

Department of Sustainability, Environment, Water, Population and Communities submission to the inquiry into the Environment Protection and Biodiversity Conservation Amendment (Emergency Listings) Bill 2011

The Environment Protection and Biodiversity Conservation Amendment (Emergency Listings) Bill 2011 (“the Bill”) is a private member’s bill that sets out emergency listing processes for threatened species and ecological communities. The Bill also provides that section 158A of the *Environment Protection and Biodiversity Conservation Act 1999* (“the EPBC Act”) does not apply to species or ecological communities that are emergency listed (s.158A effectively provides that new listings cannot be taken into account in relation to proposals which have already received a controlled action or not controlled action decision). The Government has already announced its intention to amend the EPBC Act to create an emergency listing provision for threatened species and ecological communities; however this amendment is not proposed to change the current application of section 158A.

Emergency Listing:

On 24 August 2011, the Government announced a package of reforms to the EPBC Act: the *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (the Government response). The Government response included a proposal to amend the EPBC Act to include an emergency listing process for threatened species and ecological communities. In its response the Government explained that the criteria on which the minister makes an emergency listing of a species or ecological community should be whether the native species or ecological community meets the listing category’s criteria, and whether a threat is both likely and imminent and would result in a significant adverse impact.

Provision already exists under the EPBC Act for emergency listing of heritage places and Ramsar wetlands. The new provision will operate in a similar way to these existing emergency listing provisions, however will be designed specifically for species and ecological communities. The department notes that the process and test for emergency listing must be stringent to avoid any misuse of process or vexatious claims. Consistent with the Government’s announced position with respect to other emergency listing procedures in the Act, the proposed amendment will allow the minister to seek the advice of the proposed Biodiversity Scientific Advisory Committee, wherever feasible, and to consult with relevant state, territory and Australian Government agencies as appropriate. The Biodiversity Scientific Advisory Committee is the new Committee proposed in the Government response which will expand the role of the Threatened Species Scientific Committee.

Similar to the role the Australian Heritage Council takes in heritage listings, the proposed Biodiversity Scientific Advisory Committee will be required to do the usual full independent assessment of the species or ecological community within 12 months of the emergency listing occurring. If this assessment indicates that the species or ecological community remains eligible for listing as nationally threatened, the Committee’s recommendation will also include an appropriate listing category for the species or ecological community in question.

The emergency listing process in the Bill does not provide for consultation with the Biodiversity Scientific Committee or relevant state and territory Ministers prior to emergency listing.

Section 158A:

Section 158A in the EPBC Act plays an important role in delivering business certainty. In simple terms, 158A provides business with the certainty that once a proposed development is referred to the Minister and a statutory determination under the EPBC Act is made for the assessment or approval of the proposed development, a subsequent listing, for example a new listing of a threatened species, has no effect on the decision that has already been made.

As drafted in the Bill it is the Department's view that without section 158A new listings could be used either as a new ground for seeking reconsideration of controlled action decisions prior to approval or completion of the action; or as a new ground for seeking variation of approval conditions if listed threatened species or ecological communities were controlling provisions for the original approval. This approach would significantly erode regulatory certainty that existing decisions would not be subject to change. In other words, this could create a form of retrospectivity which would undermine business and regulatory certainty.

In addition, excluding species and communities which are listed under emergency processes from the operation of section 158A would be inconsistent with the treatment of other protected matters. It would create a situation where a species that has received emergency listing is provided a "greater" level of protection than a species that has been listed through the standard nomination and assessment process. Such an approach could also create an incentive for misuse of process including unsubstantiated claims that a species is under threat.

Conclusion:

In summary, the department is committed to implementing the comprehensive package of reforms to the EPBC Act announced by the Government on 24 August 2011. Those reforms seek to strengthen environmental protection whilst seeking to retain high levels of regulatory certainty and business confidence.