

Environment and Communications References
Answers to questions on notice
Climate Change, Energy, the Environment and Water Portfolio

Inquiry: Impacts and management of feral horses in the Australian Alps
Question No: IQ23-000251
Hearing Date: 23 August 2023
Division/Agency: Heritage Division
Topic: Legal advice
Hansard Page: 37
Question Date: 23 August 2023
Question Type: Spoken

Senator David Pocock asked:

Senator DAVID POCOCK: In terms of levers at your disposal, I note in the letter from the Hon. Sussan Ley she says, 'The government is considering the development of regulations under the act in response to New South Wales's failure.' What could these regulations be?

Mr Barker: I referred to the management principles that are under the act around the development of management plans for national heritage places. Those are principles that are prescribed under the regulations, and there's a capacity in the act for a minister to prescribe more regulations—that is, new principles for the development of management plans. But it's also just important to be aware that that capacity in a direct regulatory sense is also constrained by the Commonwealth's constitutional powers. So there is that capacity, but that is the regulation power that was referenced.

Senator DAVID POCOCK: I'm guessing there would have been legal advice before this letter was sent, so I want to confirm that there is a capacity for the federal environment minister to issue regulation that would override the sort of legislation that is not actually protecting the heritage values of the Alps.

Mr Barker: This gets to the constitutional limitations I think I referenced before. There is a capacity in the act for regulations to be made. However, the extent to which that can restrict a state's own legislative capacity is a more complicated constitutional area. There will be limitations in that sense in how the Commonwealth might intervene vis-a-vis the states.

Senator DAVID POCOCK: Would you be able to take notice any legal advice that was provided in the making of this?

Ms Parry: We'll take that on notice.

Answer:

The department sought and obtained legal advice, before the date of the former Minister's letter referenced by the Senator (10 May 2021), on the Commonwealth's regulation-making powers under the *Environment Protection and Biodiversity Conservation Act 1999* in relation to the management of feral horses in the Australian Alps National Heritage place.

It has been long-standing practice not to disclose information about privileged legal advice. Privileged legal advice provided to the Commonwealth should remain confidential

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Senator David Pocock asked:

Senator DAVID POCOCK: Has the minister or the department sought advice on the constitutional issues when it comes to feral horses, the EPBC Act and the minister's ability to intervene?

Ms Parry: The department seeks a range of advice on a range of policy issues and—

Senator DAVID POCOCK: I'd love to know specifically on that.

Ms Parry: I understand that. We'll take that on notice. We wouldn't normally—

Senator DAVID POCOCK: You don't know?

Ms Parry: I'll take that on notice. It goes to a very specific question about the type of legal advice we would have received, and I would have to go back and take on notice any specific legal advice.

Senator DAVID POCOCK: Ms Parry, I think if you know that you have sought advice on that then you are required to inform the committee.

Ms Parry: I'm answering the question in that I'd like to take the specific question on notice.

Senator DAVID POCOCK: Okay. Sure.

CHAIR: Senator Pocock, what was the exact question?

Senator DAVID POCOCK: Whether or not the department, or the minister, has sought advice when it comes to issues of the Constitution and the minister's ability to intervene using the EPBC Act.

CHAIR: And you're talking about the current minister, Minister Plibersek?

Senator DAVID POCOCK: Or previous.

CHAIR: And specifically in relation to horses?

Senator DAVID POCOCK: Sure.

CHAIR: Ms Parry, I understand that if Senator Pocock wants information in relation to previous ministers you might need to take that on notice and go back and check, but can you honestly not tell us today whether the minister has sought any advice on this issue, considering you've been called in to give evidence to the committee today on this particular issue? Surely you would have that information.

Ms Parry: I'm going to have to take that on notice.

CHAIR: Could you explain to us why you need to take that on notice? Is it because you don't have the answer?

Ms Parry: I genuinely don't have the answer in front of me, and I would need to go to the nature of the question and the type of advice that the minister may or may not have sought. I don't want to provide any misleading evidence—that she sought advice on one thing and it was on something different—so I would like to take that on notice.

CHAIR: Just to be clear, we would like you to take the question on notice in relation to the current minister, Minister Plibersek—has she sought advice on the issues outlined by Senator Pocock? Also, seeing as we know the former environment minister was writing to the former

minister in New South Wales, Minister Matt Kean, I'd also like to know what type of advice was sought by the former minister, Sussan Ley.

Answer:

In 2021 legal advice was sought and obtained by the department on the scope of the regulation-making power under the *Environment Protection and Biodiversity Conservation Act 1999* and related constitutional matters in relation to the management of feral horses in the Australian Alps National Heritage place. Minister Plibersek's office has been informed about the advice.

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