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STANDING COMMITTEE ON ENVIRONMENT,
COMMUNICATIONS, INFORMATION TECHNOLOGY AND THE
ARTS

**Reference: Provisions of the Environment and Heritage Legislation Amendment
Bill (No.1) 2006**

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**SENATE STANDING COMMITTEE ON
ENVIRONMENT, COMMUNICATIONS, INFORMATION TECHNOLOGY AND
THE ARTS**

Friday, 3 November 2006

Members: Senator Eggleston (*Chair*), Senator Bartlett (*Deputy Chair*), Senators Lundy, Ian Macdonald, Parry, Ronaldson, Webber and Wortley

Substitute members: Senator Carr for Senator Lundy

Participating members: Senators Adams, Allison, Bernardi, Boswell, Brandis, Bob Brown, George Campbell, Carr, Chapman, Conroy, Crossin, Chris Evans, Faulkner, Ferguson, Ferris, Fielding, Fierravanti-Wells, Forshaw, Heffernan, Hogg, Humphries, Joyce, Lightfoot, Ludwig, Marshall, Mason, McGauran, McLucas, Milne, Moore, Nash, Nettle, O'Brien, Payne, Robert Ray, Scullion, Siewert, Stott Despoja, Watson and Wong

Senators in attendance: Senators Bartlett, Carr, Eggleston, Ian Macdonald, Ronaldson and Siewert

Terms of reference for the inquiry:

Provisions of the Environment and Heritage Legislation Amendment Bill (No.1) 2006

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Committee met at 8.32 am

CHAIR (Senator Eggleston)—Having a quorum constituted by Senator Carr, me and Senator Ronaldson, we hereby declare this hearing open. The hearing is of the Senate Committee on Environment, Communications, Information Technology and the Arts in relation to the provisions of the Environment and Heritage Legislation Amendment Bill (No.1) 2006. Today the committee will conduct its first public hearing for this inquiry and it will hold a second hearing on Monday, 6 November, also here in Canberra. The committee is due to report to the Senate on 21 November 2006. The committee's proceedings today will follow the program as circulated. These are public hearings. The committee may also agree to a request to have evidence heard in camera or may determine that certain evidence should be heard in camera.

I remind all witnesses that in giving evidence to the committee they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee, and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to the committee. If a witness objects to answering a question the witness should state the ground upon which the objection is to be taken and the committee will determine whether it will insist on an answer, having regard to the ground which is claimed. I welcome our first—

Senator CARR—Mr Chairman, before you welcome our first witness—

CHAIR—I have not finished yet, Senator Carr, as it seems there is a bit more to read. A witness called to answer a question for the first time should state their full name and the capacity in which they appear, and the witness should speak clearly and into the microphones to assist Hansard to record the proceedings. Mobile phones should be switched off. With the formalities over, I welcome everybody here today. Senator Carr.

Senator CARR—Thank you very much, Mr Chairman. I do not want to interrupt Mr Macintosh, so can I ask you, as chairman, if you can confirm for me that the department does not intend to produce its submission until it appears at 4.45 on Monday?

CHAIR—The usual practice of the department is not to have a submission and they, at the end of the hearings that we conduct, usually just answer questions.

Senator CARR—I find that that is an extraordinary proposition. A bill of this complexity, a bill of this controversy, and the department has no submission!

CHAIR—Of course, they have provided a briefing to the members of the committee, Senator Carr, and, as I said, the usual practice is to answer questions at the end of hearings.

Senator CARR—That is not my understanding. The usual practice for a department with carriage of a bill is to provide a submission to the committee. I would like to know, Mr Chairman, have you asked them to provide the committee with a submission?

CHAIR—No, I have not, Senator Carr, because, as I said, it is not the usual practice of the department and the workings of this committee.

Senator RONALDSON—They gave the committee a brief.

CHAIR—They did give this committee a briefing, as I have said.

Senator RONALDSON—Were you not there?

Senator CARR—No, I was not there. I have a few other things to do.

Senator RONALDSON—You should have made the effort to be there.

Senator CARR—You have called on a bill of this controversy at this short notice—

Senator RONALDSON—You should have made it your business to be there.

Senator CARR—and the department has no submission. I find that appalling.

Senator RONALDSON—I think it is appalling that you were not at a briefing that was provided, so stop your carry-on and let us get on with it.

CHAIR—There is no doubt, Senator Carr, that a briefing was provided. I have the notes of it here.

Senator CARR—I have got no doubt you have been briefed up hill and down dale. You are a government member. This is the parliament of Australia we are talking about—

CHAIR—Senator Carr—

Senator CARR—and you are treating the place with contempt.

CHAIR—Senator Carr, you are beginning these hearings in your usual flamboyant, aggressive style, but a briefing was provided for members of the committee by the department. If you are going to be the ALP person here, I think it should have been your business to be at the briefing and your own colleagues should have informed you of it.

Senator CARR—It might be your advice on what the ALP does on this matter, but it is my proposition to you, Mr Chairman, that this committee has got a right to see a submission from the department on a bill of this complexity and controversy.

Senator RONALDSON—You had the right to ask questions of the department when they gave us a briefing. You were not there.

CHAIR—We note your observations, Senator Carr. We have got 40 minutes here. I would propose to give perhaps 15 minutes each to the ALP and the government and to divide the rest of the time between the others. Shall we say, about 15, 15 and the rest of the time between the other parties? So we will now ask the witness—

Senator CARR—Is that excluding the introductory statement?

CHAIR—Thank you for reminding me of that, Senator Carr. I actually had not forgotten that, but you occupied the time that might have been otherwise devoted to an opening statement.

[8.39 am]

MACINTOSH, Mr Andrew Kerr, Deputy Director, Australia Institute

CHAIR—Welcome. Would you like to make an opening statement?

Mr Macintosh—Thank you. I thought I would start by stating what is probably reasonably obvious—that is, the objects for the legislation. When you boil it down there are really two objects. The first one is regulation. The idea of this piece of legislation is it is meant to set bounds on development so as to protect the matters of national environmental significance and Commonwealth areas. The second one is meant to perform an information function—that is, the lists of threatened species, ecological communities, Natural Heritage List and the Commonwealth Heritage List. They are all meant to perform an information function by providing information to the public and also to decision makers.

From that, the question is: how has this act performed against that two-pronged criteria to date? Firstly, the regulatory provisions have achieved almost nothing. If you look at the statistics it is really quite clear. In six years this piece of legislation has stopped, under the approval provisions, only four developments. One was a single housing development on Norfolk Island. The second one was a four-house subdivision on Kangaroo Island. The third one was the Bald Hills wind farm decision, and the fourth was the flying fox decisions. So that is four in six years. There has also been only about 150 conditions placed on actions, which is a very small number, and there have only been two prosecutions. The first was dismissed at the committal hearing and the second one was successful, only I understand that the terms of the order issued by the court have not been fulfilled.

The second thing is the information provisions have been perverted by politics. The lists are completely inadequate. In terms of threatened species, they do not contain all the species that are threatened. There are actually no commercial fish species on the list; there are very few invertebrates; a number of species have been omitted that clearly satisfy the criteria, like the southern bluefin tuna. In terms of the National Heritage List it reads very much like a neoconservative story book. There is very little on there that concerns Indigenous heritage and there are only two places, I understand, that concern national heritage matters. So the information and the regulatory purposes of this legislation have not been performed.

The third important issue that comes out of this piece of legislation to date is that it has cost about \$30 million a year to administer, and that is only the approval provisions. That is an enormous sum of money and it amounts to about \$180 million. So we have spent \$180 million dollars are we have barely achieved anything.

The next question is why has it failed. Firstly, it is a lack of political will, quite clearly. The second thing though is that there are a number of structural flaws in the legislation, so not all of it can be blamed on the government's lack of political will. There are problems with the legislation that need to be corrected. This provides the government with two basic options. Firstly, you could scrap the approval provisions and concentrate solely on Commonwealth areas and Commonwealth reserves and divert the money to some other cause. Quite frankly, I do not care where it goes as long as it gets spent effectively. It could go to schools; it could go

to the environment; as long as it is spent well. If it scraps the approval provisions, it then should be judged by the electorate.

The second option is it could improve the legislation. This brings us to the current bill. This bill does neither of these two options. It guts the legislation while carrying on the facade that we have proper federal environment laws. In terms of my specific concerns with the legislation, the first one is the exemptions. There is already a large number of exemptions in this piece of legislation. In fact, you could get almost anything through this legislation without actually going through the proper approval process. The bill introduces a swathe of new exemptions and, in doing so, punches a collection of new holes in an already gappy piece of legislation.

The second thing is the listing processes. As I said, one of the important functions of this legislation is the provision of information. What has happened under this bill is that it politicises the listing processes even more than they already are. The minister and the relevant committees—that is, the scientific committee and the Australian Heritage Council—will now have complete control over what goes through the listing processes and, as a result, we can almost be assured that controversial nominations will not get up.

My third major concern is multi-option referrals. Now developers will be able to put in developments that contain a collection of options on what the nature of the action is, where it is carried out and the timing of the option. This is unique in terms of planning and environmental laws in the country, and it is quite a concern because it effectively means that the assessment process is going to be undermined. Studies have shown that out of assessment processes it is generally the case that only about 30 per cent of the anticipated outcomes actually are realised. If we have multi-option referrals that is likely to increase quite considerably and make the assessment processes very ineffective.

The fourth thing that I am concerned about is the watering down of the assessment processes. The fifth is the abolition of AAT appeals for ministers' decisions regarding so-called Commonwealth permits. The sixth is the removal of the Register of the National Estate, which is something that has been in Australia since 1975 and is treasured by the heritage community. The final one is the detention and enforcement provisions that are in the back of the legislation that allow the government to detain people for, I understand, about seven days. So thank you. That is my opening statement.

CHAIR—Senator Carr, would you like—

Senator CARR—I think the government should go first. Clearly that is the game plan here, is it not? I think you should invite the government to take their 15 minutes first.

CHAIR—It is only 12 minutes, in fact, Senator Carr. I might like to ask you perhaps about the Register of the National Estate. Could you tell us a little more about why you object to the provisions in the bill about its abolition. What alternatives are there?

Mr Macintosh—The Register of the National Estate, as I said, has been around since 1975. It now contains, I understand, about 14,000 places of heritage significance. At the moment it has very little legislative importance because that was taken out in the bill that commenced in 2004. But it is an important database, an important information base, just like all the other lists should be. So I do not understand why the government is insisting on getting

rid of the Register of the National Estate from the legislation, because it does nothing. If the government intends to abolish the Register of the National Estate completely, then I would like to hear that. Otherwise it is just going to have the Register of the National Estate maintained but it is not in the legislation and there is no requirement for the government to ensure that it is updated.

CHAIR—What alternatives are there? What other listings do we have?

Mr Macintosh—We have the World Heritage List, the National Heritage List, the Commonwealth Heritage List and then you have got state lists. Also the government is introducing the place of heritage significance for overseas places.

CHAIR—So in fact we have a lot of listings of places of importance, don't we?

Mr Macintosh—We certainly do, yes. But the beauty of the Register of the National Estate is it is comprehensive. The Commonwealth list—when I say Commonwealth list I mean the World Heritage, national, Commonwealth and the overseas places lists—only concerns places that meet certain thresholds. The Register of the National Estate is meant to be comprehensive and include anything that is even of local or regional significance.

CHAIR—To get onto, for example, the National Heritage List there are also thresholds, aren't there?

Mr Macintosh—Yes, there are. That is my point. The lists that are going to be kept all have quite high thresholds, and they also have been quite badly politicised, whereas the Register of the National Estate is very comprehensive and it does not have a high threshold.

CHAIR—Wouldn't you agree that perhaps the point is to have a more focused list of places of importance?

Mr Macintosh—I can understand that in terms of lists that have legislative effect—that is, they put restrictions on what can happen to the sites. But in terms of the Register of the National Estate, the impacts are quite minimal and the minister has to take regard to those places when making decisions.

CHAIR—The other thing I might ask you about is that some concern was expressed in a bills *Alert Digest* about some of the penalties this bill imposes. Do you wish to make any comment on them?

Mr Macintosh—You are talking about the provisions in schedule 1, item 767, which gives a minister the power to force people to produce documents and to attend to give evidence. There are provisions in there that provide protections against self-incrimination, but I think there needs to be greater consideration given to the civil rights implications of that sort of provision. There are also, in item 835, provisions that allow the detention of foreigners that are 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.

Senator RONALDSON—Mr Macintosh, what was the Australia Institute's views of this legislation when it was first introduced?

Mr Macintosh—This bill or the EPBC Act?

Senator RONALDSON—The EPBC Act.

Mr Macintosh—I was not there, so I would not be able to comment. I actually do not think it did anything on the legislation at the time.

Senator RONALDSON—There was no commentary from the Australia Institute on the original bill.

Mr Macintosh—In 1998-99, no, I do not think so.

Senator RONALDSON—Has something changed at the institute that would mean that you are now taking an interest in this?

Mr Macintosh—Yes. I went to the institute and I have got expertise in the area.

Senator RONALDSON—What is your view of the new section 324E, the national listing?

Mr Macintosh—The listing processes for the National Heritage List?

Senator RONALDSON—Yes.

Mr Macintosh—I think they are politicising an already politicised process. I am concerned that it gives the minister and the Australian Heritage Council greater control over what goes up and what goes through the process. I am also concerned that the bill does not amend the processes for the minister actually making his or her decision on what gets on the list. My position on all the lists is they should be based on the relevant criteria. For the Heritage List it should be based on whether the place meets the criteria. If it meets the criteria, it should go on the list. In terms of threatened species, if it meets the criteria for being a threatened species, it should go on the list. There are ample provisions for allowing developments to go ahead even if species or places are listed, so I do not understand why the government refuses to adopt such an approach.

Senator RONALDSON—You see, Senator Carr's Labor colleagues in Tasmania actually disagree with you, and I will quote from the Tasmanian government's submission:

The Tasmanian Government also supports the simplified outline of the new usual listing process for National Listing (new section 324E), which involves an annual cycle around 12 month 'assessment periods'. This is considered a positive change, allowing the Minister and the Australian Heritage Council a sensible timeframe in which to prioritise and assess nominations.

In the same submission the Tasmanian government stated—and this is page 1, Senator Carr, if you want to follow this:

A bilateral agreement has been negotiated between the State and Australian Governments to accredit the Level 2 and Projects of State Significance processes for the purposes of the EPBC Act. The Tasmanian Government notes and supports that a number of the proposed amendments will make operation under this bilateral agreement less onerous from an administrative perspective.

Now, is that not a good thing?

Mr Macintosh—No, I do not think so.

Senator RONALDSON—You do not.

Mr Macintosh—They say ‘less onerous’, but what does less onerous mean? In terms of the listing processes, they also commented, as you said, that it makes it administratively better and sets a stricter time frame. Now, the existing provisions provide the minister with five years and 90 days to go through nominations. I think that would be ample to assess any nomination. Also, if you support a heritage-based listing process, this is the antithesis of that. It waters it down. It basically puts it all into the hands of the minister. What we have had out of the current listing process is, as I said in my introductory statement, a list that basically reads like a neo-conservative story book. There are very few listings of places of Indigenous significance—there is nothing on there. Wave Hill is not on there. The tent embassy is not on there. It is basically colonial history and post-1788 Western history. I have concerns about that because I would like to see a heritage list that represents Australia’s history more accurately.

Senator RONALDSON—The Tasmanian government supports the replacement of the accredited management plan with accredited management arrangements or an accredited management process on the basis that it will give greater flexibility in how World Heritage and National Heritage listed places are managed. What is your view on that?

Mr Macintosh—On the management plan processes?

Senator RONALDSON—Yes.

Mr Macintosh—I do not really have great concerns in terms of the management plans that are prepared in relation to heritage places. My major concern is in relation to what actually gets on the heritage list. They have also done it in relation to recovery plans. I can understand the government wants to streamline how recovery plans are prepared and get rid of the mandatory requirement for recovery plans. I can understand that because it imposes a lot of cost on the government and in a lot of cases the recovery plans are decorative at best. But what I cannot understand is not having a science-based threatened species listing process and a heritage-based heritage listing process.

Senator RONALDSON—The Tasmanian Labor government also says:

A number of the amendments proposed will assist with streamlining, to a degree, some of the processes associated with assessment processes or increasing flexibility. A number of these will benefit proponents of developments in Tasmania, and the State Government supports these amendments.

What is your view on that?

Mr Macintosh—At a rough guess there are currently about 12 to 15 processes that can be adopted. That is sufficient flexibility. Why add another, again, I would guess, about six? Why

increase it to 20? This has become like an ad hoc piece of legislation. It now has enough exemptions so you could do absolutely anything. It really does undermine the very basis for having the legislation. That brings me back to my point: if the government does not want to regulate in relation to matters of national environmental significance then get rid of the legislation. Give the money to something that needs it and then stand judged by the electorate. Do not maintain a facade of a piece of legislation.

Senator RONALDSON—Again from the Tasmanian government:

The Tasmanian Department of Tourism, Arts and the Environment is aware of concerns both from proponents and other agencies that the approvals process and timeframes involved under both Commonwealth and State legislation can cause considerable delays to the development approvals process.

We note that the amendments take some steps to reduce these problems and provide that the EPBC Act approval can be carried out in parallel with the State approval processes or that the EBPC Act approval may even precede the State processes. We support these amendments.

What is your view in relation to that?

Mr Macintosh—The existing provisions provide for referrals. The government has to make a decision on that referral within 20 business days. The government can then use a state process to assess the actions, so nothing has changed on that front. Then the government, when that process has finished and the report has been prepared, has got I think 90 business days to complete the action. So in terms of claiming that this results in significant delays, I think they are wrong and I do not think they understand the legislation.

Senator RONALDSON—The state government does not understand it.

Mr Macintosh—Yes. They are exaggerating grossly or they do not understand the legislation.

Senator RONALDSON—So you are right and they are wrong.

Mr Macintosh—I think so, yes. Any other assessment process involves similar time frames or even longer time frames. Our piece of legislation has very tight time frames, and that is something that your government does not really give.

Senator RONALDSON—I am sure they would be interested to hear your views. Just finally, because I assume my time is running out—

CHAIR—Yes.

Senator CARR—It has actually run out.

Senator RONALDSON—Thank you very much.

Senator CARR—It has actually run out.

Senator RONALDSON—I thought you would be interested to hear what your Tasmanian colleagues thought about this.

Senator CARR—Yes, but I am interested in getting a fair go here in regard to this legislation, and you are playing games.

CHAIR—Senator Carr. We thank you for your interesting interventions, but I am in the chair. Senator Ronaldson is finishing after this question and then we will come to you, and then to Senator Siewert.

Senator RONALDSON—I think you need a good night's sleep, Senator Carr. It has been a long week for you. There are a number of positive aspects in this bill. Can you quickly detail them.

Mr Macintosh—There are a number of positive aspects. They have improved the provisions, for example, in relation to penalties applying to landholders. I could go through a number of them. There are new requirements for public comments and public environment reports. There are powers for the minister to reject approvals where the proponent has a poor environmental history. I think that is a good amendment. There are amendments to the prior authorisation exemption which I think are quite positive. There is power now for the minister to alter conditions if the minister later finds out the action is having a more significant impact on the environment than first anticipated. I think that is a good amendment. There is a whole stream of them. If you want me to go through them, I can. Obviously my submission did not deal with them just because of a matter of time. I wanted to put them in there, I just did not have time to go through them.

Senator RONALDSON—If you are able to provide the committee with further details of those positive aspects, I would be very grateful.

Mr Macintosh—Yes. I have got a table here which only provides the bare bones of it, but I am very glad to give it to you.

Senator RONALDSON—Thank you.

CHAIR—If you give it to the secretariat, they can circulate it.

Senator CARR—Mr Macintosh, might I congratulate you on your submission. The fact that you have only had such a limited time to prepare it and that you have done such a good job I think warrants congratulations. You say that:

Providing two weeks for the public to consider the Bill and write submissions is insufficient, as is the time allocated for this Committee to consider public submissions and write a report.

I can only agree with you in that regard. I take it you have had a chance now to consider the bill further because you raise a whole series of proposals here in regard to quite detailed matters. Given the limited time today and the limited opportunity you have had to canvass those matters, I am wondering whether you would be prepared to provide us with additional material on suggestions on how those amendments might work.

Mr Macintosh—Yes, certainly.

Senator CARR—I think it would be of great value to the committee to examine those details. You indicated that a table has been prepared on some of your assessments of the clauses. Could you put that into a broader context of what specific measures you would like to see.

Mr Macintosh—Certainly.

Senator CARR—Have you had a chance to look at the report by the scrutiny of bills committee?

Mr Macintosh—Unfortunately I have not, no.

Senator CARR—It is a Senate committee that talks about human rights issues and examines each piece of legislation that comes through the parliament, and examines particular measures. The committee on this occasion produced a unanimous report raising serious concerns about: ‘The absence of reasons or explanations in the bill or in the explanatory memorandum for some serious new offences and penalties and the decision to limit appeals for ministerial discretion.’

Were you aware that, in speaking to the report—and I emphasise this is a unanimous report, not the sort of nonsense you are hearing today but a unanimous report—one of the government senators said:

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.

That was Senator Johnston speaking to the report. Given your submission, would you agree with that proposition that Senator Johnston put forward?

Mr Macintosh—Yes, certainly. If you go to the back of my submission, I canvass some of those issues and I steadfastly agree. They are of considerable concern and, as he said, the explanatory memorandum is one of the worst I have ever seen. It provides very little explanation for many things and many controversial issues. One of the ones that I thought was amusing, if nothing else, was the omissions relating to the nuclear actions. They provided a number of exemptions for nuclear actions and provided no explanation for that, and did not actually raise it in the explanatory memorandum. So, yes, I wholeheartedly agree with that assessment.

Senator CARR—You argue in your submission that the current legislation has been poorly administered since 2000. Can you suggest to the committee what leads you to say this?

Mr Macintosh—Yes. It is the statistics. It is quite clear, as I said in my opening statement, you have stopped only four developments in six years. That is a \$180 million piece of regulation that stopped four developments. I am not saying that everything should be stopped, but this is a piece of regulation. Regulation is designed to put bounds on development. In terms of the conditions, very few conditions have been put on actions. So, if you are not going to stop actions and you are not going to put proper conditions on developments, why have a piece of regulation? Also, in terms of the listing process, again as I said, they have been completely politicised. They are not containing all the information that should be there. You cannot have a threatened species list that contains only those species that you want to be on there. The threatened species list has got to contain all the threatened species. It is the same with the Heritage List: anything that meets the national criteria or is of national significance should be on the list.

Senator CARR—Given that circumstance, do you think there should be a new objective in the act that, for instance, more clearly spells out the responsibilities of the department with regard to, say, adverse effects on climate change?

Mr Macintosh—I can understand if a government did not want to put climate change in the legislation. It definitely needs some sort of legislation. Preferably, I would like to see an emissions carbon trading scheme set up under a separate piece of legislation. If they did that you would not need anything in the EPBC Act, in my opinion. If you did not have an emissions trading scheme, then it makes sense to have some sort of climate change trigger, as they call it, in the legislation.

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.

Senator CARR—You suggest that these amendments will serve to politicise the environment and heritage listing process to the detriment of environmental and heritage protection. Will you explain to the committee how you see the consequences of that politicisation working through?

Mr Macintosh—I think it just gets back to how the legislation is being administered. That is, it is not being enforced effectively. You are not resulting in protections on the environment; you have got lists that do not contain what they need to contain. In terms of this bill, you have created a whole collection of new exemptions and a listing process that is far more politicised. So I simply think that we are going to get more of the same in terms of outcomes, and in terms of the listing processes I actually think we are going to get worse outcomes.

Senator CARR—You say on the last page of your submission:

Few of the environmental objectives of the current act have been achieved, despite the fact that it has cost taxpayers in the order of \$150 million.

Where did you get that figure? Can you explain how you have arrived at that conclusion?

Mr Macintosh—The figure of \$150 million is derived from budget estimates and also from the Department of the Environment and Heritage annual reports. It is a rough estimate because the figures are very difficult to come by. Most of the numbers are really focusing on the approvals process as opposed to the entire piece of legislation, so in fact the entire piece of legislation is likely to cost the government a lot more than that, but that is a conservative estimate that we have got based on government figures.

Senator CARR—Can I take you to specifics? For instance, on page 3 of your submission, with regard to items 122 and 352 on bioregional plans, you say:

There is the potential for this process to be used under these new arrangements to avoid proper scrutiny and assessment.

How do you see that happening? Can you give me some examples?

Mr Macintosh—Yes. The bioregional plan provisions cover one page in this legislation—only one page. Burrup Peninsula is a good example. Burrup Peninsula has been nominated for the National Heritage list. It quite clearly meets the criteria. It is a place of national significance. I think it also meets the criteria for being a place of international significance. My concern is that the government will develop a very truncated and brief planning process to prepare a bioregional plan. It will then include a whole swathe of developments that have not been adequately assessed. Then it will prepare the bioregional plan and, as a result, all the developments in that area are subsequently exempt from the operation of the legislation. So as a result they do not go through proper scrutiny, the public does not get the proper opportunity to comment on the proposals and we are blocked out of the process.

Senator CARR—If I take you to page 7 of your submission, on clause 13 you say:

Schedule 1, Items 314 and 318, strategic assessments and endorsed plan

These amendments create a new process whereby the Minister can exempt actions or a class of actions from the operation of the referral, assessment and approval process if they are taken in accordance with a policy, plan or program that is endorsed in a strategic assessment process.

Can you give some example of what that means?

Mr Macintosh—That could potentially mean exactly the same thing as I said in relation to Burrup Peninsula. It could be exactly the same thing. You prepare a plan under another law and then endorse that plan, and that would result in the exemption of all development taken in accordance with that other plan from the EPBC Act.

Senator CARR—You say:

This process is deficient as there is no Parliamentary oversight of strategic assessments ...

Is that a deterioration in the current situation?

Mr Macintosh—It is not. The strategic assessments are not currently subject to parliamentary scrutiny, although if the government then moved to exempt actions that were under the strategic assessments I think they would be subject to parliamentary scrutiny.

Senator CARR—I take you to the clauses on page 10—364, 366 and 368—about new threatened species nominations and the listing process. You say that under this new process there is an annual assessment cycle. I take you to the particular section that says:

This process vests almost complete control of the listing process in the Minister and the hand-picked TSSC—

the group mentioned there—

It will guarantee that controversial nominations are avoided and that the lists only include those species and communities that are politically palatable.

Why do you say that? What do you mean by that?

Mr Macintosh—That has already occurred under the current process, and in many cases I think it has been borderline illegal. A classic example is the southern bluefin tuna. It has quite clearly been threatened. Everybody in the scientific community has known it has been threatened since the late 1990s. It was nominated and then the government, under the current process, is forced to assess that, and then the minister must make a decision on whether it is listed. If you list it under the current provisions then you cannot be granted an export permit under part 13A, so the government wants to avoid listing any commercial fish species that is exported, because that is going to result in a clamp on the relevant industry. Under the new process, what will happen is that the minister can effectively block nominations. So, if southern bluefin tuna comes up again, the minister can say, 'No, I am not going to assess that.' If the endeavour dogfish comes up, he can say, 'No, I am not going to assess that.' And as a result we do not get a list that contains all the species that are technically threatened.

Senator CARR—Can you explain how the new arrangements with regard to strict liability work? I refer to schedule 1, items 591 and 595, and the penalties included.

Mr Macintosh—I would have to go through it and have a look at it. Is that item—

Senator CARR—Items 591 and 595 under schedule 1. The Scrutiny of Bills Committee said:

The Committee seeks the Minister's advice as to the justification for the departure from accepted principles in this case.

Mr Macintosh—From just a quick reading of it, it appears that the strict liability only applies when the action was taken in a Commonwealth reserve. From just a quick reading of it, I understand that to mean that they would not have to prove intent—that the person intended to take the action in a Commonwealth reserve and that the member of the native species or heritage is in the reserve.

Senator CARR—In fact, there is a whole series of strict liability provisions in this bill. The Scrutiny of Bills Committee noted:

... in respect of some of these offences, the maximum penalty is seven years imprisonment and 420 penalty units.

Is this the provision whereby persons will face serious penalty if they actually seek to restrict the actions of a developer and it is proved that they have acted inappropriately or improperly?

Mr Macintosh—There are clearly very serious penalties that can be applied under this legislation. Unfortunately, I have not had a good opportunity to look at how the strict liability provisions are going to operate. That is a consequence of the fact that this is a 410-page bill.

Senator CARR—Yes.

Mr Macintosh—I just have not had time.

Senator CARR—Thank you.

CHAIR—Senator Carr, we have to move on to Senator Siewert at this stage.

Senator SIEWERT—Thank you. I would like to go back to the issue of bioregional plans. There are a couple of issues specifically. The first is the issue where it says that the minister

cannot exempt an action that consists of certain nuclear installations. You say in your submission that:

These restrictions do not cover a number of types of nuclear actions, including ... nuclear waste facilities and uranium mining and milling.

So is my interpretation of that that if they did a bioregional plan that says, 'These activities are acceptable in this area,' that need not then go through the public scrutiny? How would that work?

Mr Macintosh—Yes. As you said, you could prepare a bioregional plan that exempts a nuclear waste dump, for example, from the operation of part 3. That is the relevant provisions that concern nuclear actions; I think it is section 22. As a result, once the bioregional plan has been prepared then that action is exempt and you do not have to go through a public process. The interesting thing is that in preparing the bioregional plan there is only guaranteed public consultation in relation to plans prepared in Commonwealth areas, not in relation to bioregional plans prepared in states.

Senator SIEWERT—So let me get this right. If it is not in a Commonwealth area, a state could prepare a bioregional plan saying, 'It is okay to have a nuclear waste dump or uranium mining,' and therefore, because it is not part of the exemption, it would not need to be assessed.

Mr Macintosh—Yes, that is right. If they prepare a bioregional plan that said that in a state, yes, that would not have to be assessed under parts 7, 8 and 9, and also the public would not be guaranteed of having any consultation on the preparation of the bioregional plan.

Senator SIEWERT—I want to go back to public participation in a minute, but I want to stay on bioregional plans for a minute. A bioregional plan is prepared. What happens if new scientific information becomes available? Is that able to be taken into account or is it automatically not now covered?

Mr Macintosh—No, if it has been exempted it is exempted, so if new information arises then you cannot take it into account. The action has already been taken, or it has already been basically approved under the bioregional plan. The government could then subsequently remake the bioregional plan, but that is totally at its discretion.

Senator SIEWERT—That is the discretion then of the government that does the plan in the first place.

Mr Macintosh—That is right.

Senator SIEWERT—In view of time I am going to be quick and move on.

Mr Macintosh—Sure.

Senator SIEWERT—In terms of public participation it seems to me from reading a number of the submissions and your submission that public participation has been significantly cut through a number of provisions in this bill, including bioregional planning, in the nomination process. Is that a fair assessment on my part?

Mr Macintosh—Yes, definitely. There is no doubt it has been cut back. The minister has been given far greater discretion over when public participation occurs.

Senator SIEWERT—That is in terms of threatened species listing, heritage listing—

Mr Macintosh—And also in terms of assessments of actions under part 8.

Senator SIEWERT—I was going to ask you about the greenhouse trigger, but I think we have been there. When we were doing the national parks inquiry, the issue of granting oil and gas exploration permits and production permits in marine areas came up. If I interpret what was said properly, they were saying that the head of the department could give permission for oil and gas exploration to occur in marine protected areas if it was covered in an interim management plan. Have you looked at that?

Mr Macintosh—I am not 100 per cent sure about the operation of the petroleum act. If I gave advice it would be off the top of my head and really not worth a lot.

Senator SIEWERT—I will follow that up.

Mr Macintosh—I can help you with that later if you would like.

Senator SIEWERT—Yes, it would be appreciated if you could provide some information on that, because it seemed to me that again that removed those activities from being properly assessed through this process, and from public scrutiny.

Mr Macintosh—Yes. One thing you should note about that is that the government is currently carrying out a strategic assessment on exploration, so my guess is that what will happen out of that process now, if this bill goes through, is that they will use the strategic assessment process to exempt petroleum exploration under the legislation. So it will only effectively go through the petroleum act as opposed to having to also go through the EPBC Act.

Senator SIEWERT—Going back and using the Burrup as an example of the heritage issues, my understanding of what the new process could mean is that if the Burrup was nominated, as it just has been, it could in fact never be assessed. Is that a correct interpretation of the implementation?

Mr Macintosh—Yes. This is quite a funny case because it has already been assessed and it is basically waiting for the minister's decision, but the minister now has a discretion whether it stays at that point in the decision-making process. If the minister does nothing, Burrup goes back to the beginning and then the minister can knock it off before it actually goes through the assessment process again. So it could already be stopped, unless the minister actually does something proactively.

Senator SIEWERT—Two questions arise out of that. The first is: what is the time frame in which he will now have to make a decision about the future of the Burrup?

Mr Macintosh—If the minister exercises the discretion and determines that Burrup stays where it is in the assessment process, under the new provisions the minister can indefinitely postpone his decision forever. There is no restriction.

Senator SIEWERT—If the provisions of this bill go through, if somebody had nominated the Burrup now the situation could arise that it could in fact never be assessed?

Mr Macintosh—That is right. Under the current processes a person nominates, it then has to be assessed, unless it is vexatious. It goes through the process; the minister can extend the

process for about five years and then has a 90-day decision at the end of that decision time line. Under the new process what will happen is that if you nominate, say, the Burrup Peninsula, the minister then receives it, the minister gives it to the Australian Heritage Council, and the Heritage Council then determines whether the Burrup should go on the list. That list is then given to the minister, the minister gets a chance to vet the list—obviously for political things—and then it goes through after that and it is assessed. They also set the time lines and how long it is going to take him to assess that place. They can extend them, but there is a restriction on how many times they can extend the time lines that they set, and then the minister at the end can then indefinitely postpone how long the minister takes to make the final decision. So, effectively, I do not understand why they even have the process because it is so wide open as to be almost preposterous.

CHAIR—Senator Siewert, I think we will have to go to Senator Bartlett.

Senator BARTLETT—Given the time constraints, I have just two things. Leaving aside the points you have made about specific problems with the impact and the positive bits you have pointed out, have you been able to detect in the admittedly short time available whether there are aspects that do not do what they say they are going to do? I am asking about poor drafting or unintended consequences? I know that it is always a little bit difficult to assess the intent, but are there cases of the EM saying it does one thing and the wording is different? Have you picked up anywhere that you have just gone: ‘Hang on! That does not actually do what they reckon,’ or ‘That is going to cause some problems they have not realised.’?

Mr Macintosh—Not really. The main thing was that I thought the fact that the nuclear exemption was not even mentioned in the EM was quite interesting. In terms of unintended consequences, I do not think so. One concern I do have is with the changes they are making to the prior-use exemption. I do not know if you have seen that. A prior-use exemption is called existing uses in other jurisdictions; that is the idea. If you were doing something before the legislation commenced then you are allowed to continue to do it. They have inserted this new provision that says that an action will remain an existing use if you change where it is occurring and even change the nature of the action, so long as it does not result in a substantial increase in the impact on the land. I assume they know what they are doing but, as a consequence of that, it is basically really widening the scope of that exemption. So that is one concern I do have.

Senator BARTLETT—So it remains an existing action even if it becomes a different action in a different place.

Mr Macintosh—That is right, and that is really inconsistent with what has happened in other jurisdictions. In the 1950s and 1960s there were a number of High Court cases that concerned this very issue. As a result of that and of subsequent decisions in New South Wales, for example, they have actually legislated to make sure that it is perfectly clear that an action stops being an existing use the minute that it is changed basically in any way that is substantial. Under this provision that is not going to be the effect.

Senator BARTLETT—If I recall correctly, in a previous incarnation you worked tracking all of the referrals and those sorts of things under this act. Am I remembering right?

Mr Macintosh—Yes.

Senator BARTLETT—That experience must have been fun for you. Do you think there is too much red tape in the process at the moment?

Mr Macintosh—Not at all. As I said in the introductory statement, there are so many exemptions from this process; the minister can pick and choose whatever they want, so I find the claim that there is too much red tape in this legislation very difficult to accept. In fact, all the government reports that have been prepared on this state that this legislation is supposedly the best in the world and an example of how environment and planning legislation should be prepared. The Productivity Commission, for example, said that. So for the government now to turn around and say, ‘Geez, no; there is too much red tape in this,’ is patently wrong.

Senator BARTLETT—The Productivity Commission did not assess it as having too much red tape?

Mr Macintosh—No.

Senator BARTLETT—They are usually a fairly economically dry, red tape averse body.

Mr Macintosh—I think they are very conservative and red tape averse.

Senator BARTLETT—I am not saying that you are not, mind you; I am just clarifying their role. You have included with your submission your assessment of the record thus far with the act. In your opening comments, you mention political will or lack thereof. According to your assessment, under the existing law there is already fair scope for a lack of political will to mean that not much happens. Even if we make the improvements, you suggest that it does not really address the problem.

Mr Macintosh—Yes. You can have the best piece of legislation in the world; but, if you have no political will, it is worth nothing. In the end, it is always going to come down to political will. But I think you can also improve the structures to make sure you get the best out of any piece of legislation and, as such, this legislation has a lot of improving to do.

Senator BARTLETT—I had better leave it there.

CHAIR—Thank you, Mr Macintosh. Time is short, but thank you very much for your appearance.

[9.25 am]

MARSHALL, Mr Duncan, Adviser, Australia ICOMOS

PEARSON, Dr Michael, ACT Representative, Australia ICOMOS, and Chair, ACT Heritage Council

CHAIR—Welcome. Do you have any comments to make on the capacity in which you appear?

Dr Pearson—I appear this morning wearing two hats. One is in relation to Australia ICOMOS and the other is as the chair of the Australian Capital Territory Heritage Council, which has made a separate submission. I will illustrate that I will change hats as issues come up which affect both organisations.

CHAIR—Would you like to make an opening statement?

Dr Pearson—Yes. The primary submission we made is in relation to Australia ICOMOS. Australia ICOMOS is and has been for the last 20-plus years the primary heritage organisation guiding heritage philosophy and practice in Australia. Australia ICOMOS is a national branch of International ICOMOS, an organisation set up in 1965 under the auspices of UNESCO. Australia ICOMOS was formed in 1976. It currently has about 400 members who are all professionals operating in one form or other in the heritage field. It has had an ongoing role in promoting best practice in relation to heritage planning and, as a spin-off of that, in commenting on heritage legislation around the nation. It has had a major role in commenting on the initial EPBC Act, both in formal submissions and in discussions with ministers and government departments, and it takes up that role now in relation to the proposed amendments.

As a background, Duncan Marshall and I are long-term members of Australia ICOMOS and are heavily involved in the formulation of policy and comments in relation to legislation, listings and conservation planning procedures. I was a former chair of Australia ICOMOS and a former Deputy Executive Director of the Australian Heritage Commission. I am currently Chair of the ACT Heritage Council. Duncan has also had roles at a senior level both in the Australian Heritage Commission and in the Australian Council of National Trusts. We both now work as heritage consultants around Australia and have a lot to do with both policy and conservation planning, using the EPBC Act.

CHAIR—Thank you very much. Mr Carr, do you wish to start?

Senator CARR—The government does not want to take the first call?

CHAIR—We are offering it to you, if you wish it; if not, I will give it to Senator Siewert.

Senator CARR—I am more than happy to start on this occasion. Thank you very much for your submission, Dr Pearson. I detect a note of regret in your submission. You speak about the lack of consultation at the time of the changes to the Heritage Council Act. Were you consulted?

Dr Pearson—Not directly. 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. There

had been previous discussions through a peak forum group in relation to Australia ICOMOS's concerns. I suppose our disappointment concerns a number of long-term issues raised by Australia ICOMOS and many others—in particular, the demise of the Register of the National Estate. In our view, there is a lack of proper understanding on the part of the department and the minister about the role it actually plays in conservation in Australia. There was also disappointment in relation to the listings processes, which we think lack transparency and muddy the waters between the processes of assessment of heritage significance and management decision making. If you link the two together, you have listings based on management issues, not on assessment issues.

Senator CARR—Dr Pearson, I recall that prominent members of your organisation supported the government on the heritage legislation. Do you think you were had?

Mr Marshall—The process of developing the heritage amendments—as I am sure some of you around the table will remember—was a long and tortuous process.

Senator CARR—Yes.

Mr Marshall—Australia ICOMOS, along with a number of other non-government heritage organisations, had a very active role in trying to promote good conservation outcomes through the legislation. To some extent, the outcome was never going to be simply what resides within the legislation itself. It is a package of measures, including the sorts of programs and policies which underpin the legislation itself. For example, when we had discussions with government about the EPBC Act amendments to the National Heritage list, for example, the National Heritage list was sold to many as an opportunity to engage the community in a national conversation about heritage. In the actual implementation of the legislation, we have seen faltering steps in that direction, partly because of apparent problems with the legislation, which these amendments now seek to address. But there are other issues with the implementation of the legislation which, it is probably fair to say, we are disappointed have not achieved a more effective outcome.

Senator CARR—So it is fair to say you were conned.

Mr Marshall—Your words, Senator.

Senator CARR—I refer to parts 2 and 3 of your submission and the abolition of the Register of the National Estate. You suggest that the reasoning behind this is specious. Have I read that correctly?

Mr Marshall—That is the word used.

Dr Pearson—Yes.

Senator CARR—So why is it specious?

Dr Pearson—There are several arguments for the abolition of the RNE. One is about the apparent duplication of processes and the confusion caused by that. So, on the one hand, these amendments demolish the Register of the National Estate but then, on the other hand, introduce the list of overseas places of historical significance to Australia which, in our view, has exactly the same status as the RNE currently has. The other argument was that it clarified the relationship between the Commonwealth and the states in relation to who was responsible for what, but the reality is that the Commonwealth has not looked very closely at how the

RNE in fact works—it is embedded currently in state but particularly local government conservation processes—and that a five-year time frame for the wind-down of the Register of the National Estate is in no way going to be satisfactory in terms of allowing states and local governments to come to a process which replaces the protective role that the RNE actually plays at that level.

Senator CARR—So you would say that this was a regressive move?

Mr Marshall—It fails to build upon an asset. The Register of the National Estate is an asset. It is probably unique in the world in terms of an attempt at a comprehensive listing of heritage places across all of the environments—historic, Indigenous and natural—at all levels of significance from local up to national and world as well. It was built up over a very long period of time, involving considerable Commonwealth resources and considerable community and other levels of government support. That asset sits there as an opportunity into the future for Australia to build a better heritage system. Our concern is that the value of that asset is not being perceived; rather, there is this rather ideological view that duplication in any form is a bad thing. There is an apparent duplication—and, to some extent, it may be more apparent than real—and therefore there is this strong desire to get rid of the RNE as a way of reducing duplication and increasing simplicity. The EPBC Act is by no means a model of simplicity. The argument about the RNE needs to be rethought. We need to look at how we can build a better national heritage system using the benefits of the RNE rather than simply dispatching it.

Senator CARR—What do you think of the proposal to establish priority themes for possible nomination of national heritage places? Does this concept of priorities arbitrarily chosen by the minister reflect good heritage practice?

Dr Pearson—I think in itself the use of a thematic approach is not a bad thing. It certainly helps focus assessments in a comparative context, which is important and necessary if you are talking about a national list. Our fears are that the way in which that could be done, and can be done, through the amendments is in fact potentially a restrictive process. The extent to which the minister can restrict his consideration and the Australian Heritage Council's consideration of nominations in any particular period to those that he has identified as being the themes that he wants to see is controlled by regulation. The regulations are not before us. It could well be that the regulations are phrased in such a way that they give the minister very simple powers to disallow nominations which do not fall within the themes that he wants to see as priorities in any particular period.

Senator CARR—Yes.

Dr Pearson—The effect of that is that you could read what is being said in the amendments as disenfranchising the community from the reality of being able to nominate places with any likelihood of them being considered if they do not happen to fall within the thematic area that the minister is interested in at the time, and in other ways upsetting.

Senator CARR—No doubt you are familiar with the debate over the Bald Hills wind farm project in Victoria and the claim made that the minister used this project as a vehicle for the expression of his personal political interest in the protection of a marginal seat candidate for

the Liberal Party. Are you concerned in any way that the use of heritage as a personal vehicle for political advantage may well be an integral part of what these proposals involve?

Mr Marshall—There is a way of responding which perhaps reflects more of our concern in the submission.

CHAIR—If you would, just stick to your submission.

Senator CARR—No. You are here to say what you like. Do not be intimidated by these bullies.

Mr Marshall—I think the greater concern would be that there are thousands of people out in the rest of Australia who care passionately about their heritage places, and they may come up with very worthwhile places for nomination to the national heritage list and indeed other heritage lists. Australia ICOMOS's concern is that this process appears to shift the balance too far in one direction, in a way which may disenfranchise those people from their ability to put forward in good faith worthwhile places for the various heritage lists. Through no fault of their own, those nominations fail because they do not match up with the current priorities at the particular time. The minister and the government have a problem to address with the orderly development of the national heritage list and indeed the Commonwealth heritage list, but where these amendments fall in terms of addressing that problem seems too far in one direction.

Senator CARR—I take it you have had a look at the question of penalties in this bill and the issue of the rights of search and seizure without warrant and the right to personally frisk people. Have you looked at all those provisions?

Dr Pearson—It has not been one of our high priorities, no.

Senator CARR—It might have to be now.

Dr Pearson—One of our concerns is the time frame allowed for this. You are talking about a voluntary organisation trying to deal with a 400-page amendment of a 600-page act in a two-week period. That is not a good mix.

Senator CARR—Yes. You have seen the provision for new penalties, a maximum penalty of seven years imprisonment? Have you seen those sorts of provisions?

Mr Marshall—No. We understand that there are increased penalty provisions but we have not focused on those.

Senator CARR—There was a unanimous Scrutiny of Bills Committee report here in the Senate expressing very grave concerns about these matters. I wonder if you have had a chance to look at that and tell the committee what you think in terms of how it applies to the sort of work that you might be able to undertake, particularly in terms of the implications for third-party rights, given that your submission places particular emphasis on the rights of communities. The claim you make here is that 'the government's approach is unbalanced'. What did you mean by that? It is on page 5 under the heading 'Potential to limit community identification of national heritage places'.

Mr Marshall—That was because of this problem I was alluding to with the national heritage list process, whereby anyone at the moment can make nominations for the national heritage list. That triggers certain processes within the government, within the department, to

assess and deal with those nominations within strict time frames, and that requires significant resources on the part of the department in particular. The listing process has become simply a reactive mechanism to whatever comes in the door at any particular time. Now, that is the problem which the government is seeking to address with these amendments, and we understand the issue and recognise there need to be some changes made to remedy that situation. But the unbalanced part is that preparing a national heritage list nomination—a credible, well-researched and -documented national heritage list nomination—to meet the standards of the department, the Australian Heritage Council and the minister is a resource-intensive activity. The Commonwealth is putting up all of these barriers to national heritage list nominations coming forward, but it is not actually providing any support or resources to help the community to actually do a good job, and that is where I think the imbalance arises.

Senator CARR—Thank you.

CHAIR—Thank you. We will go to questions from the government. I might ask you about the Register of the National Estate being abolished. It is really just ceasing to be a statutory list, isn't it? It is still there.

Dr Pearson—Under the current act it ceased to be a statutory list.

CHAIR—Right. Nevertheless—

Dr Pearson—It is in the legislation but it has no statutory effect other than requiring the minister to take into account places on the Register of the National Estate when considering his decisions on matters.

CHAIR—There appears to be a little bit of disagreement.

Dr Pearson—Duncan is going to elaborate.

Mr Marshall—If I may, I will refer to one of the selling points of the original heritage amendments, particularly with regard to sections 26 and 28, which protect Commonwealth land and protect the environment from Commonwealth actions. Those provisions relate to actions affecting the environment. We were sold the idea that the environment in that situation included places on a credible heritage list, and a credible heritage list included the Register of the National Estate. So, to some extent, the Register of the National Estate has a sleeper function, if you like, with regard to those real protective provisions within the existing legislation. So, notwithstanding the amendment which removes it from formal consideration by the minister, we were previously told that consideration of that list would have to be made by agencies or people taking actions, insofar as they were Commonwealth agencies taking actions affecting the environment, or anybody else taking actions affecting Commonwealth land.

CHAIR—How many items are there on the Register of the National Estate?

Mr Marshall—About 13,000, I think.

CHAIR—That is what I believe to be the case. It is a very long, big, amorphous list in many ways. I remember being in local government and recommending matters to be put on that list. We have a number of other lists, don't we? There are the World Heritage list, the National Heritage List and the Commonwealth Heritage List, and the states have heritage lists

and so on. Wouldn't you agree that there is some argument that you need to have a more focused list with conditions which establish the real heritage value of nominations?

Dr Pearson—The problem from my view is that the process of moving from the RNE to a new regime which does that, which provides protection at different levels, at different places and identifies them—that process of transformation from one to the other—has not been thought through in terms of ensuring that there are not, in fact, things falling through the gaps in the exercise. What this amendment does is say: okay, you have basically got five years, and the RNE ceases to be something which is referred to in the act specifically as the RNE, and it seeks the states and local government processes to basically also follow that line. Many of the state and local government processes refer to RNE listed places as a trigger for consideration of heritage issues in development. If this amendment goes through, those safeguards will disappear. There will not be a formal thing to refer back to. But in that process there is no mechanism put in place by the Commonwealth to assist the states and, in particular, local government to fill that gap, to bring in provisions which protect it.

If I can just swap my hats around to wear the ACT Heritage Council chair's hat, a perfect example is right here in the ACT. On designated land the planning authority is the National Capital Authority. There are at least 20 places around the central national area which are within designated land. While the ACT can put them on its register it has no impact, no effect, in terms of the ACT planning laws. They cannot go on the Commonwealth Heritage register because they are not managed by a Commonwealth authority. They are not of sufficient significance to go onto the national register. If the RNE goes into demise there will be no formal recognition at Commonwealth level of those places within 200 metres of Parliament House. What we are saying, and have been saying for a while, to the Commonwealth is: 'Let's talk about mechanisms to fill this gap.' I am not saying these places are at imminent risk, but they do not have the same protection and the same clear, transparent planning processes that other places have, and it is because there has not been enough thinking through of the transferral from the RNE type protection to a much more rigid Commonwealth-state-territory protective mechanism.

Mr Marshall—Australia ICOMOS and probably lots of other heritage organisations are not wedded to the idea of endless lists. The world is full of lists.

CHAIR—Yes.

Mr Marshall—But you have got to recognise that the Commonwealth, in bringing forward the heritage amendments, created several new lists in that process which perhaps in hindsight may not have needed to be separate, stand-alone lists. If we were looking with wisdom back on the range of lists that we have we would probably say, 'Is there a better way of going forward?' The creation of this new list of overseas properties just adds to potential confusion and the proliferation of lists. What we would argue is that there needs to be some stepping back and looking at the purposes to which we want to put these various lists, the possible roles they can play, and to develop a more strategic approach to the lists we have at the moment and where we want to go with lists into the future.

Unfortunately, this is a sort of 'take it or leave it' approach, and if the Register of the National Estate stops being a statutory list, the practical impact of that is that government departments find it harder to fund things which are non-statutory than they do to fund things

which are statutory. The RNE is teetering on the edge of resource allocation at the moment, and if it becomes non-statutory it will simply fade into the background and have no resource allocation at all. The useful role that it can play into the future will be lost.

CHAIR—What I get out of what you have both said is that you agree that perhaps we need a bit more systemisation in our lists and perhaps greater order. What you seem to be saying is we need to have maybe some sort of consideration of a means of transferral. That could be a recommendation of this committee, for example, that that kind of mechanism is set up. Would you support that kind of approach?

Dr Pearson—Certainly our primary objective is to ensure that the mechanisms by which the community can identify the significance of places that it values and mechanisms by which it can see those places recognised by government at all levels is the key consideration. We are concerned that the current amendments remove what at community level is seen as a mechanism for identifying places which it values, and we need something to put in its place. So it is about working through the mechanism of ensuring protection at all levels. I think one of the problems with discussing the amendments and everything else is that the attention of people is at the top end. It is about the Burrup Peninsula; it is not about the town hall in Upper Woop Woop—but that is the heritage that most of the community in fact engages with. That is the side of this that we think is at risk.

CHAIR—I understand that point. That is a very big list, the Register of the National Estate. Thank you for that. I will go to Senator MacDonal now for our last five minutes.

Senator IAN MACDONALD—The government or the department argue in the explanatory memorandum that they have had six years of consultation. Would you concede that you have been talking to the government over the term of the principal act and making suggestions over the six-year period? You say that some of the suggestions you have made you have discussed with the department over the years.

Mr Marshall—Six years of consultation on amendments—

Senator IAN MACDONALD—On whether the original act is doing what it was supposed to, and whether there are glitches in it. The explanatory memorandum says that their consultation raised a broad variety of issues which need to be looked at: duplication between Commonwealth and state, heritage provisions that place onerous obligations on Commonwealth agencies et cetera. They are on page 17 of the explanatory memorandum. I assume that some of those you would agree with.

Mr Marshall—To respond, in one of the earlier rounds of discussions with departmental people a list of five pages of 21 issues was identified.

Senator IAN MACDONALD—By you or by the department?

Mr Marshall—No, by a group of non-government organisations, including Australia ICOMOS.

Senator IAN MACDONALD—Yes.

Mr Marshall—I think only a few of these issues have been picked up and dealt with in the amendments, so we still have quite a long shopping list of issues.

Senator IAN MACDONALD—Sure. But the point is you were consulted. Having been consulted, the government did not take on everything you said, so you are annoyed about that, naturally enough.

Mr Marshall—It is probably also fair to say that until the very last moment the actual form of the changes was not revealed to us. For example, the demise of the RNE, while that has been murmured about, until we actually saw the words we did not realise that the government was seriously pushing ahead. There was another sort of a meeting with a variety of government people where arguments were put, and they seemed to be listened to and appreciated, but nonetheless when the actual amendments came forward—

Senator IAN MACDONALD—The consultation process does not mean you are consulted and everything you say happens. The consultation process is the government listens to you—after all, they are the government—then they say: ‘Well, we have heard you but we do not agree. We are going to do this.’

Dr Pearson—Which is why we come to a Senate hearing and make our points again.

Senator IAN MACDONALD—Yes. We are not the government, of course.

Dr Pearson—No.

Senator IAN MACDONALD—We are a committee and we are interested in this. I do concede, as I did with another piece of legislation this committee dealt with, that the time frame allowed to us and you to look at it is too short. That is something I think the government has got to get a bit real about, but I can understand, as a former minister, that there is an ongoing consultation process. It is not just when the legislation comes out. You are in constant contact with the government, aren’t you?

Mr Marshall—Yes. I should say, having been involved in the development of the original major batch of heritage amendments, the degree of consultation in that phase was much more extensive and inclusive than the consultations that have taken place with this last batch of amendments, which have been minimal.

Senator IAN MACDONALD—Yes. Again, looking at the explanatory memorandum, the department or the government goes through that and lists the reasons why these changes come about, and I refer to page 3 of the EM which talks about ‘the following requirements are inefficient, onerous or unnecessary’ and a number of decision points, ‘the prescriptive requirements for preparation of specific recovery plans’ et cetera. I will not read them all out. A lot of those you would agree with, would you—that is, the need to address them? Whether they have been addressed correctly is another question but, having read the EM, do you accept that what was said to be wrong has some merit to it? Whether the corrections have been right is a different question.

Mr Marshall—The principal area of concern that we would probably agree with is that the listing process has a problem with it which needs to be addressed, and that is the problem that I outlined about nominations coming in at any time and tying up government resources in ways which are not necessarily effective for long-term heritage protection. Whether this is the right answer, I think we have got other views about it.

Senator IAN MACDONALD—The EM again says:

Experience with the operation of the Act has revealed a range of provisions which may be ambiguous, anomalous or which lack certainty in certain situations.

Mr Marshall—We have got a list of other things which we think are anomalous and which are more complex.

Senator IAN MACDONALD—In the original act?

Mr Marshall—Yes.

Senator IAN MACDONALD—And you have made them available to the department?

Dr Pearson—Yes, several times.

Mr Marshall—And at some stage there will be another bill and another Senate hearing about making further changes, presumably.

Dr Pearson—We acknowledge that there were issues and problems from an administration point of view with parts of the act. Our concern is that the solution to those through these amendments goes, if you like, too far the other way. It is more or less like the *Yes, Minister* hospital beds query. You have a wonderful bit of legislation but nobody can nominate anything with any likelihood of getting it up.

Senator IAN MACDONALD—I will finish here, Mr Chairman. Do you have or have you had a sort of a list of those things you put to the department, and have you got a response from the department on why they have not agreed with you on those?

Mr Marshall—We certainly have a list and we have had a broad response from the government to say that their resources have been focused elsewhere in solving these other particular problems, and that at some future time they will come back and address these other problems. Resourcing is an issue in the heritage area.

Senator IAN MACDONALD—Of course.

Mr Marshall—They seem to be struggling both in terms of the quantum and also the quality and depth of expertise they have to address the range of issues. They have been struggling to get their system up and running and working effectively.

Senator IAN MACDONALD—I am not sure how well resourced your organisation is and I do not want to put you to cost, but I think it would always be instructive if you could list what you thought was wrong and what the solutions were, but then have another column that says, 'This is the government response.' Now, the government might just say, 'Well, look, as a policy decision we do not agree with you.' Okay. You will not accept that but at least it has been looked at. But in some other areas where you are talking about technical processes, it would be interesting to see what the department has replied to you and whether they are right or you are right in those sort of things. Have you ever thought of doing something like that?

Mr Marshall—I suppose we view the list as an ongoing basis for conversation with the department, and we have never had anything formally in writing from them responding to these issues, but I suppose we could do that as a way of advancing that and perhaps making that more widely available to this committee or otherwise.

Senator IAN MACDONALD—Again, there are some things in a policy area you will not agree with, but I take the view in these things that very often your intimate knowledge of

these areas can help the government achieve what it has set out to do, not to change the general policy that the government goes to but to actually effect the input.

Mr Marshall—I would underscore the resourcing problem.

Senator IAN MACDONALD—Yes.

Mr Marshall—For example, both Michael and I, in our daily working consulting business, are involved in assessments of places of heritage value which are on, for example, the Commonwealth Heritage List. Some three years after the implementation of the legislation we do not have any assessment guidelines for how we should undertake that process, as there was, for example, under previous Commonwealth heritage regimes. At the moment there is nothing really even on the horizon that will help us—

Senator IAN MACDONALD—Are you saying that the reason for that is that the department does not have the resources to sit down and write out the guidelines?

Mr Marshall—Yes. For example, with the National Heritage List, everybody is struggling to get good, credible National Heritage List nominations up and running. The department has commissioned a series of thematic essays, and in fact Michael was the author of one of those thematic essays which the minister is very favourably disposed towards and had it published and all those sorts of things, but there are a series of other thematic essays which would give people a strong sense of what are the sorts of places that should be nominated under those particular themes. Those essays sit within the department and they cannot be released because some bit of work needs to be done, and that work cannot be done because they do not have the resources to do it. So all of those people who might want to nominate places under any particular theme do not have the benefit of that information to guide them in their nominating process, and there is no timeframe and no resources to actually move this forward. So it is catch-22. We are struggling here a bit.

Dr Pearson—There is not even any real understanding out there of the context for national list consideration by the Commonwealth. I have been approached over the last couple of weeks by two local government areas in Sydney, saying, ‘We would like to nominate place X for the national list.’ I said, ‘Have you thought about the context of it and the process that it would have to go through?’ Under these amendments, if those places did not fall into one of the themes identified by the minister on an annual basis, they would be pushing it uphill to get any real consideration of their place in a thematic context, again, partly because of the embedded resource limitations—things which are actually in the act—so the AHC has to consider nominations partly on the basis of its capacity to assess the nominations in a national context. So there is not enough information going out there to potential nominators about the process.

Senator SIEWERT—While we are talking about the list—there is a number of lists but I am referring to your list—is it possible that you could table it or, if you do not feel comfortable tabling what you have got, could you provide the committee with a list of what you think would be positive changes?

Mr Marshall—Can we take that, go away and get back to you?

Senator SIEWERT—Yes.

Mr Marshall—I think in principle, yes.

Senator SIEWERT—I would like to go back to that in a minute to ask you about some of the things that you would see as positive changes. I want to now go from where I left off when I was talking to Mr Macintosh, and that is about what would happen to the Burrup. I am using Burrup as an example because it is current and it is close to my heart. My understanding of the proposed new process is that it is possible that a place like the Burrup—and I think many people believe—one of the most important rock art sites in the world, would never get on the national list using the process that the government now proposes. Is my analysis overly—

Mr Marshall—Pessimistic.

Senator SIEWERT—Pessimistic, yes.

Mr Marshall—My understanding is that that is correct.

Dr Pearson—Yes.

Mr Marshall—If the government does not choose that as a priority theme, then it falls outside the capacity of the system to deal with it.

Dr Pearson—And the minister can consider a range of matters in removing something from nomination at two points: one at the start of the exercise when he gives the list of places on an annual basis to the AHC; and at the end of the exercise when the AHC comes back to him with their recommended list.

Senator SIEWERT—Yes.

Dr Pearson—So there are two discretionary points in that exercise, and part of the basis for his discretion is information which is not limited to information about significance.

Senator SIEWERT—You were saying before that there are changes that are needed. So if you accept the premise that changes are needed, reading from the submissions—from your submission and other heritage submissions—you do not agree with the changes that are being made. What changes would you suggest could be made to deal with the fact that the system is not perfect at the moment, but that—and I will put my cards on the table—places that have the potential significance of Burrup do not fall through the holes?

Mr Marshall—The problem seems to have been poor quality nominations coming forward to the National Heritage List under emergency or the ordinary provisions relating to the National Heritage List. To some extent the existing legislation has provisions which supposedly allow the department and the minister to deal with poor quality nominations, and those are subsections 324E(4) and 341E(4) relating to the two lists. A plain English reading of those two subsections would seem to suggest that if there is some deficiency in the nomination then the minister or the department, whichever it is, can in fact refer the nomination back to the nominator for more information, and nothing further need be done until the reasonable information comes forward. I understand that some strict legal reading of that section, not a plain English reading of it, takes another view of those two sections which make them effectively inoperative for dealing with poor quality nominations unless they are grossly inadequate; I am talking about back of a postage stamp sort of nominations.

Our suggestion would be that you tweak those two small subsections so that you make the plain English reading of those subsections the actual reading—that is, the legal reading of those subsections—so that if you have got poor quality nominations they can be dealt with. We seem to have a tail wagging a very large dog in this case by the whole process being recast, in a way, to deal with that one small problem. I have got no issue with the idea of having a structured approach, a thematic approach, to nominations as well, but if the major issue has been poor quality nominations tying up vast resources then a simpler fix seems possible.

Senator SIEWERT—I want to go on to an area that you may or may not feel you have expertise in—that is, the issue of Indigenous heritage. When the Aboriginal and Torres Strait Islander Heritage Protection Act, after a very short consultation period last year, was amended earlier this year, it came to light yet again that when the heritage amendments were brought in in 2003 then Minister Hill acknowledged that there were gross inadequacies—'gross' is probably my term—in the act that needed to be addressed and undertook to carry out consultation and to fix it. That has not occurred, although I understand supposedly the department is carrying out internal consultation which is not public. We will never know the outcome. There are no amendments in this legislation to deal with that. Do you have any comment on that? Have you been involved in any consultation?

Dr Pearson—As far as I am aware, ICOMOS has certainly not been involved in consultation.

Mr Marshall—In the dim, distant past. I do not think anything has happened in the recent past. I think ICOMOS was very supportive of the Evatt recommendations.

Senator SIEWERT—Yes.

Mr Marshall—This is not our area of expertise, but my understanding is that ICOMOS was very supportive of the Evatt report recommendations.

Senator SIEWERT—Which were 10 years ago.

Mr Marshall—Yes, but which may well stand the test of time.

Senator SIEWERT—They do. I have read them and they do still.

Mr Marshall—How these various bits of legislation currently stand, I have no strong view.

Senator SIEWERT—You have had no contact from the department about this issue?

Mr Marshall—We are not aware of any, I think is probably the answer.

Dr Pearson—No. Again wearing my ACT Heritage Council hat, there is a forthcoming workshop on, for example, criteria to try and get a more uniform criteria understanding amongst the state and Commonwealth jurisdictions and the territories. That workshop is coming up next week or the week after. Part of the problem with the current criteria, from my understanding, is that as they apply to Indigenous places for the national list they are very hard to actually work with. I think that will be one of the areas of some considerable discussion at that meeting.

Senator SIEWERT—Yes.

Dr Pearson—But that is about the mechanisms for assessing places rather than the administrative mechanisms involved.

Senator SIEWERT—That brings up the next issue. The national list does not adequately deal with those areas that are of particular cultural heritage significance to specific Aboriginal communities. I am pretty certain that was identified in the Evatt report as well, but it has certainly been identified in various analyses of the report. It seems to me that with these changes and the register disappearing, we are losing another mechanism to accommodate the need for regionally and culturally specific areas.

Mr Marshall—I am not sure that we would consider the legislation deals with historic heritage protection particularly well either.

Senator SIEWERT—I know we are grossly running out of time, but can I quickly go to the emergency listing process, which you touch on briefly in your submission. Can you quickly articulate your take on the proposed changes for the emergency listing?

Dr Pearson—I think primarily there was an obvious problem with emergency procedures simply because of the timing mechanism and the capacity to actually assess anything in that timing framework in a national context. So we have no problems with the fact that there was a problem with the act, but again we think that the solution to that swings too far the other way. It dramatically increases the minister's discretion in these matters and to some extent the AHC's discretion in these matters as well. It is a mechanism which will not strike confidence into the heart of the community that nominating something for emergency listing will in fact have an effect. Our concern is that the emergency listing process is really neutered by these changes, and it is something where a better thought out mechanism is necessary.

Senator SIEWERT—I have got another two questions following up there. First, you have taken on board providing us hopefully with a bit more information about what you think would be some positive changes to the act. Could you give us some suggestions on how you think the emergency listing procedures could be improved? Secondly, I would have thought, given the changes that they are proposing in terms of the way the assessment process actually is going to be slowed down in terms of possible sites—we have just talked about Burrup—that would have made it even more important to have a good emergency listing procedure. If they are going with a thematic approach and sites may not get assessed as quickly if they are nominated as one would hope, you would need a strong emergency listing process to protect areas that people think are particularly important. For example, I will go back to the Burrup. Just say it had not been assessed, it was not picked as a theme but it was coming under some threat. I would have thought there would have been a need for a process.

Mr Marshall—I am not sure that we have a perfect, ready-made answer for you, but pretty much all state heritage processes have emergency listing procedures in the historic heritage area, and I would have thought there is a track record there which might be worth looking at in terms of how things operate. One of the other sensitive issues is who makes the decision or what is the advice upon which a decision is made. Part of our submission is to strongly stress the need for things to be expert decisions, and particularly decisions about values to be made free of the sorts of non-heritage considerations which can sway people's judgment about whether something is truly of heritage value. Part of our mantra, part of our core belief

system, is that you need to make decisions about values quite separately from management decisions because one can muddy the other.

Senator SIEWERT—You make that point strongly in your submission.

Mr Marshall—There have been apparent issues with some of the emergency listing cases that have come forward under the current system, where there has been some tortured logic in the statements of reasons provided for particular decisions which, in a professional sense, strain the credibility of the system—in an expert sense, they strain the credibility of the system. We are very concerned that that seems to have occurred. It may be very difficult to extract the minister from the decision-making process entirely, but strengthening the role of the expert advisory body, the Australian Heritage Council or whoever, is perhaps an issue that would be worth pursuing.

Dr Pearson—Under the RNE system, for example, the Australian Heritage Commission had to make its decisions on listing or delisting of places solely on the grounds of the heritage significance of the place, with no other consideration. Some mechanism which bound the Australian Heritage Council to that process of a values-alone assessment, and some mechanism which made it much more overt where the minister disagreed with that and why, as a public document, would, I think, go a long way to clarifying that that decision cannot be justified simply by, if you like, perverting the assessment process—for example: ‘Yes, the assessment process is there; it has got values. I as Minister X make a decision why, and here are the reasons why and it has got nothing to do with heritage assessment.’ At least that is an overt decision-making process, which at the moment it is not. It is just muddled.

Senator SIEWERT—If you have any further thoughts on that, we would appreciate hearing them.

Mr Marshall—There are resourcing implications as well. Having a well-resourced, expert staff to support this process will go a long way to fixing many of the problems. I am pretty sure we do not have that at the moment!

Senator SIEWERT—It is a point well taken.

CHAIR—We have to finish there. I thank you for your appearance. If you have further comments to make, of course, you can send them in.

Dr Pearson—Thank you very much.

Mr Marshall—Thank you, Senator.

CHAIR—I refer in particular to amendments that might assist in rationalising lists.

Mr Marshall—I think the answer there is not to instantly come up with a suite of legislative fixes at this point in time. I think there needs to be some other process which steps back from specifics and looks broadly at how we are using lists across Australia, how many lists we have got and where they need to go. As I say, we should be building on the assets we have and not necessarily discarding them unreasonably. I think there is another process that needs to take place, rather than us firing in specific suggestions for amendments to you at this point in time.

CHAIR—You can write us a further addendum and suggest a process, perhaps.

Mr Marshall—Maybe another committee inquiry!

CHAIR—In due course.

Senator IAN MACDONALD—Chair, perhaps it is something we as a committee could keep in mind to look at.

Senator CARR—Maybe the bill should be withdrawn.

CHAIR—Many things are possible, Senator Carr, but I doubt if that is an option.

Senator CARR—That is the point: you should be clear about it in your submission. I understand you are actually seeking that the bill not proceed in its present form.

Senator IAN MACDONALD—That is not going to happen.

CHAIR—That is not going to happen, Senator Carr.

Senator CARR—But it certainly could happen.

Mr Marshall—We would certainly seek changes to it, yes.

CHAIR—Thank you very much.

[10.16 am]

BERGER, Mr Charles, Legal Adviser, Australian Conservation Foundation

TUPPER, Mr Graham, National Liaison Officer, Australian Conservation Foundation

CHAIR—Welcome, Mr Tupper and Mr Berger. Do you wish to make a short opening statement?

Mr Berger—Yes, we will, thank you very much. We have concerns that the bill in its current form represents a substantial increase in ministerial discretion and a decrease in ministerial accountability, but also that it is a missed opportunity to empower the Commonwealth to take serious action on issues of national environmental interest, including climate change and water use. I will just make a few short comments and then I will turn over to my colleague Graham.

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. As one indication of the resource constraints, the current act provides for a register of critical habitat which is envisioned as setting forth the critical habitats in which the threatened species live. Currently, there is critical habitat listed for only five species of the hundreds of threatened species that are currently listed under the act, so it is a provision that, for all intents and purposes, is not being implemented whatsoever.

As for the 840 recovery plans that are said to have been adopted or are in preparation, many of them have indeed been adopted but are now long out of date and can no longer be said to be accomplishing anything for the protection of the species. 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.

The second broad area of concern that we have about the bill is that it creates the potential to bypass the environmental approvals requirements of the act on a massive scale. I say that it creates the potential for that, not that that is the intent or that that is what will immediately happen, but there is a very substantial increase in ministerial discretion and the removal of public consultation processes around the new planning instruments that are contemplated. Those include things like conservation agreements, accredited management arrangements and strategic assessments. There is very little detail on the types of strategic assessments or the types of conservation agreements that are contemplated, but there is very broad scope for those to be extended and, really, for them to be implemented as an alternative entirely to the

approvals process currently under the act. I might leave it there and turn over to Graham for some further comments.

CHAIR—Thank you.

Mr Tupper—I just want to highlight two things as missed opportunities. One is climate change. 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 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, along with other actions that have been contemplated in other places—for example, a sustainability charter and perhaps a sustainability commission that is being worked on in another inquiry—those acts in themselves will give greater strength to our international credibility and the international case for taking strong action on climate change.

The other missed opportunity is major water extraction. This is an area that we need to confront in Australia. A couple of possible examples are the Mount Springs area in South Australia, where BHP was seeking to extract major amounts of water. That has now since been reversed. But those sorts of impacts and perhaps huge impoundments similar to Cubbie Station should be considered in the future. They are just a couple of examples of things we should be considering.

CHAIR—Thank you. Senator Siewert, we will begin with you.

Senator SIEWERT—Can I go to regional plans first. I do not know if you were here when Mr Macintosh was talking to us about bioregional plans. Do you concur with his assessment that there is potential to reduce public involvement in decision making and bypass provisions for environmental approvals? He went further and said that it may mean that environmental mining, milling and waste dumping would avoid the approvals process if they were contained in the plan. Is that your assessment of the bill as well?

Mr Berger—That potential certainly exists, yes, and we are concerned that that could happen. So we do share the assessment. In saying that, we are not opposed to bioregional plans, strategic assessments or the other instruments that are contemplated. In fact there is a good argument that those types of instruments are needed to address what are called cumulative impacts where you have large numbers of actions that are cumulatively impacting on a matter of national environmental significance. Those are currently not dealt with well through the project-specific approvals processes. So there is significant space for these types of planning instruments to play a role in protecting the matters of national environmental significance, but they should have all of the credibility, all of the public consultation and all of the rigour of the current approvals and assessment processes. There should be a full range of public consultation as to the development of those planning instruments and, furthermore, the role of the planning instrument should be clearly defined as supplementary to address the question of cumulative impacts rather than replacing the existing processes for large projects that, by themselves, have an impact on the environment.

Senator SIEWERT—Further, it looks like once these plans are in place they do not provide for the provision of new information. As we continue to find out more through science, it does not look like we will be able to incorporate that into the decision making process. Is that also your understanding of the bill?

Mr Berger—Yes, that is our understanding of the bill.

Senator SIEWERT—Once they are there, they are there—is that right?

Mr Berger—They are there, and I believe there are provisions for amendment of some of these instruments once they are in place as well. The processes for amendment are not clearly outlined and again do not have the full range of public consultation.

Senator SIEWERT—I would like to go to the issue of public interest enforcement. A number of provisions of the bill seem to roll back public involvement, and one of those is around public interest enforcement. I think one of the reasons for that is to stop it being used vexatiously. What is your understanding of how the public enforcement provisions of the act have been used to date? What are the outcomes, and do you believe it has been used vexatiously?

Mr Berger—I am not aware of any instance where a litigant has used the EPBC Act in a vexatious way or in a matter that was not founded upon reasonable legal arguments. But I would say, in general, although the current act provides for no security for costs in the event of an application for an injunction, a litigant under the act can still have costs awarded against them in the final judgment. So there is a substantial risk, as in any litigation, of the plaintiff having to bear an adverse costs award. Under the act currently, there are already appropriate remedies for dealing with a vexatious litigant.

To answer your question more broadly about the community's role in enforcement, it is really important to bear in mind what resources are available to the department. In terms of enforcement of the act, their resources are largely based in Canberra and they rely very heavily on information from external sources—that is all along the process, from referral all the way through to breaches of the act and non-compliance incidents. They rely upon a wide variety of external sources in initiating compliance action and in requesting that actions be referred under the approvals section. There are other governmental agencies that have relevant responsibilities—there are state governments—but the community also plays a very important role, I think. You have certainly seen, for instance, in the flying fox case in Queensland, the absolutely crucial role of committed individuals who are willing to put the time and effort in to achieve conservation outcomes through their own participation. I think in environmental law more than any other area of law in Australia, the community is relied upon for enforcement because there is no existing enforcement structure in the community, at least at the federal level.

Senator SIEWERT—Instead of going to a new issue, I would like to round that one off. How many times has public interest enforcement been used? How many times are you aware of that a case has been taken? There is the flying fox one that I am aware of, and Nathan Dam.

Mr Berger—Yes. There are a few others, but I could count them on two hands. There was a case in Canberra brought under the act and a few others related to infrastructure. There was the Bald Hills wind farm, although it was the proponent in that case. Really there is very little

litigation under the EPBC Act. Most of the community's role is in assisting the department—that is, making them aware of non-compliance and making them aware of actions that should be referred. The actual incidents of litigation are vanishingly few, and again the adverse costs award is a major disincentive, and that includes for conservation groups such as us.

Senator SIEWERT—So that is enough disincentive without making the act harder.

Mr Berger—Absolutely. It is going in the wrong direction by getting rid of the rule that you cannot have security for costs in interim injunctions. It should be going the other way and actually broadening scope for public interest costs awards, so each side bears its own costs.

Senator SIEWERT—Thank you.

Senator CARR—I thank the Australian Conservation Foundation for making a submission. You draw attention to the farcical nature of this process by saying:

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

What are the consequences of rushing through legislation of this seriousness, this complexity and this level of controversy in the time line we are facing?

Mr Tupper—I will give you one consequence and one signal it sends out. The consequence when it comes to, for example, the Indigenous protected areas and other areas of Northern Australia is that we just have not had sufficient time to even consider the implications of these amendments. The people in Northern Australia we speak to, in terms of the Kimberley round table and so on, have not had a chance to even look at the amendments in this amount of time, so we cannot bring to the table any of that advice.

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.

Senator CARR—I think the opposition has been allocated 12 minutes to talk to you about these matters.

CHAIR—At this meeting, Senator Carr.

Senator CARR—There is no departmental submission. We do not know what the department's view is and, before we actually get a chance to talk to them, we have had that dropped on us.

CHAIR—We had a briefing.

Senator CARR—This is a bill that was dropped in the house on a Wednesday or Thursday and was in for debate within a couple of days, before the submissions had been seen. We have massive changes here. Do you think that you have had a chance to read through all the provisions of the bill? Do you think you have had an opportunity to do that?

Mr Berger—Certainly not. Quite frankly, we have read through the bill. We sought to analyse it as best we could in the time frame. But I wish that we could be more constructive here. We have raised concerns. It would have been far better for us to be in a position to come with some well considered, drafted counter-proposals on how to improve it, but we have not had the time to do that. We have not had the time to consult with all of our colleagues, particularly Indigenous groups.

Mr Tupper—To be specific, if you wanted a well considered response from the Australian Conservation Foundation, given the reach we have to various communities of interest around the country—and, also, we would like to consult with expert advisers on legal implications—it would take a period of approximately three months for us to come back with a much more considered response. We just had a chance to read through and respond to what we saw as some of the most significant changes that we could perceive. We have not been able to think through all of the implications in such a long list of amendments. It is just not adequate.

Senator CARR—You talk to the department all the time. You are experts in the field. This is a matter of particular interest and passion for you. Have you been given any indication why there is this mad, desperate rush to ram this through, without proper consideration of the implications?

Mr Tupper—We have not had any communication as to why this is so urgent that it needs to be considered before the end of the year.

Senator CARR—Are you familiar with the Scrutiny of Bills Committee that works in this parliament?

Mr Tupper—Yes.

Senator CARR—Have you had a chance to look at their report?

Mr Tupper—We are aware that there was some criticism in terms of the bill, but we have not had a chance to look through that in detail.

Senator CARR—It is not just criticism. These are not just party partisan concerns. This is a unanimous report that raised very serious concerns about abuses of civil liberties and infringement of the rights of citizens. For instance, are you aware that Senator Johnson—a well-known government senator who is very close to the development industry and is a very strong Western Australian advocate for conservative property interests—said:

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.

You have had a look at the legislation in terms of the penalties. What do you think of the penalties that are proposed?

Mr Berger—We have not had the opportunity to review those in detail or to do a considered analysis of them. In a general sense we are aware of the matters you have referred to. I can imagine that there would be a number of groups in the human rights field who would

be interested in commenting on those provisions as well, but we simply have not had the time to turn our minds to it.

Senator CARR—There have been cases in Tasmania recently where conservation groups have been sued by economic interests. Will this bill encourage that sort of response or will it make it more difficult for companies to take punitive action against community groups that might have concerns about environmental matters?

Mr Berger—I am not aware of any provisions in the bill that would impact upon that in one way or another.

Senator CARR—There are the strict liability provisions, the compliance and enforcement provisions and the detention of suspected foreign offenders provisions. There is a whole range of actions that have consequences, in terms of the actions that can be taken by various groups. Could you have a look at those for me and come back to the committee with your view on the compliance questions and the implications that they have for community participation on environmental debate in this country?

Mr Tupper—I would just like to reinforce the point that, taken in its entirety, the reduction in public consultation mechanisms—we have not been able to carefully consider the penalties and so on—sends a strong signal to our constituency that there is less room for public input into the act.

Senator CARR—You say that the bill should further remove barriers to public interest enforcement actions rather than remove existing protections. What did you mean by that?

Mr Berger—That refers to the costs provisions for third party enforcement of the act—that is, the removal of the prohibition against security for costs orders in interim injunction applications. We see that as a negative change. What we propose instead is that the act should be strengthened by allowing public interest litigants to apply for a costs order in advance of litigation or at any stage, the effect of which would be that each party would bear its own costs in the proceeding.

Senator CARR—Are you surprised that the government has not taken any opportunity to treat global climate as a matter of national and environmental significance?

Mr Tupper—I am not sure about ‘surprised’. It is an area of obvious impact and significance. It is not just about global climate; when most of the environmental indicators in Australia are in decline, the way we would judge the effectiveness and the practical impact of any bit of legislation is the extent to which it would stabilise or reverse those negative trends. The problem is that we have not been consulted on changes that have been proposed. We might suggest that there are some things that we could do to actually address the purpose of the act. All the available scientific evidence about the impact of climate change shows that it will overwhelm and undermine many of the locally enforced actions or decisions made under the act in any case.

Senator CARR—Are you surprised that in November 2006 we are discussing an environment and heritage legislation amendment bill and do not have a provision anywhere—do not even use the words anywhere in this—in terms of global warming? There is nothing here at all. Are you surprised by that?

Mr Berger—One of the consequences of not having global warming or the global climate as a protected matter is that the Commonwealth has very little power to take that into account in approving proposals. Let me give you a specific instance of that. Last year the expansion of the mine at Hazelwood power plant was approved by the Victorian government. That was a project that also required approval under the EPBC Act. The federal environment minister, Senator Campbell, was very critical of the Victorian government—and rightly so—for taking a stand on wind energy right after it had approved the expansion of Hazelwood with a consequence of an additional 445 million tonnes of greenhouse pollution. One of the sad ironies of that particular instance is that, although Senator Campbell was—and again rightly—critical of the Victorian government for that, he was absolutely powerless under the act to intervene in that case. As a result, the assessment of the Hazelwood proposal under EPBC was limited to a site-specific impact on a particular species of threatened vegetation, but of course it was not able to address the major environmental consequence of that action: greenhouse pollution.

Senator CARR—Would you support the view that there needs to be inserted into any legislation of this type an objective of the act to protect Australia from adverse effects of climate change?

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

Senator CARR—Can you give me specific examples in terms of this legislation, because my reading of your submission suggests to me that you think the bill will weaken environmental and heritage protection? Have I understood that correctly? Is that the thrust of this bill: to actually weaken protections?

Mr Berger—The possibility for increased exemptions from the approvals process is one area where it clearly has the potential to weaken environmental protection. The assessment of threatened species is another area. If resources are devoted to developing a priority list, those are resources that are not going to be devoted to developing recovery plans, as contemplated under the act. Once you start assessing nominations for threatened species by priority or by themes—again, we do not know what the themes are; it may be birds this year and frogs next year; it is very unclear how the themes are going to be structured—there is a serious risk that threatened species that do not happen to fit those criteria, which may be influenced by political considerations, will simply drop off the list, in effect.

Senator CARR—What is the thing that most offends you about this particular legislation?

Mr Berger—We have raised a range of concerns about the bill itself. Frankly, it is the ongoing failure to fix the serious gaps in the act and the missed opportunity to really address the issues of climate change, water extraction and other serious environmental concerns. It is a serious missed opportunity.

Senator CARR—Is it your view that the bill should be withdrawn?

Mr Berger—We believe that a much fuller consultation process would be required on this bill for it to proceed with credibility.

Mr Tupper—At the very minimum, we believe the bill needs an extra three months at least for consideration so that we can work through the implications of it. Ultimately, given what we know now, it would be better to withdraw the bill and reconsider the impacts that it has and the scope of the bill.

CHAIR—We have run out of time.

Senator CARR—That surprises me. You surprise me all the time, Mr Chairman.

Senator IAN MACDONALD—You should look at the clock.

Senator CARR—Around here the arrogance of the government, I agree with you, should never surprise me.

CHAIR—You are very easily surprised.

Senator CARR—I am constantly amused by your efforts.

CHAIR—We will move on to Senator Bartlett.

Senator RONALDSON—Fifteen minutes of leading questions.

Senator CARR—Run by the government. Don't be silly. Who do you think you are trying to kid now?

CHAIR—Let us not eat into Senator Bartlett's time.

Senator RONALDSON—You could not even come along to the briefing.

CHAIR—That was a great expression of interest.

Senator CARR—I was not on the committee at that point. We had our own briefing from the department. I want to see the government submission and I am entitled to see a submission from the department. Don't play silly games.

CHAIR—You had your own briefing. That is a very interesting piece of information, that you have had your own briefing. Would you like to proceed, Senator Bartlett?

Senator IAN MACDONALD—I have some serious questions to ask. They are not leading political questions that embarrass the witnesses.

CHAIR—I am sure Senator Bartlett has some very pertinent questions.

Senator BARTLETT—Thank you for that show of faith, Chair. Can I just clarify your actual role, Mr Berger?

Mr Berger—I am the legal adviser for the ACF.

Senator BARTLETT—On a national scale?

Mr Berger—Yes.

Senator BARTLETT—You also have the joys of trying to monitor all the various state legislative regimes?

Mr Berger—Yes.

Senator BARTLETT—I am interested in how much the ACF has engaged with the existing act. I know you have mentioned a few examples in your submission of the way third-

party people have managed to use the act and appeal rights under the act. Has ACF been involved in any specific actions itself, as far as you know?

Mr Berger—We have from time to time engaged on a number of provisions of the act in terms of making submissions, for instance, on particular projects under EPBC. We have from time to time sought to secure compliance with the act by notifying the department of what in our view were instances of non-compliance or actions that should be referred. We have also engaged on an occasional basis with the heritage provisions and with the threatened species provisions of the act. So we have engaged to that level. We have considered legal actions from time to time but have not initiated litigation under the act ourselves.

Senator BARTLETT—I am trying to get an idea. It is always helpful for people who actually engage with the functioning of the law to give a perspective and take it outside the theoretical. There is the notion of regional plans and those sorts of things that are contained in this legislation, about which we have had a few questions already from Senator Seiwert. I know a lot of your submission basically just endorses the EDO submission. You expressed in answers to previous questions concerns about the way that is constructed in this legislation before us and the inadequacies within it. Do you have a view about the concept itself—whether it is flawed or whether it is okay as a concept—or is it just the way it is being put together here that is inadequate? I would like to get a sense on whether we could grab the concept and run with it in an ideal world and strengthen it, or whether it is really not the best way to go at all.

Mr Berger—There is a role for bioregional plans or strategic assessments. There are a variety of possibilities. There are accredited management processes—I think that is the term. I would have to consider whether we need all of those instruments. But particularly for addressing cumulative impacts these types of planning instruments make much more sense than trying to do siloed assessments of small, individual actions and trying to pigeonhole those into the framework of the act. There is a role for them there. The danger is that those types of assessments are used to supplant the approvals processes for large projects. I would say that you would want to more clearly identify the types of issues for which these instruments are well suited and then to also make sure that the requirements for the plan and the public consultation for the plan come up to the standards of consultation elsewhere in the act.

Mr Tupper—After discussing it with a number of colleagues in ACF, I would like to add that clearly the concept is sound in terms of bioregional planning. That is the way that we have been working on the future protection regimes and our sustainability regimes in regions. As a concept it has a lot of merit. We would like some more time to work through what it means to turn that concept into effective practice, for the reasons that Chuck has just outlined.

Senator BARTLETT—Your submission, section 2.3, mentions public interest enforcement actions. That goes specifically to court actions, per se, rather than the other forms of engagement in terms of putting in comments—is that right?

Mr Berger—Yes.

Senator BARTLETT—From your answer before, the ACF has not engaged with them, but obviously particularly in your role as legal overseer you would follow other groups

engaging with them. Can you specify a bit more the concerns that you have about the impact of these changes on the ability for groups to undertake those public interest enforcement actions?

Mr Berger—A large part of the barrier to taking enforcement action is the risk of an adverse costs award. That is in the existing act and it is not fixed in the bill. The bill removes the prohibition against security for costs award in an interim injunction. As that applies only to an interim injunction, there is again still the possibility under the current act of having a security for costs award with respect to the final costs award. We have seen that requirement being imposed by the Federal Court in some instances.

ACF was involved in assisting with the flying fox case a few years ago. We frequently have members of the community or other smaller conservation groups approaching us for advice on particular matters under the EPBC Act and whether they are able to take enforcement action. Sometimes we are able to assist with those requests, but it takes an exceptionally brave, committed and passionate person to put up their personal assets and put themselves at personal risk of an adverse costs award to proceed with litigation under the act.

Senator BARTLETT—I have time for only one further question, unfortunately. We have heard some comments, which have also been made in a number of submissions, about a greenhouse or climate change trigger of some sort. You mentioned the notion of putting in place a trigger for major water diversion and those sorts of things. Have you fleshed out any more ideas about how that trigger could look—whether it is defined as a quantity of extraction or an infrastructure project, like a dam of a certain size, or in some other way? Also, as a flow-on from that question—again in an ideal world—do you think that it would be better to have a stand-alone water act that would address all of those issues on a national level, ideally through the cooperation of the states, which is really moving into utopia?

Mr Tupper—In terms of the specifics of numbers that would be a trigger, no, we do not have that. With the time that we had available, we looked at this in conceptual form. For example, we have put figures on various river systems and the need for the recovery of their health. However, in the case of looking at the cumulative impacts, it is very difficult. This is coming back to your question about bioregional planning. These things are linked to water catchments, so we would have to do a bit more work to look at what would be a sensible regime to ensure that, while the trigger does not just capture one-off large water impacts, it also has the capacity to consider cumulative impacts or a combination of them. We need to do more work on that before we can offer figures.

Senator RONALDSON—This bill streamlines some of the assessment processes. What are your views on that? Do you agree with the Tasmanian government that it is a good thing, or do you agree with our earlier witness from the Australia Institute, Mr Macintosh? I will read you a quote from the Tasmanian government:

A number of the amendments proposed will assist with streamlining to a degree. Some of the processes are associated with assessment processes or increasing flexibility. A number of these will benefit proponents of developments in Tasmania and the state government supports these amendments.

Do you have any comments on that position of the Tasmanian Labor government?

Mr Berger—It is a bit difficult to answer in the abstract. There is some streamlining. There is also some additional bureaucracy, for example, around threatened species nominations. There is now going to be a priority list. So the bill is adding another list, adding another process and adding another layer before getting to the actual recovery plan for threatened species. There is some streamlining and no doubt there are some efficiencies and improvements that can be achieved through the EPBC Act, but those should be done in a way that does not lower the level of environmental protection. We are quite concerned that the streamlining has at least the potential to lower environmental protection by exempting broad classes of projects under strategic assessments from actual project-specific assessment.

Mr Tupper—In addition, there would be some merit in considering a number of options to mitigate impacts, but it is unclear until we see the regulations, how they will be applied and whether the full range of impacts will be considered for every option or not. So it is a bit hard to answer the question without seeing that work and how this process would operate in practice.

Senator RONALDSON—What is your view on the new section 324E, which is the national listing and the simplified outline of the new annual listing process? While you are looking for that, I will just read a quote from the Tasmanian Labor government's submission:

The Tasmanian Government also supports the simplified outline of the new usual listing process for National Listing (new section 324E), which involves an annual cycle around 12-month 'assessment periods'. This is considered a positive change allowing the Minister and the Australian Heritage Council a sensible timeframe in which to prioritise and assess nominations. The proposed changes should also enhance State Government's ability to respond to nominations.

Have you any views on that? If you have not, that is fine. I am just interested to know whether you have.

Mr Berger—We have not looked at that section in detail insofar as it relates to the National Heritage list. We have focused on other provisions of the act in our submission.

Senator RONALDSON—Have you looked at the emergency listing provisions?

Mr Berger—No, not in detail.

Senator RONALDSON—You didn't believe that it was significant enough to worry about?

Mr Tupper—There was insufficient time to consider everything that has been proposed. With the prior question, there may be some merit in a more systematic and annual cycle of nominations; but, without knowing how the referral process would work and how transparent the assessment would be and so on, it is very difficult to come back with an answer on whether that, in effect, is going to be an improvement.

Senator RONALDSON—You have not looked at those aspects of it.

CHAIR—Do you have any questions, Senator MacDonald?

Senator IAN MACDONALD—My questions will not be political ones that will put you in an embarrassing position. I am interested in your view on the actual legislation. Can you demonstrate in a practical way—by providing an example or two if they spring to mind—how the new act will be radically different from the old act in what you believe to be a detrimental

way? Is there some sort of process or some aspect that you could point me to by way of an example that would highlight what was available before and what is not available now?

Mr Berger—As an example, take the listing of threatened species process. Under the act as it stands now, if a nomination is made there are certain timelines for it to be acted upon and for a decision to be made. If it gets listed, that triggers a range of obligations, such as the development of a recovery plan. It opens up a number of options, such as the listing of the habitat of that species as critical. Under the changes proposed in the bill, rather than assessing nominations and treating all species equally, if you like, there will be a set of priorities developed, which may be according to themes or otherwise. It is highly unlikely that the nominations of species that do not make it to that list—even though the species may be highly endangered and highly at risk—will be considered in that timeframe and that action will be taken to develop a recovery plan for those species.

Senator IAN MACDONALD—Why would these species not make the list under the new arrangement whereas they would have under the old arrangement?

Mr Berger—For instance, if a particular theme is developed for the year for threatened species nominations—I do not know what is contemplated for the themes—and maybe the theme for the year is birds. If the theme for 2007 is birds and something happens such as a new scientific study or maybe a species previously thought extinct is rediscovered in an enclave—as happened with the nailtail wallaby—and we have new information about a species, because that species does not fit into the theme there is a risk that the nomination will not be considered promptly and that the protection of that species will be delayed because the theme for the year.

Senator IAN MACDONALD—Your understanding is that there will be a theme for the year and, again using your example, if it is birds and if we suddenly find a species of bilby has suddenly become critical, it cannot be nominated for listing—is that right?

Mr Berger—It is not that it cannot be nominated, but how is that nomination going to be processed and under what time frames?

Senator IAN MACDONALD—Are you saying in the old act that it had those processes and time frames set out whereas under the new act it will not?

Mr Berger—The identification of a theme for a year indicates a clear intent to deprioritise the species that do not fall under that theme, and in fact to delay the consideration of those nominations. That is my understanding.

CHAIR—You are talking about priorities, are you not?

Mr Berger—Yes.

Senator IAN MACDONALD—Using my example, are you suggesting that if something suddenly happens and the bilby becomes critically endangered and you put the nomination in to the department, they will say, ‘Look, we know if we wait three weeks it is going to disappear from the face of the earth, but sorry we are looking at orange-bellied parrots now, so buzz off’? Are you suggesting that can happen?

Mr Berger—It is a possibility. You have put a very extreme example of extinction in three weeks. Usually it is not quite that clear cut.

Senator IAN MACDONALD—Do the amendments not give the minister power to say, ‘It might not be three weeks, it might be three months or the process of destruction might be starting in three weeks, but we have got to do something about it’? Hasn’t the minister got power to say that we need to address that this second—not tomorrow, but this second? Has the minister got the power to do that?

Mr Berger—Yes, I would agree. The minister would still have the power to do that, but our concern is that, absent that type of specific intervention, you will have nominations that are languishing because they do not happen to suit the theme.

Senator IAN MACDONALD—You are suggesting that, because there is an almost bureaucratic process that is directed to birds, if something critical happens you would approach the minister and say that the bilby is about to go and any minister—even a Labor minister—would say, ‘Look, we’ve got to save the bilby. Let us do that tomorrow.’ Do you not see that happening?

Mr Berger—It could happen. The more typical example, though, is where you have a nomination of a threatened species and the threats tend to be ongoing—progressive threats like loss of habitat, not catastrophic events but events that gradually erode the species’ ability to survive—and where you do not have a black and white change from day 1 to day 2.

Senator IAN MACDONALD—I am sorry to interrupt you. Is your concern that, instead of going through a bureaucratic process, the minister would have the power to say, ‘Look, I am going to give that priority because the ACF has convinced my scientific advisers and my environmental experts in my department that this is a problem so we need to deal with it straight away’? I accept this is just one example—I asked you to give me one example and perhaps there would be others—but I am trying to understand the concern to the environment by changing what seems to me to be an awfully bureaucratic and long-winded process to one where the minister might be able to say, ‘Look, you have convinced my advisers that that is a problem. Let us address it.’

Senator CARR—If there is a Liberal marginal seat, that sort of thing?

Senator IAN MACDONALD—Just ignore that. I am here to try to work out something on this bill, not to play the politics. There is some other place for that.

Mr Tupper—The implied onus here is that we have to try and understand or interpret what this new direction is in practice, which is very difficult for us to do. The underlying point here is that there are a number of species nominations, and the process to date has been one of lack of resourcing to consider that. There may be some merit in looking at strategic themes to streamline that process, but you need to consider the lack of resources in the first place. We do not know what criteria will be used to develop these things. This is the issue. We cannot see where this is heading in terms of an improvement in the act.

Senator IAN MACDONALD—I confess that I have not read the bill in detail. I have barely glanced through the explanatory memorandum, but my understanding is that, instead of going through a long bureaucratic process, if there is a problem that you have identified you take it to the minister. If the Bilby is about to go, there would be resources put into that straight away.

Mr Berger—What if there are 353 problems that you are taking to the minister.

CHAIR—That would apply anyway, would it not?

Mr Berger—Does it become ad hoc again?

Senator IAN MACDONALD—Someone has to make a decision. In this instance, the elected minister, on advice from his department, will make the decision. Some people do not like that, but after all we are elected to govern. You might be familiar with the southern bluefin tuna issue, or is that more HSI? I will not go into that. I will leave that for later.

CHAIR—We are running out of time.

Senator IAN MACDONALD—You have identified your concerns. We are debating the question of whether they are genuine concerns. I appreciate your advice.

Mr Berger—I will just supplement the answer with one brief point. Under Item 360 of the bill, the minister in considering whether to list a species as endangered not only is to consider the environmental merits but also is allowed to consider whether the listing would have an effect on the survival of the species. The implication in that provision is that there are some instances—this is what is contemplated—where the listing of a threatened species could have no effect on the conservation, if you like, of that species. That is a very troubling implication because it suggests that the processes that follow listing of a threatened species are not going to be effective in actually protecting that species.

CHAIR—We will have to leave it at that point. I thank the ACF for appearing. We now call the WWF.

[11.13 am]

GLANZNIG, Mr Andreas Kurt , Program Leader, Biodiversity Policy, World Wildlife Fund, Australia

CHAIR—Mr Glanznig, would you like to make a short opening statement of not more than five minutes?

Mr Glanznig—I would like to just make some introductory remarks. At a general level, I would like to say that WWF is a science-based solutions-oriented organisation. Because of that we were heavily engaged in the original passage of the EPBC Act through the Senate and have been active supporters of the EPBC Act for a number of years. It is important to put on the record that we did highlight that it was in our opinion world best-practice legislation. It was effective. It did need an additional amount of resources to ensure that the full potential of the act could be realised. Even with the Humane Society International, we administered a project called the EPBC Unit Project, which was a community outreach program that really attempted to increase community understanding of the act and its public participation processes, to enable the community to engage with the act. I should also put on the record that our strong support of the original act was not seen as popular across the board in the conservation movement and we did have to cop a few on the chin for that support. That is the background.

We are at a point now, as highlighted in our submission, where we do need to draw a line in the sand on several points. The first is the nature of the process. The rapidity with which the bill is currently being moved through parliament is not giving groups or the parliament an opportunity to fully scrutinise and give due consideration to the bill. More importantly, in our opinion, 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.

As a final point, the bill has also missed some significant opportunities to introduce new matters of national environmental significance—new EPBC triggers. As discussed in our submission, we think that a key missed opportunity was the need to strengthen the critical habitat provisions, because at the end of the day the major threat to Australia's threatened species and biodiversity in general is habitat loss. Currently there is no strong, direct mechanism to ensure that that habitat is identified, defined and then designated under the act. I will leave it there.

CHAIR—Thank you very much. Senator Carr.

Senator CARR—Thank you for your submission. It is quite a long document. You have basically picked up other submissions and put them together, have you, for this?

Mr Glanznig—No. As we said in our opening remarks, on the technical side of things we endorse and support the submission by the EDO, and what we have attempted to do in our submission is pick up the broader policy questions. Also, for the information of the committee, we have attached our respective submissions to the Australian National Audit Office. As you know, that body is currently conducting an inquiry into a certain element of the act. We have also included our submission into the review of matters of national and environmental significance.

Senator CARR—I was struck by your term ‘a time to draw a line in the sand’. You say that you believe the amendments to be undemocratic?

Senator RONALDSON—Not another 15 minutes of leading questions.

CHAIR—Is that what you actually said?

Mr Glanznig—I would have to—

Senator CARR—I draw your attention—

CHAIR—I am concerned about the time. Perhaps you would like to rephrase your questions.

Senator CARR—I know you do not like questions critical of the government. I do not know why we have the inquiry if we are going to have—

Mr Glanznig—In response to your question, we have highlighted in the introduction the fact that we consider that the curtailment of public accountability and the curtailment of the public nomination processes could be considered undemocratic. We have stated that in our submission. Just to reiterate my opening remarks, it is our belief that the public nomination processes for threatened species and heritage sites is really what made the act stand out. It really engaged the Australian public. It engaged civil society in looking at how they could put in place, ultimately, a mature regime of listed threatened species and heritage sites that could be duly protected through the act.

Senator CARR—You spoke of a retreat from international best practice and, in your submission, you do say:

Many of the proposed amendments are undemocratic in nature.

The submission also talks about public access and government accountability, saying:

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.

Can you give some examples of what you are referring to?

Mr Glanznig—At a general level, the repeal of section 185 has the potential to wipe out around 500 threatened ecological community nominations that were originally gazetted by Minister Hill and that are currently under consideration. That section was strongly supported by WWF, and Michael Kennedy, when he appears before you, will reinforce that for HSI. That to me is one of the critical aspects of this bill. It really is like removing the key provision that seeks to keep the threatened species list up to date. That was its whole purpose. Section 185 enabled the Threatened Species Scientific Committee to review other state and territory

lists and basically pull out those that were deemed to be nationally threatened and then place them on the national threatened species or ecological communities lists. From our point of view, the repeal of that section is very disappointing.

The second point in response to your question is that, on advice received, groups such as WWF have put in a whole raft of public nominations and there is no provision in the bill to say that they will not just get put onto the scrap heap—that they will not just get put on to the non-priority list and in a sense get shot out into cyberspace somewhere. There is no security that those nominations already made will be considered under the old process. Basically, if they satisfy the eligibility criteria then they will be duly listed. That is a concern for us because for an NGO organisation to prepare a nomination it is very costly. It takes an immense amount of time to draw together all the scientific evidence, to basically pull down the scientific expertise. To have all of that work potentially come to nought with a stroke of a pen is a concern to WWF.

Senator CARR—You say that these are public submissions taken during Senator Hill's time?

Mr Glanznig—The communities that were gazetted by Minister Hill in 2001 were the species and communities listed under state and territory legislation. The purpose of section 185 was to try to put in place a fast-track process to come up with a mature list of threatened species and communities. The whole idea was to say that, if the purpose of the act is to put in place a safe minimum standard to prevent irreversible loss—in this case, extinction of threatened species or extinction of threatened ecological communities—you need to identify them, you need to properly define them and then after due assessment you need to list those so that they are given the appropriate protections under the EPBC Act.

Senator CARR—On page 3—again, I refer directly to your submission, since the government senators have trouble following this—you say:

the bill has missed a major opportunity to address major threats to Australia's environment by not introducing four new MNES triggers to better address broadscale land clearing, greenhouse emissions, unsustainable water use and construction of large dams, and strengthen the provisions pertaining to threatened species critical habitat.

I wonder if you could enlarge on what sort of examples the failure to do that will bring up, and in particular the failure to deal with the question of greenhouse anywhere in this bill?

Mr Glanznig—It is our view that to strengthen the act to make it more effective requires the act to deal more directly with key threats that potentially impact on Australia's biodiversity, and particularly on matters of national environmental significance.

In our submission we proposed four new triggers. The first relates to greenhouse. Essentially, the nature of that trigger is that if an action produces over 100,000 tonnes of carbon dioxide equivalent in any 12 months, or, over the likely lifetime of the project, it produces five megatonnes of carbon dioxide equivalent, it should be referred for assessment.

The second is unsustainable water use. Obviously we are in the midst of a drought. Water is critical. We need a mechanism to enable the act to deal with large potential actions that could impact on the viability of key aquatic matters of national environmental significance. So the proposal there is that any action of 10,000 megalitres or above in terms of surface extraction

should be referred for assessment. Similarly, for dams with the major infrastructure projects, if the crest height of that dam is over 15 metres or the capacity of the dam is over one million cubic metres, it should be referred for assessment.

Finally, given that the major threat to terrestrial biodiversity is habitat loss, and that one of the major drivers of habitat loss is land clearing, we also think that there needs to be a direct trigger for that key threat. So our proposal is that an action that would clear 100 hectares within a two-year period should also be referred for approval.

To lift this up into the conceptual level: in our opinion the triggers are focused primarily on values and that is very important. But we also need a set of triggers that target key threats directly and then engage the act directly in that way. By doing that, it would lead to a more efficient consideration of those potential actions that could impact on matters of national environmental significance.

Senator CARR—Finally, I would like to talk to you about the effect of the new offences and penalties regime that is in this bill. Have you had an opportunity to have a look at that?

Mr Glanznig—Not in close detail. Like many of us here, we are all struggling to absorb the fine detail in the bill, given the short timeframe. I would suggest that you put those questions to the EDO. Basically, they are the lawyers that have scrutinised the bill in far more detail.

Senator CARR—I appreciate that. But in terms of your organisation, and given the concerns and questions that have been raised about the association with your organisation and the government in the past, in terms of the previous legislation, were you surprised to hear of these new penalties and decisions to limit appeals from ministerial discretions?

Mr Glanznig—They are two separate questions. In general, in our opinion, there are some steps forward on the compliance liability and enforcement side of things. Obviously, the devil is in the detail. As to the second point, which is: ‘Do we support the curtailment of review of ministerial decisions?’, no we do not. They were designed quite carefully in the original crafting of the EPBC Act, and our position is that they should be maintained as is.

CHAIR—That is it, Senator Carr.

Senator CARR—I have more if you want.

CHAIR—You have a minute left.

Senator CARR—Oh, a further minute! Can I finally come to the point about the politicisation of the decision making processes. It has been raised through a number of submissions. What is your organisation’s view as to the likely consequences of these changes in terms of the politicisation of the decision making processes?

Mr Glanznig—Our second press release highlighted that increasing ministerial discretion enables the potential increased politicisation of the listings process in just the way that the act is used. That concerns us. That goes back to my opening remarks: the more that we can make this an objective, science based act—one that really brings those aspects to the fore and puts in place strong mechanisms to look at how you can then trigger ranges of actions if the scientific evidence merits it—the better. We think that the act should be focusing on those types of triggers rather than increasing ministerial discretion.

CHAIR—I would like to ask you some questions. This act has now been in force since 2001, which is five years ago, so we have had five years experience with its working. There seems to be a view that it could be made more efficient in its operation. Do you agree with that?

Mr Glanznig—With qualification, it has to be seen in terms that it could be made increasingly appropriate, increasingly efficient and increasingly effective. You cannot elevate any one of those elements out of the mix.

CHAIR—I do not mean to do that; I agree with all of the points that you made. But I think that is really the government's objective here. They have sought to simplify the processes. There are far too many forms involved and too much time spent filling in forms. Would you agree with that?

Mr Glanznig—I would say that if we talk about the principles or the intent of the bill, it is looking at how you can ensure a stronger outcome. If you look at the increased effectiveness and if you can make processes more efficient to achieve those outcomes, at the end of the day that is what we are in the business for: to ensure that there are appropriate safe minimum standards. I cannot respond to that question in a general sense.

CHAIR—The government is seeking to have more flexibility in terms of allowing for changes in proponents so that there are different methods and options in dealing with different proponents; more rapid decisions so that all the information is available and that means quicker approvals; improved cooperation with the states and territories, and tailored assessment guidelines. The government at the moment can only accredit plans enforced under a state act but now the Commonwealth under this proposal will be able to consider other management tools than the state has in place. There will be expedition of bilateral agreements. At the moment there is some delay in that. There is no approval of bilateral agreements with Victoria, for example. Bilaterals now only have a five-year life, and the new proposal is to review them every five years and continue them until they are revoked.

More strategic flexibility is a part of the object of this act, so that if a strategic assessment is approved by the minister you do not need to go back for approval under the Environment and Biodiversity Act. It will provide encouragement to engage early with the Commonwealth. So these things are all designed to improve the efficiency of this act. As you said, this was a groundbreaking act that was recognised as world's best standard, but it can be improved, made more efficient and more focused thereby providing a better outcome for the environment and for the people of Australia.

Mr Glanznig—The way that I would like to respond to that question is that there is also an opportunity to increase the efficiency of the threatened species, heritage and other aspects of the act to achieve a mature list of threatened species, communities, key threatening processes and heritage sites. So I go back to the repeal of section 185, which has really removed one of the key measures to build in that efficiency for listing. I also would like to put on the record the critical habitat provisions, the only direct regulatory mechanism to define and then designate the habitat with threatened species—which as I said earlier, is one of the key reasons why threatened species are dying by death by a thousand cuts—and the fact is you are getting incremental loss of habitat.

It is instructive to note that the amendments introduce an additional softening of the wording. At the moment it is 'may designate' and in the bill it is 'may designate as practicable.' I would like to draw the committee's attention to the fact that currently only five critical habitats have been designated under the act over six years. That pertains to far less than one per cent of species. As a way of juxtaposing that with the way that they identify priority to critical habitats in the US, in the space of two years in the US they were able to identify 190 critical habitats, albeit that most of those were not designated. The point is that there was a process to start to square away the key habitats that needed to be protected to secure the survival of the species. In the US it is 37 per cent, so that is over a third of threatened species, have had their critical habitat defined. Again, I come back to Australia. They have 37 per cent and Australia has got less than one per cent. If you are really going to start looking at efficiencies, particularly with the strategic assessments and through the bioregional planning processes, to do those effectively you need to draw lines on maps. You need to basically identify and designate the critical habitats that will secure the survival of the threatened species.

CHAIR—That is true. The recovery plans for threatened species and ecological communities often simply require habitat protection, whereas at the moment the department has to provide conservation advice and it is weighed down by lots of extra things. I understand what you are saying but, again, there has been an overload of work required and it is time to make this a bit leaner and more effective. That is the purpose of the government in this bill.

Mr Glanznig—At the end of the day you want to achieve the outcomes in the most efficient way possible. We all agree with that general principle, but if we move into the strategic assessment provisions, whilst WWF supports the opportunity to address cumulative impacts strategically so that you can overcome this death by a thousand cuts scenario that many of our threatened species face, ultimately it depends on the standards associated with those assessments and how they are accredited, and that is up to the regulations. Again, what we are seeing is the broad architecture being put in place but we cannot make a specific comment until the bar associated with the standards is fully enunciated within the regulations. That to me is the real test with these provisions in the bill, that is, to what extent do they seek to put in place a high level of standards for strategic assessments across-the-board and, in our opinion, that should include the identification and designation of all threatened species' critical habitat. Unless you have those lines on maps you are going to see death by a thousand cuts in the face of incremental development pressure. The other point that I would like to raise is the need to build in an adaptive dimension to the bill so that in the face of new evidence you can introduce new measures to protect a threatened species or another matter of national environmental significance based on that new advice. Those aspects need to be built into the strategic assessment side of things.

CHAIR—The government is going to replace that whole system of the listing of heritage places, threatened species and ecological communities with an annual cycle, which we think will be a more efficient approach.

Senator RONALDSON—Why do you believe that all knowledge apparently resides with the federal department, which is my take-out from your amendment checklist under the ‘Approval’ section, where it says:

Remove the capacity for approval powers to be delegated to States through approved bilateral agreements.

Remove the capacity for approval powers to be delegated to other Commonwealth agencies through Ministerial declarations.

Why can’t other agencies and the states be trusted? Why are they any less trustworthy than the federal department might be at any particular point in time?

Mr Glanznig—It is not so much the trust side of things. It goes back to my point about saying if you can have a rigorous set of standards that can ensure that matters of national and environmental significance, which includes designated critical habitats, are secured then that can be duly negotiated between the federal environment department and other agencies.

Senator RONALDSON—I choose these words carefully. I just get the impression that in some of the submissions that I have read—and I have got to be quite honest with you, it includes yours as well—there just seems to me to be concerns about a wider target from some environmental groups. Some of this is delegated to the states and delegated to other agencies and it suits the purposes of some within the environmental movement to have it all stuck in the Commonwealth department, which is a smaller target. I have got to be honest with you that I just cannot see why that wisdom is apparently viewed as residing with the Commonwealth department. You have got the Tasmanian government, with a different political persuasion to this government, who quite clearly believe these bilateral agreements will work.

Mr Glanznig—It goes back to the proof is in the pudding. It comes back to the standards that are codified in those agreements.

Senator RONALDSON—Quite frankly, I think the ACF fell victim to this. It is absolutely the worst case scenario that has been put forward as opposition to these amendments. I would rather hazard a guess that apart from yourself—and I acknowledge that—if you go back I suspect that groups like ACF and others were espousing the big-bang theory in relation to this principal act. I acknowledge that you were not and that you were a very passionate supporter of this, but I feel that there would have been the big-bang approach from some, including ACF, in relation to that principal act.

Mr Glanznig—Can you elaborate on what you mean by big bang?

Senator RONALDSON—It was the Chicken Little—the world as we knew it was going collapse. It clearly has not. I put to you that the scenarios that you put in, particularly when we get down to the stage of nitpicking in relation to who can take some responsibility with things under these acts, is just another example of it. That is probably more a comment than a question.

Senator SIEWERT—In terms of the worst case scenario, I know you are concentrating on the environment mainly, but you do comment on the heritage aspect.

Mr Glanznig—We did make a comment, although, given it was a joint submission with HSI, I would like to enable Michael Kennedy from HSI to respond to the heritage questions, given that is basically one of his areas of expertise.

Senator SIEWERT—I will leave that question until then. I want to go back to your opening remark where you articulated that this had been quite divisive within the environment movement. That was possibly an understatement on your part. For WWF to come and make the statements that you have indicates the level of concern that you have for this legislation, given the strong stance you took on the original legislation. Everybody is aware that it was divisive in the environment movement. Would it be fair to say that most environmental groups are now saying that they have deep concerns about this legislation?

Mr Glanznig—If the bill is passed unamended we would have serious concerns with the way that the act has been changed. I hold our original point that, as it currently stands, the original act was world's best practice. On balance, the heritage amendments were a major step forward. Again, just to highlight my opening remarks, to reduce the role for public participation in the EPBC Act processes is a step backwards. You would start to see a convergence on that arena of concern.

Senator SIEWERT—I have got some marine questions. Would it be better for me to leave those to HSI?

Mr Glanznig—Yes.

Senator SIEWERT—I would like to go to the issue of decision making. It is good that Senator Macdonald has come in because I want to pick up where he left off last time in terms of the theme process. You were here when we were talking with ACF about the theme process and what that might mean for a species that is nominated that is not part of the theme. My understanding—and it is certainly the line that we were discussing—was that the minister could intervene and require consideration of a particular nomination. My understanding of the process then is that would require a great deal of lobbying of the minister to get him or her to intervene. I would suggest that is a step back from the scientific process into a politicisation of listing, which I thought this act was designed to avoid.

Mr Glanznig—I would agree with that statement. That is reflected in our second joint press release with HIS, in that international best practice separates the listings process, which is objective and science based, from the management dimension. The listings process as much as possible needs to be scientific and beyond politics. In our view, by streamlining in this way you then curtail opportunities to feed in key potential threatened species for consideration. I will give a specific example. From our point of view, and Senator Macdonald is acutely aware of this, our organisation has played a key role in trying to elevate the issue of invasive species in general and in the policy arena. We have had a longstanding engagement with the former minister's office on that point.

Senator IAN MACDONALD—You were a very valuable member of the weeds committee, I should say.

Mr Glanznig—Given that we have noted that, particularly on islands, invasive species are one of the major extinction drivers, we have really sought to elevate that side of things. One of the ways that we could do that was by putting in a public nomination of a key threatening

process—namely, rats on offshore islands. They have driven five unique species on Lord Howe Island to extinction. They are right on the precipice of driving blue petrels on Macquarie Island to extinction in Australia, and that is of major concern to us. The way that we could engage the act as an NGO was to put in a public nomination, which was then duly considered through the threatened species scientific committee process. Scientific and government comments were invited, it then passed the eligibility criteria and it was recommended for listing. Not only did Minister Campbell list it, but he also then recommended a national threat abatement plan. This is an opportunity where we have identified a strategic gap, we have engaged the public participation processes, it has gone through a scientific process and it has ended up with not only a listing but also a decision to develop a threat abatement plan.

If you had a thematic structure we would not be able to engage the process if the theme was not, say, invasive species. Yes, we could go down an advocacy route; we could go down, in a sense, the politicised route of engaging ministers' offices and the department and so on. But, to me, that it is an inferior way of proceeding with this sort of priority, given that you have an existing, science based process that invites any public nomination of a potentially threatened species or community or a key threatening process. That is basically why WWF is supporting the status quo in relation to listings.

Senator SIEWERT—On page 19 of its submission, HIS have listed 23 nominations for ecological communities, four for threatened species and three for key threatening processes. WWF has nominations for at least three threatened communities and one threatened process. There are a couple of points here. Firstly, it is quite clear that NGOs are engaging in the process. Secondly, they are still in the process, aren't they? If I have interpreted what you have said here correctly, you are saying that part of the hold-up is lack of capacity to assess those nominations. You say that the ministers refuse to include a public or scientific committee through the nomination process. We were talking before about trying to cut red tape; however, it seems to me that the block here is not actually doing the assessment but a lack of resources.

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

Senator IAN MACDONALD—Can I just ask one question to follow on from that?

CHAIR—A quick one only, because it is Senator Bartlett's time.

Senator IAN MACDONALD—You rightly make the point about funding. So isn't the problem not enough funding for DEH rather than what the act says?

Mr Glanznig—I will just go back to my earlier point about moving to a thematic based approach. If the theme were greenhouse or whatever, we would be precluded from putting in our invasive species nominations for key, strategic threats such as the impact of invasive species on islands and would not have been able to nominate cane toads and so on.

Senator IAN MACDONALD—I cannot believe the act says that. This was my point to the previous witness. For example, if we were going to destroy the bilby tomorrow, we could not do anything about it because we can only deal with birds.

Mr Glanznig—You can still go in over the top. You could go into the minister's office, but I think the point there is that you are then politicising the process. Instead of a concerned scientist engaging the act and so on, it now requires those that have advocacy expertise.

Senator IAN MACDONALD—If you are not able to do the things that you want to do under the current act because there is not enough money, the minister has the ability to say: 'Look, this is important. There are invasive weeds on an island. I am going to act.'

Senator SIEWERT—The point there is that they are going to have to lobby to get him or her to take action.

Senator CARR—It gets linked into your marginal seat strategy.

Senator SIEWERT—That is the point.

CHAIR—It is Senator Bartlett's time, and you have just taken four minutes of it. Senator Bartlett, we will give you your full time.

Senator BARTLETT—Thank you. Obviously a lot of people have expressed concern about the process and the lack of time for examining these provisions. It has been suggested that there has been continual consultation, if you like, through the regular process of engagement with various groups. That your organisation is probably more engaged than most with the government about areas to do with EPBC would be, I think, a fair comment. Have you any view about the adequacy and nature of the consultation with your organisation on the specifics of what is before us?

Mr Glanznig—Our view would be that the consultation has been inadequate in terms of both the engagement of our organisations and the timeframe. As we flagged in our submission, we would have preferred a process that put out a discussion paper, that had a conference or a workshop or that provided some way to enable our respective groups to consider the proposed amendments, at least at a conceptual level, and to put our concerns and thoughts on the table. In that way, you could pull in the best thinking from around Australia from a whole range of different players to come up with the best set of amendments to achieve both the efficiency and the effectiveness objectives.

Senator BARTLETT—How does it compare with the process used, say, when amendments were made to the act around heritage areas? I know there was not 100 per cent happiness with the outcome. But that is not really the issue; it is about how much opportunity there was for engagement in the process and understanding of what was being done.

Mr Glanznig—I think it was a far more open process and there was also a far greater opportunity to fully scrutinise the bill. It needs to be remembered that this bill was tabled on 12 October, so we have had only two weeks to try to get our heads around it. As flagged in

one of our earlier press releases, this is not finetuning. There are significant changes to key provisions of the act. We would have thought it appropriate to have an opportunity to fully consider what the bill was going to mean in practice.

Senator BARTLETT—You mentioned at the start—I think I am quoting you correctly—that WWF copped a few on the chin for supporting the passage of this legislation in 1999—

Mr Glanznig—And again with the heritage amendments, I have to say.

Senator BARTLETT—Probably through to the present day, there is still the occasional left hook swinging through the ether in your direction. Given all of that, do you feel betrayed at all by the process and what is being put before you now?

Mr Glanznig—I think the word that I would use would be ‘disappointed’. We supported the act. I have to say that, in our support of the act, not only did we support it on paper but we also put our reputation on the line by taking out a full-page advertisement to say that this is world’s best practice. That is the backdrop, and that is why, for me, the WWF now have to draw a line in the sand. On balance, this bill is a backward step. We are disappointed in terms of both the nature of the bill and the process by which it is being presented to the public. We have not had a sufficient opportunity to fully scrutinise it.

Senator BARTLETT—A number of submissions, including yours, have mentioned the desirability of inserting a greenhouse trigger. My recollection from 1999 was that there was a promise from the government, as part of the passing of the legislation and getting the act operational, to start work then on developing a greenhouse trigger. Is my recollection correct?

Mr Glanznig—Yes. I forget the technical words, but I think the agreement was that the government would essentially float a discussion paper. I remember Minister Hill actually put out a consultation draft to provoke thinking on the potential scope and nature of such a trigger, and from there it basically died. There was initial interest by Minister Hill in at least examining the merits of a greenhouse trigger and, from our point of view, I think it really is a way of dealing with the major threat to Australia’s biodiversity and, I think more generally, to the economy in a direct way.

Senator BARTLETT—I have just a final question, given the time. This is a very broad-brush oversimplification of some of the commentary about the reasons behind the changes, but I think it is fair to say there is a common view expressed that there have not been enough resources put into the department to enable it to do all its tasks and all of the assessments of potential listings and the like. Some of the rationale, I guess, was that the reality, the pragmatic thing to do, is to enable the resources that are there to be focused on the main game. Whilst that is less than ideal, do you think that is still justifiable or do you think the changes that are accompanying the legislation are such that the ability to even enforce the main game is being reduced?

Mr Glanznig—I think the way that I would like to respond to that is to focus on the proposed repeal of section 478. I think we all know that the act is not supported by a number of federal officers that can ensure compliance on the ground and, for that reason, the surveillance basically depends on the public’s eyes and ears—

Senator BARTLETT—When you say ‘not supported by federal officers’, you do not mean they hate the act and will not do anything?

Mr Glanznig—No, it just means that there is not the capacity. You do not actually have EPBC officers out there checking whether actions are EPBC compliant. I will use a specific example. When Dr Carol Booth noted that a lychee farmer on the edge of the Wet Tropics World Heritage Area was electrocuting hundreds of spectacled flying foxes she sought recourse through the state and federal departments, and it came to nought. She was able to have standing under section 475 of the act and, because of section 478 basically prevents the Federal Court from requiring surety for a temporary injunction, Carol Booth and others were able to seek an injunction to stop the electrocution of what ended up being thousands of bats. I think it is instructive to note that, once that was brought before the courts, the courts agreed with the position of Dr Booth in that knocking out so many thousands of spectacled flying foxes would have actually degraded the World Heritage values of the Wet Tropics, given that the bats are one of the key pollinators of the rainforest. To me that was a really important case where a concerned individual, in this case a respected scientist, was able to use the third-party enforcement provisions of the act to achieve and to realise the objects of the act.

As a general point, I would flag that groups like ours and HSI have used those third-party enforcement provisions very judiciously. In the case of Nathan Dam, which is one of the cases that the WWF supported, it was again proven correct and the bills reflect the outcome of that case law. Does the bill take us away from the main game? By reducing the ways for the public to engage the EPBC Act processes, and in this case through third-party enforcement, you are going to see a number of actions that should have been referred that have not been and groups or individuals simply will not have the financial capacity to pursue injunctions or other actions through the courts. That is why section 478 was introduced into the original act, and I think it was very important. Just to bring it back to the spectacled flying foxes, what enabled over time around about 18,000 spectacled flying foxes not to be killed was section 478. By repealing that you will have these ongoing actions and there will be no recourse by individuals and organisations unless they can just simply try to persuade the state and federal agencies. If they do not want to hear, it will be very difficult to seek recourse through the Federal Court.

Senator BARTLETT—Thank you. I had better stop there.

CHAIR—Thank you very much. Thank you for appearing, Mr Glanznig.

Mr Glanznig—Thank you.

[12.06 pm]

RUDDOCK, Ms Kirsty, Principal Solicitor, Australian Network of Environmental Defender's Offices Inc.

SMITH, Mr Jeff, Chief Executive Officer, Australian Network of Environmental Defender's Offices Inc.

WALMSLEY, Ms Rachel Louise, Policy Director, Australian Network of Environmental Defender's Offices Inc.

CHAIR—We welcome you to the table. Would you like to make an opening statement?

Ms Walmsley—Yes, we would.

CHAIR—Please proceed.

Ms Walmsley—Thank you. The Australian Network of Environmental Defender's Offices, ANEDO, is a national network of nine community legal centres specialising in public interest and environmental law for over 20 years. ANEDO submits the legitimacy and credibility of the EPBC regime is contingent on three things: first, accountability; second, comprehensive coverage of issues; and third, resources for effective implementation. The bill as it is drafted does not support these three elements. Regarding the first element, a fundamental requirement of an accountable regime is public participation and opportunities for third-party input and review.

There are three primary functions of public interest and environmental litigation, namely, to challenge the merits of environmental decision making, the legality of environmental decision making, and to enforce the law by civil action or criminal prosecution. The bill contains amending provisions aimed to significantly limit two out of these three important processes. The bill reduces the ability of third parties to challenge the merits of ministerial decisions and the bill reinstates a significant barrier to civil enforcement regarding the undertakings for damages. ANEDO strongly opposes these amendments.

Current avenues for third-party enforcement review have not led to a deluge of frivolous cases and have in fact significantly contributed to the effective enforcement and implementation of the act. It is essential for the credibility and legitimacy of the regime that avenues for review are maintained. Regarding the second element of comprehensive coverage, the bill as introduced to parliament fails to address the most crucial and urgent environmental matters of national significance, namely, climate change, over extraction of water and land clearing. It is critical that additional triggers are added to address these issues. The legitimacy of the regime is undermined if these fundamental issues continue to be ignored.

Regarding the third issue, the bill includes a number of amendments designed to streamline processes and reduce the regulatory burden on DEH. A lack of DEH resources and capacity to undertake statutory functions is not an excuse to streamline the assessment requirements or statutory processes. Where issues involve potentially significant impacts on matters of national environmental significance, it is crucial that resources are available for mandatory comprehensive transparent and accountable environmental impact assessment. Streamlining

the nomination process in relation to listed threatened species and heritage items has the potential to undermine the independent assessment role of the scientific committee and the Australian Heritage Council. Species communities or heritage items that do not fit annual nomination themes may not qualify for assessment regardless of their conservation or heritage status. Amendments providing for DEH assessment responsibilities to be abrogated under accreditation of state and territory plans, policies or programs are potentially open to abuse, for example, regarding uranium mining or coastal development. The EPBC Act must remain as a safety net for regulating impacts of matters of national environmental significance. I would like to thank you for the opportunity to discuss our concerns.

CHAIR—Thank you. Senator Carr?

Senator CARR—Thank you very much for your submission. In particular, given the enormous pressure that you must have been under to produce a submission in such an extraordinarily short timeline, I want to acknowledge the detail into which you have gone to propose alternative arrangements in terms of amendments for the bill.

In regard to the statement you make on page 5:

The attempt to cater for ‘development interests’ must not be at the expense of accountability, public participation and full consideration of environmental impacts.

do I take it from your words here today that, in fact, you think that is where the bill fails?

Ms Ruddock—I can probably answer that. As you may be aware, in both New South Wales, and in Queensland where they have had these laws for quite a while, there are a number of pieces of legislation that have fast-tracked significant developments. They have been used more commonly now in New South Wales since the introduction of Part 3A of the Environmental Planning and Assessment Act last year. In Queensland we have the state development act, which has been around for some time. So large projects tend to go through without going through any planning hurdles, often with limited community consultation through those hurdles. So, the EPBC Act is really, I guess, a check on those things and any streamlining of the process is really going to affect the effectiveness of that as a significant check, because we see that there are already a lot of state laws that streamline significant projects.

Senator CARR—The term ‘streamline’ is always a very convenient way to put a spin on reduction in the public’s capacity to be engaged on these questions. I agree that there is increasing use of that at the state level. I see that the Tasmanian department has put a submission to us. Have you had a chance to look at that? At least they put a submission to us, unlike the Commonwealth department which is not able to put submissions to us; it appears that it does not have the resources to write submissions. The Tasmanian department is suggesting that, in fact, the legislation does not go far enough in undermining the public’s ability to be involved in decisions. It suggests to us that there should be:

... a process by which strategic investment nodes/corridors for industry and major infrastructure can be exempted from the need for a referral under the EPBC Act.

Is that the sort of pattern you are seeing across the states where there is an attempt to develop whole corridors that are exempted by legislation of this type?

Mr Smith—It certainly is a development that has been of some concern to us. As Ms Ruddock has already outlined, we are talking about streamlined laws in Queensland and New South Wales. The New South Wales laws were specifically introduced, if you like, for the purpose of matching Queensland and Western Australia in the resource development sectors. So, yes, it is of particular concern.

Senator CARR—You quote the explanatory memorandum in your submission, and you have been listening to the submissions that have been put to the committee this morning, I take it? You have heard most of them, is that right?

Ms Walmsley—WWF.

Senator CARR—Sorry?

Ms Walmsley—We just heard the last one and the end of ACF.

Senator CARR—If that is the case, I will say that what has happened here is that there is the Senate Standing Committee for the Scrutiny of Bills. It looks at whether or not legislation trespasses upon civil liberties and the rights of Australians in terms of any current proposals for legislative change, and that committee has produced a unanimous report raising serious concerns about the absence of reasons or explanations in this bill, or the explanatory memorandum, for some very serious new offences and penalties and the decisions to limit appeals for ministerial decisions.

One government senator, whom I have indicated already is very close to property interests in Western Australia—so he is a true conservative in that sense—has actually said:

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.

As lawyers, what is your view of the penalties and the new legal regime that is proposed in this legislation?

Ms Walmsley—Mr Smith will talk about the enforcement, but I just want to say that we did find that the explanatory memorandum was sparse on rationale and detail. For example, the explanation of removing the merits appeal of ministerial decisions is that certain decisions should be made by government, full stop, whereas we are of the opinion that on important decisions they should have public participation and review.

Mr Smith—I have not had the opportunity to look in detail at the offence regime that has been put in place. As we know, it is a 400-page bill which has just landed on our lap in the last week or so. There is nothing wrong in theory. The act certainly follows the accepted framework, if you like, for regulatory offences whereby you have a range of offences which are intentional and therefore attract significantly greater sentences—including, where appropriate, jail—and a range of strict liability offences whereby the ways in which you can get away from those are limited. There is only one acknowledged common law defence to strict liability offences. But the trade-off is that you can only impose financial penalties for those, and then you have absolute liability offences which are for mere technical breaches. So

we do not have a problem with the framework more generally. I have not looked at the detail of where people's rights may be infringed, but it certainly does not seem to infringe that general framework for regulatory offences.

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 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.

Senator CARR—What sort of actions are we talking about here in regard to strict liability provisions which attract seven years' jail? What sort of things would that involve?

Mr Smith—If I can answer in this way, strict liability refers to offences whereby you do not have to prove intention on the part of the person or organisation doing that act.

Senator CARR—Does that have an effect if you are appealing against a development action? Would that involve the possibility of legal liabilities for organisations that are actually taking actions? Are there any actions of that type that are now brought within this legislation? I am speaking here for instance of the case that was in the law courts in Tasmania against certain forestry interests. How will actions in courts stand in terms of your reading of this legislation? Will it enhance those prospects?

Ms Walmsley—You will see on page 34 of our submission, the strict liability amendments in this bill are predominantly going to essentially help DEH with enforcement. There are things like: 'that a property is a World Heritage property', 'that a place is a heritage place'. They are things that would put an onerous burden on DEH to prove and have been a bit of a barrier to DEH action. We are supportive of the provisions in this bill that will help DEH do more enforcement work, because up until now in the last six year they have not actually done much enforcement action. So, these minor aspects, that are now strict liability under the bill, are actually a part of the bill that we do support, because they should make enforcement of the legislation better.

Senator CARR—You are obviously opposed to the jailing, but in 6.5 of your submission, on page 35, you ask about the impact of liability for impacts caused by third-party actions. How does that apply?

CHAIR—Mr Smith, we could get you a copy of the *Alert Digest*.

Senator CARR—I am actually referring to your own submission here on this occasion.

CHAIR—I know but you are also referring to this in general terms.

Senator CARR—How does it work? The point you are making about liability for impacts caused by third-party actions: how does that particular amendment work in your judgement? The purpose of this amendment is to ensure that a person cannot be prosecuted or a civil penalty imposed for impacts caused by third parties. What is the impact of that particular amendment?

Ms Ruddock—I understand that this is the type of situation where there might be an agent or someone acting who might have gone outside the scope of what they were asked to do, such as with a company or a contractor that goes and clears a whole lot of things without proper consultation with the company that has actually engaged them to do the clearing. This is dealing with those types of situations.

Senator CARR—Yes, so in a World Heritage area or in an area adjacent to a World Heritage area a contractor clears 50 or 60 hectares and he can claim he did not know anything about it?

Ms Walmsley—It comes back to the principles of vicarious liability and whether the employer actually directed the contractor to do that or not. I think it is there technically to clarify that aspect.

Senator CARR—Finally, in terms of the curtailment of third-party appeal rights, if we take it from the other angle, what is your judgement of this legislation? How do you think these changes will affect third-party appeal rights?

Mr Smith—As Ms Walmsley has already outlined, there are a number of provisions in the act which take away merit appeal rights, and there are a number of other mechanisms within the act which take away the practical ability, if you like, of community and conservation groups to take action, such as the proposal to repeal section 478 regarding no requirement as to an undertaking as for damages. As I think that one of the previous speakers mentioned, that could have a significant impact on the ability of community groups to launch legal action. You will still have the relatively open standing provision; you would still have the right on paper to take action, but it has long been recognised that it is insufficient to have a right to go to court if you do not provide people with the means to do so, and the costs of litigation are extraordinarily high. So you need, again in appropriate circumstances, mechanisms in place to actually have that formal right coupled with that substantive right. As a number of the other speakers have already said, no-one goes to court lightly. There have been a handful of actions over the past six years. It would be madness to go to court lightly. There are existing mechanisms that the courts can use. They can throw matters out if they think they are frivolous or vexatious and they can make costs orders at the end of the day which act as significant disincentives within themselves for anyone who would even remotely contemplate going to court without substantial reasons to do so.

Ms Ruddock—The merits review in the AAT is also a particularly useful mechanism for environmental groups to bring in scientific evidence and have that heard by the courts to assess some of the conditions that have been imposed on particular decisions made by the minister. So removing that right will certainly have a big effect on their ability to actually also

bring scientific evidence before the AAT and strengthen conditions that are put on some of these decisions.

Mr Smith—The point was made before about whether these reforms politicise, if you like, the decision-making process. The thing to remember there is that decision making is by its nature political and it is really just having mechanisms in place to deal with that. Previous speakers have already noted that you need to make a distinction between the scientific aspects of listing, and so on, versus the more political aspects of deciding whether or not something does or does not go ahead. Those decisions about whether something does or does not go ahead, by their nature are political. But there needs to be at least two things: first, some kind of appropriate bounds around that discretion, some guidance as to the framework in which a decision is made and, secondly, there needs to be accountability. Those merits review functions where community groups and so on can take action to remake that decision and get another body to look at the arguments for and against it and remake that decision are enormously useful.

Senator BARTLETT—Just following on from that area of appeals, I know EDO is involved in a number of appeals under the federal law. You have had experience as an organisation and, I expect, personally with being a party to actions under the EPBC—is that accurate?

Mr Smith—That is correct, yes.

Senator BARTLETT—I guess that makes you well placed to make a comment on precisely what type of impact the change would make to interim injunctions and other things. But I guess the interim injunction one has the greater potential for costs. Can you give an indication of that? Maybe you could think back to past cases you have been involved in where it may have meant you would not have taken the action. What sorts of factors do you and the people you act with—community groups, usually—have to weigh up in deciding whether or not to take the step?

Mr Smith—Ms Ruddock has probably got more practical understanding of those, but I can make a more general comment just to reiterate what I said before. You do not take on these matters lightly. The requirement for an injunction is often necessary as a precondition for a determination of an issue. If undertaking for damages were considered, then that would, I would have thought in the overwhelming majority of cases, end the matter. Community groups would simply not be able to take it any further.

Ms Ruddock—Litigation is very expensive. Even just to file a matter in the Federal Court is, I think, about \$1,700 for an incorporated association, which most of the environmental groups that we have often acted for have been. On top of that you have hearing fees and all sorts of other fees that the Federal Court imposes. That is before you even look at finding a barrister to do the matter for you pro bono or at reduced fees, and having the EDO involved at very little cost for the community group. It is very expensive. If you have a costs order awarded against you, you can be up for a lot of money. The Wildlife Whitsunday Group, which took action against the federal government last year, had a \$300,000 costs bill presented to them after that court case. So it is significantly difficult for groups like that to take on litigation such as that.

Senator BARTLETT—It is not just rhetoric to say that your professional experience would be that these changes will mean that fewer actions will be undertaken?

Ms Ruddock—Particularly the enforcement actions. Our experience with enforcement certainly has been in the north Queensland office that we were routinely complaining to the department. We probably complained at least once a month about an enforcement issue for areas where critical habitat was being cleared that had not been referred, or some other enforcement issues. Most of the time the response from the department was: you have third-party enforcement rights; we do not really have the resources to take it on; how about you look at it? That is not practical for many of those groups, as I have said, for the reasons that I have just set out. Particularly in relation to enforcement, you would also need to probably present some kind of scientific evidence, often about the effect of whatever is going on. That is what Dr Booth had to do in her case. She had to call various experts to talk about the effects on the World Heritage values. So it can be a very expensive process.

Senator BARTLETT—Can I just go into that point a little bit further with you, just because you are probably the group, out of all of our witnesses, who have the most experience at the pointy end, the practical end, of this sort of thing. Take that statement you made, where the government department was saying: ‘We don’t have the resources to enforce it; how about you take court action?’ I will leave aside how that feels when you are a not overly-wealthy not-for-profit community organisation. Even in terms of that principle of clogging up the courts with actions, it seems fairly problematic to me as a public policy issue that you rely on the courts to enforce things just because a government department does not have enough resources. Do I understand that correctly?

Ms Ruddock—As far as I know the department has taken one civil prosecution, the Greentrees prosecution that was taken in New South Wales. That has been the only civil prosecution that they have conducted, so there certainly have not been a lot before the court. There have been a couple of individuals like Carol Booth who have taken their own enforcement action, but they would be the only ones.

Senator BARTLETT—Would you have an idea or be able to provide on notice just how many different types of court actions have been taken under EPBC over the—

Ms Walmsley—We do have a provisional list here of 10 actions and three reported merits review challenges. We can have that copied and provide it afterwards.

Senator BARTLETT—Yes, or if it is provisional and you want to make sure it is complete we can get it on notice—

Senator IAN MACDONALD—Does that show how many were successful?

Ms Walmsley—This is just the listing, but we can provide that information.

Senator BARTLETT—If you could, early next week, that would be good. As you know, our time frame is somewhat tight.

Ms Walmsley—Yes, that is fine.

Senator BARTLETT—You have been quite comprehensive in your submission, given the time frame, which I appreciate. The time frame also impacts on the ability of people like us to read it, so I may have missed something, but I noted that in the Australia Institute’s

submission that they pointed to a change in the definition of 'prior use' exemption under section 43B. I do not know if your submission goes to that. If you are doing it on the run it may be better for you to have a look for it. It is a 400-page bill, so I know it is a bit hard to go through it all, but it mentions a change in schedule 1, item 130, of the amending bill before us to that provision. Perhaps you could have a look and take that on notice. The concern they raised was that it widened the meaning of 'prior use' and that that might mean a change in action and change in location, but it could still count as prior use. Could you look at that? In your experience with engaging in court actions, injunctions and all those things, are you aware of any examples where there has been what might be seen to be frivolous or political actions?

Mr Smith—Are you talking about under the EPBC Act?

Senator BARTLETT—Yes.

Mr Smith—Certainly you could not define any of the 10 actions that have been undertaken—or, indeed, the three merits cases—as being frivolous or vexatious. Of course, from time to time frivolous or vexatious matters can be brought and have been brought, for example, in New South Wales, but the courts have the mechanism to deal with them and they throw them out; it is an abuse of process; costs are awarded—

Senator BARTLETT—So there is no evidence that you are aware of that there has been misuse of this injunction provision?

Mr Smith—Absolutely not, no. A number of judges have commented at length upon this very issue—the idea that, by having third party rights, there will be floodgates opening and so on, and the courts will be held up for a very long time in dealing with these. But clearly there is no empirical evidence to suggest that that has been the case.

Senator BARTLETT—Would it be fair to also say that at least some of the court actions, one would suggest, have been of assistance to everybody that uses the act, including developers, because it has actually clarified what it means?

Mr Smith—At the EDO's annual conference last year we had sitting on the panel the senior member of the Department of Environment and Heritage and I asked him that very question. He basically said that the community actions have the distinct advantage of clarifying the way that things work, of interpreting the legislation and also of keeping the department and the government on their toes.

Senator BARTLETT—Could I just ask about a final issue? The bioregional plans have been touched on briefly. A lot of submissions have pointed out things that one would suggest are categorically not good and some things that are categorically good. I am interested in any of those bits that might be in the middle; I do not know if this is one of them. To use examples that I am somewhat aware of in my own state of Queensland, I think I would have seen at least 20 potential referrals of developments in the Mission Beach area and just in that small patch surrounding there. Each referral on its own accounted for a small amount of habitat cleared and did not bring about major change, but cumulatively the referrals have led to the massive clearing of habitat of iconic endangered species. Does this notion, at least in theory, of a regional plan provide a mechanism for dealing with that problem?

Ms Ruddock—I guess our experience with the EPBC Act is that it is an important check, particularly in states like Queensland where things often slip through, and, for lots of reasons, are not assessed in relation to their species—

Senator BARTLETT—You are attacking Queensland's culture and laws there, are you?

Ms Ruddock—It is probably in relation to a lot of things, including things like Powerlink. I know some of your constituents have been quite concerned about that, so it has been a significant check on looking at some of those things as well. So, it is a very important thing. There is really no detail at this stage as to how the bioregional plans would work as to whether they would actually look at a cumulative impact. There is nothing in the act that actually suggests that they could at this stage look at the region and assess it in the way that would assist in somewhere like Mission Beach.

My concern would be more that we would have something like the Far North Queensland Regional Plan, which has been announced by the state government, being accredited under the EPBC Act and there being the need to avoid having to then tick off all of those developments in Mission Beach and in the wet tropics region that would otherwise go through the act and which often have very significant conditions put on them by the Commonwealth which very much assist in relation to some of those things that have been left out in the state process.

Senator BARTLETT—I do not want to verbal you, but is it fair, in a very shorthand summary, to say that, as it is presented in the act, there is no indication that it will serve that purpose potentially, but that if the details were fleshed out, it could? Is that a fair summary?

Ms Ruddock—Yes, that is correct.

Senator BARTLETT—I just wanted to clarify another point from what you said there. Even if all of these things go through and end up being approved, at least the legislation is providing a mechanism to monitor what is going on and to potentially add conditions and require people to comply. That has value; you cannot just say, 'Oh well, it is not stopping any developments, so it is all a waste of time'.

Ms Ruddock—It has been of very significant assistance in areas of Far North Queensland that I have worked in. Developments such as the False Cape development that was going through in Cairns. That was an old development which sort of slipped through the planning laws with very few checks and balances in that process. The Commonwealth actually banned the marinas and boating developments in that and that has been a significant advantage. They also put limits on the amount of clearing which could occur. Likewise, they have put conditions on a lot of the marina developments around the Whitsundays that have made it a lot stricter than the state government would have put on. So, again, it has been of significant use having those extra conditions. Obviously, none of the developments have been stopped and, obviously some of my clients at various times are probably very disappointed in that sense, but that ability to put on stringent conditions is really important and is part of the checks and balances that you need in having a national system.

CHAIR—Perhaps we should go to Senator Siewert now.

Senator SIEWERT—I want to pick up where we have just left off, and that is on the regional plans. Can I just ask you for further detail around something Senator Bartlett asked?

Is it your understanding that, using the planning process in Far North Queensland, if that plan went to the Commonwealth and they ticked it off, any development included in that plan would then therefore not be assessed?

Ms Ruddock—That is my understanding of what could happen. You would effectively get a plan; it would be accredited. It might be a coastal development plan. I know that is what the minister had flagged as one of the areas that he wanted to look at. Once you did something in accordance with that plan, it would be ticked off and it would not need to go through the EPBC procedure. So, that has got significant concerns, not just in relation to particular regions that may have significant species, but with themes like coal or uranium, that there might be a coal plan or a uranium plan that would then be ticked off and then those things would avoid having to go through the EPBC process.

Senator SIEWERT—That leads very nicely into my next question. When Mr Macintosh appeared this morning for the Australia Institute, I asked him about the exemption. His submission states:

An additional issue that arises in this context is section 37J, which states that the Minister cannot make a declaration exempting an action that consists of certain nuclear installations. This restriction does not cover a number of types of nuclear actions, including controversial actions like nuclear waste facilities and uranium mining and milling.

His interpretation of that is that therefore those proposals, if they are ticked off by a regional plan, would therefore not have to go through Commonwealth assessment. Is that your interpretation as well?

Ms Ruddock—That was certainly our interpretation as well.

Senator SIEWERT—It is a pretty significant issue as far as some of us are concerned. I think you were here when we were talking earlier about the thematic approach that has been taken to both world threatened species listing and heritage listings and the ongoing discussion we have been having about then the minister being able to intervene. It seems to me to be taking the process back into the advocacy process. I understood that part of the reasoning behind this act was to actually putting a more scientific basis behind environmental assessment and getting away from the old days where we had to lobby to get attention to environmental issues by the minister. Is my interpretation therefore correct that that will involve more lobbying and more advocacy to get something on the list if it is not picked up through the thematic process?

Ms Ruddock—That is certainly my understanding. I guess that has significant disadvantages for groups that are in regional areas and that just do not have ready access to getting to Canberra easily and making those kinds of appointments. Certainly from where I have been in Far North Queensland, it is not often that people get that access. They can obviously go and see some of their local senators and raise issues with them, but if there are not many senators in that local area then they just do not have that access, and certainly not the ministerial access.

Senator SIEWERT—Another issue goes to ministerial discretion. It seems to me, from reading both the amendments and the submissions, that people believe that there is more ministerial discretion through the amendments.

Ms Walmsley—There definitely is in the nominations process. We are concerned that the annual thematic process will also allow for certain politically contentious nominations to be continually delayed and deferred. For example, commercial fish species and that kind of thing are always contentious. They will not actually see the light of a proper scientific assessment because under this process they can get put on the backburner.

Senator SIEWERT—That leads me to another issue that you have raised in your submission: removing the right of review by the Administrative Appeals Tribunal. There seems to be quite a long list of decisions that are now going to be exempt. Can you provide a little more detail there?

Ms Walmsley—Yes. That is page 7.

Senator SIEWERT—There is a list there about what issues are now going to be exempt from appeals. If I interpret it correctly, the minister has more discretion now but also the right of appeal has been removed.

Ms Walmsley—If they are delegated decisions there will still be a right of review, but, for ministerial decisions, there will not be that avenue for review. As Mr Smith said earlier, there have only been three or four reported occasions that these provisions have been used by environment groups, and they have been taken very seriously. It is an important process for the accountability of a ministerial decision to be able to have this review.

Mr Smith—All the decisions that have been reviewed by third parties so far have been ministerial decisions. The only rationale we have for that change in the explanatory memorandum is to leave the merits of these important decisions to the government. I think it is a fairly blunt instrument to say that you are essentially leaving decisions of national importance, by definition, to the four-yearly election cycle. That is what it seems to be saying—that that is what the government is there for and they will be accountable for it. But these decisions are very specific decisions and it is a very blunt tool to simply leave it to that election cycle. All we are suggesting is the retention of the existing right, which has happened on three occasions in six years, to review those types of matters on their merits.

Ms Walmsley—I think the ability to appeal, for instance, like specific wildlife trade permits has actually existed since 1982 in the Wildlife Protection (Regulation of exports and Imports) Act, so it has been around for a while and it has not been abused.

Senator SIEWERT—That was under the previous act, wasn't it?

Ms Walmsley—Yes.

Senator SIEWERT—The other issue that occurred to me when we were talking about removing section 478 is that it seems as though they do not go as far as removing third-party rights; what the amendments do is make it much more difficult to actually exercise your third-party rights. Would that be a correct interpretation?

Mr Smith—That is exactly right. The distinction I made before was between formal and substantive rights, if you like. Justice Toohey once said that opening the doors to people makes little sense if you do not give them the opportunity to walk through. And that really is what is here. You still have the formal right—you still have the same standing rights as we

currently have—but those more substantive rights where you can actually afford to do it will not be backing that formal right up.

Senator SIEWERT—I would like to go back to something that you touched on before, Ms Ruddock. Individuals and environment groups, NGOs, because we have such a big country, are the eyes on the ground that help identify problems. When I used to run an environment group I had agency people say, ‘No, we cannot do that; it would be a really good idea if you did something about it.’

Ms Ruddock—Certainly that has been my experience. In fact, when I was in North Queensland I met regularly with the department and they certainly were relying a lot on our office to go through complaints that were coming in, sift through them, make sure that they had some validity and then pass them on to their office for enforcement action. There was certainly a feeling that they just did not have the eyes on the ground. They could certainly ring up their colleagues in the EPA, but there were not necessarily going to get any better response from them because they are also quite underresourced in Queensland—and probably in every state. So, essentially the environment groups were the people on the ground, taking photos and doing the type of things that otherwise, potentially, an officer could have been doing if they were not based in Canberra.

Senator SIEWERT—Thank you.

CHAIR—Senator Macdonald?

Senator IAN MACDONALD—Taking photos and getting evidence on the ground is one thing, and I think that is sensible, but are you seriously telling me that the Commonwealth Department of the Environment and Heritage is ringing you and saying: ‘We should be enforcing this under the act but we have not got the resources, so can you take them to the court?’

Ms Ruddock—Sometimes that has been their response. They obviously investigate things and look through them, but most of the time their response has been, ‘We just don’t think it’s a strong enough case; we’re not willing to risk it,’ or at times their response has been, ‘If it’s urgent, your client should go off and get an interlocutory injunction; we simply cannot look at this fast enough.’

Senator IAN MACDONALD—That is different, though. If the department looks at it and says, ‘We do not see any merit in this, but if you want to have a go, off you go’—

Ms Ruddock—It is a combination of both that they have been responding to. Sometimes it has been that, but at other times it has been, ‘We just don’t have the resources.’

Senator IAN MACDONALD—On the first one I would excuse the department. If they look through it and think that it has no merit—I would hope they would not be urging vexatious litigation—that is one thing. But, if you are saying that they are saying, ‘Look, we ain’t got the dollars to do this, so you do it,’ that would be of great concern to me.

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

Senator IAN MACDONALD—I want to come back to your list of court actions. You said there are about 10. You are going to check it out, but what is your guess as to how many of those would have been successful? Do you half a feel for that? Would it be half of them?

Ms Ruddock—Certainly Carol Booth's cases and Nathan Dam were successful.

Ms Walmsley—We can provide that information to you.

Senator IAN MACDONALD—Would a guess be that about half of them were successful? Okay, I will not pursue that. Let me come to this. Who was the respondent in all cases? Who is the other party to the court case?

Ms Ruddock—They have been a variety of people. Sometimes they have been the Commonwealth Minister for Environment and Heritage. At other times they have been various state governments and state government entities. The roads corporation was one; a Japanese whaling company was another—so a variety.

Senator IAN MACDONALD—Could you put that on your list when it comes? Are you saying there have only been 10 actual court appeals under the EPBC Act?

Mr Smith—Third party, yes.

Ms Ruddock—Yes, these are the third-party cases. The only one that I know of in addition to this is the Greentrees case, which was the enforcement action that I referred to earlier.

Senator IAN MACDONALD—That is by the Commonwealth?

Ms Ruddock—By the Commonwealth. I understand they did conduct a prosecution, but I do not think it has ever been reported on, so it is not in the case law.

Senator IAN MACDONALD—I think you mentioned the Whitsunday group that had a \$300,000 costs bill against them. Do you know anecdotally whether or not that has been paid?

Ms Ruddock—No, it will not be paid. They simply do not have \$300,000, surprisingly enough, in Bowen!

Senator IAN MACDONALD—Obviously the case had no legal merit because it was thrown out.

Ms Ruddock—It was a little bit more complicated than that. When we got the statement of reasons from the minister for environment, or his delegate in that particular case, he made no reference to considering greenhouse gas emissions. During the course of the case, the situation changed and the delegate gave evidence in the court case to say, 'Actually I did consider it; I just did not put in there,' and gave a detailed affidavit that basically satisfied the court that he had considered it.

Senator IAN MACDONALD—So because of his inaction the local group lost the case and had costs awarded against them?

Ms Ruddock—Yes, unfortunately the Federal Court is a bit tough on costs. I think in most of the cases that have been run—

Senator IAN MACDONALD—But that was the fault of the Commonwealth. Was it the case that, if they had actually had that in the initial stage, the action would not have been taken?

Ms Ruddock—That is correct. I should not say this, but I guess technically there would have been an opportunity when we got that affidavit for our client to have withdrawn the case. They still thought that there was a significant point that could be argued and we lost on that point, which was looking at whether or not climate change in the scheme of things was something that should trigger the act.

Senator IAN MACDONALD—Perhaps if the Commonwealth is the respondent that is fair game; it is just that the poor old taxpayer picks up the \$300,000 plus the, I suppose, \$1 million that the Commonwealth would have spent on legal fees. Who cares about that? It is only money!

Ms Ruddock—It was actually the coal mines as well. The coalmines joined that action and so \$100,000 of the costs was the Commonwealth and \$200,000 was the coalminers.

Senator IAN MACDONALD—Big, wealthy, foreign owned coalmines that put pollution into the atmosphere deserve to pick up the bill anyhow, don't they, even if they win. But of those 10 which were the smaller people—fishermen, a financially stressed fishing industry, a sawmill or a farmer? What happens when there is an action taken, they win, there are costs awarded in their favour and then the environmental group simply goes into liquidation and does not pay them a cent?

Ms Ruddock—As far as I know there has only been one case taken against an individual, which was the Booth and Boswell case. In that situation Carol Booth was successful, so she did not have to pay costs.

Senator IAN MACDONALD—Did she get her costs?

Ms Ruddock—I do not think she has got them yet.

Senator IAN MACDONALD—Interesting.

Senator SIEWERT—We should show the same concern for the Gunns 20. The swing goes the other way when industry takes out cases against individuals, like in the Gunns 20 case.

Senator IAN MACDONALD—Yes, but if Gunns lose, which they have, they will be up for costs and they will be recovered. If the other lot lost and Gunns tried to get the costs, they would not get a cent. I think Gunns should pay if they lose, but I think the reverse applies as well but it does not. I am interested that there are only 10 cases, because before the EPBC—I am thinking of Port Hinchinbrook and others—there were lots of actions taken which were frivolous and vexatious and costs were awarded. I am not even sure if costs were awarded, but they were never paid anyhow.

Senator SIEWERT—On Hinchinbrook?

Senator IAN MACDONALD—Yes.

Senator SIEWERT—There were large costs paid.

Ms Ruddock—Yes.

Senator IAN MACDONALD—By whom to whom?

Senator SIEWERT—By the environment groups. I am pretty certain I am right.

Senator IAN MACDONALD—I am not a real betting man, but I would—

Senator SIEWERT—There were a lot of fundraising events that went on, I can tell you.

Senator IAN MACDONALD—They were to pay the EDO—no, the EDO did not need payment in those days. The taxpayer used to pay them. But I am sure the last time I unfortunately met Keith in an airport, he told me that they never pay. Coming back to the accreditation, I note your concern, or your fear. We are particularly talking about the Queensland government, which has no environmental credentials even though the Greens preference them every time—I can never understand why. I know you would be worried about a Queensland government. Isn't the process of accreditation is such that the Commonwealth says, 'We will trust you with our legislation because you have promised us that you will follow every aspect of ours and impose the relevant conditions, and if you do that we'll accredit your plans because they've incorporated our plans'? Isn't that the layman's understanding of what the accreditation process is about?

Ms Ruddock—Yes, that would be the thrust of what would be done. Certainly that is what has happened with the accreditation that has happened so far in the bilateral arrangements, which are really about the assessment process as opposed to the decision. But our fear, I guess, would be more about how the plans will take away, in some cases, the right to look at these individual actions that often need attention because broadly they may comply with a piece of legislation—because it does not get down to that level of detail. So it is very difficult to see how you would have the kind of checks that I am talking about that are in place at the moment with individual actions.

Senator IAN MACDONALD—Perhaps I am getting this wrong. Are you concerned that the Commonwealth, who in this scenario are the good guys, were imposing conditions—

Senator SIEWERT—That makes a change.

Senator IAN MACDONALD—No, we are the most environmentally conscious government there has ever been. That might not say much for the others, but at least we are moving ahead, slowly perhaps. If, as I understand it, the states under an accredited plan approve something but they clearly are not following the EPBC Act even as amended and they are not imposing conditions that might have been available and obvious under the EPBC Act, the Commonwealth would have an ability then to come in and say, 'Hang on, we accredited you to do this work but you've shown you are not capable, so all bets are off.' Is that how it works?

Ms Ruddock—I am not sure what the powers are to actually revoke the accreditations under the act. We have not paid much attention to what they would be, but I think that the difficulty would be that in a lot of cases it is going to be just too little, too late, with that kind of situation where you would have already had a whole string of developments or other things that may have gone through in accordance with that accreditation. By the time you have enough of them to show the problems with that process to convince the Commonwealth to maybe revoke that, it is going to be too late.

Senator IAN MACDONALD—Perhaps the minister is making a rod for his own back. If the minister, as I understand it, does have additional power and discretion under the amended act, it does of course mean that the political process becomes more important and that the

minister may find that he is being called upon to assuage the concerns of local members more than he would under the present system. Do you think there is any merit in that? Perhaps that is not a fair question.

Ms Ruddock—It is not very fair in the current political climate to really say that, I don't think.

Senator IAN MACDONALD—You mentioned the Powerlink case. Sure, the Commonwealth had a role there, but it was a pretty ineffective role. I cannot see how that process would be worsened by the amendments to the act. I mean, we got nothing under the current act—

Ms Ruddock—You would have had even less, I guess. At least in the conditions that the Commonwealth minister put in there were various things about further studies having to be done on various properties where there were concerns about rainforest frogs. There were also things about making sure things did not go near creeks and other areas like that. So there were some conditions that simply would not have been imposed by Queensland even in that decision, as poor as it might have been.

Ms Walmsley—Can I just add: the bill actually says, with regard to bilateral management arrangements and processes, that once accredited the accreditation no longer expires after five years, so it could be indefinite. But there is some review. So the Commonwealth might only review that accredited plan every five years and, as Ms Ruddock said, that may be too late. One of our key concerns is that there is just not enough explicit detail in the bill to guarantee that this process will be accountable. It is a very broad-brush approach and we just want to see some criteria and explicit detail.

Senator IAN MACDONALD—I have not read the bill in that detail either—I, like you, have not had the time—but I would be confident that if, having been accredited, a state then capriciously and wilfully ignored what it had been accredited to do, there must be some ability for the Commonwealth to take it back or to override it, surely.

CHAIR—There is the five-year review.

Senator IAN MACDONALD—Yes, but if this happens in the first two months of the five-year period you have to wait a long time to—

Ms Walmsley—It would require political will of the Commonwealth to do what you are suggesting.

Senator SIEWERT—Can I just clarify that what you are talking about there is the bilateral plans not the regional plans?

Ms Walmsley—That was the bilateral accreditation of management arrangements and processes. There is also accreditation plans, regimes, policies and accreditation of bioregional plans.

Senator SIEWERT—Yes, and I think that is part of the issue. It is a matter of how enforceable is the regional plan. We had evidence before from a number of witnesses that were concerned that once those regional plans are accredited it is very difficult to go back and override—

Senator IAN MACDONALD—But they have to be followed.

Senator SIEWERT—Yes, but the point there is that, once a regional plan is approved, the Commonwealth therefore has no further role in assessing developments included in that regional plan. And that is the issue.

CHAIR—I am afraid we are out of time with these witnesses.

Mr Smith—Can I make just one final point very quickly?

CHAIR—Yes.

Mr Smith—As many speakers have noted, the bill landed in our lap in the last two weeks or so, and it is a large bill addressing all sorts of matters, but the thing that it does not address, and the obvious thing, is climate change. If you asked the ordinary person in the street: ‘Is climate change a matter of national environmental significance?’ they would say yes. This is a great opportunity to go down that path, to put the trigger in for greenhouse gases, and it has been missed. And that of course is just about putting those issues before the decision maker; it is not dictating a decision. It is simply saying: where you have large projects, let us make the decision maker think about those and make people aware to a greater extent about the impact that all these decisions are having. I just think we have missed that opportunity.

Senator IAN MACDONALD—You do not think that the decision maker would take that into account in any case? I mean, you cannot pick up a paper or turn on a radio—

CHAIR—There is a list of matters of national significance.

Senator SIEWERT—Yes.

Mr Smith—There are triggers, and a greenhouse trigger is not currently a trigger. So you can come in through the back door—

Senator IAN MACDONALD—Yes, but all the things that contribute to greenhouse would surely be in the list?

Mr Smith—That is right, but if we are acknowledging that greenhouse is an issue it should, according to the criteria by which current things are a trigger, be a trigger as well.

CHAIR—I think the purpose of these amendments was to review the working of the act after five years, to simplify the process and to expedite the decision-making procedures, but several witnesses have made the point you have just made, so we take due note of it.

Mr Smith—Okay.

CHAIR—Thank you for appearing this morning.

[1.07 pm]

HUNNEYBALL, Ms Gemma, Program Officer, Humane Society International

KENNEDY, Mr Michael, Director, Humane Society International

CHAIR—Welcome. Would you like to make an opening statement?

Mr Kennedy—If I may, just a few words. Our primary concerns are for the proposed new nomination and listing processes, the removal of merit reviews applying to a number of decisions and the requirement to undertake to pay damages in the Federal Court in applying for injunctions, although there are many other concerns outlined in our joint submission with the Tasmanian Conservation Trust and World Wildlife Fund, Australia. HSI has specialised in utilising EPBC public nomination and recovery processes and has used the courts to help better implement the EPBC, appearing twice in the Federal Court and three times in the Administrative Appeals Tribunal. We are currently reviewing further potential court cases.

We have provided you and the secretariat with some documentation showing all current EPBC habitat and key threatened process listings since the act came into being in 2000, indicating which are HSI nominations. Currently we have 42 nominations being assessed by the minister—23 endangered communities, four threatened species, three key threatened processes and 12 national heritage proposals—with six more nominations in preparation. This documentation will tell you that only 36 endangered communities, 17 key threatened processes, 33 national heritage places and five critical habitats have been listed since the year 2000. There are, however, according to DEH, nearly 3,000 endangered communities in this country, and if EPBC requirements had been effectively followed in the last five years there would now be around 1,700 listings of critical habitats under the register. This chronically poor record is in the face of 2001 election promises committing the government to assess over 500 endangered communities recognised by the states and territories and nominated by HSI using section 185, which is now being proposed to be removed, to the listing of critical habitats of all endangered species and to the assessment of all 2,891 endangered communities by the Threatened Species Scientific Committee as identified by the government's own 2002 terrestrial biodiversity assessment. None of these commitments have been met.

Our point is that, given the serious problems clearly impeding the effective current implementation of the EPBC, the amendments before us are totally inadequate. In relation to undertakings for damages, the bill sets public and democratic processes back some six years. It sets back those processes by 14 years in relation to nomination processes and 25 years in relation to public access to the courts. This has all been done without legitimate justification or mandate. The opportunities missed through potential EPBC provisions on climate change and on water use as new national NES triggers is regrettable. Senator Hill had previously released a public discussion paper on an EPBC trigger in 2000. That became lost in a political void. Similarly, a chance to develop a national heritage rivers program under the EPBC as recommended by the CSIRO in its 2002 report to the Prime Minister's Science, Engineering and Innovation Council has never been taken up. I think that about covers it in terms of our main directions.

CHAIR—Senator Siewert has some questions.

Senator SIEWERT—You were talking about a number of provisions taking us backwards. It seems to me that in the past community groups were accused of not using the process and of lobbying to get outcomes.

Mr Kennedy—Sure.

Senator SIEWERT—It seems to me that, from the evidence you have just given and the submissions that both WWF and you have provided, you have actually been very seriously engaging in this process with the act to get environmental outcomes. If these changes go through, you are going to have to go back to the lobbying approach of doing business.

Mr Kennedy—Yes.

Senator SIEWERT—Am I missing something here?

Mr Kennedy—No. 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.

Senator SIEWERT—The subject of southern bluefin tuna has come up already, and Senator Macdonald will probably pursue this theme. I wanted to use that as an example, and I think the ACF referred to it as well. Listing will now also have to consider—I am sorry, I cannot remember the exact words without looking it up—the likelihood of its success.

Mr Kennedy—The minister now has a wider discretion in what he has to account for. But I should add that, when it comes to listing—and the example of commercial fish is, I guess, the best—there is a tussle going on between NGOs like mine who would like to see commercial fish put on environment lists when recognised as being endangered. That has not yet happened for a commercial fish. The industry does not want that and nor do I think does the federal government's fisheries bureaucracy. So the tussle goes on. So, when there is a nomination made for a commercial fish, what you find is that even under the current law ways are found to delay and to delay. In the case of the southern bluefin tuna we went to court because of our concern over its sustainability as a fishery. Even while we were in court there had already been a decision by the minister's scientists that the SBT was in fact an endangered species. Their remit is to provide simply scientific advice. In the advice on the southern bluefin tuna there was an additional paragraph at the end which said, in effect, 'It is not in the best interests of the southern bluefin tuna to list it as an endangered species.'

Senator IAN MACDONALD—A very thorough point.

Mr Kennedy—That was because there was a better process externally under the CCSBT for the southern bluefin tuna. Right or wrong, we went into a fight over that with the minister—

Senator IAN MACDONALD—The former minister. But you were wrong; the courts decided against you, and rightly so.

Mr Kennedy—What was wrong is that their remit is not to provide, in effect, advice on best political processes; just the science. That is an example of where, in our view, the system was a bit corrupted.

Senator IAN MACDONALD—Sorry, I do not want to interrupt you, but I did not quite catch what your point was.

Mr Kennedy—The point was that the scientific committee that advises the minister must advise him or her solely on the science of the matter at hand. They did a paragraph in their advice which we debated in the courts which was in essence political and not scientific. We think that advice was in fact invalid. Had that advice not been given, it would have put the minister in a position where he would have had listed the fish.

Senator IAN MACDONALD—What has that got to do with today's hearing?

Mr Kennedy—We are just talking about the way in which even this process can make the listing of commercial fish very difficult. Under the amendments as proposed, it is my view that the government is being handed a process by which it will always easily avoid having to deal with controversial issues like commercial fish—because there will never be a theme that will be put up by anybody in government.

Senator SIEWERT—There are two issues there I want to address. I understand that there are a number of amendments that impact here. One is the thematic approach, which I will come to, and the other one is the addition that has been made on endangerment.

Ms Hunneyball—Is it about the conservation dependent category? The fish is eligible to be listed as conservation dependent if it is 'the focus of a management plan that provides for management actions necessary to stop the decline of and support the recovery of the species'. Is that the one you mean?

Senator SIEWERT—There is that one and also Mr Berger referred to the one where critical listing or listing will not help. There is an amendment there; I am sorry I did not get the exact words.

Mr Kennedy—I am not that sure what you mean, sorry.

Senator SIEWERT—The implication was that it should be listed unless listing will not help, which is where you then referred to SBT. The argument the government was making also at the time was, 'Listing won't help because then we won't be able to fish it and actually fishing it allows us to be part of the commission which then controls fishing.'

Senator IAN MACDONALD—A very sound argument too.

Senator SIEWERT—But the implication was that the amendment is being made so that they can run that argument.

Mr Kennedy—Another species that we have been concerned about is the orange roughy, and it has just had its quotas reduced by the government. We know that it has been found to be an endangered species. The minister has not yet announced that decision. He has delayed the

process five times thus far on the orange roughly, but it appears that they are not going to list the species as endangered but rather list it as 'CD'.

Senator IAN MACDONALD—List it as what?

Mr Kennedy—Conservation dependent, which is the fourth category under the legislation. That means that the responsibility still remains with the fisheries department, not with DEH, for its long-term management. It may or may not result in a zero quota but, nonetheless, the management for recovery is in the hands of the fisheries department and not the environment department.

Senator IAN MACDONALD—Quite right.

Mr Kennedy—What we are saying is that historically we have trouble with our fisheries, and it has always been a tough area to work in. There is going to be a crunch time when an environment department needs to take responsibility for a given species of commercial fish that is in real trouble because, if you do not, relying upon a department that is really driven its customers makes it very difficult to make sustainability remain on the table. The fish will just decline and decline. That is what has happened so far. The amendments as they stand are not going to help either the environment minister or the public to get a firmer grip when we feel that there are problems of fisheries sustainability, to say the least. They will be able to be avoided quite easily under new processes.

Senator SIEWERT—I will go back to the thematic approach to listing. We have heard quite a bit about it today. It seems to me that species do not become threatened, endangered or vulnerable in a thematic way. If we need to refine the process, how would you suggest that we do that?

Mr Kennedy—I am not sure that we need to refine it, to be honest. You get the impression from the way in which discussion has evolved in the last few weeks over the workload that there are hundreds or thousands of nominations being made by all sorts of people and that the workload is simply unmanageable. That is not the case. The fact is that, because there was the dispute between NGOs over the act's passage, many NGOs have not knuckled down and used that process. That applies to the nomination process for species, places, heritage and key threatened processes. We have had the bulk of nomination processes to date and it is clear that, apart from the swathe of communities under 185 that we nominated back in 2000, there is not a large number of nominations. Whilst resources is a problem for DEH—there is no question about that; they are underresourced chronically in terms of managing this process—they have also been very slow in assessing lots of these places. So when it comes to themes, it is not a matter of species. We have most of the species on the list; they came from previous laws. We have 1,700 and there will not be many more—unless we get a few fish up.

My concern is for the protection of clearly threatened endangered habitats. That is where we are going to get hit in the neck. We will lose those 500. It is quite clear that in practice that is what will probably happen, and if therefore you are bound by themes which do not address threatened communities in a broader sense. We know we have nearly 3,000 in the country. There are lots of them under immense pressure. We have just listed 36 only. Themes, I think, will avoid what can be hard decisions for ministers where those places involve private lands. So my concern is not for species or threatened processes or probably even heritage, which we

will come back to, but it is about whether or not we can, under this new regime, really tackle the question of habitat protection across the board in a proper, prioritised fashion. As I said, it is not just resources. When Senator Hill first listed the brigalow back in 2000 and the bluegrass, there was a huge response from the farming community—it was a shock to their system—and there is no doubt that since that time there has been a bit of a go-slow by ministers and by departments on tackling the assessment of those places.

The scientific committee has really played games, in my view. They have rejected nominations by us on invalid grounds, and we had them put back in again. But they have said that they are going to develop a national plan, priority list strategy for listing these communities. They have been doing it for five years, but they are not popping out at the end. Nothing is coming out of the end of the process, and that is bad conservation, if nothing else. What they are doing with these amendments is they are matching what is happening. They are saying: ‘This is where we are. This is all we can do. We will give away this broader, more transparent process and give ourselves a much narrower process that we can control and that in effect stops the public from giving us the broader view of life.’ NGOs do try—and we have tried very hard—to give the government places based on real priorities, places that clearly are under imminent threat. You could do nothing else. That is how we aim to operate. I should remind you too that that public nomination process has been alive and well since 1992. It is alive and well in New South Wales, Tasmania, Victoria and other states. The idea of having any person make a nomination to a government and have that assessed is an agreed and important part of threatened species conservation processes. It is using in the US; it is used all over the place. As I said, what we are doing is winding back that right back to 1992, when the endangered species act was passed in parliament.

Senator SIEWERT—I want to touch on the heritage side of the amendments, because we touched on those earlier this morning but we have since gone more onto the environmental side of it. My understanding of what we have been hearing and what we have had from submissions is that there are similar concerns about the approach that has been taken to heritage as there are with the approach to threatened species. Is that your interpretation as well?

Mr Kennedy—It is just the same, basically. As a member of the Heritage Council, and I am there as an expert on natural areas, with Denis Saunders from CSIRO, we have over the last three years tried to develop priorities for natural heritage areas that ought to be progressed. Under the current act priority is given to public nominations, not internal. So while I may suggest to the department as a council member that these are important places, internal nominations are very slowly delivered. You give priority to, and quite rightly, public nominations. What we have seen is complicated. With the heritage provisions being as powerful as they are, and they are very powerful—perhaps the strongest part of the law in relation to habitat protection—there have only been a handful of public nominations for natural areas. So we have been hamstrung. We cannot move stuff internally very fast and there have not been a set of public nominations that have been very broad. So the council’s process has been a slow one. It has all been buildings and a few Indigenous places. As the new process stands, as I read it, it is much the same as species communities. Cape York is a place that is clearly very important. Kimberley rivers are very important to be listed as heritage

rivers. So there are places that ought to be considered now for protection under heritage that are unlikely to be given any leeway in any theme that comes up. That is my view.

Senator SIEWERT—I will ask the same question as I asked on the threatened species side of things. What amendments would you suggest are needed to the heritage side of things?

Mr Kennedy—The heritage process is much the same as threatened species and communities in that they can delay things for a long time. In my view those delays are often just not warranted. For example, we made nomination for Antarctica, EAAT and the EEZ. They have had it for about a year now. It has just been given another year's extension. My question is: are the penguins giving you trouble? What is the consultation problem? There is not one. It is owned by the federal government. There is no mining down there. There is no real reason to think about the values of Antarctica for national heritage. It is clear that there is no real opposition in terms of industry. Fisheries have been taken care of. It is a different process. So delays are put back often based on the excuse that there are not enough resources. I would like to see the deadlines tightened. I am concerned the criteria are too tight. In other words, there is beginning to be a stamp collection mentality about heritage, which is that you just list the best example of something. Say there is one river or one rainforest area. That is not good conservation. You need to be able to, in the case of rivers, list rivers as a series of nominations across Northern Australia to help with protection in this country. I think the criteria where you say, 'We have two areas of rainforest which are immensely important but really it is one because we just take the best bit and nothing else,' should be that we should take the best four or five bits.

As it stands now, and this is a policy matter, you ought to be able to have the heritage process be more lenient in terms of how many places get up. It should not just be the one best place, it should be the five best places, but that has been the very difficult concept to run with. Again, it has implications for resources. That is not a legal matter. It is rather a process matter, but the process for heritage has not been too bad. Emergency nominations have not worked, as in we have lost on our own attempts at emergency, and the minister does not like them very much and they mostly get knocked back. Under the new laws, of course, there is no deadline for emergencies, and that is a no-no. If it is an emergency you must have a deadline for the minister to respond, otherwise it will drag on.

Senator BARTLETT—Can I confirm that your submission, which is a joint one with WWF, also has Tasmanian Conservation Trust support?

Mr Kennedy—Yes.

Senator BARTLETT—You mentioned in your opening remarks a few comments. You would have been here earlier when the WWF representative noted how his organisation had 'copped a few on the chin', which was the way he put it, in supporting the passage of this act coming into being, and also the heritage amendments for which—for the record, although you know—the process and outcome were not a source of universal happiness for the Democrats either. I asked him to describe his feeling, given the process and content of what is before us now. I noted that you used the phrase 'personally defeated'. If I may say so, that sounds fairly heavy. Is it that serious a situation, given that you are the major supporter in the face of some pretty ferocious attacks from the conservation movement to uphold this act and this process,

despite open concerns about the way that it has been administered? To talk about being 'personally defeated' is pretty strong.

Mr Kennedy—That is my very personal reaction. It has been a hard road to try to help this act to be implemented effectively. We have been a hamstrung for a number of reasons. It is not just resources. In many cases it is clearly a lack of political will by both the department and different ministers. Nonetheless, we have worked very hard. There have been some successes. Fisheries has been an example where the act has had a good impact upon sustainability in a general sense. So we have to decide as an organisation whether, if these amendments are passed, we would feel that there was sufficient cause and justification for us to continue burying further resources into its implementation, based on restraining nomination processes. We have not talked about access to the courts yet.

Senator BARTLETT—We will get to that next.

Mr Kennedy—I now cannot go to the court for a number of important aspects of conservation; I would risk costs against me, which I have not before. My own board would say, 'Michael, if you want to go to court and spend thousands on consultants to do nominations, we want you to tell us whether the good outcomes are going to be likely.' I suspect in review that we will feel that there is not good reason to give the resources that we ought to give as an NGO at the national level, because we will not get the outcomes that we have been getting over the past six years.

Senator BARTLETT—Apart from being an outsider, if you like, with an NGO, you have been an insider as an individual, certainly on the Heritage Council.

Mr Kennedy—I have advised government, both Labor and Liberal, at a number of high levels over the years on endangered species and biodiversity. I have seen the processes work, both well and badly. We have had cause to go to court when we were concerned that they were not going well, and those court cases have helped improve the situation even when we lost, but they were worth while doing. Given my experience both as an NGO on the outside thumping in and as an adviser to a range of issues in governments on the inside, if you like, I am not optimistic.

Senator BARTLETT—Can I just go to the provisions to do with cross-site injunctions and also the AAT merits review issue. As you mentioned at the start, you have been party to a few different actions both in the courts and in the tribunal. You did get costs awarded against you, didn't you? Or, HSI did in one case?

Mr Kennedy—No, we won and got costs.

Senator BARTLETT—You won and still got costs?

Mr Kennedy—Yes. We still had to pay \$40,000 in costs. We challenged the guidelines issued in relation to flying foxes which told producers that taking flying foxes as part of a permit system in the states for taking fruit was not significant. Our view was that you cannot tell people what is significant in that respect. We challenged those guidelines and we won, and they were changed. Even though we had won, the court decided that we had to pay our own costs of \$40,000, which we had to do within a few weeks.

Senator IAN MACDONALD—Which case was this?

Mr Kennedy—We challenged a few years ago the guidelines issued by the minister which told fruit growers what was and what was not significant in terms of taking flying foxes. Our view was that you should not make that decision in advance and that the farmer himself must decide, and we won.

Senator IAN MACDONALD—You won and did not get costs?

Mr Kennedy—Yes, we paid our own costs. My board and I were very disappointed.

Senator BARTLETT—I could imagine. Given that context where, even under current law, you have to put up the potential for significant expense, and in your case that can happen even if you win, what is the likely impact of that? Did that case involve an injunction in advance?

Mr Kennedy—No. The cases that we have been involved in so far have not involved looking for injunctions. There will be a case where we are challenging the Japanese whaling company. We will be seeking next year an injunction in the court to stop that action in our whale sanctuary in Antarctica. But in a general sense the Federal Court is always a scary place to be, whatever you are doing. The costs for QCs and lawyers are dearer than in the appeals tribunal, and you can be awarded costs if you lose. If we now also have to undertake in advance to pay loss of income to the person that we have the dispute with in advance of an injunction being decided, I doubt whether my board would permit me to go ahead and take such a risk.

Senator BARTLETT—I will use an example here with the elephants, being fairly apt given that they have finally arrived. As I understand it, that was one case where you were not successful; it was not just you, it was the RSPCA and the IFAW. Is it true that, as part of that process and as a result of the challenge, extra conditions were put on that were not in place before?

Mr Kennedy—The outcome was that the tribunal, in deciding to allow the importation, asked that both zoos, in Taronga and in Melbourne, apply a list of additional conditions that were designed to improve the welfare of the elephants. There are about 40 in all. While we did not gain our ultimate goal of opposing the imports, we did demonstrably improve the conditions for those animals in those zoos, which we hope will be monitored by both the federal government and state government to ensure that they are complied with.

Senator BARTLETT—The question I want to get at is that it is often said that people appeal and they lose, so there was no merit in their claim, and that it chews up taxpayers' money or clogs up the courts or tribunals. It is not as though you are doing this every day of the week, and on the occasions where you have done it, even if you are ultimately unsuccessful, the process itself can still have a significant benefit in terms of environmental, or in this case animal welfare, outcomes.

Mr Kennedy—I believe that is entirely true. There have not been many cases in the last 10 years brought by NGOs in the Federal Court or in the AAT. It is just a handful when you come down to it. We do not do things lightly. They cost a great deal of money, effort and stress, but in every case that we have been involved in, whether we have won or whether we have lost, the outcomes have helped improve the situation for the species, the place or the process in question. We do not regret taking on any of those cases that we did.

Senator BARTLETT—I want to ask a question about the greenhouse trigger, which has been in a lot of submissions. You were part of that process and were fairly pivotal personally as to whether the EPBC Act actually came into being. There was a commitment given at the time to progress towards a greenhouse trigger, as I recall, and I asked Mr Glanznig about that. Are you still recommending that?

Mr Kennedy—Yes. There was a commitment, and then Minister Hill produced that discussion paper. From memory it was a pretty good paper, but at the time of the 2001 election the idea was lost in the ether. I should point out that, whilst there are no triggers, there are listings in relation to the triggers we have discussed as being important to include. Land clearing and climate change are both listed as key threatening processes, thanks to our nominations. Both those key threatening processes did not trigger threat abatement plans nationally for those threats. They could have been, but the scientific committee, bless its heart, said to the minister, ‘No, you do not need it and it is not feasible to have such national plans for such key threatening processes.’ We think that was nonsense and an example of an opportunity missed where you could have had the federal government do a fair bit more than it has done thus far on those two issues. They were in fact legally applicable ways of pursuing those two important matters.

Senator BARTLETT—We did not need to develop an abatement plan to deal with the threat of climate change.

Mr Kennedy—That was the response. They were a bit disingenuous. This was five years ago. Our nomination was that climate change poses a clear threat to a large number of species and habitats and that, therefore, you need to knuckle down now and develop an adaptation plan, or mitigation plan, for how you deal with the effect on those species and places. The committee told the minister, ‘We as a small nation cannot deal with the effect of climate change in an energy sense.’ We were not asking that question. Again, they missed a chance as a scientific committee, and then the minister missed the chance to make headway on the effects of climate change and land clearing.

Senator BARTLETT—Was that in Minister Hill’s time or Minister Kemp’s?

Mr Kennedy—Minister Kemp.

Senator IAN MACDONALD—This is more of a comment to Senator Bartlett rather than to HIS: your support for the EPBC was for something that was better than was there before, wasn’t it?

Senator BARTLETT—I am well aware of that.

Senator IAN MACDONALD—That is your rationale, and I assume it is HSI’s and WWF’s. It might not have been perfect, but it was better than what was there. You and I will always disagree about SBT, but I think not only the minister but also the AAT were correct in the underlying goal of trying to deal with a problem of the species. Had you been successful, this recent change with the Japanese in cutting them back would not have occurred, because Australia would not have been in the process. We could probably argue about that all day and we would never convince each other.

Mr Kennedy—Yes, we could.

Senator IAN MACDONALD—From my point of view, for that reason, that was right. If this legislation allows the scientific committee to make those additional views, or allows the minister to take into account those views, then that in itself justifies the changes. Is that what you are saying you do not like about this: it does give the minister power to make those decisions without worrying about the AAT process?

Mr Kennedy—The AAT process will now not apply to imports and exports. I see the pressure that comes from the zoos, which are a very powerful lobby, and it comes from the fishing industry, which are a very powerful lobby. In retrospect, we are not surprised now that we are losing under these amendments the power to challenge those imports or exports in court, but I was still very shocked two weeks ago when I saw it in black and white before me. By right we have had that since 1982, and in fact I took the first legal case under those new laws in 1985 and had a win in the courts. That win was over kangaroo management in Queensland. What that win did was to vastly improve kangaroo management in Australia. It was a court case that provided tangible outcomes for the way in which we manage biodiversity in this country.

Senator IAN MACDONALD—What happened two weeks ago?

Mr Kennedy—That was when I first saw the amendments which told me that I could not go to court for certain matters like trade. We have been to court for southern bluefin tuna and for Asian elephants, but I cannot do that in the future. That has been taken out of my potential lobbying kit.

Senator IAN MACDONALD—But you have the ability to make your submission to the minister?

Mr Kennedy—As most NGOs do, I can lobby the minister's office and the department.

Senator IAN MACDONALD—You make the application for protection of the species, or for whatever your application was, and argue it. You then rely on the minister and his scientific and environmental advisers to make a decision. Is your concern the next process, that if you disagree with the decision you are not able to take it any further?

Mr Kennedy—Yes, particularly in relation to wildlife imports and wildlife exports. That right has been with us since 1982. It has never been abused. It has been used but not abused. When it has been used the outcomes have been productive for conservation.

Senator IAN MACDONALD—Can you give me an example of what are wildlife imports and exports?

Mr Kennedy—Examples in which we have been involved are fisheries exports under approved plans.

Senator IAN MACDONALD—Particularly the SBT?

Mr Kennedy—The SBT, or it can be any export of any fishery that involves the minister accrediting the plan. If we think that the accreditation is not sound we could have the debate in court. In the future, I cannot. If a zoo wants to import a highly endangered species for what we feel is in effect a de facto commercial purpose, I cannot challenge that in the appeals tribunal anymore under these amendments. Those are two examples. I suspect that in part we have cut our own throat. Our sortie into the courts on those two issues has had a backlash.

Senator IAN MACDONALD—Sorry?

Mr Kennedy—I see that our episodes in court on the southern bluefin tuna and on Asian elephants has in fact caused a backlash in part.

Senator IAN MACDONALD—Not on the tuna, because you lost. The court upheld the minister's decision. Perhaps that did make the minister say that all that has been done is waste a lot of time and that his decision was right in the first instance.

Mr Kennedy—I am sure that the minister, the departments and the fisheries industry were not appreciative of what we did; nonetheless, it has always been a public right. It is a good public right. The papers given to us by the government in this amendment bill do not justify why that right has been removed, other than to make processes smoother. There has been no real reason given as to what it is that this has done to impede the bill's implementation or good conservation.

Senator IAN MACDONALD—How many times have you been to court since 1982 on this provision?

Mr Kennedy—I went to court in 1985, and then not again until working with HSI on the elephants, the southern bluefin tuna and on Tasmanian paddymelons and the Bennett's wallaby export program, and I have been in the Federal Court on whales and flying foxes.

CHAIR—That concludes today's proceedings. I thank all the witnesses for their informative presentations. We need a motion to accept the Humane Society's documents.

Senator IAN MACDONALD—I so move.

Senator SIEWERT—I second that.

Committee adjourned at 1.53 pm