74A into the EPBC Act is intended to prevent proponents from lodging piecemeal applications and separating proposed actions into smaller components to avoid the operation of the provisions of the Act. Additionally, the section enables the Minister to consider actions that may be subject to staging and the cumulative impacts of such actions.
11. However, section 524 of the EPBC Act excludes from being an action the grant of governmental authorisations for another person to take an action. In our opinion, governmental authorisation would include such matters as the grant of permits or approvals and may also include the decision to make a plan or adopt a policy as adopted by the BMCC in its review and change its LEP. Therefore, the decision to undertake a review of the LEP, and the conversion of the LEP into a consolidated instrument consistent with the Standard Instrument LEP would not constitute an action.

What are the other options to protect World heritage areas?

12. The EPBC Act is not directed at land use planning generally in and around World Heritage areas. It is structured to assess and approve actions that will impact or likely impact on the World Heritage Values, and therefore is quite reactive in that it only assesses new projects or activities. This means that planning decisions that can have considerable cumulative impacts over time are not well considered by the EPBC Act.

Do Management Plans have legal status under the EPBC Act and Regulation and are they enforceable?

13. According to the DSEWPC website “Management arrangements are required for each Australian property included on the World Heritage List”. “In Australia management arrangements vary from property to property: ... the Greater Blue Mountains Area ... [is] managed by government agencies in [its] respective State”. This is considered a cooperative arrangement. Further: “The EPBC Act creates a mechanism for the Commonwealth and a State to enter bilateral agreements to achieve the requirements of the Act and to remove duplication of regulatory processes. This provides an avenue for formalising existing cooperative arrangements through Commonwealth accreditation of State World Heritage management plans and environmental impact assessment processes. In order to be accredited, the relevant State plan or process must be consistent with the Australian World Heritage management principles, which are regulations made under the EPBC Act”.

14. *EPBCR 2000 Schedule 5* Australian World Heritage management principles 2(f) states that a management plan should: "promote the integration of Commonwealth, State or Territory and local government responsibilities for the property".
15. On the NSW Office of Environment and Heritage GBMWhA website it states:
"The Greater Blue Mountains World Heritage Area Strategic Plan provides the broad management principles for the area, and establishes the framework for the integrated management, protection, interpretation and monitoring of the values of the eight reserves that comprise the GBMWhA. Land management of the area is carried out by the National Parks and Wildlife Service, which is part of the Office of Environment and Heritage, with additional resources provided by the Australian Government through the Department of Sustainability, Environment, Water, Population and Communities ("DSEWPC"). This plan covers Blue Mountains National Park, Kanangra-Boyd National Park, Gardens of Stone National Park, Wollemi National Park, Nattai National Park, Yengo National Park and Thirlmere Lakes National Park".
16. The 2009 GBMWhA Strategic Plan makes some very strong commitments to "proactive management and rehabilitation of threatening processes, as well as seeking to ensure the support and cooperation of neighbours and the broader community for the World Heritage objectives". Specifically in Management Response 1.6 to "provide ongoing and proactive input to the establishment and implementation of effective local government planning and land management controls for land adjacent to the GBMWhA" and in Management Response 2.2 to "provide information to local and state government authorities and other relevant organisations (for example, those responsible for infrastructure) about the GBMWhA's World Heritage values and ensure they are aware of legal provisions to protect these values". Also in Management Response 2.3 to "Work with local councils to develop suitable local and regional planning instruments". You should investigate what steps have been taken by Office of Environment and Heritage to actually implement suitable local planning instruments in accordance with the Strategic Plan.
17. In summary, the EPBC Act and Regulation provides for at least one management plan to exist for each Australian World Heritage site. The 2009 GBMWhA Strategic Plan is the only relevant management arrangements for the area. The EPBC Act at s.46 provides for a process to accredit a management plan which allows for actions under the management plan to avoid the need for individual EPBC Act approvals. This accreditation has not occurred with the GBMWhA or the Strategic Plan. The Strategic plan discusses at Management Response 1.6 provision of effective local government planning controls, 2.2 provision of information for local government about World Heritage legal provisions and 2.3 working with local councils to develop local and regional planning instruments. You may wish to raise any concerns about the implementation of the Strategic Plan with the DSEWPC, and in particular how the LEP will affect the GBMWhA.

What about a Strategic Assessment?

18. The EPBC Act can deal with cumulative processes through the procedures in the EPBC Act that deal with strategic assessments. The EPBC Act does not expressly define the term “strategic assessment.” Rather, section 146 provides that a Minister may agree that an assessment be made of the impacts of actions under the policy, plan or program on a matter protected under Part 3 – that is, matters of national environmental significance.
19. The Department of the Sustainability, Environment, Water, Population and Communities provides further step by step guidance on the stages of a strategic assessment.³ According to DSEWPC, strategic assessment examines potential impacts of actions which might occur in relation to plans including local environmental plans. The claimed benefits of strategic assessments are “early consideration of national environmental matters in planning processes, capacity to achieve better environmental outcomes and address cumulative impacts at the landscape level”. It is considered an appropriate approach to address cumulative impacts on matters of national environmental significance protected by the EPBC Act which clearly includes the GBMWhA.
20. Examples of projects currently being strategically assessed are:
 - Hamersley Iron Ore Pty Ltd (Rio Tinto) iron ore mining in the Pilbara (Western Australia)
 - BHP Billiton mining iron ore in the Pilbara region (Western Australia)
 - Gungahlin (ACT Government)
 - Great Barrier Reef (Queensland Government)
 - Perth and Peel region (Western Australia Government)
 - Browse Basin LNG Precinct (Western Australia Government)
 - Melbourne's urban growth boundary (Victorian Government)
 - Molonglo Valley Plan (ACT Government)
 - Heathcote Ridge, West Menai (New South Wales Government and Gandangara Local Aboriginal Land Council)
 - Western Sydney growth centres (New South Wales Government)
 - Fire management policy (South Australia Government)
 - Midlands Water Scheme (Tasmania Government)
 - Mount Peter Master Planned Area (Queensland Government and Cairns Regional Council).
21. One of these strategic assessments relates protection of the Wet Tropics World heritage area in conjunction with the Cairns Regional Council that is probably a similar issue to the Blue Mountains.

³ ‘Strategic Assessment Under the EPBC Act’,
<http://www.environment.gov.au/epbc/publications/pubs/strategic-assessment.pdf>

22. In our opinion, the Commonwealth has power under section 146 of the EPBC Act to conduct a statutory strategic assessment of the new Blue Mountains LEP. The one negative impact of the Strategic Assessment is that once it is undertaken and approved it enables actions to be undertaken without further assessment.

Initiating a Strategic Assessment.

23. According to s 146(1) EPBC Act: "The Minister may agree in writing with a person responsible for the adoption or implementation of a policy, plan or program that an assessment be made of the impacts of actions under the policy, plan or program on a matter protected by a provision of Part 3". Therefore the Minister needs to agree with the local council to begin the assessment.
24. According to the DSEWPC website strategic assessment guide: "Strategic assessments are undertaken by the organisation responsible for implementing the Program (for example, state or territory government, local council, industry group or organisation) in partnership with the Australian Government. They are designed to be a collaborative process that delivers positive outcomes for both parties". The scoping of the assessment is conducted jointly by DSEWPAC and the strategic partner which in this case would be the local council under delegation from the NSW government. Therefore it may come down to lobbying the local council as the strategic assessment partner to initiate the Strategic assessment process. You therefore could not initiate a Strategic assessment as a conservation group. However, the Local Council, with the support of OEH could do so.

Evaluation of the outcome of a Strategic Assessment: Sydney Growth Centres SEPP.

25. An area that has been the subject of a Strategic Assessment is the Sydney Growth Centres SEPP. In particular, the assessment has considered the impact of development in that area on the Cumberland Plains Woodland which is a listed under threatened species legislation as a Critically Endangered Ecological Community. As indicated, the process has enabled the Commonwealth to seek to ensure greater protections of some areas in exchange for development in other areas.
26. The outcome of the Strategic Assessment for Sydney Growth Centres SEPP was that development in the North West and South West was allowed and an area of Cumberland Plain in North West Sydney was preserved and a \$530 million dollar conservation fund set up to be invested in the Cumberland Plain. Another outcome is that "The need for site by site approvals under the EPBC Act for the approved actions is no longer required, as long as the actions are consistent with the endorsed Program". It also allows for "exceptional circumstances when it is not possible to secure conservation sites on the Cumberland Plain over the 30 year life of the program", in which case offsets are allowed.
27. This Strategic assessment was undertaken for two reasons. "Firstly, from an environmental perspective it will ensure that matters of national environmental

significance have been identified, considered and addressed early in the planning process. This greatly increases the opportunity to protect matters of national environmental significance whilst providing sufficient land for urban development. Secondly, the Program, if endorsed by the Commonwealth Minister for the Environment, streamlines the planning process by removing the requirement for further assessment of individual developments under the EPBC Act”⁴.

28. In summary, the state government was motivated to do this strategic assessment to identify matters of National Environmental Significance affected by new housing releases and also to allow a significant release of housing. Cumberland Plain Woodland was listed as an Endangered Ecological Community under the Threatened Species Conservation Act 1995 in June 1997 (NSW Scientific Committee 1997). It was listed as critically endangered under the EPBC Act in December 2009. Both of these events were before the draft Strategic Assessment report in May 2010.
29. The protected status of the Cumberland Plain Woodland subsequent to the Strategic Assessment is mixed in that parts are protected in public parkland which may be expanded with the Conservation Fund. However, it is still under threat with urban development and under “exceptional circumstances” it may still be lost as long as there are offsets arrangements in place. Strategic assessments can therefore have mixed results.

Conclusion.

30. We recommend that you examine what input OEH has had on the LEP and consider whether you should raise your concerns about the lack of consideration of Strategic Plans with the DSEWPC.
31. There is also a process of appealing to UNESCO by seeking a World Heritage in danger listing. Should none of the above options work in rectifying the planning issues you may want to obtain some further advice from the EDO on this issue.

Yours Sincerely,
EDO NSW



Kirsty Ruddock
Principal Solicitor