

# Minority Report by Labor and Australian Greens Senators

1.1 The Environment and Heritage Legislation Amendment Bill (No.1) 2006 represents a significant retreat and watering down of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). The bill, if passed, will weaken the protection that the EPBC Act currently provides for Australia's important biodiversity and heritage.

1.2 The bill represents a lost opportunity to address the challenge of climate change through federal environmental legislation. This could have been achieved by making climate change a matter of national environmental significance and ensuring that protecting Australia from the adverse effects of climate change was an Object of the EPBC Act.

1.3 While the bill has a small number of positive aspects, especially in reducing red-tape and streamlining some administrative processes – which Labor and Australian Greens Senators support – these are heavily outweighed by the more negative aspects of the bill. The bill, as it stands, provides greatly enhanced discretionary power to the Minister, curtails third party appeal rights, reduces transparency and accountability, undermines public consultation, and further politicises the threatened species and heritage listing processes.

1.4 The EPBC Act has the potential to make a significant contribution to the protection and conservation of the Australian environment – but this potential will only be realised if the environment and heritage provisions of the Act are improved, not emasculated as occurs under the proposed amendments.

1.5 Witnesses to the inquiry highlighted the significant downgrading of the environment and heritage protections in the Act, and an increased emphasis on promoting development interests. Rev Comben, Chair of the Australian Council of National Trusts, told the committee that:

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.

...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.<sup>1</sup>

1.6 Witnesses also emphasised the retreat from national responsibility and international best practice as lying at the heart of the bill. Mr Griffiths, Executive Officer of the Australian Council of National Trusts, stated that:

...I would say that this bill represents a further retreat by the current government away from any national responsibility for heritage protection.<sup>2</sup>

1.7 Likewise, Mr Glanznig, Program Leader, Biodiversity Policy with WWF (World Wildlife Fund)-Australia stated that:

...on balance the bill is a backward step for the Act. It is a retreat from international best practice for a number of reasons. I highlight the retreat from international best practice, which is to have a scientific objective listings process and a process that attempts to achieve a mature list of threatened species and communities and a mature list of heritage sites as quickly as is practical. The second is the significant increase in ministerial discretion. That is taking us away from an objective approach. The third is a curtailment of public accountability, and again that has two dimensions to it. One is the restricted ability of the community to seek reviews of ministerial decisions and the second is the increased restrictions placed on third-party enforcement opportunities.<sup>3</sup>

1.8 Of particular concern to Labor and Australian Greens Senators is the fact that no major environmental or heritage organisation supported the bill, although many had supported the original legislation.

1.9 WWF-Australia, the Tasmanian Conservation Trust (TCT) and the Humane Society International (HSI) indicated that they have been active supporters of the EPBC Act but have serious reservations about the current bill, emphasising the 'undemocratic' nature of several of the amendments:

Based on the nature of the current proposed amendments particularly in relation to review of Ministerial decision, threatened species nomination and listings process, and heritage nomination and listings process, it is important for our organisations to draw a line in the sand. Without

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1 Rev Comben, Australian Council of National Trusts, *Committee Hansard*, 6 November 2006, pp 38–39.

2 Mr Griffiths, Australian Council of National Trusts, *Committee Hansard*, 6 November 2006, p. 39.

3 Mr Glanznig, WWF-Australia, *Committee Hansard*, 3 November 2006, p. 33.

significant changes to the bill, HSI, TCT and WWF believe that the Act will be weakened and will no longer reflect international best practice. Many of the proposed amendments are undemocratic in nature – they will disenfranchise the public and are a significant backward step for public access and government accountability. Additionally, they will undermine the raft of public nominations that have been already submitted by individuals and organisations in good faith by not including a provision that enables already submitted nominations to be subject to the current public nomination process.<sup>4</sup>

1.10 Mr Kennedy, Director of HSI indicated that he felt disheartened with the changes proposed in the current bill after energetically supporting the original Act:

As you know, we have been supporters of the EPBC. It is undoubtedly, by any standard, a very powerful piece of law. I have been campaigning for 20 years to have new federal laws of one kind or another put in place. So I am personally defeated by these amendments. We have put in an enormous amount of work over the last 15 years to see this sort of law in place at the Commonwealth level. We have experience in using the law—not just this but other federal laws and treaties—to find better protection for biodiversity. We well understand what you can and cannot do under this law and what these amendments will in fact restrict us from doing in the future. To have to go back, in some cases to square one, and fight for those public rights is, as I say, pretty much defeating.<sup>5</sup>

1.11 The proposed reforms also appear to ignore the findings of the only major independent review of the Act by the Australia Institute. In 2005 the Institute published a discussion paper on how effective the Act had been in the first five years of its operation. The report concluded that the Act's environmental assessment and approval (EAA) regime had failed to produce any noticeable improvements in environmental outcomes. More specifically, it found that the actions that were having the greatest detrimental affects on the matters of national environmental significance were rarely referred to the Federal Environment Minister and, when they were, the Minister had failed to take adequate steps to ensure appropriate conservation outcomes. Further, despite evidence of widespread non-compliance, the Commonwealth had only taken only two enforcement actions to the EAA regime in five years.<sup>6</sup>

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4 WWF-Australia, *Submission 66*, p. 3. See also Mr Glanznig, WWF-Australia, *Committee Hansard*, 3 November 2006, pp 33–34.

5 Mr Kennedy, HSI, *Committee Hansard*, 3 November 2006, pp 54–55.

6 The Australia Institute, *Environment Protection and Biodiversity Conservation Act: A Five Year Assessment*, July 2005, pp vii–viii.

## Consultation process and conduct of the inquiry

1.12 Labor and Australian Greens Senators believe that the consultation process in relation to the development of the bill and the consideration of the bill once it was publicly released was totally inadequate.

1.13 Organisations complained about the lack of consultation in relation to the bill. Dr Pearson, representing Australia-ICOMOS (International Council on Monuments and Sites), noted that:

I think we had one briefing the day before the bill was put before parliament. There was no consultation at that level on what went into the bill.<sup>7</sup>

1.14 Mr Tupper, National Liaison Officer with the Australian Conservation Foundation (ACF), emphasised the lack of formal consultative mechanisms in the development of the bill:

The other point to make just in general about the consultation process for these amendments is that there used to exist a national environment consultative forum with the environment groups and the minister. That has not met for over 18 months. You would expect that in consideration of changes of this order, they would call for a meeting and give some briefing and advice. The signal it sends out is simply one that says to a lot of local groups who are fairly passionate about protecting environmental values in their location or region that these changes are building in more roadblocks to their work. The signal is going out that it will make it harder for them to be involved in future.<sup>8</sup>

1.15 Submissions and witnesses to the inquiry complained about the very short time-frame to consider and comment on the bill – only two weeks – especially given the length and complexity of the bill which runs to over 400 pages with over 800 amendments, together with the Explanatory Memorandum of over 100 pages.<sup>9</sup>

1.16 The ACF, reflecting much of the evidence, stated that:

...we would like to express our concern that the timeframe allowed for consideration of the Bill is wholly inadequate to ensuring well-considered, thoughtful analysis of the Bill. The *Environment Protection and Biodiversity Act 1999* ('EPBC Act') is a very complex piece of legislation, and the Bill itself runs to over 400 pages, not including the explanatory memorandum.

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7 Dr Pearson, Australia ICOMOS, *Committee Hansard*, 3 November 2006, p. 13.

8 Mr Tupper, ACF, *Committee Hansard*, 3 November 2006, p. 25.

9 The Wilderness Society, *Submission 71*, p. 1; IFA Asia Pacific, *Submission 26*, p. 1; Lawyers for Forests, *Submission 25*, pp 3–4; Mr Gooney, National Parks Australia Council, *Committee Hansard*, 6 November 2006, p. 10.

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To expect civil society groups to analyse this volume of material and to prepare detailed, sensible commentary in only two weeks is simply unrealistic.<sup>10</sup>

1.17 WWF-Australia also expressed strong reservations about the process and timetable for consideration of the bill:

In relation to the process, given the substantive nature of the proposed changes to the threatened species and heritage nomination process for example, it would have been appropriate to have had a process that included a discussion paper for public comment to allow proper analysis and scrutiny of the proposed changes. The exceptionally short proposed timetable for passage of this large complex bill through the Parliament will thwart proper parliamentary scrutiny and consideration.<sup>11</sup>

1.18 The Department, commenting on the consultation process on the bill, conceded that an exposure draft of the bill had not been distributed to interested organisations, with the legislation only released publicly on 10 October 2006.

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.

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10 ACF, *Submission 27*, p. 1.

11 WWF-Australia, *Submission 66*, p. 3.

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.<sup>12</sup>

1.19 Labor and Australian Greens Senators also note that the Australian National Audit Office is currently undertaking a review of the EPBC Act and the amending bill which is due to be released in December 2006 or January 2007. The Department indicated that there had been minimal feedback in relation to the report:

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...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.<sup>13</sup>

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12 Mr Early, DEH, *Committee Hansard*, 6 November 2006, p 54.

13 Mr Early, DEH, *Committee Hansard*, 6 November 2006, p 58.

1.20 Labor and Australian Greens Senators believe that the findings of this review could have provided useful insights and possible amendments to the Act. The opportunity to utilise the Audit review will be lost due to the Government's rush to push the bill through the Parliament before the end of the year – prior to the Audit report being tabled.

1.21 The hearings on the bill were also less than satisfactory – with less than two full days of hearings, both in Canberra. In most cases Labor Senators were given just 12 minutes (and the Australian Greens 6 minutes) to ask questions of each witness.

1.22 Despite the severe shortcomings of the process, the evidence received by the committee did highlight a number of significant weaknesses with the bill. It is to those matters that we now turn.

### **Climate Change**

1.23 Labor and Australian Greens Senators are very concerned the bill does not address Australia's greatest environmental challenge, climate change. In fact, there is no mention of climate change in the 409 pages of amendments, in the Explanatory Memorandum or in the Second Reading Speech. The existing EPBC Act also fails to mention climate change, despite the significant impact climate change will have on the matters of national environmental significance and, more generally, Australia's natural environment.

1.24 The Australia Institute questioned the failure to address climate change in the bill:

Senator CARR—Perhaps I can confirm this. In this legislation is there any use of the term 'climate change' that you have seen?

Mr Macintosh—No. There is nothing in there. There was a Federal Court case that was taken on the grounds that a coal-fired power plant development was likely to cause climate change and, as a result, have a significant impact on threatened species, but that was not successful, underlining the fact that climate change is not picked up by this legislation.

Senator CARR—What is the reason for that, in your judgement?

Mr Macintosh—The absence of 'climate change' in there?

Senator CARR—Yes.

Mr Macintosh—I do not believe this government thinks that climate change is a priority.<sup>14</sup>

1.25 Mr Tupper of the Australian Conservation Foundation was also concerned that climate change was not being addressed:

It is a critical time that we are in, and to not have climate change considered as an issue of national environmental significance and impact is not seeing

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14 Mr Macintosh, Australia Institute, *Committee Hansard*, 3 November 2006, p. 8.

the forest for the trees. There may be benchmarks, for example, of all the work that is going into protecting marine areas, yet just a two-degree increase in water temperature in the reef means that we will see substantial areas bleached. That stands out as a particular missed opportunity. I should mention there that we do not see that inserting a climate change trigger into the EPBC Act is the solution to climate change; we are not that naive. But if we did that, it would send a very strong signal...[and] will give greater strength to our international credibility and the international case for taking strong action on climate change.<sup>15</sup>

Labor and Australian Greens Senators strongly support the inclusion of a climate change trigger in the EPBC Act.

1.26 The current requirement under s.28A of the Act is for the Minister to review the need for new triggers every five years and to publish a report on the findings. We object to the proposal to remove this provision, and argue that the passage of the bill should be delayed until the Minister has tabled the findings of the current review.

### **Review of Ministerial decisions and third party enforcement**

1.27 The bill reduces the ability of third parties to challenge the merits of Ministerial decisions. The bill also reinstates a significant barrier to civil enforcement (regarding undertakings for damages). ALP Senators strongly oppose these amendments.

#### ***Review of Ministerial decisions***

1.28 There are a number of amending provisions which remove the right of review by the Administrative Appeals Tribunal (AAT) of Ministerial decisions. The affected decisions are:

- Decisions to issue or refuse a permit; specify, vary or revoke a condition of a permit; impose a further condition on a permit; transfer or refuse to transfer a permit; or suspend or cancel a permit in relation to a listed threatened species or ecological community (section 206A);
- Decisions to issue or refuse a permit; specify, vary or revoke a condition of a permit; impose a further condition on a permit; transfer or refuse to transfer a permit; or suspend or cancel a permit in relation to a migratory species (section 221A);
- Decisions to issue or refuse a permit; specify, vary or revoke a condition of a permit; impose a further condition on a permit; transfer or refuse to transfer a permit; or suspend or cancel a permit in relation to whales and other cetaceans (section 243A)
- Decisions to issue or refuse a permit; specify, vary or revoke a condition of a permit; impose a further condition on a permit; transfer or

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15 Mr Tupper, ACF, *Committee Hansard*, 3 November 2006, p. 23.

refuse to transfer a permit; or suspend or cancel a permit in relation to listed marine species (section 263A);

- Decisions to issue or refuse a permit; specify, vary or revoke a condition of a permit; impose a further condition on a permit; transfer or refuse to transfer a permit; or suspend 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 section 303FN, 303FO, 303FP in relation to international movement of wildlife specimens (section 303GJ);
- Ministerial decision to give advice in relation to contravention of a conservation order (sections 472 and 473).

1.29 Many submissions, including from the Law Council of Australia opposed these amendments.<sup>16</sup> The Law Council stated that:

The argument put forward in the Explanatory Memorandum 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 Act may have applied the law incorrectly. The exercise of the Minister's discretion in such a way should be reviewable by the AAT.<sup>17</sup>

1.30 The Australian Network of Environmental Defender's Offices (ANEDO) also argued that 'important decisions' must be subject to review if the EPBC regime is to be 'legitimate, credible, transparent and accountable. Merits review also enables the AAT to consider the effectiveness of conditions imposed in relation to these decisions'.<sup>18</sup>

1.31 ALP Senators strongly support the ability of third parties to challenge the merits of Ministerial decisions. It is essential for the credibility and legitimacy of the EPBC regime that avenues for review are maintained and that community organisation and individuals are able to participate in this process.

### ***Third party enforcement***

1.32 While Labor and Australian Greens Senators are broadly supportive of the amendments aimed at strengthening the compliance and enforcement regime under the Act, we strongly oppose the proposed amendment to repeal section 478, which currently prevents the Federal Court from requiring undertakings for damages as a condition of granting an interim injunction.

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16 The Wilderness Society, *Submission 71*, pp 6–7; The Environment Association, *Submission 58*, p. 1; IFAW Asia Pacific, *Submission 26*, pp 1–2.

17 Law Council of Australia, *Submission 37*, p. 2. See also Mrs Peatman, Law Council, *Committee Hansard*, 6 November 2006, pp 19, 22.

18 ANEDO, *Submission 17*, p. 8. See also WWF Australia, *Submission 66*, p. 17.

1.33 WWF-Australia, HSI and TCT stated that the proposed amendment will significantly increase the financial risk of third parties seeking injunctions and in doing so can be expected to lead to a virtual cessation of third party enforcement actions.<sup>19</sup>

1.34 The organisations noted that:

It is instructive to note that third parties have used the court system very judiciously, and given the Australian Government has such poor surveillance arrangements in place to ensure compliance, enabling individuals and organisations to ensure the objects of the Act are achieved should be encouraged not dissuaded.<sup>20</sup>

1.35 ANEDO made the important observation that:

Environmental law is public law and proper access to justice requires that the public is able – in appropriate circumstances – to use the court system to seek redress. The Court always has the power to strike out proceedings if they are vexatious, frivolous or constitute an abuse of process. Public interest environmental litigation is essential for correcting honest mistakes of government regulators and developing legal principles for improved environmental protection.<sup>21</sup>

## **Penalties**

1.36 The bill proposes to expand the range of enforcement powers and penalties which can be applied under the EPBC Act. These include more than 30 strict liability offences, a great many of which are accompanied by periods of imprisonment and fines well in excess of the accepted limit of 60 penalty units for these types of offences; the detention of suspected foreign offenders; the power to search individuals and their clothing, without a warrant; and the power to conduct strip searches, again, without a warrant.

1.37 ALP Senators believe that by any standards these are significant and intrusive powers and should only be conferred in exceptional and specific circumstances. Proposals for the inclusion of such powers in legislation should be accompanied by detailed explanation in the Explanatory Memorandum and also by appropriate safeguards. The Explanatory Memorandum for the bill and the bill itself falls well short of this expectation.

1.38 ALP Senators note that a recent unanimous report of the Senate Standing Committee for the Scrutiny of Bills, which runs to some 12 pages, raised serious

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19 WWF-Australia, *Submission 66*, p. 24. See also ANEDO, *Submission 17*, p. 32.

20 WWF-Australia, *Submission 66*, p. 24. See also The Wilderness Society, *Submission 71*, pp 7–8.

21 ANEDO, *Submission 17*, p. 33. See also Ms Walmsley/Ms Ruddock, ANEDO, *Committee Hansard*, 3 November 2006, pp 42, 45–46.

concerns about the absence of reasons or explanation in the Explanatory Memorandum for the serious new offences and penalties in the bill as well as the appropriateness of the range of enforcement powers and penalties in the bill.

1.39 In relation to strict liability, the Scrutiny of Bills report states that:

A very great number of items in Schedule 1 would create offences to at least one element of which strict liability applies. The items are 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. The Committee notes that in respect of some of these offences, the maximum penalty is seven years imprisonment and 420 penalty units.

The Committee notes the reference on pages 25 – 26 of *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, February 2004 (the Guide), that in preparing legislation under which strict or absolute liability is imposed, agencies should familiarize themselves with the Committee's *Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation*. In particular, the Guide refers to the following principles from the Committee's Sixth Report which accord with the Government's approach to such provisions:

- 'strict liability should be introduced only after careful consideration on a case-by-case basis of all available options; it would not be proper to base strict liability on mere administrative convenience or rigid formula';
- 'strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Commonwealth criteria of 60 penalty units ... appears to be a reasonable maximum'; and
- 'strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance, those relating to public health, the environment, or financial or corporate regulation.'

The Guide goes on to advise that '[i]f the explanatory memorandum to a Bill is not considered to provide adequate explanation for any use of strict or absolute liability, the Committee will seek an explanation from the responsible Minister.'

The explanatory memorandum makes no reference to the principles set out in the Guide or the Committee's Sixth Report, and while stating the effect of the proposed amendments, gives no explanation or justification for these apparent departures from those principles.<sup>22</sup>

1.40 With regard to Schedule 1, Item 835 – detention of foreigners – the Scrutiny of Bills report stated that:

The Committee has a long standing concern about the appropriateness of conferring police powers on persons other than police officers and the

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22 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest*, No.12 of 2006, 18 October 2006, pp 10–11.

appropriateness of applying a power to search persons under arrest to persons under detention. As a minimum, the Committee expects the explanatory memorandum to provide a detailed justification for applying such powers in the proposed circumstances and an assurance that appropriate protocols or safeguards are to be implemented and an explanation of the nature of such protocols or safeguards.<sup>23</sup>

1.41 In relation to Schedule 1, Clause 17 – which would allow approved officers to conduct strip searches on detainees in certain circumstances – the Scrutiny of Bills report notes that:

...the Committee notes that no justification or reasons are provided in the explanatory memorandum for the application of strip search provisions in this context. The Committee considers that the power of strip search represents a significant trespass on personal rights and liberties and should only be conferred in exceptional and specific circumstances. Proposals for the inclusion of such powers in legislation should be accompanied by detailed explanation and justification in the explanatory memorandum and appropriate safeguards.<sup>24</sup>

1.42 Western Australian Liberal Senator David Johnston, in speaking to the report in the Senate, raised serious concerns about the offences and penalties contained in the bill and their lack of justification in the Explanatory Memorandum:

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.<sup>25</sup>

1.43 The response of government Senators to these concerns borders on the ludicrous. Despite widespread and sustained concern expressed by many witnesses and by government members of the Scrutiny of Bills Committee, government Senators are evasive, seeking to mask the ram-raid tactics of the government with pious hopes:

The committee notes the concerns raised by the Scrutiny of Bills committee in its Alert Digest No.12 of 2006 and hopes that the minister's responses to the questions asked will address these concerns.<sup>26</sup>

1.44 Labor and Australian Greens Senators are also concerned at the lack of time provided to consider the Committee's draft report. Senators were allowed less than twenty four hours to consider the draft report and to vote on it.

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23 *Alert Digest*, p. 15.

24 *Alert Digest*, p. 18.

25 Senator David Johnston, *Senate Hansard*, 18 October 2006, p. 70.

26 Chair's report, p. 34.

1.45 Such an inadequate response is typical of the slapdash, shoddy and contemptuous way in which this bill has been introduced and considered by Parliament. Such perfunctory examination of controversial legislation is inimical to the interests of good public administration, while the high-handed way in which heavily abbreviated time constraints have been imposed on parliamentarians and the public alike to consider this bill borders on contempt of the parliamentary process.

1.46 Concerns were also raised by witnesses regarding the proposed offences and penalties in the bill. Mr Macintosh, Deputy Director of the Australia Institute noted that in relation to Schedule 1, Item 835 – detention of foreigners suspected of committing an offence:

The most alarming part of that is that it allows suspects to be detained for up to seven days while the offence is investigated. I am not an expert in federal criminal law, but what I understand is that is more than you see in relation to most other offences, and more than what is provided for under the Crimes Act 1914.

CHAIR—I believe that those penalties have come from the Fisheries Act and they are already in place, so they already are part of the Australian legal framework for dealing with foreigners coming in on fishing vessels. Would you not agree that if they are in place already then one should perhaps not be overly concerned about them being also included in this bill?

Mr Macintosh—No. I have raised the same concerns in relation to those fisheries provisions. I think they are draconian and quite discriminatory, because they apply provisions inconsistently to foreigners. So I would request that the government adopt a more consistent approach to the treatment of foreigners and to its nationals. Under the fisheries provisions, it has got a provision that results in the reversal of the onus of proof, which breaches the International Covenant on Political and Civil Rights. So I do not understand why this provision is in there, and I am quite concerned about its civil rights implications.<sup>27</sup>

1.47 Mr Smith, Chief Executive Officer of ANEDO, stated that strict liability offences should not attract jail sentences, as proposed in the bill:

Senator CARR—The maximum penalty, seven years' imprisonment, 420 penalty units—do you think that is reasonable?

Mr Smith—For intentional offences?

Senator CARR—It says here in terms of strict liability.

Mr Smith—Strict liability offences should not attract jail penalties.

Senator CARR—But it has here 'a provision of seven years' jail'.

Mr Smith—Right. That, I would say, is an approach that we would not support. It is unsupported by the criminal law. That has been fundamental through our criminal law tradition. Where someone does something

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27 Mr Macintosh, The Australia Institute, *Committee Hansard*, 3 November 2006, p. 4.

intentionally or recklessly, it is allowable, for want of a better word, for the state to, on occasion, jail people for those offences. Where it is strict liability, then they are more issues of public policy, where you set the level of the fine at such a level so as to deter those people from doing it. It is not generally acceptable to impose jail penalties for strict liability offences.<sup>28</sup>

## Resourcing

1.48 Evidence to the inquiry from a wide range of groups, including environmental, mining and development interests, argued that the Department is significantly under-resourced to effectively administer the Act as it currently stands and a number of proposed changes in the bill will require additional resourcing in the future.<sup>29</sup>

1.49 Mr Berger, Legal Adviser to the ACF, commented on the insufficient resourcing of the Department:

Many aspects of the bill appear to be a response to inadequate resourcing of the Department of 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. Just to give a broad sense of the numbers, a generous reading of the budgets for DEH leads us to think that there is somewhere between \$15 million and \$30 million per year allocated for planning and management of threatened species, threatened ecological communities and key threatened ecological processes. That is about one-20th of the amount that we as a society spend every year on subsidising the consumption of aviation fuels, so we would say the priorities are exactly backwards here...

So the resourcing for the act and in particular for the threatened species provisions of the act is perhaps one-10th or one-20th of what is actually needed to accomplish the purposes, and establishing priority lists and additional processes on top of that is not going to fix that fundamental problem.<sup>30</sup>

1.50 The ACF argued that the inadequacy of resources is evident in the review of DEH's operation of the Act for 2005-06. ACF noted that according to that report, there is a backlog of 640 threatened ecological communities requiring assessment. While the Department received 9 new nominations that year and was considering a total of 33, the Minister made only 5 decisions.

The situation is not much more encouraging with respect to threatened species. The Explanatory Memorandum refers to some 250 threatened species recovery plans having been adopted under the Act, but many of

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28 Mr Smith, ANEDO, *Committee Hansard*, 3 November 2006, p. 44.

29 ACF, *Submission 27*, p. 2; ANEDO, *Submission 17*, p. 5.

30 Mr Berger, ACF, *Committee Hansard*, 3 November 2006, p. 23.

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these have not been reviewed and are years out of date. In 2004-05, there were scheduled reviews of some 20 threatened species recovery plans, not a single one of which was completed according to the statutory schedule. One reason cited for these delays was the 'volume of recovery plans becoming due for review', according to the review of the operation of the EPBC Act for that year. Five out of the six reviews of key threatening process abatement plans were also not completed.<sup>31</sup>

1.51 WWF-Australia also noted that the EPBC Act could be implemented effectively if the Commonwealth chose to provide the Department with an adequate level of resources.<sup>32</sup>

1.52 The Minerals Council of Australia noted that additional resources will be required by the Department to implement proposed changes in the bill:

...the MCA also recognises that a number of the proposed changes will require significant additional resources. Specifically, the provisions for the extension of liability to employers and landowners, have the potential to significantly affect the Australian minerals industry, and should they be accepted, will require a program of policy development and stakeholder engagement to ensure that they do not result in unintended consequences.

The MCA has previously raised concerns that the administration of the Act is significantly under-resourced as it is currently structured. Accordingly, the MCA strongly advocates a significant injection of additional resources into the Department to ensure the effective implementation of the proposed changes and to enhance their ongoing administration.<sup>33</sup>

1.53 Labor and Australian Greens Senators believe that if the Government was serious about making the EPBC Act work effectively, it would be providing the Department with more resources to do its job, instead of watering down the Act to fit the meagre resources the Government is prepared to spare for environmental protection.

### **Threatened species nominations and listing**

1.54 ALP Senators have grave concerns in relation to the proposed process for listing threatened species and ecological communities in the bill. Instead of the current objective and scientifically determined process, the Minister will now have broad arbitrary discretion to decide what can and cannot be assessed for listing and protection under the EPBC Act.

1.55 Evidence to the inquiry raised several concerns with the proposed nomination and listing process. WWF-Australia stated that:

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31 ACF, *Submission 27*, p. 2.

32 WWF-Australia, *Submission 66*, p. 3.

33 MCA, *Submission 65*, p. 2.

The amendments open the way for the listing process to become highly and blatantly politicised and introduces provisions that are easily open to abuse to avoid politically difficult decision making. Enactment of these amendments will be a major retreat from what is national and international best practice.<sup>34</sup>

1.56 The Australia Institute noted that:

Under the new process, there is an annual assessment cycle. Members of the public can make nominations at the start of the cycle. However, the list of nominations is vetted first by the TSSC [Threatened Species Scientific Committee] then by the Minister...

This process vests almost complete control of the listing process in the Minister and the handpicked TSSC. It will guarantee that controversial nominations are avoided and that the lists only include those species and communities that are politically palatable. As history proves, this inevitably means that the species and communities that are most in need of protection will be excluded.<sup>35</sup>

### ***State and Territory lists***

1.57 Submissions and other evidence noted that the repeal of section 185 removes the requirement for the Scientific Committee to assess the threatened ecological communities listed on the state and territory lists gazetted by former Minister Robert Hill in November 2001. This wipes over 500 threatened ecological communities from the Committee's current assessment list. Section 185 was designed to provide a strategic framework for the Scientific Committee to systematically consider all the ecological communities receiving protection under state and territory legislation for their appropriate national protection under the EPBC Act.<sup>36</sup>

1.58 ANEDO stated that while the repeal of section 185 'may lighten the administrative burden for DEH and the Scientific Committee, and ease political pressure regarding controversial listings, it is heavy handed and arbitrary. It is contrary to the principles of ESD and good governance to deal with the backlog of listings in this way'.<sup>37</sup>

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34 WWF-Australia, *Submission 66*, p. 18. See also National Parks Association of NSW, *Submission 23*, p. 1; Birds Australia, *Submission 10*, pp 3–4; IFAW Asia Pacific, *Submission 26*, p. 2.

35 The Australia Institute, *Submission 60*, p. 10.

36 WWF-Australia, *Submission 66*, p. 18; ANEDO, *Submission 17*, p. 9. See also Mr Glanznig, WWF-Australia, *Committee Hansard*, 3 November 2006, pp 34, 36, 38–39.

37 ANEDO, *Submission 17*, p. 9. See also Nature Conservation Council of NSW, *Submission 21*, p. 1.

1.59 Similarly, the Australia Institute argued that the amendment:

...has obviously come about because of the Government's desire to avoid listing politically contentious species and its failure to adequately maintain the lists....The proposed amendment to remove the obligation to maintain the lists in an up-to-date condition will further erode the effectiveness of the Act.<sup>38</sup>

1.60 The ACF also registered its misgivings, noting that:

....we are deeply concerned that the huge backlog of unassessed threatened communities will simply be waived away by the legislative fiat of repealing section 185. This will not make the communities any less threatened in the real world, although presumably it will tidy up the bureaucratic record.<sup>39</sup>

1.61 The Department was fairly equivocal regarding the impact of the repeal of section 185 on unassessed threatened communities, indicating that 'they will be dealt with' but not in the way that some environmental groups 'would like'.

Senator SIEWERT—...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

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38 The Australia Institute, *Submission 60*, p. 9.

39 ACF, *Submission 27*, p. 2. See also Environment East Gippsland, *Submission 3*, p. 1; Mudgee District Environment Group, *Submission 4*, p. 1.

more strategic and to use the resources in the best possible way to get the best environmental outcomes.<sup>40</sup>

### ***Annual thematic nominations process***

1.62 The current public nomination provision (section 191) is repealed by the bill, and replaced with an annual process for thematic nominations. The theme for annual nominations is determined by the Minister. The bill provides for a minimum 40-day period in which nominations may be submitted on that theme.

1.63 ANEDO stated that these amendments significantly limit the public and scientific involvement in the listing of species:

In deciding upon a theme, the Minister has broad discretion (section 194D) which may relate to a particular group of species, a particular species or a particular region of Australia. This is not a definitive list of criteria and so in practical terms, this means that a range of considerations may come into play, not just the conservation status of the species. It is likely that the more controversial species (such as those currently commercially exploited) are unlikely to qualify thematically.<sup>41</sup>

1.64 The ACF also raised concerns with this approach:

Themes may be administratively convenient or politically attractive, but alas species do not become threatened thematically. Rather than focusing resources, a 'thematic' approach to assessing threatened species and ecological communities runs the risk of permanently ignoring meritorious and ecologically important species and communities that don't fit the identified themes or don't make the priority list, for whatever reason.<sup>42</sup>

### ***Priority assessment list***

1.65 The bill provides that once all nominations relating to the theme for the year are received, the Scientific Committee has 40 days to give the Minister a 'priority assessment list'.

1.66 Submissions noted that the Minister will have an extraordinary level of unfettered discretion to decide which nominations the Scientific Committee can assess. ANEDO noted that the Minister may make changes to the proposed list within 20 days, including omitting an item (section 194K), before making a finalised priority assessment list. There is no public consultation on the proposed list, and the Minister may have regard to 'any matter that the Minister considers appropriate' in reaching this decision. It is therefore possible under the amendments for a nominated species to be

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40 Mr Early, DEH, *Committee Hansard*, 6 November 2006, p. 61.

41 ANEDO, *Submission 17*, p. 10.

42 ACF, *Submission 27*, p. 2.

removed from the final Priority Assessment List on commercial or economic grounds, regardless of the conservation status of that species.<sup>43</sup>

### ***Conservation advices and Recovery Plans***

1.67 Section 266B requires that there is a mandatory approved conservation advice for each listed threatened species and each listed threatened community. Conservation advices are not legislative instruments. Sections 267 and 269AA provide that it is no longer compulsory to have a recovery plan. The bill provides broad Ministerial discretion regarding recovery plans. Section 270 (2A) requires that certain issues such as the identification of critical habitat in a recovery plan, need only be addressed to the extent to which it is practicable to do so.

1.68 Submissions expressed concerns about these proposed changes. WWF argued that:

It is extremely unlikely that broad Conservation Advices (not legislative instruments) would lead to meaningful conservation action at appropriate scales...The removal of the compulsory writing of recovery plans for listed species or communities removes a significant potential conservation benefit attached to listing. Furthermore, given the increased ministerial discretion with respect to listing, the Minister may decide not to list species or communities that he deems not to require a recovery plan.<sup>44</sup>

### **Heritage nominations and listing**

1.69 Provisions in the bill change the listing processes for the National and Commonwealth Heritage Lists. The processes are similar to those outlined above in relation to threatened species and ecological communities. The proposed changes follow the same theme-based process outlined above for the listing of threatened species and ecological communities. Labor and Australian Greens Senators believe the changes expose the process to even greater politicisation and undermine the integrity of the lists.

1.70 WWF-Australia raised several concerns:

Again, the Minister will be afforded unprecedented discretion over the listing process, by constraining public nominations into themes, rather than considering the heritage status of the place being nominated. Furthermore, the Minister will also have the power to omit politically controversial places from the priority assessment list provided by the Australian Heritage Council, prior to the list being available for public comment. Nominations that are not included on the priority list, while being eligible for inclusion in the annual cycle of subsequent years, have the potential to be repeatedly excluded from consideration. There is no requirement for assessment of any

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43 ANEDO, *Submission 17*, p. 11. See also WWF-Australia, *Submission 66*, p. 18.

44 WWF-Australia, *Submission 66*, p. 22. See also South East Region Conservation Alliance, *Submission 6*, p. 1; IFAW Asia Pacific, *Submission 26*, pp 2–3; ANEDO, *Submission 17*, p. 14.

publicly nominated place, nor are there any final statutory deadlines applying to nominations that are not on the priority list. This will enable the Minister to indefinitely delay the assessment of politically contentious nominations.<sup>45</sup>

1.71 Similarly, the National Trust of Australia (WA) stated that:

The extensive powers of the Minister in determining what can be assessed could further erode the recognition of National Heritage Values in their own right; and strengthens the capacity of competing interests such as economic values to be a determining factor in what is to be assessed. The capacity of the Minister to defer indefinitely a decision to list adds a new level of uncertainty to the process. Neither are conducive to good governance, transparency and accountability.<sup>46</sup>

1.72 Submissions raised concerns regarding the inadequate separation of assessment and management considerations in heritage listing procedures. Australia ICOMOS stated that:

[a] primary concern with the amendments is that they provide an inadequate separation between the process of assessment and listing and the consideration of downstream management decisions. The Minister has the power to add to or remove any place from the Priority Assessment List, after assessment by the AHC, having 'regard to any matters the Minister considers appropriate' (s.324JE(3))...the listing should be based solely on the assessment of the National Heritage values of a place.<sup>47</sup>

### ***Register of the National Estate***

1.73 Concerns were expressed at the proposed demise of the Register of the National Estate. The bill amends the *Australian Heritage Council Act 2003* to repeal the Register of the National Estate (RNE), and removes the obligation in s.391A of the EPBC Act for the Minister to have regard to the RNE when making decisions.

1.74 Submissions argued that the Register constitutes a unique and valuable collection of heritage data, including natural, cultural and Indigenous places in both public and private ownership.

1.75 Australia ICOMOS expressed concerns that the amendments ignore the role played by the RNE in State and local government processes, and potentially put at jeopardy heritage places that have not as yet been formally entered into State or local government registers and lists.

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45 WWF Australia, *Submission 66*, p. 23. See also History Council of WA, *Submission 62*, pp 1–2.

46 National Trust of Australia (WA), *Submission 22*, p. 3. See also The Australia Institute, *Submission 60*, p. 11.

47 Australia ICOMOS, *Submission 13*, p. 4. See also ANEDO, *Submission 17*, p. 15.

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State and local government processes currently apply to both registered places and places in the RNE when considering the impacts of proposals on heritage. The five year delayed implementation period is, we anticipate, insufficient to enable the States and local government to upgrade their registers and lists to give adequate protection to all of those places currently protected by reference to their RNE status under the EPBC Act.<sup>48</sup>

1.76 Australia ICOMOS argued that the RNE still has a substantial value at the State and local levels – 'as the RNE was a creation of the Commonwealth and was actively embedded in the processes of the States and local governments, we believe the Commonwealth has an obligation to ensure that no heritage place is put at risk and no community valuing a heritage place is dis-empowered by amendments to the Act'.<sup>49</sup>

1.77 The ACT Heritage Council highlighted the effect that the abolition of the Register will have in the ACT arguing that there will be no formal recognition or protection of many iconic places on national/designated land in the ACT.<sup>50</sup>

1.78 As in so many other instances, when faced with obvious weaknesses in the bill or with comprehensive professional condemnation of specific provisions government Senators preferred unsupported assertion to considered evidence. A case in point is the throw-away summary found at 5.68 of the Chair's Report that deals with the expanded and unfettered powers to be bestowed on the Minister in the listing and approval of threatened species and heritage sites.

1.79 The provisions of this bill dramatically weaken the processes and the instruments of heritage management and protection in Australia. This bill jettisons important heritage management assets such as the RNE, imposes new listing provisions that are vague and capable of manipulation, establishes an approvals process of dubious value and bestows unprecedented discretion on the Minister in managing the listing process.

1.80 Inadequate separation between processes of listing and later decisions on management has the capacity to inflict long term damage on heritage management and the protection of heritage sites. The long term implications of the legislative changes to heritage management that are contained in this legislation are not well understood and it is clear that little, or no, analysis of longer term impacts has been undertaken by the Department or considered by the Minister.

1.81 In this respect, the new power of the Minister to add or removes any site from the priority assessment list having regard to 'any matters the Minister considers

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48 Australia ICOMOS, *Submission 13*, p. 3.

49 Australia ICOMOS, *Submission 13*, p. 3. See also Dr Pearson, Australia ICOMOS, *Committee Hansard*, 3 November 2006, pp 14–16.

50 ACT Heritage Council, *Submission 35*, p. 1.

appropriate' is a markedly retrograde decision. The decision abandons the principle that listing should be based on independent evaluation applying an assessment of the national heritage values of the site.

1.82 It is a matter of regret to all Labor and Australian Greens Senators that this ill-considered, hastily rushed-through legislation has the capacity to cause considerable damage to irreplaceable heritage sites.

## **Conclusion**

1.83 The Environment and Heritage Legislation Amendment Bill (No.1) 2006 represents a significant roll-back of the *Environment Protection and Biodiversity Conservation Act 1999*. The bill proposes sweeping changes to Australia's environmental and heritage laws and represents a further retreat by the Commonwealth away from effective national responsibility for environmental and heritage protection.

1.84 The bill fails to address Australia's greatest environmental challenge, climate change. The bill represents a lost opportunity to create a climate change trigger in the EPBC Act, which would ensure that large scale greenhouse polluting projects are assessed by the Federal Government.

1.85 The bill provides greatly enhanced discretionary power to the Minister, reduces transparency and accountability, and further politicises the threatened species and heritage listing processes. The proposed amendments will seriously compromise the long-term protection of our natural and historic heritage.

1.86 Labor and Australian Greens Senators will seek to amend the legislation so that Australia's important biodiversity and heritage values are protected and enhanced.

**Senator Kim Carr**  
**Senator for Victoria**

**Senator Ruth Webber**  
**Senator for Western Australia**

**Senator Dana Wortley**  
**Senator for South Australia**

**Senator Kate Lundy**  
**Senator for the ACT**

**Senator Rachel Siewert**  
**Australian Greens Senator for Western Australia**