

Chapter 5

Compliance and monitoring

5.1 This chapter canvasses issues raised in relation to the compliance, monitoring and management of Yara Pilbara's facilities on the Burrup Peninsula. This includes the rigour and adequacy of work carried out by both the Western Australian and Commonwealth governments under legislative frameworks.

Approval conditions and compliance monitoring

5.2 The Department of the Environment and Energy is responsible for compliance monitoring under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act). Its compliance approach is described in the *Compliance and Enforcement Policy: Environment Protection and Biodiversity Conservation Act 1999* and its compliance activities for EPBC Act approvals are reported in the annual *Compliance Monitoring Report*.¹

5.3 Although the facilities are in an area listed as a National Heritage Place, submitters questioned Yara Pilbara's commitment to ensuring that its operations would not have an impact on the environment, and its willingness to engage with the legislative requirements established under the EPBC Act. First, submitters noted that Yara Pilbara had failed to self-refer the proposal for the technical ammonium nitrate production facility (TANPF) for assessment, and secondly, it has failed to comply with a number of its approval conditions.

5.4 As noted in Chapter 2, the approvals for Yara Pilbara's facilities on the Burrup Peninsula were granted with a number of conditions attached: 27 set by the Western Australian Government under relevant state legislation and 15 by the Commonwealth. However, Yara Pilbara had not initially sought assessment under the EPBC Act. The Department of the Environment and Energy submitted that in 2008 it became aware that the proposed TANPF had not been referred for assessment under the EPBC Act. The Department contacted Yara Pilbara, and as a result the company voluntarily referred the proposed action for assessment and approval.²

1 Department of the Environment and Energy, *Submission 8*, p. 4.

2 Department of the Environment and Energy, *Submission 8*, p. 4. See also Ms Monica Collins, Department of the Environment and Energy, *Committee Hansard*, 17 February 2017, p. 54.

5.5 In relation to the Commonwealth conditions, the Department noted that there have been issues of administrative non-compliance in relation to the TANPF.³ These include:

- Notification of commencement of construction was received two months late, in contravention of Condition 1. The Department determined that as there were no impacts to matters of national environmental significance arising from the late notification, the matter would only be recorded.⁴
- The 2015 annual compliance report and rock art monitoring report were produced one month late in contravention of Condition 3 and Condition 10. Despite there being no impacts to matters of national environmental significance as a result of the late production of these reports, the Department issued a formal caution to the company as this was the second breach of EPBC Act approval conditions.⁵
- An infringement notice was issued on 10 May 2017 for failing to provide the 2015/2016 annual compliance report by May 2016.⁶
- In February 2017, the Department became aware that Yara Pilbara had not fully met the approval conditions in relation to air quality monitoring. An infringement notice was issued on 24 August 2017 and a directed variation was issued on 13 September 2017.⁷

5.6 Yara Pilbara self-reported the late production of the 2016 annual compliance report as required under Condition 3, and difficulties in producing the 2016 rock art monitoring report as required under Condition 10. The latter report could not be produced in time due to the Western Australian Government undertaking a review of the state program part funded under the project.⁸

5.7 The Department undertook a routine site inspection of the TANPF in September 2016 and identified that the Operations Management Plan was in need of revision.⁹

3 Ms Monica Collins, Department of the Environment and Energy, *Committee Hansard*, 17 February 2017, p. 54.

4 Department of the Environment and Energy, *Submission 8*, p. 4. See also Ms Monica Collins, Department of the Environment and Energy, *Committee Hansard*, 17 February 2017, p. 54.

5 Department of the Environment and Energy, *Submission 8*, p. 5. Ms Monica Collins, Department of the Environment and Energy, *Committee Hansard*, 17 February 2017, p. 54.

6 Ms Monica Collins, Department of the Environment and Energy, *Committee Hansard*, 17 November 2017, p. 4.

7 Ms Monica Collins, Department of the Environment and Energy, *Committee Hansard*, 17 November 2017, p. 4.

8 Department of the Environment and Energy, *Submission 8*, p. 5. Ms Monica Collins, Department of the Environment and Energy, *Committee Hansard*, 17 February 2017, p. 54.

9 Department of the Environment and Energy, *Submission 8*, p. 5. Ms Monica Collins, Department of the Environment and Energy, *Committee Hansard*, 17 February 2017, p. 54.

5.8 The Department submitted that it is considering how to improve the capacity of Yara Pilbara to comply with the approval requirements in relation to Condition 10 noting the previously identified issues in relation to the Western Australian Government review. The Department also noted that it continues to engage with the company on a regular basis as part of its compliance monitoring program.¹⁰

Survey of rock art sites—variation of conditions, and compliance

5.9 Submitters also raised concern that the conditions of approval for the TANPF have been varied since they were initially granted, and that the variations reduce the effectiveness of monitoring programs. For example, the Bob Brown Foundation stated:

When YARA is found to not comply with various Commonwealth conditions, the Commonwealth varies the conditions to facilitate compliance. The Federal Minister needs to explain why the conditions are varied to suit the company and not upheld, given approval for construction and operation were contingent upon those conditions being met.¹¹

Heritage monitor and two kilometre survey

5.10 Dr Ken Mulvaney, heritage expert, submitted that Condition 8d of Yara Pilbara's original approval (dated 14 September 2011) required the engagement of a heritage specialist to survey rock art sites within a two kilometre radius of the project area. Dr Mulvaney noted that the intention of this condition was to identify the rock art in the area, and to provide advice on the state of the art and any observable changes on an annual basis.¹² The Bob Brown Foundation described this condition as critical 'as it provides the baseline for measuring the ongoing impacts of the emissions from the plant on the whole area'.¹³

5.11 Dr Mulvaney stated that he became aware that no such 'suitably qualified Heritage Monitor' or survey had occurred within the required period and had conveyed his concerns to the Department of the Environment and Energy in 2012. Dr Mulvaney expressed shock that this condition was subsequently twice amended, once in 2013 and once in 2014. Dr Mulvaney stated 'the department's role is to administer the requirements of the act not to facilitate resource company non-compliance'.¹⁴

10 Department of the Environment and Energy, *Submission 8*, p. 5. Ms Monica Collins, Department of the Environment and Energy, *Committee Hansard*, 17 February 2017, p. 54.

11 Bob Brown Foundation, *Submission 11*, p. 6.

12 Dr Ken Mulvaney, *Submission 10*, p. 3. See also Professor John Black, *Submission 13*, p. 20.

13 Bob Brown Foundation, *Submission 11*, p. 6.

14 Dr Ken Mulvaney, *Submission 10*, p. 3. See also Bob Brown Foundation, *Submission 11*, p. 6. See also Dr Ken Mulvaney, *Committee Hansard*, 17 February 2017, pp. 8–9.

5.12 Similarly, Professor John Black, submitted that the condition was amended 'on request by the company, to reduce the level of surveillance'. Professor Black concluded that:

The changes made to conditions in licences given by both the Western Australian and Federal governments to Yara Pilbara in relation to construction and operation of the TANPF suggest to the public that short term financial returns from industry are more important than saving for future generations the priceless, irreplaceable and world significant rock art on Burrup Peninsula.¹⁵

5.13 Dr Mulvaney noted that Condition 10c(i) still requires Yara Pilbara to engage a Heritage Monitor to carry out a survey within a two kilometre radius, and that this requirement is separate to that of the work carried out by the Western Australian Department of Environment Regulation.¹⁶ Similarly Friends of Australian Rock Art (FARA) submitted that:

Yara Pilbara was required to conduct a survey of the rock art within a 2km radius of the plant before production could begin. We understand that it sought amendment of the Commonwealth conditions to only require a sample survey.¹⁷

5.14 Dr Mulvaney submitted that comprehensive monitoring is 'essential to gauge the impact on the rock art, and should be of sufficiently high scientific standard to be able to measure subtle changes to the rock art'. Dr Mulvaney explained that based on the location and size of Yara Pilbara's site, it is estimated that between 8–15 thousand rock art images exist within the required survey site, which includes a number of significant sites such as Deep Gorge. Dr Mulvaney stated that 'unless you have specific skills in identifying the Burrup rock art, the majority of the petroglyphs will not be recognised'.¹⁸

5.15 Dr Mulvaney stated that to date Yara have not complied with the requirement to carry out a comprehensive survey and that 'the sampling of just six petroglyphs across the entire area is not an appropriate response to Yara's obligations'.¹⁹ Dr Mulvaney told the committee that the original conditions required that a 'comprehensive survey' be conducted where 'they have to comment on the condition of the rock are within that two-kilometre radius'. Dr Mulvaney commented that:

Basically, selecting rock art panels at six sites, as it is published—three that had been incorporated in an earlier study; adding three more that happened to be within that radius—is not a comprehensive comment on the condition of the rock art and, regardless of the validity or otherwise of the

15 Professor John Black, *Submission 13*, p. 20.

16 Dr Ken Mulvaney, *Submission 10*, p. 3.

17 Friends of Australian Rock Art, *Submission 14*, p. 3.

18 Dr Ken Mulvaney, *Submission 10*, p. 4.

19 Dr Ken Mulvaney, *Submission 10*, p. 4.

methodologies in the colour recording, it is not a comment on the conditions of the art. It tells us nothing but what the measurement by a machine of a colour is.²⁰

5.16 Similarly, the Bob Brown Foundation submitted:

There is no evidence that the survey by a suitably qualified person has been done. It is not adequate to consider a representative sample as the survey needs to be of the whole area. YARA is non-compliant with the fundamental condition on which approval was contingent.²¹

5.17 The Bob Brown Foundation also challenged Yara Pilbara's claim that it has been unable to provide information on the rock art survey in its latest compliance report as it has not received the information from the Western Australian Government. The Bob Brown Foundation submitted that:

The Burrup Rock Art Technical Working Group (BRATWG) report to which they refer, relates to colour monitoring of the rock art which is condition 10a. It does not relate to the survey of rock art within a 2 km radius.²²

5.18 Dr Mulvaney concluded that:

It is essential that the DoEE enforce compliance with condition 10(ci), that Yara immediately engage a professionally qualified and capable person/s to commence the identification and recording of the physical condition of the rock art in the lands surrounding the TAN plant.²³

5.19 However, Yara Pilbara told the committee that the 'conditions in the EPBC approval do not require, and do not mention, comprehensive survey'.²⁴ The Department of the Environment and Energy similarly submitted that Condition 10c only 'requires rock art monitoring at six locations within 2km of the project site'. Further, the Department noted that this work has been carried by the CSIRO since 2014, and that the results from the first monitoring event are published on the Yara Pilbara website.²⁵

5.20 Similarly, the Chamber of Minerals and Energy of Western Australia submitted that 'selected sites were determined in consultation with members of

20 Dr Ken Mulvaney, *Committee Hansard*, 17 February 2017, p. 9.

21 Bob Brown Foundation, *Submission 11*, p. 6.

22 Bob Brown Foundation, *Submission 11*, p. 6.

23 Dr Ken Mulvaney, *Submission 10*, p. 4.

24 Mr Brian Howarth, Yara Pilbara, *Committee Hansard*, 17 February 2017, p. 33. See also Yara Pilbara, *Answers to Questions on Notice*, p. 10.

25 Department of the Environment and Energy, *Answers to Questions on Notice*, 17 February 2017, p. 13.

Murujuga Aboriginal Corporation to respect the cultural laws of the traditional owners for the entitlement of access'. Further, that:

The selected sites were evaluated for their appropriateness for scientific study, including petroglyph size and quality, direction of exposure, elevation, dominant winds direction within the TAN project location. From the six selected monitoring sites; three were already part of the decade-old and ongoing BRATWG monitoring program and an additional three sites were also selected.²⁶

5.21 The Chamber of Minerals and Energy of Western Australia noted that in July 2014, the three additional sites were incorporated into the existing BRATWG monitoring program. It explained that for each monitored site, eight sampling areas were selected—four of which are classified as 'engraving', and four of which are classified as background (rock surface unmarked by a petroglyph). During monitoring, three types of measurement are taken: colour contrast monitoring; spectral mineralogy; and 3D visual imaging to assess the surface of the petroglyphs. It noted that 'based on two years of monitoring, no significant change has been detected'.²⁷

Air quality monitoring—compliance with conditions

5.22 The committee received evidence which questioned the level of compliance in relation to air quality monitoring, as required under approval granted by the Western Australian Government.

5.23 It was noted that Yara Pilbara's compliance reports to both the Western Australian Government and the Australian Government 'show significant areas of non-compliance' with requirements to measure emissions. In particular, the requirement to 'measure PM₁₀ particles, NH₃, NO_x and SO_x concentrations at five sites, including three rock art sites'.²⁸

5.24 Professor Black expressed concern that Yara Pilbara's 2016 compliance report only included the results from one of the five air quality monitoring stations, and that results were only for the period of 1 January 2015 until 17 February 2015. Further, the rest of the table stated 'No Data' for the rest of the table to 30 June 2015.²⁹

5.25 Professor Black also stated that the report contained measurements of PM₁₀ particles which were 'minus 90,000 micrograms per cubic metre'.³⁰ Professor Black submitted that:

Although the company is obliged to provide concentrations of listed chemicals in the air at the sites, no results relating to chemical emissions

26 Chamber of Minerals and Energy of Western Australia, *Submission 2*, p. 5

27 Chamber of Minerals and Energy of Western Australia, *Submission 2*, p. 6.

28 Professor John Black, *Submission 13*, p. 5.

29 Professor John Black, *Submission 13*, p. 5.

have yet been provided. Thus, the background emissions prior to the plant being commissioned have not been reported. The results provided in the company report for PM10 particles are unrealistic, with a maximum value of 112,020.5 µg/m³ and a minimum value of -90,649.28 µg/m³, when the limit established by the Australian Environment Ministers on 15 December 2015 was 25 µg/ m³. Negative values for PM10 particle emissions are impossible. Reliability of the data presented in these reports is clearly extremely poor.³¹

5.26 Professor Black expressed further concern that the report submitted to the Western Australian Government did not appear to have been 'thoroughly reviewed'. Professor Black stated that 'no action appears to have been taken by the Western Australian government in relation to the extensive areas [of] non-compliance'.³²

5.27 However, Yara Pilbara responded to these concerns by explaining that air quality monitoring stations are located in 'in the middle of a very harsh environment'. As such, the equipment can break down or be taken down for maintenance. Mr Brian Howarth, Yara Pilbara, told the committee that the company is in the process of having any 'erroneous' negative data assessed by an independent expert. Mr Howarth stated:

Where that negative data, which is raw data, was produced with negative values, we are actually in the process of having all air quality raw data in our entire program assessed by an independent air quality management expert at the moment. Their job is to interpret the data and come up with the analysis.³³

5.28 Yara Pilbara explained that it engaged an Air Quality Monitoring consultant in mid-November 2016 to undertake a review of all air quality monitoring data and baseline data sets. It went on to comment that when instrumentation is not available at the time when a measurement is required to be made, the equipment is considered to be 'down'. Yara Pilbara told the committee that despite incidents of equipment being 'down', it has met its requirements under Condition 9 of its approval—that is, a minimum of 24 months of monitoring and at least one reading four times per year for NH₃, NO₂, SO₂, Total Suspended Particulate (TSP) (at one off site monitoring station), and dust (dust deposition).³⁴

5.29 However, Yara Pilbara also explained that negative values caused by 'instrument drift are not considered erroneous and are retained in the data set for calculation of 24-hour average concentrations'. It stated that such a practice is an Australian/New Zealand standard (AS/NZS 3850.9.8-2008) 'recommendation for

30 Professor John Black, *Committee Hansard*, 17 February 2017, p. 22.

31 Professor John Black, *Submission 13*, p. 23.

32 Professor John Black, *Submission 13*, p. 23.

33 Mr Brian Howarth, Yara Pilbara, *Committee Hansard*, 17 February 2017, p. 40.

34 Yara Pilbara, *Answers to Questions on Notice*, p. 18.

treating continuous PM₁₀ data from TEOM instruments, which is typically adopted for other continuous monitoring methods for ambient dust'. Yara Pilbara noted that for 24 hour TSP sampling, 'negative values reflect gravimetric errors and those data are rejected'. However, for 'passive sampling of gases, negative data obtained by the laboratory is reported as less than the method detection limit'.³⁵

Other issues in relation to the EPBC Act

5.30 The committee received evidence in relation to a number of other matters relating to the EPBC Act including the precautionary principle and lack of consideration given to the cumulative effects of development during assessment processes.

Precautionary principle

5.31 As noted in Chapter 2, the EPBC Act includes the principles of ecologically sustainable development, including the precautionary principle.

5.32 Submitters argued that application of the precautionary principle should have prevented the approval of the TANPF by the Minister and further, the evidence relied upon to make such a decision is both inadequate and unreliable.³⁶

5.33 Ms Christine Milne, Bob Brown Foundation, argued that the precautionary principles create an obligation for Commonwealth to protect the petroglyphs of the Burrup Peninsula. However, the Commonwealth and the Western Australian Government have approved the construction and operation of the TANPF without the scientific evidence to support the conditions of approval.³⁷

35 Yara Pilbara, Answers to Questions on Notice, p. 18. See also, Yara Pilbara, Answers to Questions on Notice, Table 7, Appendix A, p. 24.

36 Ms Christine Milne, Bob Brown Foundation, *Committee Hansard*, 17 February 2017, p. 43.

37 Ms Christine Milne, Bob Brown Foundation, *Committee Hansard*, 17 February 2017, p. 43.

5.34 In an article published in *Rock Art Research*, Professor Black and co-authors, argued that the errors in research 'are so great that most of the results in the reports are useless'. As such:

The Western Australian Government remains in a state of knowledge deficit as if no study on colour change and mineralogy has been conducted, despite the large amount of time and money spent. No sound decisions about the effects of industry on the rock art on Murujuga can be made using the reports. This conclusion has political implications for governments because decisions allowing further industrialisation of Murujuga have been made on the assumption that the reports correctly state there has been no change to rock art sites over time and current and proposed concentrations of emissions are unlikely to damage the rock art.³⁸

5.35 Professor Black and co-authors argue that the precautionary principle necessitates a review of all decisions made by regulators in relation to industry on the Burrup Peninsula.³⁹

Consideration of existing facilities during the approval process

5.36 Submitters raised concern that the Minister or their delegate, in approving the construction and operation of the TANPF may have failed to take into account relevant considerations which they were obliged to take into account.

5.37 The Commonwealth Minister, in approving an action which is likely to have a significant impact on National Heritage values of a National Heritage place, must take into account the mandatory relevant considerations set out in section 136 of the EPBC Act. These considerations include 'any other information that the Minister has on the relevant impacts of the action'.

Standalone development

5.38 Some submitters argued that the TANPF should not have been treated as a single standalone development.

5.39 The Law Council of Australia (LCA) noted that under section 74A of the EPBC Act, the Minister has the discretion to decide not to accept a referral if the Minister is satisfied that the action is a component of a larger action. The LCA noted that this section is designed to deter proponents from making split referrals to circumvent the requirements of the EPBC Act.⁴⁰

38 J. Black, I. Box, S. Diffey, 'Inadequacies of Research Used To Monitor Change To Rock Art and Regulate Industry on Murujuga ('Burrup Peninsula'), Australia', *Rock Art Research 2017 - Volume 34, Number 2*, p. 145.

39 J. Black, I. Box, S. Diffey, 'Inadequacies of Research Used To Monitor Change To Rock Art and Regulate Industry on Murujuga ('Burrup Peninsula'), Australia', *Rock Art Research 2017 - Volume 34, Number 2*, p. 145.

40 Law Council of Australia, *Submission 3*, p. 4.

5.40 The Bob Brown Foundation argued that as the TANPF is associated with the existing liquid ammonia plant, the combined impacts of both should have been assessed by the Commonwealth.⁴¹

5.41 The Bob Brown Foundation argued that the Commonwealth, by treating the TANPF as a standalone development, 'failed to take account of relevant considerations which it is obliged to take into account'.⁴²

5.42 However, the LCA stated that:

...the fact that the previous facility had been referred under the EPBC Act and constructed many years earlier indicates that these were two separate actions, rather than components of one larger, single 'action'.⁴³

5.43 Mr Tregurtha, Acting First Assistant Secretary, Environment Standards Division, Department of the Environment and Energy outlined to the committee the issues that the Minister or their delegate must take into account when deciding whether to 'split an action' or 'to join one together'.

5.44 Mr Tregurtha explained that if there is a clear dependence of one action on another or if 'one action actually can't happen or would be...nonsensical without another' then the Minister or delegate would likely consider this to be one action. However, if the link between the two projects could be replaced by other sources (e.g. feeder stock for the TANPF will come from the liquid ammonia plant, however it could alternatively come from other sources) then it is likely that the Minister or delegate would assess these as two separate actions.⁴⁴

Cumulative impacts

5.45 Submitters also raised concern that the approval process for the TANPF did not consider the cumulative impacts of emissions from both the liquid ammonia plant and the TANPF.

5.46 The LCA provided evidence on this issue and commented that 'it is not clear whether the existing ammonia facility was considered when the technical ammonium nitrate plant was referred under the EPBC Act in 2008'. It noted however that the referral documentation included reference to the ammonia plant and stated that 'it appears that the Commonwealth was or should have been aware that the TANPF proposal was related to the liquid ammonia facility'.⁴⁵

41 Bob Brown Foundation, *Submission 11*, p. 2.

42 Bob Brown Foundation, *Submission 11*, p. 2.

43 Law Council of Australia, *Submission 3*, p. 4.

44 Mr James Tregurtha, Department of the Environment and Energy, *Committee Hansard*, 17 November 2017, p. 10.

45 Law Council of Australia, *Submission 3*, p. 4.

5.47 The LCA commented that because the reasons for the TANPF approval decision have not been published, the extent to which the Commonwealth considered the cumulative impacts of the TANPF combined with the existing ammonia facility is 'unclear'. The LCA did however note that the approval conditions for the TANPF refer to air quality monitoring which must be undertaken for 24 months prior to construction to establish baseline data. This would include emissions from the existing plant, and other industry on the Burrup Peninsula.⁴⁶

5.48 The LCA also noted that the legal requirement to consider cumulative impacts under the EPBC Act is limited.⁴⁷ The LCA also commented that:

Given the Commonwealth's knowledge of the liquid ammonia facility, which was the subject of the Minister's decision in 2001, it comprised 'information on the relevant impacts of the action', and its cumulative impact with the TAN plant was, by necessary inference, part of what was obliged to be considered as part of the impact of the action. A failure to take that into account was a failure to take into account a relevant consideration.⁴⁸

5.49 However, the committee received evidence that the cumulative impacts of industry in an area can be considered during the approval process for projects. Mr James Tregurtha, Department of the Environment and Energy explained to the committee that 'in making any decision under the EPBC Act in relation to an action, the decision-maker is able to have regard to any of the matters that are currently happening at that time'. Further, 'in terms of the cumulative impact in a place, the impact of current development is taken into account when the EPBC approval is undertaken'.⁴⁹ Mr Tregurtha stated:

You can't consider a project just sort of in its little box in isolation. You're thinking about what's happening and the risk that the additionality of that project has on the protected matter. The protected matter may already be suffering a degree of impact, whether that's minute or not. Then you're adding something onto that, so that means that that impact may rise.⁵⁰

5.50 The committee received evidence that the cumulative impacts of industry on the Burrup Peninsula were considered during the approval process for the TANPF. For example, Yara Pilbara told the committee that 'contrary to what has been

46 Law Council of Australia, *Submission 3*, p. 4.

47 Law Council of Australia, *Submission 3*, p. 4.

48 Law Council of Australia, Answer to Question on Notice No. 1.

49 Mr James Tregurtha, Department of the Environment and Energy, *Committee Hansard*, 17 November 2017, p. 10.

50 Mr James Tregurtha, Department of the Environment and Energy, *Committee Hansard*, 17 November 2017, p. 11.

suggested...the total cumulative emissions was modelled and taken into account in the works approval process'.⁵¹

5.51 Similarly, the Department of the Environment and Energy told the committee that:

Cumulative impacts were assessed in the Public Environment Report and the Assessment Report (the Report and Recommendations of the Environmental Protection Authority dated January 2011) for the assessment and approval process under the EPBC Act, and were taken into consideration in the approval of the action. The Public Environment Report is published on the website of the Western Australian Office of the Environmental Protection Authority.⁵²

5.52 Mr Tregurtha also assured the committee that if any future development on the Burrup Peninsula was determined to be a controlled action then 'as part of the assessment and approvals process the activity that was [already] occurring on the peninsula would be taken into account'.⁵³

Amendment or revocation of conditions

5.53 The LCA noted that the Minister has the power to revoke or amend the TANPF approval. It also noted that if the approvals conditions were amended to require that no emissions be permitted from the TANPF (which would result in it unable to operate at its current location) or to require the TANPF to relocate, then there would not be any obligation on the Commonwealth to provide compensation to any party.⁵⁴

5.54 The LCA explained that compensation would only be required in the event of the Commonwealth compulsorily acquiring property, and that precedent would indicate that the alteration or extinguishment of a right does not constitute an acquisition of property in circumstances such as an approval under the EPBC Act.⁵⁵

5.55 As such, the Minister has the power under the EPBC Act to revoke the approval of the TANPF, to require its relocation, or to require it to operate without emission, and this would not result in any obligation for the Commonwealth to compensate Yara Pilbara.⁵⁶

51 Mr Chris Rijksen, Yara Pilbara, *Committee Hansard*, 17 February 2017, p. 33.

52 Department of the Environment and Energy, Answers to Questions on Notice, pp. 4–5. See also Mr James Tregurtha, Department of the Environment and Energy, *Committee Hansard*, 17 November 2017, p. 10.

53 Mr James Tregurtha, Department of the Environment and Energy, *Committee Hansard*, 17 November 2017, p. 11.

54 Law Council of Australia, Answer to Question on Notice No. 1, p. 3.

55 Law Council of Australia, Answer to Question on Notice No. 1, pp. 3–4.

56 Law Council of Australia, Answer to Question on Notice No. 1, p. 4.

Confidence in assessment and approval

5.56 The committee explored the issue of whether the Department of the Environment and Energy has confidence in the approval for the TANPF given the issues which have subsequently emerged with the rock art monitoring program.

5.57 Ms Monica Collins, Chief Compliance Officer, Department of the Environment and Energy told the committee that at the time the approval decision took 'into consideration extensive assessment information'. The decision 'was made on the best available information at the time'.⁵⁷

5.58 Mr Tregurtha, Department of the Environment and Energy, explained that a range of information is relied upon when making approval decisions. Mr Tregurtha stated:

...what happens generally is that the department will make a recommendation to the minister or to his or her delegate in relation to making an approval decision based on the information and the assessment that's done. That can include state assessments and information. It can also include information from a range of other sources and generally also includes a range of public commentary around an issue.⁵⁸

5.59 In the event that new information emerges, which wasn't available at the time that the decision was made, the Minister 'has the power to consider the new information and can make a decision to vary conditions to respond to that'. Mr Tregurtha told the committee that the Minister:

...has the power to suspend or revoke an approval in particularly egregious cases. So those remedies are available under the EPBC Act. They're used very rarely and always used with a high degree of caution because, of course, that introduces a degree of jeopardy to approvals the Commonwealth has already made. So decisions like that are generally not taken lightly. But that's the power.⁵⁹

57 Ms Monica Collins, Department of the Environment and Energy, *Committee Hansard*, 17 November 2017, p. 5.

58 Mr James Tregurtha, Department of the Environment and Energy, *Committee Hansard*, 17 November 2017, p. 7.

59 Mr James Tregurtha, Department of the Environment and Energy, *Committee Hansard*, 17 November 2017, p. 7.

5.60 Ms Collins told the committee that despite there being questions raised in relation to the adequacy of the monitoring conducted by CSIRO, there has not been sufficient evidence to trigger a ministerial review of the approval. Rather, the directed variation to the TANPF approval provides a mechanism for a ministerial direction in the event that evidence of damage to the rock art as a result of emissions is found. Ms Collins stated:

Yes, I understand you're saying that it's been pointed out that the monitoring, to date, is flawed, but without any evidence we don't have the trigger for the minister to be in that position. One of the things that the directed variation does is insert a new condition which says that, if such information [that the rock art has been damaged] was made available, there's a process that can be stepped through in relation to management's response or the minister's ability to direct a reduction in emissions at the point in time that the information was made available.⁶⁰

60 Ms Monica Collins, Department of the Environment and Energy, *Committee Hansard*, 17 November 2017, p. 7.