



australian network of environmental defender's offices

Submission to the Senate Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Emergency Listings) Bill 2011

15 December 2011

The Australian Network of Environmental Defender's Offices (**ANEDO**) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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Executive Summary

ANEDO welcomes the opportunity to make a submission on the Environment Protection and Biodiversity Conservation Amendment (Emergency Listings) Bill 2011 (**the Bill**).¹

As Australia's only national network of independent, not-for-profit organisations specialising in public interest environmental law, ANEDO has considerable expertise in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**). We have been deeply involved in the development and reform of the EPBC Act in the past, and have acted or given advice in hundreds of cases involving the EPBC Act.

ANEDO supports the inclusion of an emergency listings power in the EPBC Act. We also support reform of section 158A of the EPBC Act, which currently prevents the Minister taking up-to-date information into account in considering proposals which have already been declared controlled actions.

Both of these reforms are important to ensuring that decisions made under the EPBC Act are as current and as accurate as they can be. They are also consistent with the Australian Government's response to the recommendations of the Report of the Independent Review of the EPBC Act (**the Hawke Review Response**), and existing provisions of the EPBC Act that provide for the emergency listing of national heritage places.

Our recommendations and the reasons for them are set out in summary and in detail below. We are very happy to provide further information on the Bill, or on further reforms to the EPBC Act arising from the Hawke Review, if that would be helpful. We are also happy to appear before the Committee if that would be helpful.

¹ The Bill is available [here](#).

Summary of Recommendations

1. Emergency listing power

- The emergency listing power set out in the Bill should be adopted as soon as possible.
- The power could be further improved by allowing the Minister to make emergency changes to the categories of existing listings.

2. Section 158A and 'listing events'

- Section 158A must be amended to allow emergency listings to work, and to ensure that EPBC decisions are as up-to-date and accurate as possible. Specifically, the amended section should ensure the following:
- Decisions not yet made should consider *all* current listings, including emergency listings and all other 'listing events' as defined by s 158A.
- Decisions which have been made, but which occur before the final approval decision (for example, decisions on the mode of assessment), can be amended by the Minister to account for new information and 'listing events'.
- That the final approval decision can only be amended to take account of new information of 'listing events' (a) to impose management conditions that protect newly discovered species or ecological communities, without causing disproportionate costs or uncertainty for the proponent, or (b) where it is required due to the fraud, recklessness or negligence of the proponent.

1. Emergency listing power

ANEDO supports amending the EPBC Act to include a power and a process to make emergency listings of threatened species and ecological communities.

Such a power is important to deal with situations where new species are discovered in the course of operations which may harm them or drive them to extinction. It would avoid the unacceptable situation whereby a proponent is entitled to destroy or significantly impact a threatened species or community immediately after discovering it. It would untie the Minister's hands and allow him or her to take action to protect that species.

Case study – Freshwater crabs at Cape York

A new species of freshwater crab, and a shrimp species not previously recorded in Australia, were discovered in the process of opening a new bauxite mine on Cape York.²

The species were discovered by scientists who were contracted by Rio Tinto to prepare an environment impact assessment for the purposes of securing approval for the project under the EPBC Act. Because these species are not listed under the EPBC Act, the Minister is not entitled to consider them or impose conditions to protect them.

Case study – Sponge community at Port Phillip

During the environmental impact assessment for the Port Phillip Bay channel deepening, it became apparent that the dredging would harm a unique underwater sponge community. The sponge community contained 112 reef invertebrate species found nowhere else in the world.³

However, because the community was not listed under the EPBC Act, the Minister's assessment did not consider it necessary to protect them. The Australian Conservation Foundation and the Victorian National Parks Association both applied to urgently list the species, but were frustrated by the slowness of the process and the fact that it would amount to a 'listing event' under s 158A of the EPBC Act (meaning it would be exempt from consideration even if it were listed).

The mechanism proposed in the Bill is an appropriate way to do this. It is consistent with the existing provisions in the EPBC Act allowing emergency listing of National Heritage places.⁴ It also appears to adopt the position set out in the Australian

² <http://www.theaustralian.com.au/business/breaking-news/crab-may-halt-bauxite-mine/story-e6frg90f-1226136539094>.

³ http://acfonline.org.au/articles/news.asp?news_id=1633.

⁴ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 324JL.

Government's Response to the Recommendations of the Hawke Review.⁵ In particular, it:

- uses the criteria of 'significant adverse impact' and 'likely and imminent';
- requires the Minister to seek the advice of the Scientific Committee; and
- requires the Committee to review the listing within 12 months.

The mechanism could be further improved by allowing the Minister to make emergency changes to the *category* under which threatened species or ecological communities are already listed. ANEDO is aware of cases where the listing of a threatened species or ecological community did not reflect the threat posed — for example, where a species that was in fact endangered was only listed as 'vulnerable'. Amending or augmenting cl 194V of the Bill to allow the Minister to urgently change these categories would fix this problem.

ANEDO therefore recommends that the EPBC Act be amended to incorporate this process as soon as possible.

2. Section 158A and 'listing events'

Section 158A of the EPBC Act is in need of significant reform to ensure that decisions under the Act take into account the most recent and up-to-date information, without causing undue hardship to project proponents.

Section 158A applies to projects in respect of which a controlled action decision under s 75 has already been made. It provides that from that point onwards, any 'approval process decision' (which includes the controlled action decision, the decision as to mode of assessment, and the approval decision) must not take into account any 'listing event' (i.e. a new addition to the threatened species list, or World Heritage list, or other such lists) which happens after this date.

The provision effectively freezes the EPBC Act in time at the point of the controlled action decision. It prevents the Minister from taking into account listings that are current in the ordinary sense of the word — listings which most people would fairly expect to apply to decisions not yet made.

ANEDO recognises that project proponents want certainty from decisions made under the EPBC Act. But we also recognise that ecological conditions change rapidly, and that highly valuable and irreplaceable ecosystems — ecosystems that the Australian Government has recognised as valuable — stand to be ignored and destroyed.

ANEDO supports the Bill in its attempt to remedy this situation and protect newly discovered species and ecosystems. However, to more effectively fix the problem that s

⁵ Department of Sustainability, Environment, Water, Population and Communities, *Australian Government Response to the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2011) p 35.

158A poses, and strike a balance between fairness to proponents and biodiversity conservation, we recommend the following changes to s 158A.

- a. **‘Approval process decisions’ which have *not yet been made* must consider all current listings (including those made after the controlled action decision).**

This amendment should be made as a minimum. It creates very little uncertainty for project proponents, as they will not have placed reliance on a decision that has not yet been made. It avoids the absurd situation where a listing that is made a week after the controlled action decision is ignored for the purposes of that project.

- b. **The Minister should be allowed to revoke or amend ‘approval process decisions’ made *before the final approval decision*.**

This amendment recognises that many decisions can be changed after the fact without causing disproportionate or excessive inconvenience to the proponent. Decisions like the controlled action decision and the decision on mode of assessment can often be changed with very little detriment to the proponent.

Indeed, the EPBC Act already provides the Minister with the power to revoke or amend a controlled action decision if circumstances change or new information comes to light.⁶ This proposed amendment therefore does little more than ensure consistency of approval process decisions with other parts of the EPBC Act.

- c. **The Minister should have limited powers to amend the final approval decision, to require the proponent to protect emergency listings.**

We recognise that allowing a final approval decision for a project to be revoked could cause considerable uncertainty for project proponents. The approval decision is, after all, what most companies ‘bank on’, because under the EPBC Act framework it is the final decision.

On the other hand, it is contrary to the very purpose of the EPBC Act to allow a proponent to drive a newly discovered threatened species or ecologically community to extinction, particularly where new scientific evidence has come to light.⁷ It is also unlikely that any developer would want to be responsible for destroying the last of a species where precautionary measures can be taken. It would therefore be unfair and short-sighted to give a development untrammelled priority over conserving our irreplaceable biodiversity.

There will be cases where the approval could be varied to protect a newly discovered threatened species or ecological community without causing undue hardship for the proponent. Consider, for example, projects where construction has not commenced,

⁶ *Environment Protection and Biodiversity Conservation Act 1999* (Cth)s 78.

⁷ See, eg, EPBC Act, s 3 (Objects of Act) and s 3A (Principles of ecologically sustainable development).

or where finance has not yet been finalised, or where the species or community in question can be protected through proportionate management actions.

To capture these cases, ANEDO recommends that the Minister be given the power to amend an approval or approval conditions (without revoking approval), to require the proponent to take proportionate actions to protect the newly discovered species or community. In doing so the Minister must balance the need to avoid unfairness to the proponent with the need to protect our highly valuable biodiversity.

This amendment strikes a balance between the competing priorities of biodiversity conservation and fairness to the project proponent. It is also consistent with existing provisions of the EPBC Act which allow conditions of approval to be varied to take account of unforeseen significant impacts.⁸

d. The Minister should have very limited power to revoke the final approval decision, where the late discovery of a new species is the proponent's fault.

There may be cases (however rare) where an entirely new and highly valuable species or ecological community is discovered after a project proposal has been approved. In some cases this may be unavoidable; but in some cases it may be due to the assessment being conducted inadequately, perfunctorily, and perhaps even deceptively by the proponent. The EPBC Act must recognise this possibility and prioritise the protection of threatened species in these cases.

ANEDO therefore recommends that the Minister be given the power to revoke an approval to protect an emergency listed threatened species or ecological community, where the failure to discover it earlier is due to the fraud, recklessness or negligence of the project proponent. This will encourage proponents to conduct assessments as thoroughly as possible, and reduce the incidence of these unacceptable cases.

In our view these amendments would provide the optimum solution to the problem posed by s 158A, and balance the need for up-to-date and accurate decisions which conserve newly discovered and highly valuable species and ecological communities. However, the Bill as proposed is nonetheless an improvement on the current situation, and ANEDO supports it.

For more information in relation to this submission please contact Michael Power, Lawyer — Law Reform (EDO Vic), on michael.power@edo.org.au or (03) 8341 3100.

⁸ *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 143. This provision does not, however, capture cases where a variation of conditions is required due to a new listing.