Australian Network of Environmental Defender's Offices Inc

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17 January 2014

Committee Secretary
Senate Standing Committees on Environment and Communications
PO Box 6100
Parliament House
Canberra ACT 2600

Dear Committee Secretary,

Environment Legislation Amendment Bill 2013

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.

ANEDO would like to thank the Committee for the opportunity to participate in the inquiry. Comments on each of the two elements in the Bill are set out below.

Validation of Past Decisions that Failed to Consider Approved Conservation Advices

Any measure that dilutes a requirement to consider scientific advice and removes accountability of the Minister and department for failing to follow the law is contrary to best practice and inconsistent with the achievement of the objects of the EPBC Act.

ANEDO notes the amendments made during the passage of the Bill in the House of Representatives. Removing the prospective application of the changes relating to approved conservation advices (ACAs) is a positive step that ANEDO supports. However we remain

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opposed to the changes proposed in the Bill as amended, as they will retrospectively remove what was a mandatory requirement for decision-making under the Act.

The administrative discretions given to decision-makers under the EPBC Act have a range of both statutory and common law conditions attached to them. The mandatory statutory conditions, including the requirement to consider ACAs, serve two important functions - to help ensure that decision-makers make decisions that are well informed and consistent with the objects of the Act; and to allow review of those decisions to ensure that standard is achieved. Removing that requirement significantly undermines the integrity of the scheme.

Additionally there is a presumption against and long commented concern about, retrospective changes to rights, obligations, powers, privileges or immunities. This is evidenced by section 7(2) of the *Acts Interpretation Act 1901*, the common law presumption against retrospective operation[1] and the Scrutiny Committee's terms of reference which encompass retrospective operation within TOR (1)(a)(i).[2] The policy underpinning the Bill, to provide proponent certainty, is not in the circumstances sufficient to overcome the longstanding and well recognised concerns about retrospective changes in rights, obligations, powers, privileges or obligations.

ACAs set out:

- the grounds on which the species or community is eligible to be included in the category in which it is listed;
- the main factors that are the cause of it being so eligible;
- information about what could appropriately be done to stop the decline of, or support the recovery of, the species or community or a statement to the effect that there is nothing that could appropriately be done to stop the decline of, or support the recovery of, the species or community.[3]

The Department of the Environment website describes ACAs as providing "guidance on immediate recovery and threat abatement activities that can be undertaken to ensure the conservation of a newly listed species or ecological community."[4] The reason that description says 'newly' listed species is that the Act anticipates that following the listing of the species a 'recovery plan' will ordinarily be developed.[5] However of the 1,746 species currently listed as threatened (including both species and communities, at each of the vulnerable, endangered, critically endangered, and extinct in the wild levels), only 796 species are covered by recovery plans.[6] The absence of the more detailed recovery plans[7] only elevates the importance of ACAs.

ACAs contain very significant information about the health of the relevant species and the requirements to ensure the ongoing survival of the species. Approved conservation advices are vital in ensuring that the decision maker has all the relevant information before them and

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[1] *Victrawl Pty Ltd v Telstra Corporation Ltd* (1995) 183 CLR 595.
[2] Noting in particular the Scrutiny Committee's comments on this Bill in Report 8 of 2013 at pp14-15.
[3] *EPBC Act* section 266B.
[4] Available at http://www.environment.gov.au/topics/biodiversity/threatened-species-ecological-communities/conservation-advices, accessed 16 January 2014.
[5] See *EPBC Act* Part 13 Division 5.
[6] Department of Sustainability, Environment Water, Population and Communities, Annual Report 2012-3, Table A10 p251, available at http://www.environment.gov.au/resource/department-sustainability-environment-water-population-and-communities-annual-report-2012, accessed 16 January 2014.
[7] The requirements of recovery plans are set out in the *EPBC Act* section 270.

is fully aware of the potential consequences on the particular species. For example in the *Tarkine* case failing to consider the approved conservation advice meant that the Minister had made the decision without considering:

- the timetable for possible extinction of the Tasmanian Devil;
- the lack of effective cures for devil facial tumour disease; and
- research priorities for the protection of the devil.[8]

These are clearly not trivial procedural matters which Parliaments have on many occasions accepted should not invalidate decisions. These issues are the essential substance of the decision that the Minister is required to balance to give effect to the object of the Act.

Attached is a list of all the decisions potentially affected by the changes proposed in the Bill. In essence the Bill is asking the Parliament to validate conduct by the executive that breached the standard currently required by the Parliament. Prior to passing the Bill ANEDO recommends that the Government outline to the Senate all the decisions about which there is some concern that the mandatory process required by the Act has not been followed. This would allow the Senate to make a much more considered decision about whether or not the retrospective validation of conduct that was in breach of the current Act is justified. At the very least, the Government should explain the decision-making process that gives rise to the concern. For example was it a common practice for decision makers to simply consider summaries or extracts of the ACA or other material that department officials considered overlapped with the ACAs, rather than providing the ACAs themselves to decision makers? Alternatively was the requirement to consider the ACAs simply overlook entirely?

Further the Government should also provide an explanation of how the content of the ACAs was considered by decision-makers, in order to satisfy the Senate that it is not being asked to validate decisions which, as in the *Tarkine* case, not only didn't meet a mandatory procedural requirement but also failed in substance to consider the extent of the damage that was being permitted to occur to matters of national environmental significance.

In the absence of compelling explanations to both questions it would be inconsistent with both the objects of the EPBC Act and the rule of law to support the passage of the Bill.

ANEDO does not support these changes to the Act.

However if the Senate does decide to support the intent of the changes proposed in the Bill ANEDO recommends that minor drafting changes be made to clarify the intended operation of the clauses. The amendment to item 1 in schedule 1 made during the passage of the Bill through the House of Representatives has created some ambiguity and structural untidiness that we submit the Senate ought to insist be rectified. The HoR amendment transformed item 1 from prospective operation for future decisions to retrospective validation for past decisions and actions taken before 31 December 2013 that have failed to comply with the mandatory requirement currently set out in the Act. In turn this means that sub item (1) of item 2 of the schedule is now redundant and some confusion is created by the absence of the 31 December 2013 limitation now included in item 1.

To rectify this confusion, current items 1 and 2 could be consolidated with the effect that the proposed amendment would read:

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[8] *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694 at [48].

1 Non-compliance with requirement to have regard to any approved conservation advice before 31 December 2013

(1) If a provision of the *Environment Protection and Biodiversity Conservation Act 1999* requires the Minister to have regard to any approved conservation advice, then a thing is not invalid merely because the Minister failed, when doing the thing or anything related to the thing at any time before 31 December 2013, to have regard to any relevant approved conservation advice.

(2) 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.

(3) All persons are, and are taken always to have been, entitled to act on the basis that the thing is, and always has been, valid and effective as mentioned in sub item (2).

At the very least, additional explanatory material should be included within the explanatory memorandum to clarify the operation of the item and avoid any confusion about the potential *prospective* operation of item 2.

Increases in Penalties for Offences Relating to Dugongs and Turtles.

ANEDO supports robust enforcement measures and the proposed increase in penalties to prevent environmental harms to dugongs and turtles.

However to achieve improved compliance with the Act it is our view that there are a range of other measures that should also be implemented to complement the increased penalties proposed in the Bill. In particular community education about the importance of these species and the need to protect them together with practical enforcement measures to catch and prosecute offenders will both be required to change offender behaviour. Without these complementary initiatives the level of penalty provided in the Act will be of little consequence.

Further, appreciating the Government's pre-election commitment relating to dugongs and turtles, it is unclear why the increase in penalties is restricted to these two particular species. In all other respects the EPBC Act creates no distinction between the various listed threatened species protected by the Act and the basis upon which these two species are considered differently from the other species that are otherwise afforded the same level of protection by the Act has not been explained. ANEDO submits that the increase in penalties should apply to all threatened species protected by the Act.

Amendments Relating to Approval Bilateral Agreements

In relation to the amendments moved by Mr Bandt and proposed to be moved by Senator Waters, ANEDO has previously made a number of submissions strongly opposing approval

bilateral agreements.[9] Attached is a summary of our objections. Consistent with this position we would support the removal of the provisions in the Act which provide for approval bilateral agreements as proposed in the amendments. As was argued during the HoR debate on the Bill it is simply not appropriate that the executive functions required to be exercised by a Commonwealth Act should be delegated to the executive of another jurisdiction over which the Commonwealth Parliament does not have direct control.

Yours sincerely,
Australian Network of Environmental Defender's Offices

Nicola Rivers
Law Reform Director
EDO Victoria

Attachments:

Impact of the proposed Environment Legislation Amendment Bill 2013 on the use of 'Conservation Advices'.

Objections to the Proposal for an Environmental 'One Stop Shop'

[9] See for example *ANEDO Submission to Productivity Commission Draft Report on Major Projects Assessment* and *Submission on Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012* at www.edo.org.au

Impact of the proposed Environment Legislation Amendment Bill 2013 on the use of 'Conservation Advices'

This table sets out all the decisions where a failure to consider approved conservation advices would have invalidated the decision. Under the changes proposed in the Bill any of these decisions made before 31 December 2013 will be made valid even if the decision maker failed to consider the approved conservation advice.

Note: 'conservation advice' is only used in relation to *threatened* species.

Section	What does the section specify?	What is the decision in regards to?
Section 34D Declarations relating to listed threatened species and ecological communities (Part 4, Division 2)	In relation to declarations under section 33, namely actions covered by Ministerial declarations and accredited management arrangements or accredited authorisation processes: *(1) The Minister may **make a declaration** under section 33 relating to a listed threatened species or a listed threatened ecological community only if:* … *(ca) the Minister has had regard to any approved conservation advice for the species or community…* *(2) The Minister may **accredit a management arrangement** or authorisation process under section 33 for the purposes of a declaration relating to a listed threatened species or a listed threatened ecological community only if:* … *(d) the Minister has had regard to any approved conservation advice for the species or community*	Declaration and management of species/ communities listed as 'threatened' in accordance with an accredited management/ authorisation process
Section 37G Declarations relating to listed threatened species and ecological communities (Part 4, Division 3)	In relation to declarations under section 33, namely actions covered by Ministerial declarations and bioregional plans: *The Minister may **make a declaration under section 37A** relating to a listed threatened species or a listed threatened ecological community only if:* … *(d) the Minister has had regard to any approved conservation advice for the species or community.*	Declaration of species/ communities listed as 'threatened' in accordance with a particular bioregional plan
Section 53 Agreements relating to listed threatened species and ecological communities (Part 5, Division 2)	*(1) The Minister may **enter into a bilateral agreement** containing a provision relating to a listed threatened species or a listed threatened ecological community only if:* … *(ca) the Minister has had regard to any approved conservation advice for the species or community…* *(2) The Minister may **accredit a management arrangement or an authorisation process** under section 46 for the purposes of a bilateral agreement containing a provision relating to a listed threatened species or a listed threatened ecological community only if:* … *(d) the Minister has had regard to any approved*	Entering into a bilateral agreement that contains a provision relating to a listed threatened species/community

	conservation advice for the species or community.	
Section 139 Requirements for decisions about threatened species and endangered communities	*(2) If:* *(a) the Minister is considering whether to approve, for thepurposes of a subsection of section 18* [Actions with significant impact on listed threatened species or endangered community prohibited without approval] *or section 18A,*[Offences relating to threatened species etc.] *the taking of an action; and* *(b) the action has or will have, or is likely to have, a significant impact on a particular listed threatened species or a particular listed threatened ecological community;* *the Minister must, in deciding whether to so approve the taking of the action, have regard to any approved conservation advice for the species or community.*	Approval of actions that may have a significant impact upon or be considered an offence relating to threatened species/ communities.
Section 146K Approvals relating to listed threatened species and ecological communities	*(1) This section applies if the approval relates to a listed threatened species or a listed threatened ecological community.* … *(3) The Minister must have regard to any approved conservation advice for the species or community.*	Deciding to approve an action in accordance with an endorsed policy, plan or program.
Section 201 Minister may issue permits	*(1) Subject to subsections (3) and (3A), the Minister may, on application by a person under section 200, issue a permit* [e.g. in relation to killing/taking/harming listed threatened species etc – see ss196-196E] *to the person.* … *(3A) The Minister must, in deciding whether to issue the permit, have regard to any approved conservation advice for the listed threatened species or listed threatened ecological community concerned.*	Issuing of permits in relation to the killing/injuring/ taking of threatened species/ecological communities
Section 238 Minister may issue permits (Part 13, Species and Communities – Division 3, Whales and other cetaceans)	*(3AA) If the specified action would or could relate to a species of cetacean that is a listed threatened species, the Minister must, in deciding whether to issue the permit, have regard to any approved conservation advice for the species of cetacean.*	Issuing of permits in relation to the killing/injuring/ trading/ 'treating' of cetaceans
Section 303DB Listing of exempt native specimens (Part 13A, Division 3 – Exports of regulated native specimens)	*(1) The Minister must, by instrument published in the Gazette, establish a list of exempt native specimens.* … *(6) The list must not include a specimen that belongs to an eligible listed threatened species unless:* … *(aa) the Minister has had regard to any approved conservation advice for that species…*	Exemption of certain threatened native specimens from the provisions regulating export of native specimens.
Section 303DG	*(4A) If the Minister is considering whether to issue a permit relating to a specimen that belongs to a particular eligible listed*	Issuing of permits for the (otherwise

Minister may issue permits (Part 13A, Division 3)	*threatened species, the Minister must, in deciding whether to issue the permit, have regard to any approved conservation advice for the species.*	prohibited) exportation of regulated threatened native specimens
Section 305 Minister may enter into conservation agreements (Part 14)	*(3A) If:* *(a) the Minister is considering whether to enter into a proposed conservation agreement that is wholly or partly for the protection and conservation of biodiversity; and* *(b) the agreement would or could affect a particular listed threatened species or listed threatened ecological community;* *the Minister must, in deciding whether to enter into the agreement, have regard to any approved conservation advice for the species or community.*	Decision to enter into a conservation agreement that may impact upon a listed threatened species/community

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Objections to the proposal for an environmental 'one stop shop'

The proposal for a 'one stop shop' for environmental approvals threatens biodiversity protection across Australia. Handing Commonwealth power to the States would endanger some of our most sensitive natural areas.

What's wrong with the 'one stop shop' proposal?

Only the Commonwealth has the mandate and willingness to consider the needs of the whole of Australia when approving projects that could affect the environment. A State government has no motivation to put the national interest before its own State interest when approving development within its own State.

We need the Commonwealth to ensure the efficient and effective implementation of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

It is a conflict of interest to allow States to assess and approve State-sponsored development on behalf of the Commonwealth. Would the Victorian Government reject its own election commitment to allow cattle grazing in Alpine national parks? Would the Queensland Government find that its State-endorsed coal expansion plans did not meet federal environmental standards? We can't expect that a government will properly consider matters of national environmental significance when its own financial and political interests are at stake.

An audit of state and territory laws by the Australian Network of Environmental Defender's Offices (ANEDO) clearly shows that no state or territory biodiversity or planning laws currently meet the federal environmental standards necessary to effectively and efficiently protect the environment. Therefore no state or territory can be accredited unless it significantly reforms its laws.

Since the completion of the ANEDO audit, many states and territories have in fact *lowered* their environmental law standards. Such lowering of state standards *increases* the need for Commonwealth protection of the environment. Accreditation of state or territory laws that do not meet minimum requirements:

- puts at risk matters of national environmental significance;
- is inconsistent with our international obligations; and
- creates a significant risk of the Commonwealth being exposed to legal liability.

There is a real danger that States will only lift their standards for matters that fall under the EPBC Act for the purpose of achieving Commonwealth accreditation, rather than lifting standards for all environmental impact assessment in their state. This will produce two completely different assessment processes within each state, creating more bureaucratic confusion and delay. If this occurs it would be a clear demonstration that the real aim of the changes is not efficiency and streamlining, but removing the Commonwealth from environment protection.

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Bilateral assessment agreements with states and territories have been in place for nine years, but the Commonwealth has never audited whether states and territories are complying with them. How will the Commonwealth ensure that federal environment protection standards will be maintained under the 'one stop shop' model? What independent body with the necessary environmental expertise will be appointed to assess this? The Commonwealth has not provided any information on whether it will put in place rigorous oversight to ensure states and territories are meeting federal standards.

Many state environmental laws are currently under review and in transition. For example, the NSW planning legislation is currently being developed and many environmental standards are to be determined by future instruments that will not be finalised by 18 September 2014, when an approval bilateral agreement is already intended to be in place. In order to achieve the Australian Government's aim of 'maintaining high environmental standards', any reform process must be predicated on states and territories having the necessary comprehensive suite of legislated process and outcomes standards in place and operative *before* accreditation can occur.

What must be done?

The Commonwealth must retain its power to protect Australia's environment for the benefit of present and future generations of Australians. Environmental approval powers and monitoring and enforcement powers must be retained by the Commonwealth. There should be no approval bilateral agreement in any state or territory.

The Commonwealth must renegotiate environmental *assessment* agreements in each state and territory and seize this once-in-a-generation opportunity to lift environmental standards across Australia and to produce a more consistent national standard of environment protection.

State and territory environmental impact assessment should only be accredited when it achieves the objectives of the EPBC Act and enshrines best practice environmental standards. These standards should be applied across the board to all environmental impact assessment in each state and territory, not just to Commonwealth-accredited assessments. Further, it is the Commonwealth's responsibility to ensure all assessments are conducted in a manner and to a standard that allows proper understanding of the impacts on nationally significant issues. This must be enshrined in assessment agreements.

Developments that pose a conflict of interest for states – i.e. state-developed projects or where the state has a significant financial interest – must be excluded from assessment agreements and instead continue to be assessed by the Commonwealth. The Commonwealth must also retain power to assess any development itself when it decides it is necessary on environmental protection grounds.

The Australian Government must properly audit state and territory compliance with assessment bilateral agreements throughout the life of the agreements to ensure states and territories are properly fulfilling the challenge of protecting nationally significant environmental matters in the national interest.

About us

The Australian Network of Environmental Defender's Offices is a network of nine public interest environmental law centres across Australia. We are environmental law experts and we assist the community to protect the environment and advocate for better environmental laws.

ANEDO supports a strong Commonwealth role in the protection of Australia's unique biodiversity and heritage.

For more information

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