

30 October 2006

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**SUBMISSION ON THE *ENVIRONMENT & HERITAGE LEGISLATION AMENDMENT BILL (NO 1) 2006***

This submission is on behalf of the Australian Environment and Planning Law Committee (the Committee) of the Law Council of Australia.

The Committee welcomes:

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

However the Committee is concerned at the increase in the discretionary powers given to the Minister for the Environment and Heritage.

**Review of Ministerial Decisions**

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

1. 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).
2. 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);
3. 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);
4. 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 listed marine species (section 263A);
5. Decisions to issue or refuse a permit; specify, vary or revoke a condition of a permit; impose a further condition in 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);
6. Ministerial decision to give advice in relation to contravention of a conservation order (Section 472 and 473)

While decisions of the Delegate of the Minister remain reviewable, it is reasonable that the Minister's decision (as he/she is exercising discretion) can be tested on appeal to the AAT.

The argument put forward in the Explanatory Paper that these provisions leave "the merits of these important decisions to be dealt with by the Government" do not allow for the position where the Minister in applying the law under this Act may have applied the law incorrectly. The exercise of the Minister's discretion in such a way should be reviewable by the AAT.

### **Annual Thematic Nominations Process**

The Committee endorses the proposed Annual Thematic Nominations Process. The Bill provides that once all nominations relating to themes for year are received, the Threatened Species Scientific Committee has 40 days to give the Minister a priority assessment list. The Minister may make changes to the proposed list within 20 days. Although there is no public consultation on the proposed list, the Minister may have regard to any matter that the Minister considers appropriate in reaching his decision. However the presumption arises that the Threatened Species Scientific Committee has investigated the proposed themes which may relate to a particular group of species, or

a particular region of Australia, and that their assessment relating to the nominations of the themes for the year for the Minister's consideration have been fully considered prior to the nomination being made.

The public has 30 days in which to comment on the finalised list to be prepared by the Threatened Species Scientific Committee. The Threatened Species Scientific Committee will only consider comments that relate to eligibility for inclusion of an item on the list and the effect of including the item in the list on the survival of the species or community concerned.

The Committee supports these provision in the Bill.

### **Transparency**

The new Section 189B gives the Minister discretion to allow the Scientific Committee assessments to be made public. If the Minister does not exercise his/her discretion then the Scientific Committee assessments and advice remain confidential until a listing is made. This secrecy is unnecessary and may prevent the Scientific Committee from receiving information or advice which may impact on its decision to list a species or an ecological community. The documentation before the Scientific Committee should be available to the public under a Freedom of Information Application as it may assist the Government in making the appropriate assessment to have further scientific or local knowledge data from the public placed before the Scientific Committee.

### **Critical Habitat**

Section 207A of the Act is amended to include new subsections 207A(1A) and (1B) and 207A(3B). The amendments require the Minister to consider the conservation benefit of listing habitat critical to the survival of a listed, threatened species or ecological community. The Minister is to have discretion to withhold specific information in the Register of Critical Habitat from release if such release could adversely landholders' interests.

The Committee considers that whilst this may be a very practical and useful tool to the Minister, discretion exercised by the Minister should be allowed to be tested before the AAT on appeal. The Minister is exercising his discretion to give priority to one "interest" over another "interest". It may well be that the Minister exercises his discretion appropriately in these circumstances, but nevertheless discretion should be able to be tested as to its appropriateness in accordance with the provisions of the Act by appeal to the AAT.

### **Conservation Advices and Recovery Plan**

The Committee supports the amendment before Subdivision A, of Division 5 of Part 13 which inserts subdivision AA to the Act. Subdivision AA requires the Minister to ensure there is a pre-conservation advice for each threatened species and threatened ecological community.

The Committee also supports the amendment to Section 269AA which requires the Minister to decide whether to have a recovery plan for a threatened species or ecological community. The Minister is obliged to make this decision within 90 days of

the species or ecological community becoming listed. Following this decision the Minister then has the discretion to decide at any other time to have a recovery plan for a threatened species or ecological community.

### **Heritage Nominations and Listing**

The Committee supports the proposed changes to the Annual Thematic Nominations and limiting the public nominations to a distinct time of the year and on a particular theme.

### **Streamlining of the Referrals and Assessment Process**

The Committee is in support of any proposals for the streamlining of the referrals and assessment process provided the implementation of the Act is to effect the shortening of the period for assessment.

1. The Bill provides for fast track approvals. New Section 95 applies to those actions that are suitable for assessment on preliminary documentation based on the information contained in the referral. The Committee supports this new section which will require the proponent to provide adequate information to allow assessment to take place at the time of referral, and therefore to take advantage of the reduced timeframe for assessment.
2. The new Section 95A applies in the same manner as Section 95 except that the Minister will require further information to assess the relevant impact. The further information may be a requirement from the Minister to include the information about mitigation or attenuation strategies.

### **Commercial in Confidence Information**

The Committee supports the new Section 170BA which allows a proponent to request the Minister for permission to withhold Commercial in Confidence Information when publishing assessment documentation in accordance with Division 4, 5 or 6 of Part 8 of the Act.

### **Compliance and Enforcement**

#### **Third Party Enforcement**

The Committee supports the proposed repeal of Section 478 of the Act which currently prevents the Federal Court from requiring undertakings for damages as a condition of granting an interim injunction. The Court will retain its discretionary power whether to require, or not require such an undertaking. It is appropriate to give that power to the Court so that the Court can exercise its discretion, on the circumstances of the case before it, whether or not to require undertakings for damages as a result of granting an interim injunction. This will require the party using the injunction before the Court to consider carefully the impact of the injunction on all aspects of the matter.

#### **Corporate Liability**

Division 22 Section 498B – The Committee supports this amendment in relation to the liability of corporations for the conduct of its directors, employees and agents.

## **Landholders Liability**

The Committee supports the proposed amendment set out in Division 18A, section 496B/D. These are not offences of strict liability and require evidence of, for example, recklessness or negligence. There is a defence for the landholder if he/she can prove that he/she took reasonable steps to prevent the contravention.

## **Strict Liability**

The Act provides several Strict Liability offences (15A; 15C; 17B; 18A; 196(1c), 196B(1b); 196D(1b); 20A and section 211(1c); 211B(1b), 211D(1b); 24A; 27A; and section 27C). The Department of Environment and Heritage should educate the public so that the public are aware, for instance, that they stand upon World Heritage Property, or that a particular species is a listed migratory species.

## **Remediation**

The Committee supports the proposed amendments in relation to remediation. The amendments:

1. Provide a power for the Federal Court to make a Remediation Order, but only on application by the Minister.
2. Confer on the Minister a power to make a remediation determination, or to accept enforceable financial undertakings as an alternative to prosecution and;
3. The Minister may make remediation determinations regarding contravention of civil penalty provisions (within six years) (Division 14B, section 480D).

Any financial contributions for paid for civil penalty contraventions should be applied to remediation of the particular site, species or ecological habitat which has been damaged, or to provide for its ongoing sustainability.

## **Regulations**

We note that the regulations to accompany the amendments to the Environment and Heritage Legislation Amendment Bill 2006 have not yet been promulgated. We request the right to make submissions in relation to those regulations prior to their gazettal.

We take this opportunity to thank you for allowing the Law Council of Australia to have the opportunity to comment on this proposed legislation. Prior to preparing this submission, the Committee had the benefit of perusing the draft submissions by the Environment Defenders Office of New South Wales.

Yours faithfully



Peter Webb  
**Secretary-General.**