

Standing Committee on Environment, Communications, Information Technology and the Arts – Hearing into the Provisions of the Environment and Heritage Legislation Amendment Bill (No.1) 2006 on Monday 6 November 2006

The Law Council replies to the questions raised on 6 November 2006 as follows:

1. Could you please provide your response to the strengthened search, seizure provisions in the Bill, along with your views on the strict liability provisions and the 7 year jail terms.

The search and seizure provisions are of concern when the activities of search and seizure are being carried out by people who are not Police Officers. The Act provides that the officers will be appropriately trained, however there is no detail of the "appropriate training" to be given to the officers concerned. Presumably the appropriate protocol and safeguards are to be included in the Regulations to the Bill. However when such wide ranging powers are being given to persons other than Police Officers, a draft of the Regulations setting out the appropriate protocols and safeguards for the training and disciplining of these officers should be provided prior to the Bill being passed.

These same officers have the power to search without warrant under Section 406 (1)(ba). This activity may well be necessary in the extremes of the Australian waters but nevertheless without being able to consider the Regulations which would control the protocols, safeguards, training and discipline of the officers conducting the search without warrant, it is difficult to assess whether this provisions is appropriate. Similar comments apply to Section 413, the proposed clause 17 of the new Schedule 1.

In relation to strict liability it is usual to have offences of strict liability in relation to environmental offences. However, for instance, the Protection of the Environment Operations Act 1999 in New South Wales has Tier 1 offences which are the most serious and although they are strict liability they also require proof of mens rea as they relate to the wilful or negligent disposal of waste in the manner that harms, is likely to harm, the environment, wilfully or negligently causing a substance to leak, spill or otherwise escape in a manner that harms or is likely to harm the environment etc. The Tier 1 offences attract liability for a corporation up to \$5 million; for an individual up to \$1 million or 7 years imprisonment or both. Tier 2 offences under the Environment Operations Act are offences of strict liability and attract fines for corporations up to \$1 million, and for individuals up to \$250,000.00 but do not attract jail sentences. There is no argument that stands that says that strict liability offences cannot attract jail sentences as well as a fine – and those fines can be very high. However, a jail sentence should only be for a very serious crime – We note the amendments to the Act are to make offences – offences of strict liability but the penalties remain the same.

2. Could you please provide your views regarding the annual thematic approach to the listing of heritage places and threatened species, and what this may mean

for the 500 or so listings that are currently waiting for approval and that may not fit into the new thematic approach.

The thematic approach appears to be reasonable considering the objects of the Act. The objects of the Act are to assess and improve actions which are likely to have a significant impact on:

- The commonwealth marine area.
- The world heritage properties.
- Ramsar wetlands of international importance.
- Internationally threatened species and ecological communities.
- Internationally protected migratory species.

Without being an environmental scientist the thematic approach appears to be in accordance with the objects of the Act.

In terms of themes and the 500 or so listings that are currently waiting for approval and may not fit into this approach they are catered for by the savings and transitional provisions (Sch 2 Part 7), which deem them to meet the requirements of the new Act depending on where they are up to in the system. For example if there has been a nomination they are treated as though nominated during the first period called for nominations (ie even if theme declared the intention is that they would be included). The nominations can only be rejected if they are not in good faith, frivolous or vexatious (same as current provisions 191 and 341E) or do not comply with new regs. Interestingly if they were rejected as the Act stands the Minister was obliged to:

341E(7) If the Minister rejects the nomination under this section, he or she must, as soon as reasonably practicable:

- (a) advise the person of that fact; and
- (b) give the person written reasons for the rejection

Under the changed act the requirement is only for a rejection to be in writing.

I would suggest the requirement for the rejection to include reasons should be added back in to ensure transparency and accountability. This ties in with the comments we have made about judicial review of the minister's decisions.

The new scheme for the Act then provides that the Scientific Committee or Heritage Council then has to develop a priority assessment list, which the Minister signs off on and can amend, the matters that make the list are then assessed and referred to the Minister for final determination. Where the current noms could face problems is that if a theme is determined for the first assessment year they could get knocked out if they do not fit into that particular theme. The way around this would be to have the Minister's power to declare themes only apply after the first assessment period has

been and gone (this is only a problem for items nominated for the National Heritage list and TS).

3. **Could you please provide your understanding of the situation in the various states and territories besides NSW, as to whether or not developments would be halted under existing laws, post-discovery of a threatened species.**

Our committee has not had time to consider this question except for New South Wales and Queensland. To assist we set out New South Wales and Queensland below. The details in relation to New South Wales are expanded upon those answers given at the Senate Hearing and the comments in relation to the savings and transition provisions of the Bill are relevant as a separate issue.

New South Wales:

The assessment takes place in the developments approval process under the provisions of Section 79 of the Environmental Planning and Assessment Act 1979.

5A Significant effect on threatened species, populations or ecological communities, or their habitats

(1) For the purposes of this Act and, in particular, in the administration of sections 78A, 79B, 79C, 111 and 112, the following must be taken into account in deciding whether there is likely to be a significant effect on threatened species, populations or ecological communities, or their habitats:

- (a) each of the factors listed in subsection (2),
- (b) any assessment guidelines.

You need a species impact statement for development requiring consent or an activity requiring approval (Pt 4 and 5 of the EP&A Act). You do not need an Species Impact Statement for Part 3A projects.

The offence provisions and stop work orders of the Threatened Species Act and the National Parks and Wildlife Act do not apply if what is occurring is essential to the carrying out of development or activity (see 91AA(4), 118A(3)(b) and generally 118A-118G of NPWS, 114 TSC and 75U of the EP&A Act.

The regime is predicated on the basis that the assessment of impact on threatened species takes place at the development approval process phase. There definitely seems to be a gap in the scenario where threatened species is only discovered once development begins given that the relevant sections do not apply or it is a defence to the usual offence if the act was:

essential for the carrying out of:

- (i) development in accordance with a development consent within the meaning of the *Environmental Planning and Assessment Act 1979*, or
- (ii) an activity by a determining authority within the meaning of Part 5 of that Act if the determining authority has complied with that Part, or

(iii) an activity in accordance with an approval of a determining authority within the meaning of Part 5 of that Act if the determining authority has complied with that Part, or

(iv) a project approved under Part 3A of the Environmental Planning and Assessment Act 1979,

In this context I agree with National Parks position, it definitely appears to be a problem (how likely it is to come up I can't say but contrast this with heritage act in NSW where similar exemption does not appear eg if you discover a relic while re-developing building).

However the Minister has the power to issue a stop work order at any time. If that does not occur and a Koala was taken or a Koala habitat was taken for instance, the developer or landholder, or both could be prosecuted under the National Parks and Wildlife Act for killing a Koala or taking a Koala habitat. There are provisions in New South Wales under the Threatened Species Conservation Act 1995, that Native Vegetation Act 2003 and the National Parks and Wildlife Act 1974.

Queensland:

If a species were to be added to the listed threatened species under the EPBC Act would Queensland legislation halt an approved development impacting on that species? It is assumed that *development* is synonymous with *action* under EPBC and that the development would have *significant impacts* resulting in the development being a *controlled action* for the purposes of the EPBC Act. The question does not call for a response as to the operation of the EPBC Act in relation to the development rather it is limited to a consideration of relevant state legislation.

The state legislation we considered was the Environmental Protection Act 1994, the State Development and Public Works Organisation Act 1971 and the Integrated Planning Act 1997 (chosen as they are mentioned in the Qld-Cth bilateral agreement as provided for under s45 of the EPBC Act). The legislature appears to have failed to consider the possibility of factors not relevant at the time of the approval process having an impact in the future.

It is also possible that the State Minister might make an interim conservation order under the Nature Conservation Act 1992 following a species being placed on a list of threatened species under the EPBC Act. Despite this, under the NCA a landholder issued with an order is entitled to compensation. This might act as a disincentive to an interim conservation order being made.

Conclusion:

I attach the Summary Sheet handed to the Senators on 6/11/06.

I reiterate my advice to the Senate Committee that it is the Law Council's view that the laws across Australia in relation to the conservation of threatened species, of

flora, fauna and ecological habitat, should be uniform across Australia, so that the state jurisdictions, where the vast majority of enforcement takes place, interlinks with the federal provisions of the Act and the Acts across Australia are uniform in their provisions.

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Summary of Principal Requested Changes to the Proposed Amendments to the
Environment Protection and Biodiversity Conservation Act 1999

1. **s. 206 (A) Delete proposed amendment**
Paragraph 212 – Items 286 – 288
2. **s. 221 (A) Delete proposed amendment**
Paragraph 222 – Items 413-415
3. **s. 243(A) Delete proposed amendment**
Paragraph 238 – Items 446-448
4. **s. 263 (A) Delete proposed amendment**
Paragraph 246 – Items 463-465
5. **s. 303GJ (1) Delete proposed amendment in Item 530 removing right of appeal to AAT from Ministerial decision, but leave in amendments Item 529 + 531 regarding definition of "Tribunal"**
Paragraph 282 - Items 529-531
6. **s. 473 (1) insert (1A) Delete proposed amendment**
Paragraph 476 – Items 758 – 762
7. **s. 189B –Amend by inserting the words "public" as follows:**
(3) Subsection (1) does not apply to a disclosure of particular information if:
(a) the Chair of the Scientific Committee requests the Minister to give permission to disclose that information to a particular person (or persons within a particular group of persons)or the public;
(b) Delete
(c) the disclosure is made to the person (or a person within that group)or the public.
Paragraph 185 – Item 365
