

15 December 2011

Mr Stephen Palethorpe
Committee Secretary
Senate Standing Committee on Environment and
Communications
PO Box 6100
Parliament House
Canberra ACT 2600



Via email: ec.sen@aph.gov.au

Re. Senate Committee Review - EPBC Amendment (Emergency Listings) Bill 2011

Dear Mr Palethorpe,

The Minerals Council of Australia welcomes the opportunity to provide a submission to the Senate Committee Review of the EPBC Amendment (Emergency Listings) Bill 2011.

As you are aware, the Minerals Council of Australia (MCA) represents over 85% of minerals production in Australia. The MCA's strategic objective is to advocate public policy and operational practice for a world class industry that is safe, profitable, innovative, environmentally responsible and attuned to community needs and expectations.

MCA members commit to continuous improvement in their performance, beyond regulatory requirements, as signatories to *Enduring Value – The Australian Minerals Industry Framework for Sustainable Development*. A key element in this Framework is the commitment to 'contribute to conservation of biodiversity and integrated approaches to land-use planning'.

The MCA recognises the need for an EPBC process for emergency listings; however any approach developed should be science based, transparent and provide a clear process for listing to provide certainty for project proponents.

The implications of an Emergency Listing process on existing and proposed projects should not be underestimated. The development of an Emergency listing process needs to be carefully considered to minimise or avoid the following impacts:

- increased potential for unnecessary delays and significant opportunity costs for project proponents;
- increased sovereign risk created by proposed powers to vary, suspend or revoke previous approval decisions for projects, including those which may have been previously determined as 'not a controlled action' under the EPBC Act;
- the creation of significant uncertainty and regulatory risk through potential broadening of the scope of issues dealt with under emergency listings; and
- potential 'lobbying' of the Minister and the Department with unsubstantiated claims for emergency listing for both 'new' and 'old' unlisted species which would impact heavily on already limited Government resources.

Specific Comments

Lack of 'Stringent' Independent Process

In line with the Hawke Review recommendations and the Australian Governments 'agreed in principle' response, there needs to be a transparent and stringent process to test for emergency listings to '**avoid any misuse of process of vexatious claims**'¹.

The Bill is unclear in not providing any process for the determination of emergency listings other than where the Minister believes that a native species is eligible and under threat of likely and imminent significant adverse impacts. The nomination process currently provided in Subdivision AA for the listing of threatened species provides clear guidance on timeframes, consultation and independent review, none of which are provided within the Emergency Listings Amendment Bill. The Emergency Listings Bill only provides for these processes **after** the Emergency Listing for a species/ecological community is determined (as part of the inclusion of Subdivision AB, Subsections 194U to 194ZH).

Without these safeguards, and in particular without a process of independent analysis, it is unclear how the aim to avoid 'misuse or vexatious claims' will be achieved. According to the proposed Amendment Bill, once a species or ecological community has been emergency listed, it may take up to 12 months before a decision is made whether the listed species or community should remain on the list. This may lead to serious unnecessary delays and/or overly conservative conditions being placed upon project proponents and create significant opportunity costs.

Given the above risks, a stringent, science based and transparent process to test applications for emergency listing is **imperative** to minimising potential significant adverse impacts of the Amendment Bill on existing and proposed projects and reduce the potential resource burden on Government.

The MCA considers that a formal assessment process would not necessarily require significant time and hence impact adversely on a potential Emergency Listing of a species or community. For example, upon an application satisfying the set of 'test' criteria, an emergency meeting of the Scientific Committee could be convened within a short timeframe (i.e. 30 days).

Lack of Criteria for Emergency Listing

A clear set of criteria is required to inform this assessment process and 'test' the eligibility of applications prior to further assessment by the Scientific Committee.

Only the following broad 'criteria' has been provided in the proposed Amendment Bill for Emergency Listing in Subsections 194V (species) and 194ZC (ecological communities):

Minister may include a species/ecological community in threatened species/ecological community list if under threat:

(1) If the Minister believes that:

- (a) a native species/ecological community is eligible to be included in a category in the threatened species/community list; and*
- (b) the native species/ecological community is under threat of a significant adverse impact; and*
- (c) the threat is both likely and imminent;*

Without further specific criteria for emergency listing, there remains significant uncertainty on the eligibility of species and what information will be required to be provided to support the Minister's decision. The absence of emergency listing criteria will create uncertainty for project proponents and the Regulator alike and may result in significant increased 'lobbying' or

¹ Australian Government Response to the Report of the Independent Review of the EPBC Act 1999

unsubstantiated applications for emergency listing. This would significantly impact on the already limited availability of Government resources.

Increased Sovereign Risk

The EPBC Amendment may seriously and adversely impact on projects operating under a previous EPBC determination, as it is intended that the emergency listing would override existing Section 158A provisions which state that a listing event cannot affect the validity of a primary decision made prior to a listing event (vary, suspend or revoke an existing decision). **This retrospective power would significantly increase the sovereign risk for projects.** Accordingly, the MCA considers the proposed amendments to Subsection 158A (1) paragraph (i) and paragraph (j) be removed.

Risks of Broadening the Scope of Issues

The MCA considers that the uncertainty created by the lack of specific criteria and process for Emergency Listing would increase the risk that the scope of issues dealt with under the emergency listing provisions would be broadened. This would, in turn, create significant regulatory risk for proponents throughout the assessment and approvals process and increase risks post EPBC determination.

Duplication and Existing Levels of Protection

In order to avoid duplication, as part of any review process, the MCA considers it important to account for the existing level of protection provided by the States or Territory Environmental Regulation. In some circumstances, while a species or community may not be listed under the EPBC Act, adequate controls may already be in place at the jurisdictional level.

The MCA would welcome the opportunity to discuss these issues and/or participate in further consultation on the Amendment Bill.

Yours sincerely

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Assistant Director – Environmental Policy