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LAWYERS for FORESTS

17 January 2014

The Senate Standing Committee on Environment and Communications
Legislation Committee
Inquiry into the Environment Legislation Amendment Bill 2013
PO Box 6100
Parliament House
Canberra ACT 2600
By email only: ec.sen@aph.gov.au

Lawyers for Forests Inc submission re the Environment Legislation Amendment Bill 2013 (Cth)

1 This submission is made by Lawyers for Forests Inc (**"LFF"**).

2 LFF is a not for profit organisation incorporated in October 2000. It is an association of voluntary legal professionals working towards the protection and conservation of Australia's remaining old growth and high conservation value forests.

3 LFF writes this submission in response to the proposed amendments that would be effected by Schedule 1 (**"the Schedule 1 amendments"**) of the Environment Legislation Amendment Bill 2013 (**"the Bill"**) to the *Environment Protection and Biodiversity Conservation Act 1999* (**"the Act"**).

4 In summary, the LFF opposes the Schedule 1 amendments because they would derogate from the right of judicial review of a Minister's decisions, substantively weaken the function of approved conservation advice and operate contrary to the objects of the Act.

5 The detailed explanation of our position is contained in sections 6 to 8, which are as follows:

6 THE PROPOSED AMENDMENT

The Schedule 1 amendment to the *Environment Protection and Biodiversity Conservation Act 1999* (**the Act**) that the Environment Legislation Amendment Bill 2013 (**the Bill**) proposes to introduce reads as follows:

> 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.

A number of provisions of the Act require the Minister to have regard to any approved conservation advice. Pursuant to subsections 266B (1) and (2) of Division 5 of Part 13 of the Act, approved conservation advice is a document, approved in writing by the Minister, that contains a statement setting out the grounds on which a threatened species or threatened ecological 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, and either 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.

From subsections 266B (4) and (5) it is apparent that the [Threatened Species] Scientific Committee is the chief source of any approved conservation advice.

The functions of the Scientific Committee are set out under s 503:

> (a) to advise the Minister in accordance with Division 5 of Part 13 in relation to recovery plans, threat abatement plans and approved conservation advice; and
> (b) to advise the Minister (on the Minister's request or on the Committee's initiative) on the amendment and updating of the lists established under Part 13; and
> (c) to advise the Minister, at his or her request, on matters relating to the administration of this Act; and
> (d) to give the Minister such other advice as is provided for in this Act; and
> (e) to perform such other functions as are conferred on the Committee by this Act. (fn EPBC s 502)

Since the weight to be given by the Minister to any approved conservation advice is a key issue in the proposed amendment, we note the general breadth and importance of the Scientific Committee's advice. The Minister is required under to subsection 274(1) to 'obtain and consider' advice from the Scientific Committee on recovery plans, threat abatement plans and related matters, under s 277 on adoption of State plans, under s 280 on variation by a State or Territory of joint plans and plans adopted by the Minister, and under sections 289, 292 and 295 on wildlife conservation plans, adoption of State wildlife conservation plans and variation of such plans.

The Revised Explanatory Memorandum & its account of the consequences of the proposed amendment

The Revised Explanatory Memorandum of the Environment Legislation Amendment Bill 2013 ('**the Memorandum**') states the purpose of Schedule 1 of the Bill as 'to address the risk to past decisions' made under the EPBC Act arising from the Federal Court's decision in the Tarkine case[1], in which the approval given to Shree Minerals Limited under Part 9 of the EPBC Act was declared invalid due to a failure to 'have regard to' the approved conservation advice.

Item 1 of the Memorandum states at paragraph 1.4 that 'Item 1 [of the Bill] provides that if the Minister fails to have regard to conservation advices under the EPBC Act this will not invalidate any thing, in respect of any thing done by the Minister prior to 31 December 2013'. This explanation is drawn more loosely than the proposed amendment, omitting the qualifications 'merely' and the time-based reference. It is to be hoped that, if the proposed amendment is passed into law, the explanation at 1.4 of the Memorandum does not become the operative understanding of the provision, as this would create a wider ambit for ministerial and delegated actions than is said to be intended by the proposed amending provision.

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

The use of the term 'relevant' in paragraphs 1.2, 1.4 and 1.6 of the Memorandum, on the other hand, mirrors the insertion of the term into the proposed amendment ('any relevant approved conservation advice'). We note that the term used consistently throughout the Act is 'any approved conservation advice'. For example section 139(2), cited by Marshall J as the 'critical provision' in *Tarkine*[2], reads:

> If:
>
> (a) the Minister is considering whether to approve, for the purposes of a subsection of section 18 or section 18A, 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.

The term 'relevant' could be construed as permitting the Minister to decide, before having regard to the approved conservation advice, whether it is relevant and carries therefore the requirement to have regard to it. We consider this term should be omitted from any amending provision to maintain consistency in the legislative scheme.

The Memorandum asserts at paragraph 1.2: 'Provisions in the EPBC Act relating to approved conservation advice will not be effected (sic).' A similar statement is made in paragraph 1.6 of the Memorandum. While it is true that the provisions in the Act requiring consideration of any approved conservation advice, or account to be taken of such advice or regard to be had to it, remain, we do not agree that those provisions remain unaffected by the proposed amendment.

7 THE DECISION IN TARKINE

The importance of approved conservation advice in the scheme of the Act

In *Tarkine*, Marshall J gave detailed consideration to the place of approved conservation advice in the scheme of the Act. Paragraphs [8] to [12] of the Reasons for Judgment given 17 July 2013 set out the 'complicated statutory process'[3] for approvals under Part 9 for the taking of an action 'which will have significant impact on a listed threatened species or is likely to have such an impact';[4] '[S]uch approvals are not lightly given'.[5]

Paragraph 28 of the judgment reads: 'It can be discerned from the legislative scheme that the approved conservation advice for a threatened species is an important document which is intended to be used to inform the Minister's decision-making process.'[6] At paragraph 56 it was said: 'it is unsurprising that Parliament would require the Minister to have regard to any approved conservation advice from a scientific committee concerning a threatened species before approving an action which will have, or is likely to have a significant impact on that species.'[7]

The meaning of 'have regard to' in the scheme of the EPBC Act

[2] Ibid [24].
[3] Ibid [54].
[4] Ibid [53].
[5] Ibid [54].
[6] Ibid [28].
[7] Ibid [56].

The judgment in *Tarkine* contains detailed consideration of the term 'have regard to'. Marshall J refers to *Minister for Immigration and Citizenship v Khadgi* (2010) 190 FCR 248 at [57][8] and *Lansen v Minister for Environment and Heritage* (2008) 174 FCR 14 in which the Full Court determined the consequences of failure to consider matters in s 134(4) of the Act.[9] Referring to High Court authority on the question,[10] the majority in *Lansen* stated: 'The purpose of the legislation will be gleaned from the scope and object of the EPBC Act which gives the power to do that act. The ascertained purpose will determine whether the act done in breach of a condition precedent in the EPBC Act is valid or invalid.'[11]

Given his honour's view on the place of approved conservation advice in the scheme of the Act, he concluded: 'The Minister's failure to have regard to the document for the purpose of making his decision is fatal to its validity.'[12] He characterised it as 'a failure to comply with a statutory obligation ', stating 'it is the intention of the provisions of the Act dealing with the protection of threatened species is that an act done in breach of the requirement imposed by s 139(2) should be invalid'.[13] His honour noted that the Minister's failure to have regard to approved conservation advice could also be considered as 'failure to take into account a relevant consideration that he was bound to take into account'.[14]

Hence, while the Court in *Tarkine* contemplated that 'have regard to' could mean, in some contexts, 'mere consideration by the decision-maker' or, in others, 'a fundamental element in the decision-making process',[15] it concluded that in the context of the Act it bore the latter meaning: 'The Minister has a duty **to keep such matters in the forefront of his or her mind in the decision-making process** ... The requirement **to have regard to** any approved conservation advice relevant to a threatened species before approving action which may have impact on that species is **a pivotal element** of that system of protection.[16] (Emphasis added.)

Further consideration of 'have regard to'

Pursuant to s 15AA of the *Acts Interpretation Act* 1901, a construction of a provision 'that would promote the purpose or object underlying the Act ...shall be preferred to a construction that would not promote that object or purpose'. This principle was applied in the decision in *Tarkine.*

We have also considered the expression as a syntactical element of the legislative scheme in the context of the related expressions 'consider' and 'take into account'. Following *Wilson v Commissioner of Stamp Duties* (1986) 6 NSWLR 410 at 418-19 per Lee J,[17] we assume that unless the contrary is clearly apparent, the same words or expressions in the Act have been given the same meaning. As a corollary, we assume that different terms or words are used to express different meanings.

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[8] Ibid [42].
[9] Ibid [43].
[10] *Project Blue Sky* 194 CLR 355 at 390; *Commissioner of Taxation v Futuris Corporation Ltd* (2008) 82 ALJR 1177 cited in Lansen: ibid [43].
[11] *Lansen* [35] cited in *Tarkine* at [43].
[12] *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694, [49].
[13] Ibid [50].
[14] *Minister for Aboriginal Affairs v Peko-Wallsend Limited* (1986) 162 CLR 24 per Mason J at 42: *Tarkine* [60].
[15] *Khadgi* at [61]: cited in *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694 at [42].
[16] *Tarkine* at [42].
[17] Cited in Cook, C, Creyke, R, Geddes R & Hamer, D in *Laying Down the Law,* Australia 2005 at 254.

The following is a brief review of the use in the Act of the expressions 'consider', 'take account of' and 'have regard to' in relation to actions to be taken or decided by the Minister. As the three terms are not used solely in relation to approved conservation advice, we refer to their use in the Act in a wider range of decisions and actions.

The 'critical provision',[18] s139(2) illustrates that 'considering' and 'having regard to' are not interchangeable. 'Considering' is a more general term, while 'having regard to' occurs as part of the act of deciding. Regard must be had to specific material.

> If:
> (a) the Minister is **considering** whether to approve, for the purposes of a subsection of section 18 or section 18A, 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.
> (Underlining and bold added.)

Some provisions require the Minister to 'consider' indeterminate material (e.g. 'comments (if any) received'[19], or a broad array of information sources.[20]

Other provisions of the Act require the Minister to 'have regard to … any approved conservation advice[21] as a condition of certain Ministerial actions.[22] 'Regard' must sometimes be had to documents other than approved conservation advice, such as specific advices and settled documents.[23]

Provisions requiring the Minister to 'take into account' certain matters[24] concern specific subject matter where, however, there is likely to be a range of views or interests that need to be balanced. In the scheme of the Act, 'taking into account' occupies an intermediate position between general consideration of many sources of information and opinion and having regard to specific sources of advice and guidance that will be reflected in the decision.

'Have regard to' in its ordinary meaning

Subsection 15AB(1) of the *Acts Interpretation Act 1901* provides that while extrinsic material may be used to assist in ascertaining the meaning of a provision, regard should be had to 'the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the Act and the purpose or object underlying the Act'.

The expressions 'consider', 'have regard to' and 'take into account are not defined in the Act.

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[18] *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694 at [24].
[19] *Environment Protection and Biodiversity Conservation Act 1999* sections 276, 291 and 303FR and subsections 75(1A) and 303GB(9).
[20] Ibid subsections 87(3) and 146F(1).
[21] Ibid s 146K.
[22] Ibid s 37G; subsections 34D(1) & (2)(d)), 281(3), 303DB(6), 303DG(4A), 305(3A).
[23] Ibid s 270; subsections 176(5), 190(2), 269AA(3), 303FN(4)& (5).
[24] Ibid, eg subsections 269AA(5), 269A(5)(a), and 270B(5)(a)(i), and section 391.

The following dictionary meanings are provided for the Committee's assistance. In our view they are consistent with the use of the terms in the Act.

The *Oxford English Dictionary* (**OED**)[25] defines 'consider' relevantly as 'to contemplate mentally, fix the mind upon; to think over, meditate or reflect upon; bestow attentive thought upon, give heed to, take note of'.

'To have regard to' is defined in the OED as 'to give protective attention or heed to'.
As a substantive (noun) 'regard' is defined relevantly as:
- 'Observant attention or heed bestowed upon or given to a matter.
- 'Attention, care or interest, directed to some end. Chiefly in phrase *to have or take regard to* (a thing).'
- 'Attention, heed or consideration … having some effect on one's actions.'

'Take into account' is defined more tersely in the OED as 'to take into consideration as an existing element, to notice'.

8 LFF'S VIEW OF THE CONSEQUENCES OF THE PROPOSED AMENDMENT

The stated purpose of the proposed Schedule 1 amendment, 'to address the risk to past decisions', is not, in our view, a justifiable basis for the amendment. 'The risk' is, in reality, the normal provision for judicial review where the Minister has failed to consider a relevant matter, in this case if the Minister has not, when so required, had regard to the approved conservation advice for a species or ecological community that is or could be affected by a proposed action. In our view, the proposed amendment is an extraordinary measure to circumvent the legislatively sanctioned ability for aggrieved persons to seek review of a wrongly made decision.

The provision for review under section 5 of the *Administrative Decisions (Judicial Review) Act 1977* is for precisely the circumstances in which required procedure is not followed or relevant matters not taken into account. In proposing the amendment under Schedule 1, in our view the Minister shows insufficient regard for the reasons for judgment in *Tarkine*, specifically the importance of approved conservation advice pursuant to section 139(2) and the particular nature of 'having regard to' it in the context of the Act.

As the legislative scheme and ordinary definitions show, 'having regard' differs in character from general consideration. In the context of the Act, 'having regard' is inherently connected both in time and purpose with the ultimate decision phase of a Minister's deliberations on a matter. While it is correct to suppose that the Minister will have seen the approved conservation advice at the time it was approved by the Minister in writing, there may be considerable lapse of time between the approval of an advice for all purposes and the occasions on which it is applied in the making of particular decisions.

In our view the assertion that 'the provisions in the EPBC Act relating to approved conservation advice will not be effected (sic)' is untenable. If the proposed amendment is adopted so that it is effectively non-mandatory for the Minister to have regard to approved conservation advice, the advice itself is at risk of becoming ineffectual. Whether for one decision or many, this is contrary to the objects of the legislation.

While legislation can reasonably allow for a formality to be omitted or not performed as prescribed (e.g. allowing for comments submitted late to be considered, or for the Minister to complete some steps after a

[25] *The compact edition of the Oxford English Dictionary – complete text reproduced micrographically*, Oxford University Press 1971.

statutory deadline) we consider it inappropriate to treat the non-performance of substantively important conditions as mere house-keeping matters.

9. DOES SUNSETTING THE AMENDMENT MAKE IT SUPPORTABLE?

In our view it is important that the scheme of the Act is preserved. Therefore the 'sun-setting' of the proposed amendment would be an important step in reinstating the intended operation of the Act. However, the need to do so accentuates the arbitrary nature of the proposed amendment, running as it does counter to precedent and to the purpose of the Act.

We submit that the amendment, even for a limited period, is an inherently undesirable development.

Thank you for considering LFF's submissions in relation to this matter.

Yours sincerely,

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