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Australian Conservation Foundation (ACF) Submission to the Senate Inquiry in to the Environment Legislation Amendment Bill 2013

Overview

Australia's system of environmental laws is currently failing to prevent environmental degradation on almost every available indicator, including loss of biodiversity, habitats, and ecosystem health. Australia's environment laws, especially the Environment Protection and Biodiversity Conservation (EPBC) Act, need to be reviewed and strengthened to ensure that Australia's environmental health is maintained. This Bill would weaken rather than strengthen the rigour, objectiveness and accountability of the current Act, and should be rejected.

Schedule 1

ACF bases its assessment of this Bill on the following principles:

- i. Environmental decision making should be objective and based on science**
- ii. Certainty under the Act would be best promoted by stronger, not weaker, requirements to base decisions on scientific advice.**
- iii. Environmental decisions should be based on rigorous process**
- iv. Decision making on environmental impacts should be transparent and accountable.**

The effect of the proposed amendments under Schedule 1 of the Environment Legislation Amendment Bill 2013 is, according to the Government's Explanatory Memorandum, to:

Provide that a failure to comply with a requirement for specified decisions and instruments under the EPBC Act that the Minister must have regard to any relevant approved conservation advice, does not invalidate those decisions and instruments. The requirement to consider approved conservation advice under the EPBC Act is not otherwise altered by

the amendments. The objective of this amendment is to address the implications arising from the Tarkine case.

As amended in the House, the proposed legislation will only have effect in relation to decisions taken before December 2013, and will therefore be reasonably limited in effect.

However, the approach taken in this legislation, and its effect even for a limited period, are problematic for the following reasons:

i. Environmental decision making should be objective and based on science

Protection of endangered species is a central function of the EPBC Act. The Conservation Advice prepared in relation to a species is the best scientific information available on how to protect that species. A Minister's decision about a development impacting on a threatened species could not be made properly without regard to this advice.

The stated objective of addressing the implications of the Tarkine case is misguided, as the Tarkine case simply held that an improperly made decision was not valid. If a Minister fails to have regard to critical information which should have been considered, then the decision cannot be valid, and anyone concerned should be able to hold the decision maker to account in law, especially given the importance to many stakeholders of the decision in question. The appropriate way to address the implications of the Tarkine case would be to ensure that the Minister always has regard to the relevant Conservation Advice, rather than removing accountability for failing to do so.

ii. Certainty under the Act would be best promoted by stronger, not weaker, requirements to base decisions on scientific advice.

If any changes are made to how the Minister must regard Conservation Advice, a more appropriate change would be to require that the Minister cannot make a decision that would have an effect contrary to a Conservation Advice.

The Explanatory Memorandum indicates that the intent of the Bill is to "*provide legal certainty for specified decisions that require the Minister to have regard to any relevant approved conservation advice*" however at present stakeholders have no certainty that a decision will be made under the EPBC Act which has taken the best scientific advice into account. The Minister is only required to have regard to the advice, but not to act accordingly.

A central failing of the EPBC Act is that excessive ministerial discretion makes it hard to predict outcomes under the Act, and harder to have confidence that the Act's primary purpose – protecting the environment – will be given sufficient priority in decision making. Mandatory objective criteria for decisions made under the Act would provide better environmental outcomes and greater certainty than the current levels of ministerial discretion under the Act.

iii. Environmental decisions should be based on rigorous process

It goes against common sense and the spirit of the EPBC Act to maintain that a Minister must have regard to a Conservation Advice, but that it is not a legal error to fail to do so. The proposed change protects and therefore encourages sloppy or careless decision making instead of thoroughness and careful consideration.

iv. Decision making on environmental impacts should be transparent and accountable.

The role of communities in monitoring the impact and effectiveness of environment legislation is critically important. Any changes, such as the proposed amendments in this schedule, which weaken the ability of local communities impacted by decisions and by other community based groups to hold decision makers accountable through legal processes, will have significant negative consequences for democracy and the environment.

Schedule 2

ACF does not have detailed comments on the proposals made under Schedule 2, except to note that the protection of dugong and sea turtle populations is far more dependent on factors such as the industrialisation of their habitat, the effects of climate change, the existence of marine reserves, and the adequate resourcing of traditional owner Sea Ranger groups than the size of penalties imposed on any individual who may harm a dugong or turtle.