

In-House Memorandum

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The First 100 Days – Abbott Government

Since taking office last year, the Abbott Government has brought about significant changes to environmental law. This paper considers the four main proposed changes over the government's first 100 days in office:

1. The Ministers Retrospective Approvals
2. One Stop Shop
3. Proposed World Heritage Boundary Modification
4. Climate Change Repeal

Retrospective Approvals - Environment Legislation Amendment Bill 2013

Environment Protection and Biodiversity Conservation Act 1999 (Cth) ('EPBC Act') gives the Federal Environment Minister a large number of environmental responsibilities. A central requirement is that any action that has or is likely to have a significant impact on a matter of national environmental significance¹ requires the Federal Environment Minister's approval².

In the 2013 Tarkine Case³, the Federal Minister failed to have regard to approved conservation advice⁴ regarding the impact on the threatened species⁵: being the risk of extinction of the Tasmanian Devil as a result of a large mine development. The failure to consider such advice resulted in the legal challenge and the Federal Court declared the Minister's decision invalid⁶.

The case posed a risk to other Ministerial decisions. As it had been shown that the Minister failed to consider required conservation advice, other decisions adopting a similar procedure could potentially be overturned. So, the Abbott Government drafted the *Environment Legislation Amendment Bill 2013* ('the Bill') which retrospectively removes the requirement to take conservation advice into account under the EPBC Act.

Examples of recent high profile decisions include:

- The dredging and offshore disposal (within the Great Barrier Reef Marine Park) of up to three million cubic metres of dredge spoil, to facilitate construction of three new terminals at Abbot Point in Queensland;
- The construction of a Liquid Natural Gas facility on, and pipeline to, Curtis Island near Gladstone in Queensland;
- The Coal mining operations in the Galilee Basin in Queensland.⁷

However, if the Bill is passed, it seems that not only will past decisions be validated, but any Ministerial decision in the future that ignores conservation advice will still remain valid.

"The thing is as valid and effective, and is taken always to have been as valid and effective, as it would have been had the person, when doing the thing or anything related to the thing, had regard to any relevant approved conservation advice."⁸

¹ Environment Protection and Biodiversity Conservation Act 1999 (Cth) Part 3 (includes World heritage sites, National Heritage sites, Wetlands of International Importance, Listed threatened species, marine environment, Great Barrier Reef Marine Park, etc).

² Environment Protection and Biodiversity Conservation Act 1999 (Cth) Part 9.

³ Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities [2013] FCA 694.

⁴ Environment Protection and Biodiversity Conservation Act 1999 (Cth) Section 139.

⁵ Environment Protection and Biodiversity Conservation Act 1999 (Cth) Section 18.

⁶ Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities [2013] FCA 694 [61]-[64].

⁷ Tomaras, Julie and McCormick, Bill, 2014, Environment Legislation Amendment Bill 2013: Bills Digest, Bills Digest No. 32, 2013-14.

⁸ Environment Legislation Amendment Bill 2013 Item 2(2), Schedule 1 of the Bill (Third Reading, Lower House).

The proposed changes will be included in a Schedule to a separate Act from the EPBC Act. It has been noted that this is likely to:

“make it more difficult for interested parties to find and confidently appreciate the practical operation of approved conservation advice, than if the new provisions were inserted into the EPBC Act.”⁹

Environment Minister Hunt claimed that the Bill was not intended to affect the requirement to have regard to a relevant approved conservation advice. He noted that:

“The amendments apply retrospectively to ensure that past decisions are not put at risk of being invalid. This will provide certainty for industry stakeholders with existing decisions and the projects that rely on those decisions.”¹⁰

However, the Minister did acknowledge that:

“The amendments will also apply to future decisions to avoid similar issues arising.”¹¹

The Law Council of Australia made a submission relating to the proposed changes. It suggested that there are no clear and compelling reasons for retrospective validation. It urged a one-by-one consideration of past relevant decisions and suggested the integrity of the Executive would be enhanced if the Minister reported to the Senate Inquiry on the extent of relevant approvals granted before 31 December 2013, where conservation advice have not been taken into account¹².

Kellehers Australia contributed to the LCA submission seeking clarification as to whether other projects, are known to have been approved with reliance upon poor conservation advice and whether this Bill is triggered by bureaucratic procedures.

The Senate referred the Bill to the Environment and Communications Legislation Committee which delivered its report on 12 February 2014. The Committee, Chaired by Senator John Williams, stated that concerns in relation to Schedule 1 of the bill are ‘largely unwarranted’:

“... since the Tarkine case, conservation advices are now attached to the brief to the Minister when making relevant decisions under the EPBC Act. As such, the committee considers that relevant decisions made under the EPBC Act since July 2013 are unlikely to be vulnerable to challenge on the same technical legal grounds as in the Tarkine case. As to decisions made before then, the committee notes the evidence that statutory time limits for seeking judicial review of decisions would mean that decisions made before that date are highly unlikely to be challenged. The Department also indicated that there are no legal proceedings currently underway which would be impacted upon by the bill. As such, the potential impact of the bill is minor, but is nevertheless important to provide reassurance and certainty to proponents and developers who have made significant investments based on decisions made under the EPBC Act.”¹³

However, the Senate Scrutiny of Bills Committee warned:

9 Tomaras, Julie and McCormick, Bill, 2014, Environment Legislation Amendment Bill 2013: Bills Digest, Bills Digest No. 32, 2013–14.

¹⁰ Hunt, Greg, 2013, Second Reading Speech: Environmental Legislation Amendment Bill 2013, House of Representatives Hansard: Canberra.

¹¹ Ibid.

¹² Law Council of Australia, 2014, Submission Environment Legislation Amendment Bill 2013, LCA: Canberra.

¹³ Environment and Communication Legislation Committee, 2014, An inquiry into the Environment Legislation Amendment Bill 2013, Senate Standing Committees on Environment and Communications: Canberra

“The retrospective validation of administrative decisions may have a detrimental effect on a person's rights or liberties. In this case, the detrimental effect may be on the right of an 'aggrieved person' to bring proceedings under the ADJR Act to enforce the requirements of the EPBC Act. The practical effect of item 2 of Schedule 1 is that a decision which was invalid when made cannot be challenged by such an aggrieved person under the ADJR Act”¹⁴”

Since the 12 February 2014, when the report was tabled, the bill has passed back to the Senate and its Second Reading moved. However the House adjourned on 13 February 2014 and the bill has not yet been heard. The Senate is due to sit again on 3 March 2014. The draft Legislation Program states that the Bill is due to be heard again on 6 March 2014.

“One-Stop-Shop” for Environmental Approvals

Environment Minister Hunt announced last year that the Government had approved a framework to achieve what is called a ‘One Stop Shop’ for environmental approvals. The framework will shift the burden of approvals off the Federal Minister and onto State and Territory Governments.

The framework will consist of a network of bilateral agreements under the EPBC Act, which delegate final approval powers for projects assessed under the EPBC Act to the States and Territories¹⁵. State planning systems will be accredited under bilateral agreements to create a single environmental assessment and approval process¹⁶.

Memoranda of Understanding have already been signed with all States and Territories¹⁷. The next steps involve:

- drafting bilateral agreements¹⁸;
- negotiation of bilateral agreements within 12 months¹⁹.

The Federal Department of the Environment notes that:

“The one stop shop policy aims to simplify the approvals process for businesses, lead to swifter decisions and improve Australia's investment climate, while maintaining high environmental standards.”²⁰”

Whilst the majority of decisions will be decided by the States and Territories, the Commonwealth will retain control over decisions involving offshore Commonwealth waters, nuclear actions, and projects for which State Governments are likely to have significant conflict of interest²¹.

However these changes may be removing the Federal Government's ‘safety net’ role. The Federal Government's “interests on the protection of matters of national environmental significance”²² have in the

¹⁴ Senate Scrutiny of Bills Committee, Alert Digest 8/13, p. 14.

¹⁵ At present, the EPBC Act currently prohibits a person from taking an action without the Federal Minister's approval; approvals are not needed in cases where actions are already covered by bilateral agreements. Part 4, Division 1, EPBC Act.

¹⁶ DSEWPC, 2014, Fact Sheet: EPBC Act – Environment Assessment Process, Australian Government: Canberra.

¹⁷ See <http://www.environment.gov.au/topics/about-us/legislation/environment-protection-and-biodiversity-conservation-act-1999/one-stop>, accessed 26 February 2014.

¹⁸ See <http://www.environment.gov.au/topics/environment-protection/environment-assessments/bilateral-agreements>, accessed 26 February 2014.

¹⁹ <http://www.environment.gov.au/topics/about-us/legislation/environment-protection-and-biodiversity-conservation-act-1999/one-stop>, accessed 5/2/14.

²⁰ Ibid.

²¹ The Commonwealth will not delegate to the states decisions under its national environmental laws in which the states have a “conflict of interest”, at <https://theconversation.com/commonwealth-will-keep-environmental-power-over-state-projects-18688>, accessed 26 February 2014.

²² Commonwealth Department of the Environment <<http://www.environment.gov.au/topics/about-us/legislation/environment-protection-and-biodiversity-conservation-act-1999/about-epbc>>.

past played a role in stopping State Government approved projects. One example of the Federal Government preventing a decision by a State that would significantly impact environment protected under EPBC Act was the action of former Federal Minister Peter Garrett in refusing the Traveston Dam application. At the time, Minister Garrett was quoted as saying "my decision is entirely consistent with the legislation and entirely consistent with my responsibilities as Environment Minister,"²³ This role may now be reduced or altered in the bilateral agreement making with the states.

Proposed World Heritage Boundary Modification – Tasmania

The Abbott Government is seeking to re-classify the boundaries of the Tasmanian Wilderness World Heritage Area. The Tasmanian Wilderness was inscribed on the World Heritage List in 1982 and is described as one of the last expanses of temperate rainforest in the world²⁴. It combines unique and outstanding examples of environmental and cultural heritage²⁵. The World Heritage area was extended in 1989, again in June 2010, June 2012 and lastly modified in June 2013 by the Gillard government.

As part of what is termed a 'minor boundary modification', the Abbott Government proposes to remove 74,000 hectares from the World Heritage Area, retaining only 98,000 hectares (or 57%) of the 2013 extension²⁶. Speaking on Radio National Breakfast with Fran Kelly on 3 February 2014, Environment Minister Hunt stated that these:

*"... are areas which many people feel should never have been included because they significantly detract from what is one of the great world heritage areas"*²⁷.

He noted that none of the areas proposed to be removed by the modifications had previously been national parks or reserves and were not so because the Tasmanian government had never considered them "to be of sufficient quality"²⁸.

The proposal follows many years of political unrest within the Tasmanian forestry community. The Tasmanian Forestry industry has urged the government, to honour the 2013 Tasmanian Forests Intergovernmental Agreement²⁹.

The current boundary remains in place and continues to be protected under national environment law until a new boundary is agreed to by the World Heritage Committee. The boundary request was submitted now to allow time for consideration by the World Heritage Committee at its 38th session in Doha, Qatar in June 2014.

²³ The Sydney Morning Herald, Tony Moore, 'Unacceptable': Garrett rejects Blighs Traveston Dam 11 November 2009 <<http://www.smh.com.au/environment/unacceptable-garrett-rejects-blighs-traveston-dam-20091111-i91e.html#ixzz2ualXTrxb>>.

²⁴ UNESCO, no date, 'Tasmanian Wilderness', <http://whc.unesco.org/en/list/181>, accessed 5/2/14

²⁵ The Tasmanian Wilderness is one of the three largest temperate wilderness areas remaining in the Southern Hemisphere. The region is home to some of the deepest and longest caves in Australia. It is renowned for its diversity of flora, and some of the longest lived trees and tallest flowering plants in the world grow in the area. The Tasmanian Wilderness is a stronghold for several animals that are either extinct or threatened on mainland Australia. In the southwest Aboriginal people developed a unique cultural tradition based on a specialized stone and bone toolkit that enabled the hunting and processing of a single prey species (Bennett's wallaby) that provided nearly all of their dietary protein and fat. Extensive limestone cave systems contain rock art sites that have been dated to the end of the Pleistocene period. Southwest Tasmanian Aboriginal artistic expression during the last Ice Age is only known from the dark recesses of limestone caves.

²⁶ The proposed boundary modification relative to the 2013 boundary modification: <http://www.environment.gov.au/node/34177>, accessed 4/2/14.

²⁷ "Hunt: move to delist heritage areas no 'timber grab'", Radio National Breakfast with Fran Kelly, ABC Radio National, 3 February 2014.

²⁸ Ibid.

²⁹ <http://www.abc.net.au/news/2013-12-10/forestry-industry-urges-abbott-to-honour-peace-deal/5147818>, accessed 28 February 2014.

Climate Change Repeal – Regulatory Suite

The Abbott Government has resolved, from 1 July 2014, to abolish what it called the ‘Carbon Tax’. The ‘Carbon Tax’ forms part of the Carbon Price Mechanism (CMP), effectively a cap-and-trade emissions trading scheme introduced by the Gillard Government³⁰. This scheme began with a three-year fixed price on carbon, legislated to end in 2015 when the scheme would transition to a full emissions trading scheme with links to international carbon markets³¹.

In his Second Reading Speech, Prime Minister Abbott characterised the 2013 election as a ‘referendum on the carbon tax’³². He described his government’s new bill as:

“a cornerstone of the government’s plan for a stronger economy built on lower taxes, less regulation and stronger businesses.”³³

Illustrative of future environment and climate change policy, Prime Minister Abbott introduced a Direct Action Plan and an Emissions Reduction Fund:

“... there is a less complicated and less costly way to reduce greenhouse gas emissions – a way that will actually reduce emissions and will not damage the economy. The government will scrap the carbon tax and then proceed with its Direct Action Plan. The centrepiece of the Direct Action Plan will be the Emissions Reduction Fund – a market based mechanism for reducing carbon dioxide emissions, a fund which provides a powerful and direct additional incentive for businesses to reduce their greenhouse gas emissions.”³⁴

The package of new environmental bills sees the abolition Climate Change Authority (CCA) and the Clean Energy Finance Corporation in the need for ‘smaller climate bureaucracy’. Environment Minister Hunt argued that the Department of Environment possessed requisite skills and expertise to take on a role similar to the CCA and noted that:

“The government accepts the science of climate change. The government is committed to our unconditional emissions reduction target to reduce emissions by 5 per cent below 2000 levels by the year 2020.”³⁵

Despite Mr Hunt’s statement, a key advisor to the Abbott Government’s Business Advisory Council has recently publically denounced climate change science³⁶.

The Abbott Government’s large package of amendments will include:

- The removal of a number of Acts that legislated a price on carbon³⁷;
- The transfer of monitoring carbon price exploitation to the ACCC³⁸;
- The removal of tax offset, tax free thresholds³⁹ and levies⁴⁰;

³⁰ Pyburn, Swodoba, Talburg and Tomaras, 2014, Clean Energy Legislation (Carbon Tax Repeal) Bill 2013 [and] True-up Shortfall Levy (General) (Carbon Tax Repeal) Bill 2013 [and] True-up Shortfall Levy (Excise) (Carbon Tax Repeal) Bill 2013, Bills Digest No. 16, 2013–14.

³¹ Ibid.

³² Mr Abbott, Second Reading speech: Clean Energy Legislation (Carbon Tax Repeal) Bill 2013, 13 November 2013, accessible in Parlinfo Search.

³³ Ibid.

³⁴ Ibid.

³⁵ Mr Hunt, Second Reading speech: Climate Change Authority (Abolition) Bill 2013, 13 November 2013, accessible in Parlinfo Search.

³⁶ For example, Maurice Newman writes that climate change policies driven by "scientific delusion" have been a major factor in the collapse of Australia's manufacturing sector, at <http://www.theaustralian.com.au/national-affairs/policy/climate-policies-helped-kill-manufacturing-says-maurice-newman/story-e6frg6xf-1226792218812#>, accessed 26 February 2014.

³⁷ Clean Energy Legislation (Carbon Tax Repeal) Bill 2013.

³⁸ Clean Energy Legislation (Carbon Tax Repeal) Bill 2013.

³⁹ Clean Energy (Income Tax Rates and Other Amendments) Bill 2013.

⁴⁰ True-up Shortfall Levy (General) (Carbon Tax Repeal) Bill 2013, and True-up Shortfall Levy (Excise) (Carbon Tax Repeal) Bill 2013.

- A reduction in funding to The Australian Renewable Energy Agency (ARENA)⁴¹;
- The abolishment of the Climate Change Authority⁴² and Clean Energy Finance Corporation⁴³;
- Repealing substantial legislation relating to carbon pricing for the aviation industry and Synthetic greenhouse gas⁴⁴;

As yet, no positive legislation has been made public to enact what the Government has called its Direct Action Plan and Emissions Reduction Fund.

Within the transition period (to 1 July 2014), the ACCC gains a number of new powers to monitor and prohibit commercial price exploitation. From 1 July 2014 to 30 June 2015 there will be a new prohibition on price exploitation with respect to carbon and a new prohibition on false and misleading representations.

Cameron Algie
26 February 2014

⁴¹ Clean Energy Legislation (Carbon Tax Repeal) Bill 2013.

⁴² Climate Change Authority (Abolition) Bill 2013.

³³ Clean Energy Finance Corporation (Abolition) Bill 2013.

⁴⁴ Customs Tariff Amendment (Carbon Tax Repeal) Bill 2013; the Excise Tariff Amendment (Carbon Tax Repeal) Bill 2013; the Ozone Protection and SGG (Import Levy)(Transitional Provisions) Bill 2013; the Ozone Protection and SGG (Import Levy) Amendment (Carbon Tax Repeal) Bill 2013; and Ozone Protection and SGG (Manufacture Levy) Amendment (Carbon Tax Repeal) Bill 2013.