

Chapter 6

Other Issues

6.1 A number of other issues were drawn to the committee's attention during the inquiry, and three are addressed here: the triggers in the Act for matters of national environmental significance; review of ministerial decisions; and departmental resources.

Triggers for matters of National Environmental Significance

6.2 The EPBC Act focuses on environmental protection of aspects of the environment that are matters of National Environmental Significance.¹

6.3 Numerous participants in the inquiry were concerned that there were important threats to the environment that currently are outside the scope of 'national environmental significance'. Foremost amongst these was climate change:

Mr Tupper—We believe that there needs to be a trigger that would look at any significant impacts in terms of greenhouse gas pollution. We can debate the nature of that trigger, but we believe that it needs to be a combination of the carbon intensity of the proposal as well as the volume of emissions.²

Ms Walmsley - Regarding the second element of comprehensive coverage, the bill as introduced to parliament fails to address the most crucial and urgent environmental matters of national significance, namely, climate change, over extraction of water and land clearing. It is critical that additional triggers are added to address these issues. The legitimacy of the regime is undermined if these fundamental issues continue to be ignored.³

Mr Smith—As many speakers have noted, the bill landed in our lap in the last two weeks or so, and it is a large bill addressing all sorts of matters, but the thing that it does not address, and the obvious thing, is climate change. If you asked the ordinary person in the street: 'Is climate change a matter of national environmental significance?' they would say yes.⁴

Mr Macintosh—I can understand if a government did not want to put climate change in the legislation. It definitely needs some sort of legislation. Preferably, I would like to see an emissions carbon trading scheme set up under a separate piece of legislation. If they did that you

1 The Act, section 3(1)(a).

2 Mr Graham Tupper, Australian Conservation Foundation, *Committee Hansard*, 3 November 2006, p. 27.

3 Ms Rachel Walmsley, Australian Network of Environmental Defender's Offices Inc., *Committee Hansard*, 3 November 2006, p. 42.

4 Mr Jeff Smith,, Australian Network of Environmental Defender's Offices Inc., *Committee Hansard*, 3 November 2006, p. 53.

would not need anything in the EPBC Act, in my opinion. If you did not have an emissions trading scheme, then it makes sense to have some sort of climate change trigger, as they call it, in the legislation.⁵

Birds Australia is aware of the impacts of climate change, habitat destruction and lower environmental stream flows. The amendments would be more effective if these elements, and associated triggers, were incorporated into the criteria for matters of national environmental significance.⁶

ASH strongly recommends that climate change (so-called greenhouse effect) must become a trigger under the Act.⁷

We are also very concerned about climate change and would like to see the EPBC take this environmental impact into account.⁸

6.4 The committee acknowledges the widely held view that climate change is a matter of National Environmental Significance. However, the Act already includes the capacity for additional triggers to be established. Accordingly, these concerns are not relevant to consideration of the bill before the committee. No amendment is required for a new trigger to be adopted.

Review of ministerial decisions

6.5 A person whose interests are affected by a decision to issue or refuse a permit can apply to the Administrative Appeals Tribunal (AAT) for the decision to be reviewed. Appeals to the AAT are different from appeals to the Federal Court. Most importantly, the AAT conducts 'merits review', while the Federal Court can only review matters relating to law. This means that the AAT is able to 'stand in the shoes' of the original decision maker and consider all matters that were relevant to the original decision. In contrast, Federal Court reviews are confined to the issue of whether the original decision was made in accordance with the law.⁹

6.6 The bill includes a number of clauses that removes the right of review by the AAT of Ministerial decisions. New subsection 303GJ(2) removes review by the AAT as an avenue of review for relevant decisions made personally by the Minister. The explanatory memorandum noted that decisions made by a delegate of the Minister remain subject to review by the AAT.

6.7 The bill removes the right of review for the following Ministerial decisions to:

- issue or refuse a permit;

5 Mr Andrew Macintosh, The Australia Institute, *Committee Hansard*, 3 November 2006, p. 7.

6 Birds Australia, *Submission 10*, p. 4.

7 Alliance to Save Hinchbrook Inc, *Submission 24*, p. 1.

8 Manduka Cooperative, *Submission 12*, p. 1.

9 WWF, *Environment Protection and Biodiversity Conservation Act – User's Guide*, p. 34.

- specify, vary or revoke a condition of a permit;
- suspect or cancel a permit;
- issue or refuse a certificate under section 303CC(5) or a decision of the Secretary under a determination in force under section 303EU;
- make, refuse, vary or revoke a declaration under sections 303FN, 303FO, 303FP in relation to international movement of wildlife specimens (section 303GJ).

6.8 Some witnesses expressed concern about the removal of the right of appeal through the Administrative Appeals Tribunal (AAT) against certain ministerial decisions in relation to applications for protected species and other listings:¹⁰

There are several amendments which remove the right of review by the Administrative Appeals Tribunal (AAT) of ministerial decisions. Important decisions must be subject to review if the EPBC regime is to be legitimate, credible and accountable.¹¹

6.9 ANEDO strongly opposed the removal of AAT review options for Ministerial decisions.¹² The Law Council of Australia argued:

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.¹³

6.10 The Department pointed out that ministerial decisions involve the complex balancing of competing interests and issues, and that it is appropriate that such decisions are taken at the ministerial level:

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.¹⁴

10 Mr Michael Kennedy, Humane Society International, *Committee Hansard*, 3 November 2006, p. 60.

11 Nature Conservation Council, *Submission 21*, p. 1.

12 Australian Network of Environmental Defender's Offices, *Submission 17*, p. 37.

13 Mrs Maureen Peatman, Law Council of Australia, *Committee Hansard*, 6 November 2006, p. 19.

14 Mr Gerard Early, Department of the Environment and Heritage, *Committee Hansard*, 6 November 2006, p. 61.

6.11 The Department set out in detail not only the need for some decisions to be taken by an elected representative, but also highlighted the limited nature of the proposed exemptions:

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.¹⁵

The committee is satisfied with this response.

Departmental resources

6.12 Many witnesses to the inquiry expressed concerns that these amendments are prompted by a lack of funding and personnel in the Department, rather than a need to simplify or streamline.

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

15 Department of the Environment and Heritage, answers to questions on notice, 10 November 2006.

expectations of the act are and perhaps not over-refer, as is our current practice, which tends to delay the system even more.¹⁶

Resourcing is an issue in the heritage area...They seem to be struggling both in terms of the quantum and also the quality and depth of expertise they have to address the range of issues. They have been struggling to get their system up and running and working effectively.¹⁷

Mr Berger— Many aspects of the bill appear to be a response to inadequate resourcing of the Department of the Environment and Heritage. In particular, the proposals to establish priority lists for threatened species and ecological communities and to establish themes for nominations of matters appear to be based on inadequate resources to actually implement the act as it currently stands.¹⁸

Mr Glanznig—The block is not the red tape. The block is a lack of resources. We make that point about lack of resources in our introduction. The federal environment department has been too under-resourced to properly implement the Act. In a sense, this bill is codifying a new regime which essentially enables the department not to consider these types of nominations. I go back, in particular, to the repeal of section 185 and the potential wiping out of about 500 ecological communities for consideration. It is a resourcing issue—that is definitely part of it. It is also a process issue, which is the need to keep the current process to achieve the policy objective to come up with a mature-threatened species list so that all assessed threatened species, not just the charismatic mega fauna, can be afforded the protections under the EPBC Act.¹⁹

Ms Ruddock—I do not think it is so much the dollars; it is just the resources and the time to take it on. They are also looking at cases across the country. I think they have four people in their enforcement section. That is the difficulty that they have.²⁰

ANEDO submits that instead of addressing the backlog of nominations by simply repealing section 185, it would be more appropriate to implement and fully resource a program for DEH and the Scientific Committee to address outstanding nominations and lists. This should involve additional staff and resources for an intensive period.²¹

16 Ms Melanie Stutsel, Minerals Council Australia, *Committee Hansard*, 6 November 2006, pp 2–3.

17 Mr Duncan Marshall, Australia ICOMOS, *Committee Hansard*, 3 November 2006, p. 18.

18 Mr Charles Berger, Australian Conservation Foundation, *Committee Hansard*, 3 November 2006, p. 23.

19 Mr Andreas Glanznig, WWF, *Committee Hansard*, 3 November 2004, p. 38.

20 Ms Kirsty Ruddock, Australian Network of Environmental Defender's Offices Inc., *Committee Hansard*, 3 November 2006, p. 50.

21 Australian Network of Environmental Defender's Offices, *Submission 17*, p. 9–10.

6.13 The committee recognises that concern about departmental resourcing levels was expressed by diverse stakeholders. It notes that one of the purposes of the reforms is to make environmental protection and project approval processes more streamlined and efficient, and some improvements in resourcing will come from these changes. However, the committee has some sympathy with the concerns expressed by participants in the inquiry

Recommendation 3

6.14 The committee recommends that the Government review the level of resources made available for the Department's administration of the Act.

**Senator Alan Eggleston
Chair**