
Environment Protection and Biodiversity Conservation Amendment (Emergency Listings) Bill 2011

Senate Standing Committee on Environment and Communications

Submission by the Australian Environment & Planning Law Group of the Law
Council of Australia

14 December 2011

The Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession, and represents about 56,000 legal practitioners nationwide. It has an Australian Environment and Planning Law Group which has given consideration to the Parliament's proposal to enact the Environment Protection and Biodiversity Conservation Amendment (Emergency Listings) Bill 2011.

The Current Position

Currently species and communities are listed by the Minister following nomination, prioritisation and assessment of species and communities for listing, and following advice by the Threatened Species Scientific Committee ("TSSC"). Since amendments made to the EPBC Act in 2007, this process takes place on an annual cycle. The priority assessment list process has regard to, inter alia, the capacity of the TSSC to make assessments while still performing its other functions (s.194G(2)(c)). This means that species or communities otherwise eligible for listing may not be considered for listing in any particular year or years because there have been many nominations and other species or communities are deemed of higher priority for listing, given available resources of the TSSC.

The Proposal

The Emergency Listings Bill seeks to give the Environment Minister the power to list a species or ecological community on an emergency basis where the Minister believes that:

- a. the species or community is eligible for listing
- b. the species is under threat of a "significant adverse impact", and
- c. the threat is both likely and imminent

This seems to be a sensible and important reserve power to be available to the Minister, particularly in light of the delays inherent in the process of listing. It allows a species to "jump the queue" where the Minister believes that a significant threat is likely and imminent.

There are already emergency listing procedures for listing in the Commonwealth and National heritage lists (see ss 341JJ and s324 JK).

Following an emergency listing, it is proposed that the TSSC be required to make its assessment of the eligibility of the species, including calling for public comment, and give advice to the Minister. The Minister must then make a decision as to whether to alter or remove the listing, and if no decision is taken within 12 months of the listing, the listing lapses automatically.

Amendments to s.158A

Section 158A of the EPBC Act provides in short that where the Minister has made a decision about whether an action is or is not a controlled action ("the primary decision"), the validity of the primary decision is not affected by a subsequent listing decision and the primary decision cannot be revoked, reviewed or challenged. The primary decision includes a decision as to which are the "controlling provisions" for the action (see ss 75 and 67).

Further, the subsequent listing event is to be disregarded in making any further approval process decision in relation to the relevant action. "Approval process decision" means any of the following decisions:

- a. a decision under section 75 whether an action is a controlled action;
- b. a decision under section 75 whether a provision of Part 3 is a controlling provision for an action;
- c. a decision under section 78 in relation to a decision referred to in paragraph (a) or (b) of this definition;
- d. a decision under section 87 on the approach for the assessment of the impacts of an action;
- e. a decision under section 133 whether to approve an action;
- f. a decision under section 134 to attach conditions to an approval of an action;
- g. a decision under section 143 to revoke, vary or add to conditions attached to an approval of an action;
- h. any other decision made under a provision of this Chapter that is specified in the regulations.

For example if the Environment Minister found that a project was a controlled action because of its impact on the World Heritage Values of a listed property, and a threatened species were subsequently listed, the Minister could not have to have regard to the impact of the action on the newly listed threatened species. He or she could not require that the impact on the species be considered as part of the assessment, or impose conditions which might ameliorate the impact of the project on the species.

Where a decision has been made that a matter is not a controlled action, this decision is final and the proposed amendment does not alter this.

The amendment to s.158A proposes to require the Environment Minister to consider the impacts on the newly listed species when making any subsequent approval process decision.

Discussion

Unless amendment is made to s.158A, even if a species were listed on an emergency basis because of a likely, significant adverse impact, the impact of a proposal on that species could not be taken into account in the assessment process. This would be the case even if the proposal constituted the very threat of significant adverse impact. This is not satisfactory.

On the other hand, it should be recognised that a proponent may have expended a significant amount of money, carried out an assessment for Commonwealth purposes, have obtained all necessary State government approvals and be about to commence operations, subject only to Commonwealth approval. The proposed amendment to s.158A may prevent that project going ahead without further assessment, even if the project were not the cause of the species being listed. This would give a species listed on an emergency basis higher "standing" than other threatened species.

Conclusion

The likelihood of a species being listed on an emergency basis is low. The likelihood that this listing will affect an action about which a primary decision has been made is even lower. However, where there is a credible threat of a significant adverse impact on a species which is already eligible for listing, it seems reasonable to require the Minister to consider this impact at least when making a decision as to the level of assessment to be carried out, the matters of national environmental significance to be assessed and any ameliorative conditions to be imposed in any approval. In particular, where an action is the very cause of a significant adverse impact which prompts emergency listing, then the argument for consideration of the impacts before approval is given to the action is compelling.

The Australian Environment and Planning Law Group supports the enactment of Environment Protection and Biodiversity Conservation Amendment (Emergency Listings) Bill 2011, subject to amendment as described generally above, as an appropriate amendment consistent with objects set out in section 3 of the Environment Protection and Biodiversity Conservation Act 1999.

Attachment A: Profile of the Law Council of Australia

The Law Council of Australia is the peak national representative body of the Australian legal profession. The Law Council was established in 1933. It is the federal organisation representing approximately 56,000 Australian lawyers, through their representative bar associations and law societies (the “constituent bodies” of the Law Council).

The constituent bodies of the Law Council are, in alphabetical order:

- Australian Capital Territory Bar Association
- Bar Association of Queensland Inc
- Law Institute of Victoria
- Law Society of New South Wales
- Law Society of South Australia
- Law Society of Tasmania
- Law Society of the Australian Capital Territory
- Law Society Northern Territory
- Law Society of Western Australia
- New South Wales Bar Association
- Northern Territory Bar Association
- Queensland Law Society
- South Australian Bar Association
- Tasmanian Bar Association
- The Victorian Bar Inc
- Western Australian Bar Association
- LLFG Limited (a corporation with large law firm members)

The Law Council speaks for the Australian legal profession on the legal aspects of national and international issues, on federal law and on the operation of federal courts and tribunals. It works for the improvement of the law and of the administration of justice.

The Law Council is the most inclusive, on both geographical and professional bases, of all Australian legal professional organisations.