

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

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

**Information provided by the Department of the Environment and Heritage in  
response to Questions from the Committee**

**10 November 2006**

**Questions at the Committee Hearing**

**Question No 1**

At the Committee hearing on 6 November 2006, Senator Carr asked (Hansard Page ECITA 53):

When did you sign off on it [the Explanatory Memorandum]?

**Answer**

The Department submitted the Explanatory Memorandum to the Minister for his consideration on 10 October 2006. The Minister approved it for circulation on 10 October 2006.

**Question No 2**

At the Committee hearing on 6 November 2006, Senator Siewert asked (Hansard Page ECITA 61):

I would like to know whether the public taking action in the public interest to protect something is consistent with other Acts.

**Answer**

A response to this question will be provided separately – by 15 November 2006, as requested.

**Issues raised following the Committee Hearing**

The following issues were raised with the Department by the Committee following the hearing:

**Issue No 1**

Concerns expressed regarding the Minister's discretion regarding the listing of threatened species, consideration of nominations for the list and removal of species from the list.

**Response**

The proposed amendments to the listing process for threatened species are designed to address the problems being experienced as a result of by the ad hoc nature of the current process. At the moment, nominations are dealt with as they are submitted, regardless of merit and regardless of whether other species should be accorded greater priority. This means valuable resources from both the Department and the Threatened Species Scientific Committee may be tied up dealing with nominations that have little

merit, or do not deserve priority attention or, if successful, would result in little conservation benefit. That is neither a sensible nor optimal way to develop a list of our most threatened and priceless species.

Under the proposed amendments, the Threatened Species Scientific Committee will be asked to identify which nominations are best placed within a strategic framework and will provide that advice to the Minister. This will allow the Minister, on the basis of expert advice, to ensure that efforts are focused on the most important issues. It will also ensure that the highest priority tasks are undertaken in the context of a well planned and manageable work programme.

While decisions on these matters are made by the Minister, the EPBC Act will require, as currently, that the Minister obtains and considers advice from the Threatened Species Scientific Committee.

## **Issue No 2**

Concerns expressed over the removal of the requirement for Recovery Plans for listed threatened species.

### **Response**

The proposed removal of the mandatory requirement for recovery plans for all listed threatened species will not impact adversely on the actual recovery in nature of any threatened species or ecological community.

Experience has shown that, for many species, the development of recovery plans is an expensive, time consuming and overly bureaucratic process without benefits commensurate to the effort expended to develop them. The current onerous statutory requirements are arguably skewing the Australian Government's expenditure on threatened species too far towards planning, relative to actual implementation of recovery action. Plans are often too focussed on filling research or knowledge gaps rather than identifying recovery actions or providing information to support statutory decision-making.

This problem with the current process has been recognised by the Threatened Species Scientific Committee. With the approval of the Minister, the Committee has over the past year or so been providing short pragmatic conservation advice at the time of recommending listings to the Minister. This conservation advice, which is made publicly available, sets out the main factors associated with the species' threatened status and information about appropriate recovery action. The advice can be fed directly into regional natural resource management plans and investment strategies, rather than waiting for the development of a recovery plan

The proposed amendments recognise the success of the new approach and require approved conservation advice to be provided for all listed threatened species and ecological communities at the time of listing.

The proposed amendments also recognise that there will continue to be species and ecological communities that require the development of a detailed recovery plan in the traditional style. The Minister must make a decision whether or not such a recovery plan is required in relation to all listed species and ecological communities. In doing so, he is required to have regard to the independent, expert view of the Threatened Species Scientific Committee.

### **Issue No 3**

Concerns expressed that amendments remove the right of appeal of the Minister's decisions to the AAT.

#### **Response**

There is currently a limited range of decisions under the EPBC Act that are subject to AAT jurisdiction. Such decisions are limited mainly to permits – regarding listed threatened species and ecological communities; listed migratory and marine species; cetaceans; and import and export of wildlife. They also include decisions regarding declarations about wildlife trade operations and wildlife trade management plans and issuing of a CITES certificate. The overwhelming majority of these decisions currently subject to AAT jurisdiction are made by public servants as delegates of the Minister.

The Government accepts that the ability of the community to appeal the abovementioned administrative decisions when made by public servants is an important right. This ability is being preserved. The AAT will have the same jurisdiction as now in relation to any decisions made by public servants as delegates of the Minister.

However, a small number of the permit and declaration decisions noted above require careful balancing of competing interests and judgements. The Government considers that where these decisions are sufficiently important to be taken by the Minister as an elected representative, those judgement calls should not be able to be overturned by an unelected tribunal such as the AAT.

Appeal rights to the Federal Court under the *Administrative Decisions (Judicial Review) Act 1977* (ADJR Act) will continue to apply to all decisions under the EPBC Act, whether taken by the Minister or his or her delegate.

### **Issue No 4**

A lack of recourse to appeal/review rights.

#### **Response**

The proposed amendments will not remove any appeal rights in relation to judicial review. Any person aggrieved by a particular decision will still be able to appeal that decision under the ADJR Act. Further, the EPBC Act will continue, as currently, to extend the meaning of a person aggrieved under the ADJR Act to include Australian citizens or residents and incorporated organisations or associations engaged in environmental activities at any time in the two years immediately before the particular decision in question.

The proposed amendments would repeal the prohibition on the Federal Court requiring an applicant for an injunction to give an undertaking as to damages as a condition of granting an interim injunction. This means that the Federal Court will have the discretion whether or not to require an undertaking based entirely on the particular circumstances applying in any particular case. It is appropriate for the Federal Court to be making such a decision on its merits rather than for the decision to be prescribed in legislation.

Review by the Administrative Appeals Tribunal of a small number of decisions made personally by the Minister will be eliminated under the proposed amendments for the reasons set out in relation to Issue No 3 above.

#### **Issue No 5**

A perception of arbitrary decision-making rather than decisions driven by a scientifically determined process.

#### **Response**

The proposed amendments will make no changes to the requirement, as currently, that the Minister obtains and considers independent, expert advice from the Threatened Species Scientific Committee or the Australian Heritage Council in making a large number of decisions under the EPBC Act. Members of the public will be able to obtain copies of advice provided to the Minister by the Threatened Species Scientific Committee and the Australian Heritage Council as is currently the case.

#### **Issue No 6**

A perceived lack of transparency.

#### **Response**

The EPBC Act is, and will remain, one of the most transparent pieces of environmental legislation anywhere in the world. The EPBC Act website ([www.deh.gov.au/epbc/index.html](http://www.deh.gov.au/epbc/index.html)) provides countless opportunities for members of the community to comment on proposals, nominations and other actions and to examine recommendations, reports and decisions made under the Act.

#### **Issue No 7**

A perception of 'politicised' decision-making processes.

#### **Response**

If 'politicised' decision-making processes are taken to mean decisions made by Ministers, then the perception has been accurate since the first Australian Government environmental laws were introduced in the 1970s. In fact, the perception is probably accurate in relation to most environmental laws anywhere in the world. Even where environmental decisions are made by independent authorities, there is often an appeal mechanism to elected government ministers.

Nothing in the proposed amendments will diminish the rigorous, transparent and scientifically based decision-making under the EPBC Act.

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**Questions at the Committee Hearing**

**Question**

At the Committee hearing on 6 November 2006, Senator Siewert asked (Hansard Page ECITA 61):

I would like to know whether the public taking action in the public interest to protect something is consistent with other Acts.

**Answer**

There are very few pieces of legislation that provide for persons to seek injunctions from a “public good perspective”. Some of that legislation such as the *Motor Vehicles Standards Act 1989*, the *Sea Installations Act 1987*, the *Ozone Protection and Synthetic Greenhouse Gas Management Act 1989* and the *Hazardous Waste (Regulation of Exports and Imports) Act 1989* contain provisions that require the court to not require an undertaking as to damages as a condition of granting an interim injunction. However, these provisions only apply in the circumstance where the Minister makes an application to a court for the grant of an injunction. This is in contrast with section 478 of the EPBC Act where the ‘no undertakings as to damages’ requirement applies in the circumstance where the Minister or an interested person is applying to the Federal Court for an injunction.

Other Commonwealth legislation such as the *National Health Act 1953*, the *Fuel Quality Standards Act 2000* and the *Agricultural and Veterinary Chemicals Code Act 1994* may be regarded as legislation involving a “public good perspective”. While providing for persons to seek injunctions, these statutes do not contain ‘no undertakings as to damages’ provisions. The need for such undertakings is left to the courts.

Department of the Environment and Heritage  
15 November 2006