COMMONWEALTH OF AUSTRALIA

Official Committee Hansard

SENATE

STANDING COMMITTEE ON ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY AND THE ARTS

Reference: Provisions of the Environment and Heritage Legislation Amendment Bill (No.1) 2006

MONDAY, 6 NOVEMBER 2006

CANBERRA

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SENATE STANDING COMMITTEE ON

ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY AND THE ARTS

Monday, 6 November 2006

Members: Senator Eggleston *(Chair)*, Senator Bartlett (*Deputy Chair)*, Senators Lundy, Ian Macdonald, Parry, Ronaldson, Webber and Wortley

Substitute members: Senator Carr for Senator Lundy

Participating members: Senators Adams, Allison, Bernardi, Boswell, Brandis, Bob Brown, George Campbell, Carr, Chapman, Conroy, Crossin, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Fierravanti-Wells, Forshaw, Heffernan, Hogg, Humphries, Joyce, Lightfoot, Ludwig, Lundy, Marshall, Mason, McGauran, McLucas, Milne, Moore, Nash, Nettle, O'Brien, Payne, Robert Ray, Scullion, Siewert, Stott Despoja, Watson and Wong

Senators in attendance: Senators Bartlett, Carr, Eggleston, Ian Macdonald, Parry, Ronaldson, Siewert and Wortley

Terms of reference for the inquiry:

Provisions of the Environment and Heritage Legislation Amendment Bill (No.1) 2006

WITNESSES

Committee met at 9.07 am

CHAIR (Senator Eggleston)—I declare open this hearing of the Senate Standing Committee on Environment, Communications, Information Technology and the Arts in relation to its inquiry into the provisions of the Environment and Heritage Legislation Amendment Bill (No.1) 2006. This is a continuation of the hearings which began on Friday and which were also held in Canberra. The committee's proceedings today will follow the program as circulated. These are public proceedings. The committee may also agree to a request to have evidence heard in camera and may determine that certain evidence should be heard in camera.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as contempt. It is also contempt to give false or misleading evidence to the Senate. If a witness objects to answering a question, the witness should state the ground upon which the objection is to be taken and the committee will determine whether it will insist on an answer, having regard to the ground on which it is claimed.

May I just say for the purposes of committee members that I propose to follow the same sort of formula that we followed on Friday of dividing the time into six and giving the government and opposition two-sixths and splitting the other two-sixths between the minor parties here today, the Greens and the Democrats. That would work out at about 12 minutes for each of the major parties and six for each of the minor. It is always difficult to manage time in these tight hearing time frames. With the formalities over—

Senator CARR—As you know, the opposition has profound reservations about the proceedings, the fact that so little time has been provided and that they are being held in the circumstances where there is a very controversial matter being debated in the chamber. I would ask you directly: what is your ruling with regard to quorums, because it is quite clear that there are difficulties in senators being here whilst they are required to be elsewhere.

CHAIR—It is a difficult problem, but as I understand it we have been given permission to sit during the time the Senate is debating the Patterson bill and I do not think quorums and divisions will be called at that time. This afternoon during question time and dealing with motions, we are not sitting and so can attend the Senate as required.

Senator CARR—Thank you. With regard to the quorum of this committee, what are the arrangements?

CHAIR—A quorum is constituted by a member of the government and a full member of the committee, or a substitute member, which is yourself from the opposition, or a majority of members of the committee, which would mean five full members of the committee. That is a quorum as per standing orders.

Senator RONALDSON—I think it only becomes an issue if someone brings it to your attention. If they do not, then it is not an issue.

CHAIR—That is certainly the case. I would hope that we can maintain the quorum properly.

Senator CARR—Without a quorum, you are not properly covered by parliamentary privilege—is that correct?

CHAIR—That is correct.

Senator CARR—The witnesses are not covered by parliamentary privilege?

CHAIR—That is correct. I have had to close down an estimates hearing once on the advice of the Clerk of the Senate when there was a particularly robust exchange going on, and I was advised three times that there was no quorum and I should close the sittings for that reason. I complied with that. So I do know that rule quite well.

[9.10 am]

FARRELL, Mr Cormac, Policy Officer, Environment, Minerals Council of Australia

STUTSEL, Ms Melanie, Director, Environmental and Social Policy, Minerals Council of Australia

CHAIR—If it is the wish of the committee, I will now invite the witnesses to make an opening statement. I note that the time is 9.10 am, so we will shift our program forward by 10 minutes and perhaps forego the morning tea break to catch up. Would you like to make an opening statement on behalf of the Minerals Council of Australia?

Ms Stutsel—Thank you for inviting the Minerals Council to appear before you today. For those of you who are not familiar with our organisation, essentially we are the peak national organisation representing the exploration, mining and minerals-processing industry in its contribution to society through the sustainable development of natural resources. We consider, as an organisation, that attracting and maintaining a social licence to operate is a critical adjunct to a regulatory licence that is issued by government in that it requires our companies to operate in a manner that is attuned to the expectations of the communities in which we work.

We also consider that that licence is more enduring than a regulatory licence. So, to assist our member companies to meet these expectations, the Minerals Council of Australia developed *Enduring value—the Australian minerals industry framework for sustainable development*. It establishes a platform to assist companies to continuously improve their social and environmental performance beyond the expectations of regulation. It was developed with the input of over 900 stakeholders nationally and provides detailed operational guidance on those key aspects of sustainable development that should be implemented at the mine site level.

To assist this, though, the MCA is a strong believer in a regulatory framework providing a minimum platform of performance, and that needs to provide consistent, equitable and efficient standards of minimum performance while at the same time supporting and encouraging the adoption of leading practice approaches such as those outlined in *Enduring value* and other beyond compliance measures.

The Minerals Council of Australia has a history of active engagement with the Environment Protection and Biodiversity Conservation Act, and our companies often refer projects under the act as a precautionary measure recognising the high degree of legal certainty that is provided by determinations under this act. Following the completion of an external scorecard on mining project approval processes by the MCA in May 2006, the MCA has sought to work cooperatively with the Department of the Environment and Heritage to improve the implementation of the act. This is really as a result of the consistently low scores that were received by the act relevant to other pieces of environmental legislation, particularly those at the state level and specifically in the areas of environmental impact assessment, air pollution standards and fauna management. These issues were also further exacerbated in delaying mining project approvals processes when the EPBC Act was not aligned to other approval processes in a range of jurisdictions where bilateral agreements were not in place.

The MCA supports the proposed amendments to the act as a positive step to both improving the efficiency of existing administrative processes and improving the coordination between Commonwealth and state and territory jurisdictions. But in addition to supporting these amendments, and in view of the outcomes of our approval scorecard, which I am happy to table today, the MCA considers that a substantial increase in the resourcing of the administration of the EPBC Act is critical to ensuring that the proposed amendments can be effectively implemented in a way that maintains protection for matters of national environmental significance and which avoids the imposition of unnecessary costs and other unintended consequences on industry. Thank you.

CHAIR—Thank you very much. Would you like to lead, Senator Carr?

Senator CARR—Yes. Can I ask the Minerals Council if you could give me your view of the effectiveness of the existing EPBC Act.

Ms Stutsel—From our perspective, the act itself is one of the best developed pieces of legislation that currently relates to environmental approval processes for our industry, and I will limit my comments to the experience of our industry. However, we found that it is actually the administration of the act that poses more issues for us than the nature of the act itself. There is a lack of resourcing for that administration that means that processes are often not as clearly articulated to industry and that there is the opportunity for companies to have a better handle on what the expectations of the act are and perhaps not over-refer, as is our current practice, which tends to delay the system even more.

We have concerns that in some jurisdictions there are not bilateral agreements in place; hence we have two layers of approvals and two layers of assessment, which can delay projects and does not actually lead to any greater level of environmental protection from those projects. We also have some concerns that the appeals process is really more in relation to appealing whether due process has been followed in the administration of the act rather than the decisions related to the act itself.

Senator CARR—In your view, have you had sufficient time to assess the processes and timelines that the industry needs to assess the implications of this piece of legislation?

Ms Stutsel—From our perspective, we have been continuously engaged with the Department of the Environment and Heritage on this legislation since its development because it is such a critical piece of legislation to our industry. For us this phase of amendments is really just another process in an ongoing cycle of engagement.

Senator CARR—When were you first approached by the department about this legislation?

Ms Stutsel—We were not approached by the department about this legislation in terms of the amendments; rather were made aware of it through an environmental network that we are involved in and we then later engaged with the department on that basis.

Senator CARR—When did you first see the bill?

Mr Farrell—That would have been Wednesday a fortnight ago.

Senator CARR—Have you had time to read it all thoroughly and understand it?

Ms Stutsel—We have had time to read it to the extent that we needed to feel comfortable with what was in the bill.

Senator CARR—Do you think two weeks is sufficient for the Minerals Council?

Ms Stutsel—Because it is an issue that we are continuously engaged on, I think it was an appropriate time period.

Mr Farrell—We were also given a detailed briefing by officers from the Department of the Environment and Heritage.

Senator CARR—When did that happen?

Mr Farrell—On Wednesday about two weeks ago, from memory, but I would need to check on that.

CHAIR—The same time as the committee.

Senator CARR—You have put a very brief submission to us. I am surprised it is such a brief submission since you have had so much consultation. I note with particular interest your reference here to:

The MCA recognises that several of the changes to the compliance and enforcement provisions under the proposed amendments are in response to operational experience enforcing the Act.

What do you mean by that?

Mr Farrell—What we are referring to there is that we recognise that many of the changes being made are in response to specific court cases that have occurred with the legislation.

Senator CARR—Which ones?

Mr Farrell—I would need more time to give you a detailed briefing, but I understand from previous experience of the act that the Gwydir Wetlands case has had some bearing on these amendments. I believe the compliance and enforcement issue concerning Lord Howe Island also had some bearing on the amendments.

Senator CARR—To whom did you express those concerns?

Mr Farrell—We have discussed them previously with the Department of the Environment and Heritage.

Senator CARR—And the department have responded with this legislation, have they?

Mr Farrell—No, it was during the briefing we had about two weeks ago that we discussed this with them.

Senator CARR—In your submission you use the words 'the MCA considers that these extensions of liability'. The proposed extension of liability seems to be a major issue of concern for you. Is that right?

Ms Stutsel—That is correct.

Senator CARR—You also mention landowners. You say:

...these extensions of liability have unintended consequences if the administration and implementation of these provisions are not properly managed.

You also say that the MCA considers:

... that such measures should include a 'gross negligence test' ...

Do you want further amendments? Do you think this bill is still too tough on the Minerals Council?

Ms Stutsel—We do not consider that this bill is too tough for the Minerals Council or for any of our members. Rather, as significant landholders, we would consider that there is value in ensuring that there is a standardised legal gross negligence test, as exists in most pieces of legislation, such that where you are responsible for the actions of third parties that is as a result of you not taking all possible precautions to prevent their activities from occurring.

Senator CARR—Are you aware of the concerns expressed by Liberal Party members of the Senate Scrutiny of Bills Committee about the enforcement provisions of this particular bill?

Ms Stutsel—No, we are not.

Senator CARR—I have drawn these matters to the committee's attention before, but Senator Johnston says:

This explanatory memorandum is probably one of the most appalling I have ever seen in the short time I have been in the Senate. It discloses no motivation, no reasoning and no justification for some of the most draconian powers that this parliament can conceivably and possibly enact: rights of search and seizure without warrant, rights of personal frisking without warrant ...

Penalties under these provisions involve seven years jail. Can you express to the committee what operational experiences you could you imagine would warrant penalties involving seven years jail?

Ms Stutsel—I cannot provide any specific examples of that.

Senator CARR—Have you read that explanatory memorandum?

Ms Stutsel—Yes.

Senator CARR—Were you concerned about the references to the seven years jail?

Ms Stutsel—Yes, which is why we have requested the inclusion of a gross negligence test.

Senator CARR—And you expressed that view about the seven years jail provision to the department?

Mr Farrell—Not specifically.

Senator CARR—Did you lobby for the inclusion of those penalties?

Ms Stutsel—No, we did not.

Mr Farrell—No.

Senator CARR—Do you think they are a bit of overkill?

Senator IAN MACDONALD—I do not know that the witnesses are required to offer that opinion.

Senator CARR—I have asked them for an opinion. They are here giving us an opinion. They are saying the Minerals Council supports this legislation.

Ms Stutsel—The Minerals Council does not have a formal position on whether we think the penalties are overly onerous.

Senator CARR—You say you are concerned about the unintended consequences of extending liability for employers and landowners. What do you think of the unintended consequences of such harsh jail terms?

Ms Stutsel—Given that our industry is focusing on beyond compliance performance, I would like to think that there would be no unintended consequences for our industry, but the possible unintended consequences of such legislation could be that, were a gross negligence test not in place, natural justice may not be followed in determining whether or not all adequate measures were undertaken to prevent such activities from occurring.

Senator CARR—As the bill stands, could you envisage anyone receiving a jail term as a result of the extension of liability tests that are currently in the bill?

Ms Stutsel—The Minerals Council does not have a formal position on that matter.

Senator CARR—Are there any other amendments you would like to see made to this bill?

Ms Stutsel—Certainly we would like to see some additional administrative support, but no additional amendments to the bill itself.

Senator CARR—Thank you very much.

Senator IAN MACDONALD—I have just a couple of quick questions. You mentioned the duplication of, I assume, the Australian government regulation, the various states and territories and perhaps even local government. How does this bill help people who deal with those areas?

Ms Stutsel—Certainly the bill puts an additional layer of focus on the development of bilateral processes, which would mean accreditation of existing state approval processes to meet the needs of the EPBC Act. Effectively that would mean that, in the assessment or the approval process, by undertaking a single assessment using the state assessment process, where it is accredited to the Commonwealth, we would not have those two layers of assessment, which would provide additional surety and expediency in that process.

Senator IAN MACDONALD—Is there any concern that one or other of the states might have different and, perhaps from your point of view, more extreme or harsher rules?

Ms Stutsel—States currently have quite different legislation in this area. We find that approval processes in some states are more easily understood and achieved than in other jurisdictions, but certainly with the accreditation process that is established under the EPBC Act there is a strong focus on ensuring that there is consistency with the intent of the EPBC Act processes and that they are not overly onerous.

Senator IAN MACDONALD—As I understand the accreditation process, the Commonwealth says to the state: 'These are the things we think you should look at and give approvals or make conditions about. If you agree to do those and follow the federal legislation, you can do the lot and the applicants won't have to come near us.' Is that how it works?

Ms Stutsel—That is correct.

Senator IAN MACDONALD—You are saying that the import of doing this would be to get some uniformity across all states and territories. Is that correct?

Ms Stutsel—That is correct, and that is certainly an objective of the Minerals Council of Australia—not necessarily to have legislation identical on a jurisdictional basis but to have national consistency in such legislation—and the EPBC Act provides a path to achieve that.

Senator IAN MACDONALD—A number of people have said the same thing, including, I think, WWF. Are you suggesting to us that the Department of the Environment and Heritage is not sufficiently well resourced to do things in as timely a manner as you might hope? Do you agree with that general statement, without being too specific?

Ms Stutsel—Certainly. We definitely agree that the department is not sufficiently resourced, but that is not necessarily only based on the time it takes to do the assessment process. Rather, the department is in an excellent position to provide additional explanatory materials and support to companies. For example, they have quite a comprehensive database of fauna communities around the country so that you can determine whether you intersect with matters of national environmental significance. But there is certainly a low awareness of the kinds of resources that the department offers, and some of those resources are not well supported. So, with additional administrative support, we consider that the department could better administer the act overall and reduce the number of referrals that are potentially occurring, more on a preventative basis than on the basis that they intersect with matters of national environmental significance.

Senator IAN MACDONALD—Do not answer this question if you think it might impact upon your future dealings with the department but, by and large, do you think the personnel in the department are sufficiently skilled and qualified to deal with the complexities of some of the things that come before them from your area? As I say, if you are frightened of retaliation in the future, don't answer.

Ms Stutsel—I have no fear of retaliation. I think the department has very strong leadership in this area. There are a number of officers in the department who are extremely capable and who are very well skilled in the administration of this act. I do, however, think that there are a very low number of officers. One of our member companies recently commented that they were surprised that a project on which they had over 50 officers doing the work internally had one officer in the department who was responsible for assessing the outputs of those 50 company personnel. So, I think it is really about the number of officers and it is also about retention of the skill base within the department. There seems to be quite a significant turnover.

Senator IAN MACDONALD—Can you make a comment on the cost to industry of that situation? Obviously, you cannot give me individual figures on individual cases, but is that a big issue? And is it a costly issue for the industry in that they have a team of 50 people there working to do things but they are dealing with one very good but overworked officer from the department?

Mr Farrell—I think one of the issues with this act is that it requires a very high level of scientific infrastructure. It needs a lot of information on threatened species and migratory species and on World Heritage properties and their management. The department have done a

really good job of providing that information in some specific areas, particularly through the conservation advice that they now provide, which is really welcomed by our companies. They really like it because it allows them to do work beyond compliance work in addition to meeting their obligations under the act. An extension of that would be fantastic, and that is what the MCA is really promoting here. We say that we would like not only more officers but also more resources for the department to provide that underlying scientific infrastructure. A cost to industry from that is that, when it is not there, industry have to go out and get it themselves.

Senator RONALDSON—I notice that in your submission you commented that members of the MCA, representing over 85 per cent of minerals production in Australia, 'have a longstanding commitment to environmental stewardship'. Can you just expand on that for me, please?

Ms Stutsel—Members of the Minerals Council of Australia were one of the leading industries in 1997 to develop the Australian Minerals Industry Code for Environmental Management, which was one of the first voluntary beyond-compliance initiatives developed by any industry sector in Australia. At the same time the industry adopted public environmental reporting, which at the time was not considered common practice, and we positioned ourselves as the leaders in public environmental reporting across all industry sectors. Since that time we have certainly expanded our environmental stewardship role to include materials stewardship in looking at the impacts of our products from their production process right through to their end-of-life disposal. Our environmental stewardship in terms of rehabilitation and reclamation is now more focused on trying to achieve sustainable ecosystems rather than just creating safe and stable landscapes, which was more of a regulatory response and the historical legacy of the industry. We certainly recognise that our performance on environmental issues has not always been of the standard that the community would expect, and we are now rapidly working towards improving that performance so that we are attuned to the expectations of our host communities.

Senator CARR—Are your members aware of these seven-year jail penalties?

Ms Stutsel—Yes, they are.

Senator CARR—Have you told them?

Ms Stutsel—We have provided them with advice on the nature of the act.

Senator CARR—What was their response?

Ms Stutsel—Their response is articulated in our submissions.

Senator CARR—Have you had a fair bit of feedback from your members in the two weeks that you have had access to the bill?

Ms Stutsel—We have. In fact, our annual sustainable development conference occurred within that two-week period. We had over 450 site and environmental practitioners and community relations practitioners from all over the country together, so we really used that as an opportunity to have a broad discussion on this matter.

Senator CARR—I did not see any reference to the penalties in your submission. Is that right?

Ms Stutsel—That is correct.

Senator CARR—It is not there?

Ms Stutsel—There is no reference to it.

Senator CARR—Why not?

Ms Stutsel—It was not something that our membership specifically asked us to refer to.

Senator CARR—So, they are not concerned?

CHAIR—Senator Carr, you are actually using Senator Siewert's time, with respect. I think you have made your point.

Senator CARR—I am just surprised.

CHAIR—We will move on to Senator Siewert.

Senator SIEWERT—I would like to follow up on some of the detail of the bill. Have you looked at the bioregional planning provisions? It seems to me that there are some quite significant exemptions there, such as uranium mining, waste dumps and milling. I am just wondering what your opinion is on those possible exemptions?

Mr Farrell—We have not looked at those in a great deal of detail. The main briefing that we were provided with was from the department concerned. When we looked at those provisions we mainly focused on the statutory weight that has been given to bioregional plans and the support that is given to planning on a whole-of-landscape basis, which the MCA supports.

Senator SIEWERT—Given that a lot of your concerns seem to centre around lack of resources in administration, are you not concerned about the lack of detail in the bill around bioregional planning and statutory support? It seems to me that it is very unclear what will be approved and what will not, and what will be assessed at Commonwealth level and what will not. It seems to me you could drive a truck through the interpretation of some of the provisions of the bill. Here you are, saying that you are concerned about approval process and administration, and yet it seems to me that this is not going to solve the problem. It is left even more open for interpretation.

Ms Stutsel—That is not something that our members raised as a concern with us, but certainly we found that the implementation of the act has been undertaken in a very consultative manner to date, and we would consider that, where there is not clarity in the legislation, the department has worked very effectively to provide that clarity to us retrospectively.

Senator SIEWERT—On the one hand you are concerned about the current lack of rigour in the act, but on the other you do not seem to be concerned about the provisions that have been brought in that continue that process.

Mr Farrell—We are not so much concerned about the lack of rigour in the act; we are more concerned about the resources being provided to the department to assist in the smooth and efficient running of the act. We would see a lot of the bioregional planning as something that would be done, by its nature, through a process of negotiation. Due to our previous interactions with the Department of the Environment and Heritage we have confidence that

where there is an issue of a lack of clarity we would be able to come to a suitable arrangement. We certainly have in the past. I suppose that reflects our confidence, as an industry, in the department.

Senator SIEWERT—Have you looked at the specifics of the listing of threatened and vulnerable species? We heard from the Humane Society and WWF last week that they are extremely concerned that a lot of work that they had been doing on getting listings up and on critical habitats is going to be lost. Have you looked at that? For example, they are saying the 500 critical habitats that have been nominated since 2001 are just going to disappear. Have you looked at that and do you have concerns about that?

Mr Farrell—Our members did consider this and were supportive of the proposed shift towards a thematic listing process, where things are considered more in terms of a landscape function and where they are looked at as a whole rather than as a piecemeal listing process. One comment that has been made is that the current process could be seen, and has in the past been seen, as stamp collecting.

Senator SIEWERT—Last week it became obvious that if we move to a thematic approach in order to get a species up we are going to have to go back to the bad old days of lobbying the minister. Basically, we have to go back to advocacy; that is what environmental groups are going to have to do. Because it is at the discretion of the minister, they are going to have to go back to lobbying the minister. Do you think that is a good approach?

Ms Stutsel—We would consider that the ministerial decisions would be based on sound science. Therefore, should an advocacy group be able to demonstrate on the basis of sound science that a species should be listed, we would consider that the minister would be more likely to list that species.

Senator SIEWERT—But they are going to have to go back to lobbying to get the minister to consider it. If the species is, say, a bat—and the theme is mammals this year—they are going to have to go back to lobbying to get the minister to even consider it in the first place, regardless of the science. They are going to have to lobby the minister first to then look at the science. Do you think that is a good approach to listing species?

Ms Stutsel—We do not have an official position on that.

Senator SIEWERT—Did you talk about that when your groups met?

Ms Stutsel—That was not raised in discussions that I was involved in.

Mr Farrell—I had some discussions with members who were interested more in terms of opportunities for whole-of-landscape mapping out of threatened species and threats and threatened areas, so the specific lobbying that would possibly occur was not specifically discussed.

Senator SIEWERT—Can you tell me about the whole-of-landscape approach to threatened species?

Mr Farrell—The minerals industry has a lot of links with groups such as Greening Australia and other research organisations. It is in fact recognised in its own right as a leader in research and development for biodiversity management. One of the areas that the industry is particularly well known for is arid zone recovery and planning. The industry would be

looking to do things such as look at an entire ecosystem, identify the areas of that ecosystem that are under pressure from things such as feral animals and then develop plans and strategies to address those key threatening processes to restore ecosystem function. The industry considers that these amendments would assist in that process.

Senator SIEWERT—What happens to the 500 that have already been identified as critical habitats—habitats, not species?

Mr Farrell—We would expect that that would be considered in the scientific process.

Senator SIEWERT—They can, potentially, be taken completely out of the system.

Mr Farrell—We do not have a specific view on that.

Senator BARTLETT—I wonder whether you have a view about the removal of the merits review appeals to the AAT for ministerial decisions.

Mr Farrell—That was not specifically discussed with our membership. As we have previously stated, all our members comply quite rigorously with the act and they do not really interact much with the AAT.

Senator BARTLETT—It is not that common for anybody to do it, I guess. There has been only a handful—or, perhaps, 10 at the most, I think. The circumstances would be that perhaps the minister, instead of saying 'no wind farm', next time might say 'no mine'. There would be an opportunity for the relevant company or your own body, I am sure, to have standing to seek merits review removal of that. That is not a matter of concern?

Ms Stutsel—Certainly in our scorecard of approvals the issue of the appeals process was raised as a concern in relation to the act, and the issue of the wind farm was specifically discussed in that context. We consider that there is a case for companies to be able to seek clarification or to potentially challenge the decision of a minister, whereas currently that ability is really limited to challenging the process rather appealing the decision itself.

Senator BARTLETT—Your submission says:

> … the proposed provisions ensuring that existing approvals are not affected by new listings of threatened species, ecological communities and national heritage places, the MCA is concerned that this may not meet the legitimate expectations of the community ...

I understand that you say that this will not be an issue for your members, because you have procedures in place beyond strict compliance. But could you just expand a bit further on that concern and say what you think it might mean in the wider context of environmental and heritage management.

Ms Stutsel—Our concern really is that if a project is given approval and subsequently a threatened species, ecological community or an area of national heritage, for example, is discovered, because there is not the ability to implement retrospective requirements for amendments to that project approval process under the act, there could potentially be damage to matters of national environmental significance. For that reason, our companies would support the implementation of voluntary arrangements, as of the on-compliance measure, effectively a co-regulatory approach, to ensure that there is retrospective protection of those species.

Senator BARTLETT—How would we make that happen? You say that, basically, your industry does it already. How would we make sure others do it?

Ms Stutsel—We certainly think that there is an opportunity in the act to encourage the development of co-regulatory approaches to deal with these sorts of situations. In addition, the provision of additional resourcing to the Department of the Environment and Heritage would enable them to effectively advise people of those species or ecological communities as they are determined and where they intersect with existing projects and provide them advice on what the nature of those impacts might be or encourage them to at least seek additional scientific advice on the nature of their impacts and possible measures to mitigate such impact.

Senator BARTLETT—You have mentioned a couple of times this morning, as well as in your submission about resourcing, that you advocate a significant injection of additional resources into the department to ensure the effective implementation of the proposed changes and to enhance their ongoing administration. You also say that you have previously raised concerns that the administration is significantly underresourced. Have you raised those concerns with the minister, the government, the department—or all of the above?

Ms Stutsel—All of the above. Certainly in our pre-budget submission last year we raised that we thought that additional resourcing was required for the department. We raised that with Treasury as well.

Senator BARTLETT—Where do you think the shortcomings to date have manifested themselves most in terms of underfunding, underresourcing?

Ms Stutsel—The Minerals Council would consider that there are probably two key areas where those issues have manifested themselves. The first is that there is perceived by many to be somewhat of a hands-off approach to the assessment process within the department, and that is purely because of the lack of resources that are available to provide any in-depth review or analysis of the materials that are submitted by companies. The second is that, because of the significant turnover in departmental officers and the low numbers of officers, some of our companies have experienced a lack of knowledge about specific species or ecological communities when contacting the department and have been required to bring third-party scientific advice into that process to assist capacity both within the company and within the department itself.

Senator BARTLETT—When you say 'a hands-off approach', does that mean that you just let all the documentation flow through without really forensically examining it?

Ms Stutsel—I think our members would say that the level of assessment is not as detailed as we would think the community would expect it should be.

Senator BARTLETT—As a very stereotypical view, I suppose, one might think you would think that would be better for your members, that it all went through without forensic examination, but you feel it is better if you are confident that it has been properly looked at?

Ms Stutsel—We consider that the key benefit of this act, as I mentioned earlier, is in actually providing legal certainty to our companies that they are not impacting on matters of national environmental significance inadvertently or directly. We would be very keen to ensure that the assessment process is comprehensive and adequate in ensuring that such incidences do not occur.

Senator BARTLETT—Just to finish, I am taking from your comment in your submission that, if anything, theses changes reinforce the need for more resourcing?

Ms Stutsel—That is correct.

CHAIR—I think that is about it, so I thank the Minerals Council of Australia for appearing here today. You are a very important witness and we are grateful for your submission and your comments during the course of these questions.

[9.47 am]

GOONREY, Ms Christine, President, ACT Division, National Parks Australia Council

GOONREY, Mr Michael, Research Officer, ACT Division, National Parks Australia Council

HURLSTONE, Mr Clive, Past President, ACT Division, National Parks Australia Council

CHAIR—We welcome the witnesses from the National Parks Australia Council. We invite you to make an opening statement.

Ms Goonrey—First of all, I would like to thank this committee for the opportunity to address you. Unlike the Minerals Council, we have not been consulted, neither have we had anything to do with the department nor any previous knowledge of the bill until press releases alerted us and other groups to it. It is a very valuable opportunity for us to speak with you. Just briefly, the NPAC is a peak national body consisting of national parks associations in New South Wales, the Australian Capital Territory, Queensland, Victoria, South Australia, Tasmania, and the Nature Conservation Society in South Australia. Our common purpose is to protect and promote natural areas and national parks systems within Australia. All of us are non-profit, voluntary, largely self-funding, and our members come from all ages, interest groups, and backgrounds. We have been around for nearly 50 years, and our wide range of activities basically underlie a commitment to our natural areas as places of conservation where human activity must take second place to conservation of the areas' natural values.

We would like to express our concern right at the beginning that this bill, which is a substantial bill, has been introduced without sufficient consultation time. We have had less than a month to scrutinise it, and I apologise for any shortcomings in giving evidence to this committee because we are a voluntary organisation. This is done on the third shift, and we have done the best we can.

We would begin by suggesting that the Senate consider deferral of this bill until there is time for further consideration. Our concern in speaking to you is that this piece of legislation is basically a framework for resolving conflict between different groups seeking divergent uses of places in Australia. It gives us some certainty that conflict will be resolved through scientifically based, transparent and consistent decision making. We would submit that the changes to the EPBC Act introduced in this bill undermine the purposes of that act. In particular, the delisting in effect of 500 threatened species means a move away from a scientific listing process to one based on ministerial discretion.

The effect of these amendments will be to constrict the role of environmental groups like NPAC in the listing of species and increase our members' distrust of the listing process. They are already asking, quite rightly, how many of the 500 species currently waiting for assessment will fit within next year's theme, and how many within the theme of the next five years. Further, we think the minister has been given such broad discretion in deciding on a theme, it is highly likely political consideration, not the conservation of the species or ecosystem, will be given undue weight in specific instances. It is likely that controversial

species, such as those commercially exploited, will not be considered under a thematic approach.

We are concerned about the review of ministerial decisions. It is not defensible, we submit, in a democracy to claim that ministerial decisions are too important to allow citizens to challenge them. We are also concerned about the proposed repeal of section 478 of the act, which currently prevents the Federal Court from requiring an undertaking for damages. The existence of this provision in the existing act recognises the important role of voluntary organisations in bringing matters of environmental significance to public attention. Its repeal would establish a significant barrier for third parties to seek injunctions and would so restrict their capacity to ensure the laws are enforced. We are also concerned about the removal of regular review of part 3 of the act. Repeal of this provision carries a danger of preserving the EPBC Act in aspic and ensuring it will become less and less relevant to the management of our national environmental issues.

More importantly, we are concerned that this bill is based on a premise that we approach such important issues on a case-by-case basis to strike a fair and reasonable balance between development needs and environmental needs. That is no longer a sustainable position given the fact that the ecosystems that are at most risk through this approach are the ones that we rely on for our water, our food and our prosperity. We would ask this committee to consider deferring this legislation until these matters, including the significant issue of climate change, can be taken into account.

Senator IAN MACDONALD—Could you just explain that last statement?

Ms Goonrey—Basically what we are saying is that this government is now taking climate change seriously. This act is being introduced at a point where the government is obviously reconsidering its position on climate change and environment.

Senator IAN MACDONALD—I see. Okay.

Ms Goonrey—We will not get a second chance at pushing the type of needed amendments to this act if it is passed now in its current form.

Senator IAN MACDONALD—I would not be certain of that.

Ms Goonrey—That is our point, yes.

Senator IAN MACDONALD—Amending acts is a dynamic process, as you probably know if you are from Canberra

Ms Goonrey—No, I had finished. If I can repeat in case it was lost, the safest recommendation you can make is to defer this bill.

Senator CARR—The council does support the inclusion of a climate change trigger in the act, and you would like that amendment in this bill—

Ms Goonrey—Yes.

Senator CARR—to have a climate change trigger?

Ms Goonrey—Absolutely.

Senator CARR—Are you surprised that the term ‘climate change’ is not mentioned anywhere in this bill?

Ms Goonrey—I would be pushed to say 'surprised'. No, we are not surprised because of the lack of consideration in current government policy of climate change. We are deeply, deeply concerned.

Senator CARR—Would you like to see a provision in the objects of the bill for climate change to be considered?

Ms Goonrey—Absolutely.

Senator CARR—As well as a specific trigger?

Ms Goonrey—We would like to see a specific trigger in the act which brought into consideration the broad issues of ecosystems, interaction of ecosystems, and the preservation of natural environment.

Senator CARR—Do you think you have had sufficient time to consider these proposals?

Ms Goonrey—Under no circumstances. I would dearly like to have been in the position even two weeks ago of having discussions with the department. We are not on their party list apparently. We, as I say, were first alerted to it by the issuing of a press statement by the minister, and we have been flat out, among our other jobs of course, trying to get our heads around it since.

Senator CARR—So you have not had the same sort of access that the Minerals Council has had. Is that what you are saying?

Ms Goonrey—No, we have not had the same sort of access as a great number of other organisations.

Senator CARR—You say that you are actually alarmed by the proposed amendments to the bill. You say that on page 2.

Ms Goonrey—Yes.

Senator CARR—You use the word 'alarm'. You see the bill as undermining good environmental outcomes. Can you explain why you see that as the case?

Ms Goonrey—At the moment the EPBC Act is a safety net, and our members actually are a little reassured that if things go really belly up in their local area the EPBC Act is there to protect them. Our members are just ordinary, average people walking in their local bush on the whole, and they believe to date that the EPBC Act is there to be called upon when things start to go dramatically wrong. Our alarm is that 500 species have been wiped off. They are no longer under consideration. If you are not on the list, you cannot bring an action under this act. That is one of the reasons for alarm.

Senator CARR—In your opinion, what are the underlying assumptions of this proposed legislation?

Ms Goonrey—We consider the underlying assumption is that we can continue to deal with our environment on a piece-by-piece basis. If you want to put a mine there or if you want to fish that species, it will not have an effect on the broad outcome. We consider that that is increasingly dangerous and that we must look at the broad perspectives of our entire environment in order to protect those bits that we use let alone the bits that plants and animals rely on.

Senator CARR—You are obviously very concerned about the listing regime that is proposed in this legislation.

Ms Goonrey—We are.

Senator CARR—Do you think it is workable? Is it realistic? How do you see it operating in practice if this legislation is carried in its present form?

Ms Goonrey—We are very confused as to what a theme should be, because the bill does not specify. We are unable to see how that will affect, for example, the need to suddenly declare a protected species, such as an orchid, that is discovered. How will that get on to the list? My particular passion is orchids, and the rhizanthella underground orchid is only ever discovered when somebody digs something up. Now, how would we manage to get a new species of rhizanthella listed? It is never going to make the theme list. I cannot see how. Does that answer your question?

Senator CARR—Yes, it does. Is this what you mean by diminished ecological rigour? Is that what you are referring to?

Ms Goonrey—Absolutely. There is a real challenge there to see how we can bring an overall approach to Australia's ecosystems that will protect it. How can one theme a year cover the incredible diversity of Australia's flora, fauna and ecosystems? It is impossible to see. As we say, even in five years, you could not even begin to cover the broad variety.

Senator CARR—You have raised concerns about the scientific foundation of this legislation.

Ms Goonrey—Yes.

Senator CARR—The fact is that it is the withdrawal of scientific evidence-based decision-making and making it a more political process whereby the ministerial discretion is given much greater emphasis. Are you also concerned about the civil liberties implications of this legislation?

Ms Goonrey—I am afraid we did not have a chance to consider the civil liberties. We understand that they are there. We understand that other people are addressing them, and we simply had to focus on the bits that concerned us most. From the press reports, they seem deeply disturbing, but of our own experience and research we are unable to speak.

Senator CARR—It is unusual for the Scrutiny of Bills Committee to be this strong on a bipartisan basis and to give a unanimous report that is this strong and that raises concerns about civil rights.

Ms Goonrey—Which is one of the reasons we chose to leave it out of our own struggle to master the 300 pages.

Senator CARR—Would you like to have a look at that and come back to us, if you have the resources to do so?

Ms Goonrey—Certainly, we will.

Senator RONALDSON—You indicated that, while you had not been given a lot of information, a great number of other organisations had. Was that what you said?

Ms Goonrey—We understand from some of the submissions we have had time to read that they had had discussions with the department.

Senator RONALDSON—I just wanted to confirm that you said that a great number of other organisations had.

Ms Goonrey—I am not aware of a great number.

Senator RONALDSON—I think those were your words.

Ms Goonrey—They were my words; I am afraid I said them in the heat of the moment.

Senator RONALDSON—I am not too sure how much heat there was, but I accept that. Where does the streamlining fit as an issue for you?

Ms Goonrey—That is a very interesting point. We consider that the streamlining promotes the streamlining of administrative consideration on a case-by-case basis. It streamlines the alienation of environmental areas, of natural areas, from their natural state. It does not streamline the declaration of natural areas as conservation areas protected under the act.

Senator RONALDSON—Because the Tasmanian Labor government is a strong supporter of this change in the streamlining of approvals processes particularly. They say it will assist environmental outcomes, not detract from them. The Tasmanian government also supports the replacement of accredited management plans with accredited management arrangements, or an accredited management process. They say this will give greater flexibility in how World Heritage and Natural Heritage listed places are managed. What is your view on that?

Ms Goonrey—We are quite comfortable with improving those sorts of administrative arrangements. We are saying the bill does not go far enough, that in streamlining cases that come under the act we are simply streamlining consideration of bits and pieces, not consideration of the overall picture or consideration of protection of areas that at the moment are not under threat from development. There is no broader view. Unless there is a development application, these areas are not protected or considered except through nature reserves and national parks, which are a small proportion of Australia. Streamlining administrative processes is fine. That is not our concern; however, streamlining consideration on a case-by-case basis is our concern.

Senator IAN MACDONALD—Thank you for coming along and thank you for what you do. You are all Canberra-based, did you say?

Ms Goonrey—We are because we are the only ones who are available. The executive of NPAC at the moment are in, I think, three different national parks across Australia because of previous commitments.

Senator IAN MACDONALD—The onus is perhaps not on you, but I am not sure what your own private backgrounds are. It does not really matter but, being Canberran, you know how the town works. It would be helpful if you would give the department a ring and ask them to give you a briefing, or did you perhaps do that and they refused?

Ms Goonrey—No. We did not because we were given notification last Monday to appear, and we just got stuck into the work. As you say, we are familiar with the way Canberra works. It is not a department that necessarily is very open to groups such as ours at the moment, if I could put it that way.

Senator IAN MACDONALD—We are like you a bit. It is a very big and complex sort of amendment.

Ms Goonrey—Yes.

Senator IAN MACDONALD—We did not get a briefing from the committee. Obviously the Minerals Council have, and I know some others did. I think WWF said they had spoken to the department, too. Anyhow, if you are interested, I am sure they would be happy to speak to you. If they are not happy, I would be happy to try and facilitate that.

Ms Goonrey—Thank you. That would be very useful. The point we are trying to make is that organisations such as NPAC have no full-time officers. We only have part-time officers. They are exactly the sorts of organisations that ordinary people turn to. They come home from a bush walk; they are disturbed about something; they will join our organisation rather than WWF. So the reason we took this opportunity to appear is that we understand that, at a national level, minerals councils and WWF operate frequently with the parliament and have a good understanding of each other. NPAC we felt needed to have a voice here because we are the people who make the most trouble. We are the ones in the end who, if we get cranky, bring our grandchildren along to the protests and the marches. We are scientists, teachers, farmers and workers. That is our voice. The department probably is not terribly interested in hearing from us. Certainly, we would welcome your support in talking to them.

Senator IAN MACDONALD—Contact them and try and get a briefing. They do have a standard briefing. It is only half an hour.

Ms Goonrey—Yes.

Senator IAN MACDONALD—If you cannot get anywhere, let me know. I think your national organisation appeared before this committee in relation to the inquiry into national parks recently, so they obviously—

Ms Goonrey—There was, I understand, something like a six-month lead time on that.

Senator IAN MACDONALD—Yes. It was an inquiry of the committee, not a reflection of the government, of course.

Ms Goonrey—Yes.

Senator IAN MACDONALD—I am saying that only to say that they are obviously familiar with this committee and how things work.

Ms Goonrey—We work very hard at trying to have our voice heard.

Senator IAN MACDONALD—Perhaps this is getting away from questioning a bit. I am a former minister, but I think you will find governments may not always agree with you—

Ms Goonrey—No.

Senator IAN MACDONALD—but I have always found most government departments, certainly in the areas I was in, are very happy to talk to you. I am very happy for you to talk to public servants because I clearly understand that public servants—skilful, able, committed though they are—do not always know everything and do not always get it right. I think the government can benefit from input from people like you.

Ms Goonrey—I certainly agree. We have heard even from the Minerals Council that they are a little alarmed at the lack of staff.

Senator IAN MACDONALD—Yes. I questioned them on that and that concerns me, too. I have already made a comment to the chairman about that. I would encourage you to continue to try to interact with them. Could I suggest that, before you organise a protest, which quite frankly never gets very far—

Ms Goonrey—No.

Senator IAN MACDONALD—Before you do that, you should try to contact the department. If you cannot do it by yourself, there is any number of members or senators who would be helpful. If your local members and senators are not helpful, although I know Senator Humphries would be very keen because he has a bit of an interest in this area himself—

Ms Goonrey—Yes.

Senator IAN MACDONALD—If he is not, please feel free to call on me just to get the appointments. Senator Humphries, as I recall, is a member of Landcare here; perhaps he is even a member of your organisation.

Ms Goonrey—No, I do not think he is. I hope I have not given the committee the wrong impression that we are all going to go out marching in the streets tomorrow.

Senator IAN MACDONALD—No, you did not.

Ms Goonrey—I am simply saying that the act has provided our members with certainty regarding a process and this bill undermines that.

Senator IAN MACDONALD—You mentioned something about orchids.

Ms Goonrey—Yes.

Senator IAN MACDONALD—I was interested to hear they had to be dug up. I was going to say that there is an argument for logging because it is the only way they would be dug up.

Ms Goonrey—I am sure that argument has been put.

Senator IAN MACDONALD—How do you dig up orchids? This is not really a question; this is just curiosity.

Ms Goonrey—The *Rhizanthella* is one of the most unusual plants in the world. It actually grows underground. It is a collection of anything up to 100 individual little orchids in a great big almost mushroom-like thing.

Senator IAN MACDONALD—How do you find them?

Ms Goonrey—You simply cannot find them. In some cases, they are associated with particular vegetation. In other cases, there is no known association. The only ones I have ever read of are ones that have been dug up by ploughing in Western Australia, a freeway in New South Wales and I think it was a proposed sports stadium down near Nowra. We only find them when we actually turn the soil over.

Senator IAN MACDONALD—I bet the loggers have found them.

Ms Goonrey—I am not sure that they would let on.

Senator IAN MACDONALD—Are they a pretty orchid?

Ms Goonrey—No. They are quite ugly, actually. They are just really fascinating.

Senator SIEWERT—They are different, though.

Ms Goonrey—No, they are immensely ugly.

Senator IAN MACDONALD—I agree with the professor from Western Sydney. You have to make value out of these unique things whilst protecting the species.

Ms Goonrey—Yes.

Senator IAN MACDONALD—WWF mentioned this. They used the example of birds, being the theme this year. If you came across a rare and unusual species like this orchid, are you suggesting that if you went to the department and said, 'Here is something that has to have something done about it now,' under this act they would say, 'Sorry, this year our theme is birds and that is not a bird, so buzz off'?

Ms Goonrey—No. That is the difficulty with this bill. It is saying that it is streamlining things and yet, in effect, by declaring a theme it is creating a huge workload in that there would be a constant stream of people on the doorstep saying: 'Look, we have found this thing. We actually need it declared now.' Of course, they would be very urgent because you would already have the ditch digger on site. We do not think it will streamline it.

Senator IAN MACDONALD—How is that different to now?

Ms Goonrey—The bill will change it.

Senator IAN MACDONALD—What in the bill is changing that? If the amendments are passed, why is it now going to be more difficult to do that than it was before these amendments were passed?

Mr Goonrey—I guess the point is that if the government is proposing these changes to the listing process, including the thematic approach, why would you undermine the whole point of that by still being open to a whole series of individual nominations? There does seem to be a tension between those—either what you are about is streamlining and you are wanting to more efficiently use your public service resources, or you are open to all of these individual nominations, as is the current situation. There does seem to be that tension, and one would expect that the department and the minister would favour the more efficient streamlining approach than the individual approach.

Senator IAN MACDONALD—That is something we can inquire about with the department. Some witnesses start from the basis that the department is totally opposed to them and is not interested in the environment; that it wants to rape and plunder everything. By and large, the department starts at the opposite end. It is as conservationist as you, but it is then constrained by resources and legislation. I will put that to the department myself, but I would be very surprised if this bill will change your ability, using your example, to highlight the orchid just because this year there happens to be a more streamlined approach of saying birds are the focus this year, rather than trying to do something more widely.

Ms Goonrey—Our question then is: why have the two processes? Why invent a whole new process if the current one is sufficient?

Senator IAN MACDONALD—I will ask that. That is something I would be interested to find out. It has been raised a couple of times. I would be fairly confident there is an answer, but let me not predict that. Let me wait until I put it to the department. I have just been handed a note from an officer from the minister's private staff saying that a briefing is on offer and that you should contact Gerard Early on 6274 1077.

Ms Goonrey—Thank you very much.

Senator IAN MACDONALD—Hopefully you will be able to go through some things on that.

Ms Goonrey—That will be extremely useful.

CHAIR—Thank you, Senator Macdonald. We now go to Senator Siewert.

Senator SIEWERT—You probably heard me asking earlier about the bioregional plans. I am particularly interested in the bioregional plans and the issue of what developments will, therefore, be assessed by the Commonwealth. Have you specifically looked at that in detail?

Ms Goonrey—No, we have not, I am afraid.

Senator SIEWERT—I know that you have had limited time, so I understand.

Ms Goonrey—I do regret that.

Senator SIEWERT—I just want to follow on from where Senator Macdonald was going with the issue of the thematic approach and being able to nominate. You heard me talk about it earlier and we talked about it last week—that is, that you are going to have to go to a lobbying approach to the minister.

Ms Goonrey—Yes.

Senator SIEWERT—Do you remember the bad old days when that is what we used to have to do to get these up?

Ms Goonrey—Yes.

Senator SIEWERT—Are you concerned that that is essentially what people are going to have to do again?

Ms Goonrey—I am concerned on three counts. One is a personal one. The wear and tear on individuals is extreme. We have people out in the field now—not our organisation, but we know of people out in the field—who are actually on their own undertaking research, tracking birds and animals to determine their habitat and how they live in order to support their listing as a threatened species; they know they have become incredibly rare. For the little eagle, in the ACT, there is one nesting pair left, and it is proposed to put a housing development where it nests. Individuals are out there doing this work, but at the moment they actually have some certainty about the listing process. I am concerned about the wear and tear on people when the process becomes so much more complex and in the hands of others. We are concerned about the impact on the species themselves.

If you have to jump up and down and if you have to make personal representations on behalf of every ecosystem, every species, every bird and every fish that does not fall within that theme, how many are we going to lose? How many nests are going to be bulldozed? How many animals are going to have their habitat destroyed while we are waiting to get through

that? At the moment there is a certainty of process. At the moment people are content to leave those 500 species that are about to be de-listed; they are content to feel that they are reasonably safe and are under active consideration. Environmentally but also on a human level there is a great cost to the community.

Senator SIEWERT—My understanding is that, when people nominate species, it is a quite rigorous process in terms of the science that you have to fill out. I get the impression that it is not as if there are thousands of people out there saying, 'I'd like to protect the spotted fish. Please consider it.' My understanding is that the process is rigorous and that you have to have a decent level of scientific understanding to actually nominate something.

Ms Goonrey—Absolutely. Mr Hurlstone might like to add to that. Most of the people seeking listings that I am aware of are themselves scientists or people who have had a previous career and in their own time undertaken scientific research and study. It is an extremely rigorous process.

Mr Hurlstone—I do not have anything to add to that. That supposition is quite correct. There is a lot of information to be gathered and under very rigorous preparation of the case to nominate something.

Senator SIEWERT—I would like to move on to the issue of the public's ability to take court action. I do not know how much you have been able to look into the detail of the changes that have been made there?

Ms Goonrey—We have tried to focus on it, yes.

Senator SIEWERT—Do you have any specific comments around that? Are you concerned that the public's ability to take action through the courts would potentially be curtailed through the changes?

Ms Goonrey—I noted Senator Bartlett's comment earlier that only about 10 actions had been taken since the EPBC Act came into effect. We would wonder whether that small number was because ministerial decisions were subject to review and whether taking away that review would create an exponential increase in the number of ministerial decisions because they are now safe from further scrutiny. That is our deepest concern, that it makes it a very nice little get-out clause. As the Minerals Council pointed out, that would increase the need/option to keep lobbying ministers, and it turns into a matter of political power rather than environmental outcome. That is underlying that scrutiny. It operates to deter that subversion of the process.

Senator SIEWERT—My last issue concerns triggers and the fact that there has been a great deal of support for a greenhouse trigger. A number of the other submissions that we have had, for example, from the WWF and the HSI, were suggesting that there should be triggers around land clearing and water. Do you have a view on that?

Ms Goonrey—I will give a specific example in the ACT that we are aware of. Endangered yellow box woodland is being protected in the current development plans for the Molonglo Valley. There is a stand there of quite high quality. However, the immediate area, which is lower quality woodland, is not being protected and is in fact planned for high development housing. What we will have are these little remnants of previously high quality increasingly surrounded by degraded or other use so that they themselves become either prisons for

species, which must die out because they cannot have broader access to their water and food supplies, or they cannot move out for cross-fertilisation and all of those sorts of things that they rely on. Looking at a case-by-case basis, as the current act does, is in fact simply imprisoning our most valuable environment within development. Any mechanism to take on those broad considerations is essential in the EPBC Act. Does that make that clear?

Senator SIEWERT—Yes. I suspect what you are also talking about is cumulative impact, which is not being picked up?

Ms Goonrey—Yes, that is right. We are isolating these things. We need corridors. We need to see the ecosystems in a much broader context. We have learnt that with the Murray-Darling Basin. We are starting to see these whole ecosystems. A point of concern is that the current act can be triggered only if it is an endangered species, not if it is a much broader issue of maintaining the surrounding environment or other environments.

Mr Goonrey—If I could add to that, the repeal of section 28A is of concern. That guaranteed that at least every five years you had a look at possible new triggers that could then be included in the act. By repealing that section there is now no guarantee. Yes, governments do have the right to bring on regulations or bring on amendments, but you no longer will have a statutory guarantee that at least every five years you can have a look at what the current issues are and consider new triggers to be included.

Senator BARTLETT—You mentioned at the end of your submission that you would be providing further comment on specific matters with examples drawn from the experience of community organisations such as yourselves. I know you have done a bit of that already, but I just wonder if there are any further examples drawn from experience that you would like to provide us with?

Ms Goonrey—There are. I will refer again to the Molonglo Valley proposed development in the ACT. We are drawing on our own local knowledge here. That is to reinforce the fact that the EPBC has very limited ability at the moment to operate effectively to preserve whole systems. There are two points that I would like to make about that. The first is that in discussions with our local planning authority, the comment was made by a planner that the EPBC is not his problem and that the environment is not his problem but it is the problem of somebody else to solve. It is a limitation of the act if people believe that they do not have to worry about it while they are planning, that it will become the problem of the developer when he brings in the bulldozers. It is a significant problem for developers to understand that they are assuming a risk that a government planner has passed on to them.

The second example that I would like to use in terms of this need to look at the broader picture is work being undertaken by members of the Carruthers Group, for example, which is a voluntary organisation of very highly qualified and highly experienced scientists. Through their work on climate change in the high alpine areas, they are discovering that it is not so much a warming of the alpine areas as a change. For example, an early thaw will bring out the pygmy possum long before its food sources have arrived. This is important in terms of the overall perspective of our environment because one of the food sources is the Bogong moth that comes down from northern New South Wales and Queensland. We need to be able to look at our ecosystems across the nation in that way.

I would really like to finish with the example of this ACT Molonglo Valley proposal. The statement was made in consultation that the act is only triggered when the bulldozers come in. That seems to us to be a particular weakness of the act that is not addressed in the bill.

Senator BARTLETT—I am not sure that it is an accurate assessment of the act but it is a concern that somebody thinks it is.

Ms Goonrey—Exactly.

Senator BARTLETT—In fact, I am sure it is not an accurate assessment. I imagine the government would say—and I suspect the department will say—that this problem that you have talked about of regions is the purpose behind the component in this bill about bioregional plans or that sort of thing. The concern that has been raised by some witnesses is that the concept might be fine but the detail in the bill is not sufficient to give confidence that that will work. Therefore, the risk might be that it could just be a blanket exemption if it is a poor plan.

We do have the department coming this afternoon. I would be interested, when you do have your briefing, whether you are able to get any more details about how that will work in practice and perhaps whether groups like you that have the on-the-ground experience can be involved in the fleshing out of it. Getting commitments from them about that would be useful. I would also be interested in any response that you get to the issue that has been raised about the removal of appeals to the AAT and how that helps strengthen environmental protection, as the bill is purported to.

You mentioned in your opening comments that the EPBC Act as it stands is seen by many of your members and groups as a safety net and that you are concerned about this bill potentially undermining environmental outcomes. I wanted to get a sense of what your feeling is about the act as it currently stands. Some people say that it is a waste of space and it should be scraped anyway. Do you feel that, whilst it is not perfect, it does provide some useful protections?

Ms Goonrey—There was some suspicion when it was initially introduced, but we grow comfortable with pieces of legislation, particularly after we have used them or seen them operate effectively. I think there is a sense that it might not be too bad a thing if it continues to work effectively and is seen to be fair. We would submit that this bill is calling that last element of fairness into considerable doubt.

Senator BARTLETT—Your feeling to date and those of your members is that, whilst you might not have liked every decision out of the act, it has provided some increased protection to the environment?

Ms Goonrey—Yes. You do not have to fight every battle with every gun that you have. At times you can simply rely on the listed species and it is all over; there is no wasted time and energy.

Senator IAN MACDONALD—Legislation is dynamic. I appreciate that you are not well resourced and that you are a voluntary group. You should have a constant interaction with the department on this. That is what you will find the Minerals Council and WWF were saying. They regularly keep in touch with the government to talk about things. I would urge you to do

that. I accept your comment that you are a group of grassroots people and that you are in the national parks. I would encourage you to do that.

Ms Goonrey—We certainly will.

Senator BARTLETT—I wanted to get a clear statement on the record that your association feels that the act as it currently stands has provided some increased protection.

Ms Goonrey—Our association does believe the act as it currently stands provides some protection, particularly to listed species and systems.

Senator IAN MACDONALD—Senator Bartlett, you deserve credit for supporting it.

CHAIR—That is all the questions that we have for you.

[10.33 am]

PEATMAN, Mrs Maureen, Chair, Australian Environment and Planning Law Group, Law Council of Australia

CHAIR—We welcome the Law Council of Australia here today. Would you like to make an opening statement?

Mrs Peatman—The importance of this bill and the proposed amendments is easily understood when one considers that the bill is to assess and approve actions that are likely to have a significant impact upon the Commonwealth marine area, the World Heritage properties, Ramsar wetlands of international importance, nationally threatened species and ecological communities and internationally protected migratory species. The Law Council's principal concern is to ensure that the rights of the individual or a company are maintained and not eroded. It is for the government to promulgate the law and for its ministers to apply it. It is not for the government to promulgate the law and then have its ministers as the sole arbitrator of how the law should be applied.

This bill intends to take away the right of the individual to a judicial review of the minister exercising his discretion in applying the provisions of the act. The reason given repeatedly in the notes to the proposed amendments is that this leaves the merits of these important decisions to be dealt with by the government. The government promulgates the law. It is not for the government to take away our democratic rights to an appeal to the third arm of government. If the minister has exercised his discretion appropriately, in accordance with the provisions of the bill, then the likelihood is that the Administrative Appeals Tribunal will uphold his or her decision. But what if the minister has not exercised his discretion appropriately? Is there to be no review? If the minister believes in the integrity of this bill and the integrity of his or her decision-making process, then he or she should not be concerned to allow a judicial review of how he or she came to a decision applying provisions of this bill.

You have the written submissions of the Law Council. We have also prepared a summary of the principal requested changes to the proposed amendments of the bill. Mr Chair, I would seek leave to hand a copy to each senator.

CHAIR—We will receive those documents.

Mrs Peatman—It is simply an extract out of the Law Council's submission.

CHAIR—Each of us has a copy of your submission.

Senator IAN MACDONALD—I thought I had read it before.

Mrs Peatman—The principal amendments from the Law Council's perspective are section 206(A), 'delete the proposed amendment'—this gives the minister the power to make a decision without any right of appeal in relation to a threatened species; section 221(A), 'delete the proposed amendment'—this gives the minister the power to make a decision without any right of appeal in relation to migratory species; section 243(A), 'delete the proposed amendment'—this gives the minister the power to make a decision without any right of appeal in relation to whales and other cetaceans; section 263(A), 'delete proposed amendment'—this gives the minister the power to make a decision without any right of

appeal in relation to listed marine species; section 303GJ, 'delete proposed amendment'—this gives the minister the power to make a decision without any right of appeal in relation to the international movement of wildlife specimens; and section 473(1), insert '(1A)', 'delete proposed amendment'—this gives the minister the power to make a decision without any right of appeal relating to the minister giving advice as to whether there has been a breach of compliance with a conservation order.

The argument put forward in the explanatory paper that these provisions leave the merits of these important decisions to be dealt with by the government do not allow for the position where the minister, in applying the law under this bill, may have applied the law incorrectly. The exercise of the minister's discretion in such a way should be reviewable by the Administrative Appeals Tribunal.

Section 189(B), amend by inserting the word 'public' so that the amendment reads 'that we have more transparency than at present'. The amendment that we have recommended in this section does not give transparency but it gives the chair of the scientific committee the power to release information to a particular person or persons, group or indeed the public. It may be in the best interests of Australia to have further scientific or local knowledge from a particular person, group or the public placed before the scientific committee prior to the making of its recommendation to the minister. At present that power rests solely with the minister under the provisions of the amendments to this act. The submissions that the Law Council made are more extensive than those, but they are the principal ones that we wish to press today.

CHAIR—Do you wish to start, Senator Carr?

Senator CARR—As lawyers, how concerned are you about civil liberties when it comes to amendments to Commonwealth legislation?

Mrs Peatman—Always.

Senator CARR—Is it a paramount matter for you?

Mrs Peatman—It is a matter of the democratic process that we have the right to test the decision-making process.

Senator CARR—Have you had a chance to look at the Scrutiny of Bills Committee report?

Mrs Peatman—No, I have not. Even though I am a lawyer in full-time employment, the Law Council is a voluntary organisation, as are most that come before you.

Senator CARR—Do you think that you have had enough time to examine the details of this legislation?

Mrs Peatman—The Law Council has had sufficient time to put its principal concerns before the committee.

Senator CARR—Is that sufficient time to examine the details of this legislation?

Mrs Peatman—The answer to that would be that I could take two months to examine the detail full time and I do not, nor does my committee, have sufficient time to do that. With the resources that we have, we have applied those as well as we could in the time.

Senator CARR—Two months would not be unreasonable for most legislation, particularly legislation of this controversy and this complexity. Senator Johnston is a Liberal senator and his speech to the Senate Scrutiny of Bills Committee report said:

This explanatory memorandum is probably one of the most appalling I have ever seen in the short time I have been in the Senate. It discloses no motivation, no reasoning and no justification for some of the most draconian powers that this parliament can conceivably and possibly enact: rights of search and seizure without warrant, rights of personal frisking without warrant.

… … …

... this legislation should go back to the drawing board.

Given those sorts of sentiments, do you think it might be appropriate that there be more time available?

Mrs Peatman—Time is always a useful tool. I do not wish to make a comment in relation to whether the decision to make amendments to a bill should be extended indefinitely. In terms of the decision to make amendments to this bill you must always keep in mind that this bill, as the federal government's jurisdiction, is overarching. Most of the threatened species in this country are dealt with at a state and local level. That is why I put the principal objects of the act at the beginning of it. The perspective needs to be kept at all times that this act does not stand alone. It is not the only threatened species legislation that we have in this country. Most of it is dealt with at the state level, which is why you have the referral provisions; the federal government refers it off to the state in the first instance and then it comes back.

Senator CARR—I see the point that you are arguing there. What about the prospect of seven years jail proposed in this legislation? Does that surprise you?

Mrs Peatman—I am not aware of that provision. Can you give the details of it?

Senator CARR—Yes, I can. Strict liability, items 5, 7, 12, 14, 16, 18, 20, 22, 24, 26, 28, 32, 39, 41, 44, 46, 50, 52, 57, 59, 61, 63, 64, 66, 71, 73, 75, 77, 80 and 82.

Mrs Peatman—They would not all have the maximum of seven years jail.

Senator CARR—The committee notes that with respect to some of these offences the maximum penalty is seven years imprisonment, 420 penalty units. As lawyers, I am sure you would have had a chance to look at that matter. I am surprised that you are not able to advise the committee on that. What about the question of search and seizure?

Mrs Peatman—I can take that on notice.

Senator CARR—Schedule 1, 'Search without warrant', item 633. Search without warrant, schedule 1, item 835. Search without warrant, clause 17. Exercise of legislative powers, schedule 2, part 2, item 43, which is the main point of your submission. I am interested to know that the main focus of your concerns goes to the issue of the review proceedings under the AAT. Where there may be other matters, would it not also be appropriate to examine those from a Law Council perspective?

Mrs Peatman—Certainly.

Senator RONALDSON—I turn to the critical habitat section, new subsections 207A(1A), (1B) and 207A(3B). Can you elaborate why the Law Council believes this should be tested on appeal to the AAT?

Mrs Peatman—This is on 206(A)?

Senator RONALDSON—It refers to 207(A) in your—

Mrs Peatman—In my submission?

Senator RONALDSON—On page 3—but they may well be one and the same.

Mrs Peatman—I think it is.

Senator RONALDSON—It does refer to critical habitat. It is on page 3 of your submission.

Mrs Peatman—It is not one of the principal concerns. That is why I did not put it in the list that I have given you today. But it is still of concern. The minister is exercising his discretion to give priority to one interest in the community over another by not listing. There may be situations where that is not appropriate.

Senator RONALDSON—I just wanted to clarify that the list that you gave us is the area of your primary concern?

Mrs Peatman—Yes.

Senator RONALDSON—I take it that would be an area of secondary concern?

Mrs Peatman—Yes.

Senator RONALDSON—Your committee has welcomed the proposed reduction in processing time and costs for development interests. In your submission you say:

The provisions to provide enhanced ability to deal with large scale projects and give priority attention to projects of national importance through the use of strategic assessment and approval approaches, and putting in place measures to enable developers to avoid impacts on matters of national environment significance protected by the Act.

Mrs Peatman—The people here before me from National Parks Australia Council believe that the developer would only find any threatened species as the bulldozers went in. That is not possible by the development process in the state legislation. All of those issues have to be dealt with by experts before a development approval is given. It is a rare thing for the bulldozers to find a threatened species.

Senator RONALDSON—Are the concerns misplaced?

Mrs Peatman—I think they are not understood.

Senator RONALDSON—They are a voluntary group.

Mrs Peatman—Yes, that is right. I understand their concerns. They are well founded, but I do not believe they understand the planning process.

Senator RONALDSON—As you say, they are a community group and you are the lawyer. Do you support the annual thematic nominations process?

Mrs Peatman—Yes. I do all of that with the rider that we need to see the regulations.

Senator RONALDSON—You did say that. You support the conservation advices and recovery plans section?

Mrs Peatman—Yes.

Senator RONALDSON—You support the heritage nominations and listing, the streamlining of the referrals and assessment process, the commercial-in-confidence information section?

Mrs Peatman—Yes.

Senator RONALDSON—You support the third party enforcement section, the corporate liability, landholder's liability, strict liability and the remediation sections of the bill?

Mrs Peatman—Yes, that is right. With respect to third party enforcement, I have practised in this area of the law for over 20 years. From a personal perspective, there are times when action groups have power beyond commonsense. That is why I supported the third party enforcement; it still allows the Federal Court to have a discretion to say, 'This is well founded and there are no cost penalties at all'. It allows the Federal Court to say: 'This is not a well-founded argument. It may not be vexatious, but it may be bordering on that', and it allows them to give a costs order accordingly. I think that is appropriate.

Senator RONALDSON—You view that as a commonsense approach?

Mrs Peatman—Yes.

Senator IAN MACDONALD—You mentioned that if the minister does not follow the process there is no challenge to his decision because of the removal of the AAT. Is there not still some sort of challenge if the law is not followed?

Mrs Peatman—He is exercising his discretion.

Senator IAN MACDONALD—Yes.

Mrs Peatman—You are thinking of what we call the Wednesbury rule.

Senator IAN MACDONALD—It is 20 years since I did law. I am not familiar with Wednesbury. I think they were the prerogative writs, weren't they?

Mrs Peatman—It is the Wensbury rule that is applied most consistently now in government decision-making processes where, if you take into account the information before the government in making that decision, that decision was not reasonably open to the government to make.

Senator IAN MACDONALD—But if it does not follow the law, then there is a challenge?

Mrs Peatman—If he has acted outside it completely?

Senator IAN MACDONALD—Yes. Unfortunately, *Hansard* does not record your quizzical expression. It is not a submission of mine; it really is a genuine question. As I said, it is a long time since I was involved in practical law.

Mrs Peatman—If the department has not followed proper process, then the decision of the department can be challenged.

Senator IAN MACDONALD—But you are saying not under this act now?

Mrs Peatman—The minister has a discretion. They have allowed the appeal if it is from a delegate. If a delegate of the minister has made the decision, there is still an appeal.

Senator IAN MACDONALD—To the AAT?

Mrs Peatman—Yes, but not by the minister. If the minister has exercised his discretion and made the decision, then there is no appeal on his decision.

Senator IAN MACDONALD—On his decision?

Mrs Peatman—Yes.

Senator IAN MACDONALD—If he does not follow the law—

Mrs Peatman—There would be an injunction, but it is much more difficult to prove that. We are testing the veracity of a decision that he has made.

Senator IAN MACDONALD—Thank you for alerting me about the delegate's decision. Wouldn't most of the decisions made under this act be made by delegates, except perhaps regarding orange-bellied parrots?

Mrs Peatman—It may be so. But it is always a concern when rights are taken away.

Senator IAN MACDONALD—When you say maybe so, again, I do not have the facts. Are you aware of whether most of the decisions—

Mrs Peatman—No, but I would assume that is the case. The delegate of the minister prepares the brief for the minister in any event and the minister makes the decision at the end of the day, if the minister makes a decision.

Senator IAN MACDONALD—I see from your submission—and I am pleased to note—that you are supporting the thematic approach?

Mrs Peatman—It seemed a sensible approach. When you go back to the beginning, the objects of this act are overarching. They are the Commonwealth marine area, the World Heritage properties, the Ramsar Wetlands of International Importance, nationally threatened species and ecological communities and internationally protected migratory species. From that perspective a theme seems a sensible approach. Once again, we would need to see the regulations on how they are going to apply that. But you will find that most of the threatened species are covered in the state legislation and are dealt with at that level, and by local government.

Senator IAN MACDONALD—Did you say that you are in practice in this area of law?

Mrs Peatman—Yes, I am.

Senator IAN MACDONALD—You are a private practitioner and a volunteer for the Law Council?

Mrs Peatman—Yes, I am.

Senator IAN MACDONALD—I love getting advice from lawyers when it does not cost me. A lot of the other witnesses have been concerned at that thematic approach, which you feel is not a bad idea. Their concern is that, if something happens in an area that is not part of the theme for this period, then it may not get the same attention. Without actually knowing, I would feel that if there were some urgent listing process that came up, some urgent

endangered thing happening, the minister or the department would have the ability to deal with it straightaway. Would you be able to confirm whether that is the case?

Mrs Peatman—I will have to take that on notice.

Senator IAN MACDONALD—As I said, I am not going to pay you for this. I was going to put it to the department, anyhow, but I just thought you might have a view on that.

CHAIR—Any other questions?

Senator BARTLETT—I note that you mentioned some areas of the bill that you support. Senator Carr asked questions on that, but I would like to get a sense of how fully you feel your committee has been able to assess the bill?

Mrs Peatman—Not at all from a scientific basis.

Senator BARTLETT—From a legal basis?

Mrs Peatman—From a legal basis—it is a huge bill. This is the bill and these are the amendments. It is a huge task to go through this from a legal point of view or a scientific point of view and give you detailed input. That has not been done because of the time constraints.

Senator BARTLETT—I appreciate what you have given us. I just wanted to get a sense as to whether that was as a result of a comprehensive full-blown examination of every clause and its ramification, or whether it was just a snapshot of the main points on the basis of the chance you have had to go through it to date?

Mrs Peatman—Yes, it is going through the explanatory paper, the items and the paragraphs and comparing both.

Senator BARTLETT—You said that you are a general practitioner in this area, so you would have a fair understanding of the way the EPBC Act operates.

Mrs Peatman—I have a fair understanding. I have rarely come across needing to use it, because I am a New South Wales based lawyer. The development that is approved, from huge to small, is done under the threatened species act. You need to come back to where this act is to apply.

Senator BARTLETT—You have not had an extensive engagement?

Mrs Peatman—No, but I have had many developments dealing with threatened species under the New South Wales legislation.

Senator BARTLETT—I am trying to get a sense of—in your opinion or, if it is appropriate, the Law Council committee's opinion—how adequately the EPBC has operated to date.

Mrs Peatman—My understanding is that most of the time it has been referred to the states for assessment first and then it comes back to the Commonwealth government. It is a tortuous process because it is lengthy. If you are putting in a development of any sort, your time constraints are always important, so the more streamlined we can have any legislation the more likely we are to get a sensible result for everybody.

Senator BARTLETT—Community organisations and environment groups do not particularly like battling something for years and years. Do you feel that the streamlining that has been put forward in this legislation does that without compromising the environmental protection goal?

Mrs Peatman—Yes—subject to seeing the regulations. The devil of the detail is in the regulations.

Senator BARTLETT—Unfortunately, the legislation goes through before we get to see the regulations. That is happening rather frequently these days. I will leave it there.

Senator RONALDSON—Chair, I bring it to the committee's attention that the Australian Labor Party is now not represented at this committee hearing.

CHAIR—We do have a quorum, because we have a majority of members of the committee here, and there is a participating member, who also counts towards a quorum.

Senator SIEWERT—I would like to go back to the issue of the training process. You referred to the group that appeared before us earlier: the National Parks Australia Council. They were talking about the potential implementation of this act around Australia. Are you familiar with the various bits of environmental legislation around Australia?

Mrs Peatman—I am familiar with the environmental legislation in New South Wales. I have committee members all around Australia who are experts in those areas.

Senator SIEWERT—They were using a specific example of where a threatened species is potentially found. They were talking about one in particular, the orchid, and what they were saying is that it is highly likely that you could not find it through a survey. In that case they were using examples like that. I have got to put on the table that I have 16 years of experience in working for an environment group, so I know that some surveys are better than others and that it does occur that species are found after development starts. My understanding of the changes to the act is that, in that case, once development approval is given in those circumstances, they cannot then bring back the issue of a threatened species. Is that a correct understanding or not?

Mrs Peatman—It would not be the case in New South Wales. If any threatened species were found on the land during development then development would stop until that species was protected. The species can be protected in various ways. The example of the underground orchid is an extraordinary example because you can see most threatened species.

Senator SIEWERT—Not in WA, either. We have specific threatened species that only turn up during specific seasons. If you have done your threatened species survey and have not been comprehensive and have not done a proper seasonal one, it is highly likely that a species will turn up that has not been found. That is the way our vegetation works.

Mrs Peatman—The development would stop in New South Wales until it was protected.

Senator SIEWERT—That is in New South Wales, but what about in other states?

Mrs Peatman—I cannot answer that off the top of my head. I can find out for you. I did a development in far northern New South Wales, at rainforest-cleared land. This was land that had been cleared for 40 years, but it was previously rainforest. There was a remnant species on the land and we did a plan of management. We gave a substantial amount of money to the

local council to put in a trust and we set up a protected area so that those species would be saved forever. That is what usually happens in developments and that is what should happen in development.

Senator SIEWERT—The point that I understand the group was making before is that their understanding of the amendments is that if a threatened species is found during development they will not be able to use that EPBC Act to address that issue.

Mrs Peatman—Yes, but they were Canberra based. I am not sure what the legislation is in the ACT to protect threatened species. I think they were speaking from their experience at that point. That would not happen in New South Wales.

Senator SIEWERT—The conversation earlier was that you thought that they did not understand the process, and the point I am making is that it may not happen in New South Wales, but it may be the case in other states around Australia.

Mrs Peatman—I am happy to take that on notice and come back to you.

Senator SIEWERT—I would appreciate that. I would like to refer to the issue around the thematic approach as well. The theory that we have had put to us by conservation organisations is that, if a species is found that is not part of the theme, they are going to have to get back to the old advocacy/lobbying approach with the minister, which is how it used to be.

Mrs Peatman—Yes. The only rider that I have on all of this is that most of the development is approved at state or local level and that the state legislation applies, so surely the protection should be there firstly. This is overarching protection for Australia-wide or international protection, which we should have. I am not saying that we should not have it, but because it is overarching it only gets used a fraction of the time that the state legislation does.

Senator SIEWERT—Do you know how many species have been put on the list for consideration by HSI and WWF?

Mrs Peatman—No, I do not.

Senator SIEWERT—There are at least 500 critical habitat nominations.

Mrs Peatman—I knew that there were 500, but I did not know if there were more than that.

Senator SIEWERT—They are going to fall off the list if the government decides that they are not going to deal with them.

Mrs Peatman—Are they on state based lists?

Senator SIEWERT—Yes. If you follow that argument through, do you think that there should not be a federal list?

Mrs Peatman—Yes—by all means. It has to relate to the Commonwealth marine area, the World Heritage properties, the Ramsar wetlands, the national threatened species and ecological communities and the internationally protected migratory species. I see it placed in that area as opposed to the state area. It should all interlink. We should have protection from the Commonwealth down to the local level. We should have all of it.

Senator SIEWERT—Is your argument, then, that the Commonwealth should be pushing the states to better protect their threatened—

Mrs Peatman—The states should be doing it themselves and it should be interlinked.

Senator SIEWERT—Do you understand the argument, from a conservation perspective, that the states are not doing it and expect the Commonwealth to be able to protect these species?

Mrs Peatman—I see.

Senator SIEWERT—Do you acknowledge that?

Mrs Peatman—I acknowledge that might be an argument. I have not heard it. I think it should be done at the state level because that is the practical day-by-day exercise of the jurisdiction.

Senator SIEWERT—I see where you are coming from now.

Mrs Peatman—It should be the same right across Australia. That is one of the points that the Law Council keeps pushing. We want common laws right across Australia in all jurisdictions—federal, state and local—as far as possible.

Senator SIEWERT—I would like to go to bioregional plans. Have you looked at the bioregional planning provisions in the bill?

Mrs Peatman—No, I have not.

Senator SIEWERT—I had a specific question that I wanted your opinion on, but, if you have not looked at it, that is fine.

CHAIR—We thank you for appearing today on behalf of the Law Council of Australia. Your submission and evidence has been very important to this committee.

Mrs Peatman—Thank you for the opportunity of making a submission and for the invitation to come today.

CHAIR—We have also provided you with a copy of the bills alert, which has been put on your desk.

Proceedings suspended from 11.08 am to 11.34 am

McLOUGHLIN, Mr Richard, Managing Director, Australian Fisheries Management Authority

RICHARDSON, Mr Geoffrey Robert, General Manager, Sustainability and Business Management, Australian Fisheries Management Authority

CHAIR—I resume this hearing. We welcome the Australian Fisheries Management Authority, represented by Mr Richardson and Mr McLoughlin. Would you like to make an opening statement?

Mr McLoughlin—I have no opening statement to make.

CHAIR—We would really like you to make one, just to hear your general views on these amendments, because you have not put in a submission. It would be helpful and of assistance to the committee if you were to set out your views.

Mr McLoughlin—I will then gather my thoughts for a couple of seconds and say two things. The first thing is that AFMA is an agency within the DAFF portfolio and we have had extensive discussions with our DAFF portfolio colleagues. The majority of comment on this draft bill will be provided through the DAFF portfolio response rather than direct from AFMA. Obviously we are here to answer questions and make comment as you require.

The second thing is that it is a very dynamic time for fisheries management in Australia. The policy settings for fisheries management have changed substantially in the last 18 months. Those were put into place by your colleague Senator Macdonald, and they have largely sent fisheries management in a new direction in the last 18 months. As part of that, the government also committed $220 million for a structural adjustment package for the industry to effectively halve the size of the Commonwealth fishing fleet, if we can do that. That buyout process is still running but with a clarification around government policy for what is being desired as an outcome of Commonwealth fisheries management. That has been clarified by government. The structural adjustment program is enabling that to occur.

Much of what we do in terms of implementing government policy now is well under way or has been implemented, but it does have interactions with the EPBC Act, getting back to the connection, and we have a lot of interaction with the Department of the Environment and Heritage and its minister, as does our industry. So there are quite strong links between fisheries management as a form of wildlife management and also the Commonwealth fisheries act, which has to deal with a whole range of issues, not only fisheries management but also illegal fishing and the like.

CHAIR—Thank you very much.

Senator SIEWERT—What is your experience with the current conditions of the act with strategic assessments?

Mr McLoughlin—I think largely the strategic assessments were a significant new area of activity for us when they were first put in place, as they were for all fisheries agencies around the country. They were initially thought of as particularly onerous. What they have done over time is highlight a number of areas that fisheries management of the eighties and nineties should have been thinking about and probably was not, so it has been beneficial in that

respect. Our more recent experience is that we have been able to comply with strategic assessments. We have not failed any strategic assessments as yet in the Commonwealth. We have a good proportion of the five-year exemptions, rather than the wildlife trade permits arrangements.

I think by and large they have been a relatively successful way of including a whole range of other issues for fisheries management. What they have meant as well is a significant level of expenditure, some of which has been met by industry, so that has been a sort of a change in recent years. The cost of doing fisheries management and the level of complexity has increased, but that is not to say that the issues should not have been dealt with anyway.

Senator SIEWERT—I do not think that could be an argument for why we should not be doing it, if it has resulted in better fisheries management. What benefits do you see coming from the changes that have been made in terms of strategic planning?

Mr McLoughlin—At this stage with the limited amount of time that we have had to go through the bill in detail, as I sit here today, I would have to say I am not 100 per cent aware of what changes it will mean. We are running strategic assessment reaccreditation processes right now, and I assume that they may well be affected by what is in the bill if it goes through.

Mr Richardson—One of the changes is something that we have been seeking for sometime from the portfolio, and that is around an expansion or more flexibility in terms of the sorts of management arrangements that can be accredited under those strategic assessment provisions of the EPBC Act. Rather than just formal management plans under our Fisheries Management Act, we manage some fisheries under fishing permits that are not under formal plans of management, and it has been quite difficult in the past to actually get those accredited or assessed, if you like. These changes clarify those points and expand the sorts of arrangements that can be assessed under that part of the act.

Senator SIEWERT—As to the issue around commercial fisheries and commercial fish, you are obviously aware that HSI was in on Friday and had concerns that no commercial fish had been listed, and they believe that the changes proposed to the act will mean that no commercial fish will appear on the list. I assume that AFMA does not want commercial fish on the list?

Mr McLoughlin—I do not think it is a matter of whether we have an opinion one way or the other. If the science and the statistics say that commercial fishing has resulted in a particular outcome that needs a particular management response, we will go with that as the law and policy decides. Certainly if a fish stock got to the stage where it was to be listed as vulnerable or endangered, that would be of concern because effectively the fishery management has failed to that point. We have not seen that as yet, and it is also very difficult internationally, let alone nationally, to find any evidence that commercial fishing has fished down a stock where it genuinely faces extinction, other than in estuaries and fresh water.

We have some that you can point to where commercial fishing has had a detrimental impact, but in terms of driving them to extinction, the evidence is very limited for that, as much as anything because the economics would say that fishermen will move on to other things and still leave a small number in the water. There are always some examples you can

point to. But estuaries and freshwater systems, lakes and rivers, are the ones that are most at risk from commercial fishing. We do not tend to see the same evidence out in marine species.

Senator SIEWERT—I am speechless—there is SBT—

Mr McLoughlin—I said 'the threat of extinction', which is really what the EPBC Act as currently established sets out to avoid.

Senator SIEWERT—Are you talking about in Australian waters or are we talking globally? I really need to clarify this.

Mr McLoughlin—I think it is both. It is actually quite difficult to find clear evidence that commercial fishing in the marine waters has led to extinctions.

Senator SIEWERT—And you are being very careful about using the word 'extinction', are you not? You are not talking about levels that are almost unsustainable and questioning their viability?

Mr McLoughlin—Absolutely. The current provisions of the EPBC Act are set up to avoid extinctions—quite rightly.

Senator SIEWERT—So what about where species are vulnerable? Do you not believe that we need to manage for that?

Mr McLoughlin—Of course—that is why we have a Commonwealth Fisheries Act and a Fisheries Management Authority, to avoid things becoming vulnerable to extinction. That is the way the current EPBC Act is set up. With the new policy settings that are in place, with fishing ceasing at particular levels of stock, I think it would very difficult—

Senator SIEWERT—Why are we not doing that for SBT?

Mr McLoughlin—SBT is a species which—

Senator SIEWERT—Or orange roughy?

Mr McLoughlin—Orange roughy is managed by AFMA. SBT is not managed by AFMA other than AFMA manages the administration of the take of it in Australian waters. It is an internationally managed species, as you are probably aware. For orange roughy, it is managed in Australian waters by AFMA, but it is also a species—

Senator RONALDSON—Tuna is southern bluefin tuna, is it?

Mr McLoughlin—Yes. Orange roughy is a species that occurs in the Mediterranean through to the east of New Zealand. We manage a small portion of that stock in south-east Australia and southern Australian waters and there is no question that it was overfished in Australian waters in the late eighties and early nineties. That is why in the last month AFMA has literally set quotas that are effectively zero to deal with that overfishing.

Senator SIEWERT—Australia is still fishing SBT though?

Mr McLoughlin—Yes, we are.

Senator SIEWERT—I presume therefore that you support the changes to the act that say—I cannot remember the exact wording—along the lines of, 'We will not list it if its listing will result in its further endangerment'?

Mr McLoughlin—It is not up to us to list or not list; it is to put in place a total allowable catch and a quota management system that has been agreed to and committed to by the Australian government in those international forums. A whole range of scientific processes goes into that. We are not responsible for listings.

Mr Richardson—On my reading—and I go back to Richard's point that we have not had a lot of time to go through them—the subsections that relate to listing as vulnerable, endangered or critically endangered have not changed. The only one that has changed is the one about the conservation dependent category. That is really what we are talking about with these amendments.

Senator SIEWERT—Yes. The issue there is that it is the conservation dependent category that has changed, as well as the process changing to a thematic approach.

Mr Richardson—You are right. That is correct.

Senator SIEWERT—We have had a number of conservation organisations, including HSI, raising some strong concerns about that.

Senator BARTLETT—In the spirit of cooperation, and because I am sure you will take onboard some of the concerns that we have in formulating your report, I might allow a bit of time across to you folks. I presume that you are aware of the report of the Senate Standing Committee for the Scrutiny of Bills on this legislation?

Mr McLoughlin—No, I have not seen it.

Senator BARTLETT—There have been significant concerns raised in that report, as well as in others, about the combining of strict liability with jail sentences and also about some of the powers in this legislation which I acknowledge are part of harmonising it with the fisheries act and the Migration Act about strip-search and detention for, I think, seven days. Do you think those sorts of powers and penalties are necessary for environmental protection measures? My understanding is that most of these relate to illegal fishers and so on. You can take it on notice if you like.

Mr McLoughlin—The fisheries officers of AFMA work extensively in Northern Australia on illegal foreign fishing and the like, and those powers have already been made available to AFMA Commonwealth officers. There is an issue that, where fisheries officers, for example, in a hypothetical situation, find a fishing vessel that has turtles and dolphin onboard but no fish, the AFMA fisheries officers are without the powers to deal with that effectively. For example, they might be hiding or concealing dugong tusks on their body. They are very valuable. If the AFMA fisheries officers were at sea, they could search those people and charge them as appropriate under the fisheries act; but without those powers in the EPBC Act, they could not effectively undertake the same sort of work they might otherwise do because they are on the scene. The powers are consistent with the Fisheries Management Act. I am not really in a position to say whether or not they are appropriate, but they would seem to be effective in an operational sense to enable officers in the field to deal with a wider range of offences as they see them.

Senator BARTLETT—Are you able to tell me—again, perhaps you can take it on notice—whether this combination of strict liability and seven-year jail sentences is something that occurs in fisheries legislation at the moment?

Mr McLoughlin—I would have to take that on notice. I do not believe so, but I will take it on notice.

Senator IAN MACDONALD—Is there a strict liability with our international fisheries response within Australian waters?

Mr McLoughlin—Yes.

Senator IAN MACDONALD—So there is a strict liability in relation to the Southern Ocean and elsewhere, I assume?

Mr McLoughlin—Yes.

Senator BARTLETT—It is a combination of strict liability and the jail term or what seem to be quite large fines. I think you have a copy of that report now, so perhaps you know what I am referring to. I just want to know whether it is something that is parallel with existing fisheries—

Mr McLoughlin—We do have very constrained access to jail sentences under the fisheries act because of the UN Convention on the Law of the Sea, UNCLOS, which does not provide for jail sentences for illegal fishing. So UNCLOS does provide significant constraints on what we can do in terms of jail terms and more severe penalties. We have a fines regime in Australian fisheries legislation that is one of the stiffest in the world, but international agreements are in place that constrain our access to jail terms.

Senator BARTLETT—If you could also look at the comparison with the fines, it would be appreciated.

Mr McLoughlin—Okay.

Senator IAN MACDONALD—That raises a good point. I guess one benefit of this might be that jail sentences will be available to those fishermen who are stealing dugong tusks as well as fish. They cannot be jailed for fish but could they be jailed internationally not under the fishing law but under the environment law?

Mr McLoughlin—Yes, theoretically.

Senator IAN MACDONALD—It may in fact have some benefits there. Mr McLoughlin, just to make it clear, the role of the Fisheries Management Authority in broad terms is management and that involves conservation of the species; is that correct? Could you just elaborate on that?

Mr McLoughlin—That is correct, yes.

Senator IAN MACDONALD—You are charged under your act with proper conservation management of the species. That is not only because you are charged under the act to do so; if you do not manage the species they will not be there for the fishermen.

Mr McLoughlin—That is correct.

Senator IAN MACDONALD—How do you as an authority work out what is a sustainable level of catch for, in the case of Senator Siewert's questions, the SBT, although that is slightly different, and the orange roughy in Australia? People can rightly say your predecessors failed in the past with orange roughy. How can we be confident that your

organisation has the powers and the will to properly conserve a species such as orange roughy?

Mr McLoughlin—The objectives of the act are relatively specific for us, so ecologically sustainable development is the No. 1 objective of the act. I would contend that through much of the nineties in the first decade or so of AFMA's existence there was a policy gap in that what was not clear in the expression of how AFMA should go about its business was what level of risk the government was prepared to take in the management of its fisheries, or what it was prepared to have its management agency take. That has been resolved with our *Fishing future* statement of last year, which said that, in reality, the government was not prepared to take high risks at all with the management of the fish stocks. It filled in the policy gap for AFMA that said, 'We will take a conservative approach; precautionary management is required.' It ended essentially what was many years of debate with the fishing industry about the setting of catch levels. The appropriate levels of risk have now been defined for us and for industry such that the debate around catch levels is constrained within what would be literally a world's best practice management regime. The rules are now upfront that fisheries must be maintained at particular levels and fishing will cease at other levels that are lower than that. I believe that we now have a set of legislative and policy frameworks in place that provide a moderately low-risk fisheries management regime, and the tools now in place say how we conserve species under fisheries management.

Senator IAN MACDONALD—That being the case, how do the amendments to this bill impact upon the fisheries? I have to say that the committee, similar to a lot of the witnesses, has not had a lot of time to go through these in detail. I do not want to ask you things that will put you in an embarrassing position with your colleagues, because I am aware that you have to deal with DAFF and DEH, and I am also aware that since this ridiculous decision on Uhrig—which I can say but you cannot—you will become even more closely aligned to the government and you will answer to the government rather than to your board in some instances. With those qualifications—and I do not want to put you in an embarrassing situation—how will these amendments to the act impact or interact with your role, which you have just very clearly enunciated, in conserving as well as managing the fish stock?

Mr McLoughlin—I will split it into two areas: one is the resource management, the job of the fish stocks; and the other is the interactions around offences, potential interaction with illegal fishing. On the resource conservation side, which I take is more the relevant part of your question, for us as yet we are not really across how the proposed amendment in section 179(6), I think it is, will work. A fisheries management plan is effectively a conservation plan, and the fishery management plan under the act must specify and detail how we will ensure sustainability of fish stocks under that management plan.

Senator IAN MACDONALD—Under which act?

Mr McLoughlin—Under the current Fisheries Management Act. The EPBC Act Amendment Bill specifies a new clause 179(6), which provides that the environment portfolio may well have the environment minister or the environment agency proposing that it be a conservation plan under the EPBC Act. We are not quite sure what that means in practice, but a fishery management plan is a document under the fisheries act that has a very extensive consultation process and is a familiar process for the fishing industry to work with us on.

Senator IAN MACDONALD—Based on science?

Mr McLoughlin—Based on science and the like, and the government policy settings that we are putting into place or have put into place over the last 12 months. If a fishery management plan was to also be a conservation plan under the EPBC Act, we are not quite sure what that means in terms of amendments to that plan or how the decision making under that plan would occur within the fishery management agency if we also had to refer to the environment portfolio all the time. So we are not quite sure how that will work yet.

Senator IAN MACDONALD—If you do not know how that will work it makes it very difficult for the committee to try to predict that. What will calling it a conservation management plan under the EPBC Act add to its being a fisheries management plan under the fisheries act?

Mr McLoughlin—In terms of our current legislative objectives that we must make under the Fisheries Management Act, this new policy tool that will be available to us early next year, the Commonwealth harvest strategy policy, which dictates the actual policy settings for how we are to manage fish stocks, and the other measures that we have in place, including compliance and administration, monitoring, control, surveillance—all of those other measures that are in management plans—I would have to say that we believe that we can do all of that and meet government policy and conserve fish stocks if we are meeting those requirements.

Senator IAN MACDONALD—What you will have is a duplication of process such that no-one is quite certain which will take precedence, who will administer it and who will enforce it?

Mr McLoughlin—As I said, we have not worked out the operation of that clause as yet, so I cannot say whether that would be the case.

Senator IAN MACDONALD—I do not want to put you in a sensitive position with your colleagues, but just as an aside I think the committee should really investigate that. The problem is—and you said in your earlier statement that you will work it out through AFMA with DEH in the time ahead, and good luck to you on that—that we as a parliament, and we as a committee of parliament, will not be part of that process. We are looking at perhaps how this committee should recommend to the Senate its approach to the legislation. That is really the only chop we will have at this until perhaps further amendments are introduced. I am particularly interested—and I will ask the department later—in how calling those fisheries management plans conservation plans will happen? How do you deal with the vulnerable species? You said that your requirements are to manage for that so that, whilst you would not list them, you have a very close involvement in that goal?

Mr McLoughlin—Indeed. The Commonwealth harvest strategy as it currently stands, which was provided to us as a ministerial direction by you in November last year—

Senator IAN MACDONALD—There are dorothy dix questions—

Mr McLoughlin—I say that at the risk of its being interpreted as a Dorothy dixer. It specifies for the first time in AFMA's history that decision making will occur at particular levels of stock size. So, in the current settings of that policy and which we have applied to the South East Trawl Fishery this year and applied across all Commonwealth fisheries for next year, from 1 January, when stocks are assessed as being down to 20 per cent of their pre-

fishing size, fishing must cease. We have applied that across all Commonwealth fisheries from 1 January in the setting of quotas for next year, except where we make provision, for example, for very small levels, say, of 20 tonnes across orange roughy for a whole zone for by-catch.

Senator SIEWERT—I thought orange roughy was 400 tonnes?

Mr McLoughlin—For one area where the stocks are assessed to be above 20 per cent. In all other areas the stocks are less than that, so fishing is effectively stopped except for small arrangements for by-catch.

Senator SIEWERT—So do the fish stay in little areas?

Mr McLoughlin—The scientific evidence says that in one particular part of the fishery, on the Cascade Plateau, south-east of Tasmania, the fish stocks are healthy, up around 60 per cent to 70 per cent on that area, and so a small fishery has been allowed.

Senator SIEWERT—It boggles my mind. Overall, is it not down to seven per cent?

Mr McLoughlin—No, that is incorrect. The ranges are between 7 per cent and 15 per cent depending on the management zone that you consider. Overall, except for the Cascade Plateau, it is probably around 12 per cent.

Senator SIEWERT—Is that not below 20 per cent?

Mr McLoughlin—It is, and that is why we have set the TACs for orange roughy at effectively zero for all except the Cascade.

Senator SIEWERT—Yes, it is playing with words.

Senator IAN MACDONALD—But it is not playing with words.

Senator SIEWERT—It is playing with words. Overall, the biomass is 12 per cent.

Senator IAN MACDONALD—But it is a specific biomass on the Cascade, which is well above 20 per cent, as I understand it.

Mr McLoughlin—The evidence is that it is a separate stock, so we have allowed a small fishery there.

Senator IAN MACDONALD—When you say 'evidence', that is of course scientific evidence?

Mr McLoughlin—The scientific evidence, yes.

Senator IAN MACDONALD—And not just the thoughts of well-meaning but, with respect, ill-informed people; that is scientific—

Senator SIEWERT—Twelve per cent overall. We think it is okay to fish out the last healthy population when the other is below 20 per cent?

Senator IAN MACDONALD—No, the Cascade, which is a specific fishery, on scientific evidence is above 20 per cent. Even I can understand that. You do not have to be very clever to—

Senator SIEWERT—I can understand how we can play with statistics, too.

CHAIR—With some hesitation, given the interest in this conversation, I do remind senators that we are here to address this bill and the amendments.

Senator IAN MACDONALD—The southern bluefin tuna was mentioned, and you qualified that by saying it is an international arrangement and that you administer Australia's share of the international quota. Through DAFF or as part of DAFF, do you have an input into the international commission?

Mr McLoughlin—Certainly, in two ways. Firstly, we monitor and administer the catch in Australian waters to ensure that it does not exceed Australia's agreed level of catch. Secondly, we have input into the broader fishery management strategies that are taken at the commission. Everyone would be aware that that is a stock that is in need of some careful management probably over the next two decades at least. The efforts that Australia makes to ensure that the global catch is kept within its global catch limit as agreed at the commission has been the subject of an enormous amount of work over the last 18 months.

Senator IAN MACDONALD—Southern bluefish tuna is a species that just passes through Australian waters. It does not originate in Australian waters and does not end up in Australian waters. Is that correct?

Mr McLoughlin—In broad terms, yes. It spawns to the north-west of Australia out in the Timor Sea. It spends a deal of its life in Australian waters before moving into the Southern Ocean. It is caught as it moves through the Australian fishing zone.

Senator IAN MACDONALD—You have mentioned management plans and conservation plans under this act. Is there any other part of this legislation and these amendments that you have been able to ascertain, in the short time you have had available, will have an impact on or in any way affect the management of fisheries by your organisation?

Mr McLoughlin—At this stage, I would have to say no. I spent the weekend looking through it. Fisheries management is really effected through fishery management plans at the Commonwealth level, and where we do not have those we have permits, as my colleague Mr Richardson indicated earlier. Fishery management plans are the basis of fisheries management at the Commonwealth level. The interaction between the EPBC Act and fishery management plans is the key issue about which we would like a bit of further discussion. Clarification around the operation on the water of the illegal foreign fishing powers is a discussion to be had as well.

Senator IAN MACDONALD—Could you elaborate? I am not familiar with how the EPBC Act amendments deal with enforcement.

Mr McLoughlin—They provide a penalties regime and heads of power for apprehensions, searches, arrests and detention of people suspected of breaching the EPBC Act for wildlife species. That is a very significant—

Senator IAN MACDONALD—That is where we started, with tusks of dugong, but it is not related to fish.

Mr McLoughlin—No. Fisheries offences are in the fisheries act and stay there. As I interpret what I read here, it is about wildlife and a set of powers in the EPBC Act equivalent to the ones that fisheries officers currently have.

Senator RONALDSON—Similar powers?

Mr McLoughlin—Similar powers, yes.

Senator IAN MACDONALD—Thank you very much for that. I do not think I have any other questions. It does not impact on you apart from those two areas you have mentioned?

Mr McLoughlin—No. They are the two areas of obvious interaction between the two acts. One is the operational one on compliance. We can talk through how that might work with DEH and our DAFF colleagues. The interaction management plans are the means by which we manage fisheries and issue statutory fishing rights, and it is that interaction in respect of which we do not have concerns but we are not quite sure how the clause as it is currently drafted would work. We would want to see what that interaction was, particularly the operational interpretation of it.

CHAIR—Thank you very much. Unless there are other questions, we thank you for your appearance this morning.

Mr McLoughlin—Thank you.

[12.08 pm]

FRANKLIN, Mr Peter Gary, Chief Executive Officer, Commonwealth Fisheries Association

CHAIR—Mr Franklin, we are very pleased to have you here today. I notice that you, too, have not made a written submission. Fishermen are obviously people who prefer talking to each other rather than writing.

Senator IAN MACDONALD—They are out fishing. They are actually workers in this community.

CHAIR—As you will have noted from the previous witnesses, we like to have something to work on, so I would be grateful if you could give us a quick outline of your association's views about the proposed amendments to the environment and biodiversity act and any other general comments you would like to make, and then the senators can question you.

Mr Franklin—The association represents the broad interests of fishermen that operate in Commonwealth fisheries. We are the peak organisation of the range of associations that represent the individual fisheries that comprise Commonwealth fisheries. It is correct we have not made a submission. I must say getting across this task has not been an easy one, but I have prepared an opening statement, which I would like to give.

CHAIR—Thank you very much. That is very good.

Mr Franklin—We welcome the opportunity to participate in the review of the legislation being undertaken by the committee. Unfortunately, our capacity to effectively engage in this process has been severely limited by the short notice and complexity of the package, some 414 pages, and our total lack of consultation and involvement in the preparation of the package for legislation. From our perspective, these circumstances have been exacerbated by the absence of meaningful information in the explanatory memorandum on the nature of the changes and the superficial analysis contained in this document on the implications of their adoption. Basically, that has given us no insight into the thinking behind the changes.

This has meant that the only way to understand the scope and potential impact of the amendments is to undertake a detailed section by section, paragraph by paragraph analysis of the documents. At such short notice, such an analysis is well beyond our capacity. I should also note that collectively our membership has not had the opportunity to consider the amendments in any detail and as a consequence my comments today will be fairly limited in nature.

In this context, it is noteworthy and somewhat ironic that the explanatory memorandum identifies the main parties affected by the legislation as industry, business and individuals, yet we suspect that no real attempt has been made to effectively engage those parties. The lack of meaningful consultation and the absence of engagement with key stakeholders is a real pity. From our perspective, it represents a significant missed opportunity to move beyond the command and control paradigm that seems to exemplify the development of the EPBC Act and its amendments to one involving more collaborative and positive engagement with those in the industry it seeks to influence.

While the changes proposed here are well intentioned, we have no confidence that they are the result of a comprehensive review of the limitations of the EPBC Act and its interaction with related Commonwealth legislation. In this respect, there is a strong industry desire for greater clarity and harmony in the interpretation and administration of the EPBC Act 1999 and the Fisheries Management Act 1991. For example, we find it both unusual and frustrating that the Minister for environment retains the power to close down fisheries through the listing of particular species or to preclude the export of wild caught fish in circumstances where the Australian Fisheries Management Authority has the clear responsibility for managing those resources under the Fisheries Management Act.

Through the development and implementation of detailed science based harvest strategies, industries with AFMA, as Mr McLoughlin indicated before, responded effectively to the ministerial direction last year from the Minister for Fisheries, Forestry and Conservation in terms of addressing overfished stocks and promoting more profitable commercial fishing activities. At the same time, industry is working hard to reduce its impact on bycatch species and fulfil the requirements of the EPBC Act in relation to interactions with threatened, endangered and protected species. In addition, the fishing industry is being required to forgo access to large tracts of the AFZ, the Australian fishing zone, through the development and implementation of an extensive network of marine protected areas. However, as things currently stand, the commercial fishing industry is exposed to the risk of being excluded from export markets by an unfavourable DEH strategic assessment. Worse still, despite fulfilling all the requirements of Fisheries Management Act, industry is exposed to the risk of having fisheries closed down through the listing of key target species or bycatch species under the provisions of the EPBC Act.

The amendments proposed under clauses 179, 186 and 187 appear to partly address these concerns. But much more needs to be done to effectively harmonise the EPBC Act and the Fisheries Management Act, as well as to encourage a more functional and collaborative working relationship between DEH, DAFF and AFMA on fisheries management issues. The CFA would not wish to delay or otherwise interrupt these changes or those designed to address difficulties that we understand have been identified in accrediting fisheries management under the Torres Strait Fisheries Act and the Fisheries Management Act, and those designed to promote the orderly rollout of the South-East Marine Protected Area Network.

We also welcome amendments to item 413 in relation to appeals against ministerial decisions, and the increasing flexibility under item 471 for the minister to not be bound to list under a particular category. On the surface, these changes appear to be sensible. However, as always, the final test is how they will be interpreted and applied. Nevertheless, we would appreciate the opportunity to have a more fulsome briefing on the amendments to ensure that we are fully cognisant of the nature and extent of the changes proposed.

Senator RONALDSON—When you say 'the changes', do you mean the whole of the bill?

Mr Franklin—I mean those changes that affect the industry. At the moment we have tried to cherry-pick those ones we think apply, but there is an amazing array of amendments.

Senator RONALDSON—Thank you.

Mr Franklin—Importantly, we need to be more confident in our understanding of their rationale, their implications and how they will be interpreted and implemented by DEH. From our perspective, there is a real and pressing need to eliminate the current double jeopardy that the fishing industry is exposed to in relation to the management of commercial fisheries. In our view, this can be achieved only by a more comprehensive, transparent and inclusive review of the interaction of the EPBC Act 1999 and the Fisheries Management Act 1991, as well as the respective roles and responsibilities of DAFF, DEH and AFMA in the management of commercial fisheries.

CHAIR—Thank you very much, Mr Franklin. Who would like to start?

Senator IAN MACDONALD—As I said to the national parks people, have you not been offered briefings today?

Mr Franklin—No.

Senator IAN MACDONALD—Have you sought one from DEH?

Mr Franklin—I have made a couple of contacts with the DEH and they were helpful. Late last week I got a list of what they thought were the main changes that were going to affect the fishing industry, but it was fairly shorthand. I think there were a couple missing from it. The trouble is that then you have to go to the amendments, get out the act, work through and see how they sit together and then try to interpret what is in the mind of the person who is drafting the changes.

Senator IAN MACDONALD—What are your resources at CFA? Have you a team of lawyers, researchers and scientists on your staff?

Mr Franklin—We have one part-time executive officer, and I am a part-time CEO—well, I am paid part time.

Senator IAN MACDONALD—And at the moment you are the only existing national fishing organisation since ASIC went into liquidation?

Mr Franklin—That is correct.

Senator IAN MACDONALD—I know I can offer this, because when I raised this with the national parks people someone from the minister's office came down and said, 'If you want a briefing, contact Gerard Early on 6274 1077.' I am sure that, if that offer was made to national parks, I could confidently make that in your case, if that would be helpful in addition to what DEH assisted you with. Needless to say, the process does concern me. If Senator Carr were here he might have made that point. I note again that the Labor Party completely ignore these hearings; they do not seem to be interested at all.

CHAIR—Abandoned.

Senator RONALDSON—Abandoned, as the chairman said.

Senator IAN MACDONALD—Were he here, he might have made that point, but I will make it for him. You heard Mr McLoughlin talk about the fisheries management plans being, it appears, duplicated by conservation plans. Have you had a look at that? Have you had time to do that?

Mr Franklin—My understanding is that it is more a process of accreditation of the fisheries management plans as conservation plans. That is our hope, and I think that is the intention. But, again, I would not like to be held to that. That is the way I have interpreted it—that these amendments provide the capacity for the Minister for the Environment and Heritage to accept the fisheries management plan as a conservation plan. But, having said that, I think the arrangement is that he may accept it, which means, of course, that he may not accept it. If he does not accept it then you are back to square one.

Senator IAN MACDONALD—Already the Department of the Environment and Heritage has an influence on fishing management, through the strategic assessments. Could you just explain to the committee how that works?

Mr Franklin—As part of the permit to export, there has to be a strategic assessment of the fishery. My understanding is that you need a strategic assessment only if you are, in fact, in the export game, and you cannot export Australian produce, wild caught fish, unless your fishery has received a tick under the DEH strategic assessment process.

Senator IAN MACDONALD—What does the strategic assessment cover?

Mr Franklin—It is a fairly comprehensive assessment of the fishery and its sustainability.

Senator IAN MACDONALD—Is it correct to say that, if you get the tick under that strategic assessment, that is an indication from DEH that it considers that the fishery is sustainable in the terms of the current management arrangements?

Mr Franklin—It could do, but it does not necessarily avoid the prospect of you running foul of another DEH arrangement. For example, you could receive a tick under the strategic assessment but be excluded from a marine protected area because your fishing activity is considered to be unacceptable in that context. It does not translate across all DEH requirements. It is more a specific one that relates to the export powers. But I guess it is better than not having it.

Senator IAN MACDONALD—You mentioned clauses 179, 186 and 198(7) harmonising something. Could you again—

Mr Franklin—My understanding—and this is qualified by the fact that I am just having a fairly quick look at it—is that they seem to be trying to develop a more sensible arrangement between AFMA and DEH in relation to the listing of species, particularly conservation dependent species. If that works as well as we hope it does, it would mean that under the harvest strategies there would be a bit more harmonisation of that process. At the moment, there can be conflict between the way the harvest strategy sets its reference and limit points and what could be included in the listing of a species. It is fairly complex, and our concern is that, unless the two systems are harmonised, you could be satisfying one and be caught by the other.

Senator IAN MACDONALD—You mentioned marine protected areas, which are not part of this act, I do not think. Were you involved in consultation with the department of the environment in relation to those marine protected areas?

Mr Franklin—Yes. I was in fact the chairman of the industry working group on the marine protected area network.

Senator IAN MACDONALD—Was it a satisfactory process—as a process? I am not necessarily asking about the outcomes.

Mr Franklin—It was a process that was proceeding slowly but in an orderly fashion until the announcement of the structural adjustment arrangements last year. Then it was decided to bring the two processes together, which meant that for the areas to be nominated the announcement was accelerated. The announcement made prior to Christmas about the areas that were being contemplated was quite ill-conceived and it took us about three months of solid negotiation and researching to achieve a more rational and orderly outcome. But my understanding is that there are elements in this amendment that affect how that plan will be rolled out. My understanding is that the current act is deficient in that if the—

Senator IAN MACDONALD—Which act?

Mr Franklin—The current EPBC Act. My understanding is that under the current EPBC act, once an area is declared, unless there is a management plan in place, there can be no fishing regardless of whether the fishing would have been authorised under the management plan.

Senator SIEWERT—When you say 'declared', what do you mean?

Mr Franklin—When the full process of declaration goes through and the marine protected network is finally declared as being in place—

Senator SIEWERT—This is under the regional plan assessment process once an MPA is declared?

Mr Franklin—If that is how the MPA is declared—I am sorry, I am not sure of the intricacies.

Senator SIEWERT—Sorry, you are talking about specifically a marine protected area?

Mr Franklin—Yes. If, for example, that south-east network is declared, unless there is a management plan in place at that time all fishing must cease regardless of whether that fishing would be authorised under the broad categorisation of the various areas. My understanding is that there is an amendment in the current group of amendments that is designed to address that and to provide for an interim arrangement.

Senator IAN MACDONALD—So you would be happy with that, if it is as you think it is?

Mr Franklin—Yes. It would seem to me to be unreasonable for people to be excluded simply because of the deficiency in the legislation.

Senator IAN MACDONALD—That is all I have, thank you.

Senator RONALDSON—Just so that I am absolutely clear, the evidence that you are giving to the committee is that you support the amendments?

Mr Franklin—The evidence I am giving is that, within the limits of what we have been able to assess, there seems to be a number of elements that are worth while.

Senator RONALDSON—Common sense?

Mr Franklin—Common sense, yes. Nonetheless, it is an act of faith rather than an act of confidence, if you know what I mean.

Senator RONALDSON—I think Senator Macdonald's part-time job is as an organiser of ministerial briefings. We will hopefully get that sorted out for you. Thank you.

Senator SIEWERT—I will follow up on the export permit? As I understood it, you agreed with the amendment that now prevents appealing ministerial decisions; is that right?

Mr Franklin—Yes.

Senator SIEWERT—Can I ask you to play the devil's advocate for a minute? What happens if the minister says, 'No, we're not going to allow that export?' Wouldn't the fishing industry want to be able to appeal?

Mr Franklin—Yes.

Senator SIEWERT—Why do you support the amendment that says 'no appeal'?

Mr Franklin—Our view is that it is a serious undertaking and that, if you are serious about it, you should be prepared to fully commit yourself to that appeal.

Senator SIEWERT—So the fishing industry is confident that the minister is always going to make the right decision?

Mr Franklin—Those in the fishing industry that I have been able to talk to about this particular element are satisfied with the arrangements that have been suggested.

Senator SIEWERT—No commercial fish species have been listed under the act.

Mr Franklin—No.

Senator SIEWERT—Why does the industry think that the changes are necessary if no species have been listed anyway?

Mr Franklin—One can equally argue: if no species have been listed, why do you need the power? But our concern is that there is an orderly and understood process that the industry is involved in and that is science based to determine the management arrangements for fisheries. Under the harvest strategies that involve setting target levels and limit levels that at certain stages would mean that, if you got to a particular point in a fishery, you would stop fishing. In our view, that is quite adequate and quite clear and the arrangements are orderly and well understood. Our view is that, if you have those arrangements in place and they are robust, why do you need another set of arrangements that potentially could be executed for a whole range of other reasons and close down your fishery? The other issue for us is that there is a high degree of uncertainty, if a species is listed, as to how it becomes unlisted. It is taking us into a dark cave and we do not know where the light switch is.

Senator SIEWERT—Would it not be better to fix that bit than to curtail the listing bit?

Mr Franklin—Sorry, I am not sure what you mean?

Senator SIEWERT—At the moment, do you agree with the bar being 20 per cent?

Mr Franklin—In some circumstances 20 per cent is a responsible level; in other circumstances it may not be.

Senator SIEWERT—Under what circumstances?

Mr Franklin—What we are talking about is hundreds of different species that all have different characteristics. They operate in different circumstances and different environments subject to different environmental conditions. Twenty per cent might be right for one species but it may not be right for another species. For example, as Mr McLoughlin said, with estuarine fisheries you may want to be far more cautious. I am not a scientist, but I know that broad rules of that nature do not necessarily apply. For example, you can have very short-lived species that are highly fecund; their reproduction is determined more by environmental conditions than fishing conditions, and their biomass naturally fluctuates wildly, whereas with other species that are long-lived and are not so fecund you might want to be more conservative.

Senator SIEWERT—One of the issues you raised about listing commercial species is getting them off the list. I presume you mean once they have gone past the set level, whether it 20 per cent or whatever, getting them back on the list so that you can fish them? That is my understanding of what the issue is.

Mr Franklin—That is one of the issues. The fundamental issue is: why should we have two agencies doing the same thing?

Senator SIEWERT—Wouldn't you suggest that you should be separating fishing management from conservation management so that the environmental agency would be better off setting the limits on—

Senator IAN MACDONALD—It is the same thing.

Senator SIEWERT—Sorry?

Senator IAN MACDONALD—Sorry, keep going.

Senator SIEWERT—So that you have separation between who sets those limits?

Mr Franklin—I can see absolutely no merit in that suggestion at all. The Australian Fisheries Management Authority with industry put a huge amount of money into research and understanding fish stocks. They are the ones who are best equipped to understand exactly what is happening with fish stocks. Are you suggesting that the DEH would set up a—

Senator SIEWERT—No, I am quite happy for them to hand over that information. I must confess that I am worried about, for example, the orange roughy—and we have had this discussion before—where the biomass is down at 12 per cent, yet we still approve 400 tonnes being taken out of a specific area. My understanding is that the science is not clear about whether that is a single population. Erring on the side of the precautionary principle, I would suggest that we should not be fishing that.

Mr Franklin—I do not think we are going to agree on that point.

Senator SIEWERT—But that is the point. That is why I am raising it. I would suggest that is a decision that should be taken away from the commercial managers of the fishery.

Mr Franklin—The commercial fishermen do not make that decision.

Senator SIEWERT—The agency that regulates commercial fishing, then.

Mr Franklin—In that case there must be a deficiency in the Fisheries Management Act.

Senator IAN MACDONALD—There is not, though; that is the thing. The Fisheries Management Act requires, as Mr McLoughlin told you, to manage to sustainability.

CHAIR—I will just remind everybody, of course, that we are dealing with an act and the amendments, rather than a general discussion.

Senator SIEWERT—The point is: the decision as to whether that fish should be listed as endangered is going to be made more difficult with these changes than it is already. There is already controversy over whether it should be fished or whether it should be listed. It is the same with SBT.

Senator IAN MACDONALD—But it should not become endangered if it is properly managed.

CHAIR—Rather than having an across-the-room conversation, you speak through the chair.

Senator SIEWERT—We can have this discussion elsewhere.

Senator IAN MACDONALD—Yes, we will.

CHAIR—You should be asking questions of the witness.

Senator SIEWERT—You know very well that we have a different opinion over SBT. The fact is that these amendments are going to make it harder to list commercial species than it already is.

CHAIR—Do not reply, Senator Macdonald, because Senator Siewert will be addressing the witness.

Mr Franklin—My only comment on this is this: if your management plans are scientifically based and if you have the right triggers and limit points, there is no need to list. The Fisheries Management Act has the capacity to set at zero TAC. What more do you want?

Senator SIEWERT—I will not pursue it, sorry; it is pointless. I am finished.

CHAIR—Senator Bartlett has no questions. Senator Parry?

Senator PARRY—I have no questions, thank you.

CHAIR—Senator Macdonald?

Senator IAN MACDONALD—I think we have established what we need to establish. Thank you.

CHAIR—In that case, we thank you for appearing, Mr Franklin. It has been very helpful and we hereby suspend this sitting until 4.00 pm.

Proceedings suspended from 12.35 pm to 3.59 pm

COMBEN, Reverend Patrick, Chair, Australian Council of National Trusts

GRIFFITHS, Mr Colin, Executive Officer, Australian Council of National Trusts

WARNE-SMITH, Mr Tom, Research Officer, Australian Council of National Trusts

CHAIR—I welcome the representatives from the Australian Council of National Trusts. We invite you to make an opening statement to put a summary of your point of view to us.

Rev. Comben—Thank you for the opportunity to be here and for accepting our submission. I will make a few introductory remarks and put what we call the big picture before you before handing over to Mr Griffiths and Mr Warne-Smith. We represent some 80,000 members across Australia and I want to get rid of two preliminary matters. Firstly, we will not trouble you with the issues of time frames for discussions and submissions; we ask only that you note our concern and protest, but I think that would have been raised many times. Secondly, we willingly support and put to one side the pure administrative tidying up of the previous act. Some housekeeping matters were needed. The haste and compromise of the original act are clearly evident and need that housekeeping.

In terms of this particular bill, it is our view that the act which the bill seeks to amend is not in actual fact working and we firstly bring that to your attention. We note that the objects of the original act include CA to provide for the protection and conservation of heritage. We would suggest that that is not being achieved. If you look at the 33 places on the national register, there is nowhere that is truly under threat. When we look at places like Rippon Lea, the Glasshouse Mountains or the Opera House, we wonder what it is that the original act and now this bill is seeking to achieve by the major changes. Of the places on the register, some 33 of them on the National Heritage List, we do not think it is protecting and conserving heritage. We do note that the one piece of living heritage on that list, the Tree of Knowledge, has died in the last few months and is no longer there.

This bill is more than just administrative changes. It represents a real shift from environment and heritage conservation towards facilitating developments and catering to development interests. This is not being melodramatic. Examples of this shift are evident right throughout the bill. The explanatory memorandum explicitly states this objective. The expanded use of management policies and plans and bioregional plans will reduce the amount of scrutiny which proposals will be subjected to. Individuals and groups are having further barriers placed in front of them when they wish to challenge decisions. Approvals for actions will be further entrenched by the new section 158A which prevents changes to approvals even though the action may be having a very detrimental effect on the environment or heritage.

This legislation, if passed, will continue to change the very face of cultural heritage protection as we know it. Special parts of Australia's spirit might be lost as a result of this bill, firstly because there are no guarantees that states or territories could cope with the avalanche of responsibilities being unilaterally hoisted around their necks and secondly, because of the ministerial discretions which this bill delivers to the minister. Power corrupts; absolute power corrupts absolutely. May I be a little expansive here and add that it surprises me that a minister would wish to have this sort of discretion available.

When I was steering the preparation of the Queensland heritage bill through the Queensland parliament, it was a conscious decision of the party in power at that time to provide an independent heritage council as a buffer to the minister. The reasons for doing that concerned transparency and political reasons. I acknowledge that the minister has had that discretion for the past two years, but it has not worked. Ministers will be inundated and overwhelmed by politics of community action. Thirdly, this bill will not work because of the protection of development rights and no protection of heritage over larger areas. There may be development certainty but significant treasures could be lost.

For example, in Brisbane reasonably recently, at the Prudential Building, it was discovered that a laneway which was about to be developed was actually over the top of one of the oldest original houses in Brisbane. The result was that work stopped and a heritage order was obtained so that more archaeological digging could be done. Under this proposal, such a discovery would not work. At Coffs Harbour recently, a shopping developing was stopped while further archaeological work was done on one of the most important mainland sites of the convict era. At Wellington in New Zealand a small hamlet has been preserved under the major development that has gone on there and which was not known.

Those sorts of things are major development issues which come to light and which will not be protected under this legislation. What we would say about this legislation is that it does not provide objectivity. It provides no transparency and no certainty for Australia's heritage. We do not believe it promotes the legislation which was originally put into place. We believe that this, in actual fact, will reduce the protection for Australia's heritage.

Mr Griffiths—To complement what our chairman has said, I would say that this bill represents a further retreat by the current government away from any national responsibility for heritage protection. We juxtapose the protection for cultural heritage, which seems to enjoy very little priority or resources from this government, with the largesse that is available for the conservation and protection of natural heritage through the multibillion dollar Natural Heritage Trust. Those of us who are more concerned with cultural heritage have argued for some time that there is a gross imbalance in the way in which the Commonwealth funds cultural heritage and the way in which, conversely, the natural heritage of this country is funded through the Natural Heritage Trust.

It is a national responsibility, particularly when one looks at the results of the recent Productivity Commission report which showed that the three-tier system of national, state and local heritage really is not working. The burden falls in a great way on local government, which is not resourced in any way to protect, identify and conserve cultural heritage. The states do not seem to be doing a great deal to step into that gap and, by default, we as a national trust are concerned that our total cultural heritage is now put at risk. We would regard that risk to be something that is a national priority. The sense that the government has no concept of this risk is further underlined by its decision to abolish the Register of the National Estate, which includes some 13,000-odd places in the database, many of which have national significance. We regard the reasons for abolishing the register as not having been explained. There seem to be no words in either the explanatory memorandum or the bill itself which can explain away why the last vestige of protection from Commonwealth actions of these 13,000 places now intends to be written into law.

I would also say that best practice heritage legislation, which goes back to the days of the Australian Heritage Commission and was then reflected in the Burra Charter—which in turn is reflected in the legislation and practices of all the states—sets out that heritage identification and management is a two-stage process that one should adopt. The first step is to identify that heritage in an objective way, using the expertise that one would find in an organisation like the Australian Heritage Council. Then, as a second step, departments and ministers should consider actions that they propose to take or that would have some impact on the registered place. One of the problems that we have with this legislation is it mixes up in an

inextricable and intertwined way the decisions about what should be listed and the decisions about what should happen to those listed places. That is something that does not represent best practice and which we do not believe is in the national interest. There are a number of other issues that we could draw your attention to, but I think for the moment I will restrict my remarks to those and leave the other issues to be teased out in any questions that the committee may have.

CHAIR—Do you want to make any comment, Mr Warne-Smith?

Mr Warne-Smith—I will leave it at that and respond to your questions.

CHAIR—You have made mention of the Register of the National Estate and said that there are some 13,000 items on that list. It will still be there; it is just ceasing to exist as a statutory—

Mr Griffiths—I cannot hear very well; I do not know whether the microphones are on.

CHAIR—The Register of the National Estate has some 13,000 items on it. It will still exist but not as a statutory list. Thirteen thousand items is a lot of items. There are a number of other lists, as you know. There is the National Heritage List, the Commonwealth list, the state heritage lists, the World Heritage List and an international list of heritage. In this legislation, the government is seeking to have a threshold under which, rather than having 13,000 items on a list, there will be more items of greater significance. I would have thought that you would see that as something of an advantage in ensuring that heritage places of importance are on a list, rather than there being a great plethora of places, including as you said, Rippon Lea and the Opera House, which, it seems, you dispute as having any great heritage significance.

Rev. Comben—I did not dispute that in any way. I disputed the fact that there would be any threat to that heritage, and I would stick by that. If you look at the 33 items on the list, it is difficult to see where there would be any true threats. In my view, it is an empty gesture. It looks good, but who is actually going to knock over the Opera House? Who is going to knock over the granite plugs that are the Glasshouse Mountains? With the one exception, which could have had some travesty done to it, which has died—the Tree of Knowledge of Barcaldine—I do not actually see where your list is working, anyway. Secondly, I do not think the list is protecting anything; it is an empty gesture.

CHAIR—It is a list that recognises the status of those 33 places. I used to be in local government, and I knew that people looked around for things to put on the Register of the National Estate. I used to think some of them were of very dubious value to go on such a prestigious list. I feel that we should perhaps search more for quality rather than quantity.

Rev. Comben—Certainly the icons that are there—that is effectively what is presently on the shorter list—but the other matters are the spirit, the heart and the conscience of Australia. Let us take the example not of a state but of a territory: the Northern Territory is not able to provide real protection for all the items that come under it, simply because of the question of scale—the number of places compared with the taxpayers and the money available. So, de facto, there was going to be a problem there.

CHAIR—But, even with the Commonwealth, if you have a huge list of 13,000 there is an issue about how far the money that is available can go in protecting those locations and

buildings and so on. I find it difficult to believe that you do not see the case for rationality in having a shorter list or lists of items of higher quality and importance.

Mr Griffiths—The Register of the National Estate was developed over a period of some 25 years in a most comprehensive and professional way. I would suggest that the integrity of every place on that list could be supported by proper assessments and statements of significance. Each of the places on that list would be of heritage significance. I think the issue comes to where one draws a line or puts a boundary around the Commonwealth's powers. Obviously this government has decided that it has no interest in the 13,000 places on that register. Instead of that, they are going to retreat into some sort of place where they will concentrate and give resources only to the 33 places at the moment that anybody with any knowledge of heritage could have said would be put on some national list.

I would be able to sit down with the Register of the National Estate and pull out of it, I would suggest in a very short period of time, another hundred places which have national significance, and one could forgo the expenditure and the processing that has been going on over the last two or three years to produce what is a very bizarre list. The 33 places that are on that list are a very strange collection of places. If anybody flew to the earth from some other planet and said, 'Show us your national list,' and they were shown the list of 33 places, they would wonder what sort of heritage we had. It is a most peculiar list. It is based on serendipity and on peculiar decisions that have no thematic or systematic approach. We find, in a sense, that the exercise has not been worth the obvious tens of millions of dollars in professional time and process that have been poured into it by the department.

CHAIR—Perhaps I agree. Your hundreds of locations probably should be on the list. Without trying to say things that you did not mean to say, I think in a way you are telling me that of the 13,000 that are on the list at the moment perhaps a much smaller number are of real and important heritage significance. You seem to be saying that you could distil that 13,000 down to a much smaller list of more important locations. What do you think will be the impact of the register ceasing to exist on the 13,000 sites of natural, cultural and Indigenous heritage significance in Australia?

Mr Warne-Smith—Something we should also point out is the obvious question of why we have had all these resources poured into developing the register and at the moment there is the one sentence of section 391A which the minister is required to consider when he is considering a development proposal.

CHAIR—Yes.

Mr Warne-Smith—Why not have that sentence in there and keep the estate so the minister at least has the opportunity to consider it in a development.

Mr Griffiths—The register does not really get in the minister's way. It is an inconvenience and I do not know the extent to which he does look at the register when he is making a decision, but even that is now being removed. The minister has no need to refer to the Register of the National Estate at all.

CHAIR—I suppose ministerial staff and people in the Department of the Environment and Heritage are really the ones who look at the list, but surely that does not preclude items being

put up on their own merits for inclusion in other lists. It is a statutory requirement at the moment, but all of those sites and locations can still be considered.

Mr Griffiths—I think one useful exercise could be for somebody to analyse the Register of the National Estate, see how many places that have national significance are listed on that register but are not listed on the National Heritage List and move them across from the Register of the National Estate onto the National Heritage List. It might save everybody a lot of time and effort—that is, if that is the way the government is going. It is obviously intent on maintaining only the national list and the Commonwealth list. I might add, if we are talking about a preponderance of lists, that under the legislation as I understand it each Commonwealth department has to maintain their own list of places that they believe have heritage significance. So there is going to be a multiplicity of lists; every department and agency will be compiling lists.

CHAIR—As I said, I think the government is just looking for rationality in this proposal. We also have this question of thematic nomination. How do you believe the new thematic listing process will take into account conservation and heritage issues? Do you have any comment on that?

Mr Griffiths—Yes. I think that the thematic approach is one that is understandable, so rather than relying on what might be serendipity in the way that nominations are made to the Heritage Council and the minister, one sets about setting out a particular theme. I do not see anything in the legislation that would direct the minister as to the sorts of themes that should be chosen. There is nothing that suggests the theme should be chosen with a view to what, in a sense, is a priority matter within overall heritage protection. So I would prefer to see some guidance with respect to the themes.

Also, the way in which the themes can be chosen and implemented seems to me to represent a potential to deny certain places that might be important being considered. Because they are not in the particular theme for a year, they can be delayed or pushed away for up to five years while the minister considers other themes that have a particular priority. It is a matter of some concern that that is there and able to be manipulated to the exclusion of important places that will not even get before the minister because they do not fit within a predetermined theme.

CHAIR—That point has been raised in relation to other matters, but thank you very much.

Senator RONALDSON—WWF gave some evidence on Friday, I think, and they expressed some concern about the amendments. But they were very, very strong supporters of the principal act. You are saying that you were not even supporters of the principal act, let alone the amendments. Is that right?

Mr Warne-Smith—Not at all. When the 2004 amendments came in we formed a partnership with WWF and Tasmanian Conservation Trust and funded the EPBC project. In fact, we continue to fund the weekly subscriber service, which is one of the most successful elements of that. We tell people each week what is happening and all the referrals that have come into DEH. So certainly we very much participated in the process, gave it every chance to succeed and tried to help people take ownership of the act and continue in the spirit of the act, very much as WWF and HSI did. So I do not think that is a fair comment at all.

Senator RONALDSON—What are you saying—that the principal act has not worked?

Mr Warne-Smith—Largely, and that we feel that in fact these amendments—

Senator RONALDSON—Do you want to answer this, Reverend Comben?

Rev. Comben—I was just making sure that my colleague realised that that was what I had said. I do not think it has worked. There is a difference between being supportive of an original act and then seeing it in practice. If I could allow Tom to continue, Tom has some very strong views on this.

Mr Griffiths—I might interrupt and say: look at the numbers. We have been going now for 2½ or three years. We have 33 places on the national list, which is the jewel in the crown. When one computes the amount of effort, time and money that has gone into producing a list of 33 places—which, as I say, have no cohesion; it is a very strange list of places—if one is judging the act from a heritage perspective, and that is our major interest, one wonders whether in fact it has been successful. I would suggest those places, as Pat said, are adequately protected and funded under state legislation or through whatever particular ownership there might be—the National Trust owns Rippon Lea, for example—so those places do not require the added protection that national heritage listing will bring. So why has the journey been necessary?

Rev. Comben—There are some odd questions within that list. The rhyolite plugs in the Glass House Mountains in south-east Queensland were recently nominated and listed. The nomination talks about the volcanic origins et cetera. Yet, further north in Queensland, the Undara Lava Tubes are one of only two world examples, and by far the best example. So why is that not there and yet these rhyolite plugs are, when they have no threats—how do you knock over the Glass House Mountains? There is no threat there as such, whereas the Undara Lava Tubes have a number of genuine threats around them. You wonder how that came to be.

Senator RONALDSON—Reverend Comben, as a former Labor minister in Queensland, would you be concerned that the Tasmanian department of the environment supports many of the amendments to the bill? Have you seen their submission?

Rev. Comben—We support many of the amendments in the bill. I raised housekeeping as a preliminary matter—and I do not know that you were in here at the time, Senator. We willingly support and put to one side the pure administrative tidying up in many areas of need. The haste and compromise of the original act are evident and that housekeeping is needed. We are talking about some specific issues about heritage. We are very conscious that the Tasmanian government is looking at its heritage issues at the present time—even today, I think it is debating a new national trust act. Tasmania is in a unique position over its heritage.

Senator RONALDSON—They are actually reviewing their own state heritage legislation at the moment—is that right?

Rev. Comben—I think they are debating it this afternoon, yes.

Senator RONALDSON—It is an extensive review of that legislation. The amendments to the register will involve a three-tier register: local, state and national significance. Are you aware of that?

Rev. Comben—Yes, we are very much aware of it. Effectively, their act is also changing the structure of the National Trust in Tasmania. So we are very much aware of that. We are aware of the limited money which is in Tasmania. I am not sure exactly how far you are suggesting the Labor government is taking it, but, I think, at minimum, we agree there is much good in the egg—it is like the curate's egg, though.

Mr Griffiths—I would not say that Tasmania represents the final word in terms of what is best practice heritage legislation. If one thinks of their activities over the past 25 years, there is the fact that all those national estate forests were saved from woodchipping due to the provisions of section 30 of the Heritage Commission Act under the Register of the National Estate, which is now going to be set to one side and will not exist anymore.

Senator RONALDSON—I presume you have advised them of your concerns.

Mr Griffiths—I was not aware until you mentioned that they had made that submission. But if I get the chance I certainly will.

Senator RONALDSON—What about the streamlining of the assessment processes?

Mr Warne-Smith—Do you mean the increased use of management plans, bioregional plans and that?

Senator RONALDSON—The Tasmanian government, for example, supports the replacement of accredited management plans with accredited management arrangements, or accredited management processes. What are your views on that?

Mr Griffiths—When one reads the explanatory memorandum of a significant amending bill to the Commonwealth's primary piece of environmental and heritage legislation, it is a little worrying to find that one of the major purposes of the legislation is to streamline things. The first two points in the explanatory memorandum go to the fact that this bill is designed to streamline, fast-track and facilitate development. As somebody who has been a practitioner in heritage protection for a number of years, I find that sort of statement up-front on page 1 of an EM starts to ring some bells. Speedy decisions where things are not allowed to be taken fully into account are a worry. As a general reaction—

Senator RONALDSON—Thank you for taking the time to come, gentlemen.

Senator CARR—Would it be fair to say that the National Trust actually supported the more radical changes to the heritage legislation?

Mr Griffiths—Originally.

Senator CARR—Yes. And now you are accusing the government of lacking leadership and abrogating its heritage responsibilities—that is how I read your submission. Is that a fair statement, Reverend Comben?

Rev. Comben—It would be one interpretation that you could put on our words. What we clearly say is that the original act, if it came with a viewpoint of protecting heritage, could have done a lot. In actual fact very little has been done. It is without content, and now there is a diminution of the protective provisions which, in our view, will destroy heritage protection as we know it in Australia.

Senator CARR—You say I have interpreted those words. I will read directly from your submission. Under 'Decline in national leadership', it states:

The repeal of the Register of the National Estate is a sign of the abrogation of national heritage responsibilities.

If it is not the Commonwealth you are talking about, who are you talking about?

Rev. Comben—I am talking about the Commonwealth.

Senator CARR—It is an interpretation, but it is based fairly on those words. Your submission goes on to state:

The Bill provides no alternatives and shows a lack of Commonwealth Government commitment to protecting the national estate.

Rev. Comben—That is precisely our point. We supported the original fundamental act and said, 'Properly done, this could be all right.' In actual fact, the practice of that act has not been achieved in the way that we would have expected it to be achieved. Secondly, this now waters down the protective provisions there and further splits open the dyke.

Senator CARR—I just raise the point because I think you said there was one interpretation. I think 'a clear statement of fact' is what you actually said. What interests me though is whether or not you now feel dudded.

Rev. Comben—Yes.

Senator CARR—It seems to me that what has happened here is that the government was only too happy to use your endorsement to get through the somewhat ambiguous heritage legislation. It was a highly controversial matter and it now seems the government is prepared to give much greater weight to much more powerful voices than the National Trust when it comes to heritage. Would you agree?

Rev. Comben—Yes. The original legislation had among those who were bringing their minds to bear on it Simon Molesworth, my predecessor, a QC in Victoria who practices in the environmental field. He did an excellent job of getting the best out of a difficult situation. To that extent, because compromises were made, and they are well shown, we thought, 'All right, that is the best that can be achieved.' What is now happening is that we see the practice has not lived up to the expectation and what was achieved is being watered down. There are those two issues. It is true to say that we supported the last act, because it was the best that was going to be achieved.

Senator CARR—Your press release of 2 November says:

Quite simply, it is legislation gone mad.

I hope I have quoted you correctly.

Rev. Comben—Yes.

Senator CARR—What did you mean by this?

Rev. Comben—I meant that in the objects of the act where it says 'to provide for the protection and conservation of heritage', these matters in the bill do not support that. It has gone mad. You cannot say 'to provide for the protection and conservation of heritage' and only have 33 items and say that is the protection and conservation of heritage. It is not.

Senator CARR—When the trust was discussing heritage changes two or three years ago, were you given any commitments about the Register of National Estate.

Mr Griffiths—I was not there, but I can say something. I do not have the reference, but I have been told that around that time there was a political commitment from the government that the register would be retained. I have been able to delve no further into that, so I put that in as what I hope is a helpful comment. I do not know. Certainly, Mr Warne-Smith and I were not with the National Trust at the time and I do not think Mr Comben was involved in the argy-bargy over the compromises that were around when the Senate was heavily involved in the work on the bill as it was going through.

Rev. Comben—My understanding at the time was that the register was to be retained. I was on the edges of it; I was part of the feedback system. It was certainly to be retained. That it was not to grow was a major consideration for us at the time. To think that there are now only 33 on the new list and that the register is effectively not going to be there in five years time and will not grow any further. It is going to become a nice archive, but it will be an anachronistic archive.

Senator CARR—Would you check your records to see if there is any written evidence of the commitment that you speak of? What do you see as a consequence of the abolition of the list? I read a report in the *Canberra Times* on the weekend, following the evidence given by the Australian Capital Territory council, that some of the Australian Capital Territory's most important and best loved buildings could be under threat from changes to the federal heritage legislation. Icons such as the Hyatt and Currajong Hotels, Albert Hall, St John 's Anglican Church in Reid and a number of other buildings have been referred to. Would you agree with that assessment? Will they be under threat if there is not an active list?

Mr Griffiths—I think it was Dr Pearson who made that submission and I think it goes to a peculiarly ACT situation because of the responsibilities of the National Capital Authority, which operates under federal legislation, and the way in which the local territory heritage protection operates. There is a gap in coverage and the only protective mechanism available to the certain group of buildings that Mike Pearson mentions is the Register of the National Estate. If my understanding is correct, and I think it is, any vestige of protection that those buildings will get from the register will disappear with this repeal.

Senator CARR—The point that is made more generally though—and this is the point that I think you were making—is that it is not the iconic buildings that are usually at risk. The Sydney Opera House and a whole series of others are not likely to be knocked over—there is no threat to them from the bulldozers—but the local church hall and the local significant suburban historical building are under threat if there is no protection under this type of legislation. Is that the submission that you are making?

Rev. Comben—Yes. We would widen it into that area where the minister has discretion to say, 'All right; I will protect that, but nothing else is protected and no-one can bring any sort of challenge.' As part of my daytime job, I am the administrator of a diocese of the Anglican Church. Within our diocese, we have St Thomas's Anglican Church, Port Macquarie. It is the fifth-oldest church in Australia; Lachlan Macquarie designed it—or built it, anyway. There is a very large curtilage there. If one day St Thomas's goes on the list and nowhere else and the minister says, 'Well, we are protecting that, but you can develop'—and some of the local

congregation want to see development because it provides an income for the parish—and we uncover some of the most significant convict foundations and ruins in Australia, there is potentially no protection. That is a major issue. There are plenty of examples in Australia where development has gone on near somewhere and then it has stopped. Under this act, there will be a clear right to just keep on going. At least today we hope the reasonable developers will look and say, 'Let us think.' They do not have to under this act.

Senator CARR—Is that what you refer to here when you speak of a number of elements in the legislation that back away from best practice?

Mr Griffiths—Yes. I previously referred to what is best practice in our view and in the view of the organisation called Australia ICOMOS. It is reflected in something called the Burra Charter, which I guess you have heard a lot about. Put simply, it is a two-step process. Firstly, it is important to identify and put a boundary around the place that has the heritage significance and that is done as a separate professional independent exercise with an arms-length heritage council hopefully making that decision free of involvement of the minister. It becomes a stand-alone professional statement: 'That is the place that has heritage significance and that is its boundary,' and that sits on the register.

The second issue arises when there is a particular development proposal that might impact on that particular place. Best practice would suggest that that is best dealt with by a minister or a decision maker who has to make decisions in a very clear and transparent way about what that development will mean for the identified heritage. If it means that the development will have an adverse impact on that identified heritage, that has to be explained and he or she is politically accountable for that decision. What we are worried about at the moment is that those two steps are inextricably linked and the decision as to what is actually put on the list is taken by the minister through consultation. I am thinking particularly of the Burrup Peninsula, where there are a lot of negotiations going on. So before the Burrup is actually defined, a whole series of political issues to do with the views of the state government, the development companies and the minister come to bear on where the boundary is drawn. That, to me, does not represent best practice.

Senator CARR—Do you agree with the submission from the National Trust of West Australia that argues that the new proposals for heritage nomination are not conducive:

... to good governance, transparency and accountability.

Mr Griffiths—Yes.

Rev. Comben—Absolutely.

Senator CARR—Is this not a case where political favouritism starts to play an increasing role? If you get on the annual listing then of course you are able to extract financial support from a government and if you do not—

Mr Griffiths—Pat, as an ex-politician, can refer to and use the word 'favouritism'. I would not do it.

Rev. Comben—Are we protected by privilege here?

Senator CARR—Yes, of course we are. We have a quorum and therefore you are covered by parliamentary privilege, I assure you.

Rev. Comben—I think the issue of favouritism is not just in the example that you have just given, Senator Carr, but also in terms of what a developer will ask for before they start. That is where the real favouritism is—and the lack of transparency, the lack of knowledge of what has happened, and the lack of requirement of any real knowledge or research. That is where I am scared. It is not about getting on the list. There are so few on the list and how do you spend money on the Glass House Mountains? I have obviously got a bug about that one, I am afraid—but I am a Queenslander.

CHAIR—We have noticed that.

Senator CARR—But equally, Reverend Comben, could it not be argued that if a national heritage organisation does not choose to cooperate with the government, then they may well be penalised? For instance, could it not be argued that Port Arthur, which is heavily dependent on federal funding, may well find that its budget increases or decreases depending on how sympathetic submissions are to Senate inquiries?

Rev. Comben—I think that is the wider issue where every community organisation—whether it be a conservation group or a heritage group—that becomes dependant on funding starts to worry: how independent are we any longer? It would be nice to have purity in those matters, and some smaller groups will have the purity of the impotent in actual fact, because they do not receive money. But they are very small because they cannot employ the numbers to increase and all those sorts of things. It is an issue across a wide range of areas, but it is potentially a major issue here as well. I agree with you, Senator.

Senator CARR—What do you think needs to be done to rectify the situation?

Mr Griffiths—With this legislation?

Senator CARR—Yes.

Mr Griffiths—I think that, put simply, we should seek to not repeal the Register of the National Estate. We should try to get a better separation of decisions between identification and heritage listing on the one hand and the downstream decisions that are taken about a place once it is listed on the other hand. I would prefer that decisions about what should go on the National Heritage List be taken by the Heritage Council and the Heritage Council alone as the expert professional organisation that has been appointed by the government and for the minister to not involve himself in decisions about what should be listed. I said before, that is moving away from best practice.

I also believe that there are two or three areas, that I might get Tom to mention, which are going to prevent conservation groups from taking particular action under this legislation—action which has been taken to date by organisations that have been quite effective in changing government decisions. Tom, you might like to mention a couple of those.

Mr Warne-Smith—I would specifically refer to undertakings for damages which we heard a lot about on Friday. I think everyone established pretty well that was an important part of the act that had not been abused. It seems to be a repetitive theme, but the question is why. It has not hurt anyone. Like Senator Bartlett helped the HSI point out, even when they had not been directly successful, productive outcomes had been achieved from the challenges that had been made under the act. There seems no reason to get rid of a valuable provision that is really in with the key themes of the act in encouraging community participation and

involvement. It seems that getting rid of that is a further move toward helping development interests. Right throughout the provisions, we do see more than administrative cleanups and aiding streamlining the effect to a real shift away from conservation and towards development interests.

Right from the start, we are saying now there will be broader management plans and bio-regional plans, where the ministerial decision as to whether an assessment should take place will be at the start of the referral. Under the new 37A, the minister will be able to decide that we do not need an assessment of this because of social or economic considerations and what have you, without having an assessment done to weigh those considerations. We are saying that the justification is that we are helping chip away at cumulative impacts, which in theory is a good idea, and it is definitely a shortcoming of the act that it cannot address cumulative impacts—because if each action does not have a significant impact it falls through—but I think then the failure of these measures is that there is no provision ensuring that what is being offered will be better than the act.

If it is going to stop cumulative impacts, then necessarily the assessment must be more onerous than what is there now. So, if you are saying that it is not going to be subject to assessment at all, how can that help achieve a reduction in cumulative impacts? We would argue that surely there should be a provision in the act guaranteeing that, under any plan or assessment, no action can be subject to less scrutiny than would otherwise have been the case under the current act. That would be a real measure then to ensure that the cumulative impacts were addressed; whereas, now, I cannot understand how they are. I feel the process is too broad and there are no safeguards in there.

Further on that theme: once someone has their approval, the new clause 158A guarantees that no listing decisions can then change, alter or otherwise affect that action, which I find astonishing, given that the aim is conservation—to then necessarily exclude the act from being able to say, 'Look, something has gone amiss here: a listing has taken place that we should respect,' or, 'The heritage values of a certain place have changed.' The government should then be able to negotiate—at least—with developers and say: 'Look, this is unacceptable, and it's not fair that your development is going to impinge on the rights of every other Australian who will lose some of their environmental heritage.'

Senator CARR—What does the trust say about the removal of appeal rights in terms of references to AAT and the like?

Mr Warne-Smith—That is mostly with wildlife trades.

Mr Griffiths—They do not affect the cultural heritage aspect.

Senator CARR—You have no view about any of those rights?

Mr Griffiths—We have no real mandate from our board to talk about those. We have a mandate from our board meeting that took place eight to 10 days ago to put in our submission, but, because those appeal rights do not affect the heritage that we are more interested in, we have no mandate. I could express a personal concern that any move away from access by parties to the Administrative Appeals Tribunal to me represents a move away from transparency and accountability, and it seems to me that the decisions that have been reviewed

through conservation groups being able to access AAT provisions have in fact resulted in better decisions. It seems to be therefore a retrograde step.

Senator BARTLETT—We are tight for time unfortunately. Clearly, as with other witnesses, it has been difficult for you to have the time to go through the legislation in detail. I am just wondering whether you had noted a proposed amendment to section 75 about—and I will give advance notice for the people sitting behind you who are coming up next—the minister only needing to consider the impacts of a relevant action on the part of the action that is taken in or on Commonwealth land. Does that ring a bell at all to you? Have you noted that one?

Mr Warne-Smith—I have spent some time in great consternation over the exact implication of that section. I have spoken to a number of DEH policy officers, and they assured me that it was in fact limited. Its application is actually limited to events that are already on Commonwealth land—if you see 15B(3), 15C(5), 15C(6). So he is saying that that first sentence limits its impact to Commonwealth land so that, where it was a part of the action outside of the Commonwealth land and it did have an impact on a matter of national environmental significance, that would still be protected.

But I would say to that: that is fine, so long as they are protected, but if you read that paragraph it is difficult to understand and certainly makes for an argument. A developer could get up and say, 'You're not allowed to consider that because it's not on Commonwealth land and 75(2)(2A) says that you're only allowed to consider the impacts on the Commonwealth land.' So we do not think it is the best provision in there. If, as I am assured by DEH, it is restricted to purely the impacts on Commonwealth land and has no effect on restricting what the minister can consider outside of Commonwealth land then we would not have a problem with it, but were it to impinge on his ability to assess impacts not on Commonwealth land then, yes, we would be very concerned.

Senator BARTLETT—We will see if we can get a clarification from the next witness. I hope somebody understands it.

Mr Griffiths—That is why we let him answer!

Senator BARTLETT—So you think it is okay—maybe, possibly, perhaps?

Mr Warne-Smith—I think that, yes, if you read strictly the words there and a strict black-letter interpretation is placed on that, it would be okay, but there would be scope for argument that it could go the other way.

Rev. Comben—Can I just make the observation that that really sums up for us—even though I earlier said that we are not going to argue the time here because everyone coming here is arguing the time. But this would all be a lot better if there was a decent period of consultation. Some of us who have knocked around this stuff for many years cannot get on top of this in the period that we have. I think your question indicates the same, Senator Bartlett.

Senator CARR—We cannot get on top of it, let alone—

Rev. Comben—It is an incredibly—what is it, 450 pages?

Senator CARR—What an outrage.

Mr Griffiths—For an organisation like the Australian Council of National Trusts it was pure coincidence that we had a board meeting and AGM in Darwin a weekend ago. We were able to rush out some very quick analysis of the legislation that we put together in a couple of days with the board papers. We had a good discussion in Darwin, and as a result of that we have come here with a mandate based on that very rushed analysis. Organisations like ours need time to send it out to our stakeholders internally within the national trust movement, because the ACNT comprises the eight separate state and territory national trusts. As I say, it was just a piece of luck that we were able to have that meeting, which only takes place once every six months, and develop some sort of position for us to come and talk to you about. But it has been done on a wing and a prayer really. Had we not had the advantage of that face-to-face meeting, we would have really been struggling to put something together for you in the time that we had.

Senator BARTLETT—Could I clarify a response you gave to an earlier question by Senator Carr. My understanding of the thrust of what was said was that, basically, your organisation put its neck out in supporting the amendments a few years ago in somewhat contentious circumstances and, broadly speaking, you feel somewhat dudded by the way things have panned out. And that was before this legislation came down.

Rev. Comben—Yes.

Senator BARTLETT—We have had a few witnesses from different perspectives, including the Minerals Council, say that inadequate resourcing has been a problem with the ability of the department to properly administer the act. This is all aspects of it, not just heritage. If you feel able to answer this: do you think the problems have been really just not enough resources to properly do all the assessment of potential sites and those sorts of things, or do you think it is really just no genuine political interest or will?

Mr Griffiths—I have not been that close to the legislation, I must admit, but one thing I do feel is that the Register of the National Estate has not had the proactive sustenance that I believe it should have. In addition to being a register of heritage places it is a very excellent and almost unique educative tool, at a time when history and the teaching of history is on the national agenda—and we have seen evidence from the Minister for Education, Science and Training doing that. We in the National Trust own some 300 places that we believe can contribute to that debate, and also we believe that the register, with its unique amalgamation of 13,000 places, could become a very important community education tool and also a tool to be used in schools. There was evidence of that sort of activity under the work that the Australian Heritage Commission did with fairly constrained resources. My own observation would be that the department has done its best in difficult circumstances. I know departments are always constrained, and it has had very tight timetables to get things done. I would have liked to have seen more resources devoted to converting the register into a much more proactive document to take advantage of the 25 years of investment of public money in that register that has been going on since 1976.

Senator BARTLETT—I had better leave it there, given the time. Thanks.

Senator SIEWERT—You have articulated the arguments very well. I want to look specifically at Burrup—surprise, surprise. When Australia ICOMOS was here on Friday they expressed concerns about—and you touched on the issue—what would and what would not,

in fact, get on the national list. They felt that under the new process there was a potential that sites like the Burrup would not get on the list.

Mr Griffiths—Sorry—was that ICOMOS?

Senator SIEWERT—Yes. Australian ICOMOS said that there was a potential that sites like the Burrup would not get on the list. Is that also your interpretation of the changes—that there is a potential that, due to the thematic approach, Burrup, for example, may not get on the list?

Rev. Comben—You could come to it from two levels. Firstly, there is so little there; what else is going to get listed? All right, a few more places get on there, and it is thematic. What are the themes? You cannot look at this legislation and have any confidence at all that anything is going to get on there other than the iconic. And, if it is iconic, almost certainly it is protected by immediate public pressure or other means.

Senator SIEWERT—I would dispute that even the iconic would get on the list.

Rev. Comben—Some of the iconic.

Senator SIEWERT—What about the Burrup?

Rev. Comben—We are intending to run around it.

Mr Griffiths—The Burrup would be, I would suggest, the most contentious. I do not know what is in the wings, waiting to be assessed, or is going through a process, but I cannot imagine anything more contentious than the Burrup. It would be much more contentious in terms of getting on the register, on the national list, and in terms of the boundary of it than, I would think, any of the 33 places that are on the list already—maybe with the exception of Recherche Bay, but I do not know. That was a bit of a hiccup. But it would certainly be much more contentious than virtually every other place on the national list.

Rev. Comben—When you start to get that development, against preservation or conservation, obviously when you leave the discretions with one person and there is no independent assessment you start to get worried. We are intending to run a reasonably major campaign on it. It has been suggested to us that it could be the next Tasmanian dams case. I am not sure about that, but we are certainly very keen to talk to anyone who is interested in preserving that area. To hear your colleagues saying it is goose bumps stuff to look at a human outline and know that you are looking at the oldest remaining representation of a human anywhere in the world, and it is underfed, you have got to do something.

Senator SIEWERT—Which leads me to the next point of emergency listing. You have touched on that and the changes in your submission. It seems to me that it has taken the guts out of any potential to use a truly emergency listing. Is that your interpretation? I am interpreting what you have said, that it no longer becomes an emergency listing provision. The requirement for 10 days is taken out and the requirement to publish the reasons for the minister making his or her decision is no longer there.

Mr Warne-Smith—Certainly. We understand that the 10-day provision was very onerous for DEH. I know that when they got submissions it caused them grief. We are certainly happy for changes to be made, but, like with most contentious things, we would suggest that the changes have gone too far. Indeed, necessarily in an emergency, the minister should be

obliged to make some sort of response somewhere to someone nominating and, even just within a reasonable time frame, to offer real protection for that place. Certainly we feel—it is in our submission—that there should be the possibility for the minister to say, 'Yes, this place certainly does merit a heritage assessment, so it should be protected until we can conduct an assessment and discover what is there and what the heritage values are before we go ahead and develop it.'

Mr Griffiths—You would move the protective provision further up the line, in a sense. You would invoke it before that full-on assessment had been done.

Senator SIEWERT—When we talked to Australian ICIMOS they said that some of the time delays were due to what they felt were perhaps not fully developed submissions—that perhaps all the information was not provided et cetera. They felt that, instead of some of these changes, what might be better would be to have the provision whereby you could send nominations back and say, 'More information, please.' Would you support that type of provision?

Mr Griffiths—I think so, yes. That makes sense. Having been involved in the administration of the register for a number of years, we got forms filled out that were just not good enough and so they were sent back. The clock does not start ticking until you have a set of data that you can work with and come to some measure of understanding of the significance of the place. That makes sense to me.

Senator SIEWERT—Can I just go back to your comment about the emergency provisions. What you are saying, if I can just expand that a little bit, is that there would be emergency protection while the heritage evaluation was—

Mr Griffiths—Yes.

Senator SIEWERT—So make that protection clearer.

Mr Griffiths—If it passes a sort of prima facie barrier that it has potential for national heritage significance, there ought to be some protective provisions invoked. Again, that goes back, I am afraid, to the Register of the National Estate. When a place was assessed by the commission initially and it came to a conclusion that it had heritage significance, that fact was advertised and people were able to object through a statutory process. But the moment that that notice went out, the protective provisions of section 30 applied even though in the end the appeal mechanism may have actually dismissed it as having heritage significance or in fact the boundaries would have been changed. The protective provisions were applied at the earlier possible point so that you do not get people running around, as some do, worrying that they might own something on their land that is likely to be heritage listed and then it burns down or disappears overnight. Those sorts of things are a worry.

CHAIR—I thank the National Trusts Group for appearing. Your evidence has been very interesting and we appreciate it.

[5.03 pm]

BAILEY, Mr Terrence Gerard, Assistant Secretary, Heritage Division, Department of the Environment and Heritage

BURNETT, Mr Peter Keith, First Assistant Secretary, Heritage Division, Department of the Environment and Heritage

COCHRANE, Mr Peter, Director of National Parks, Parks Australia, Department of the Environment and Heritage

EARLY, Mr Gerard Patrick, First Assistant Secretary, Approvals and Wildlife Division, Department of the Environment and Heritage

FLANIGAN, Mr Mark, Assistant Secretary, Policy and Compliance Branch, Department of the Environment and Heritage

FLETCHER, Mr Wayne William, Director, Legislation Policy Section, Department of the Environment and Heritage

HEFFERNAN, Dr Kenneth James, Director, Heritage Policy Section, Department of the Environment and Heritage

PETRACHENKO, Ms Donna Mary, First Assistant Secretary, Marine Division, Department of the Environment and Heritage

TERRILL, Dr Gregston Charles, First Assistant Secretary, Heritage Division, Department of the Environment and Heritage

CHAIR—I would like to welcome officers from the Department of the Environment and Heritage. I know it is your usual practice not to make a submission on these inquiries that this committee conducts but to answer questions. But you may wish to make some sort of opening statement, Mr Early.

Mr Early—I would like to make a short opening statement. The Environment Protection and Biodiversity Conservation Act, known as the EPBC Act, has been in existence for over six years now. During that time it has gained wide acceptance across the Australian community and has achieved real results in protecting matters of national importance. Nevertheless, experience over the past six years has shown there are still ways in which the act can be improved.

The community itself has also raised issues with the act through various public consultation processes undertaken in relation to the development of guidelines under the act, other public processes and through comments and suggestions about how the act would work better. In essence, we think the environment and heritage protection afforded by the EPBC Act can be improved while streamlining some of its provisions, providing greater capacity and flexibility for using more strategic approaches, and by improving the compliance and enforcement regime. In particular we consider the proposed amendments would facilitate a shift in the Australian government's focus from ad hoc project-by-project approvals to a focus on a more strategic framework. The proposed amendments would also allow the environment minister to take a more strategic approach towards listings of heritage places and threatened species.

We would just like to make a couple of comments about some of the issues that have been raised so far in the committee's inquiries—firstly, the Senate Standing Committee for the Scrutiny of Bills *Alert Digest* and comments by Senator Johnston. We believe what is proposed is consistent with the 2002 report of the scrutiny of bills committee as well as the 2004 *Guide to Framing Commonwealth Offences Civil Penalties and Enforcement Powers*, issued by the Minister for Justice and Customs. We believe the environment minister's reply to the scrutiny of bills committee *Alert Digest* will allay most of the concerns of Senator Johnston and the committee.

In terms of strict liability, the proposals for strict liability in this bill are limited in extent. They do not apply to all aspects of the particular offences. They apply only to the element of the offence that relates to the matter protected under the EPBC Act. Strict liability in this context eliminates the need for the prosecution to prove a person knew or was reckless to the fact that they were dealing with a protected matter. The amendments only impose strict liability for specific elements of certain offences under the EPBC Act. This means that the prosecution will still have to prove intent in relation to the fact that an action is likely to have a significant impact on a species or area.

The application of strict liability to elements of these offences is consistent with the principles of the Senate scrutiny of bills committee 2002 report as well as the Minister for Justice and Customs' 2004 guide. Page 284 of the Senate committee report, for example, notes that it is appropriate that ensuring the maintenance of the integrity of the environmental regulatory regime aimed at protecting the environment can be a reason for having strict liability.

Page 285 of the committee's report notes the problems that sometimes may occur in proving a mental element to an offence. Certainly for the Department of the Environment and Heritage it has proved very difficult to prosecute the existing fault provisions such as in cases involving the killing of a grey nurse shark or the shooting of sea birds from commercial fishing boats.

The department's experience has been confirmed by the Commonwealth Director of Public Prosecutions by noting that the requirement to prove a mental element is a substantial impediment to proving these offences. We believe that the strict liability provisions are also appropriate to overcome a knowledge of law problem, again as advised by the Commonwealth Director of Public Prosecutions. The problem arises because it is necessary to establish that a person was reckless that an animal or plant was on the list of threatened species. Proving such an awareness renders these provisions virtually unenforceable.

The strict liability offences will only apply to those persons who are actually liable for the offence—that is, the person who takes an action that has or is likely to have a significant impact on a matter of national environmental significance. The defence of honest and reasonable mistake of fact remains available to the potential defendant. The application of strict liability to elements of these offences is appropriate for the reasons mentioned and given that the commission of such offences will result in direct and serious impacts on the environment.

Another issue that has been raised with the committee is the enforcement regime outside the migration zone. The proposed provisions that relate to the detention of suspected foreign

offenders outside the migration zone are designed to redress a serious weakness in our current capacity to tackle environmental crime by foreign fishermen who target marine reserves like Ashmore Reef and also protected species like turtles, dugongs and dolphins.

The proposed mechanisms for tackling this issue already exist in Australian law. The proposed provisions for inclusion in the EPBC Act mirror existing provisions of the Fisheries Management Act 1991, which in turn are modelled on relevant sections of the Migration Act 1958. The proposed new provisions for the EPBC Act are required because currently the Migration Act 1958 does not allow non-citizens suspected of committing offences under the EPBC Act to be brought into Australia to face prosecution. This means that the only action open to the government under current law is to seize illegal fishermen's catch and gear and send them on their way. They cannot be detained. They simply re-equip and start their plunder again.

Provisions which allow for the searching, screening and identification of detainees, once again already in Australian law, are necessary for the orderly and safe operation of detention centres. It is essential that properly authorised officers are able to conduct basic searches of detainees to ensure the safety of detainees and other people and to ensure that illegal fishing offences can be fully investigated. Basic searches are subject to strict rules and limitations. The department will be working closely with the Department of Immigration and Multicultural Affairs to establish the mechanisms and protocols needed to implement the amendments. They will not be commenced until all the arrangements have been settled.

Another couple of issues that have been raised with the committee are the issues of bioregional planning and strategic assessment, and many issues have been raised in relation to the making of declarations and actions taken in accordance with a bioregional plan that do not need approval under the EPBC Act. The following points need to be made. It is entirely a matter for the minister whether or not a bioregional plan is made for a Commonwealth area, and for a bioregional plan to be effective in a non-Commonwealth area, clearly the cooperation of the states or territories would be required.

The government does not intend to make any declarations in relation to actions which are likely to have a significant impact on matters of national environmental significance unless these potential impacts have been fully assessed and there has been proper public consultation. The minister is simply not able to make a declaration unless satisfied that the actions covered by the declaration would not have unacceptable or unsustainable impacts on any of the matters protected by the act, and the declaration is not inconsistent with the government's international obligations and national requirements in relation to matters such as threatened and migratory species, heritage places and Ramsar wetlands. In a situation where the bioregional plan was not being complied with or move information comes to light, it is possible for the minister to be able to revoke a declaration.

Strategic assessments of policies, plans and programs will also involve rigorous environmental assessment and proper public consultation. An approval granted as a result of a strategic assessment will enable the minister to set legally enforceable conditions that are subject to the penalty provisions of the EPBC Act. Just as in the case with a normal approval, the minister would have the ability to vary the conditions if new information came to light about the impacts of the approved action. The minister also has the ability to suspend or

revoke a strategic assessment approval if unforeseen impacts come to light. That is some information on a couple of the matters that were raised with the inquiry. I do not propose to go into everything, but perhaps we can resolve other issues through questioning.

CHAIR—Thank you, Mr Early.

Senator CARR—Mr Early, I wonder if you could clarify one matter for me. I am advised by staff of this committee that it was originally the intention of the department to make a submission to the inquiry, but you decided to not do so around 9 a.m. on Friday morning.

Mr Early—That is not the case. We never even thought of making a submission, I have to say. It is not normal practice for the department to make a submission on a government bill and, in fact, it has not been the case. We have not made submissions to previous amendments to the EPBC Act, including of course the very significant heritage amendments that were brought in a couple of years ago. We were not invited by the committee to make a submission.

Senator CARR—Sorry, did you say you were not invited?

Mr Early—We were not invited by the committee, so I did not think there was any expectation on the part of the committee that there would be a submission and, in fact—

Senator IAN MACDONALD—There wasn't.

Mr Early—we were not asked by the committee or anyone else whether we were proposing to make a submission until you raised it on Friday. Our normal practice in these events is to let the documentation, the government's documentation, speak for itself. We gave the committee a briefing on 18 October about the amendments. We also gave private briefings to the spokespersons of the various political parties—to Senator Bartlett, to Senator Siewert, to Senator Brown, to Mr Albanese and to Mr Ferguson's office—so we felt that was the sort of normal arrangement for an inquiry into a government bill.

Senator CARR—That is certainly not my experience of this parliament. I am surprised that the committee secretariat did not ask you for a copy of a submission.

CHAIR—Usual practice, Senator.

Mr Early—As I say, it was not even mentioned until Friday morning.

Senator CARR—That is certainly not my experience. I was not consulted about the timing of these hearings, or who had asked for submissions or otherwise, as you can obviously tell from my remarks. I would ask you—although we did have someone at the briefing with Mr Albanese.

CHAIR—You did have ALP people here.

Senator CARR—Sorry?

CHAIR—There are ALP members of the committee, Senator Carr, and they could have accommodated your interests had you wished them to.

Senator CARR—You might have thought that, but you might have asked me to establish whether or not that was the case.

CHAIR—It is not my role to ask you and the ALP members on this committee.

Senator CARR—No, it is certainly not your role. Your role is to protect the government, quite apparently.

Senator IAN MACDONALD—His role is as chairman of the committee not to look after the ALP's inefficiency.

Senator CARR—His role is to ask members of the committee what they actually would like to see at the inquiry.

Senator IAN MACDONALD—You are a member of the committee.

CHAIR—And you were not there, and your agents did not ask on your behalf.

Senator CARR—You say that your response to the Scrutiny of Bills Committee will satisfy Senator Johnston. We will wait and see if that is the case or otherwise. But you refer specifically to the Scrutiny of Bills 2002 report.

Mr Early—That is right.

Senator CARR—It was the 2002 report that the Scrutiny of Bills Committee was actually quoting—you would be aware of that no doubt?

Mr Early—That is right.

Senator CARR—The strict liability provisions are detailed on page 10 and they go on for a number of pages thereafter. You are saying that the government's response will deal with each one of those items?

Mr Early—That is right.

Senator CARR—I see. Did the department have a role in writing the explanatory memorandum?

Mr Early—Yes.

Senator CARR—When did you sign off on it?

Mr Early—I cannot remember. I would have to take that on notice. I am not sure.

Senator CARR—Could you? How many weeks ago was it?

Mr Early—I did not sign off on it; the minister signed off on it.

Senator CARR—The department advised the minister to sign off on it?

Mr Early—Yes.

Senator CARR—Are there any sections, sentences or other parts of the memorandum that were dictated by the minister's office after you sent advice?

Mr Early—No.

Senator CARR—Senator Johnston and the Scrutiny of Bills Committee argue that you fail to provide reasoning or justification for the draconian powers of search and seizure. Are you able to provide that justification now?

Mr Early—I thought I had, in my opening remarks, in the sense that the search and seizure powers are already in Australian law, in two pieces of legislation. This bill attempts to remove

an anomaly in terms of dealing with environmental crime outside our migration zone by picking up what already exists in Australian law and transferring it to the EPBC Act.

Senator CARR—This bill provided for 31 strict liability offences. Can you list them?

Mr Early—They are in the committee report are they not?

Senator CARR—You would obviously understand the bill. What are the 31 strict liability offences under this bill?

Mr Early—They essentially relate to matters of national environmental significance, actions by Commonwealth agencies, actions on Commonwealth land, Commonwealth reserves, approval conditions—

CHAIR—They would be in the bill, wouldn't they?

Senator CARR—No. If we had a submission we probably could deal with this but—

Mr Early—They relate to matters of national environmental significance, Commonwealth land; Commonwealth heritage; contravention of an approval condition; taking, injuring and killing a listed threatened species, a ecological community, a listed migratory species or a listed marine species in a Commonwealth area; injuring or killing a cetacean in the Australian whale sanctuary; and taking an action prohibited in a Commonwealth reserve.

Senator CARR—That is the full 31, is it?

Mr Early—Yes.

Senator CARR—It took a little while to get to that, Mr Early—you are the expert.

Mr Early—I did not expect to have to go through them.

Senator CARR—Didn't you? Do you think that the public has had enough time to go through this legislation?

Mr Early—That is a matter of conjecture; I cannot make that comment.

Senator CARR—How long has the public had to go through this legislation?

CHAIR—He is the departmental official, Senator Carr. That is a political question I think.

Senator CARR—How long has the public had to examine this legislation?

Mr Early—It was introduced into the parliament on 12 October.

CHAIR—That is a policy issue as to when the government introduces legislation.

Senator CARR—Did the department recommend that time line be followed?

Mr Early—The department, as the Chairman said, has no role whatsoever in how the government allocates parliamentary business.

Senator CARR—Did the department recommend any particular period of time for public consultation?

Mr Early—No, and it would not be appropriate to do so.

CHAIR—Which I think you know, Senator Carr.

Senator CARR—Which organisations did you consult?

Mr Early—We have been consulting, having discussions, with various organisations for the past 12 months. I am not quite sure what sort of time frame you are talking about.

Senator CARR—That is the point, you see. How many people got to see an exposure draft of the bill?

Mr Early—Nobody.

Senator CARR—Surely an exposure draft would have been circulated to other departments.

Mr Early—No.

Senator CARR—So other Commonwealth departments have not seen this bill either.

Mr Early—They have seen it now.

Senator CARR—Before it went to cabinet was an exposure draft distributed to departments?

Mr Early—We do not take the bill to cabinet.

Senator CARR—I see—just the drafting instructions.

Mr Early—Yes. The government considered what it wanted in the bill in the normal course of events and departments were consulted and have been involved in that discussion over the last 12 months. But consultation on the bill occurred at the government level prior to the finalisation of the bill.

Senator CARR—When was the mining council given a copy of bill?

Mr Early—I did not give them one but I assume they got one after 12 October.

Senator CARR—So no organisation got a copy of the bill in exposure draft form or any other format prior to its tabling in the parliament.

Mr Early—I was just advised and reminded that the Attorney-General's Department, of course the Department of the Prime Minister and Cabinet and the department of territories saw relevant parts of the bill.

Senator CARR—But they would not have seen a full bill.

Mr Early—I think PM&C and AG's probably would have.

Senator CARR—When did they see that?

Mr Early—They have been involved in the drafting. Obviously, Attorney-General's have been involved in a number of the issues. This is the normal sort of development of legislation.

Senator CARR—This is not normal legislation, though.

Mr Early—I do not know why it is not.

CHAIR—What is it, Senator Carr? How would you define normal legislation?

Senator CARR—I would say this is much more complex and controversial than normal legislation.

CHAIR—Complex legislation comes to the parliament.

Senator CARR—Have you noticed, Mr Early, that a number of the organisations that have come before the committee have indicated that they felt that they had been dudded by the department, the government. The National Trust has just indicated that, the World Wildlife Fund indicated that last Friday and ICOMOS indicated that last Friday. Each of these organisations argued that the amendments are a backward step and will effectively reduce the level of environment and heritage protection. What is your answer to each one of those organisations?

Mr Early—I think they are wrong.

Senator CARR—Why?

Mr Early—Because they have not looked at the bill in its entirety.

Senator CARR—Haven't they?

Mr Early—No.

Senator CARR—In the eight days they have had to look at it, they have not looked at it in its entirety—is that what you are saying?

Mr Early—They do not appear to have, judging by their comments.

Senator CARR—You would agree they have had eight days to look at it.

Mr Early—Presumably they have had more than that if it was 12 October; it is now 6 November.

Senator CARR—If they knew it was tabled. In terms of this inquiry's proceedings, they have had eight days. You are not surprised. What would you say to the National Trust when they have obviously indicated that the government is no longer interested in showing leadership and your legislation is putting that retreat into law?

CHAIR—That is a political question, Senator Carr.

Mr Early—I do not agree with that.

CHAIR—These are not questions you can ask departmental officials.

Senator CARR—The World Wildlife Fund has been a partner of the departments in operating the EPBC unit project—that is right, isn't it?

Mr Early—Yes, that is right.

Senator CARR—That is aimed at increasing the community's understanding of the legislation. Now they say that you are advocating undemocratic amendments. What is the department's response to them?

Mr Early—They are wrong.

Senator CARR—Why?

Mr Early—As I told you: they do not understand what they are saying.

Senator CARR—Can you explain why there is not a single reputable environment or heritage group that has been willing to appear before this committee to support this legislation?

Senator RONALDSON—It is not a question the officer can answer.

CHAIR—That is neither true nor an appropriate question, Senator Carr.

Senator RONALDSON—You should not answer, Mr Early.

CHAIR—We have had a lot of impressive witnesses.

Senator CARR—I am most concerned that not one of the department's partners or associates or the people that they deal with—an environment or heritage group—has been prepared to come here and support this legislation.

Senator RONALDSON—Again, this is not a question an officer should be answering.

CHAIR—You should really confine yourself to the legislation, Senator Carr.

Senator CARR—I have just asked Mr Early: as a senior official of the department, are you not concerned by that?

Mr Early—I am concerned that the organisations have problems with parts of the bill, that is true, and I would be silly not to be, but I believe that their fears are not justified.

Senator CARR—Can you tell me: where did the suggestion come from of a new process of annual priorities, the themes for listing of endangered species in heritage places?

Mr Early—I cannot recall where individual proposals came from, but I should point out of course that the existing act has provision for themes for heritage places.

Senator CARR—Was that particular initiative developed within the department?

Mr Early—I cannot comment on where government policy was developed.

CHAIR—Senator Carr, I am going to have to interrupt you, because you have actually used your time. I will go to Senator Bartlett, but we can come back to you.

Senator BARTLETT—Obviously people from the heritage groups, as you would know, expressed concern about the statutory erasing of the Register of the National Estate, for want of a better term—I am sure there is a better one. What is the actual rationale for that? It has not been causing a problem, has it? It has not been a major, onerous administrative requirement for the minister to consider information in the register, has it?

Mr Burnett—The principal rationale for the amendments relating to the Register of the National Estate is to complete the transition to a three-tiered arrangement for heritage within Australia—that is, the federal government looking after national matters; the states, matters of state significance; and local governments, matters of local significance. The Register of the National Estate does not fit into that model because it covers places with heritage significance at all three levels.

Senator BARTLETT—When you say 'complete the transition', it makes it sound like this was always intended to happen with the register.

Mr Burnett—That is right. It was agreed in 1997 by COAG. It was part of the original agreement, often referred to as heads of agreement, that later became the matters of national environmental significance that formed the backbone of the EPBC Act.

Senator BARTLETT—Why did heritage groups, particularly those that were involved in sticking their neck out somewhat in supporting the incorporation of the heritage changes in

the EPBC Act three or four years ago, seem surprised and disappointed by this happening if it was just something that has been in the pipeline for nine years?

Mr Burnett—I do not know why they would be surprised. They would be aware that it has been on the agenda going back to 1997, but they have also been briefed over the last few months that this was on the cards. I am sorry, what was the second part of your question: why would they oppose it?

Senator BARTLETT—Yes, particularly those groups such as ones we have just heard from who were supportive of the government with the amendments relating to heritage three or four years ago. They seem to be displeased now that this change is happening.

Senator RONALDSON—He is asking you to comment.

Mr Burnett—I cannot really comment on it, Senator. They have made their views known, but I can only explain the government's rationale for the amendment.

Senator BARTLETT—I think this was from the last group; I am rushing into a lot of things at the moment. As you know, there are groups including the Council of National Trusts which supported the amendments which were somewhat controversial three or fours ago. I thought they said they felt they had gained a commitment that the Register of the National Estate would be preserved. You are saying that that is not the case, that they were not given that commitment?

CHAIR—That is a fair question to ask.

Mr Burnett—No, I did not say that, Senator.

Senator RONALDSON—The National Trust most certainly did not emphatically say that. They thought possibly so, but they had been unable to locate any paperwork.

CHAIR—They did say that.

Senator BARTLETT—Isn't it therefore reasonable for me to ask for clarification of that from the department?

Senator CARR—It is a bit more important than selling a used car.

Senator RONALDSON—You didn't even turn up to the car auction, so what are you talking about!

CHAIR—Time is short for Senator Bartlett. Senator Bartlett is seeking clarification. You have said there was an agreement, and maybe personnel have changed in the interim, but you might like to make some comment in response.

Mr Burnett—I have to say I was not involved at the time so I do not have any personal knowledge. My knowledge is limited to saying that the government did retain the Register of the National Estate at the time when the heritage amendments were going through at the end of 2003, but I am not aware of any agreements outside of what has been publicly stated.

Senator BARTLETT—Does the removal of merits review from the AAT come under what you would call streamlining or improving streamlining or improving flexibility, or is there some other rationale for it?

Mr Early—I guess so, yes, Senator. Streamlining and also, I suppose, greater certainty to the process.

Senator BARTLETT—Removing appeals certainly adds certainty; there is no doubt about that. There are amendments in this legislation that touch on management of parks, as I understand. What sort of effect are they going to have on the makeup and the operations of the board of management of parks like Uluru or Kakadu?

Mr Cochrane—I do not believe it will have a huge significance, but there has been some uncertainty about qualifications for membership and the appointment processes, and the proposed amendments will clarify that. For example, if a board member has a lengthy criminal record, that is not a matter the minister could take into account in any way. Consistent with decisions that government have made at the Council of Australian Governments that they would introduce such provisions more broadly, this amendment provides for that capacity by the minister to filter an appointment or to remove someone.

Senator BARTLETT—Have there been any concerns expressed by traditional owners or others about the potential impacts of those changes.

Mr Cochrane—Not that I am aware of.

Senator CARR—They wouldn't know this was on, would they? When have they been consulted?

Senator BARTLETT—As you would know, a number of witnesses have made comments about there being fewer resources than they would have liked for the administration of the act to date. I am sure you would probably like more resources as well. One of the witnesses—it might have been the Minerals Council this morning—suggested these changes might actually lead to more requirements for administration despite the overall suggestion of streamlining. I know in the financial impact statement you have said there are minor one-off costs et cetera. Do you see these changes as having any wider resource impacts in terms of administration requirements and enforcement requirements of the act?

Mr Early—I think, as we said in the explanatory memorandum, there will certainly be some transitional costs which actually could go on for some time because, as I said, we are trying to develop a more strategic approach to projects, but at the same as we are developing that we will be doing things on a project-by-project basis. Although we would hope to get efficiencies they will take a little bit of time to realise, so there will still be a considerable requirement for resources for the act, as there is currently.

Senator BARTLETT—I do not know if you heard or noted the evidence last Friday from Ms Ruddock of the EDO who reported occasional feedback that there were insufficient resources to enable compliance from within the department. Do you think that these changes will free up things a bit more to enable more compliance activity to be done?

Mr Early—We are certainly hoping that the strengthening of the compliance regime will make it easier for us to have successful prosecutions, and to that extent I guess we will not be putting efforts into basically lost causes. Mr Flanigan may want to make a comment on that.

Mr Flanigan—I was going to emphasise a similar point. Changes like introducing the strict liability to the NES offences will make a substantial difference to our ability to take

cases forward. They will deny people—if you like, the rogues—the ability to claim that the act does not apply to them simply because they did not understand the legislation and their responsibilities. So, in that context, it will allow us to be more effective in the targeting of our activities.

Senator BARTLETT—Were you aware of or did you have your attention brought to the comments made by the EDO last week?

Mr Flanigan—I did, yes.

Senator BARTLETT—Do you have any response to those?

Mr Flanigan—I think Ms Ruddock was applying a selective sort of interpretation to some of the discussions my officers would have had with her. We see about 250 or 300 compliance incidents reported to us a year, and clearly we are not able to deal with all of those at an absolutely high level. We look into all of them at a cursory level, but we do then have to pick priorities amongst them in terms of the ones that are the best for us to engage in, both in achieving the best environmental outcomes and in implementing compliance policy. A lot of those 350 I think we could characterise as being largely unsubstantiated. So I think from time to time there will have been discussions about us not being in a position to take or seeing merit in taking active cases forward, and we will have pointed out the provisions available in the act, but that is about as far as it will have gone.

Senator BARTLETT—Could I just ask a final question—I raised this before; I think you would have heard it—on the uncertainty about the amendment to section 75 for the purpose of deciding whether or not a relevant action requires approval for the purpose of natural heritage places. Could I just get a clarification of what the impact of that change is.

Mr Early—We do not believe there is any uncertainty about that. Basically, if you look at the provisions that it refers to, you will see that it only relates to those provisions or matters of national environmental significance involving Commonwealth land. So basically it is not limiting at all; it is just clarifying that, when we look at Commonwealth land, we only look at the impacts of that part of the action that takes place on Commonwealth land. To give you an example: suppose we had a pipeline that went from Darwin to Adelaide and went through 10 kilometres of Commonwealth land. You would not assess the entire pipeline on the basis of impacts on Commonwealth land; you would only assess the 10 kilometres. You may well assess the rest of it for other reasons, like threatened species or whatever. So it is just clarifying what in fact the impacts on Commonwealth land are. Some people have interpreted that section as applying to all national heritage or all threatened species, but it only applies to those that occur on Commonwealth land.

Senator BARTLETT—I do have one more question. A few people have raised with me—as you would be well aware—the very contentious proposals for a dam in south-east Queensland at the moment. Is this legislation likely to have any impact one way or the other about how that is assessed—or similar type projects?

Mr Early—I would not have thought so.

CHAIR—It is very hypothetical.

Mr Early—Basically, we have had discussions with Queensland. The intention for Queensland is to refer under the legislation, and it will be dealt with as a project under the act in the same way, if the act is amended, as it is currently. That is my understanding. I do not think there would be any other way of doing it.

CHAIR—Is that it, Senator?

Senator BARTLETT—Yes. I was just trying to do you a favour in assuaging people's concerns about devious conspiracies. But, if you want to let them keep running, feel free to try and gag me. That is fine.

CHAIR—No, Senator Bartlett, that is fine. Senator Siewert.

Senator SIEWERT—I am aware that the Australian National Audit Office are currently carrying out an assessment. Has there been any feedback from them on their assessment so you could feed any changes that you think would be necessary into these amendments?

Mr Early—Not really. They will give us a draft report which we will then comment on, and it will then be released to the parliament. To be honest, I have been somewhat distracted with other things lately so I have not been fully across what is in the report, but certainly we believe some of the issues that they will raise will be addressed by the amendments, but we will have to look at the report when it is finalised. I do not know whether any of my colleagues have anything more to add.

Mr Flanigan—No. I have seen some of their early drafts but I think, given that they are drafts, comment on what their report is going to be would probably be best left to them. They would not thank me for talking about it here.

Senator SIEWERT—I am not asking you to tell me what they might be saying. What I am concerned about is that they are doing an audit, they are reporting, and their report may lead to suggestions there should be changes made to the act. It seems to me that therefore the timing is not brilliant, depending on the way you think about it, in that these amendments are going to be going through and we might then need to bring another raft of amendments if their concerns have not been dealt with.

Senator RONALDSON—Chair, I think that is a policy matter.

CHAIR—It does sound rather like a policy to me. The officials cannot really comment on policy but they can comment on the content of the legislation. I can see you are looking hard at me, but they are the boundaries.

Mr Early—Mr Flanigan reminds me that the Audit Office are looking at the amending bill. I realise that the timing is a little bit different, but any comments that they make will obviously be picked up by the government.

Senator SIEWERT—Can I go back to the issue of regional plans. I recognise that you did touch on this in your opening statement. How much detail do you expect to be in bioregional plans? I would not have thought that they would be detailed enough to actually go down to what should or should not be in development proposals.

Mr Early—I think the problem is that people are looking at bioregional plans as something they are not. For example, I do not believe that an approved bioregional plan would cover everything that is likely to happen in that bioregion. The way that we are currently doing our

regional risk assessments on a voluntary basis in a number of regions around Australia is to basically try to, if you like, limit the number of activities that subsequently need to go through the project approval. For example, I would see a bioregional plan as identifying the sorts of things that would be required for particular matters that were likely to come up within that bioregion, and then it may well say they do not need approval, but of course the minister has the capacity to attach conditions so there might well be further conditions that would have to be met. The notion that somehow or other we could do a bioregional plan and then the Commonwealth could walk away from that region and not be concerned about anything that might happen is a little bit misleading.

Senator SIEWERT—Can I take you to a marine example. My understanding of the process would be that, for example, a marine environment regional plan—let us make in plain—in Commonwealth waters may cover a marine protected area. They do already. Oil and gas facilities would be an example of a development in a bioregional plan.

Mr Early—Yes.

Senator SIEWERT—They would be one, presumably, that would, if these certain requirements were met, not need further assessment. Is that correct?

Mr Early—It could be that, or it could be that if there are facilities in a certain area it does not need further assessment, but if it is in another area within that bioregion it does need individual assessment. It is not one rule applies to all and, for example, the declarations do not even need to relate to all the matters of NES. There has been some concern that this is somehow some loophole to get nuclear in. If nuclear is not assessed as part of the process, then it is not going to be one of the matters that the minister signs off on in the bioregional plan. That was the point I was trying to make at the beginning—that the bioregional plan or strategic assessment will only deal with matters of NES to the extent that they have been assessed within that bioregional plan and strategic assessment.

Senator SIEWERT—I will come back to oil and gas, but since we have moved over to nukes let us stay there. Why are uranium mining, nuclear waste facilities and milling specifically referred to?

Mr Early—Sorry?

Senator SIEWERT—Sorry, I always get this back to front. They are ones that do not need an exemption?

Mr Early—They are currently in the legislation. Basically what this is doing is providing a different avenue, if you like, for approvals. Exactly the same requirements on the minister in terms of approvals currently would need to be placed on the minister for these processes as well. It is simply lifting up what is currently in the legislation and putting it in place in relation to—

Senator SIEWERT—My understanding is that this is spelling it out differently to that which it has been previously. Is that not correct?

Mr Early—That is not correct.

Senator SIEWERT—Thank you for clarifying that. Can we go back to oil and gas facilities in a marine protected area in a bioregional plan. Is there a potential that they would not require further assessment from the Commonwealth?

Mr Early—It is possible, in the same way now that, for example, we might get a referral for an oil facility in a particular area and it goes through the referral process and we decide it is not a controlled action. For example, if it is somewhere where there are no environmental issues and no matters of national environmental significance that are impacted—

Senator SIEWERT—In a marine protected area?

Mr Early—Sorry, I thought you were talking about the bioregion.

Senator SIEWERT—I am talking about a marine protected area.

Mr Cochrane—In a marine protected area, the fact that a facility may be a possibility would still not prevent the whole assessment and approvals process applying to that activity. Part 3 would still apply to any proposed development in a marine protected area.

Senator SIEWERT—In an MPA?

Mr Cochrane—Yes.

Senator SIEWERT—Thank you for clarifying that. Aboriginal heritage—you knew I was coming to that, didn't you?

Mr Burnett—Yes.

Senator SIEWERT—There has been a commitment for a significant period of time to review, as you know, the ATSIHP Act. Why was that not included in these amendments, given that it has been on the books for a long time?

Mr Burnett—I can give a response. That is a separate government proposal. There is no proposal to roll the ATSIHPA legislation into this bill. You would be aware, from discussions we had at an earlier estimates hearing, that there is a commitment in the most recent budget papers to resume work on reviewing and updating the ATSIHPA legislation. That is under way as a separate project from this.

Senator SIEWERT—There is a suggestion, though, is there not, that some of that may in fact roll over to the EPBC?

Mr Burnett—No, it is really a separate regime, because the ATSIHP Act is not built around matters of national environmental significance. That is the key difference. Indigenous heritage is picked up in this act only to the extent that it relates to national heritage as a matter of national environmental significance. ATSIHPA is really separate.

Senator SIEWERT—At the risk of Senator Ronaldson saying this is a policy decision, I am going to ask why the changes are being made about costs to the public of taking action through the courts. What is the reasoning behind those amendments?

Mr Early—At the risk of being cute, it is a matter of government policy, but the rationale is that this is putting the EPBC Act on the same footing as other Commonwealth legislation. Basically, it is leaving the decision up to the courts in the same way that the courts make similar decisions every day in relation to all other Commonwealth legislation.

CHAIR—So it is consistency.

Senator SIEWERT—Is it the same sort of legislation, though? What other legislation concerns the public taking action to protect something? This is about the public taking action to protect an environmental good.

Mr Early—The principal mechanism for taking action under the EPBC Act has been the Administrative Decisions (Judicial Review) Act. Those are the circumstances in that case. The EPBC Act gives extended standing, so it goes a bit beyond the AD(JR) Act. The undertakings as to damages are basically the same. The existing EPBC Act goes further than that. In fact, one of the most usual mechanisms for groups to take action is in relation to environment protection.

Senator SIEWERT—You said it is about consistency with other Commonwealth legislation.

Mr Early—That is what I am saying: it is consistent with the AD(JR) Act.

Senator SIEWERT—Is that the only other act that you are referring to?

Mr Early—I would have to take that on notice. The advice I have from the Attorney-General's Department is that this legislation would bring it into line with just about all other Commonwealth legislation.

Senator SIEWERT—I would like to know because in this case people are taking action to protect an environmental good, which I would have thought was different from some of the other Commonwealth legislation. I would like to know whether the public taking action in the public interest to protect something is consistent with other acts.

Mr Early—I will get back to you on that.

Senator SIEWERT—Thank you. That would be appreciated. I suspect some of my other questions are going to be classed as policy but I am going to ask them anyway.

CHAIR—We are running out of time.

Senator SIEWERT—This will be my last one.

CHAIR—You can put questions on notice, of course.

Senator SIEWERT—This is about taking away the rights of appeal. I am moving to other areas where the public is able to appeal ministerial decisions. For example, what is the rationale? I have seen what is in the EM.

Mr Early—What is in the EM is the rationale. Basically, the government believes that, with matters of high public importance, decisions should be taken by the minister and, as such, should not be reviewable by an unelected tribunal.

Senator SIEWERT—I have one more question. HSI, as you will be aware, are concerned about what is going to happen with a lot of the nominations they have in the system at the moment. For example, will the 500 critical habitat nominations that are in fall off the list?

Mr Early—I think it is a bit hypothetical. Those nominations will go into the process, and whether they make the list for consideration will depend on what the Threatened Species

Scientific Committee advise the minister. If they do not make the list, they can be considered the following year, as a rule.

Senator SIEWERT—Does that apply to all their other nominations? You have seen their list.

Mr Early—Transitional arrangements will apply to all the existing nominations. What status they have reached will depend on how they go into the new process.

Senator SIEWERT—So their concerns about what may happen to their nominations is justified, in that they may or may not be dealt with in the new process.

Mr Early—They will be dealt with but not in the way that they would like, I guess.

Senator SIEWERT—Yes.

Mr Early—It is true that, at the end of the day, they may not progress immediately, and that is part of the process that we are looking for to get more strategic and to use the resources in the best possible way to get the best environmental outcomes.

Senator IAN MACDONALD—I appreciate that the management of legislation is a matter for the minister and not yourselves, but are there any technical things in the bill that require it to be dealt with quickly?

Senator SIEWERT—What he means is: why the rush?

Mr Early—I am not sure I follow the question senator.

Senator IAN MACDONALD—Are there particular issues, procedures or programs dependent upon the amendments to this bill going through this week rather than next week or this month rather than next month?

Mr Early—Not that I am aware of senator.

Senator IAN MACDONALD—I guess someone has been appointed to keep an eye on the proceedings so you would have watched some of the interaction earlier on. On the question about the thematic listings rather than dealing with the list now, there seemed to be a lot of concern—most simply put last Friday—that if there is an urgent listing required with underground orchids but this year our theme is birds, well we say, 'Forget about the listing of this orchid; we are only dealing with birds.' Without having read the legislation in that detail, I assumed that that would not be correct. Do you have a comment on that? A number of different witnesses genuinely raised it.

Mr Early—That is not correct, Senator. There are a number of aspects. First of all the capacity of the minister to establish themes is not mandatory, so he may or may not establish themes. As I pointed out earlier, there currently is provision in the existing legislation for themes on heritage places and he has not chosen to actually use that provision, neither did the previous minister. So there is no guarantee that it is really providing an opportunity for the minister to establish themes.

The second thing is even if the minister does establish themes, then that is obviously a priority that the threatened species committee or the Heritage Council will look at, but it is not an impediment. It is not saying that if you put up a valid and really good nomination that is outside that theme, that cannot be picked up in the list.

The other consideration is that there is nothing in the legislation that says that if someone pops up a really good nomination, whether it is threatened species or heritage, quite outside the annual cycle after the nominations have closed, that they cannot be considered as well. Really this is a facilitating mechanism not a prohibition.

Senator IAN MACDONALD—I am pleased to hear that and that is what I would have thought. The other argument was that, because there were these themes around, the department's resources would be focused on the themes, meaning fewer resources for any of these other issues that might come up and need to be dealt with with relative urgency.

Mr Early—I do not think that is really the case senator because as you know the nomination process is but one part of our activities. So even if there were a theme for heritage or for threatened species we are still dealing with projects on a day-to-day basis which involve all sorts of other things. So it is not as though we would suddenly not be doing any work except on that theme that would be only in relation to the nominations.

Senator IAN MACDONALD—Thanks, I am encouraged by your answer. I comment in passing though that a lot of the misconceptions might not have been around had you taken the opportunity to consult with various groups who have a history of not being radical opponents. But you know that is probably an unfair comment to you. These things perhaps are determined outside your sphere of interest, but it does seem unfortunate to me that some people who have a genuine interest in this were not approached for their views on it at an earlier stage.

One other issue raised was that the amendments would impose pressures on your existing resources, which would make it even more difficult for you to do the things that you are required to do. Is it fair to ask you for a comment on that? Perhaps you could deny it.

Mr Early—It is probably not fair, Senator, in the sense that it is part of government processes, but as Senator Bartlett said, we never refuse extra resources.

Senator IAN MACDONALD—No. Assuming your resources stay exactly where they are, will these amendments put greater pressure on you because things are being done differently?

Mr Early—In the explanatory memorandum we identified that there would be a one-off increase and also some increases in resource needs. It will be up to the department to find how to deal with that.

Senator IAN MACDONALD—Finally, you would have seen my discussions with both AFMA and the CFA on the fishing plans and Mr McLoughlin collegiately said that he would work out any differences between the two of you, and it is great to see that happening. I do not happen to be quite so trusting and I am not under the constraints that Mr McLoughlin might have been under to give his view on those things. From the interaction I had with AFMA and more importantly with the CFA, what is the scope of the managed fisheries management plan that can be accredited or adopted as conservation management plans, and then the concern was, what does that really mean?

I think they are uncertain. Again it might be that lack of consultation, lack of understanding by them does not allow them in the short time available to fully appreciate that. I think there was a comment made that might be covered in the regulations but of course the regulations come long after the act is passed. Could you comment on the interaction and how it will

work—what the procedures will be and which will take precedence if fisheries management plans are credited as conservation plans?

Mr Early—In terms of native fish, basically it is not accrediting AFMA or any other fisheries managers' plans as conservation plans. There are two provisions in the conservation dependent category. For non-fish—if I can put it that way—if the species is a focus of a conservation program the cessation of which would lead to that species going to a higher level of threat, they can be listed as conservation dependent. What we are saying here—and it picks up a bit of what Richard was saying earlier about the changes that have been introduced over the past 18 months or so—is that it provides that, if the plan of management provides for management actions necessary to stop the decline and support the recovery of the species, it can be listed as conservation dependent rather than at a higher category. So it is actually picking up the management plans of the fisheries authorities. Provided they have the proper measures within their management plans, that is what we would be relying on. It is not duplicating or putting one above the other.

Senator IAN MACDONALD—What if they do not have the right measures?

Mr Early—If they do not have the right measures then it cannot be included as conservation dependent.

Senator IAN MACDONALD—What is the impact of that?

Mr Early—It is a bit hypothetical. It would depend on the circumstances of the fish we are talking about.

Senator IAN MACDONALD—Would you then take some action? Would you introduce some sort of management plan? If it is not in the fisheries management plan, how would you enforce whatever your interest was in it?

Mr Early—Through negotiation with the fisheries manager.

Senator IAN MACDONALD—What if you do not reach agreement? They are going to be an independent commission, you know.

Mr Early—Then the minister would have to look at the status of the species and make the decision as to whether or not—

Senator IAN MACDONALD—What decisions did he make? This is the thing. There is some uncertainty. I do not know whether a bit more discussion might have clarified it in their minds. I do not want to speak for AFMA.

Ms Petrachenko—A couple of things are going on right now. As Mr McLoughlin mentioned, we are working quite closely together, and with the Department of Agriculture, Fisheries and Forestry, who are developing a harvest strategy for the Commonwealth fisheries. That harvest strategy will clarify how the management plan will interact with, as Mr Early said, conservation dependent stocks. The harvest strategy will outline the levels to which the fisheries management agency, AFMA, will operate for target reference points and limit reference points and how, when a limit reference point is identified, conservation dependent action will have to be taken. It will all be done in the agreed-upon harvest strategy that is yet to be finalised.

Senator IAN MACDONALD—What if you do not reach agreement? For the next 12 months AFMA is an independent statutory authority. What if you do not agree with them? Under this amendment relating to this area, do you have some power to do something?

Ms Petrachenko—There would be the potential. It would be conservation dependent, meaning that if you follow the actions in that plan then it will ensure its survival. If you do not have a plan then by definition it could potentially be considered by the threatened species committee for a listing under the act.

Senator IAN MACDONALD—Is that as a result of the new amendments?

Ms Petrachenko—Currently it could be as well, but the conservation dependent nature of it and the relationship to fisheries is clearer now.

CHAIR—We have run out of time; we will have to wrap up.

Senator IAN MACDONALD—That is very unfortunate. There are some issues here that the fishing industry and I feel very concerned about. Senator Siewert may well be glad of it but there is some uncertainty.

Senator SIEWERT—I share your concern, but from the other perspective.

Senator IAN MACDONALD—Yes.

Senator CARR—You did indicate, Mr Chairman, that I would get a chance to ask a few more questions.

CHAIR—We had extra time, but people have taken longer than expected. We had an hour allocated to the department.

Senator CARR—That is terrific; just terrific!

CHAIR—We added 15 minutes on, and then another seven.

Senator CARR—I think I had 12 minutes.

CHAIR—No, you had 18 minutes.

Senator IAN MACDONALD—I had seven minutes, if that is of any interest to you, Senator Carr.

CHAIR—So, I am afraid we have run out of time. I thank the witnesses for appearing, Hansard for being here and the secretariat for facilitating this meeting. I add that senators can, of course, put questions on notice and the department will answer them.

Resolved (on motion by **Senator Ronaldson**):

That this committee authorises publication, including publication on the parliamentary database, of the transcript of the evidence given before it at public hearing Friday, 3 November.

Committee adjourned at 6.08 pm