COMMONWEALTH OF AUSTRALIA

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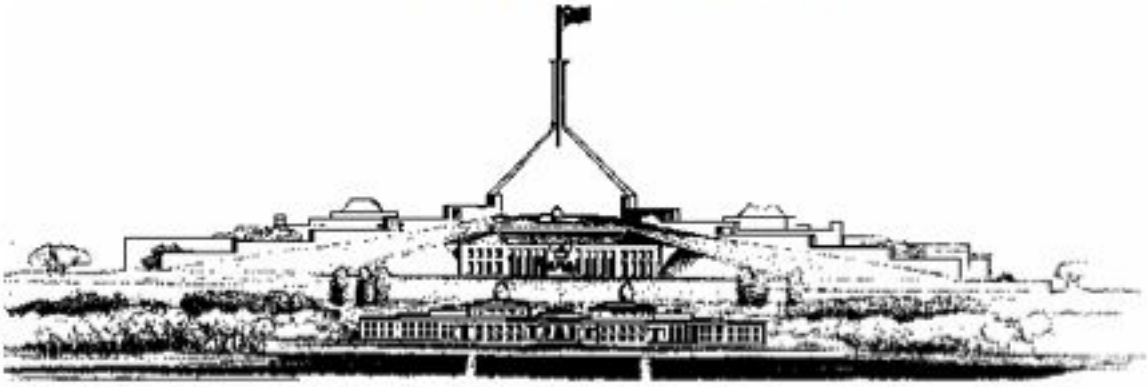

THE SENATE

MINISTER FOR THE ENVIRONMENT AND HERITAGE

Censure Motion

SPEECH

Wednesday, 9 August 2006

BY AUTHORITY OF THE SENATE

SPEECH

Date	Wednesday, 9 August 2006	**Source**	Senate
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Questioner		**Responder**	
Speaker	Brandis, Sen George	**Question No.**	

Senator BRANDIS (Queensland) (4.02 pm)—I have been sitting here for the last 20 minutes listening in utter fascination to Senator Carr constructing for himself an evermore implausible, elaborate, Byzantine conspiracy theory. As Senator Carr's time counted down, I thought: 'What a pity Senator Carr's time is expiring, because, if he had another 10 minutes, I am sure he could have worked out a way to persuade himself that Senator Ian Campbell had something to do with the Kennedy assassination.' Of course, Senator Carr, being an old-fashioned Stalinist, loves conspiracy theories. For Senator Carr, everything is a conspiracy. Senator Carr, I do not have any doubt that you believe it but, as the great Sir Isaiah Berlin once famously said, there is no a priori reason to believe that the truth, when discovered, will turn out to be interesting. Senator Carr, although I listened with rapt fascination to your elaborate baroque conspiracy theory, I am afraid the truth is much more prosaic.

What I am going to do in the time available to me is to take the Senate carefully, methodically, through the prosaic truth of the matter. But before I begin to do that—

The ACTING DEPUTY PRESIDENT (Senator Troeth)—Order! There is an enormous amount of talk and laughter coming from the opposition benches. The Senate would be obliged if that ceased. Please resume, Senator Brandis.

Senator BRANDIS—Before I do that, let me at once nail the misconception upon which Senator Carr's—and indeed Senator Evans's—entire case against Senator Ian Campbell seems to rest, and that is that there was a determination by the Federal Court of Australia against the minister's decision last Friday. That is not right. What there was last Friday was a consensual settlement of the litigation between Bald Hills Wind Farm Pty Ltd and the Commonwealth on the basis of which a Federal Court judge made a consent order—the most commonplace routine form of legal order—

Senator Wong—What about a costs order?

Senator BRANDIS—which, as you well know, Senator Wong—because unlike Senator Carr you do know a little about this—does not constitute, never constitutes, a determination by the court on the merits. Let us lay this to rest at the start. There has been no determination by any court on the merits of this case. What there has been is a negotiated resolution embodied in a consent order, and the use, as I tried to explain yesterday, of a formulaic expression in the consent order that it be remitted for determination according to law, which is purely a legal formula, does not constitute a decision by a court turning its mind to the merits of the question one way or the other.

Let us go back to the process, because the one thing that Senator Evans and Senator Carr did get right is that this is a question of process. The question on which Senator Ian Campbell stands or falls is the question of proper process. It seems to me that within that question there are three issues. The first issue is this: was the minister bound to follow the initial departmental advice, which it is common ground he did not follow? Plainly, the answer to that question is no, and I will explain why in a moment. The second issue is: was the minister entitled to commission and, having commissioned, to rely upon the study by Biosis Research Pty Ltd? Plainly, the answer to that question is yes. The third issue is: did the findings of the Biosis report support the minister's conclusion? Plainly, once again, the answer to that question is yes.

Senator Forshaw—There's a fourth question: why didn't you ask the parrot?

Senator BRANDIS—You can satirise this, Senator Forshaw, but if you are reduced to satire and the sort of Monty Python burlesque on which the Labor Party has gorged itself throughout question time rather than turning

your mind to the legal, factual and scientific issues that are raised by this debate then no doubt those who listen to the debate will judge your contribution accordingly.

Senator Forshaw—Madam Acting Deputy President, on a point of order: Senator Brandis should be addressing his remarks through the chair and not to me directly, and it was Senator Brandis who raised Stalin and the Kennedy assassination.

The ACTING DEPUTY PRESIDENT (Senator Troeth)—Senator Forshaw, in response to your point of order, Senator Brandis has referred his remarks through the chair and it is my understanding that he referred to you in the third person, which would indicate that it was through the chair. At this point I also ask opposition senators to refrain from interjecting.

Senator BRANDIS—Thank you very much indeed, Madam Acting Deputy President. I was not satirising Senator Carr when I made that remark either. What Senator Ian Campbell was obliged to do was discharge a statutory obligation set out in quite elaborate detail by the terms of the Environment Protection and Biodiversity Conservation Act 1999. What he in particular was obliged to do was to make a determination under part 9 of that act as to whether the particular project that was before him for consideration, the Bald Hills wind farm project in southern Gippsland, on the coastline of Gippsland, should be approved. But he did not have carte blanche in making that determination. He was governed by certain statutory criteria.

In particular, he was governed by the criteria in section 18, which is one of the core provisions of the act and which contains the scheme for the protection of endangered species. It is common ground that the orange-bellied parrot is an endangered species. It is listed on the appropriate lists of endangered species. We are told —and nobody has called this into question—that there are only 50 breeding pairs of this particular animal left. Apparently, most of them are in southern Victoria. So nobody is arguing that this is not an endangered species.

Therefore, the protective obligations under section 18 of the act calling for a ministerial determination under part 9 of the act are invoked. Section 18(3) of the act, dealing with endangered species, says:

A person must not take an action that:

(a) has or will have a significant impact on a listed threatened species included in the endangered category; or

(b) is likely to have a significant impact on a listed threatened species included in the endangered category.

The act then provides for an elaborate process by which such a determination may be assessed. In particular, the minister is required to commission one of five different varieties of assessment. That is an obligation that lies on the minister or his delegate under section 87 of the act.

The minister, by his delegate, adopted one of the five alternative courses of action that were open to him under section 87 for the purpose of making an assessment. That was, under section 87(4), to decide to commission an accredited assessment process. Nobody doubts or suggests that the minister, by his delegate, was doing the wrong thing in doing that. What happened—because this is the way in which the act is administered—is that the accredited assessment process was commissioned by the Victorian government. That is the commonplace way in which this act is administered. State government environment departments are accredited authorities for the purpose of assessment processes under section 87(4) of the act. That was done.

On 19 August 2004—and hold that date in your mind, Madam Acting Deputy President, because something important turns on it in a moment—the Victorian Minister for Planning wrote to the Minister for the Environment and Heritage, providing a copy of the assessment report for the Bald Hills wind farm. It was on the basis of that assessment report, itself a document generated within the Victorian government, that the department, through Mr Early, the senior officer of the department, provided the initial advice to the minister that it seemed that the Bald Hills wind farm project should be approved, subject to conditions, and made that recommendation.

Nevertheless, the minister, in consultation with the department, considered that the assessment report provided by the Victorian state government was insufficient. So, on 25 May 2005, on the advice of his department and in consultation with it, the minister commissioned another report, the report from Biosis Research Pty Ltd, to address a different or more particular issue which had not been addressed sufficiently in the assessment report generated by the Victorian government. That was to undertake a study to assess the cumulative impacts of bird strike from wind farms, including the Bald Hills wind farm, on priority Environment Protection and Biodiversity Conservation Act listed bird species, which included but was not limited to the orange-bellied parrot.

The minister, on the advice of his department and before making his decision, commissioned this further, more particular study. Why? You know, Madam Acting Deputy President, as a Victorian senator that there have been quite a number of these wind farms built along the shore of the Gippsland Peninsula. Whereas one wind farm in isolation might not pose a significant risk to migratory bird species whose routes of migration track through that area, if you build a multiplicity of wind farms along the migration path, depending on the heights at which the birds fly, trajectories and a range of other considerations that scientific experts know about but we do not, the greater the accumulation of wind farms in a given migratory bird area, the greater the risk to migratory bird species.

I think Senator Campbell was wise to heed the advice of his department to commission the further study by Biosis. The Biosis report was received, and this was its conclusion in relation to the orange-bellied parrot. I will read from page 47:

> Given that the Orange-bellied Parrot is predicted to have an extremely high probability of extinction in its current situation, almost any negative impact on the species could be sufficient to tip the balance against its continued existence. In this context it may be argued that any avoidable deleterious effect—even the very minor predicted impacts of turbine collisions—should be prevented.

Rather than the one birdstrike in a thousand years that the Labor Party kept citing, if you read the relevant sections of the Biosis report, as I have done, you will see that under three alternative models the authors of that report predict a likelihood of about one birdstrike a year from wind turbines built in this locality. Under the three different models, there is one study that suggests fewer than one a year—about 0.87 a year; one that suggests about one a year; and one that suggests a greater frequency than one a year.

That is what we are talking about. We are talking about the likely incidence of one turbine collision producing the loss of an orange-bellied parrot per year; this being a species in which there are only 50 breeding pairs left in the world. I think most people would consider that the avoidable loss of one per cent of the population of this endangered species per year was something which, to apply the statutory words in section 18 of the Environment Protection and Biodiversity Conservation Act 1999, would 'have a significant impact on a species'.

Relying on the Biosis report, and also relying on all of the other matters, Senator Campbell made an adverse determination. In doing that, he was acting within his statutory obligations. I do not want to embarrass Senator Carr in the eyes of his more intelligent colleagues such as Senator Wong, but Senator Carr would have had us believe that one of the mistakes that Senator Campbell made was that he did not follow the precedents. But you, Senator Wong, and you, Senator Kirk, both of whose legal skills I have considerable respect for, do not need to be told that an administrative decision maker always has to address the question before him on the basis of its own particular facts, and not be governed by precedents emerging from other circumstances in which there are materially different facts. He may have regard for guidance to precedents, but the one thing that is guaranteed to ensure that the decision of an administrative decision maker will be overturned is if the decision maker addresses his mind to the wrong question by slavishly applying a precedent involving different material facts to the determination of the very question before him.

Senator Campbell did the very thing he was meant to do. He addressed himself to the particular case before him. He did not slavishly say, 'Because we approved a different wind farm in a different part of the country, lying on land with different environmental characteristics in the past, we have to approve this one now.' That is what he avoided doing, as he should have done. In making his determination to refuse the application under section 133(7), Senator Campbell was in fact fulfilling his statutory duty under section 136 of the act, which says, among other things, in subsection (2):

> In considering those matters—

that is, applying the statutory criteria I read before—

> the Minister must—

I interpolate to emphasise the word 'must'; he does not have a discretion—

> take into account:
>
> (a) the principles of ecologically sustainable development; and
>
> (b) the assessment report relating to the action; and

… … …

(e) any other information the Minister has on the relevant impacts of the action ...

In the published decision which he made on 5 April 2006, Senator Campbell does list the various matters to which he had regard in the discharge of his statutory obligation under section 136 of the act—to have regard to the assessment report, but also to have regard to the other information available to him, which included the Biosis report. Ask yourself the question, Madam Acting Deputy President: if a minister has a statutory obligation to make determinations for the protection of endangered species, which include refusing applications for controlled projects, to use the statutory expression, 'which may have a significant impact on a species', and if he is seized of scientific conclusions to the effect that I have read to you, is he entitled to arrive at the conclusion that the project should not be approved? Of course he is. He might have been entitled to arrive at a different conclusion; I do not address that matter. But was he doing the wrong thing? Was he acting irrationally? Was he acting extra-jurisdictionally? Was he acting unlawfully in arriving at that conclusion, being seized of that scientific advice? Of course he was not.

There is one codicil to this story and it is this. You might remember, Madam Acting Deputy President, that I asked you to keep in mind that date—19 August 2004, the date on which the Victorian government's environmental assessment, which became the assessment report, was transmitted to the minister. That is put forward as the case in favour of approving the Bald Hills wind farm. You saw the pile of papers he had before him in question time; it was about two-foot thick. It was all the material that was sent to him by the Victorian government, but what was not sent to the minister by the Victorian government and in fact was not before him at the time he made that decision was a submission received by the Victorian government on 19 December 2003 from the Victorian Department of Sustainability and Environment. That was something to which the author of the assessment report had had regard but it was not provided to the minister. This is what it said about the orange-bellied parrot:

The Bald Hills wind farm proposal will increase the level of threat to the orange-bellied parrot, an IFG listed species. The department agrees that the orange-bellied parrot is unlikely to utilise the site; however, it is highly likely that the OBPs commuting between habitat patches in South Gippsland will fly across the site. Their commuting flights are often at heights encompassed by the rotor swept area.

(Time expired)