

# Chapter 3

## Discussion of key issues

### Summary of submissions

3.1 Environmental organisations supported the bill and believed that the emergency listing provisions are an important mechanism to allow the minister to '...respond rapidly when there are significant threats facing a particular species or ecological community'.<sup>1</sup>

3.2 The Australian Network of Environmental Defenders Offices (ANEDO) and the Law Council of Australia both supported the inclusion of an emergency listings power in the EPBC Act as it is '...consistent with objects set out in section 3 of the [Act]...'.<sup>2</sup>

3.3 Opposition to the bill was raised by the National Farmers' Federation which believed that the removal of section 158A of the Act and the possibility for emergency listings to be applied retrospectively to controlled action decisions '...increases uncertainty for the agricultural industry...'.<sup>3</sup>

3.4 The Minerals Council of Australia, whilst recognising the need for an EPBC process for emergency listing, raised similar concerns about the bill and highlighted that possible implications could include uncertainty for developments, increased sovereign risk, unnecessary delays and the potential for lobbying of the minister for emergency listings.<sup>4</sup>

3.5 To address the issues raised by submitters this chapter will examine the bill in two parts: part one will discuss the emergency listing provisions and part two will focus on section 158A of the EPBC Act and the approvals process for proposed actions.

### Emergency listing provisions

3.6 The need for the emergency listing provisions was recognised by most submitters, including environmental groups, legal organisations and the Minerals

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1 Humane Society International, *Submission 3*, p. 2. See also: International Fund for Animal Welfare (IFAW), *Submission 1*; Fitzroy Basin Association, *Submission 4*; Birds Australia, *Submission 6*; Mackay Conservation Group, *Submission 9*; and The Wilderness Society, *Submission 10*.

2 Law Council of Australia, *Submission 5*, p. 4. See also Australian Network of Environment Defenders Offices (ANEDO), *Submission 8*, p. 2.

3 National Farmers' Federation, *Submission 2*, p. 1.

4 Minerals Council of Australia, *Submission 7*, p. 1.

Council of Australia.<sup>5</sup> It was generally felt that the current nominations and assessment process under the EPBC Act is not responsive to listing threatened species and ecological communities coming under significant and imminent threat.

3.7 Whilst in principle support to the emergency listing provisions was given by most organisations, concerns were raised by some about possible vexatious claims being made to list species and communities and the perceived weakness of the scientific criteria governing emergency listings.<sup>6</sup> The Minerals Council of Australia argued that:

...any approach developed should be science based, transparent and provide a clear process for listing to provide certainty for project proponents.<sup>7</sup>

3.8 The National Farmers' Federation further raised concerns that the Environment Minister had already flagged substantial changes to the EPBC Act in 2012 in line with the recommendations of the Hawke review and any amendments made prior to these changes would be premature.<sup>8</sup>

***Constraints with the existing assessment process for threatened species and ecological communities***

3.9 According to environmental groups, the bill would provide the minister with an option to fast-track the listing of threatened species or ecological communities when under significant and imminent threat.<sup>9</sup> The International Fund for Animal Welfare (IFAW) submitted that:

The Bill is needed because the current listings process under the EPBC Act for threatened species is often slow and species and ecological communities are not protected by the Act until listed, even when their very existence may be threatened.<sup>10</sup>

3.10 Several submitters aired frustrations with the current nomination and assessment process for threatened species and ecological communities due to the

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5 See: IFAW, *Submission 1*, p. 2; HSI, *Submission 3*, p. 3; Fitzroy Basin Association, *Submission 4*, p. 1; Law Council of Australia, *Submission 5*, p. 4; Birds Australia, *Submission 6*, p. 1; Minerals Council of Australia, *Submission 7*, p. 1; ANEDO, *Submission 8*, p. 2; Mackay Conservation Group, *Submission 9*, p. 1; The Wilderness Society, *Submission 10*, p. 1; and Department of Sustainability, Environment, Water, Population and Communities (DSEWPac), *Submission 11*, p. 1.

6 See: Minerals Council of Australia, *Submission 7*, p. 1; and National Farmers' Federation, *Submission 2*, p.1.

7 Minerals Council of Australia, *Submission 7*, p. 1.

8 National Farmers' Federation, *Submission 2*, p.1.

9 Humane Society International, *Submission 3*, p. 2. See also: IFAW, *Submission 1*; Fitzroy Basin Association, *Submission 4*; Birds Australia, *Submission 6*; Mackay Conservation Group, *Submission 9*; and The Wilderness Society, *Submission 10*.

10 IFAW, *Submission 1*, p. 2.

significant time taken to complete assessments and the effort required to see the process through.<sup>11</sup>

### *Nominations process*

3.11 The Humane Society International (HSI), which between 2007 and 2010 successfully nominated 20 of the 103 nominations added to the Finalised Priority Assessment List (FPAL), informed the committee that the nominations process is demanding and lengthy.<sup>12</sup> According to Mrs Wellbelove, Senior Program Manager for the HSI:

The process of preparing a nomination is quite challenging. Obviously, you have to make sure it is very scientifically justified and, depending on the species, some of the information is easier to obtain than it is for others. Often when we are preparing a nomination we will contact relevant scientists who we believe can provide us with data to do that. We find for concerted work that it can take a period of at least a month to do but then you are going backwards and forwards over a period of six months.<sup>13</sup>

3.12 It was also noted by the HSI that every year there is a deadline for nominations to be added to the Finalised Priority Assessment List, usually towards the end of March.<sup>14</sup> If this deadline is missed nominations need to be held over until the next year.

### *Assessment process*

3.13 Once a species has made it onto the FPAL, the Threatened Species Scientific Committee (TSSC) commences an assessment process. Under the EPBC Act this process must be completed by the deadline specified in the Finalised Priority Assessment List.<sup>15</sup> This deadline can however be extended by the minister up to a period of 5 years.<sup>16</sup>

3.14 The HSI gave evidence to the committee that in their experience the assessment processes usually takes up to four years.<sup>17</sup> Mrs Wellbelove told the committee that:

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11 See: IFAW, *Submission 1*, p. 2; and HSI, *Submission 3*, p. 3.

12 Mrs Alexia Wellbelove, Senior Program Manager, Humane Society International, *Proof Committee Hansard*, 3 February 2012, p. 4.

13 Mrs Alexia Wellbelove, Senior Program Manager, Humane Society International, *Proof Committee Hansard*, 3 February 2012, p. 4.

14 Mrs Alexia Wellbelove, Senior Program Manager, Humane Society International, *Proof Committee Hansard*, 3 February 2012, p. 4.

15 EPBC Act, s. 194P.

16 EPBC Act, ss. 194P(1).

17 Mrs Alexia Wellbelove, Senior Program Manager, Humane Society International, *Proof Committee Hansard*, 3 February 2012, p. 4.

...from the point when we put forward the nomination to the minister, the minister's decision has been made in two or three years, but that is really the earliest. Generally, a four year time frame is not unusual.<sup>18</sup>

3.15 Mrs Wellbelove went on to state that the HSI find the assessment process to be:

...very variable and very frustrating sometimes when we believe that there is obviously a very important perceived need to address something in a more timely manner.<sup>19</sup>

3.16 In the opinion of environmental organisations, the effect of such a lengthy and involved assessment process means that species or ecological communities that are at risk to significant and imminent threats cannot be given timely protection under the EPBC Act.<sup>20</sup>

3.17 In particular, the committee heard evidence from The Wilderness Society concerning the Cape York Peninsula in Queensland where there are approximately 300 plant and vertebrate species unique to the area.<sup>21</sup> Since 2011 three new frog species have been discovered on the eastern part of Cape York and a new species of crab and shrimp have been discovered on a proposed Rio Tinto mine site.<sup>22</sup> Mr Glenn Walker of The Wilderness Society emphasised that the current assessment process means that:

...all of these new species that will no doubt be discovered will have absolutely no legal protection. That is a big flaw in our environmental laws and it means that we cannot meet our international obligations. When we find these wonderful new species, which will obviously be highly threatened when they are on a mine site and found nowhere else...our laws mean that these species cannot be protected.<sup>23</sup>

3.18 The Department of Sustainability, Environment, Water, Population and Communities (DSEWPaC) informed the committee that in the last five years the average time taken for the assessment of species, from the finalisation and publication of the FPAL to the provision of advice to the minister by the TSSC, is 12 to 15

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18 Mrs Alexia Wellbelove, Senior Program Manager, Humane Society International, *Proof Committee Hansard*, 3 February 2012, p. 4.

19 Mrs Alexia Wellbelove, Senior Program Manager, Humane Society International, *Proof Committee Hansard*, 3 February 2012, p. 4.

20 See: IFAW, *Submission 1*, p. 2; HSI, *Submission 3*, p. 3; and The Wilderness Society, *Submission 10*, p. 1.

21 Mr Glenn Walker, Wild Rivers Campaign Manager, The Wilderness Society, *Proof Committee Hansard*, 3 February 2012, p. 5.

22 Mr Glenn Walker, Wild Rivers Campaign Manager, The Wilderness Society, *Proof Committee Hansard*, 3 February 2012, p. 5.

23 Mr Glenn Walker, Wild Rivers Campaign Manager, The Wilderness Society, *Proof Committee Hansard*, 3 February 2012, p. 5.

months.<sup>24</sup> This timeframe is not directly comparable to the four year timeframe suggested by the HSI as it does not include the time taken from the public call for nominations, the screening of nominations to determine the proposed priority assessment list and the decision process culminating in the FPAL. It also excludes the time taken by the minister to consider the TSSC's advice and deciding whether or not to add the species to the threatened species list.

*Committee comment*

3.19 The committee recognises the importance of having a mechanism in the EPBC Act to allow for the emergency listing of species and ecological communities under significant and imminent threat. The committee acknowledges that due to the detailed informational requirements, the current nomination and assessment process is necessarily lengthy. For this reason it does not adequately protect newly discovered threatened species and ecological communities that are under significant and imminent threat.

***The strengthening of scientific criteria***

3.20 The Minerals Council of Australia, whilst agreeing in principle to the need for emergency listing provisions, was concerned about the '...lack of specific scientific criteria which need to be met for the purposes of emergency listing of a species or ecological community'.<sup>25</sup> The Minerals Council was concerned that the lack of specific criteria could result in vexatious claims being made to list species and communities and the possibility of lobbying of the minister for emergency listings.<sup>26</sup>

3.21 In its response to the Hawke report, the government considered that:

...the criteria on which the minister makes an emergency listing of a species or ecological community should be whether the native species or ecological community meets the listing category's criteria, and whether a threat is both likely and imminent and would result in a significant adverse impact.<sup>27</sup>

3.22 The government further noted that '...the process and test for emergency listing must be stringent to avoid any misuse of process or vexatious claims'. The

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24 DSEWPAC, *Additional answers to questions on notice*, 3 February 2012 (received 27 February 2012), p. 2.

25 Mr Chris Fraser, Acting Chief Executive, Minerals Council of Australia, *Proof Committee Hansard*, 3 February 2012, p. 10.

26 Minerals Council of Australia, *Submission 7*, pp 2–3.

27 Australian Government, *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, August 2011, p. 35, [www.environment.gov.au/epbc/publications/pubs/epbc-review-govt-response.pdf](http://www.environment.gov.au/epbc/publications/pubs/epbc-review-govt-response.pdf) (accessed 16 January 2012).

government also considered it to be important for the minister to seek the advice of the scientific advisory committee wherever feasible.<sup>28</sup>

3.23 Similar to the government's position, proposed sections 194V (species) and 194ZC (ecological communities) of the bill set out the criteria that are required to be met for emergency listings. These provisions are almost identical to the provisions already included in the EPBC Act for the emergency listing of heritage places which according to the department are working well.<sup>29</sup>

3.24 The bill specifies that for threatened species and ecological communities to be emergency listed the minister must believe that:

- a native species/ecological community is eligible to be included in a category in the threatened species/communities list;
- the native species/ecological community is under threat of significant adverse impact; and
- the threat is both likely and imminent.<sup>30</sup>

3.25 The Minerals Council of Australia submitted that 'a clear set of criteria is required to inform this assessment process and "test" the eligibility of applications...'.<sup>31</sup> The Council further stated that:

Without further specific criteria for emergency listing, there remains significant uncertainty on the eligibility of species and what information will be required to be provided to support the Minister's decision.<sup>32</sup>

3.26 The Minerals Council of Australia did not specify what the scientific criteria ought to be.

3.27 The Minerals Council proposed that the minister be required to convene an emergency scientific committee meeting to assess within 30 days whether an emergency listing should be made for a particular species or ecological community.<sup>33</sup>

28 Australian Government, *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, August 2011, p. 35.

29 EPBC Act, s. 341K–341JP. See also DSEWPac, *Answer to question on notice*, 3 February 2012 (received 20 February 2012), p. 2.

30 Environment Protection and Biodiversity Amendment (Emergency Listings) Bill 2011, item 4, s. 194V and s. 194ZC.

31 Minerals Council of Australia, *Submission 7*, p. 2.

32 Minerals Council of Australia, *Submission 7*, p. 2.

33 See: Minerals Council of Australia, *Submission 7*, p. 2; and Mr Chris McCombe, Assistant Director, Environmental Policy, Minerals Council of Australia, *Proof Committee Hansard*, 3 February 2012, p. 12.

3.28 The Australian Network of Environmental Defenders Offices (ANEDO) informed the committee that due to the complexity of scientific evidence needed to nominate a species or community for listing, the probability of vexatious claims being made is unlikely. Ms Nicola Rivers from the ANEDO told the committee that:

Even under an emergency listing process, which may be a shorter process than the normal listing process, the government still has a lot of things that it has to take into account to make that listing. ...those listing process have quite high standards, a lot of evidence is needed, and it is very difficult to make up an excuse for a listing...<sup>34</sup>

3.29 The department informed the committee that under the heritage emergency listing provisions of the EPBC Act (on which the threatened species and ecological community provisions are based) there have been 71 requests for emergency listing.<sup>35</sup> Only four emergency listings have occurred since the provisions commenced in 2004, with 44 of the requests failing to be supported by sufficient evidence to allow further consideration.<sup>36</sup>

*Committee comment*

3.30 The committee acknowledges the concerns raised by the Minerals Council of Australia regarding the possibility of vexatious claims being made. The committee notes however that significant scientific evidence would be required to support a nomination for emergency listing to satisfy the listing criteria already set out in the EPBC Act and associated guidelines.<sup>37</sup> The minister also has the capability to reject any nomination for emergency listing if he or she does not believe the species or ecological community meets the criteria.

***Interaction with state and territory legislation***

3.31 The Minerals Council of Australia raised concerns over the possible duplication of emergency listings with existing state and territory levels of protection.<sup>38</sup> According to the Council:

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34 Ms Nicola Rivers, Law Reform Director, Environmental Defenders Office Victoria, Australian Network of Environmental Defenders Offices, *Proof Committee Hansard*, 3 February 2012, pp 17–18.

35 DSEWPaC, *Additional answers to questions on notice*, 3 February 2012 (received 27 February 2012), p. 1.

36 DSEWPaC, *Additional answers to questions on notice*, 3 February 2012 (received 27 February 2012), p. 1.

37 EPBC Act, ss. 178–179, 181–182. See also DSEWPaC, *Guidelines for assessing the conservation status of native species*, [www.environment.gov.au/biodiversity/threatened/pubs/guidelines-species.pdf](http://www.environment.gov.au/biodiversity/threatened/pubs/guidelines-species.pdf) (accessed 23 February 2012).

38 Minerals Council of Australia, *Submission 7*, p. 3.

In some circumstances, while a species or community may not be listed under the EPBC Act, adequate controls may already be in place at the jurisdictional level.<sup>39</sup>

3.32 Both the ANEDO and the HSI informed the committee that New South Wales is the only state with an emergency listing process for threatened species.<sup>40</sup>

*Committee comment*

3.33 The committee notes that there may be some commonality between the proposed emergency listing provisions, those that the government intends to bring forward and those that apply currently in New South Wales. The committee further notes that this situation is not unique to the current circumstances. In considering this bill and when implementing its EPBC reform package, it is the committee's view that the government should eliminate or minimise as far as possible any regulatory duplication.

***Government changes to the EPBC Act***

3.34 As indicated in the Australian government's response to the Hawke report, the government intends to introduce a package of amendments to the EPBC Act in 2012, including creating emergency listing provisions.<sup>41</sup>

3.35 These amendments are likely to be introduced into the Parliament during the 2012 autumn sittings.<sup>42</sup>

3.36 The department submitted that the government's emergency listing provisions will be based on the provisions that exist for the emergency listing of Ramsar wetlands and heritage places. The department noted that:

Consistent with the Government's announced position with respect to other emergency listing procedures in the Act, the proposed amendment will allow the minister to seek the advice of the proposed Biodiversity Scientific Advisory Committee, wherever feasible, and to consult with relevant state, territory and Australian Government agencies as appropriate.<sup>43</sup>

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39 The Minerals Council of Australia, *Submission 7*, p. 3.

40 ANEDO, *Answers to questions on notice*, 3 February 2012 (received 14 February 2012), p. 1 and Humane Society International, *Answers to questions on notice*, 3 February 2012 (received 13 February 2012), p. 1.

41 Australian Government, *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, August 2011, p. 35.

42 Department of Prime Minister and Cabinet, *Legislation proposed for introduction in the 2012 autumn sittings*, [www.dpmc.gov.au/parliamentary/docs/proposed\\_legislation.pdf](http://www.dpmc.gov.au/parliamentary/docs/proposed_legislation.pdf) (accessed 23 February 2012), p. 11.

43 DSEWPac, *Submission 11*, p. 2.



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## Recommendation 1

**3.37 The committee gives in principle support to the emergency listing provisions of the bill and notes that the government intends to introduce similar legislation into the Parliament during the autumn sittings.**

### Section 158A and 'closing the gate'

3.38 In addition to the emergency listing provisions outlined above, the bill seeks to amend section 158A of the EPBC Act to ensure that any emergency listings are considered in proposed developments that have already received a controlled action decision.

#### *Intent of section 158A*

3.39 Section 158A of the EPBC Act ensures that once the minister makes the primary decision on whether an action is a controlled action or not, that decision is not affected by subsequent listing events.

3.40 The section was introduced into the EPBC Act in 2006 and was designed to bring certainty to the environment assessment process.<sup>44</sup> Mr Peter Burnett, First Assistant Secretary, DSEWPac, informed the committee on the reasoning behind section 158A:

Before that section existed, if a new species or any new matter of environmental significance was listed, there were two complex scenarios. The first scenario was that if the listing event occurred during the assessment of a particular project, and if it was relevant ... the minister then might have to make a discretionary decision as to whether they were going to reconsider the controlled action decision they had already made and add this new matter of national environmental significance. In other words the assessment process would be varied and an additional matter would be required to be assessed. There are then two sub-scenarios, and this is why it is very complicated and it is one of the reasons that section 158A was brought in. ...If the particular proposal had already triggered for threatened species—say it was one other threatened species—and then we have this new threatened species that is listed, then, automatically, the assessment would have to look at the impact on the two species instead of just the earlier one. But if the referral had not triggered for threatened species—say the initial assessment was that there were no threatened species in the area—the minister is then in the scenario where, either on their own motion or at the application of a third party, they have to consider whether to reopen the referral decision and add this new threatened species in as a new trigger. If there is already an assessment underway, and it is not looking at threatened species, and suddenly it has to start looking at threatened species, obviously that can take extra time, or require a different approach.

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44 Mr Peter Burnett, First Assistant Secretary, Regulation Review Task Force, DSEWPac, *Proof Committee Hansard*, 3 February 2012, p. 23.

It also has differing impacts depending on what stage of the process we are at. If it is on day one, perhaps it does not make a great deal of difference, but if it is the day before the minister is about to make a decision, on a worst-case scenario, the minister has to decide, 'Am I going to put the brakes on this, vary the decision, add this new threatened species and require basically an additional or even a fresh assessment?'"<sup>45</sup>

### ***Submitters' comments***

3.41 Environmental organisations considered this amendment to be particularly important to wildlife conservation and believed it would '...help make "emergency" protection genuine protection'.<sup>46</sup> Legal organisations likewise considered the proposed changes 'compelling'.<sup>47</sup>

3.42 Environmental organisations were supportive of the bill's amendments to section 158A.<sup>48</sup> Environmental groups felt that section 158A is counterintuitive to the protection of threatened species as any discoveries made during the environmental assessment process, which takes place after the controlled action decision, cannot be taken into consideration when considering if conditions should be placed on an action. The Wilderness Society submitted that:

This means that although a developer may discover a new species in the process of conducting their Environmental Impact Statement (which is more thorough than the initial desktop studies that are required for referral as a controlled action), they are not legally obliged to protect the species. This is a serious flaw on Australia's commitment to protecting biodiversity.<sup>49</sup>

3.43 Birds Australia similarly told the committee that:

It is hypocritical to suggest that a species or ecological community discovered in the course of an EIS process, which may be threatened by the proposed development, should be afforded a lower level of protection than any other species.<sup>50</sup>

3.44 In particular, The Wilderness Society held concerns for a new crab species and new freshwater shrimp species found as part of an EIS conducted by Rio Tinto on its bauxite mine expansion on the Cape York Peninsula. According to The Wilderness Society:

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45 Mr Peter Burnett, First Assistant Secretary, Regulation Review Task Force, DSEWPac, *Proof Committee Hansard*, 3 February 2012, pp 23–24.

46 IFAW, *Submission 1*, p. 3.

47 Law Council of Australia, *Submission 5*, p. 4.

48 For example see: IFAW, *Submission 1*, pp 3–4; Humane Society International, *Submission 3*, p. 2; Birds Australia, *Submission 6*, p. 1; and The Wilderness Society, *Submission 10*, p. 1.

49 The Wilderness Society, *Submission 10*, p. 1.

50 Birds Australia, *Submission 6*, p. 1.

Despite the significant threat the mine poses to the newly discovered crab and shrimp species, Rio Tinto is not legally obliged to protect these new species. The discovery of new Crustaceans should have at least triggered a thorough independent study of aquatic ecosystems in the project area to determine the habitat and extent of these species...With the amendments as proposed in the Bill being considered by this committee, Rio Tinto would be forced to do one of the following: prove unequivocally that their mine would not harm these species; alter their mine plans to demonstrate the species will not be harmed; or not proceed with the mine.<sup>51</sup>

3.45 The Australian Environment & Planning Law Group of the Law Council of Australia (the Law Council) provided an example of how the emergency listing provisions would apply without amendment to section 158A:

...if the Environment Minister found that a project was a controlled action because of its impact on the World Heritage Values of a listed property, and a threatened species were subsequently listed, the Minister could not have to have regard to the impact of the action on the newly listed threatened species. He or she could not require that the impact on the species be considered as part of the assessment, or impose conditions which might ameliorate the impact of the project on the species.

Where a decision has been made that a matter is not a controlled action, this decision is final and the proposed amendment does not alter this.

The amendment to s.158A proposes to require the Environment Minister to consider the impacts on the newly listed species when making any subsequent approval process decision.<sup>52</sup>

3.46 The Law Council submitted that the current arrangement where an emergency listed species could not be taken into account in the assessment process '...is not satisfactory'.<sup>53</sup> The Law Council recognised that:

The likelihood of a species being listed on an emergency basis is low. The likelihood that this listing will affect an action about which a primary decision has been made is even lower. However, where there is a credible threat of a significant adverse impact on a species which is already eligible for listing, it seems reasonable to require the Minister to consider this impact at least when making a decision as to the level of assessment to be carried out, the matters of national environmental significance to be assessed and any ameliorative conditions to be imposed in any approval. In particular, where an action is the very cause of a significant adverse impact which prompts emergency listing, then the argument for consideration of the impacts before approval is given to the action is compelling.<sup>54</sup>

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51 The Wilderness Society, *Submission 10*, pp 1–2.

52 Law Council of Australia, *Submission 5*, p. 3.

53 Law Council of Australia, *Submission 5*, p. 3.

54 Law Council of Australia, *Submission 5*, p. 4.

3.47 The ANEDO submitted to the committee that 'section 158A must be amended to allow emergency listings to work, and to ensure that EPBC decisions are as up-to-date and accurate as possible'.<sup>55</sup>

3.48 On the other hand the National Farmers' Federation and the Minerals Council of Australia were opposed to the retrospective aspect of the amendment as it would cause '...significant uncertainty and regulatory risk...'.<sup>56</sup>

3.49 The National Farmers' Federation opposed the changes to section 158A on the basis that the changes could allow retrospective conditions to be placed on a controlled action which '...increases uncertainty for the agricultural industry...'.<sup>57</sup> The agricultural peak body was also concerned about the additional costs that could be placed on farms that are required to conduct an environmental assessment.<sup>58</sup>

3.50 Similarly the Minerals Council of Australia was opposed to the changes to section 158A for the reasons of increasing uncertainty, increasing regulatory risk and creating unnecessary delays in major projects.<sup>59</sup> The Council submitted that:

The EPBC Amendment may seriously and adversely impact on projects operating under a previous EPBC determination, as it is intended that the emergency listing would override existing Section 158A provisions which state that a listing event cannot affect the validity of a primary decision made prior to a listing event...This retrospective power would significantly increase the sovereign risk for projects.<sup>60</sup>

#### *Committee comment*

3.51 The committee recognises that section 158A of the EPBC Act was designed to provide certainty to proponents in what can be a complex and costly environmental assessment process.

3.52 The committee also acknowledges that the current operation of section 158A means that threatened species and ecological communities discovered after the minister's initial controlled action decision are not afforded legal protection for that controlled action. This may leave newly discovered species and ecological communities vulnerable to significant and imminent threats.

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55 ANEDO, *Submission 8*, p. 3.

56 Minerals Council of Australia, *Submission 7*, p. 1. See also National Farmers' Federation, *Submission 2*, p. 1.

57 National Farmers' Federation, *Submission 2*, p. 1.

58 Mr Gerald Leach, Chair, National Farmers' Federation Sustainability Committee, National Farmers' Federation, *Proof Committee Hansard*, 3 February 2012, p. 15.

59 Minerals Council of Australia, *Submission 7*, p. 1.

60 Minerals Council of Australia, *Submission 7*, p. 3.

### *'Closing the gate'*

3.53 It was noted by several submitters that the most likely time that threatened species or other matters of national environmental significance are found on a proposed development site is when an environmental assessment is conducted.<sup>61</sup> Although some referrals contain significant quantities of environmental information, a more systematic and thorough environmental assessment is generally only conducted after the minister decides that a proposed development is a controlled action. The IFAW submitted that:

...as the EPBC Act currently stands it is impossible for the Minister to:  
1) make an emergency listing; and crucially 2) then take that listing into account in making assessments of referred activities under the EPBC Act, if that new species is discovered during the assessment process but after the initial referral decision has been made.<sup>62</sup>

3.54 Under section 158A of the EPBC Act, once the minister has made the primary decision on whether a proposed development is a controlled action or not, he or she is not able to consider the proposal's impacts on emergency listed threatened species and ecological communities. Mr Burnett described the controlled action decision point as 'closing the gate':

The effect of 158A was to say, 'That's the point [when the controlled action decision is made] at which we should have certainty.' Until that decision point, if new matter comes along, we should look at it; once that decision point is reached, the gate is closed. I have identified, say, these three matters that need to be assessed, so go off and assess them. If a new, fourth matter comes along through some other listing process, the act says, 'I'm sorry; it is too late,' and that is not taken into account.

3.55 Essentially this means that there are only 20 business days (the legislated period for the minister to make a controlled action decision) for species or ecological communities to be emergency listed if the minister is to consider the relevant impacts during the subsequent environmental assessment process.

3.56 Under the proposed bill the gate on considering the impact on emergency listed species and ecological communities would stay open indefinitely.

3.57 At the public hearing there was some discussion between Senator Waters and Mr Burnett concerning amending section 158A to have the gate close at the conclusion of the approval process (that is, longer than the 20 business days currently required), but not staying open indefinitely as proposed in the bill:

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61 For example see: IFAW, *Submission 1*, p. 2; Humane Society International, *Submission 3*, p. 1; Birds Australia, *Submission 6*, p. 1; Mackay Conservation Group, *Submission 9*, p. 1; and The Wilderness Society, *Submission 10*, pp 1–2.

62 IFAW, *Submission 1*, p. 2.

**Senator WATERS:** ...So my question is: would the department have a different approach and would it advise the minister differently if there was a gate closing but the gate closed a bit later in the process—namely, when the approval was given?

**Mr Burnett:** Again, while I cannot tell you what our advice would be in a hypothetical situation, I can answer your question in part by saying that if your bill was proposing a gate closing at a different time, that partially addresses the concern that flows from amending section 158A. But because it is closing at a different time, it still has a different result to the policy that is currently reflected in the act.<sup>63</sup>

### *Committee comment*

3.58 The committee recognises that the current operation of section 158A of the EPBC Act would result in the minister, when deciding whether to approve a proposed development, not having to consider the impact on a threatened species or ecological community which was emergency listed after the initial controlled action decision was made.

3.59 The committee acknowledges that this situation would not provide adequate legal protection for an emergency listed species or ecological community from a possible threat. The committee also acknowledges that removing section 158A of the Act as it would apply to emergency listings could leave the approval process for a proposed action open indefinitely.

3.60 A compromise position may be to amend the EPBC Act to 'close the gate' at a point during the assessment period, such as at that point when the department accepts the final assessment documents prepared by the proponent, rather than at the time of a controlled action decision. If determined, such an amendment should only be applied to prospective projects and not to projects that have already been referred under the EPBC Act.

### **Recommendation 2**

**3.61 The committee recommends that the bill not be passed.**

**3.62 The committee recommends that the government consider amending the EPBC Act in such a way as to 'close the gate' at a point during the assessment period, as part of the package of amendments to the EPBC Act in 2012.**

**Senator Doug Cameron**  
**Chair**

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63 Mr Peter Burnett, First Assistant Secretary, Regulation Review Task Force, DSEWPac, Proof Committee *Hansard*, 3 February 2012, p. 26.