Submission to the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999.*

Submitted by: Australian Hydroponic & Greenhouse Association

Date: 24 January 2009

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SUBMISSION TO THE INDEPENDENT REVIEW OF THE EPBC ACT 1999
AUSTRALIAN HYDROPONIC AND GREENHOUSE ASSOCIATION

Comments are primarily directed at the Assessment and Approvals Process and Decision-Making under the Act.

The Australian Hydroponic and Greenhouse Association (AHGA) has recently been the recipient of a decision under the EPBC Act (1999) on its request to amend the Live Import List to include the bumblebee *Bombus terrestris*. This was to allow importation of managed hives from Tasmania for use in enclosed greenhouse situations, a matter of documented and agreed considerable benefit to the greenhouse industry, as well as highly likely to result in a substantial reduction in pesticide use in greenhouses. The request was denied by Hon Peter Garrett on 22 October 2008. This application was initially made in 1996 and has been directed through various government departments and agencies over the years, in each case following due process under existing Acts. A review of the process and the documentation provided can be found on the AHGA website www.ahga.org.au. For the AHGA, the process has been long, expensive, and in the end, deeply disappointing and frustrating.

The AHGA has no problem with the Federal Government conducting thorough environmental reviews of the potential environmental impact of proposed importations of alien species. However, the present process is seriously flawed and natural justice denied by a lack of transparency, due process and scientific rigour in decision making.

The process under the current act allows for agreement on Terms of Reference (TOR) for the submission, following posting and public comment. This is followed by a draft report on the agreed TOR, which is also posted on the Department of Environment, Water, Heritage and the Arts (DEWHA) website for public comment, and sent to State and Territory government agencies for their comments. The DEWHA compiles these comments and the proponent must respond to these in preparing the final report. All responses were requested to be scientifically verified and referenced. The final report is assessed in-house by DEWHA, primarily by a single assessor, and then is passed through the bureaucracy for further review. A brief is then prepared for the Minister, who personally makes a decision on whether or not to allow the request. If the proponent is not satisfied with the decision, a request for a Statement of Reasons for the decision can be requested in the next 28 days, after which the proponent can accept the decision or apply to Federal Court for a review of the decision. Even then, the Minister is not bound by the Court to change his decision.

There are several obvious flaws in this system:

i. The qualifications of the DEWHA in-house reviewer(s) to assess in-depth detailed scientific determinations are not specified, nor open to public scrutiny. The Department can and does consult elsewhere, but is under no obligation to share or discuss this information with the applicant, or to do this in a non-biased way.

ii. Although the material submitted by the proponent has to be scientifically justified and subjected to third party scrutiny, there is no such requirement for the material collected by the DEWHA. The process is not conducted on a level playing field and is thus open to abuse.

iii. The decision of the reviewer(s) can be undermined at any stage by unknown bureaucrats, or indeed, by the Minister himself. The Minister has no obligation to accept the advice of his reviewers, or to reveal that advice.

iv. While the Minister must furnish a Statement of Reasons for the decision on request, there is no official requirement to ensure that the proponent is aware of this fact, nor of the very limited time period during which an application for this Statement must be made.

v. If the material furnished by the Minister is inadequate, the only recourse is to take legal action, again within a 28 day period, which is expensive and beyond the reach of most proponents. This fact does not have to be volunteered to the applicant.

vi. The court of public opinion can prejudge an application. Lobbying by environmental groups outside the process can have a profound effect on public and government perception of the issue. In the absence of public scrutiny and science-based decision-making, it is more likely that a political decision will be taken, rather than a scientific one based entirely on its merits.

vii. The Precautionary Principle with its key criterion of 'full scientific certainty' makes it very easy for the Minister to deny a request as it implies zero tolerance of risk, an impossible criterion to satisfy.

viii. There is no requirement for DEWHA to post the proponent's final submission on the Department's website, nor the response to public and Government comments. Nor, apparently, is it usual practice to do so. Thus the public and government agencies have no opportunity to judge the complete information in the documents. This is a major disadvantage to the proponent where substantial new information has been added or where allegations are disputed or facts misrepresented.

ix. If the Minister's decision is a positive one, then the States can effectively countermand it by having the organism listed as a Key Threatening Process (KTP) under their own legislation.

x. There is no opportunity to work together to arrive at a consensus on how to mitigate potential impacts, so it becomes an adversarial exercise instead of a cooperative one.

<u>Suggestions for improving the process</u>

The AHGA suggests that:

i. the Threatened Species Scientific Committee (TSSC) (or similar independent Committee) replace the present DEWHA in-house assessment process, and have statutory powers to make determinative rather than advisory listing decisions; that this committee (a) should be independent of the Minister and his Department (b) should provide full scientific justification for its determinations that is available for public scrutiny, and (c) is empowered to engage in dialogue with the main proponents and opponents to explore areas of mutual agreement, to clarify contentious issues, and to provide full transparency and opportunity for rebuttal or provision of further information.

ii. The NSW Scientific Committee has made similar proposals in its submission (#150); however, this State committee exemplifies a problem previously identified, of State committees essentially being able to undermine the determinations of the Federal government. In this specific case, should Minister Garrett's decision have been favourable, the NSW Scientific Committee in 2004 had already put in place legislation listing *Bombus terrestris* as a Key Threatening Process in NSW, requiring control if it is found. The decision was based on extremely limited information provided by a small group of environmental lobbyists, had no scientific rigour, and in our view was unjustifiable. In 2001, the TSSC, on the other hand, had made a far more rigorous determination in turning down the listing of *Bombus terrestris* as a Key Threatening Process under the EPBC Act, based on lack of sufficient evidence. This determination was not commented on by the Minister in his recent decision, again questioning the effective role of the TSSC as currently structured. The TSSC could conceivably have been called upon to review its decision based on considerable new evidence. The overlap of these State and Federal committees presents a conflict on jurisdiction on environmental issues of national importance, and is concerning if standards for acceptance or rejection of listings differ. The make-up and independence of the Federal Committee also needs to be very carefully considered so as not to consist of intransigent individuals unwilling to examine issues with an open mind. An overarching neutral body is required to oversee its composition and the selection process should be open to public scrutiny.

iii. The submission by the Invasive Species Council (#166) praises the Minister's decision to ban bumblebees, but suggests that the risk assessment report submitted by the AHGA should have been written by independent experts and not by its own hired experts. This view is reiterated as a general requirement for proponents. The authors of the AHGA submission strongly consider that they have acted in an independent manner. Funding for the final report came from both the industry and Horticulture Australia Ltd. No funding was provided prior to this. Claims of bias, unreliable information and selective data are affronting and more appropriately reside with certain opponents of the importation. In the particular experience of the AHGA, extensive lobbying over many years by a few environmentalists has completely polarised both public and so-called experts. It would have been impossible to find 'independent' experts of the type envisaged by the ISC. This issue has become so highly politicised that even those who might favour bumblebee introduction are not willing to stand up and be counted. As an alternative suggestion, we reiterate the need for an independent committee similar to the TSSC which can receive and assess submissions scientifically from all stakeholders, or at least one based on the New Zealand model which has demonstrable expertise and is prepared to consult experts in a non-biased manner.

iv. The ISC is in error in some of its statements and has clearly not been provided with information in the final report and other documentation, which is a fault of the assessment process previously identified. The final submission should be made available to the public and posted on the Department's website. It is not sufficient to leave only the draft report in the public arena.

v. The 'Precautionary Principle' should be replaced in favour of a precautionary approach. It is not possible to have full scientific certainty on any issue and merely gives the Minister an escape clause for difficult decisions. The PP is being applied selectively in any case, which undermines the integrity of the process. The key

criterion of 'full scientific certainty' inserted into the Act implies zero tolerance. The New Zealand legislation in this area states clearly that 'there is no such thing as zero risk - everything we do involves a certain amount of risk. The purpose of risk-based decision making is to identify and assess those risks so that they can be either managed or prevented'.

vi. The DEWHA does not appear to have any procedural guidelines for assessing the level of risk of importing an alien species or dealing with an existing species, such as exist in New Zealand. The decision-making process is thus open to accepting hearsay and decisions being based on political repercussions of making the 'wrong' decision. This lack of integrity in accepting considerable environmental risk in some cases and no risk in others undermines confidence in the system.

vii. The DEWHA must justify its decisions with adequate, scientifically-based explanation. In this particular case, the reasons presented made it clear that considerable evidence in the AHGA submission was ignored, again raising questions about the integrity of the process.

viii. Presently, under the EPBC Act, if an appellant is aggrieved by the Minister's decision, it must apply to the Federal Court for an order of review under the Administrative Decisions (Judicial Review) Act, which is simply a judicial review where, if successful, the decision can be set aside, but not changed. The Minister is obliged to reconsider the original decision, but is not obliged to alter it. Currently, the EPBC Act does not have any provision to appeal to the Administrative Appeals Tribunal (AAT): the AAT can only review a decision if an Act, Regulation or other legislative instrument provides specifically that the decision is subject to review by the Tribunal. This denies an appellant the opportunity for a merits-based appeal and the opportunity to review the decision. We strongly recommend that the EPBC Act be amended to provide an opportunity for an aggrieved appellant to make application to the AAT. The present system not only denies an appellant recourse to a merits-based appeal, but is designed to discourage it from appealing to the Federal Court through the tight time constraints to have the appeal lodged (28 days from issue of the Minister's Statement of Reasons) and the substantial and prohibitive financial costs to the applicant. This denies natural justice.

ix. Consideration requested by ISC and others, that genetically distinct variants of permitted invasive species be assessed rather than automatically granted entry, works both ways. It should also be possible to permit entry to subspecies or variants with demonstrated safety, where the species as a whole has been turned down. Thus it was requested that the English bumblebee subspecies *Bombus terrestris audax*, currently also in Tasmania and New Zealand, be considered as it might carry less risk of establishment in warmer zones than Mediterranean subspecies. This request was denied as not being possible.

Finally, it may be said that the New Zealand process for reviewing new organisms, administered by the Environmental Risk Management Authority, under its 'A Guide to the Hazardous Substances and New Organisms Act', is light years ahead of that in Australia (see www.ermanz.govt.nz/resources/ and follow FAQ). It is sensible, balanced, objective, and a great model for countries such as Australia, where the government is too often held to ransom

by powerful environmental groups and commonsense struggles to find a voice. It has a risk-based decision-making process which weighs risks against benefits, and should be used as a basis for developing a totally different approach to risk assessment in Australia.