Australian Government
Department of the Environment, Water, Heritage and the Arts
Office of the Secretary

Senator Anne McEwen
Chair
Senate Standing Committee on Environment, Communications and the Arts
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

Dear Senator McEwen

I refer to your letter dated 8 October 2008 inviting the Department to comment on criticisms of its administration of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act) made in some submissions to your Committee's Inquiry into the operation of the EPBC Act. I thank the Committee for providing this opportunity.

The submissions referred to in your letter, including the submissions in general and particularly submissions 76, 79, 81, 90, 91, 93 and 94, raise a number of issues related to the Department's administration of the EPBC Act. I would like to make the following comments in response.

The significance test

A large number of the criticisms of the Department essentially represent disagreements about the merits of decisions on environmental significance. Environmental significance as a concept is at the core of decision-making in environmental impact assessment and approval processes throughout Australia and, indeed, most of the rest of the world. Despite the prominence of the concept, around which decisions turn, the concept remains largely undefined.

This is because, as confirmed by Australian courts, the likely significance of the outcome of an action must be gauged on an individual basis after a consideration of all the impacts of the particular action on the relevant affected environment. Each individual decision about significance must

reflect different levels of intensity of the action, different contexts and different sensitivities of the environment which may be impacted.

This requires judgements to be made about the likely impacts of the action in relation to the timing, duration and frequency both of the action and its impacts; on-site and off-site impacts; direct and indirect impacts; the geographic area affected; existing levels of impact from other sources; and the degree of confidence with which the impacts of the action are known and understood. In the case of decisions about whether or not to approve a proposal, relevant economic and social matters must also be taken into account. There is often room for differences of opinion about the weight to be given to all of these factors, and their likely effect, in any particular case.

Against such a background, it is not surprising that such differences of opinion are, from time to time, expressed about the merits of decisions made under the EPBC Act. However, that should not be taken to suggest that the Department's administration of the Act is therefore deficient. The EPBC Act properly requires that individual decisions made under the Act must be considered individually. To the extent that the Department's administration of the Act has been challenged in the courts, that administration has overwhelmingly been found to be appropriate.

Consistency of advice

I can assure the Committee that the Department takes considerable care to provide consistent advice on the application of the EPBC Act. The Department has published numerous policy guidelines about the Act and its operation to assist the public and prospective proponents in applying the Act. These include specific policy guidelines about determining environmental significance. Copies are available on the Department's website: http://www.environment.gov.au/epbc/index.html.

The Committee should be aware, however, that the framework of the EPBC Act requires, as a matter of law, that individuals and companies themselves must consider the particular facts and circumstances of their proposed actions to determine likely impacts on matters protected by the Act and whether or not they need to make a referral. This is why the Departmental guidelines on environmental significance provide a 'self-assessment' process, including detailed criteria, rather than giving definitive advice. When the Department attempted to provide such definitive advice in a set of guidelines (by stating when a referral was not

required), the Federal Court held that such advice was not authorised by law[1].

That situation often frustrates proponents and the community who are looking for the Department to indicate definitively whether or not a referral is required. We attempt to assist proponents as much as possible but ultimately need to advise them that the decision is theirs and that perhaps, where there is ambiguity, they should seek independent scientific or legal advice.

Often, also, different queries on proposed actions will give rise to different Departmental advice because of variations in the circumstances between actions. Proponents also commonly approach the Department at an early stage (which we encourage) but the boundaries and details of the proposed action may not be clear. When further details about the action come to light, such as the methods to be used or the actual site specifications, the implications for the application of the Act may change, as may the advice issued by the Department.

The Department is committed to continuing to develop the skills of its staff in administering the Act and in providing advice to the community. We invest significant resources in training as well as developing manuals and policy guidelines to assist our assessment officers in applying the Act in a consistent manner.

The Department has benefited from additional funding for EPBC Act activities in recent years allowing for the investment of further resources in assessment, approval and compliance and enforcement activities.

Apparent bias and predetermined outcomes

I dispute absolutely allegations that Departmental officers are biased toward development or that there are pre-determined outcomes for assessment applications. Such allegations are easy to make but are unsubstantiated and unproven.

Departmental officials are instructed, through manuals and guidelines, to assess proposed actions against the criteria prescribed in the Act. There have been twenty applications (not including appeals) for judicial review of decisions made under the EPBC Act, only two of which have been successful on administrative law grounds. In one case where a decision was set aside, administrative error was involved and, in the other, there

[1] Humane Society International Inc v Minister for the Environment and Heritage [2003] FCA 64 (12 February 2003).

was an error in statutory interpretation. There was absolutely no suggestion in either case, or in any others, that Departmental officers acted improperly. And the Department takes active steps to re-examine and improve its administrative process in response to comments made in court judgments.

The Auditor-General has conducted two thorough audits of decision-making under the EPBC Act (Audit Report No.38 2002–03 *Referrals, Assessments and Approvals under the* Environment Protection and Biodiversity Conservation Act 1999, and Audit Report No.31 2006–07 *The Conservation and Protection of National Threatened Species and Ecological Communities*). While a number of recommendations were made to improve administration of the Act (and these are being implemented), neither audit indicated even a suggestion that there was any bias on the part of Departmental officers.

Rejection of proposals

A number of submissions have concluded that the low level of formal rejections of proposals under the EPBC Act demonstrates an alleged propensity for the Department to favour development over conservation. Apart from the conclusion being incorrect, this is a simplistic argument, first, because the formal number of rejections is not an accurate reflection of the number of proposals that have not proceeded as a result of the legislation. Secondly, even if it were, the argument does not take account of the substantial environmental improvements made to proposals through the assessment process even if they ultimately receive approval under the Act.

There have been seven formal rejections of proposals (including one proposal that was subsequently approved in a modified form), another two proposals that had an option rejected, in one case the proponent's preferred option, and four proposals that have been determined to be clearly unacceptable. In addition, more than 70 referrals have been withdrawn or lapsed prior to a controlled action decision being made and more than 140 have been withdrawn or lapsed after having been determined to be a controlled action under the Act. In addition some proposals are not even referred in their initial form because preliminary discussions suggest to proponents that their proposals will not be acceptable.

Obviously there is a range of reasons for proposals being withdrawn or lapsed, including problems with funding or redefinition of the proposal; however, some proposals are withdrawn only because of the difficulty

foreseen with environmental approval, either following initial discussions with the Department or when the assessment approach is decided.

Knowledge of assessment officers and staff turnover

As noted above, the Department is committed to continuing to develop the skills of its staff. We have officers skilled in the areas of biology, chemical analysis, risk assessment, environmental science, compliance and enforcement as well as a range of other disciplines. Continued education is encouraged and, from time to time, is provided in house. For example, the ANU's Fenner School of Environment and Society is currently conducting a detailed course within the Department on different types of scientific methodology and their usefulness and limitations for decision-making.

Where the Department lacks necessary expertise particular to an action, external consultants are engaged. We also have access to expertise in other Australian Government agencies, such as CSIRO, BRS and ABARE. The Chief Scientist has assisted with independent reviews of contentious issues conducted by panels of experts chaired by the Chief Scientist. The Minister has appointed an independent expert group of eminent Australian scientists plus an internationally recognised expert on pulp mills from the Helsinki University of Technology to advise the Minister and Department on matters relating to the design, implementation and approval of the Environmental Impact Management Plan for the Gunns Pulp Mill in Tasmania.

Of course, some level of staff turnover is unavoidable and the Department is not immune to this fact. The Department seeks to actively minimise staff turnover to the extent possible by creating a positive and rewarding workplace. We also seek to manage turnover impacts by manuals and guidelines, sound record-keeping practices and arranging handover transition where possible.

Delays in listing threatened species

The administrative delays in listing threatened species were raised by the Auditor-General in his Audit Report No.31 in 2007 and the Department has taken action to implement the Auditor-General's recommendations to remedy the situation.

The 2006 amendments to the EPBC Act have assisted in this regard by establishing a new process for listing threatened species, ecological communities and key threatening processes. This new process has

improved the effectiveness of listing with a more strategic approach, focussing on those species and ecological communities in greatest need of protection, and has streamlined the process through an annual cycle of nominations from the community.

The additional funding provided to the Department for EPBC Act activities has also enabled us to speed up the listing process. The Department has established procedures to deal with the backlog and ensure that new nominations of species placed on the priority assessment list will be assessed within a twelve month period, unless otherwise agreed in advance by the Minister.

Prior to these amendments, nominations could occur at any time, and there was no statutory timeframe for assessments of the nomination. Nominations could go for years with no decision. The amendments provided statutory timeframes for all parts of the assessment process and decision by the Minister.

Insufficient compliance and enforcement activities

The Department's enforcement of the EPBC Act against non-compliant parties often involves complex issues of fact and law. As a result, enforcement action, particularly through the courts, can take some time. Criticisms of delays do not adequately reflect the need for rigorous processes to maximise the likely success of enforcement actions.

Most submissions criticising the Department's compliance and enforcement activities do not reflect recent developments within the Department. In our submission to your Inquiry we highlighted that in 2007-08 DEWHA allocated substantially more resources to the compliance and enforcement of the EPBC Act.

In July 2007 the Department established a dedicated Compliance and Enforcement Branch, currently comprising approximately 50 officers, who undertake the full range of monitoring, audit, compliance and investigation functions. The Department expects that, together with the strengthening of the EPBC Act's compliance and enforcement regime in the 2006 amendments, this development will reinforce and strengthen the Department's compliance and enforcement activities.

Lack of transparency

The referral, assessment and approval processes involve extensive opportunities for public participation and comment. Public consultation is guaranteed under the Act.

All referrals of proposed actions are published on the Department's website. Public comments are part of the referral process and all types of assessment under the Act require periods of public consultation. All comments received are taken into account in the decision-making process.

Almost all decisions made under the Act are notified on the Department's website. (Occasions when decisions are not notified are rare.) The Minister or the Minister's delegates in the Department routinely provide statements of reasons for EPBC Act decisions to members of the community or proponents.

Litigation decisions

There is criticism of the Department in seeking to recover costs against unsuccessful litigants. However, the Legal Services Directions, the binding rules issued by the Attorney-General about the performance of legal work for the Australian Government, require Australian Government departments to act in accordance with legal principle and practice. The usual legal rule is that the unsuccessful party should pay the costs of the successful party, and the Department usually seeks to enforce costs orders in favour of the Australian Government.

Further, under the *Financial Management and Accountability Act 1997* (FMA Act), the Department has responsibilities for the use and management of public money and an obligation to seek to recover debts owing to the Australian Government. The financial framework recognises however that the pursuit of debts must have regard to the circumstances. For example, if a debtor has an incapacity to pay a debt, or if the expense in seeking to pursue the debt would be excessive, the FMA Act framework allows that debt to be written off on a case by case basis.

Finally, it should be noted that awarding costs is a general discretion of the courts and it is appropriate for the courts to make the decision rather than the Department. EPBC Act cases have resulted in the full gamut of decisions being made, from full costs being awarded, to a percentage less than 100 being awarded, to no costs, to costs being shared.

Conclusion

I trust that this information will be of assistance to the Committee.

I take this opportunity to reiterate the undertaking provided in the Department's submission to the Committee that we are more than willing to provide the Committee with any further information it may require for the purposes of its Inquiry.

Yours sincerely

David Borthwick
Secretary

November 2008