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Dr Bradnee Chambers
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By email to: BChambers@cms.int

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Dear Dr Chambers

Australia's obligations under the Convention on the Conservation of Migratory Species of Wild Animals

Humane Society International (HSI) is the global arm of *The Humane Society of the United States* (HSUS) the world's largest animal protection organisation with over 12 million members. HSI Australia was established in Sydney in 1994, and we now have over 60,000 supporters. HSI is writing with regards to Australia's obligations under the Convention on the Conservation of Migratory Species of Wild Animals (CMS), as a party to the Convention and a signatory of a number of Agreements. HSI holds a number of concerns as to how the current approach by the Australian Government in removing what it calls 'green tape' and developing a 'one stop shop' for environmental assessment and approval is likely to impact upon these obligations. As a result we have sought further advice from our lawyers, the Environmental Defender's Office NSW.

Within Australia, species listed under the CMS are directly protected under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), with migratory species (protected under international agreement) listed as Matters of National Environmental Significance (MNES). The EPBC Act requires that a person wishing to carry out an activity that has, will have, or is likely to have a significant impact on migratory species, including those protected under the CMS, must refer that action to the Minister for Environment and undergo an environmental assessment and approval process.

The Australian Government has a goal of moving to a 'one stop shop' for environmental assessments and approvals, to avoid what it calls 'green tape' by September 2014. To this end, the Australian Government is in the process of developing and signing bilateral agreements with States in relation to both environmental assessment and environmental approval. This process will mean that the Australian government will all but remove itself from the decision making process and oversight with respect to projects that are likely to have a significant impact on listed migratory species.

The States and Territories in Australia have varying standards of protection for threatened

species and other fauna. To a very limited extent this may overlap with migratory species protected under the CMS. However, the emphasis of State and Territory legislation is the threat to species within the particular State or Territory. There is almost no reference to the CMS in State and Territory planning and environment legislation. In addition, an analysis by the Australian Network of Environmental Defender's Offices (ANEDO) has observed the inadequacy of State and Territory laws for the protection of threatened (including migratory) fauna.[1]

In the state of Queensland, the CMS is referred to in the following limited circumstances:

a. under Schedule 3A to the *Environment Protection Regulation 2008* as a location where certain mining activities may not occur; and

b. reference to the need to conserve existing populations of birds that are listed as of 'least concern' but fall under the CMS, when State government agencies are exercising a function or carrying out a power: *Nature Conservation (Wildlife) Regulation 2006*, clause 34.

In the state of New South Wales (NSW), there are references to the impact on migratory species as a matter for consideration in development applications. However, the term migratory species is not defined by reference to the CMS. No other State or Territory refers to the CMS.

The States and Territories within Australia do not have international obligations under the CMS. Rather, it is the Australian Government that has signed on to the CMS and is therefore obligated to comply with it. By signing over its approval powers under these bilateral agreements, the Australian Government is putting itself in a position where it will have very limited municipal legal powers to protect species listed under the CMS.

Oversight of the assessment and approval processes being devolved to the States will be carried out by Ministers with responsibility for planning and infrastructure development, rather than a Minister with principal responsibility for protection of the environment. From a governance perspective, this move is problematic where the subject matter involves migratory species of international importance. The governance issue is exacerbated by the fact that the bilateral agreements will apply to activities proposed by the States themselves.

Under the draft approval bilateral agreements (in particular, those for NSW and Queensland which we have examined most closely), the Australian Government will take almost no role in determining whether an activity might have a significant impact on migratory species or their habitat. It will be left to the State government to request the proponent to identify any such impacts, and left to the State government to assess the impacts of the action on those species.

The agreements also put in place a limitation on environmental assessment so that "*The extent of the assessment will be proportionate to the level of likely environmental risk*". This may give rise to a subjective and less rigorous assessment and approval process, particularly with States that are themselves seeking to fast track development for economic purposes. Legal analysis by ANEDO has found that no existing State or Territory major project assessment process meets the standards necessary for accreditation by the Australian Government.[2]

It appears that the approval bilaterals are also seeking to remove the process under which the Australian Government Minister for the Environment can determine that a proposed action is

[1] Protect the laws that protect the places you love: An assessment of the adequacy of threatened species & planning laws in all jurisdictions of Australia, 2012, ANEDO. See http://www.edonsw.org.au/native_plants_animals_policy

[2] Ibid.

'clearly unacceptable'. Instead, the approach is one of a hierarchy of avoid, mitigate, or offset impacts, rather than refusing applications on the basis of their unacceptable impacts on listed migratory species.

There is an internal inconsistency between this approach and the provision in clause 6.3 of the draft approval bilaterals that a decision maker will not act inconsistently with, relevantly:

> *"(e) for a listed migratory species:*
> *(i) Australia's obligations under:*
> *(A) the Bonn Convention;*
> *(B) CAMBA;*
> *(C) JAMBA;*
> *(D) ROKAMBA; or*
> *(E) an international agreement approved under section 209(4) of the EPBC Act; and*
> *(ii) a wildlife conservation plan for the species,*
> *as in force at the time the decision is being made."*

The Australian Government Minister for the Environment may determine that an action is not one to which the approval bilateral relates if the Minister considers that a proposed approval is inconsistent with the above matters. However, it is unclear how the Minister will become aware of this, given that assessment and approval will be occurring at the State level.

In addition, the focus of the agreement is on dispute resolution. It appears that any such determination will only be given in circumstances where the Australian Government considers, after dispute resolution, that an action is likely to create "*serious or irreversible damage.*" This is a higher bar than the terms found within the CMS, and the 'significant impact' trigger under the EPBC Act.

In summary, having regard to the above matters, HSI considers that the approach by the Australian government risks weakening the capacity for Australia to fulfil its protection obligations in relation to listed migratory species under the CMS by removing much of its capacity to control the matters set out in Article III(4) of the Convention.

In particular, by removing its oversight of activities that can affect migratory species, the Australian Government will not be well placed to prevent activities increasing obstacles or endangering listed migratory species.

We therefore ask you to seek further information from the Australian Government on how they remain able to effectively meet their obligations under the CMS Convention.

Yours sincerely,

Michael Kennedy
Campaign Director