The Senate

Standing Committee on Environment, Communications, Information Technology and the Arts

Environment and Heritage Legislation Amendment Bill (No. 1) 2006 [Provisions]

November 2006
Committee Membership

Committee Members
Senator Alan Eggleston, Chair (LP, WA)
Senator Andrew Bartlett, Deputy Chair (AD, QLD)
Senator Kate Lundy (ALP, ACT)
Senator the Hon. Ian Macdonald (LP, QLD)
Senator Stephen Parry (LP, TAS)
Senator the Hon. Michael Ronaldson (LP, VIC)
Senator Ruth Webber (ALP, WA)
Senator Dana Wortley (ALP, SA)

Substitute members for this inquiry
Senator Kim Carr to replace Senator Kate Lundy

Participating members involved in this inquiry
Senator Bob Brown (AG, TAS)
Senator Rachel Siewert (AG, WA)

Committee Secretariat
Dr Ian Holland, Secretary
Mr Peter Short, Principal Research Officer
Ms Kate Palfreyman, Principal Research Officer
Ms Joanna Woodbury, Senior Research Officer
Ms Jacquie Hawkins, Research Officer
Mrs Dianne Warhurst, Executive Assistant

Committee Address
Standing Committee on Environment, Communications, Information Technology and the Arts
PO Box 6100, Parliament House
Canberra ACT 2600

Tel: 02 6277 3526
Fax: 02 6277 5818
Email: ecita.sen@aph.gov.au
## TABLE OF CONTENTS

Committee Membership .................................................................................................................................... iii

Recommendations ............................................................................................................................................... vii

**Chapter 1 - Background** ............................................................................................................................... 1
- Referral and conduct of the inquiry .................................................................................................................. 1
- Scope of the report .......................................................................................................................................... 2
- Background to the bill ..................................................................................................................................... 3
- Outline of the bill ............................................................................................................................................. 4
- General position on the proposed amendments ............................................................................................ 5

**Chapter 2 - Streamlining of Approvals Processes** ....................................................................................... 7
- Current law .................................................................................................................................................... 7
- Rationale for change ...................................................................................................................................... 7
- Changes proposed by the bill ......................................................................................................................... 8
- Comments and concerns ............................................................................................................................... 11
- Conclusion ................................................................................................................................................... 15
- Committee view ........................................................................................................................................... 15

**Chapter 3 - Heritage Listings and Nominations** .......................................................................................... 17
- Current law .................................................................................................................................................. 17
- Rationale for the change ............................................................................................................................... 17
- Changes proposed by the bill ......................................................................................................................... 18
- Comments and concerns ............................................................................................................................... 19
- Conclusion ................................................................................................................................................... 24
- Committee view ........................................................................................................................................... 24

**Chapter 4 - Compliance and Enforcement** ............................................................................................... 27
- Introduction .................................................................................................................................................. 27
- Changes proposed by the bill ......................................................................................................................... 27
Enforcement issues ..................................................................................................29
Collecting evidence .............................................................................................34
Committee view ....................................................................................................37

Chapter 5 - Threatened Species and Ecological Communities .......................39
Current law ...........................................................................................................39
Rationale for change ............................................................................................41
Changes proposed by the bill ...............................................................................42
Comments and concerns .......................................................................................45
Conclusion ............................................................................................................55

Chapter 6 - Other Issues ..................................................................................57
Triggers for matters of National Environmental Significance ..............................57
Review of ministerial decisions ...........................................................................58
Departmental resources .......................................................................................60

Minority Report by Labor and Australian Greens Senators .........................63
Consultation process and conduct of the inquiry .................................................66
Climate Change ..................................................................................................69
Review of Ministerial decisions and third party enforcement .........................70
Penalties ................................................................................................................72
Resourcing ............................................................................................................76
Threatened species nominations and listing .........................................................77
Heritage nominations and listing .........................................................................81
Conclusion ............................................................................................................84

Additional comments by the Australian Greens .............................................85

Democrats Minority Report .............................................................................91

Appendix 1 .......................................................................................................121
Appendix 2 .......................................................................................................127
Recommendations

Recommendation 1

3.41 The committee recommends that the Government investigate the issue of heritage properties within the Australian Capital Territory that are located on designated Commonwealth land to ensure their protection and heritage status is not compromised with the repeal of the Register of the National Estate.

Recommendation 2

5.67 The committee recommends that the minister review the wording of proposed new subsection 179(6) in light of the above issue.

Recommendation 3

6.14 The committee recommends that the Government review the level of resources made available for the Department's administration of the Act.
Chapter 1

Background

Referral and conduct of the inquiry

1.1 On 12 October 2006, the House of Representatives introduced the Environment and Heritage Legislation Amendment Bill 2006 (the Bill). A lengthy explanatory memorandum accompanied the Bill.

1.2 The provisions of the bill were referred to the Senate Standing Committee on Environment, Communications, Information Technology and the Arts, for inquiry and report by 17 November 2006.

1.3 On 18 October 2006, the Senate granted an extension of time to report until 21 November 2006.

1.4 The committee corresponded with a large number of individuals, environment and heritage departments and agencies, industry bodies and other key stakeholders, and invited them to provide a submission to the committee's inquiry.

1.5 In accordance with its usual practice, the committee also sought public comment by advertising the inquiry in The Australian on Tuesday 16 October 2006, calling for submissions by Friday 27 October 2006.

1.6 The committee received 138 submissions to its inquiry (see Appendix 1).

1.7 The committee held two public hearings in Canberra; on Friday 3 November 2006 and Monday 6 November 2006. The committee heard evidence from a number of witnesses, including representatives of key environment and heritage protection groups and natural resource managers, industry representatives, and government departments including the Department of Environment and Heritage. A complete list of witnesses is provided at Appendix 2.

1.8 A number of questions were placed on notice at the hearing. Those questions and responses are at Appendix 3.

1.9 Published submissions and the Hansard of the committee's hearings are tabled with this report, together with supplementary material provided to it following the committee's hearings. Submissions and transcripts of the committee's hearings are available on the Parliament's internet site at www.aph.gov.au.

Acknowledgements

1.10 The committee acknowledges the assistance and contribution made to its inquiry by those who prepared and provided written and oral submissions to the
inquiry. Their work has been of considerable assistance to the committee, particularly given the timeframe for the inquiry.

Scope of the report

1.11 The inquiry focused on the provisions of the Environment and Heritage Legislation Amendment Bill (No. 1) 2006. This bill makes a series of amendments to the *Environment Protection and Biodiversity Conservation Act 1999* (the Act) and related Acts.

1.12 According to the explanatory memorandum, the bill proposes to amend the Act to make it more efficient and effective, to allow for the use of more strategic approaches and to provide greater certainty in decision making.

1.13 In particular the bill:
- reduces processing time and costs for development interests;
- provides an enhanced ability to deal with large scale projects and give priority attention to projects of national importance through the use of strategic assessment and approvals approaches and putting in place measures to enable developers to avoid the impacts on the matters of National Environmental Significance protected by the Act;
- enables a better focus on protecting threatened species and ecological communities and heritage places that are of real national importance; and
- clarifies and strengthens the enforcement provisions of the Act.¹

1.14 The explanatory memorandum stated that these changes would be made without weakening the protection that the Act provides for Australia's biodiversity and heritage.

1.15 This report addresses the various aspects of the bill that have been raised as issues of interest or concern, and that have been examined during this inquiry by the committee.

1.16 The individual components have been separated to enable discussion of the key issues. Chapter 1 provides background and overview of the bill. Chapter 2 considers the provisions relating to proposed development actions. Chapter 3 examines the changes in relation to heritage listings and nominations. Chapter 4 focuses on a range of new enforcement and penalties provisions. Chapter 5 considers the changes made to threatened species and ecological communities. Chapter 6 deals with other issues raised during the inquiry.

Background to the bill

1.17 The Environment and Heritage Legislation Amendment Bill amends the *Environment Protection and Biodiversity Conservation Act 1999* to refine the provisions of the Act as it currently exists.

1.18 The Act provides a comprehensive national approach to environmental protection that deals with a wide range of environment and heritage issues, and clarifies the linkages between the Australian Government and state and territory governments by providing mechanisms for consultation and cooperation between those governments.

1.19 Practical application of the Act over the last six years has revealed that there are ways in which the operation of the Act can be improved to optimise its efficiency while maintaining and enhancing its environmental effectiveness, and the purpose of the Bill is largely to introduce increased efficiencies.²

1.20 Each year since the Act's inception the Department of the Environment and Heritage has carried out a review of the operation of the Act and has published an annual report on its findings.³ This report shows that generally, the Act appears to be working well to achieve the purposes for which the legislation was intended.

1.21 Under the Environment and Heritage Legislation Amendment Bill, the same basic framework and general approach would be maintained as currently exists under the Act, whilst at the same time strengthening and/or streamlining the various provisions of the Act which have been shown to need some adjustment.

1.22 The bill aims to make improvements in four distinct areas: streamlining administration of the Act for efficiency and effectiveness, thereby cutting 'red tape' in government; being more strategic and flexible in directing Australian Government action on the environment; strengthening compliance with, and enforcement of, the Act; and implementing a range of minor amendments needed to overcome some technical deficiencies in the Act.⁴

1.23 Therefore, the purpose of the proposed amendments is to greatly improve the operation of existing provisions of the Act.

---

⁴ Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 3.
Outline of the bill

1.24 The Bill consists of two schedules which amend the *Environment Protection and Biodiversity Conservation Act 1999*. Schedule 1 consists of the amendment of Acts, while Schedule 2 contains application, saving and transitional provisions.

1.25 The explanatory memorandum states in its regulation impact statement that the bill addresses the following principal issues through the proposed amendments:

- inefficient, onerous or unnecessary processes with limited environmental outcomes;
- insufficient incentives and statutory constraints on strategic approaches;
- duplicative and inconsistent processes;
- insufficient transparency and risks to the environment;
- insufficient flexibility and scope;
- ambiguities, anomalies or lack of certainty;
- potential for delay or frustration of processes; and
- technical and other issues.\(^5\)

1.26 The explanatory memorandum's impact analysis (costs and benefits) identifies the main groups affected by or having an interest in the problem and its proposed solutions as being:

- companies, partnerships or individuals undertaking development actions or other actions with impacts on the environment;
- Australian Government agencies;
- state and territory governments and local government; and
- environment and heritage groups.\(^6\)

1.27 The impact analysis also outlines beneficial impacts of the proposed amendments to the Act in the following areas:

- referral, assessment and approvals processes;
- protected species provisions;
- fisheries provisions;
- wildlife trade provisions;
- heritage provisions; and

---


Additionally, the impact analysis points out that costs associated with the proposed amendments to the Act are generally limited to implementation costs for the Australian Government, and minor costs associated with the need for stakeholders to become familiar with the new arrangements.

While implementation costs will generally be limited, it should also be noted that transitional costs associated with the amendments may carry through for some time, as efficiencies would not be realised immediately, but would occur as each subsequent issue was dealt with on a case by case basis.

Items 1 to 835 in Schedule 1 of the bill amend numerous sections of the *Environment Protection and Biodiversity Conservation Act 1999*. Many of these items are of a minor technical nature only, however a number of items may have somewhat more of an impact, and these will be individually identified and discussed later in this report.


Items 1 to 58 in Schedule 2 incorporate application, saving and transitional provisions of the bill and make a number of technical amendments to the Act in this regard.

The Department of the Environment and Heritage has commenced preparations for the implementation of the proposed amendments to the Act, as well as commenced preparation of information products explaining the amendments to external stakeholders. It has been advised that the need to implement the proposed amendments in a number of stages is not necessary, as the majority of the amendments simply involve the refinement of existing provisions.

**General position on the proposed amendments**

Submissions to the inquiry were generally supportive of the provisions of the bill to streamline processes and reduce unnecessary administrative burdens under the existing Act.  

---

8 Mr Gerard Early, Department of the Environment and Heritage, Committee Hansard, 6 November 2006, p. 57.
9 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 18.
1.35 While a variety of concerns were raised by witnesses about various aspects of the bill, and these will be discussed later in this report, the committee believes that these concerns must be weighed up against the evidence presented by 6 years of practical application of the existing provisions of the Act which has highlighted areas where the legislation needs a measure of fine tuning.

1.36 The committee generally accepts the Government's rationale and objectives in putting forward this legislation, while noting some areas of concern, as outlined in subsequent chapters of this report.
Chapter 2

Streamlining of Approvals Processes

Current law

2.1 The creation and implementation of the Environment Protection and Biodiversity Conservation Act 1999 has worked towards ensuring a focus on the protection of matters of national environmental significance by Australian Government interests, while at the same time ensuring that the States and Territories have retained responsibility for matters of state and local significance.

2.2 The regulations introduced by the Act have been successful in providing for a higher level of protection for the environment than was previously the case, while at the same time providing for timely, transparent and efficient development approvals processes.\(^1\)

2.3 However, in the six years since the original legislation was enacted, it has become apparent that this legislation needs to be amended to make it more practical when it comes to approvals and related processes to allow for more efficient administration of the Act.

Rationale for change

2.4 Since coming into effect, it has been recognised that the Environment Protection and Biodiversity Conservation Act 1999 (the Act) needs to be improved, particularly for those making applications or nominations under the Act.\(^2\)

2.5 Operational improvements can be achieved by reducing processing times and the number of decision points affecting the environmental assessment and approval of proposed developments by using more strategic approaches and by providing greater incentive for development interests, the states, territories, and local government, to engage with the Act earlier in their planning cycles.\(^3\)

2.6 The amendments propose to allow for faster approvals to occur by allowing the examination of preliminary proposals for development and making a preliminary assessment on that basis.

\(^1\) Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 2.

\(^2\) Second Reading Speech, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 3.

\(^3\) Second Reading Speech, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 3.
2.7 The bill introduces more incentives for proponents of development actions to engage earlier in the planning process, through the implementation of bioregional plans that will allow for over-arching strategic assessments.

2.8 Once the provisions of the bill take effect, the Commonwealth will set plans that will allow for the routine approval of developments by the states and territories. This mechanism proposes to free up the Commonwealth from having to approve those development proposals that can be managed at a state and/or territory level through bilateral agreements.

Changes proposed by the bill

2.9 The bill proposes to make changes to a number of areas where the existing Act has been shown to be inadequate in its practical application in the approvals process.

2.10 One significant aspect of the bill is the move towards reduced processing times for development approvals that will also result in reducing costs for development interests. This will assist with the removal of 'red tape' within the existing Act, while still working to ensure positive environmental outcomes.4

2.11 The bill proposes to allow the Commonwealth to adopt new or strengthen existing bioregional plans by way of bilateral agreements with the states and territories. This will allow for the routine approval of some developments without the need to seek Commonwealth approval, thus giving the states and territories more control over the process and also reducing approval times for proponents of developments expected to comply with the Act.

2.12 This reduction in duplicative processes will be made possible through improved co-operation between the states and territories and the Commonwealth in the form of stronger bilateral agreements than currently exist, and through the accreditation of state and territory authorisation processes, and legally binding management arrangements as outlined below.

2.13 The insertion of division 3 of part 4 into the Act amends existing legislation to provide an incentive to have certain proposed actions considered within the context of bioregional plans. If an action is proposed to be taken within the context of a bioregional plan then these actions do not require individual approval under the Act, as long as the Minister is satisfied that the taking of the action or actions will not have unacceptable or unsustainable environmental impacts.5

4 Second Reading Speech, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 3.
5 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 25.
Currently under the Act, bilateral agreements between the Commonwealth and states and territories last five years. Under the new provisions of the bill these agreements will now continue unless revoked, to cater for longer-term development projects and proposals.6

This is reflected in an amendment to section 65 of the Act which provides for a bilateral agreement to have effect for a period specified in the agreement, rather than ceasing to have effect after 5 years, leading to increased certainty, especially for larger scale developments that may be operating for periods longer than 5 years at a time.7

In addition, development approval processing times have essentially been reduced by removing the need for proponents to provide the Minister with preliminary information prior to a decision on assessment approach being made.8

In order to allow for this, the bill repeals section 86 of the Act, removing the need for proponents to provide preliminary information if the action is deemed to be a controlled action under section 75 of the Act. As the explanatory memorandum outlines, preliminary information provided by a developer of a project duplicated information that was already provided for in referral documents, adding unnecessary red tape to the approvals process.9

A new section 95 has been proposed in the bill that contributes towards a reduced timeframe for assessment by allowing proponents to provide adequate information for assessment at the time of referral, in effect reducing the amount of administration required under the existing Act.10 This provides developers with the incentive to engage earlier in planning processes.

Once the bill becomes law, it will also be possible for the courts to seek financial surety for damages if court injunctions are sought against developers of proponents of actions for breaches of the Act. This will work towards ensuring the elimination of vexatious injunctions by third parties.

This is made possible through the repeal of section 478 of the existing Act which effectively removes the 'no undertakings as to damages' provision.

---

6 Department of the Environment and Heritage, preliminary committee briefing, 18 October 2006.
7 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 28.
9 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 32.
10 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 33.
Environmental safeguards

2.21 The bill amends section 53 of the Act to require the Minister to have regard for approved conservation advice relating to a listed threatened species or a listed threatened ecological community when entering into a bilateral agreement with the states and territories.¹¹

2.22 An amendment to section 72 of the Act by inserting a new subsection 72(3) allows for a number of alternative proposals to be submitted for consideration for a proposed action. The motivation for this is to not only allow for greater flexibility in the planning stages of a proposed action, but to facilitate better environmental outcomes by allowing the relative impacts of the different proposals to be taken into consideration.¹²

2.23 The bill also provides for increased transparency of the development approvals process. The amendment of sections 104 and 105 of the Act will require that the proponent of any proposed action finalise and publish an Environmental Impact Statement that contains a summary of public comments received during the consultation on the draft report.¹³

2.24 Another measure which encourages better environmental outcomes is an amendment to section 134 of the Act, which allows the Minister to attach conditions to Part 9 approvals, requiring specific activities to be undertaken for protecting, repairing, or mitigating damage to, a matter protected under part 3 of the Act; or, requiring a specified financial contribution to support such activities.¹⁴

2.25 These amendments allow for broadened conditions to be attached to developments such as voluntary compensatory actions and financial contributions to offset developmental impacts where these impacts are unavoidable.¹⁵

2.26 A new subsection 144(2A) provides the Minister with the ability to suspend an approval in reasonable circumstances, for example the Minister may suspend an

---

¹¹ Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 27; Environment Protection and Biodiversity Act 1999, p. 94.
¹² Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 27.
¹³ Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 35.
approval to ensure that a development activity does not occur during a time of year that may be damaging to a threatened species.16

Comments and concerns

2.27 A number of organisations welcomed the majority of changes proposed by the amendments, arguing that these changes would give more certainty to existing provisions and streamline the efficiency of approvals, referrals, assessment and administrative processes to protect matters of national environmental significance, while reinforcing a commitment to sustainable development.17

2.28 As stated by the Chamber of Minerals and Energy WA in their submission to the inquiry:

CME does not advocate for lower standards of environmental protection measures but rather promotes improvements to the efficiency and co-ordination of legislation within and between jurisdictions. CME thus supports the majority of proposed amendments improving the efficiency of EPBC Act such as the proposed changes to assessment and approval provisions.18

2.29 Other witnesses to the inquiry, including the Minerals Council of Australia, welcomed and supported as follows:

The establishment of processes for rapid decisions on straightforward proposals;
Clarification of what constitutes an indirect impact, with a project now needing to be the “substantial cause” or to “facilitate in a major way” any indirect impacts before these become a relevant consideration;
Greater flexibility to change proposals during the assessment and approval process;
Increased capacity to rely on conditions of approval imposed by other Ministers (including State/Territory Ministers); and
Formal processes for consulting with proponents in advance of approval decisions.19

2.30 The Minerals Council of Australia in their appearance at the committee hearings stressed the importance of environmental protection measures in conjunction

17 Tasmanian Government Department of Tourism, Arts and the Environment, Submission 20, p2; Minerals Council of Australia, Submission 65, p. 2; The Association of Mining and Exploration Companies, Submission 1, p. 1; Australian Network of Environmental Defenders Offices, Submission 17, p. 5.
18 Submission 63, p. 1.
19 Submission 65, p. 2
with the streamlining efforts, as this would give more certainty to council members who were proponents of development actions that they were doing the right thing by the community thereby reinforcing their commitment to sustainable activities.\textsuperscript{20}

2.31 The Property Council also highlighted their recognition and support for best practice in environmental policy for Australia. As they stated in their submission to the inquiry, they support and advocate best practice in environmental policy for Australia, and said that:

\begin{quote}
The Property Council views the amendments as generally worthwhile in improving the efficiency of the administration of the Act and as a step towards providing greater certainty of process.\textsuperscript{21}
\end{quote}

2.32 As the Law Council of Australia argued in their submission, the provisions provide enhanced ability to deal with large-scale projects and give priority attention to projects of national importance through the use of strategic assessment and approval approaches, and put in place measures to assist developers to avoid impacts on matters of national environment significance protected by the Act.\textsuperscript{22}

2.33 During the committee hearings the Law Council also pointed out, in regards to the adequacy of the existing legislation in relation to planning approvals:

\begin{quote}
My understanding is that most of the time it has been referred to the states for assessment first and then it comes back to the Commonwealth government. It is a tortuous process because it is lengthy. If you are putting in a development of any sort, your time constraints are always important, so the more streamlined we can have any legislation the more likely we are to get a sensible result for everybody.\textsuperscript{23}
\end{quote}

2.34 In addition to general support for the streamlining provisions of the bill, there were a number of witnesses to the inquiry who raised concerns about the proposed amendments to the Act, arguing that the changes would be a backward step for environmental protection rather than an improvement. Some raised concerns that the streamlining of approvals processes and the move towards stronger bilateral arrangements with the states and territories would weaken environmental protection from developers under the bill as there would be less scrutiny of individual projects. The Australian Council of National Trusts pointed out:

\begin{quote}
The expanded use of management policies and plans and bioregional plans will reduce the amount of scrutiny which proposals will be subjected to.\textsuperscript{24}
\end{quote}

\begin{footnotes}
\item[21] Submission 67, p. 1–2.
\item[22] Submission 37, p. 1.
\end{footnotes}
2.35 In a review of the existing Act, The Australia Institute pointed out that between July 2000 and July 2006 approximately 149 development proposals were approved, and only four refused under part 9 of the Act. In effect this meant that the environment approval and assessment (EEA) regime had only prevented four development proposals from going ahead since the regime began operating six years ago.25

2.36 This concern was also raised by The Australia Institute during the committee hearings as substantiation that the current approvals regime was not tough enough, and that any streamlining of the system would in effect make it even easier for development approvals to be carried through successfully without rigorous environmental assessment.26

2.37 Others, such as the Minerals Council of Australia, argued that:

We have concerns that in some jurisdictions there are not bilateral agreements in place; hence we have two layers of approvals and two layers of assessment, which can delay projects and does not actually lead to any greater level of environmental protection from those projects.27

2.38 This concern has largely been addressed in the bill, as under the amendments proposed by the bill, state and territory governments will be required to have significantly improved environmental protection measures via approved bioregional plans under new bilateral agreements with the Commonwealth. This will ensure a better level of protection for the environment and will also ensure a greater level of consistency across the jurisdictions than currently exists under the Act. There will be more streamlined approvals processes while at the same time adequate environmental protections will be maintained.

2.39 The Department of the Environment and Heritage explained that:

The notion that somehow or other we could do a bioregional plan and then the Commonwealth could walk away from that region and not be concerned about anything that might happen is a little bit misleading.28

2.40 Another point that was raised was that while the proposed amendments appeared to create the appropriate changes for streamlining environmental assessment processes, they would not necessarily provide for a decision making rationale that was consistent across commonwealth, state and local government assessment processes.29

26 Mr Andrew Macintosh, Committee Hansard, 3 November 2006, p. 7.
27 Ms Melanie Stutsel, Committee Hansard, 6 November 2006, pp 2–3.
28 Mr Gerard Early, Committee Hansard, 6 November 2006, p. 59.
29 Birds Australia, Submission 10, p. 3.
Yet, as the Department pointed out during the committee hearings:

The strategic assessment of policies, plans and programs will also involve rigorous environmental assessment and proper public consultation. An approval granted as a result of a strategic assessment will enable the Minister to set legally enforceable conditions that are subject to the penalty provisions of the EPBC Act. Just as in the case with a normal approval, the Minister would have the ability to vary the conditions if new information came to light about the impacts of the approved action. The Minister also has the ability to suspend or revoke a strategic assessment approval if unforeseen impacts come to light.\(^{30}\)

Support was given for these aspects of the legislative changes by the Australia Network of Environmental Defender’s Offices:

Amendments to section 134 provide that the type of conditions the Minister can attach to approvals can include financial contributions towards projects not directly related to the controlled action. ANEDO supports this condition with three provisos. First, any such financial contribution must go toward remediation and conservation projects and not simply go to Consolidated Revenue. Second, there should be a nexus between the conservation project and the development project itself on equity grounds. Third, the basis for the calculation should be set down in regulations for transparency and accountability.\(^{31}\)

The Law Council of Australia also supported the proposed amendments in relation to remediation. As they outlined in their submission to the inquiry:

The amendments: Provide a power for the Federal Court to make a Remediation Order, but only on application by the Minister. Confer on the Minister a power to make a remediation determination, or to accept enforceable financial undertakings as an alternative to prosecution and; The Minister may make remediation determinations regarding contravention of civil penalty provisions (within six years) (Division 14B, section 480D). Any financial contributions for paid for civil penalty contraventions should be applied to remediation of the particular site, species or ecological habitat that has been damaged, or to provide for its ongoing sustainability.\(^{32}\)

Under the provisions of the bill, there would also be the increased opportunity for public comment and transparency during the environmental assessment and review process in relation to proposed actions.

These new arrangements were supported by Birds Australia, who stated in their submission to the inquiry:

---

\(^{30}\) Mr Gerard Early, Department of the Environment and Heritage, *Committee Hansard*, 6 November 2006, p. 52

\(^{31}\) *Submission 17*, p. 28.

\(^{32}\) *Submission 37*, p. 5.
There appear to be a number of positive elements in the amendments. Increased opportunity for public comment and transparency during the environmental assessment and review processes is welcomed, for example the provision for public comments on section 75 decisions.33

2.46 And as the Association of Mining and Exploration Companies stated:

The changes reinforce a commitment to sustainable development while at the same time recognising the need to streamline the processes associated with managing sustainable development.34

**Conclusion**

2.47 Overall, the Department considered that the proposed amendments would facilitate a shift in the Australian Government’s focus from ad hoc project-by-project approvals to a focus on a more strategic framework.35

2.48 It was explained that this approach is more likely to ensure that regional natural resource management plans are taken into account, providing a stronger and more strategic framework for environment and heritage protection.36

2.49 As the Minister has said, the Australian Government is streamlining the Act with a series of amendments that will improve environmental protection by focusing more on outcomes than process while maintaining our strong commitment to protecting Australia’s unique and iconic natural, cultural and Indigenous heritage.37

**Committee view**

2.50 The committee supports the changes to the Act in relation to streamlining of approvals processes and the strengthening of the relationship with the states and territories in regards to these streamlining provisions. The amendments appear to largely eliminate duplication of processes between the states and territories and Commonwealth authorities in relation to the Act.

2.51 The committee supports the proposal for the rollover of bilateral agreements with the states and territories, subject to five yearly reviews. The committee

---

33 Submission 10, p. 4.
34 Submission 1, p. 1.
35 Mr Gerard Early, Department of the Environment and Heritage, Committee Hansard, 6 November 2006, p. 50.
36 Second Reading Speech, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 4.
recognises that this is an effective use of state and territory resources within Commonwealth agreements.

2.52 The amendments remove complexity and time consuming and unnecessary procedures that exist currently under the Act.

2.53 The committee is also of the view that the new efficiency arrangements will free up departmental resources in order for them to concentrate effectively on other important aspects of managing the Act, assuring a continuing focus on environmental outcomes.
Chapter 3
Heritage Listings and Nominations

Current law

3.1 The Environment Protection and Biodiversity Act 1999 contains provisions dealing with the listing and protection of World Heritage properties and National Heritage properties. It also provides for the identification and protection of the Commonwealth's own heritage which encompasses important places within the Commonwealth's control.¹

3.2 As a signatory to the World Heritage Convention, the Australian Government cooperates closely with state and territory authorities to ensure the protection and promotion of state-managed world heritage, and this is consistent with Australia's national undertakings under the convention.

3.3 The Australian Heritage Council has responsibility under the Act for ensuring that places on the National Heritage List and the Commonwealth Heritage List have been adequately assessed for their heritage values. The Minister may refer a public nomination or a direct request to the Council for assessment, while the Council itself may initiate a heritage assessment. The results of these assessments are then provided to the Minister for a decision as to a heritage listing taking place.

3.4 The Act has provisions for ensuring that management plans are prepared that set guidelines for the protection and conservation of heritage sites. If these sites are within a state or territory then the Act provides that the Australian Government must endeavour to ensure that management plans are implemented by the relevant local authority.²

Rationale for the change

3.5 There is a need to increase efficiencies in the area of heritage management processes and also need to reduce duplication across heritage registers.³

3.6 The principal rationale for the amendments relating to the Register of the National Estate (RNE) is to complete the transition to a three-tiered arrangement for heritage within Australia. While the Australian Government is responsible for national

---

¹ Second Reading Speech, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 2.
³ Second Reading Speech, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 2.
matters; the states are responsible for matters relevant to states, and local governments responsible for matters of local significance.4

3.7 Having a Register of the National Estate complicates the three tiered model, as it includes places with heritage significance at all three levels. This issue was identified as significant by the Council of Australian Governments in 1997.5

Changes proposed by the bill

3.8 The Environment and Heritage Legislation Amendment Bill 2006 allows for World Heritage properties to be transferred across to the National Heritage List without imposing any requirements for further assessment.6 This will ensure protection for those properties already listed, as they will not need to be reassessed prior to being shifted.

3.9 However, the repeal of section 324B of the Act has the effect that the National Heritage List will no longer be able to include places outside Australia's jurisdiction, and a new list called the list of Overseas Places of Historic Significance is being established under chapter 5A to record them.7

3.10 The bill also proposes changes that complete the transition to a three tiered heritage system, as proposed by the Council of Australian Governments in 1997, by enacting that the Register of the National Estate will cease to be a statutory register. This register will be abolished after a period of five years to allow sufficient time for heritage listings to be transferred to states and territory registers.8

3.11 The bill repeals sections 324E to 324J and inserts a new subdivision BA of division 1 of part 15 of the Act which will enable the Minister to set themes, following advice from the Australian Heritage Council focussing on places of potential heritage value, rather than being driven by the order in which public nominations are received.9

4 Second Reading Speech, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 5.

5 Mr Peter Burnett, Department of the Environment and Heritage, Committee Hansard, 6 November 2006, p. 56


7 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 62.


9 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 62.
3.12 The bill also allows the Minister to set more than one heritage theme in an assessment period (section 342H). The Minister may seek advice from the Australian Heritage Council to assist in determining heritage themes.\textsuperscript{10}

3.13 Under the amendments to the Act heritage listings will now occur on an annual cycle approval process, rather than on an ad-hoc basis as is currently the case. A new annual 12 month assessment cycle will commence within 12 months of the legislation coming into effect (new section 342E).\textsuperscript{11}

3.14 The role of the Australian Heritage Council will be expanded to better enable this strategic approach to be taken to listing. Advice will be provided to the Minister on annual work programs based on the strategic importance of the nominations rather than when they happen to be nominated.\textsuperscript{12}

3.15 A new section 324K simplifies the outline for emergency listing processes for properties with potential heritage value. In conjunction with new section 324JL this enables the Minister to emergency list a place in the National Heritage List if it may have National Heritage values, if any of those values is under threat of significant adverse impact, and the threat is both imminent and likely.\textsuperscript{13}

3.16 The bill also amends the Act by repealing section 391A which requires that the Minister must consider information in the Register of the National Estate in making decisions relating to heritage listings.\textsuperscript{14}

3.17 This amendment will no longer be required once the Register of the National Estate ceases to operate as a statutory heritage list five years from the commencement of the provisions of the bill.\textsuperscript{15}

\textbf{Comments and concerns}

3.18 Some witnesses supported the streamlining provisions as they recognised the need for reform, but were concerned that emergency listing process for heritage value properties could be compromised:

\textsuperscript{10} Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 63.

\textsuperscript{11} Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 62.

\textsuperscript{12} Second Reading Speech, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 3.

\textsuperscript{13} Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 65.

\textsuperscript{14} Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 256.

\textsuperscript{15} Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 79.
We understand that the 10-day provision was very onerous for DEH. I know that when they got submissions it caused them grief. We are certainly happy for changes to be made, but, like with most contentious things, we would suggest that the changes have gone too far. Indeed, necessarily in an emergency, the minister should be obliged to make some sort of response somewhere to someone nominating and, even just within a reasonable time frame, to offer real protection for that place. Certainly we feel—it is in our submission—that there should be the possibility for the minister to say, ‘Yes, this place certainly does merit a heritage assessment, so it should be protected until we can conduct an assessment and discover what is there and what the heritage values are before we go ahead and develop it.\(^\text{16}\)

3.19 However, an amendment to the Act establishing new section 324K, which allows for the Minister to rapidly consider protection for properties with potential heritage value if they are deemed to be under threat, diminishes concerns about the provisions of the Act to deal with emergency listings.

3.20 Some witnesses argued strongly against the discontinuation of the Register of the National Estate (RNE) and the consolidation of existing heritage registers.

3.21 Australia ICOMOS stated during the committee hearings:

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.\(^\text{17}\)

3.22 More dramatically, the Australian Council of National Trusts argued:

The bill sees the statutory death of the Register of the National Estate. The Register has been compiled over the past 25 years by the Commonwealth and is a national treasure. It holds details of over 13 000 places of heritage significance, many of which are not protected by other legislation. Although its powers are limited the Register needs to be retained and sustained.\(^\text{18}\)

---

16 Mr Tom Warne-Smith, Australian Council of National Trusts, Committee Hansard, 6 November 2006, pp 48–49.
17 Dr Michael Pearson, Committee Hansard, 3 November 2006, p. 16.
18 Submission 68, p. 5.
3.23 However, given that the RNE will continue to act as an archive reference list after the expiry of the five year statutory period, there appears to be no real need for the heritage properties currently listed on the RNE to be transferred to the National Heritage List. This would go against the purpose of streamlining the Act to move towards a three-tiered registry system across all levels of government, and create unnecessary work and duplication. Therefore, concerns that its removal will cause the loss of an important register are somewhat unfounded.

3.24 Others arguments put forward said that the system could work if additional steps were taken to manage the process. As the Australian Council of National Trusts said:

I think one useful exercise could be for somebody to analyse the Register of the National Estate, see how many places that have national significance are listed on that register but are not listed on the National Heritage List and move them across from the Register of the National Estate onto the National Heritage List. It might save everybody a lot of time and effort—that is, if that is the way the government is going.19

3.25 The Australian Archaeological Association also highlighted the issue of deficiencies at state level, stating:

The time-frame and rationale for the abolition of the RNE assumes that over this period state and territory governments will work to redress statutory deficiencies in their legislation regarding the capacity to protect and manage all aspects of heritage. However, it is by no means certain that this will take place, or that archaeological sites and relics in particular will be included in this process.20

3.26 But as the Tasmanian Government pointed out:

Tasmania, as part of its extensive review of state Heritage legislation and procedures, is already in the process of amending its heritage register and developing a three tiered register of items of local, state and national significance. This process, although underway, will take several years to complete.21

3.27 This is evidence that state governments are working proactively to engage in the heritage listing process under the provisions of the Act and the changes contained in the bill, and are working towards improvements.

3.28 Of note to the committee were specific concerns that were raised by the Australia ICOMOS in regards to heritage listings and nominations within the ACT:

19 Mr Colin Griffiths, Committee Hansard, 6 November 2006, p. 41.
20 Australian Archaeological Association Ltd, Submission 29, p. 3.
21 Tasmanian Government, Department of Tourism, Arts and the Environment, Submission 20, p. 4.
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.  

3.29 These concerns were reiterated by the Australian Council of National Trusts:

I think it goes to a peculiarly ACT situation because of the responsibilities of the National Capital Authority, which operates under federal legislation, and the way in which the local territory heritage protection operates. There is a gap in coverage and the only protective mechanism available to the certain group of buildings that Mike Pearson mentions is the Register of the National Estate. If my understanding is correct, and I think it is, any vestige of protection that those buildings will get from the register will disappear with this repeal.

3.30 This issue was also of concern to the committee.

3.31 Witnesses expressed concern that it was a lack of resources that was instrumental in the removal from the Act of the RNE as a statutory list:

My own observation would be that the department has done its best in difficult circumstances. I know departments are always constrained, and it has had very tight timetables to get things done. I would have liked to have seen more resources devoted to converting the register into a much more proactive document to take advantage of the 25 years of investment of public money in that register that has been going on since 1976.

3.32 There was no evidence presented to the committee however, that a lack of resources was in fact the reason for the abolishment of the RNE as a statutory register.

3.33 As Australia ICOMOS emphasised, the primary objective was the education and engagement of the community in the heritage listing process:

22 Dr Michael Pearson, Australia ICOMOS, Committee Hansard, 3 November 2006, p. 16.
23 Mr Colin Griffiths, Committee Hansard, 6 November 2006, p. 44.
24 Mr Colin Griffiths, Australian Council of National Trusts, Committee Hansard, 6 November 2006, p. 48.
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.25

3.34 However, the evidence shows that the Australian Government is committed to protecting properties of national heritage value at both ends of the scale.

3.35 The Minister in September this year reinforced his recognition of the potential heritage value of the Burrup Peninsula as this extract from his media release shows:

The Minister for the Environment and Heritage, Senator Ian Campbell, today announced he would seek public comment on the proposed National Heritage List boundary for ancient indigenous rock art and stone arrangements on the Burrup Peninsula and Dampier Archipelago in Western Australia’s north-west. “The Australian Heritage Council has completed its assessment of the area and advised me of its opinion that the area meets the high threshold for inclusion in the National Heritage List,” Senator Campbell said. “The Council has also provided a potential boundary for a listing. Agreeing on the right boundary is a key element of ensuring the heritage and economic values of the area can co-exist into the future. I have previously publicly stated that I am fully aware of the significant heritage values of the area and of the need to protect these values. I am also very conscious of the enormous economic values of the area and its significance to the nation’s economy. We have to get the balance right.”26

3.36 And to highlight the Australian Government's commitment to somewhat less prominent heritage, the Minister recently announced $10.5 million in funding over four years for the protection of diverse heritage properties, including:

- $500,000 for works to Brush Farm House, NSW, a 19th century colonial built for explorer Gregory Blaxland.
- $310,000 to support works to the interior of Sydney’s Great Synagogue.
- $454,545 for conservation works on the National Heritage listed Newman College, Vic, designed by Walter Burley Griffin and Marion Mahoney Griffin.

25 Dr Michael Pearson, Committee Hansard, 3 November 2006, p. 17
• $95,909 to conserve the historic fabric of the National Heritage and World Heritage listed Royal Exhibition Building, where Australia’s first Federal Parliament was opened in 1901.

• $72,966 to uncover and restore the rare façade of St Kilda’s Luna Park Carousel organ.

• $45,000 for works to the former St Matthews Church, Tasmania, designed by noted convict architect James Blackburn.27

3.37 Despite some witnesses' concerns, there is a strong commitment to preserving the heritage of both small and large heritage properties, and the proposed amendments to the Act are unlikely to impact on such a commitment.

Conclusion

3.38 As the explanatory memorandum outlines, the benefits arising from the proposed amendments to the Act's heritage provisions include:

• Improved efficiency of the heritage listing process by removing onerous statutory requirements and providing for strategic approaches to be taken;

• Increased ease of communication with owners or occupiers and people proposing listings by improving consultation mechanisms;

• Provision of greater certainty and removal of duplication for Australian Government agencies in relation to their responsibilities for protection of listed heritage places;

• Provision of greater certainty for owners of heritage listed properties in external territories; and

• More efficient administration and greater certainty through resolution of definitional and technical uncertainty and problems.28

Committee view

3.39 While the Register of the National Estate has approximately 13,000 listings and will be retained for five years and beyond as a reference, it will cease to exist as a statutory list. This move is supported by the committee as there currently exists a number of heritage lists at state and territory and Commonwealth levels, and this will work towards streamlining and consolidating existing heritage lists to reduce duplication and facilitate adoption of the three-tier system.

27 Senator the Hon. Ian Campbell, Australian Minister for the Environment and Heritage, More community funding to protect important heritage places, Press Release, C277/06, 27 October 2006.

3.40 The committee does note that there is some concern that the Register of the National Estate is the only mechanism to protect sites in the ACT under the control of the National Capital Authority. The committee believes the Government should examine this particular issue to ensure that this anomaly is addressed.

Recommendation 1

3.41 The committee recommends that the Government investigate the issue of heritage properties within the Australian Capital Territory that are located on designated Commonwealth land to ensure their protection and heritage status is not compromised with the repeal of the Register of the National Estate.
Chapter 4
Compliance and Enforcement

Introduction

4.1 The Environment Protection and Biodiversity Conservation Act 1999 (the Act) provides a range of enforcement mechanisms, including civil and criminal penalties, environmental audits, conservation orders, injunctions, infringement notices, the power to publicise contraventions and the power to take action to remedy environmental damage and to recover the costs of these actions from perpetrators.¹

4.2 In the second reading speech the Parliamentary Secretary to the Minister for the Environment and Heritage said that changes were needed to continue to strengthen compliance with the Act and to establish new enforcement options. The Parliamentary Secretary said:

   While there have been a number of successes in ensuring compliance with the act during the first six years, practice has shown that the current provisions are often difficult to use. The proposed amendments will strengthen environmental protection by fixing these problems and making it easier and quicker to bring compliance action against people and organisations that breach the act.²

4.3 The explanatory memorandum states that one of the overarching objectives of the proposed amendments is to 'increase the effectiveness of the compliance regime'.³

4.4 Of the witnesses and submitters that addressed the issue, many were broadly supportive of measures aimed at strengthening the compliance and enforcement regime under the Act. Many still expressed strong opposition to individual amendments, particularly the amendment dealing with third party enforcement.⁴

Changes proposed by the bill

4.5 According to the Department of the Environment and Heritage, the proposed amendments are designed to address compliance difficulties that have been identified

---

¹ Environment Protection and Biodiversity Conservation Act 1999, Chapter 6, Part 17.
² The Hon. Mr Gregory Hunt MP, Parliamentary Secretary to the Minister for the Environment and Heritage, House of Representatives Hansard, 12 October 2006, p. 4.
⁴ Australian Conservation Foundation, Submission 27, p. 6; Australian Network of Environmental Defenders' Offices, Submission 17, p. 32; The Environment Association, Submission 58, p. 1.
in relation to the Act and will strengthen environmental protection by making it easier to take action against people who breach the Act's protected area provisions.\(^5\)

4.6 The explanatory memorandum said that the bill will introduce 'more effective and more flexible compliance and enforcement provisions', including:

- addressing the lack of appropriate and effective alternatives to litigation in varying circumstances;
- ensuring that employers, principals and landowners are accountable for actions by their employees, agents and land managers respectively;
- offence formulations which address evidentiary difficulties (that is, the introduction of strict liability to certain elements of some offences);
- the provision for criminal penalties for serious contraventions of the Act in Commonwealth reserves, in addition to civil penalties;
- scope of the court’s power to grant rehabilitation orders and ability to grant a rehabilitation order in the absence of an injunction;
- powers under warrant and powers of seizure;
- provision for civil penalties and liability of executive officers of corporations for non-compliance with provisions of approved wildlife trade operations and management plans;
- provision of enforcement of conditions relating to future sale, management, manner of keeping and reproduction of certain imported and exported wildlife specimens;
- ability to prosecute non-citizens who are suspected of contravening the Act; and
- powers of investigation, specifically the ability to introduce a 'notice to produce and attend' and increased powers for the detention, searching and screening of alleged offenders.\(^6\)

4.7 The bill is expected to bring in the following benefits:

- simplified, flexible and cost-effective compliance and enforcement arrangements;
- strengthened enforcement procedures including powers under warrants and power of seizure;
- broadened capacity for a court to grant rehabilitation orders; and

---


\(^6\) Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 6.
• efficient and effective administration and greater certainty through resolution of definitional and technical uncertainty and problems.\textsuperscript{7}

4.8 A range of witnesses and submitters expressed support for measures in the bill that seek to clarify and strengthen compliance and enforcement provisions.\textsuperscript{8} Australian Network of Environmental Defender's Offices (ANEDO) argued that there needed to be 'a commitment of resources and political will to use the provisions effectively.\textsuperscript{9}

**Enforcement issues**

**Lack of enforcement**

4.9 In discussing compliance with the Act, ANEDO and The Australia Institute both drew attention to the 'lack of compliance action' taken by the Commonwealth Department of the Environment and Heritage (the Department).\textsuperscript{10} The Australia Institute said that 'to date, only two enforcement actions have been taken by the Commonwealth' in relation to the environmental assessment and approval regime.\textsuperscript{11} These are known as the *Greentree Case\textsuperscript{12}* and *Booth v Bosworth\textsuperscript{13}*.  

4.10 The Australia Institute questioned the extent to which the Act has been able to achieve the purpose of deterring wrongdoing given 'there has been a marked lack of political will to prosecute people' who fail to comply with the Act's requirements.\textsuperscript{14} The Institute argued that compliance was often a function of the risk of prosecution and the penalties that are likely to be incurred following prosecution.

4.11 ANEDO and The Australia Institute put forward a number of possible reasons as to the reluctance to prosecute people who fail to comply with the provisions including:

- a lack of political will;
- difficulty in proving that a person has breached the 'likely to have a significant impact test';
- the costs of undertaking legal proceedings; and

\textsuperscript{7} Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 14.

\textsuperscript{8} ANEDO, *Submission 17*, p. 5.

\textsuperscript{9} *Submission 17*, p. 5.

\textsuperscript{10} ANEDO, *Submission 17*, p. 32; The Australia Institute, *Submission 60 (Attachment 1)*, p. 167.

\textsuperscript{11} *Submission 60 (Attachment 1)*, p. 159.

\textsuperscript{12} See *Minister for the Environment and Heritage v Greentree (No 2) [2004] FCA 741*.

\textsuperscript{13} *[2001] FCA 1453*.

\textsuperscript{14} *Submission 60 (Attachment 1)*, p. 167.
• a lack of resources needed to gather evidence and monitor compliance.\textsuperscript{15}

4.12 However, as the Department notes, in its Compliance and Enforcement Policy, criminal prosecutions are the last step in a hierarchy of measures designed to achieve the objectives of environmental legislation:

The Department employs a range of responses that escalate according to the severity of the contravention or if non-compliant activities continue. Generally, education and/or warnings are used in response to first and less serious contraventions; this ensures that suspected offenders become aware of legislative requirements. For serious or continuing contraventions, deterrent sanctions are used that may include suspension or cancellation of permits or approvals, injunctions, remediation orders, pecuniary penalties, and criminal prosecution.\textsuperscript{16}

4.13 A small number of prosecutions may indicate the success of this 'enforcement pyramid',\textsuperscript{17} not any limitation on the commitment or capacity of the Department to ensure compliance with Australian environmental laws.

\textit{Third party enforcement}

4.14 Third parties can participate in enforcement of the Act in a number of ways:

• by notifying the Department of actions that should be referred to the Minister under the Act or by providing other information about suspected breaches;
• by taking legal action (see sections 475 and 487); and
• ensuring that administrative decisions are made in accordance with the law.

4.15 The bill proposes to repeal section 478 of the Act (at Item 763) which currently prevents the Federal Court from requiring undertakings for damages from an applicant as a condition of granting an interim injunction.

4.16 The explanatory memorandum states that the repeal of section 478 brings the Act into line with other Commonwealth legislation that gives the Federal Court discretion whether or not to require an applicant for an injunction to give an undertaking as to damages.\textsuperscript{18}

4.17 A number of submissions expressed concern about the bill's proposed removal of 'no undertakings as to damages' protections for civil society actors seeking to

\textsuperscript{15} Submission 60 (Attachment 1), p. 168; Submission 17, p. 32.


\textsuperscript{18} Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 88.
enforce the Act by way of injunctions.\textsuperscript{19} The Committee heard that section 478 in effect facilitates effective enforcement of the Act by environmental groups.\textsuperscript{20}

4.18 Associate Professor Lee Godden and Ms Jacqueline Peel from the Faculty of Law at The University of Melbourne argued:

An important enforcement tool currently provided by the EPBC Act is the capacity for any ‘interested person’, including environmental civil society groups, to seek an injunction to prevent breaches of the Act (s 475). Such applications supplement the enforcement activity carried out by the Department of the Environment and Heritage, and play an important role in ensuring the accountability of developers for the environmental consequences of their actions on MNES.\textsuperscript{21}

4.19 Associate Professor Godden and Ms Peel said that the changes were 'likely to affect, adversely, the enforcement strength of the legislation' because environmental groups and other community members rarely have the necessary resources to meet demands for an undertaking as to damages.\textsuperscript{22} The National Trust of Australia (Western Australia) agreed and commented that the change would 'effectively prevent many heritage and environment groups from seeking judicial redress where they believe there has been a breach of the EPBC Act'.\textsuperscript{23}

4.20 Humane Society International (HSI), the Tasmanian Conservation Trust (TCT) and WWF-Australia argued against the repeal of section 478 and said:

It is instructive to note that third parties have used the court system very judiciously, and given the Australian Government has such poor surveillance arrangements in place to ensure compliance, enabling individuals and organisations to ensure the objects of the Act are achieved should be encouraged not dissuaded.\textsuperscript{24}

4.21 The Australian Conservation Foundation (ACF) highlighted that 'important gains' had been made through public interest enforcement of environmental laws, but noted that there were many barriers to third party enforcement of the Act. The ACF argued that the following steps would assist in overcoming those barriers:

- Provision for public interest costs orders in legal proceedings under the Act, following the recommendations of the ALRC (Report 75);


\textsuperscript{20} ACF, \textit{Submission 27}, p. 6.

\textsuperscript{21} \textit{Submission 15}, p. 5.

\textsuperscript{22} \textit{Submission 15}, p. 5.

\textsuperscript{23} \textit{Submission 22}, p. 7.

\textsuperscript{24} \textit{Submission 66}, p. 24.
• Establishment of administrative review of decisions by the Minister not to request referral of a proposed action under section 70(1), where a third party has requested that the Minister seek such a referral;
• Establishment of merits review of controlled action decisions under Chapter 4, Part 7; and
• Broadening further the standing rules in section 475 and 487 so as to allow “any person” to seek injunctive relief for a breach of the Act and/or to seek review of administrative decisions.25

4.22 The committee is concerned that there may be some misunderstanding of the effect of this change. It will not mean that environmental groups will always be required to give undertakings for damages if they initiate action under section 475 or 487. As the Law Council of Australia noted in its support for the proposed repeal of section 478, the Federal Court will have the discretionary power whether to require, or not require such an undertaking.26 The Department argued that 'It is appropriate for the Federal Court to be making such a decision on its merits rather than for the decision to be prescribed in legislation'.27

**Strict liability**

4.23 The bill applies strict liability to certain elements of some offences. The changes proposed by the bill mean that it will not be an excuse to not know that a matter is protected by the Act.

*What is strict liability?*

4.24 Strict liability offences are those which do not require guilty intent for their commission, but for which there is a defence if the wrongful action was based on a reasonable mistake of fact.28

4.25 At common law there is a presumption that fault must be proven for each element of an offence.29 However, this presumption may be displaced by an express legislative provision that an offence or element of an offence carries strict liability.30 In its *Sixth Report of 2002*, the Senate Standing Committee for the Scrutiny of Bills

---

25 Submission 27, p. 6.
26 Submission 37, p. 4.
27 Department of the Environment and Heritage, answer to question on notice, 10 November 2006.
29 *The Criminal Code* (Commonwealth), s. 5.6.
30 *The Criminal Code* (Commonwealth), s. 6.1.
said that fault liability is one of the most fundamental protections of criminal law and 'to exclude this protection is a serious matter'.

The provisions of the bill

4.26 The intent of the amendments is to make it clear that the prosecution does not have to show a person knew or was reckless as to the following facts:

- that the property was a World Heritage property (section 15A);
- that the heritage value was a National Heritage value (section 15C);
- that the place was a National Heritage place (section 15C);
- that the wetland was a declared Ramsar wetland (section 17B);
- that the threatened species or threatened ecological community is a listed threatened species or threatened ecological community (section 18A and sections 196(1)(c), 196B(1)(b) and 196D(1)(b));
- that the species is a listed migratory species (section 20A and sections 211(1)(c), 211B(1)(b) and 211D(1)(b);
- that the area is a Commonwealth marine area (section 24A);
- that the area is Commonwealth land (section 27A);
- that the place is a Commonwealth Heritage place (section 27C);
- that the cetacean is in the Australian Whale Sanctuary or waters beyond the outer limits of the Australian Whale Sanctuary (section 229(1)); and
- that the species is a member of a listed marine species (sections 254, 254B and 254D).

Strict liability offences

4.27 In its Sixth Report of 2002, the Senate Standing Committee for the Scrutiny of Bills referred to the Commonwealth Attorney-General's Department's guidelines that stated that strict liability has been applied in the following cases:

- to ensure the integrity of a regulatory regime, particularly those which relate to the environment or public health;
- where it is difficult for the prosecution to prove a fault element because a matter is peculiarly within the knowledge of the defendant; or
- to overcome the 'knowledge of law' problem, where an element of the offence expressly incorporates a reference to a legislative provision.


The Law Council of Australia stated that in relation to strict liability:

…it is usual to have offences of strict liability in relation to environmental offences….There is no argument that stands that says that strict liability offences cannot attract jail sentences as well as a fine – and those fines can be very high. However, a jail sentence should only be for a very serious crime.33

The Law Council also argued that where an offence of strict liability exists, the Department of the Environment and Heritage should focus attention on educating the public so that people are aware that, for example, a particular species is a listed migratory species.34 The Nature Conservation Council of NSW was supportive of strict liability being applied to offences:

There are a number of amending provisions that make it clear that offences are strict liability offences. NCC strongly supports these amendments. NCC is supportive of greater enforcement of the Act. Adequate resources must be dedicated on the ground for this effort.35

The Scrutiny of Bills committee recently reiterated, in the context of the Environment and Heritage Amendment Bill, the principles outlined in its Alert Digest (No. 12 of 2006) and from the its Sixth Report of 2002 on the use of strict liability in legislation:

• 'strict liability should be introduced only after careful consideration on a case-by-case basis of all available options; it would not be proper to base strict liability on mere administrative convenience or on a rigid formula'; and

• 'strict liability should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Commonwealth criteria of 60 penalty units…appears to be a reasonable maximum'.36

The committee notes the concerns raised by the Scrutiny of Bills committee in its Alert Digest No. 12 of 2006, and hopes that the Minister's responses to the questions raised will address these concerns.

**Collecting evidence**

The bill proposes a number of other changes to the Act in relation to the collection of evidence and dealing with offenders.

---

33 Law Council of Australia, additional information, 14 November 2006.
34 Submission 37, p. 5.
35 Submission 21, p. 5-6.
36 Senate Standing Committee for the Scrutiny of Bills, Alert Digest (No. 12 of 2006), 18 October 2006, p. 10.
4.33 The bill would insert a new schedule 1 into the Act which provides for the detention of 'suspected non-citizen offenders'. According to the explanatory memorandum, the Government is limited in its ability to:

- enforce the Act in Australia's maritime jurisdiction and non self-governing external Territories; and
- protect Commonwealth reserves, such as Ashmore Reef National Nature Reserve and listed species.

4.34 Currently under the Act authorised officers are prevented by the *Migration Act 1958* from bringing non-citizens suspected of committing offences against the Act into the migration zone as such persons are not authorised to travel to Australia.

4.35 The main objects of the new schedule 1 provide for:

- the detention of non-citizens reasonably suspected of committing an offence against the Act;
- the searching and screening of persons in environment detention and the carrying out of identification tests; and
- transition between environment detention and subsequent detention and repatriation under the *Migration Act 1958*.\(^{38}\)

4.36 Schedule 1 mirrors the provisions contained in the *Migration Act 1958* for dealing with the detention of unauthorised non-citizens and the provisions of the *Fisheries Management Act 1991* providing for detention of foreign fishers suspected of offences against that Act. For example, current legislation only makes it possible to confiscate illegal fishing catches of species protected under the Act, but does not endow the relevant officers with the authority to detain, search and screen offenders or suspected offenders. The proposed changes intend to make it easier to prosecute foreign offenders and bring environmental enforcement in line with similar provisions in the *Migration Act 1958* and the *Fisheries Management Act 1991*.

4.37 Items 854 to 869 would make related amendments to the enforcement visa provisions of the *Migration Act 1958* that currently apply to suspected illegal foreign fishers so that they apply also to suspected offenders against the EPBC Act.\(^{39}\)

4.38 Item 633 of the bill would allow an approved officer to conduct, without warrant, a search of a detainee and a detainee's clothing and any property under the

---

37 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 95.

38 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 95.

detainee's immediate control to find out whether evidence of a crime is concealed about the person of the detainee.

4.39 The bill also provides that a person cannot refuse to provide information on the grounds of self-incrimination (but the uses of that information are then limited). Item 767 of schedule 1 would insert a new section 486J into the Act which would abrogate the privilege against self-incrimination for a person required to answer a question or produce a document under new division 15A of the Act. Proposed subsection 486J(2) would limit the circumstances in which information so provided is admissible in evidence in proceedings against the affected person.

4.40 There was support for improving enforcement provisions such as these.

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 years 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.40

Mr McLoughlin—The fisheries officers of AFMA work extensively in Northern Australia on illegal foreign fishing and the like, and those powers have already been made available to AFMA Commonwealth officers. There is an issue that, where fisheries officers, for example, in a hypothetical situation, find a fishing vessel that has turtles and dolphin onboard but no fish, the AFMA fisheries officers are without the powers to deal with that effectively. For example, they might be hiding or concealing dugong tusks on their body. They are very valuable. If the AFMA fisheries officers were at sea, they could search those people and charge them as appropriate under the fisheries act; but without those powers in the EPBC Act, they could not effectively undertake the same sort of work they might otherwise do because they are on the scene. The powers are consistent with the Fisheries Management Act. I am not really in a position to say whether or not they are appropriate, but they would seem to be effective in an operational sense to enable officers in the field to deal with a wider range of offences as they see them.41

40 Ms Rachel Walmsley, Australian Network of Environmental Defender's Offices Inc, Committee Hansard, 3 November 2006, p 33.

41 Mr Richard McLoughlin, Australian Fisheries Management Authority, Committee Hansard, 6 November 2006, p. 28.
Committee view

4.41 The committee's view is that the powers of search and seizure given to departmental officers, and the establishment of strict liability provisions with strong penalties, are necessary for better enforcement of the Act. The committee understands that these provisions have come from those that currently exist in the *Fisheries Management Act 1991*, and therefore supports their inclusion in the bill.

4.42 The committee notes some concerns raised by the Scrutiny of Bills committee in its Alert Digest No. 12 of 2006 in regard to the provisions above, and hopes that the Minister's responses to the questions raised by that committee will allay any fears regarding these reforms.
Chapter 5

Threatened Species and Ecological Communities

Current law

5.1 To date, the Act has been working to ensure the protection of threatened species and ecological communities throughout the Commonwealth.

5.2 Since the Act has been in operation, nearly 200 species, communities and processes have been included on the lists of threatened species, ecological communities and key threatening processes. Over 250 listed threatened species recovery plans and 50 Ramsar management plans are in place, and over 15,000 wildlife trade permits have been issued.\(^1\) In any Commonwealth area a permit is required to kill, injure, take, keep or move a member of a listed threatened species, threatened ecological community, migratory species or marine species.\(^2\)

Plants and wildlife

5.3 International movement of wildlife and wildlife products is regulated under part 13A of the Act (except cetaceans which are regulated under sections 232A and 232B of part 13).\(^3\) The Act currently regulates the:

- export of Australian native species other than those identified as exempt;
- export and import of all species that are recognised internationally as endangered or likely to become so if trade is not strictly regulated;
- import of species identified by other countries who are members of the Convention on International Trade in Endangered Species of Wild Fauna and Flora (1973) (known as CITES) as requiring international cooperation to regulate their trade; and
- import of live plants and animals that, if they became established in Australia, could adversely affect native species or their habitats.\(^4\)

5.4 Plants or animals included on the list of exempt native specimens do not require a permit under part 13A of the Act for the export of the native plant or animal, or a specimen derived from the native plant or animal. If the plant or animal is not

---

1  Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 2.
included on this list, then a permit is required before exportation can take place. Commercial export of regulated wildlife and wildlife products may occur only where the specimens have been derived from an approved source (captive breeding program, artificial propagation program, aquaculture program, wildlife trade management operation, or wildlife management plan).

5.5 The list of CITES specimens contains all species included in Appendices I, II and III of the Convention of International Trade in Endangered Species of Wild Fauna and Flora (1973) (CITES). Generally, a permit is required to import or export a member of a species that is included on the list, or a specimen derived from a member of a species on the list.

5.6 The import of CITES listed specimens for commercial purposes must be from an approved commercial import program or approved captive source and is subject to specific conditions (section 303CH) related to the particular appendix on which the specimen is listed. Specific conditions (section 303CH) also apply to the commercial export of CITES listed species.

5.7 Regulated wildlife may also be exported or imported if it is for an eligible non-commercial purpose. Eligible non-commercial purposes include research, education, exhibition, conservation breeding or propagation, a household pet, a personal item or for a travelling exhibition.

5.8 The list of specimens suitable for live import regulates the importation of live plants and animals from outside of Australia. Specimens fall into one of two categories:

- unregulated specimens; and
- allowable regulated specimens.

5.9 Generally, a wildlife trade permit is required for the importation of allowable regulated specimens (subsection 303EN(3)). Unregulated specimens can be imported without a permit. Live specimens that are not included on the list in either of the categories are prohibited from being imported. However, a person may apply to the Minister to amend the list of specimens suitable for live import.

5.10 The Act stipulates that wildlife conservation plans outline the actions that are required to support the continued survival of the relevant species. More particularly,

---

5 Environment Protection and Biodiversity Conservation Act 1999, subsection 303CA(3).
6 Environment Protection and Biodiversity Conservation Act 1999, section 303CG.
9 Environment Protection and Biodiversity Conservation Act 1999, section 303EB.
they must outline the actions that are necessary to protect the relevant species, identify habitats of the species and specify the actions needed to protect those habitats.

**Fisheries**

5.11 Since the Act's inception, over 120 fisheries have been assessed and associated accreditations and declarations made by the Commonwealth.10

5.12 A 'Commonwealth marine area' is defined in section 24 of the Act. Marine protected areas are marine areas which are recognised as having conservation value. The Commonwealth marine environment is a matter of national environmental significance under the Act. This includes:

- activities taken in a Commonwealth marine area that are likely to have a significant impact on the environment;11
- activities taken outside a Commonwealth marine area that are likely to have a significant impact on the environment in a Commonwealth marine area;12 and
- fishing in a Commonwealth managed fishery that is likely to have a significant impact on the environment.13

5.13 The Commonwealth marine area is the area between three nautical miles and 200 nautical miles from the low water mark of the Australian coast or the edge of the continental shelf (whichever is further).14

5.14 Waters less than three nautical miles from the low water mark are considered state or territory waters. However, even if an action is taken within state or territory waters a referral must still be made under the Act if that action may have a significant impact on the environment in Commonwealth waters.15

**Rationale for change**

5.15 Along with the need to streamline existing processes under current legislation, it has been recognised that there is a need to address difficulties in accrediting or

---

10 Second Reading Speech, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 3.
11 Environment Protection and Biodiversity Conservation Act 1999, subsection 23(1).
12 Environment Protection and Biodiversity Conservation Act 1999, subsection 23(2).
13 Environment Protection and Biodiversity Conservation Act 1999, subsection 23(3).
recognising fisheries managed under the *Torres Straight Fisheries Act 1984* and the *Fisheries Management Act 1992*.16

5.16 A need to strengthen compliance with and enforcement of the Act has also been identified, resulting in the various provisions of the bill relating to the protection of threatened species and ecological communities.17

5.17 According to the explanatory memorandum, benefits resulting from the proposed amendments to the Act’s wildlife trade provisions will include:

- simplified and streamlined wildlife import provisions and less onerous approval mechanisms for some wildlife exports;
- more effective enforcement through provision for conditions to continue to apply after expiry of import/export permit; and
- more efficient administration and greater certainty through resolution of definitional and technical uncertainty and problems.18

5.18 According to the explanatory memorandum, benefits resulting from the proposed amendments to the Act's fisheries provisions will include:

- reduced duplication in regulatory requirements for fisheries through broader capacity to accredit Australian Government and state and territory fishery management arrangements;
- clarification of arrangements for assessment and review of fisheries management accreditations;
- clarification of the application and scope of exemptions; and
- more efficient administration and greater certainty through resolution of definitional and technical uncertainty and problems.19

**Changes proposed by the bill**

5.19 The bill changes the listing processes for threatened species, ecological communities and key threatening processes. Broadly, the amendments aim to 'streamline' the nominations process and, according to the explanatory memorandum,
enable a 'better focus' on protecting threatened species and ecological communities that are of 'real national importance'.

5.20 The bill inserts a new subdivision AA which amends the process for listing threatened species, ecological communities and key threatening processes (at Item 368).

5.21 The key changes to the listing process include the ability for the Minister to determine conservation themes (new section 194D), and the dedicated period in which nominations may be submitted (new section 194E). These could include groups of particular plants, animals and/or geographic regions.

5.22 In relation to protected species, the following are benefits that are expected to flow from the changes to the protected species provisions (as outlined in the explanatory memorandum):

- improved effectiveness of listing procedures and recovery planning for threatened species and ecological communities by allowing for a strategic approach, prioritisation of listings and a stronger focus on conservation outcomes;
- provision for listing of commercially fished species with reduced impact on existing export fisheries;
- simplification of cetacean permit provisions resulting in greater consistency in regulatory requirements and reduced timeframes for decision-making;
- provision for non-disclosure of sensitive information in recovery documents that may jeopardise the survival of a species;
- streamlined reporting requirements for fisheries impacting on protected species; and
- more efficient administration and greater certainty through resolution of definitional and technical uncertainty and problems.

State and territory lists

5.23 At Item 359, the bill repeals section 185 of the Act. The repeal of section 185 removes the requirement for the Scientific Committee to assess the threatened ecological communities listed on the state and territory lists gazetted in November 2001.


21 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 46.

22 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 11.
5.24 The bill repeals the current public nomination process provided for in section 191 of the Act and replaces it with a new annual process for thematic nominations (new section 194D).

**Nominations**

5.25 The annual theme for nominations is determined by the Minister and could include the conservation of particular groups of species, particular species or particular regions of Australia (new subsection 194D(2)).

5.26 New section 194G requires the Threatened Species Scientific Committee to consider the nominations received (having regard to the Minister's conservation themes) and prepare, for the Minister's consideration, a priority assessment list. This list must be provided to the Minister within 40 business days. The Minister may make changes to the proposed list within 20 days, including omitting an item (new section 194K), before making a finalised priority assessment list.

5.27 The Scientific Committee may add things to the priority assessment list that it considers appropriate or that itself wishes to nominate.\(^{23}\)

5.28 The bill introduces new section 189B which requires members of the Scientific Committee not to disclose an assessment or information used to make an assessment, of any proposed amendments to lists of threatened species (section 178), lists of threatened ecological communities (section 181) and lists of key threatening processes (section 183), until:

- such an amendment has been registered under division 3 of part 4 of the *Legislative Instruments Act 2003*; or
- the Minister decides not to include the item in the lists; or
- the Minister decides to remove an item from the lists.\(^{24}\)

5.29 The Minister can give permission for the Scientific Committee to disclose particular information to particular persons. If the Minister does not exercise his or her discretion then the Scientific Committee assessments and advice remain confidential until a listing is made.

5.30 Under new subsection 194F(3), the Minister may reject a nomination from the Scientific Committee if the nomination is 'vexatious, frivolous or not made in good faith' or not made in the manner and form specified by the regulations.

---

23 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 47.

24 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 46.
Comments and concerns

5.31 A number of witnesses, including the International Fund for Animal Welfare (IFAW), expressed concern about the process for listing threatened species, ecological communities and key threatening processes as proposed in the bill.\(^{25}\)

5.32 The Australian Network of Environmental Defenders’ Offices (ANEDO), Humane Society International (HSI), the Tasmanian Conservation Trust (TCT) and WWF-Australia (WWF) were concerned that the repeal of section 185 'wipes the assessment of 500 threatened ecological communities from consideration by the Scientific Community'.\(^{26}\)

5.33 Section 185 was designed to provide a strategic framework for the Scientific Committee to consider all the ecological communities that received protection under State and Territory legislation for their appropriate national protection under the EPBC Act.\(^{27}\)

5.34 ANEDO highlighted the extensive time and funding that environment and community groups have put into making nominations under the Act that are yet to be assessed and finalised. In relation to the new process ANEDO argued:

> The new process provides no assurance that any of these nominations will now be assessed for protection. DEH [Department of the Environment and Heritage] has failed to process section 185 and many public nominations under section 191 to date, despite obligations to do so. The removal of obligations to process and assess nominations is a serious flaw in the bill.\(^{28}\)

5.35 HSI, TCT and WWF-Australia said that HSI alone currently has nominations for 23 ecological communities, four threatened species and three key threatening processes outstanding under the current assessment system.

> When we submitted these nominations we did so in good faith on the understanding that their consideration would be through an objective scientific process according to statutory deadlines. If these amendments are passed our nominations may never be incorporated into the Minister’s priority lists and the obligation for them to be assessed can ultimately be removed altogether.\(^{29}\)

5.36 Mr Peter Andren MP did not support the changes and argued:


\(^{26}\) Australian Network of Environmental Defenders Offices, Submission 17, p. 9.

\(^{27}\) Humane Society International, WWF Australia, Tasmanian Conservation Trust, Submission 66, p. 18.

\(^{28}\) Submission 17, p. 9.

\(^{29}\) Submission 66, p. 19.
It is inexcusable that this bill determines the Minister no longer must keep the lists of threatened species and ecological communities up-to-date.\(^30\)

5.37 HSI, TCT and WWF-Australia said that the repeal of section 185 could lead to a 'slower rate of new threatened species being added under the EPBC ACT'.\(^31\)

5.38 As WWF-Australia stated at the committee hearings:

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.\(^32\)

5.39 The Australian Marine Conservation Society said:

The bill should not allow the Minister to remove altogether already submitted public nominations for the listing of threatened species, ecological communities…\(^33\)

5.40 Concerns were also raised regarding subsection 194D(2) and the implementation of annual nomination themes which it was argued do not provide a definitive list of criteria. Some groups questioned what factors would be taken into account apart from the conservation status of the species or communities.

5.41 Concerns were raised about the streamlining provisions of the bill in regards to the introduction of themes, with the National Parks Australia Council stating:

That is the difficulty with this bill. It is saying that it is streamlining things and yet, in effect, by declaring a theme it is creating a huge workload in that there would be a constant stream of people on the doorstep saying: ‘Look, we have found this thing. We actually need it declared now.’ Of course, they would be very urgent because you would already have the ditch digger on site. We do not think it will streamline it.\(^34\)

5.42 The Australian Conservation Foundation stated that:

\(^{30}\) Submission 59, p. 6.

\(^{31}\) Submission 66, p. 20.

\(^{32}\) Mr Andreas Glanznig, Committee Hansard, 3 November 2006, p. 34.

\(^{33}\) Submission 40, p. 1.

\(^{34}\) Ms Christine Goonrey, Committee Hansard, 6 November 2006, p. 15.
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.\textsuperscript{35}

5.43 There were also concerns raised about the ease of the community to engage in the listing process:

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.\textsuperscript{36}

5.44 While some witnesses felt the new listing process would make the system more political, others argued to the contrary:

The amendments will also provide for a more strategic approach for listing threatened species, ecological communities and heritage places, through an annual program based on the importance of nominations and listing proposals rather than the current as hoc approach. We support what has the potential to become a more objective, less politicised listing process.\textsuperscript{37}

5.45 In looking overall at the issues that were expressed by the majority of concerned parties in relation to the thematic nominations process, they mainly appeared to relate to the use of ministerial discretion, and the loss of existing nominations from the list.

5.46 In response to these concerns the Law Council of Australia provided the following clarifications:

The thematic approach appears to be reasonable considering the objects of the Act. The objects of the Act are to assess and improve actions which are likely to have a significant impact on:

The commonwealth marine area;

World heritage properties;

Ramsar wetlands of international importance;

Internationally threatened species and ecological communities;

Internationally protected migratory species.

\textsuperscript{35} Mr Charles Berger, \textit{Committee Hansard}, 3 November 2006, p. 31.

\textsuperscript{36} Mr Andreas Glanznig, WWF, \textit{Committee Hansard}, 3 November 2006, p. 38.

\textsuperscript{37} National Farmers' Federation, \textit{Submission 64}, p. 2.
Without being an environmental scientist the thematic approach appears to be in accordance with the objects of the Act.

In terms of themes and the 500 or so listings that are currently waiting for approval and may not fit into this approach they are catered for by the savings and transitional provisions (Schedule 2 Part 7), which deem them to meet the requirements of the new Act depending on where they are up to in the system. For example if there has been a nomination they are treated as though nominated during the first period called for nominations (ie even if theme declared the intention is they would be included). The nominations can only be rejected if they are not in good faith, frivolous or vexatious (same as current provisions 191 and 341E) or do not comply with new regs.  

5.47 Another group in support of the thematic listing process was the Minerals Council of Australia, who said that:

Our members did consider this and were supportive of the proposed shift towards a thematic listing process, where things are considered more in terms of a landscape function and where they are looked at as a whole rather than as a piecemeal listing process. One comment that has been made is that the current process could be seen, and has in the past been seen, as stamp collecting.  

5.48 The Department of the Environment and Heritage also clarified the fact that the thematic process should be no impediment to nominations falling outside of the annual themes process:

There are a number of aspects. First of all the capacity of the Minister to establish themes is not mandatory, so he may or may not establish themes. As I pointed out earlier, there currently is provision in the existing legislation for themes on heritage places and he has not chosen to actually use that provision, neither did the previous Minister. So there is no guarantee that it is really providing an opportunity for the Minister to establish themes. The second thing is even if the Minister does establish themes, then that is obviously a priority that the threatened species committee or the Heritage Council will look at, but it is not an impediment. It is not saying that if you put up a valid and really good nomination that is outside that theme, that cannot be picked up in the list. The other consideration is that there is nothing in the legislation that says that if someone pops up a really good nomination, whether it is threatened species or heritage, quite outside the annual cycle after the nominations have closed, that they cannot be considered as well. Really this is a facilitating mechanism not a prohibition. 

38 Mrs Maureen Peatman, Law Council of Australia, answers to questions on notice, 14 November 2006.

39 Mr Cormac Farrell, Committee Hansard, 6 November 2006, p. 7.

40 Mr Gerard Early, Department of the Environment and Heritage, Committee Hansard, 6 November 2006, p. 62.
5.49 Some of the other concerns raised about the proposed changes were:

- the public are only invited to comment on the finalised list and so the public will not necessarily know what the Scientific Committee recommended as priorities for assessment that the Minister omitted from the final list (under new section 194K; note that new section 189B gives the Minister the discretion to allow the Scientific Committee assessments to be made public);\(^1\)

- the Scientific Committee will only consider comments that related to eligibility for inclusion of an item on the list and the effect of including the item in the list on the survival of the species or community concerned;\(^2\)

- the priority list is not a legislative instrument and therefore not disallowable by parliament.\(^3\)

5.50 Humane Society International (HSI), the Tasmanian Conservation Trust (TCT) and WWF-Australia argued that the current process was 'objective and scientifically determined' and that the changes meant that:

…the Minister will now have broad arbitrary discretion to decide what can and cannot be assessed for listing and protection under the EPBC Act. The amendments open the way for the listing process to become highly and…[e]nactment of these amendments will be a major retreat from what is national and international best practice.\(^4\)

5.51 Others put forward arguments that:

- the amendments would 'significantly limit the public and scientific involvement in the listing of species';\(^5\)

- the changes would make it more difficult for members of the public to secure legal protection under the Act for threatened species and ecological communities;\(^6\)

- that 'the more controversial species' (such as those that are used on a commercial basis) were unlikely to qualify thematically.\(^7\)

---

\(^1\) Humane Society International, Tasmanian Conservation Trust and WWF-Australia, Submission 66, p. 19; ANEDO, Submission 17, p. 11.

\(^2\) Law Council of Australia, Submission 37, p. 3.

\(^3\) ANEDO, Submission 17, p. 11.

\(^4\) Submission 66, p. 18.

\(^5\) ANEDO, Submission 17, p. 10.

\(^6\) IFAW, Submission 26, p. 2.

\(^7\) ANEDO, Submission 17, p. 10; IFAW, Submission 26, p. 2.
submitted that nomination and listing must be based on conservation status only;\(^{48}\)

- if the new process comes into effect, it is not clear what happens to nominations of a species that is not related to a theme;\(^{49}\)
- there is no public consultation on the proposed list;\(^{50}\)
- the Minister may have regard to any matter that the Minister considers appropriate in reaching a decision;\(^{51}\) and
- the Minister can refuse to allow a previously rejected nomination to be reassessed by the Scientific Committee, even if its conservation status has declined further since the initial assessment.\(^{52}\)

5.52 In response to concerns expressed regarding the Minister’s discretion regarding the listing of threatened species, consideration of nominations for the list and removal of species from the list, the Department explained:

The proposed amendments to the listing process for threatened species are designed to address the problems being experienced as a result of the ad hoc nature of the current process. At the moment, nominations are dealt with as they are submitted, regardless of merit and regardless of whether other species should be accorded greater priority. This means valuable resources from both the Department and the Threatened Species Scientific Committee may be tied up dealing with nominations that have little merit, or do not deserve priority attention or, if successful, would result in little conservation benefit. That is neither a sensible nor optimal way to develop a list of our most threatened and priceless species.

Under the proposed amendments, the Threatened Species Scientific Committee will be asked to identify which nominations are best placed within a strategic framework and will provide that advice to the Minister. This will allow the Minister, on the basis of expert advice, to ensure that efforts are focused on the most important issues. It will also ensure that the highest priority tasks are undertaken in the context of a well planned and manageable work programme.

While decisions on these matters are made by the Minister, the EPBC Act will require, as currently, that the Minister obtains and considers advice from the Threatened Species Scientific Committee.\(^{53}\)

\(^{48}\) ANEDO, Submission 17, p. 10.

\(^{49}\) ANEDO, Submission 17, p. 10.

\(^{50}\) Law Council of Australia, Submission 37, p. 2.

\(^{51}\) Law Council of Australia, Submission 37, p. 2.

\(^{52}\) IAFW, Submission 26, p. 2; ANEDO, Submission 17, p. 10.

\(^{53}\) Department of the Environment and Heritage, answers to questions on notice, 10 November 2006.
5.53 There was support offered for the permit provisions contained in the bill: As IFAW Asia Pacific stated:

IFAW does support and welcome amendments (subsection 303CG(2A)) that would provide certain permit conditions related to the import and export of wildlife to continue to have effect after the permit has expired – usually 6 months. This would help to ensure that conservation and animal welfare conditions extend for the life of the animal and its progeny. 54

5.54 The Law Council of Australia argued that the documentation before the Scientific Committee should be available to the public. It argued further:

…this secrecy is unnecessary and may prevent the Scientific Committee from receiving information or advice which may impact on its decision to list a species or an ecological community. 55

5.55 In the event that the Scientific Committee were to make 'politically unfavourable listing recommendations', HSI, TCT and WWF-Australia pointed out that the Scientific Committee is prohibited from making this advice public.

5.56 The Law Council of Australia thought that the information should be available to the public under the Freedom of Information Act 1982 because of potential benefits to the Government of having scientific or local knowledge data from the public placed before the Scientific Committee. 56 As currently drafted, ANEDO said that the amendments are likely to frustrate freedom of information applications and undermine the transparency of the legislation. 57

5.57 It is important however, that concerns about the amendments contained in the bill are kept in perspective. As was pointed out during the committee hearings:

The perspective needs to be kept at all times that this act does not stand alone. It is not the only threatened species legislation that we have in this country. Most of it is dealt with at the state level, which is why you have the referral provisions; the federal government refers it off to the state in the first instance and then it comes back. 58

5.58 The Department provided a response to concerns expressed over the removal of the requirement for Recovery Plans for listed threatened species. It was stated by the Department that:

54 Submission 26, p.2.
55 Submission 37, p. 3.
56 Submission 37, p. 3.
57 Submission 17, p. 12.
58 Mrs Maureen Peatman, Law Council of Australia, Committee Hansard, 6 November 2006, p. 20.
The proposed removal of the mandatory requirement for recovery plans for all listed threatened species will not impact adversely on the actual recovery in nature of any threatened species or ecological community.

Experience has shown that, for many species, the development of recovery plans is an expensive, time consuming and overly bureaucratic process without benefits commensurate to the effort expended to develop them. The current onerous statutory requirements are arguably skewing the Australian Government’s expenditure on threatened species too far towards planning, relative to actual implementation of recovery action. Plans are often too focussed on filling research or knowledge gaps rather than identifying recovery actions or providing information to support statutory decision-making.

This problem with the current process has been recognised by the Threatened Species Scientific Committee. With the approval of the Minister, the Committee has over the past year or so been providing short pragmatic conservation advice at the time of recommending listings to the Minister. This conservation advice, which is made publicly available, sets out the main factors associated with the species’ threatened status and information about appropriate recovery action. The advice can be fed directly into regional natural resource management plans and investment strategies, rather than waiting for the development of a recovery plan.

The proposed amendments recognise the success of the new approach and require approved conservation advice to be provided for all listed threatened species and ecological communities at the time of listing.

The proposed amendments also recognise that there will continue to be species and ecological communities that require the development of a detailed recovery plan in the traditional style. The Minister must make a decision whether or not such a recovery plan is required in relation to all listed species and ecological communities. In doing so, he is required to have regard to the independent, expert view of the Threatened Species Scientific Committee.59

**Fisheries**

5.59 One witness raised concerns specifically about the provisions in relation to the improbability of any future potential listing of commercial fish as protected species. As HSI pointed out:

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,

---

59 Department of the Environment and Heritage, answers to questions on notice, 10 November 2006.
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.\textsuperscript{60}

5.60 However, in contrast to these concerns the Minister recently listed the first commercial fish species under the provisions of the Act. The Minister's 9 November 2006 media release stated that:

The Orange Roughy fish species will be added to the threatened species list under Australian environment law…..Orange Roughy is the first commercially harvested fish to be listed under the Environment Protection and Biodiversity Conservation Act 1999…… Orange Roughy will be listed as conservation dependent, and will be managed subject to a conservation programme to be implemented by the Australian Fisheries Management Authority (AFMA). Scientific advice to me indicated that Orange Roughy is under considerable pressure and protection under environment law is needed if the species is to have any chance of long-term survival….. The conservation programme will protect Orange Roughy from over-fishing, in part by prohibiting targeted fishing in fishing zones. Catch limits at the Cascade Plateau will be set at levels that will conserve the species – AFMA has already announced a reduction in the zone’s 2007 total allowable Orange Roughy catch. My decision to add the Orange Roughy to the threatened species list follows careful consideration of the scientific information, as well as extensive consultation with experts and the public,” Senator Campbell said.\textsuperscript{61}

5.61 The Australian Fisheries Management Authority (AFMA) welcomed the provisions of the bill, pointing out that:

One of the changes is something that we have been seeking for sometime from the portfolio, and that is around an expansion or more flexibility in terms of the sorts of management arrangements that can be accredited under those strategic assessment provisions of the EPBC Act. Rather than just formal management plans under our Fisheries Management Act, we manage some fisheries under fishing permits that are not under formal plans of management, and it has been quite difficult in the past to actually get those accredited or assessed, if you like. These changes clarify those points and expand the sorts of arrangements that can be assessed under that part of the act.\textsuperscript{62}

5.62 The Commonwealth Fisheries Association welcomed the changes the bill contained to allow for the recognition of fisheries management plans as conservation plans, saying:

My understanding is that it is more a process of accreditation of the fisheries management plans as conservation plans. That is our hope, and I

\textsuperscript{60} Mr Michael Kennedy, \textit{Committee Hansard}, 3 November 2006, p. 55.

\textsuperscript{61} Senator The Hon. Ian Campbell, Australian Minister for the Environment and Heritage, \textit{‘Orange Roughy added to threatened species list’}, Press Release C300/06, 9 November 2006.

\textsuperscript{62} Mr Geoffrey Richardson, \textit{Committee Hansard}, 6 November 2006, p. 27.
think that is the intention. But, again, I would not like to be held to that. That is the way I have interpreted it—that these amendments provide the capacity for the Minister for the Environment and Heritage to accept the fisheries management plan as a conservation plan.63

5.63 The Department clarified the arrangements under the provisions of the bill in terms of fisheries management plan by stating:

In terms of native fish, basically it is not accrediting AFMA or any other fisheries managers’ plans as conservation plans. There are two provisions in the conservation dependence category. For non-fish—if I can put it that way—if the species is a focus of a conservation program the cessation of which would lead to that species going to a higher level of threat, they can be listed as conservation dependent.

What we are saying here—and it picks up a bit of what Richard was saying earlier about the changes that have been introduced over the past 18 months or so—is that it provides that, if the plan of management provides for management actions necessary to stop the decline and support the recovery of the species, it can be listed as conservation dependent rather than at a higher category. So it is actually picking up the management plans of the fisheries authorities. Provided they have the proper measures within their management plans, that is what we would be relying on. It is not duplicating or putting one above the other.64

5.64 The committee does note that there may be an unintended consequence of the proposed amendment to subsection 179(6). The Australian Fisheries Management Authority is required to apply the Australian Government’s Harvest Strategies to all Commonwealth fisheries, and these will be specified in Plans of Management under section 17 of the *Fisheries Management Act 1991*.

5.65 With the current proposed wording of paragraph 179(6)(b), every Plan of Management developed by AFMA could be considered to be a plan referred to in subparagraph 179(6)(b)(ii). If so, this would have the effect (presumably unintentional) of making every species of fish taken in accordance with an AFMA Plan of Management eligible to be listed as conservation dependant under subsection 179(6).

5.66 Perhaps a more effective arrangement would be to build a link into the EPBC Act back to the Australian Government’s Harvest Strategy, which would specify the criteria for a fish species to be listed as conservation dependant. Clause 179(6) would then need to specify that these criteria would be agreed by both the Minister for Environment and Heritage and the Minister for Fisheries in the context of the management plan for the fishery.

63 Mr Peter Franklin, *Committee Hansard*, 6 November 2006, p. 35.

64 Mr Gerard Early, Department of the Environment and Heritage, *Committee Hansard*, 6 November 2006, p. 62.
Recommendation 2

5.67 The committee recommends that the minister review the wording of proposed new subsection 179(6) in light of the above issue.

Conclusion

5.68 While scepticism was expressed by various witnesses about the changes which would place a greater emphasis on the setting of themes for assessment by the Minister, there was also support for this process. Explanations as to how this system could work effectively while still taking into account provisions for emergency listings were deemed to be satisfactory.

5.69 The committee regards the adoption of the thematic approach as useful and generally supports it, however does stress the need for there to be provisions within the Act for emergency listings to be more adequately accommodated.
Chapter 6

Other Issues

6.1 A number of other issues were drawn to the committee's attention during the inquiry, and three are addressed here: the triggers in the Act for matters of national environmental significance; review of ministerial decisions; and departmental resources.

Triggers for matters of National Environmental Significance

6.2 The EPBC Act focuses on environmental protection of aspects of the environment that are matters of National Environmental Significance.¹

6.3 Numerous participants in the inquiry were concerned that there were important threats to the environment that currently are outside the scope of 'national environmental significance'. Foremost amongst these was climate change:

Mr Tupper—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.²

Ms Walmsley - 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.³

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.⁴

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

¹ The Act, section 3(1)(a).
² Mr Graham Tupper, Australian Conservation Foundation, Committee Hansard, 3 November 2006, p. 27.
³ Ms Rachel Walmsley, Australian Network of Environmental Defender's Offices Inc., Committee Hansard, 3 November 2006, p. 42.
⁴ Mr Jeff Smith, Australian Network of Environmental Defender's Offices Inc., Committee Hansard, 3 November 2006, p. 53.
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.\(^5\)

Birds Australia is aware of the impacts of climate change, habitat destruction and lower environmental stream flows. The amendments would be more effective if these elements, and associated triggers, were incorporated into the criteria for matters of national environmental significance.\(^6\)

ASH strongly recommends that climate change (so-called greenhouse effect) must become a trigger under the Act.\(^7\)

We are also very concerned about climate change and would like to see the EPBC take this environmental impact into account.\(^8\)

6.4 The committee acknowledges the widely held view that climate change is a matter of National Environmental Significance. However, the Act already includes the capacity for additional triggers to be established. Accordingly, these concerns are not relevant to consideration of the bill before the committee. No amendment is required for a new trigger to be adopted.

**Review of ministerial decisions**

6.5 A person whose interests are affected by a decision to issue or refuse a permit can apply to the Administrative Appeals Tribunal (AAT) for the decision to be reviewed. Appeals to the AAT are different from appeals to the Federal Court. Most importantly, the AAT conducts 'merits review', while the Federal Court can only review matters relating to law. This means that the AAT is able to 'stand in the shoes' of the original decision maker and consider all matters that were relevant to the original decision. In contrast, Federal Court reviews are confined to the issue of whether the original decision was made in accordance with the law.\(^9\)

6.6 The bill includes a number of clauses that removes the right of review by the AAT of Ministerial decisions. New subsection 303GJ(2) removes review by the AAT as an avenue of review for relevant decisions made personally by the Minister. The explanatory memorandum noted that decisions made by a delegate of the Minister remain subject to review by the AAT.

6.7 The bill removes the right of review for the following Ministerial decisions to:

- issue or refuse a permit;

---

5  Mr Andrew Macintosh, The Australia Institute, *Committee Hansard*, 3 November 2006, p. 7.
• specify, vary or revoke a condition of a permit;
• suspect or cancel a permit;
• issue or refuse a certificate under section 303CC(5) or a decision of the Secretary under a determination in force under section 303EU;
• make, refuse, vary or revoke a declaration under sections 303FN, 303FO, 303FP in relation to international movement of wildlife specimens (section 303GJ).

6.8 Some witnesses expressed concern about the removal of the right of appeal through the Administrative Appeals Tribunal (AAT) against certain ministerial decisions in relation to applications for protected species and other listings.10

There are several amendments which remove the right of review by the Administrative Appeals Tribunal (AAT) of ministerial decisions. Important decisions must be subject to review if the EPBC regime is to be legitimate, credible and accountable.11

6.9 ANEDO strongly opposed the removal of AAT review options for Ministerial decisions.12 The Law Council of Australia argued:

If the Minister has exercised his discretion appropriately, in accordance with the provisions of the bill, then the likelihood is that the Administrative Appeals Tribunal will uphold his or her decision. But what if the Minister has not exercised his discretion appropriately? Is there to be no review? If the Minister believes in the integrity of this bill and the integrity of his or her decision-making process, then he or she should not be concerned to allow a judicial review of how he or she came to a decision applying provisions of this bill.13

6.10 The Department pointed out that ministerial decisions involve the complex balancing of competing interests and issues, and that it is appropriate that such decisions are taken at the ministerial level:

Basically, the government believes that, with matters of high public importance, decisions should be taken by the Minister and, as such, should not be reviewable by an unelected tribunal.14

10 Mr Michael Kennedy, Humane Society International, Committee Hansard, 3 November 2006, p. 60.
12 Australian Network of Environmental Defender's Offices, Submission 17, p. 37.
13 Mrs Maureen Peatman, Law Council of Australia, Committee Hansard, 6 November 2006, p. 19.
14 Mr Gerard Early, Department of the Environment and Heritage, Committee Hansard, 6 November 2006, p. 61.
6.11 The Department set out in detail not only the need for some decisions to be taken by an elected representative, but also highlighted the limited nature of the proposed exemptions:

There is currently a limited range of decisions under the EPBC Act that are subject to AAT jurisdiction. Such decisions are limited mainly to permits—regarding listed threatened species and ecological communities; listed migratory and marine species; cetaceans; and import and export of wildlife. They also include decisions regarding declarations about wildlife trade operations and wildlife trade management plans and issuing of a CITES certificate. The overwhelming majority of these decisions currently subject to AAT jurisdiction are made by public servants as delegates of the Minister.

The Government accepts that the ability of the community to appeal the abovementioned administrative decisions when made by public servants is an important right. This ability is being preserved. The AAT will have the same jurisdiction as now in relation to any decisions made by public servants as delegates of the Minister.

However, a small number of the permit and declaration decisions noted above require careful balancing of competing interests and judgements. The Government considers that where these decisions are sufficiently important to be taken by the Minister as an elected representative, those judgement calls should not be able to be overturned by an unelected tribunal such as the AAT.

Appeal rights to the Federal Court under the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act) will continue to apply to all decisions under the EPBC Act, whether taken by the Minister or his or her delegate.15

The committee is satisfied with this response.

Departmental resources

6.12 Many witnesses to the inquiry expressed concerns that these amendments are prompted by a lack of funding and personnel in the Department, rather than a need to simplify or streamline.

Ms Stutsel—From our perspective, the act itself is one of the best developed pieces of legislation that currently relates to environmental approval processes for our industry, and I will limit my comments to the experience of our industry. However, we found that it is actually the administration of the act that poses more issues for us than the nature of the act itself. There is a lack of resourcing for that administration that means that processes are often not as clearly articulated to industry and that there is the opportunity for companies to have a better handle on what the

15 Department of the Environment and Heritage, answers to questions on notice, 10 November 2006.
expectations of the act are and perhaps not over-refer, as is our current practice, which tends to delay the system even more.16

Resourcing is an issue in the heritage area…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.17

Mr Berger—Many aspects of the bill appear to be a response to inadequate resourcing of the Department of the 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.18

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 under-resourced 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.19

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.20

ANEDO submits that instead of addressing the backlog of nominations by simply repealing section 185, it would be more appropriate to implement and fully resource a program for DEH and the Scientific Committee to address outstanding nominations and lists. This should involve additional staff and resources for an intensive period.21

16 Ms Melanie Stutsel, Minerals Council Australia, Committee Hansard, 6 November 2006, pp 2–3.
17 Mr Duncan Marshall, Australia ICOMOS, Committee Hansard, 3 November 2006, p. 18.
18 Mr Charles Berger, Australian Conservation Foundation, Committee Hansard, 3 November 2006, p. 23.
19 Mr Andreas Glanznig, WWF, Committee Hansard, 3 November 2004, p. 38.
20 Ms Kirsty Ruddock, Australian Network of Environmental Defender's Offices Inc., Committee Hansard, 3 November 2006, p. 50.
21 Australian Network of Environmental Defender's Offices, Submission 17, p. 9–10.
6.13 The committee recognises that concern about departmental resourcing levels was expressed by diverse stakeholders. It notes that one of the purposes of the reforms is to make environmental protection and project approval processes more streamlined and efficient, and some improvements in resourcing will come from these changes. However, the committee has some sympathy with the concerns expressed by participants in the inquiry.

Recommendation 3

6.14 The committee recommends that the Government review the level of resources made available for the Department's administration of the Act.

Senator Alan Eggleston
Chair
Minority Report by Labor and Australian Greens Senators

1.1 The Environment and Heritage Legislation Amendment Bill (No.1) 2006 represents a significant retreat and watering down of the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act). The bill, if passed, will weaken the protection that the EPBC Act currently provides for Australia's important biodiversity and heritage.

1.2 The bill represents a lost opportunity to address the challenge of climate change through federal environmental legislation. This could have been achieved by making climate change a matter of national environmental significance and ensuring that protecting Australia from the adverse effects of climate change was an Object of the EPBC Act.

1.3 While the bill has a small number of positive aspects, especially in reducing red-tape and streamlining some administrative processes – which Labor and Australian Greens Senators support – these are heavily outweighed by the more negative aspects of the bill. The bill, as it stands, provides greatly enhanced discretionary power to the Minister, curtails third party appeal rights, reduces transparency and accountability, undermines public consultation, and further politicises the threatened species and heritage listing processes.

1.4 The EPBC Act has the potential to make a significant contribution to the protection and conservation of the Australian environment – but this potential will only be realised if the environment and heritage provisions of the Act are improved, not emasculated as occurs under the proposed amendments.

1.5 Witnesses to the inquiry highlighted the significant downgrading of the environment and heritage protections in the Act, and an increased emphasis on promoting development interests. Rev Comben, Chair of the Australian Council of National Trusts, told the committee that:

   This bill is more than just administrative changes. It represents a real shift from environment and heritage conservation towards facilitating developments and catering to development interests. This is not being melodramatic. Examples of this shift are evident right throughout the bill. The explanatory memorandum explicitly states this objective. The expanded use of management policies and plans and bioregional plans will reduce the amount of scrutiny which proposals will be subjected to. Individuals and groups are having further barriers placed in front of them when they wish to challenge decisions. Approvals for actions will be further entrenched by the new section 158A which prevents changes to approvals even though the action may be having a very detrimental effect on the environment or heritage.

   This legislation, if passed, will continue to change the very face of cultural heritage protection as we know it. Special parts of Australia’s spirit might
be lost as a result of this bill, firstly because there are no guarantees that states or territories could cope with the avalanche of responsibilities being unilaterally hoisted around their necks and secondly, because of the ministerial discretions which this bill delivers to the minister.

…We do not believe it promotes the legislation which was originally put into place. We believe that this, in actual fact, will reduce the protection for Australia’s heritage.¹

1.6 Witnesses also emphasised the retreat from national responsibility and international best practice as lying at the heart of the bill. Mr Griffiths, Executive Officer of the Australian Council of National Trusts, stated that:

….I would say that this bill represents a further retreat by the current government away from any national responsibility for heritage protection.²

1.7 Likewise, Mr Glanznig, Program Leader, Biodiversity Policy with WWF (World Wildlife Fund)-Australia stated that:

….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.³

1.8 Of particular concern to Labor and Australian Greens Senators is the fact that no major environmental or heritage organisation supported the bill, although many had supported the original legislation.

1.9 WWF-Australia, the Tasmanian Conservation Trust (TCT) and the Humane Society International (HSI) indicated that they have been active supporters of the EPBC Act but have serious reservations about the current bill, emphasising the ‘undemocratic' nature of several of the amendments:

Based on the nature of the current proposed amendments particularly in relation to review of Ministerial decision, threatened species nomination and listings process, and heritage nomination and listings process, it is important for our organisations to draw a line in the sand. Without

---

² Mr Griffiths, Australian Council of National Trusts, Committee Hansard, 6 November 2006, p. 39.
³ Mr Glanznig, WWF-Australia, Committee Hansard, 3 November 2006, p. 33.
significant changes to the bill, HSI, TCT and WWF believe that the Act will be weakened and will no longer reflect international best practice. Many of the proposed amendments are undemocratic in nature – they will disenfranchise the public and are a significant backward step for public access and government accountability. 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.4

1.10 Mr Kennedy, Director of HSI indicated that he felt disheartened with the changes proposed in the current bill after energetically supporting the original Act:

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.5

1.11 The proposed reforms also appear to ignore the findings of the only major independent review of the Act by the Australia Institute. In 2005 the Institute published a discussion paper on how effective the Act had been in the first five years of its operation. The report concluded that the Act's environmental assessment and approval (EAA) regime had failed to produce any noticeable improvements in environmental outcomes. More specifically, it found that the actions that were having the greatest detrimental affects on the matters of national environmental significance were rarely referred to the Federal Environment Minister and, when they were, the Minister had failed to take adequate steps to ensure appropriate conservation outcomes. Further, despite evidence of widespread non-compliance, the Commonwealth had only taken only two enforcement actions to the EAA regime in five years.6

4 WWF-Australia, Submission 66, p. 3. See also Mr Glanznig, WWF-Australia, Committee Hansard, 3 November 2006, pp 33–34.
5 Mr Kennedy, HSI, Committee Hansard, 3 November 2006, pp 54–55.
Consultation process and conduct of the inquiry

1.12 Labor and Australian Greens Senators believe that the consultation process in relation to the development of the bill and the consideration of the bill once it was publicly released was totally inadequate.

1.13 Organisations complained about the lack of consultation in relation to the bill. Dr Pearson, representing Australia-ICOMOS (International Council on Monuments and Sites), noted that:

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.7

1.14 Mr Tupper, National Liaison Officer with the Australian Conservation Foundation (ACF), emphasised the lack of formal consultative mechanisms in the development of the bill:

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.8

1.15 Submissions and witnesses to the inquiry complained about the very short time-frame to consider and comment on the bill – only two weeks – especially given the length and complexity of the bill which runs to over 400 pages with over 800 amendments, together with the Explanatory Memorandum of over 100 pages.9

1.16 The ACF, reflecting much of the evidence, stated that:

…we would like to express our concern that the timeframe allowed for consideration of the Bill is wholly inadequate to ensuring well-considered, thoughtful analysis of the Bill. The Environment Protection and Biodiversity Act 1999 ('EPBC Act') is a very complex piece of legislation, and the Bill itself runs to over 400 pages, not including the explanatory memorandum.

7 Dr Pearson, Australia ICOMOS, Committee Hansard, 3 November 2006, p. 13.
8 Mr Tupper, ACF, Committee Hansard, 3 November 2006, p. 25.
9 The Wilderness Society, Submission 71, p. 1; IFA Asia Pacific, Submission 26, p. 1; Lawyers for Forests, Submission 25, pp 3–4; Mr Gooney, National Parks Australia Council, Committee Hansard, 6 November 2006, p. 10.
To expect civil society groups to analyse this volume of material and to prepare detailed, sensible commentary in only two weeks is simply unrealistic.10

1.17 WWF-Australia also expressed strong reservations about the process and timetable for consideration of the bill:

In relation to the process, given the substantive nature of the proposed changes to the threatened species and heritage nomination process for example, it would have been appropriate to have had a process that included a discussion paper for public comment to allow proper analysis and scrutiny of the proposed changes. The exceptionally short proposed timetable for passage of this large complex bill through the Parliament will thwart proper parliamentary scrutiny and consideration.11

1.18 The Department, commenting on the consultation process on the bill, conceded that an exposure draft of the bill had not been distributed to interested organisations, with the legislation only released publicly on 10 October 2006.

Senator CARR—How long has the public had to examine this legislation?
Mr Early—It was introduced into the parliament on 12 October.
CHAIR—That is a policy issue as to when the government introduces legislation.

Senator CARR—Did the department recommend that timeline be followed?
Mr Early—The department, as the Chairman said, has no role whatsoever in how the government allocates parliamentary business.

Senator CARR—Did the department recommend any particular period of time for public consultation?
Mr Early—No, and it would not be appropriate to do so.
CHAIR—Which I think you know, Senator Carr.

Senator CARR—Which organisations did you consult?
Mr Early—We have been consulting, having discussions, with various organisations for the past 12 months. I am not quite sure what sort of time frame you are talking about.

Senator CARR—That is the point, you see. How many people got to see an exposure draft of the bill?
Mr Early—Nobody.

Senator CARR—Surely an exposure draft would have been circulated to other departments.
Mr Early—No.

10 ACF, Submission 27, p. 1.
11 WWF-Australia, Submission 66, p. 3.
Senator CARR—So other Commonwealth departments have not seen this bill either.

Mr Early—They have seen it now.

Senator CARR—Before it went to cabinet was an exposure draft distributed to departments?

Mr Early—We do not take the bill to cabinet.

Senator CARR—I see—just the drafting instructions.

Mr Early—Yes. The government considered what it wanted in the bill in the normal course of events and departments were consulted and have been involved in that discussion over the last 12 months. But consultation on the bill occurred at the government level prior to the finalisation of the bill.

Senator CARR—When was the mining council given a copy of bill?

Mr Early—I did not give them one but I assume they got one after 12 October.

Senator CARR—So no organisation got a copy of the bill in exposure draft form or any other format prior to its tabling in the parliament.

Mr Early—I was just advised and reminded that the Attorney-General’s Department, of course the Department of the Prime Minister and Cabinet and the department of territories saw relevant parts of the bill.

Senator CARR—But they would not have seen a full bill.

Mr Early—I think PM&C and AG’s probably would have.

Senator CARR—When did they see that?

Mr Early—They have been involved in the drafting. Obviously, Attorney-General’s have been involved in a number of the issues. This is the normal sort of development of legislation.\(^{12}\)

1.19 Labor and Australian Greens Senators also note that the Australian National Audit Office is currently undertaking a review of the EPBC Act and the amending bill which is due to be released in December 2006 or January 2007. The Department indicated that there had been minimal feedback in relation to the report:

Senator SIEWERT—I am aware that the Australian National Audit Office are currently carrying out an assessment. Has there been any feedback from them on their assessment so you could feed any changes that you think would be necessary into these amendments?

Mr Early—Not really. They will give us a draft report which we will then comment on, and it will then be released to the parliament...but certainly we believe some of the issues that they will raise will be addressed by the amendments, but we will have to look at the report when it is finalised.\(^{13}\)

\(^{12}\) Mr Early, DEH, *Committee Hansard*, 6 November 2006, p 54.

\(^{13}\) Mr Early, DEH, *Committee Hansard*, 6 November 2006, p 58.
1.20 Labor and Australian Greens Senators believe that the findings of this review could have provided useful insights and possible amendments to the Act. The opportunity to utilise the Audit review will be lost due to the Government's rush to push the bill through the Parliament before the end of the year – prior to the Audit report being tabled.

1.21 The hearings on the bill were also less than satisfactory – with less than two full days of hearings, both in Canberra. In most cases Labor Senators were given just 12 minutes (and the Australian Greens 6 minutes) to ask questions of each witness.

1.22 Despite the severe shortcomings of the process, the evidence received by the committee did highlight a number of significant weaknesses with the bill. It is to those matters that we now turn.

**Climate Change**

1.23 Labor and Australian Greens Senators are very concerned the bill does not address Australia’s greatest environmental challenge, climate change. In fact, there is no mention of climate change in the 409 pages of amendments, in the Explanatory Memorandum or in the Second Reading Speech. The existing EPBC Act also fails to mention climate change, despite the significant impact climate change will have on the matters of national environmental significance and, more generally, Australia’s natural environment.

1.24 The Australia Institute questioned the failure to address climate change in the bill:

> 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.14

1.25 Mr Tupper of the Australian Conservation Foundation was also concerned that climate change was not being addressed:

> 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

---

14 Mr Macintosh, Australia Institute, *Committee Hansard*, 3 November 2006, p. 8.
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...[and] will give greater strength to our international credibility and the international case for taking strong action on climate change.\textsuperscript{15}

Labor and Australian Greens Senators strongly support the inclusion of a climate change trigger in the EPBC Act.

1.26 The current requirement under s.28A of the Act is for the Minister to review the need for new triggers every five years and to publish a report on the findings. We object to the proposal to remove this provision, and argue that the passage of the bill should be delayed until the Minister has tabled the findings of the current review.

**Review of Ministerial decisions and third party enforcement**

1.27 The bill reduces the ability of third parties to challenge the merits of Ministerial decisions. The bill also reinstates a significant barrier to civil enforcement (regarding undertakings for damages). ALP Senators strongly oppose these amendments.

**Review of Ministerial decisions**

1.28 There are a number of amending provisions which remove the right of review by the Administrative Appeals Tribunal (AAT) of Ministerial decisions. The affected decisions are:

- Decisions to issue or refuse a permit; specify, vary or revoke a condition of a permit; impose a further condition on a permit; transfer or refuse to transfer a permit; or suspend or cancel a permit in relation to a listed threatened species or ecological community (section 206A);
- Decisions to issue or refuse a permit; specify, vary or revoke a condition of a permit; impose a further condition on a permit; transfer or refuse to transfer a permit; or suspend or cancel a permit in relation to a migratory species (section 221A);
- Decisions to issue or refuse a permit; specify, vary or revoke a condition of a permit; impose a further condition on a permit; transfer or refuse to transfer a permit; or suspend or cancel a permit in relation to whales and other cetaceans (section 243A)
- Decisions to issue or refuse a permit; specify, vary or revoke a condition of a permit; impose a further condition on a permit; transfer or

\textsuperscript{15} Mr Tupper, ACF, Committee Hansard, 3 November 2006, p. 23.
refuse to transfer a permit; or suspend or cancel a permit in relation to listed marine species (section 263A);

• Decisions to issue or refuse a permit; specify, vary or revoke a condition of a permit; impose a further condition on a permit; transfer or refuse to transfer a permit; or suspend or cancel a permit; issue or refuse a certificate under section 303CC(5) or a decision of the Secretary under a determination in force under section 303EU; make, refuse, vary or revoke a declaration under section 303FN, 303FO, 303FP in relation to international movement of wildlife specimens (section 303GJ);

• Ministerial decision to give advice in relation to contravention of a conservation order (sections 472 and 473).

1.29 Many submissions, including from the Law Council of Australia opposed these amendments. The Law Council stated that:

The argument put forward in the Explanatory Memorandum that these provisions leave 'the merits of these important decisions to be dealt with by the Government' do not allow for the position where the Minister in applying the law under this Act may have applied the law incorrectly. The exercise of the Minister's discretion in such a way should be reviewable by the AAT.

1.30 The Australian Network of Environmental Defender's Offices (ANEDO) also argued that 'important decisions' must be subject to review if the EPBC regime is to be 'legitimate, credible, transparent and accountable. Merits review also enables the AAT to consider the effectiveness of conditions imposed in relation to these decisions'.

1.31 ALP Senators strongly support the ability of third parties to challenge the merits of Ministerial decisions. It is essential for the credibility and legitimacy of the EPBC regime that avenues for review are maintained and that community organisation and individuals are able to participate in this process.

**Third party enforcement**

1.32 While Labor and Australian Greens Senators are broadly supportive of the amendments aimed at strengthening the compliance and enforcement regime under the Act, we strongly oppose the proposed amendment to repeal section 478, which currently prevents the Federal Court from requiring undertakings for damages as a condition of granting an interim injunction.

---


1.33 WWF-Australia, HSI and TCT stated that the proposed amendment will significantly increase the financial risk of third parties seeking injunctions and in doing so can be expected to lead to a virtual cessation of third party enforcement actions.19

1.34 The organisations noted that:

It is instructive to note that third parties have used the court system very judiciously, and given the Australian Government has such poor surveillance arrangements in place to ensure compliance, enabling individuals and organisations to ensure the objects of the Act are achieved should be encouraged not dissuaded.20

1.35 ANEDO made the important observation that:

Environmental law is public law and proper access to justice requires that the public is able – in appropriate circumstances – to use the court system to seek redress. The Court always has the power to strike out proceedings if they are vexatious, frivolous or constitute an abuse of process. Public interest environmental litigation is essential for correcting honest mistakes of government regulators and developing legal principles for improved environmental protection.21

Penalties

1.36 The bill proposes to expand the range of enforcement powers and penalties which can be applied under the EPBC Act. These include more than 30 strict liability offences, a great many of which are accompanied by periods of imprisonment and fines well in excess of the accepted limit of 60 penalty units for these types of offences; the detention of suspected foreign offenders; the power to search individuals and their clothing, without a warrant; and the power to conduct strip searches, again, without a warrant.

1.37 ALP Senators believe that by any standards these are significant and intrusive powers and should only be conferred in exceptional and specific circumstances. Proposals for the inclusion of such powers in legislation should be accompanied by detailed explanation in the Explanatory Memorandum and also by appropriate safeguards. The Explanatory Memorandum for the bill and the bill itself falls well short of this expectation.

1.38 ALP Senators note that a recent unanimous report of the Senate Standing Committee for the Scrutiny of Bills, which runs to some 12 pages, raised serious

---

19 WWF-Australia, Submission 66, p. 24. See also ANEDO, Submission 17, p. 32.


21 ANEDO, Submission 17, p. 33. See also Ms Walmsley/Ms Ruddock, ANEDO, Committee Hansard, 3 November 2006, pp 42, 45–46.
concerns about the absence of reasons or explanation in the Explanatory Memorandum for the serious new offences and penalties in the bill as well as the appropriateness of the range of enforcement powers and penalties in the bill.

1.39 In relation to strict liability, the Scrutiny of Bills report states that:

A very great number of items in Schedule 1 would create offences to at least one element of which strict liability applies. The items are 5, 7, 12, 14, 16, 18, 20, 22, 24, 26, 28, 32, 39, 41, 44, 46, 50, 52, 57, 59, 61, 63, 64, 66, 71, 73, 75, 77, 80 and 82. The Committee notes that in respect of some of these offences, the maximum penalty is seven years imprisonment and 420 penalty units.

The Committee notes the reference on pages 25 – 26 of *A Guide to Framing Commonwealth Offences, Civil Penalties and Enforcement Powers*, February 2004 (the Guide), that in preparing legislation under which strict or absolute liability is imposed, agencies should familiarize themselves with the Committee’s Sixth Report of 2002: Application of Absolute and Strict Liability Offences in Commonwealth Legislation. In particular, the Guide refers to the following principles from the Committee’s Sixth Report which accord with the Government’s approach to such provisions:

- ‘strict liability should be introduced only after careful consideration on a case-by-case basis of all available options; it would not be proper to base strict liability on mere administrative convenience or rigid formula’;
- ‘strict liability offences should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Commonwealth criteria of 60 penalty units … appears to be a reasonable maximum’; and
- ‘strict liability may be appropriate where it is necessary to ensure the integrity of a regulatory regime such as, for instance, those relating to public health, the environment, or financial or corporate regulation.’

The Guide goes on to advise that ‘[i]f the explanatory memorandum to a Bill is not considered to provide adequate explanation for any use of strict or absolute liability, the Committee will seek an explanation from the responsible Minister.’

The explanatory memorandum makes no reference to the principles set out in the Guide or the Committee’s Sixth Report, and while stating the effect of the proposed amendments, gives no explanation or justification for these apparent departures from those principles.22

1.40 With regard to Schedule 1, Item 835 – detention of foreigners – the Scrutiny of Bills report stated that:

The Committee has a long standing concern about the appropriateness of conferring police powers on persons other than police officers and the

appropriateness of applying a power to search persons under arrest to
persons under detention. As a minimum, the Committee expects the
explanatory memorandum to provide a detailed justification for applying
such powers in the proposed circumstances and an assurance that
appropriate protocols or safeguards are to be implemented and an
explanation of the nature of such protocols or safeguards.23

1.41 In relation to Schedule 1, Clause 17 – which would allow approved officers to
collect strip searches on detainees in certain circumstances – the Scrutiny of Bills
report notes that:

…the Committee notes that no justification or reasons are provided in the
explanatory memorandum for the application of strip search provisions in
this context. The Committee considers that the power of strip search
represents a significant trespass on personal rights and liberties and should
only be conferred in exceptional and specific circumstances. Proposals for
the inclusion of such powers in legislation should be accompanied by
detailed explanation and justification in the explanatory memorandum and
appropriate safeguards.24

1.42 Western Australian Liberal Senator David Johnston, in speaking to the report
in the Senate, raised serious concerns about the offences and penalties contained in the
bill and their lack of justification in the Explanatory Memorandum:

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.25

1.43 The response of government Senators to these concerns borders on the
ludicrous. Despite widespread and sustained concern expressed by many witnesses
and by government members of the Scrutiny of Bills Committee, government
Senators are evasive, seeking to mask the ram-raid tactics of the government with
pious hopes:

The committee notes the concerns raised by the Scrutiny of Bills committee
in its Alert Digest No.12 of 2006 and hopes that the minister’s responses to
the questions asked will address these concerns.26

1.44 Labor and Australian Greens Senators are also concerned at the lack of time
provided to consider the Committee’s draft report. Senators were allowed less than
twenty four hours to consider the draft report and to vote on it.

23 Alert Digest, p. 15.
24 Alert Digest, p. 18.
25 Senator David Johnston, Senate Hansard, 18 October 2006, p. 70.
26 Chair’s report, p. 34.
1.45 Such an inadequate response is typical of the slapdash, shoddy and contemptuous way in which this bill has been introduced and considered by Parliament. Such perfunctory examination of controversial legislation is inimical to the interests of good public administration, while the high-handed way in which heavily abbreviated time constraints have been imposed on parliamentarians and the public alike to consider this bill borders on contempt of the parliamentary process.

1.46 Concerns were also raised by witnesses regarding the proposed offences and penalties in the bill. Mr Macintosh, Deputy Director of the Australia Institute noted that in relation to Schedule 1, Item 835 – detention of foreigners 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.  

1.47 Mr Smith, Chief Executive Officer of ANEDO, stated that strict liability offences should not attract jail sentences, as proposed in the bill:

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

---

27 Mr Macintosh, The Australia Institute, Committee Hansard, 3 November 2006, p. 4.
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.\textsuperscript{28}

**Resourcing**

1.48 Evidence to the inquiry from a wide range of groups, including environmental, mining and development interests, argued that the Department is significantly under-resourced to effectively administer the Act as it currently stands and a number of proposed changes in the bill will require additional resourcing in the future.\textsuperscript{29}

1.49 Mr Berger, Legal Adviser to the ACF, commented on the insufficient resourcing of the Department:

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…

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.\textsuperscript{30}

1.50 The ACF argued that the inadequacy of resources is evident in the review of DEH’s operation of the Act for 2005-06. ACF noted that according to that report, there is a backlog of 640 threatened ecological communities requiring assessment. While the Department received 9 new nominations that year and was considering a total of 33, the Minister made only 5 decisions.

The situation is not much more encouraging with respect to threatened species. The Explanatory Memorandum refers to some 250 threatened species recovery plans having been adopted under the Act, but many of

\textsuperscript{28} Mr Smith, ANEDO, *Committee Hansard*, 3 November 2006, p. 44.

\textsuperscript{29} ACF, *Submission 27*, p. 2; ANEDO, *Submission 17*, p. 5.

\textsuperscript{30} Mr Berger, ACF, *Committee Hansard*, 3 November 2006, p. 23.
these have not been reviewed and are years out of date. In 2004-05, there were scheduled reviews of some 20 threatened species recovery plans, not a single one of which was completed according to the statutory schedule. One reason cited for these delays was the 'volume of recovery plans becoming due for review', according to the review of the operation of the EPBC Act for that year. Five out of the six reviews of key threatening process abatement plans were also not completed.\(^\text{31}\)

1.51 WWF-Australia also noted that the EPBC Act could be implemented effectively if the Commonwealth chose to provide the Department with an adequate level of resources.\(^\text{32}\)

1.52 The Minerals Council of Australia noted that additional resources will be required by the Department to implement proposed changes in the bill:

… the MCA also recognises that a number of the proposed changes will require significant additional resources. Specifically, the provisions for the extension of liability to employers and landowners, have the potential to significantly affect the Australian minerals industry, and should they be accepted, will require a program of policy development and stakeholder engagement to ensure that they do not result in unintended consequences.

The MCA has previously raised concerns that the administration of the Act is significantly under-resourced as it is currently structured. Accordingly, the MCA strongly advocates a significant injection of additional resources into the Department to ensure the effective implementation of the proposed changes and to enhance their ongoing administration.\(^\text{33}\)

1.53 Labor and Australian Greens Senators believe that if the Government was serious about making the EPBC Act work effectively, it would be providing the Department with more resources to do its job, instead of watering down the Act to fit the meagre resources the Government is prepared to spare for environmental protection.

**Threatened species nominations and listing**

1.54 ALP Senators have grave concerns in relation to the proposed process for listing threatened species and ecological communities in the bill. Instead of the current objective and scientifically determined process, the Minister will now have broad arbitrary discretion to decide what can and cannot be assessed for listing and protection under the EPBC Act.

1.55 Evidence to the inquiry raised several concerns with the proposed nomination and listing process. WWF-Australia stated that:

---

31 ACF, Submission 27, p. 2.
32 WWF-Australia, Submission 66, p. 3.
33 MCA, Submission 65, p. 2.
The amendments open the way for the listing process to become highly and blatantly politicised and introduces provisions that are easily open to abuse to avoid politically difficult decision making. Enactment of these amendments will be a major retreat from what is national and international best practice.34

1.56 The Australia Institute noted that:

Under the new process, there is an annual assessment cycle. Members of the public can make nominations at the start of the cycle. However, the list of nominations is vetted first by the TSSC [Threatened Species Scientific Committee] then by the Minister…

This process vests almost complete control of the listing process in the Minister and the handpicked TSSC. It will guarantee that controversial nominations are avoided and that the lists only include those species and communities that are politically palatable. As history proves, this inevitably means that the species and communities that are most in need of protection will be excluded.35

**State and Territory lists**

1.57 Submissions and other evidence noted that the repeal of section 185 removes the requirement for the Scientific Committee to assess the threatened ecological communities listed on the state and territory lists gazetted by former Minister Robert Hill in November 2001. This wipes over 500 threatened ecological communities from the Committee’s current assessment list. Section 185 was designed to provide a strategic framework for the Scientific Committee to systematically consider all the ecological communities receiving protection under state and territory legislation for their appropriate national protection under the EPBC Act.36

1.58 ANEDO stated that while the repeal of section 185 'may lighten the administrative burden for DEH and the Scientific Committee, and ease political pressure regarding controversial listings, it is heavy handed and arbitrary. It is contrary to the principles of ESD and good governance to deal with the backlog of listings in this way'.37


35 The Australia Institute, *Submission 60*, p. 10.


Similarly, the Australia Institute argued that the amendment:

...has obviously come about because of the Government's desire to avoid listing politically contentious species and its failure to adequately maintain the lists....The proposed amendment to remove the obligation to maintain the lists in an up-to-date condition will further erode the effectiveness of the Act.38

The ACF also registered its misgivings, noting that:

....we are deeply concerned that the huge backlog of unassessed threatened communities will simply be waived away by the legislative fiat of repealing section 185. This will not make the communities any less threatened in the real world, although presumably it will tidy up the bureaucratic record.39

The Department was fairly equivocal regarding the impact of the repeal of section 185 on unassessed threatened communities, indicating that 'they will be dealt with' but not in the way that some environmental groups 'would like'.

Senator SIEWERT—...HSI, as you will be aware, are concerned about what is going to happen with a lot of the nominations they have in the system at the moment. For example, will the 500 critical habitat nominations that are in fall off the list?

Mr Early—I think it is a bit hypothetical. Those nominations will go into the process, and whether they make the list for consideration will depend on what the Threatened Species Scientific Committee advise the minister. If they do not make the list, they can be considered the following year, as a rule.

Senator SIEWERT—Does that apply to all their other nominations? You have seen their list.

Mr Early—Transitional arrangements will apply to all the existing nominations. What status they have reached will depend on how they go into the new process.

Senator SIEWERT—So their concerns about what may happen to their nominations is justified, in that they may or may not be dealt with in the new process.

Mr Early—They will be dealt with but not in the way that they would like, I guess.

Senator SIEWERT—Yes.

Mr Early—It is true that, at the end of the day, they may not progress immediately, and that is part of the process that we are looking for to get

38 The Australia Institute, Submission 60, p. 9.

39 ACF, Submission 27, p. 2. See also Environment East Gippsland, Submission 3, p. 1; Mudgee District Environment Group, Submission 4, p. 1.
more strategic and to use the resources in the best possible way to get the best environmental outcomes.\textsuperscript{40}

\textit{Annual thematic nominations process}

1.62 The current public nomination provision (section 191) is repealed by the bill, and replaced with an annual process for thematic nominations. The theme for annual nominations is determined by the Minister. The bill provides for a minimum 40-day period in which nominations may be submitted on that theme.

1.63 ANEDO stated that these amendments significantly limit the public and scientific involvement in the listing of species:

\begin{quote}
In deciding upon a theme, the Minister has broad discretion (section 194D) which may relate to a particular group of species, a particular species or a particular region of Australia. This is not a definitive list of criteria and so in practical terms, this means that a range of considerations may come into play, not just the conservation status of the species. It is likely that the more controversial species (such as those currently commercially exploited) are unlikely to qualify thematically.\textsuperscript{41}
\end{quote}

1.64 The ACF also raised concerns with this approach:

\begin{quote}
Themes may be administratively convenient or politically attractive, but alas species do not become threatened thematically. Rather than focusing resources, a 'thematic' approach to assessing threatened species and ecological communities runs the risk of permanently ignoring meritorious and ecologically important species and communities that don’t fit the identified themes or don’t make the priority list, for whatever reason.\textsuperscript{42}
\end{quote}

\textit{Priority assessment list}

1.65 The bill provides that once all nominations relating to the theme for the year are received, the Scientific Committee has 40 days to give the Minister a 'priority assessment list'.

1.66 Submissions noted that the Minister will have an extraordinary level of unfettered discretion to decide which nominations the Scientific Committee can assess. ANEDO noted that the Minister may make changes to the proposed list within 20 days, including omitting an item (section 194K), before making a finalised priority assessment list. There is no public consultation on the proposed list, and the Minister may have regard to 'any matter that the Minister considers appropriate' in reaching this decision. It is therefore possible under the amendments for a nominated species to be

\textsuperscript{40} Mr Early, DEH, \textit{Committee Hansard}, 6 November 2006, p. 61.

\textsuperscript{41} ANEDO, \textit{Submission 17}, p. 10.

\textsuperscript{42} ACF, \textit{Submission 27}, p. 2.
removed from the final Priority Assessment List on commercial or economic grounds, regardless of the conservation status of that species.\textsuperscript{43}

\textit{Conservation advices and Recovery Plans}

1.67 Section 266B requires that there is a mandatory approved conservation advice for each listed threatened species and each listed threatened community. Conservation advices are not legislative instruments. Sections 267 and 269AA provide that it is no longer compulsory to have a recovery plan. The bill provides broad Ministerial discretion regarding recovery plans. Section 270 (2A) requires that certain issues such as the identification of critical habitat in a recovery plan, need only be addressed to the extent to which it is practicable to do so.

1.68 Submissions expressed concerns about these proposed changes. WWF argued that:

> It is extremely unlikely that broad Conservation Advices (not legislative instruments) would lead to meaningful conservation action at appropriate scales...The removal of the compulsory writing of recovery plans for listed species or communities removes a significant potential conservation benefit attached to listing. Furthermore, given the increased ministerial discretion with respect to listing, the Minister may decide not to list species or communities that he deems not to require a recovery plan.\textsuperscript{44}

\textit{Heritage nominations and listing}

1.69 Provisions in the bill change the listing processes for the National and Commonwealth Heritage Lists. The processes are similar to those outlined above in relation to threatened species and ecological communities. The proposed changes follow the same theme-based process outlined above for the listing of threatened species and ecological communities. Labor and Australian Greens Senators believe the changes expose the process to even greater politicisation and undermine the integrity of the lists.

1.70 WWF-Australia raised several concerns:

> Again, the Minister will be afforded unprecedented discretion over the listing process, by constraining public nominations into themes, rather than considering the heritage status of the place being nominated. Furthermore, the Minister will also have the power to omit politically controversial places from the priority assessment list provided by the Australian Heritage Council, prior to the list being available for public comment. Nominations that are not included on the priority list, while being eligible for inclusion in the annual cycle of subsequent years, have the potential to be repeatedly excluded from consideration. There is no requirement for assessment of any

\textsuperscript{43} ANEDO, \textit{Submission 17}, p. 11. See also WWF-Australia, \textit{Submission 66}, p. 18.

publicly nominated place, nor are there any final statutory deadlines applying to nominations that are not on the priority list. This will enable the Minister to indefinitely delay the assessment of politically contentious nominations.45

1.71 Similarly, the National Trust of Australia (WA) stated that:

The extensive powers of the Minister in determining what can be assessed could further erode the recognition of National Heritage Values in their own right; and strengthens the capacity of competing interests such as economic values to be a determining factor in what is to be assessed. The capacity of the Minister to defer indefinitely a decision to list adds a new level of uncertainty to the process. Neither are conducive to good governance, transparency and accountability.46

1.72 Submissions raised concerns regarding the inadequate separation of assessment and management considerations in heritage listing procedures. Australia ICOMOS stated that:

[a] primary concern with the amendments is that they provide an inadequate separation between the process of assessment and listing and the consideration of downstream management decisions. The Minister has the power to add to or remove any place from the Priority Assessment List, after assessment by the AHC, having 'regard to any matters the Minister considers appropriate' (s.324JE(3))…the listing should be based solely on the assessment of the National Heritage values of a place.47

**Register of the National Estate**

1.73 Concerns were expressed at the proposed demise of the Register of the National Estate. The bill amends the *Australian Heritage Council Act 2003* to repeal the Register of the National Estate (RNE), and removes the obligation in s.391A of the EPBC Act for the Minister to have regard to the RNE when making decisions.

1.74 Submissions argued that the Register constitutes a unique and valuable collection of heritage data, including natural, cultural and Indigenous places in both public and private ownership.

1.75 Australia ICOMOS expressed concerns that the amendments ignore the role played by the RNE in State and local government processes, and potentially put at jeopardy heritage places that have not as yet been formally entered into State or local government registers and lists.


46  National Trust of Australia (WA), *Submission 22*, p. 3. See also The Australia Institute, *Submission 60*, p. 11.

47  Australia ICOMOS, *Submission 13*, p. 4. See also ANEDO, *Submission 17*, p. 15.
State and local government processes currently apply to both registered places and places in the RNE when considering the impacts of proposals on heritage. The five year delayed implementation period is, we anticipate, insufficient to enable the States and local government to upgrade their registers and lists to give adequate protection to all of those places currently protected by reference to their RNE status under the EPBC Act.\(^{48}\)

1.76 Australia ICOMOS argued that the RNE still has a substantial value at the State and local levels – 'as the RNE was a creation of the Commonwealth and was actively embedded in the processes of the States and local governments, we believe the Commonwealth has an obligation to ensure that no heritage place is put at risk and no community valuing a heritage place is dis-empowered by amendments to the Act'.\(^{49}\)

1.77 The ACT Heritage Council highlighted the effect that the abolition of the Register will have in the ACT arguing that there will be no formal recognition or protection of many iconic places on national/designated land in the ACT.\(^{50}\)

1.78 As in so many other instances, when faced with obvious weaknesses in the bill or with comprehensive professional condemnation of specific provisions government Senators preferred unsupported assertion to considered evidence. A case in point is the throw-away summary found at 5.68 of the Chair’s Report that deals with the expanded and unfettered powers to be bestowed on the Minister in the listing and approval of threatened species and heritage sites.

1.79 The provisions of this bill dramatically weaken the processes and the instruments of heritage management and protection in Australia. This bill jettisons important heritage management assets such as the RNE, imposes new listing provisions that are vague and capable of manipulation, establishes an approvals process of dubious value and bestows unprecedented discretion on the Minister in managing the listing process.

1.80 Inadequate separation between processes of listing and later decisions on management has the capacity to inflict long term damage on heritage management and the protection of heritage sites. The long term implications of the legislative changes to heritage management that are contained in this legislation are not well understood and it is clear that little, or no, analysis of longer term impacts has been undertaken by the Department or considered by the Minister.

1.81 In this respect, the new power of the Minister to add or removes any site from the priority assessment list having regard to 'any matters the Minister considers

---

48 Australia ICOMOS, Submission 13, p. 3.
49 Australia ICOMOS, Submission 13, p. 3. See also Dr Pearson, Australia ICOMOS, Committee Hansard, 3 November 2006, pp 14–16.
appropriate' is a markedly retrograde decision. The decision abandons the principle that listing should be based on independent evaluation applying an assessment of the national heritage values of the site.

1.82 It is a matter of regret to all Labor and Australian Greens Senators that this ill-considered, hastily rushed-through legislation has the capacity to cause considerable damage to irreplaceable heritage sites.

Conclusion

1.83 The Environment and Heritage Legislation Amendment Bill (No.1) 2006 represents a significant roll-back of the Environment Protection and Biodiversity Conservation Act 1999. The bill proposes sweeping changes to Australia's environmental and heritage laws and represents a further retreat by the Commonwealth away from effective national responsibility for environmental and heritage protection.

1.84 The bill fails to address Australia’s greatest environmental challenge, climate change. The bill represents a lost opportunity to create a climate change trigger in the EPBC Act, which would ensure that large scale greenhouse polluting projects are assessed by the Federal Government.

1.85 The bill provides greatly enhanced discretionary power to the Minister, reduces transparency and accountability, and further politicises the threatened species and heritage listing processes. The proposed amendments will seriously compromise the long-term protection of our natural and historic heritage.

1.86 Labor and Australian Greens Senators will seek to amend the legislation so that Australia's important biodiversity and heritage values are protected and enhanced.

Senator Kim Carr
Senator for Victoria

Senator Ruth Webber
Senator for Western Australia

Senator Dana Wortley
Senator for South Australia

Senator Kate Lundy
Senator for the ACT

Senator Rachel Siewert
Australian Greens Senator for Western Australia
Additional comments by the Australian Greens

ECITA report on the committee inquiry into the
Environment & Heritage Legislation Amendment Bill (No. 1) 2006

This bill is a catalogue of measures to delegate, displace and otherwise evade the Commonwealth Government’s responsibilities for matters of environmental significance.
The bill seems designed to absolve the Commonwealth from its responsibilities at the same time as investing even more discretionary powers in the hands of the Minister.
This is particularly evident in the changes relating to bilateral agreements, bioregional plans, Regional Forest Agreements and conservation agreements.

The recent high court decision outlining the broad powers of the Commonwealth in relation to corporations should make it easier for the Government to regulate in the interests of the national environmental matters covered under the Act. Instead there is an increased devolution of responsibility back to the States and Territories.

The bill is clearly intended to tip the balance further in favour of project developers, as acknowledged in the Explanatory Memorandum. The intention of this legislation should be to protect our national environment, not to fast-track and smooth the way for environmentally destructive activities.

As the depth of environmental crisis in Australia is becoming more evident the Commonwealth Government should be seeking to strengthen its environmental protection and biodiversity conservation legislation, not weakening it.

Matters of National Environmental Significance

Australian Greens Senators support the inclusion of climate change as a matter of national significance that should be included as a trigger under the Act. We are particularly concerned that the existing EPBC Act fails to take account of the impacts of climate change on Australia's environmental protection and biodiversity conservation. It is an indictment on the failure of the Commonwealth Government to engage with the likely implications of climate change that in 2006 they are introducing amendments to the EPBC Act that still do not address this issue. While changes to the EPBC Act alone would not be sufficient to address the wide-ranging implications of climate change for the nation, Australian Greens Senators regard the introduction of this bill as another missed opportunity to tackle this issue of national importance.

In addition to climate change, we propose a number of items which clearly represent matters of national environmental significance and should be brought within the ambit of the Act. Given the increasingly serious impacts of climate change on water resources and the renewed emphasis on the importance of terrestrial ecosystems as
carbon sinks, it is essential that at least the following additional Matters of National Environmental Significance be added:

- Broadscale land clearing
- Construction of large dams
- Large-scale surface or ground water extraction or diversion

The absence of such triggers is an acknowledgement by the Government that it does not consider these issues to be of national environmental significance, which is hardly a credible position.

Noting that in recent weeks the Commonwealth Government has indicated a change in policy and expressed a desire to begin to engage in International agreements on climate change which will involve some of these very issues, it would be prudent to delay the passage of this bill to allow an examination of possible changes to the bill in light of these new international commitments.

The current requirement under s.28A of the Act is for the Minister to review the need for new triggers every five years and to publish a report on the findings. We object to the proposal to remove this provision, and argue that the passage of the bill should be delayed until the Minister has tabled the findings of the current review.

**Bioregional plans (Schedule 1, Items 122 and 352)**

While in principle the concept of bioregional planing is worthy of further investigation, in practice the drafting of these items within this bill opens substantial loopholes and introduces highly discretionary powers for the Minister to exempt actions if they are carried out in accordance with bioregional plans.

“There is the potential for this process to be used as a way of avoiding proper scrutiny and assessment.... there is a risk they will be used to reduce the opportunities for public consultation and oversight.” (submission 60; The Australia Institute)

‘Nuclear actions' in particular may be entirely exempt from assessment under the terms of these items, for which no explanation is given in the explanatory memorandum.

In his statement to the Committee, the Australia Institute’s Deputy Director Andrew Macintosh was very clear about the potential for nuclear installations to escape public scrutiny:

**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.

We do not support the Government’s approach to bioregional plans and strongly recommend against the adoption of these items.

**Bilateral agreements and evasion of Commonwealth responsibility**

Many of these amendments appear designed to compensate for resource shortages within DEH by scaling back important functions within the Department and evading Commonwealth responsibility for environmental protection.

The main mechanism for divesting responsibility away from the Commonwealth Environment Minister is through assessment and approval bilaterals and exemptions such as those seen in Regional Forest Agreements.

“The amendments overall reinforce the doughnut-like propensities of the EPBC Act. The centre, where the Commonwealth is directly responsible for environmental impact assessment and matters of national environmental significance, is hollowed out by creating multiple routes for the Minister to divest his obligations. These routes or processes, modelled on Regional Forest Agreements, enable classes of actions to be exempted from Commonwealth environmental impact assessment. The states and territories will become the dominant environmental decision-makers. The experience of RFAs shows the agreements themselves are environmentally inadequate and the capacity of the Commonwealth to monitor or enforce them is weak to non-existent.”

(Submission 18; Margaret Blakers)

We therefore support the removal of the ability to delegate *approval* powers to States and other Commonwealth agencies. This will require the Government to provide commensurate resources to DEH and Minister’s office so that these responsibilities can be properly discharged.

Furthermore, Australian Greens Senators believe that *Assessment* bilaterals should be subject to Parliamentary scrutiny and disallowance.
Regional Forest Agreement regions (Item 189)

Sections 38 – 42 of the current Act exempt forestry operations conducted in accordance with Regional Forest Agreements. We do not support the broad-scale exemption of forestry operations from proper assessment by the Commonwealth.

“It makes little sense to establish a uniform national system of environmental protection, but then to render it inapplicable to the very projects and activities that are likely to be most contentious and most in need of a public, national approach. Unfortunately, that is exactly what has happened in some instances. The most sweeping example is found in sections 38-42 of the EPBC Act, which exempt forestry operations conducted in accordance with Regional Forest Agreements. (submission 27; the Australian Conservation Foundation.)

The Australian Network of Environmental Defenders Offices (ANEDO) note that item 189 has the effect of prohibiting the Minister from considering adverse impacts of a forestry operation if it is within an RFA region. That the Government considers it necessary to specifically exclude the Minister from taking actual environmental damage into consideration simply because of the existence of an administrative boundary shows how far this legislation has strayed from a science-based approach.

The Australian Network of Environmental Defenders Offices notes:

“The limits on Ministerial consideration is unwarranted. It is artificial in the extreme to excise certain potential real impacts of a proposal because of an artificial (policy-derived) exemption (submission 17)

Definition of conservation dependent species (Schedule 1, Item 353)

This item within the bill will enable commercial fish species to be listed as 'conservation dependent' thus ensuring that commercial fishing can continue despite the species being under threat. This is designed so that species that are threatened can escape mandatory protections such as export restrictions. To date, only one commercial fish species has ever been listed under EPBC (the Orange Roughy), despite several reaching critical thresholds (for example southern bluefin tuna; dogfish; some shark species). Instead of strengthening the law, this amendment weakens it.

As a result, a flawed process for protecting commercial fish species has been further weakened.

“This process undermines the operation of the environment protection provisions in the legislation, as well as the scientific integrity of the list of threatened species. It places the short-term interests of the fishing industry ahead of the conservation of biodiversity” (submission 60; The Australia Institute).
The marine environment is clearly an area where national leadership is called for. Instead, the EPBC Act has perpetuated a complex administrative arrangement which has hampered true bioregional marine planning and done nothing to prevent the collapse of commercially important fish species.

**Conclusion**

These amendments are being rushed through without adequate community consultation, before the Australian National Audit Office has finalised its assessment of the implementation of the Act, before the public reporting on the triggers of matters of environmental significance (as is required under the Act) has taken place, and before the 2006 State of the Environment report has been released. These matters together raise serious questions as to why these changes are being pushed through with such undue haste, when pertinent information is close to hand. These amendments are not supported by the community, they do not deliver better environmental outcomes, and in fact function to further set back environmental protection at a time when it is crucially needed.

This Bill should be withdrawn.

**Senator Rachel Siewert**  
**Australian Greens Senator for Western Australia**
Democrats Minority Report

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

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 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.¹

Poor Legislative Process

Apart from additions made to address Heritage issues, the Environment and Heritage Legislation Amendment Bill (No.1) 2006 contains the first major set of modifying amendments to the Environment Protection and Biodiversity Conservation Act brought forward since the Act was first passed in 1999. Yet the Government engaged in no significant consultation on the Bill with the environment and heritage groups or other bodies that use the Act regularly.

Senator CARR— How many people got to see an exposure draft of the bill?

Mr Early—Nobody.

Senator CARR—Surely an exposure draft would have been circulated to other departments.

Mr Early—No.²

The 409 page Bill was debated in the House of Representatives within a week of its first seeing the light of day. The Government is now bulldozing this major and wide-ranging pile of amendments through the Senate without proper time for scrutiny and analysis. The process is contemptuous of democracy and the environment, and is particularly unfortunate given the enormous amount of time and energy went into consultations and considerations when the EPBC Act was in its gestation phase in 1998-99.

The purpose of properly examining legislation is to conduct the fundamental task of assessing the likely effects in the real world of changes to the law, and whether those effects match what the government says they will be.

¹ Mr Macintosh, Deputy Director, The Australia Institute, Committee Hansard, 3 November 2006, p.8.
² Mr Early, First Assistant Secretary, Approvals and Wildlife Division, Department of the Environment and Heritage, Committee Hansard, 6 November 2006, p. 54.
The process that has been followed on this occasion is manifestly inadequate, and has simply not allowed fully considered public and expert input, or for serious, comprehensive analysis to occur. Every witness that appeared at the Senate Committee’s hearings raised concerns about aspects of the package and said they needed more time to examine and assess perceived problems and potential unintended consequences. For example:

…… 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.3

Finally, HSI, TCT and WWF have strong reservations about the process and timetable for these amendments. In the relation to the process, given the substantive nature of the proposed changes to the threatened species and heritage nomination process for example, it would have been appropriate to have had a process that included a discussion paper for public comment to allow proper analysis and scrutiny of the proposed changes. The exceptionally short proposed timetable for passage of this large complex bill through the Parliament will thwart proper parliamentary scrutiny and consideration. As such, the timetable for consideration in the Senate should be extended to 2007.4

Even one of the Government’s own Committee members admitted that he had not had time to examine the Bill.

I confess that I have not read the bill in detail. I have barely glanced through the explanatory memorandum.5

The Government has failed to explain at all why it is necessary for the Bill to pass before the end of the year, or what the consequences would be of waiting a couple of months to allow for greater consultation and examination. The truth is that there is no reason to rush this Bill through. There are no budgetary or national security issues related to this Bill. What we are seeing is an arrogant government that is no longer interested in democracy.

4 HSI, TCT and WWF, Submission No. 66, p. 3.
5 Senator Ian McDonald, Committee Hansard, 3 November 2006, p. 32.
Of course this is not the first Bill the Government has bulldozed through the parliament. Many pieces of legislation now have ridiculously short Committee Inquiries, with quick reporting dates and truncated hearings. This sausage machine approach not only means governments are more likely to get away with implementing outrageous policy before people have a chance to realise it. Even worse, it means there is a much greater chance that the legislation itself will have flaws that make it harder to understand or enforce, or give rise to unintended consequences.

In June 2005 the Prime Minister, John Howard, promised to use his Senate majority "...soberly, wisely and sensibly. We won't use it capriciously or wantonly or indiscriminately, and I make that solemn promise on your behalf to all of the Australian people."

Complex, contentious legislation, like this Bill, pushed through parliament without proper consideration and debate mean Mr Howard has gone back on his word.

Given the short time frame to examine and report on this lengthy and complex bill, it is difficult to address all our concerns in this minority report.

**Strong Environment Laws need Political Will and Adequate Resourcing**

For many years the Democrats had called for a stronger and more coherent approach on environmental issues at the national level. In the Democrats' view, major environment issues are too significant to be left to the vagaries of individual state or local government regimes.

The Environmental Protection and Biodiversity Heritage (EPBC) Act 1999 was introduced by the Coalition Government in 1998. After a lengthy Senate inquiry and consultation with many environment groups, the Democrats' negotiated a raft of major improvements before supporting the passage of the legislation. Whilst not a perfect Act, it was clearly better than the laws they replaced, and also provided a good foundation for further improvement.

The Democrats certainly do not believe that we now have the perfect Act, that everything is fine; we think there is a hell of a lot of room for improvement still. But the framework is now in place for more effective improvements to be built on the foundation that is there in a much easier way than using the various disconnected acts that were in place or that currently exist that will be replaced by the new Act when it comes into force next year.\(^6\)

The EPBC Act is undoubtedly the strongest environment law Australia has ever had.

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.7

Mr Kennedy from the Human Society International (HSI) told the Committee he thought the EPBC was a very powerful piece of legislation:

As you know, we have been supporters of the EPBC. It is undoubtedly, by any standard, a very powerful piece of law.8

Despite the lack of political will from the Coalition government to fully use many of the powers contained in the Act, those environment groups who have sought to use the EPBC Act have found it useful. Ms Ruddock, Principal Solicitor, Australian Network of Environmental Defender’s Offices outlined to the Committee some of the practical benefits resulting from the operation of the EPBC Act:

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.

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.9

Unfortunately a major lack of political will and resourcing has meant the Act has not fulfilled its potential. Mr McIntosh from the Australia Institute (AI) echoed the Democrats’ and many environment groups’ concerns when he told the Committee:

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.10

7 Mr Glanznig, World Wildlife Fund, Committee Hansard, 3 November 2006, p. 33.
8 Mr Kennedy, Human Society International, Committee Hansard, 3 November 2006, p. 54.
10 Mr Macintosh, The Australia Institute, Committee Hansard, 3 November 2006, p. 12.
Similarly Mr Kennedy from HSI said both the department and ministers demonstrated a lack of political will:

> 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.\(^{11}\)

The lack of resourcing was raised as a key area of concern by numerous submissions and witnesses to the inquiry. For example, Mr Glanznig from WWF was unequivocal in his statement that the problem with the EPBC Act was not red tape but lack of resources:

> 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 under resourced to properly implement the Act.\(^{12}\)

Ms Ruddock from the Australian Network of Environmental Defenders Office (ANEDO) told the Committee that in her experience, lack of resources was often a reason given by the Department for not enforcing the Act:

> 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?\(^{13}\)

Even the Minerals Council of Australia expressed their concerns with the lack of resources:

> From our perspective, the Act itself is one of the best developed pieces of legislation that currently relates to environmental approval processes for our industry, and I will limit my comments to the experience of our industry. However, we found that it is actually the administration of the Act that poses more issues for us than the nature of the Act itself. There is a lack of resourcing for that administration that means that processes are often not as clearly articulated to industry and that there is the opportunity for companies to have a

\(^{11}\) Mr Kennedy, Human Society International, *Committee Hansard*, 3 November 2006, p. 58.


\(^{13}\) Ms Ruddock, Australian Environmental Defenders Office, *Committee Hansard*, 3 November 2006, p. 46.
better handle on what the expectations of the Act are and perhaps not over-
refer, as is our current practice, which tends to delay the system even more.\textsuperscript{14}

The Democrats welcome recommendation 3 in the Chairs report to review the level of resources made available for the Department's administration of the Act. Given the concern raised by witnesses that some of the Government's worries could be addressed by better resourcing, rather than changing the process and diminishing accountability, scientific opinion and public scrutiny, the Democrats believe that the Bill should be delayed until this review has been completed.

While there are some positive aspects to the Government's Bill, there are also amendments that have the potential to seriously weaken it and make it far more politicised, as noted by Mr McIntosh from the Australian Institute:

\begin{quote}
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.\textsuperscript{15}
\end{quote}

The Joint submission between HSI, WWF, and Tasmanian Conservation Trust (TCT) stated that without changes the amendments will weaken the Act and it will no longer reflect best practice. They were also concerned that:

\begin{quote}
Many of the proposed amendments are undemocratic in nature – they will disenfranchise the public and are a significant backward step for public access and government accountability. 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.\textsuperscript{16}
\end{quote}

Mr Kennedy from HSI, a strong supporter of the Act when it was first passed, and a member of the Heritage Council advising the Government, told the Committee that he is now assessing whether it is worth the HSI continuing to engage in the process if the Bill is weakened:

\begin{quote}
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.\textsuperscript{17}
\end{quote}


\textsuperscript{15}Mr Macintosh, The Australia Institute, \textit{Committee Hansard}, 3 November, 2006, p. 8.

\textsuperscript{16}HSI, WWF and TCT, \textit{Submission No. 66}, p. 3.

\textsuperscript{17}Mr Kennedy, Human Society International, Committee Hansard, 3 November 2006, p. 58.
The Australian Democrats are not opposed to streamlining and improving the Act, so long as scientific opinion and public scrutiny are not sacrificed in the process. Some of the changes appear to be reasonable ones deserving of support and there are no doubt some efficiencies and improvements that are made.

Unfortunately, evidence presented by witness suggest that much of the "streamlining" as proposed in this Bill will serve to further politicise the Act, making it easier for politics to triumph above scientific opinion and will reduce public scrutiny.

The Democrats agree with the sentiments expressed by HIS, WWF and TCT in their submission:

> Weakening the legislation and retreating from best practice is an unwise and retrograde step, especially when the challenges facing our natural environment are becoming ever more serious.\(^{18}\)

It will be difficult for the Democrats to support this Bill without significant amendments.

**Third Party Enforcements and Ministerial Review**

One of the key concerns for the Democrats is the proposed weakening of options for third party enforcement by removing the review of Ministerial decisions by the Administrative Appeals Tribunal (AAT) and reinstating requirements for financial undertakings for interim injunctions.

The move away from third party enforcements is concerning and flies in the face of proper accountability. There is absolutely no evidence of this appeal right being misused or even being used overly frequently. It is simply a blatant attempt to remove a key check on decisions made by the Minister.

Mr Smith from ANEDO argued that decision making is by its nature political and that's why it is important for appropriate boundaries to be placed around decision making. Accountability mechanisms such as third party enforcement are critical for successful legislative implementation:

> 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...

\(^{18}\) HIS, WWF and TCT, *Submission No. 66*, p. 3.
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.  

The Bill removes the right of review for the following Ministerial decisions to:

- issue or refuse a permit;
- specify, vary or revoke a condition of a permit;
- suspect or cancel a permit;
- issue or refuse a certificate under section 303CC(5) or a decision of the Secretary under a determination in force under section 303EU;
- make, refuse, vary or revoke a declaration under sections 303FN, 303FO, 303FP in relation to international movement of wildlife specimens (section 303GJ).

The Majority of submissions strongly opposed the removal of the right of review. For example the Nature Conservation Council (NCC) stated:

> Important decisions must be subject to review if the EPBC regime is to be legitimate, credible and accountable.  

The ANEDO noted the usefulness of the AAT on considering the effectiveness of conditions imposed by the minister on projects approval:

> Merits review also enables the AAT to consider the effectiveness of conditions imposed in relation to these decisions.

Ms Ruddock from ANEDO told the committee that removal of the right of review eliminates a mechanism which has been important for environmental groups when they wish to bring scientific evidence to the courts:

> 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.
The Department weakly argued that on particular matters, the Ministers decisions should not be able to be overturned:

> Basically, the government believes that, with matters of high public importance, decisions should be taken by the minister and, as such, should not be reviewable by an unelected tribunal.

> …… a small number of the permit and declaration decisions noted above require careful balancing of competing interests and judgements. The Government considers that where these decisions are sufficiently important to be taken by the Minister as an elected representative, those judgement calls should not be able to be overturned by an unelected tribunal such as the AAT.\(^{23}\)

The Department were not concerned about the need for accountability.

The Question raised by the Law Council of Australia as to what happens if the Minister has not exercised their discretion appropriately remains unanswered:

> If the minister has exercised his discretion appropriately, in accordance with the provisions of the bill, then the likelihood is that the Administrative Appeals Tribunal will uphold his or her decision. But what if the minister has not exercised his discretion appropriately? Is there to be no review? If the minister believes in the integrity of this bill and the integrity of his or her decision-making process, then he or she should not be concerned to allow a judicial review of how he or she came to a decision applying provisions of this bill.\(^{24}\)

The Bill also proposed to repeal section 478 of the Act which currently prevents the Federal Court from requiring undertakings for damages as a condition of granting an interim injunction. This will effectively cut out third parties from engaging in enforcement actions because of fear of accruing unmanageable financial damages. Ms Ruddock from ANEDO told the committee that groups already do not take action lightly as the costs associated with litigation are often prohibitive for a not-for-profit organisation:

> 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

\(^{23}\) Department of the Environment and Heritage, answers to questions on notice, 10 November 2006.

\(^{24}\) Mrs Peatman, Law Council of Australia, Committee Hansard, 6 November 2006, p. 19.
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.\textsuperscript{25}

No evidence was produced that the current provision had led to excessive cases being made. In fact the Committee was told that only 10 actions had been made in the past 7 years. Nor was there evidence that the provision was being abused to make frivolous or vexatious claims:

\textbf{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—

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

\textbf{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.\textsuperscript{26}

There was however evidence that the provision was beneficial to everyone that uses the Act:

\textbf{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?

\textbf{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.\textsuperscript{27}

The Committee was told that repeal section 478 would result in fewer actions being undertaken:

\textsuperscript{25} Ms Ruddock, ANEDO, \textit{Committee Hansard}, 3 November 2006, pp 45-46.
\textsuperscript{26} Mr Smith, ANEDO, \textit{Committee Hansard}, 3 November 2006, p. 47.
\textsuperscript{27} Mr Smith, ANEDO, \textit{Committee Hansard}, 3 November 2006, p. 47.
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.28

The Democrats support the assertion made that important decisions must be subject to review if the EPBC regime is to be legitimate, credible and accountable. The amendments in this Bill will seriously undermine the ability for this to occur, and they should not be supported.

**Threatened Species, threatened ecological communities and Heritage Nominations and Listing**

Concern was also expressed by many of those who provided evidence to the Committee about the proposed changes to the threatened Species, threatened ecological communities and Heritage nominations and listing processes.

According to the explanatory memorandum, the amendments aim to 'streamline' the nominations process and make it more 'strategic'.

The Australian Conservation Foundation (ACF) noted in their submission that there is a backlog of 640 threatened ecological communities requiring assessment and some 250 threatened species recovery plans having been adopted, but many of these had not been reviewed and are years out of date.29

Rather than put more resources into addressing the backlog, the Government have decided to replace the current objective and scientific approach with an annual process for thematic nominations.

The new process begins with the repeal of section 185 which removes the requirement for the Scientific Committee to assess the threatened ecological communities listed on the state and territory lists gazetted by former Environment Minister Robert Hill in November 2001. This wipes over 500 threatened ecological communities from the Committee’s current assessment list. The ANEDO was extremely critical of the proposed strategy:

---

28 Ms Ruddock, ANEDO, *Committee Hansard*, 3 November 2006, p. 46.
29 Australian Conservation Foundation (ACF), *Submission No. 27*, p. 2.
While this may lighten the administrative burden for DEH and the Scientific Committee, and ease political pressure regarding controversial listings, it is heavy handed and arbitrary. It is contrary to the principles of ESD and good governance to deal with the backlog of listings in this way.

DEH has failed to process section 185 and many public nominations under section 191 to date, despite obligations to do so. The removal of obligations to process and assess nominations is a serious flaw in the Bill.\(^{30}\)

Proposed section 194K allows the Minister without explanation or justification to omit any item from the annual priority assessment list developed by the Scientific Committee. According to the ANEDO and the Australia Institute a nominated species may be removed for commercial or economic grounds regardless of its conservation status:

There is no public consultation on the proposed list, and the Minister may have regard to “any matter that the Minister considers appropriate” in reaching this decision. It is therefore possible under the amendments for a nominated species to be removed from the final Priority Assessment List on commercial or economic grounds, regardless of the conservation status of that species.\(^{31}\)

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.\(^{32}\)

Witnesses told the Committee that the Minister could effectively delay the listing of a species or heritage area almost indefinitely:

Even when a nomination makes it onto a priority assessment list the Minister can specify an assessment period that is longer than 12 months with no apparent time limitation (the current statutory timeframe for the Scientific

\(^{30}\) ANEDO, Submission No. 17, p. 9.

\(^{31}\) ANEDO, Submission No. 17, p. 11.

\(^{32}\) Mr Macintosh, The Australia Institute, Committee Hansard, 3 November 2006, p. 9.
Committee to consider nominations). He can then give an additional extension to whatever the unlimited original specified period is, for a further 5 years.\textsuperscript{33}

The ANEDO in their submission pointed out that "the loss of species over the last 5 years demonstrates the dangers of this approach."\textsuperscript{34}

Nominations are further restricted by section 194F(c), which prevents renomination of species previously rejected under section 191. The ANEDO argued that this was problematic:

\begin{quote}
This is extremely problematic where new scientific information or evidence becomes available regarding certain species, for example, southern bluefin tuna, or the koala.\textsuperscript{35}
\end{quote}

The proposed amendments also repeal the requirement for the Minister to make a determination on emergency listing of heritage sites.

Many submissions and witness before the Committee were concerned that the new process was arbitrary, gave the Minister too much discretion and would only serve to politicise the process even further:

\begin{quote}
Instead of the current objective and scientifically determined process, the Minister will now have broad arbitrary discretion to decide what can and cannot be assessed for listing and protection under the EPBC Act. The amendments open the way for the listing process to become highly and blatantly politicised and introduces provisions that are easily open to abuse to avoid politically difficult decision making. Enactment of these amendments will be a major retreat from what is national and international best practice.\textsuperscript{36}
\end{quote}

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.\textsuperscript{37}

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

\begin{footnotes}
\item[33] HIS, WWF and TCT, \textit{Submission No. 66}, p. 19.
\item[34] ANEDO, \textit{Submission No. 17}, p. 12.
\item[35] ANEDO, \textit{Submission No. 17}, p. 10.
\item[36] HIS, WWF and TCT, \textit{Submission No. 66}, p. 18.
\end{footnotes}
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.  

The idea of themes was considered by many environment organisations to be a joke, as species do not become threatened thematically. Environment groups were also concerned that the proposed process runs the risk of ignoring meritorious and ecologically important species:

Themes may be administratively convenient or politically attractive, but alas species do not become threatened thematically. Rather than focusing resources, a “thematic” approach to assessing threatened species and ecological communities runs the risk of permanently ignoring meritorious and ecologically important species and communities that don’t fit the identified themes or don’t make the priority list, for whatever reason.

The Democrats are concerned about the potential these amendments will serve to further politicise the listing process and make delays and attempts to avoid difficult nominations valid.

If the amendments do proceed without significant changes, the Democrats would like the Minister to make an undertaking to ensure that all public nominations (for threatened species, ecological communities, key threatened processes and Heritage) submitted in good faith under the existing system will be considered and assessed under the current nomination process.

**Recovery Plans and Critical Habitat**

The Democrats are also concerned with the Bills proposed changes to recovery plans and critical habitats.

The Bill provides that it is no longer compulsory to have a recovery plan, and allows broad Ministerial discretion regarding recovery plans.

WWF, HSI and TCT in their submission noted that the drafting of recovery plans had been slow, but argued that this was an issue of inadequate resources and not one of too much information.

As noted by ANEDO in their submission, "recovery and threat abatement plans are vital tools for conserving threatened species in Australia, and must be fully supported

---

38 Mr Macintosh, The Australia Institute, Committee Hansard, 3 November 2006, p. 4.
39 WWF, Submission No. 27, p. 2.
40 HIS, WWF and TCT, Submission No. 66, p. 22.
as a priority for the Australian Government.\footnote{ANEDO, \textit{Submission No. 17}, p. 15.} WWF, HIS and TCT outlined in their submission reasons why recovery plans are important:

> Threatened species lists are of critical importance for two reasons – firstly, to provide a vital index of species decline over time (irrespective of recovery potential) and secondly, as flagship indicators for the decline of specific habitats or the impact of particular threats, and therefore to generate decisive and effective conservation activity to ameliorate those issues. It is vital that lists be maintained as comprehensively and timely as possible to prevent inaccurate impressions of the state of the environment and inadequate conservation measures.\footnote{HIS, WWF and TCT, \textit{Submission No. 66}, p. 22.}

It is the Democrats view that the proposed amendments to recovery plans are a step backwards. Recovery and threat abatement plans are vital to the survival of a species and should be compulsory, not up to the discretion of the Minister.

Similarly the amendment to critical habitat process that allows for critical habitats only to be designated "where practicable" and entirely on the Ministers discretion is clearly inadequate.

ANEDO note in their submission that broad discretion for other considerations, includes political considerations and the interest of landholders.

Critical habitat is a crucial element of threatened species protection. Avoiding its recognition does not make it less critical to the species concerned and can lead to death-by-neglect.

The Democrats support calls from WWF, HIS, TCT and ANEDO to amend that Act to:

- provide a formal process for public nominations of critical habitat, equivalent to the current threatened species nomination process.
- provide a mechanism for automatic consideration for listing identified in action plans for listing in the register.
- Provide a time frame of 2-3 years in which existing recovery plans must be revised to identify critical habitat.
- Emergency interim protection orders to be made in relation to critical habitat.

**Strategic Assessments and Bioregional Plans**
The Bill includes a proposal to undertake strategic assessment or bioregional plans. The Democrats are supportive of such a concept in principle, as we are increasingly concerned about the number of small projects being approved in their own right but the accumulative effects are not taken into account. For example, many small developments have been approved in recent years - albeit sometimes with conditions attached – in coastal areas around Mission Beach in far Northern Queensland, because when assessed in isolation, they only have a small impact on the surrounding environment. However, the cumulative effects of all the developments there have been hugely detrimental to the habitat of the endangered cassowary.

However, while the principle can be supported, the problem with the Bill is that there is little detail as to how the strategic assessment and bioregional plans will work in practice. Evidence to the Committee was also supportive of the concept but cautious and pointed to the lack of detail:

> 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.43

Ms Ruddock - 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........

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.44

While cumulative impact assessment is desirable in principle and is supported in principle, the mechanism by which it is achieved is all-important. The ANEDO submission raises numerous issues pertaining to the amendments designed to streamline the referrals and assessment process.45

---

43 Mr Tupper, ACF, Committee Hansard, 3 November 2006, p. 29.
44 Ms Ruddock, ANEDO, Committee Hansard, 3 November, p. 47.
45 HIS, WWF and TCT, Submission No. 66, p. 24.
One of the key concerns witnesses raised with the Committee was the potential for the strategic assessment/bioregional plan to be used as a way to avoid proper scrutiny and assessment of individual projects:

There is the potential for this process to be used as a way of avoiding proper scrutiny and assessment…….Given the nature of the powers conferred on the Minister under these provisions, there is a risk they will be used to reduce the opportunities for public consultation and oversight.\footnote{The Australia Institute, \textit{Submission No.60}, p. 3.}

This Bill appears to see proponents relieved of the current requirement to undertake individual environmental impact assessments if the projects are within areas covered by “strategic assessments”.\footnote{HIS, WWF and TCT, \textit{Submission No. 66}, p. 24.}

\textbf{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?

\textbf{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.\footnote{Ms Ruddock, ANEDO, Committee Hansard, 3 November, p. 48.}

One witness told the Committee that it appeared unlikely that new scientific evidence with respect to an individual project could be taken into account once a strategic assessment or plan had been approved:

\textbf{Senator SIEWERT}— 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?

\textbf{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.\textsuperscript{49}

Mr McIntosh from the Australia Institute also raised the prospect that once you prepare a plan under another law and then endorse that plan, that that would result in the exemption of all development taken in accordance with that other plan from the EPBC Act.\textsuperscript{50} For example:

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.\textsuperscript{51}

The Department suggested that some of the concerns raised by witnesses were not justified and were misleading:

\textbf{Mr Early}—I think the problem is that people are looking at bioregional plans as something they are not. For example, I do not believe that an approved bioregional plan would cover everything that is likely to happen in that bioregion. The way that we are currently doing our regional risk assessments on a voluntary basis in a number of regions around Australia is to basically try to, if you like, limit the number of activities that subsequently need to go through the project approval. For example, I would see a bioregional plan as identifying the sorts of things that would be required for particular matters that were likely to come up within that bioregion, and then it may well say they do not need approval, but of course the minister has the capacity to attach conditions so there might well be further conditions that would have to be met. The notion that somehow or other we could do a bioregional plan and then the Commonwealth could walk away from that region and not be concerned about anything that might happen is a little bit misleading.

The Democrats believe that there needs to be further detail and examination of this part of the Bill before a reasoned assessment can be made of whether the potential problems outweigh the potential benefits. This is yet another argument for postponing debate on the legislation in the Senate, while further details are developed of how the strategic assessments and bioregional plans will work in practice.

\textsuperscript{49} Mr Macintosh, The Australia Institute, \textit{Committee Hansard}, 3 November 2006, p. 10.
\textsuperscript{50} Mr Macintosh, The Australia Institute, \textit{Committee Hansard}, 3 November 2006, p. 8.
\textsuperscript{51} Mr Macintosh, The Australia Institute, \textit{Committee Hansard}, 3 November 2006, pp 10-11.
Search & seizure and strict liability provisions

The Democrats believe the strong concerns voiced by the Scrutiny of Bills Committee\(^{52}\) into the penalties for a range of strict liability offences were not adequately addressed by evidence given to this inquiry. It is not good enough to just hope that the Minister’s response will allay any fears. Such major penalties from the use of strict liability should not apply unless there are extremely good reasons given. To date, the Minister and the Explanatory Memorandum have given no reasons at all.

The Democrats also note that some of the proposed enforcement provisions will bring the Act into line with existing measures in the Migration Act 1958 and the Fisheries Management Act 1991. This is an example of the problem of allowing a bad principle of excessive curtailment of legal principles or civil liberties into one piece of law, as it is then used to justify further similar changes to other pieces of legislation on the grounds of ‘ensuring consistency’.

Whether it was a slippery slope or the thin end of the wedge, the original decision by the Parliament to allow such provisions into law in one circumstance has now been broadened out to have much wider application.

Improving the legislation

Many of the submissions outlined ways that the Act could be improved. Unfortunately there is not enough time to outline them all here, and we would recommend that interested members of parliament and the public read the submissions made to this inquiry.

In his second reading speech on the amending Bill, the Parliamentary Secretary to the Environment Minister Greg Hunt MP said the changes “will allow the Australian Government greater flexibility and capacity to deal with the emerging environmental issues of the 21st century.”

Two of the biggest economic, social and environmental issues facing Australia in the 21st century are climate change and water shortages and mismanagement. Yet our National Environment Act has nothing in it to address these issues.

It is no surprise that a number of organisations renewed calls for new matters of National Environmental Significance to be added to the EPBC Act to go some way to dealing with climate change and water mismanagement. Four new triggers were suggested:

a) Broadscale Land Clearing - The clearing of native vegetation over 100 ha in any two year period, or the clearing of any area of native vegetation that

---

\(^{52}\) Senate Standing Committee for the Scrutiny of Bills, Alert Digest (No. 12 of 2006), 18 October 2006.
provides significant habitat for EPBC Act listed threatened species or ecological communities, or that is on the Critical habitat list.

b) Greenhouse - Any actions likely to result in greenhouse gas emissions of over 100,000 tonnes of carbon dioxide equivalent in any 12 month period or is likely to produce 5 Mt of carbon dioxide equivalent over the likely lifetime of the action.

c) Unsustainable Water Use - The abstraction of surface and ground water resources over 10,000 megalitres.

d) Dams - The construction and operation of any large dam, defined as having a crest height of 15 m or more or a capacity of over 1 M cubic metres.\(^{53}\)

The argument for including these 4 new triggers is compelling, and is outlined in Appendix A.

The Majority report response to calls for the new triggers was inadequate. For a start it only focused on one of the proposed new triggers - climate change:

6.4 The committee acknowledges the widely held view that climate change is a matter of national environmental significance. However, the Act already includes the capacity for additional triggers to be established. Accordingly, these concerns are not relevant to consideration of the bill before the committee. No amendment is required for a new trigger to be adopted.

The Democrats reject the majority reports response. Of course these concerns are relevant to the Consideration of the Bill. The Department claim that the Bill is a result of 6 years of review of the Act, yet it has failed to include any new MNE triggers. This is despite the fact that the Democrats extracted a pledge from the government back in 1999 to develop a greenhouse mechanism for the EPBC. This promise has never been fulfilled and this Bill presents the perfect opportunity to fulfil that promise.

The Majority reports response is even more galling when this Bill removes the requirement for the Government to review the need for new triggers every 5 years and publish a report on the findings.

The Democrats strongly urge the inclusion of these 4 new triggers to the EPBC.

**Conclusion**

It is well known that the Democrats’ decision, after negotiating major improvements, to support the passage of the EPBC legislation in 1999 was a controversial one. The party was subjected to vociferous criticism by some environment groups, as were those environment groups and individuals in the environment movement who supported the Democrats’ actions.

\(^{53}\) HIS, WWF and TCT, *Submission No. 66*, p. 7
While successive Ministers have not been able to muster the resources and political will to enable the EPBC Act to show its full potential, time has shown that the Act clearly is a significant improvement on the laws it replaced at the time. Even some of the strongest critics of the law at the time of its passage in 1999 have since turned to it in an effort to achieve better environmental outcomes.

There have been significant achievements as a result of the EPBC Act. As evidence to this Inquiry showed, this can occur through mechanisms other than relying on a Minister to stop a development. Indeed, it is a sad indication of the lack of interest in enforcement at government level that some of the biggest environmental wins with this Act have come through conservation groups and individual citizens taking legal and political action. For this reason, the Democrats find the proposal to remove appeal rights to the AAT particularly unacceptable.

Given the Democrats crucial role in bringing the EPBC into being, and our preparedness to take the hard decision to back the Act, when the politically easy thing to do would have been to just attack the government for not producing the perfect law, it is extremely disappointing that the government has seen fit to rush through major changes – some of which clearly weaken the Act and open up more loopholes for environmental and heritage protection to be avoided – without any meaningful consultation with either other political parties or with the many environmentalists who have defended the legislation and sought to work with it and demonstrate its worth over many years. Some of the changes made in this Bill cannot be objectively justified as being beneficial for environmental or heritage protection, and the legislation should not proceed until they are removed.

**Recommendation 1**

As no remotely justifiable case has been made for urgency, the legislation should be deferred to enable proper consideration and consultation with the many groups in the community who use the EPBC Act regularly to assess the best ways to strengthen the Bill.

**Recommendation 2**

The sections of the Bill which remove the right of appeal to the AAT for review of Ministerial decisions should be deleted.

---

**Senator Andrew Bartlett**

**Deputy Chair**
Appendix A - Additional Matters of National Environmental Significance

Extract from pages 11-16 of the HIS, WWF and TCT submission (Submission No. 66)

Land Clearance

New trigger - A person must not take an action that has, will have or is likely to have a significant impact on the environment by Broadscale clearing.

New definitions -

Broadscale Clearing means the removal, damage or destruction of native vegetation that:

(a) exceeds a combined area of 100 ha in any two year period, or

(b) provides significant habitat for listed threatened species or ecological communities, or

(c) is listed critical habitat.

Native vegetation means

(a) trees (including any sapling or shrub, or any scrub),

(b) understorey plants,

(c) groundcover (being any type of herbaceous vegetation), or

(d) plants occurring in a wetland,

where not less then 70% of the vegetation are Native Species

While Australia is one of the most biologically diverse nations in the world, it also clears more native vegetation per year than any other developed nation in the world. Broad scale is widely recognised as the key major threat to Australia’s terrestrial biodiversity.

In January 2003, WWF- Australia commissioned a scientific analysis of the biodiversity impacts of clearing in Queensland (which prior to 2003 averaged about 500,000 hectares per year). That study found that land clearing killed more than 100 million birds, mammals and reptiles each year in Queensland alone. Satellite data shows that during 1999-2001, 94% of tree clearing in Queensland was for pasture. Combine those figures with the reality that extensive clearing in Queensland has already led to 107,000 hectares of land in the State showing signs of salinity, with over a third of this land no longer able to support farming.
The impact of broadscale clearing is undeniable. Indeed, the 2001 SoE report noted that “the destruction of habitat by human activities remains the major cause of biodiversity loss”. Not only does it result in the destruction of native species, but it has the knock on effect of destroying habitat resulting in further species loss, leading to the occurrence of dryland salinity, increasing the likelihood of weed infestation and invasive species movement, leads to soil degradation and erosion, and contributes very 13% of Australia’s total carbon dioxide emissions.

The National Objectives and Targets for Biodiversity Conservation 2001-2005 set the target of all jurisdictions having clearing controls in place that will have the effect of reducing the national net rate of land clearance to zero, by 200112. However, in 2001 alone an estimated 248,000 ha of Australian land was cleared13. The 2001 review of the National Strategy for the Conservation of Australia's Biological Diversity, noted that object 3.2 of the National Strategy had not been achieved. Objective 3.2 called for the Australian Government to “ensure effective measures are in place to retain and manage native vegetation, including controls on clearing” by ensuring that there were adequate policies and controls in place throughout the Australian jurisdiction.

Some of the States have made efforts to halt unsustainable native vegetation clearance. For example, the Queensland Parliament has passed the Vegetation Management and Other Legislation Amendment Act 2004, which aims to phase out the large-scale clearing of mature remnant bushland. However, one of the issue preventing State and Territory legislation from adequately protecting the environment from excessive broadscale land clearing is the differing regimes that exist throughout the country.

Without a national focus on land clearing activities, the damage to the Australian Nation will continue. In the past 10 years alone the number of terrestrial bird and mammal species assessed as extinct, endangered or vulnerable rose by 39%15. The threat and cost of salinity will also rise. In 2000, about 46,500 sq kms (4.6 million hectares) of agricultural land was already affected with a high salinity hazard costing an estimated $187 million in productivity. The EPBC Act is the most appropriate place for the Australian Government to focus its efforts to combat the impacts of broadscale clearing.

Given the rate of biological loss and environmental degradation cause broadscale clearing, it is clear that current methods of control are failing to work and Australia is falling far short of its international obligations, such as those under Article 8 (c) – (e) the Biodiversity Convention.

With broadscale land clearing as an EPBC Act trigger, the Australian Government can actively achieve the objects of EPBC Acts by promoting the principles of Ecologically Sustainable Development. In particular, principles of integrating of long and short term economic, social and equitable considerations, inter-generation equality and the conservation of biological integrity.
Greenhouse emissions

**New Trigger** - A person must not take an action that has, will have or is likely to have a significant impact on the environment by resulting in, or that is likely to result in greenhouse gas emissions of:

(a) over a 100,000 tonnes of carbon dioxide equivalent in any 12 month period, or
(b) 5 Mt of carbon dioxide equivalent over the likely lifetime of the action.

**New Definitions**

Greenhouse Gas Emission means the release of:

(a) carbon dioxide (CO2),
(b) methane (CH4),
(c) nitrous oxide (N2O),
(d) perfluoromethane (CF4),
(e) per-fluoroethane (C2F6), or
(f) any combination of (a) – (e) above.

Pollution from Greenhouse gas emissions is a global issue that, within the Australian jurisdiction is best dealt with at a National level. Greenhouse gas pollution from human sources has already caused a 0.6°C rise in the global average temperature above the preindustrial level. This seemingly small change in temperature has already had a significant impact on the Australian environment by causing coral bleaching in our marine reserves and World Heritage areas and by increasing the severity of the recent drought and bushfires across the country.

The Inter-governmental Panel on Climate Change identified a range of impacts on ecosystems, human health and the incidence of extreme weather events associated with an increase in the global average temperature of 2°C above the pre-industrial level. This dangerous temperature threshold must be avoided if the risk of large and irreversible changes is to be lowered.

By incorporating a greenhouse trigger into the EPBC Act the Australian Government could have more control over new developments and any increase or changes in existing projects where they are likely to result in the release of greenhouse emissions over a 100,000 tonnes of carbon dioxide equivalent in any 12 month period, or is likely to produce 5 Mt of carbon dioxide equivalent over the expected lifetime of the action. Australia’s Greenhouse gas emissions are increasing. Indeed, in the 10 years to 2002 Australia’s total net greenhouse emissions increased 8.8% to 550 megatonnes (Mt) CO2 equivalent. Even without any further increase, given the current levels of greenhouse gas pollution and the inherent inertia of the climate system, the global
community is probably ‘locked into’ at least a further 1°C rise in the global temperature. This is likely to cause major problems for Australia with increases in extreme weather events, reducing water resources and negative impacts on natural ecosystems, agriculture and fisheries.

Greenhouse is already recognised by the Australian Government as a serious issue with the *National Climate Change Adaptation Programme* allocating $14.2 million for preparing Australian governments, vulnerable industries and communities for the “unavoidable impacts of climate change”. Review of the National Strategy for the Conservation of Australia's Biological Diversity noted that objective 3.6 Impacts of Climate Change on Biological Diversity had not yet been achieved. By incorporating greenhouse gas emissions into the EPBC Act the Australian government will achieve national, cost effective and efficient ways to legislate for any further development that will significantly add to the nation’s greenhouse charge.

On 30 December 1992, Australia became the ninth State to ratify the *United Nations Framework Convention on Climate Change* (the FCCC). Under Article 4 of the FCCC, Australia is obligated to adopt national policies and take corresponding measures for the mitigation of climate change. By incorporating a greenhouse gas emissions trigger into the EPBC Act the Australian Government could give effect to its obligations while securing the objects of the EPBC Act.

**Unsustainable Water Use**

**New Trigger** - A person must not take an action that has, will have or is likely to have a significant impact on the environment by abstraction or enabling the abstraction of surface and/or ground water resources over 10,000 megalitres. By 2000, about one-quarter of Australia's surface water management areas were already classed as highly used or overused, with 11% of the surface water management areas and another 11% of the groundwater management units exceeding the overdeveloped threshold. The addition of an EPBC trigger where any person wants to undertake an action that abstracts or enables the extraction or harvesting of surface or ground water exceeding 10,000 megalitres will provide the Australian Government with a more direct way of regulating the impacts that water extraction has on Australia’s environment. For example, such a trigger would apply to large irrigated agriculture developments, including those harvesting water from floodplains via large scale levee banks, channels and dams, which are likely to have a significant impact on downstream aquatic ecosystems and other users.

Water extraction is a National issue that often transcends State borders (such as extraction from the Murray River). Indeed, river systems provide about 73% of the water used in Australia (~24 000 GL) with a further 21% coming from ground water aquifers. Unsustainable water use is a major problem in Australia. So much so that, for example, reducing the level of water over allocation in the Murray-Darling Basin will cost $500 million over five years commencing in 2004-05.
One of the continuing issues hindering the sustainable use of Australia’s water resources is the sheer size of the current diversion coupled with the differing legislative regimes in each of the States and Territories. Australia has 325 surface water management areas, based on the country's 246 river basins, and 538 groundwater management units (hydrologically connected water systems). The river systems and catchments within these areas are at differing stages of use and development and often pass through differing legislative regimes along their length. For example, irrigation corporations along the Murray, Goulburn and Murrumbidgee River systems cumulatively extract over 5,000,000 megalitres each year, effecting the environment across 3 State borders.

Unsustainable water use affects all jurisdictions across Australia. In NSW for example 87% of the river length within the State already has altered hydrologic regimes, while in Tasmania there as been a 173% surge in surface water use in the past 20 years. In Queensland, large scale floodplain harvester Cubbie Station on the Balonne River, has a cumulative storage capacity exceeding several hundred thousand megalitres, and Australia-wide bulk water licences for irrigation corporations can exceed 2,000,000 megalitres.

Water abstraction is a key threat to many wetlands of national and international importance. The NLWRA Terrestrial Biodiversity Assessment study of key threats to wetlands listed in the Directory of Important Wetlands in Australia 2001 identified hydrological change as one of the top 4 threats. Additionally, water abstraction is a key threat to a number of Ramsar listed wetlands, such as the Macquarie Marshes and harvesting of overland flows, especially in highly variable river systems, and reduces connectivity between floodplain features, resulting in fragmentation of freshwater ecosystems.

By adding an EPBC Act trigger for unsustainable water use, at the level of abstraction over 10,000 megalitres, the Australian Government can control the environmental impacts of large scale water projects. This will foster the Australian government’s efforts to achieve the objects of the EPBC Act to provide for the protection of the environment, to promote the conservation of biodiversity, and to promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources. It will also allow cooperative regimes with the States, with the level of extraction proving a clear indicator of whether the proposed water use is a matter of State or National significance.

Unrelenting and unsustainable use of Australia’s water resources will inevitably mean that river systems, aquifers, and caste systems will no longer be able to support their native ecosystems, which, in some cases, exist nowhere else in the world. The Biodiversity Convention requires the Australian Government to promote the protection of ecosystems and natural habitats. Additionally, the Ramsar Convention requires effective management of listed wetlands. With the continued use of Australia’s water resource at the current level, Australia will fall far short of its obligations in relation to freshwater ecosystems.
The Construction and operation of Dams

**New Trigger** - A person must not take an action that has, will have or is likely to have a significant impact on the environment by the construction and or operation of any Large Dam.

**New Definition** -

Large Dam means any artificial barrier that obstructs, directs or retards natural water flow and that

(a) has a crest height of 15 m or more; or

(b) has an impoundment capacity of over 1 M cubic metres.

Australia is the driest inhabited continent with annual rainfall averaging only 455 mm. The rainfall that does occur is distributed unevenly across the continent so that river flows are nearly 3 times more variable in Australia than the world average. Perhaps a consequence of this restricted rainfall is Australia’s fondness of damming its river systems. Australia has 447 large dams with a combined capacity of 79 000 GL of water.

This is equivalent to 158 times the volume of Sydney Harbour. This hydrological modification occurs throughout Australia to varying degrees and has a potentially devastating impact on the Australian environment.

The threat to the Australian environment is increasing with the unsustainable use of the available water resources. Indeed, between 1983/84 and 1996/97, surface water use across Australia annually increased by 69 per cent (20 300 GL). Making large dams an automatic trigger for the EPBC Act will allow the Minister to create clearer guidelines on how dams, as a MNES, will be assessed.

The recent *Nathan Dam* Federal Court Case pointed to the difficulties in assessing large scale dam proposals. The full Federal Court found that when assessing the dam, the Minister must consider “all adverse impacts” of the proposal, which was found to be “not confined to direct physical effects of the action on the matter protected by the relevant provision of Pt 3 of Ch 2 of the EPBC Act. It includes effects which are sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be, the consequences of the action on the protected matter”.

Making large dam proposals an automatic trigger for the EPBC Act where they are likely to have a significant impact on the environment will provide a more direct method for DEH and the Minister to assess the likely environmental impacts of such an action, reducing proponent’s uncertainty and creating a common standard by which all large dam projects are assessed.

As a current example, Queensland's proposed Mary River Dam has been called in for
assessment by the Commonwealth Minister for Environment and Heritage. The assessment process may well seek to focus on specific issues, such as the Queensland lung fish, however the most important factors in maintaining a functional component of freshwater biodiversity are maintenance of water quality, provision of adequate environmental flows and mitigation for potential threats such as cold water pollution. If it seeks to adequately assess this large dam's impact on MNES, the Commonwealth may well need to assess the project on the basis of its wider impact on water.

The issues preventing the issue of dams from being adequately dealt with in the current regime, despite the COAG agreement, are not only the differing legislative regimes but also the failure of some of the States to adequately enforce the existing regimes. In NSW and Victoria there are approximately 30 large dams that breach statutory pollution laws (NSW) or water quality protection policies (VIC) regarding water temperature regimes. For example, from the information available it would appear that 18 large dams owned by State Water in NSW regularly discharge water that exceed the maximum allowable 2 degree Celsius temperature range established by Schedule 3 of the Protection of the Environment Operations (General) Regulation 1998:

cl. 10. Any thermal waste (being any liquid which, after being used in or in connection with any activity, is more than 2 degrees Celsius hotter or colder than the water into which it is discharged).

Amendments to the NSW Water Management Act 2000 that passed in 2005 mean that if dam operators have in place a management plan that sets out future management of cold water issues, then they are exempt from the Protection of the Environment Operations Regulation.

Some, but not all, have management plans in place and mitigation efforts are often ineffective in the short-term. Commonwealth oversight on development and implementation of cold water mitigation may improve river health over hundreds of kilometres of water courses in the Murray Darling basin.

Large dam projects can have a devastating impact on fresh water ecology and biodiversity, not only by restricting water flow but also by changing nutrient levels, thermal pollution, sediment build up and simply by being in the way and preventing movement. Dams also destroy the ecosystem in the inundation zone, and can effectively starve downstream ecosystems of the water they need to survive.

The Commonwealth and States agreed in 1994, in COAG's National Water Initiative, that

"proposals for investment in new or refurbished water infrastructure continue to be assessed as economically and ecologically sustainable prior to the investment occurring" (Section 69).

By adding an EPBC trigger on the development of large dams, the Commonwealth will play a leading role in implementing this section of the National Water Initiative.
Large Dam projects throughout Australia should be a MNES, and be built in accordance with the overarching principles of ecologically sustainable development. This would help the Australian government achieve the objects of the EPBC Act, especially those in relation to ecologically sustainable development through the conservation and ecologically sustainable use of natural resources as well as promoting the conservation of biodiversity.
Appendix 1
Submissions, Tabled Documents and Additional Information

1. Association of Mining & Exploration Companies (Inc)
2. Dr Geoff Mosley
3. Environment East Gippsland
4. Mudgee District Environment Group Inc
5. The Coastwatchers Association Inc
6. The South East Region Conservation Alliance (SERCA)
7. Ms Isabella Jeans
8. Dr Maralyn J Bennett
9. Ms Joan Dawson
10. Birds Australia
11. Mr Peter Smith
12. Manduka Cooperative
14. Ms Kath Crilly
15. Dr Lee Godden and Ms Jacqueline Peel
16. Mr Rolf W Beck
17. Australian Network of Environmental Defender's Offices Inc
18. Ms Margaret Blakers
19. Dr Carol Booth
20. Department of Tourism, Arts and the Environment, Tasmania
22. National Trust of Australia (Western Australia)
23. National Parks Association of NSW
24. Alliance to Save Hinchinbrook Inc
25. Lawyers for Forests Inc
26. IFAW Asia Pacific
27. Australian Conservation Foundation
28. The Colong Foundation for Wilderness Ltd
29. Australian Archaeological Association Ltd
30. Mr Don Baxter
31. Urban Bushland Council WA Inc
32. Ms Diarne Wiercinski
33. Douglas Shire Sustainability Group
34. M Ellis
35. ACT Heritage Council
36. Dr Sarah Bekessy
37. Law Council of Australia
38. Government of Victoria
39. Dr Brendan Wintle
40. Australian Marine Conservation Society
41. Mr David Matheson
42. Mr Nathan Summers
43. Ms Heather Kenway
44. Mr Luke Chamberlain
45. Ms Janine Turner
46. Ms Liz Riley
47. Australasian native Orchid Society
48. Mr Lewis Morley
49. Mr Donald and Mrs Elizabeth Hutchison
50. Mr James Tedder
51. Mr Bill Harvey
52. C. Hartley
53. Ms Valerie Hutt
54. Mr Ken Holland
55. Mr Mark Purcell
56. See separate entry at end of submissions list
57. See separate entry at end of submissions list
58. The Environment Association Inc
59. Mr Peter Andren, MP
60. The Australia Institute
61. National Parks Australia Council
62. History Council of Western Australia
63. The Chamber of Minerals & Energy WA
64. National Farmers' Federation
65. The Minerals Council of Australia
66. WWF-Australia; Humane Society International and the Tasmanian Conservation Trust
67. Property Council of Australia
68. Australian Council of National Trusts
69. Mr Nathan Sidney
70. Ms Meg Good
71. The Wilderness Society
Submission 56

The committee received a number of submissions based on information provided by the Environmental Defender's Office. These have been given the one submission number, 56. Many of them contained identical text, but some contained additional information. All these submissions have been accepted by the committee and are being considered by it as part of its deliberations on the bill. These submissions were received from the following individuals and organisations:

Wide Bay Burnett Conservation Council  Mackay & Whitsunday Bird Observers Club of Australia  Environmental Defender's Office (SA) Inc
Ms Prudence Barnard  Mr John Beasley  Ms Jo-Anne Bragg
Cairns and Far North Environment Centre  Centenary and District Environment Action Inc  Dr Ian Curtis
Ms Amy E Glade  Tamborine Mountain Natural History Association  Wildlife Preservation Society of Queensland, Logan Branch Inc
Rana Koroglu  The National Parks Association Queensland Inc  Queensland Conservation Council
Ms Noelle Rattray  Ms Margery Street  Mr Peter Schneider
Ms Jennifer Singfield  Mr Eric Walker  Mr Ross Street
Tamborine Mountain Progress Association Inc  The Wildlife Preservation Society of Queensland Bayside Branch Inc  Dr Martin Wardrop
Larissa Waters  C4 – Community for Coastal and Cassowary Conservation Inc  Natalie Frischknecht
Name and address withheld (4)

Submission 57

The committee received a number of submissions based on a common set of points. These have been given the one submission number, 57. Many of them contained identical text, but some contained additional information. All these submissions have been accepted by the committee and are being considered by it as part of its deliberations on the bill. These submissions were received from the following individuals and organisations:
Tabled Documents

Folder of documents tabled by the Humane Society International on 3 September 2006 containing:

1. Election commitment to HSI from the Coalition in 2001
2. Listed Threatened Ecological Communities
3. Register of Critical Habitat
4. HSI submission (July 2003): Recommendations for Listings on the EPBCA Critical Habitat Register
5. National Heritage List
6. Listed Key Threatening Processes
7. HSI list of outstanding nominations under the EPBC Act
8. HSI nominations under the EPBC Act, for:
   a. threatened ecological communities
   b. national heritage
c. key threatening processes  
d. threatened species  

9. Grumpy Old Greenies – lament waiting lists, wasted opportunities and wayward pork barrelling in Australia's biodiversity programs

Summary of Principal Requested changes to the Proposed Amendments to the Environment Protection and Biodiversity Conservation Act 1999 tabled by the Law Council, 6 November 2006.

**Additional Information**

Table of issues raised at meetings with DEH and a position statement on the Register of the National Estate prepared by the National Cultural Heritage Forum, forwarded by Dr Michael Pearson, Australia ICOMOS (International Council on Monuments and Sites).

List of 3rd Party Enforcement Actions under the EPBC Act forwarded by the Australian Network of Environmental Defender's Offices Inc.

Draft National Recovery Plan for the Spotted-tailed Quoll forwarded by Mr Andrew Ricketts, The Environment Association Inc.
Appendix 2
Public Hearings

Friday, 3 November 2006 – Canberra

Australia Institute
  Mr Andrew Macintosh, Deputy Director

Australia ICOMOS – International Council on Monuments and Sites
  Dr Michael Pearson, ACT Representative and Chair, ACT Heritage Council
  Mr Duncan Marshall, Adviser, ICOMOS

Australian Conservation Foundation
  Mr Graham Tupper, National Liaison Officer
  Mr Charles Berger, Legal Adviser

WWF – Australia
  Mr Andreas Glanznig, Program Leader, Biodiversity Policy

Australian Network of Environmental Defender's Offices
  Mr Jeff Smith, Chief Executive Officer
  Ms Rachel Walmsley, Policy Director
  Ms Kirsty Ruddock, Principal Solicitor

Humane Society International
  Mr Michael Kennedy, Director
  Ms Gemma Hunneyball, Program Officer
Monday, 6 November 2006 – Canberra

Minerals Council of Australia

Ms Melanie Stutsel, Director, Environmental and Social Policy
Mr Cormac Farrell, Policy Officer, Environment

National Parks Australia Council

Ms Christine Goonrey, President, ACT Division
Mr Michael Goonrey, Research Officer, ACT Division
Mr Clive Hurlstone, Past President, ACT Division

Law Council of Australia

Mrs Barbara Peatman, Chair, Australian Environment and Law Planning Group

Australian Fisheries Management Authority

Mr Richard McLoughlin, Managing Director
Mr Geoffrey Richardson, General Manager, Sustainability and Business Management

Commonwealth Fisheries Association

Mr Peter Franklin, Chief Executive Officer

Australian Council of National Trusts

Reverend Patrick Comben, Chair
Mr Colin Griffiths, Executive Officer
Mr Tom Warne-Smith, Research Officer

Department of the Environment and Heritage

Mr Terrence Bailey, Assistant Secretary, Heritage Division
Mr Peter Burnett, First Assistant Secretary, Heritage Division
Mr Peter Cochrane, Director of National Parks, Parks Australia
Mr Gerard Early, First Assistant Secretary, Approvals and Wildlife Division
Mr Mark Flanigan, Assistant Secretary, Policy and Compliance Branch
Mr Wayne Fletcher, Director, Legislation Policy Section
Dr Kenneth Heffernan, Director, Heritage Policy Section
Ms Donna Petrachenko, First Assistant Secretary, Marine Division
Dr Gregston Terrill, First Assistant Secretary, Heritage Division