



PO Box 193 Surrey Hills VIC Australia 3127
Phone: (03) 9895 4493
Fax: (03) 9898 0249
Email: secretariat@nela.org.au

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

By email: ec.sen@aph.gov.au

17 January 2014

Dear Ms McDonald,

Environmental Legislation Amendment Bill 2013

The National Environmental Law Association (NELA) welcomes the opportunity to comment on the *Environmental Legislation Amendment Bill 2013* ('the Bill').

NELA is Australia's leading national environmental law organisation with a membership base that includes legal practitioners, law firms, academics, judges and policy makers.

Introduction

NELA believes that unless further amended, the provisions introduced by Schedule 1 of the Bill will be an inappropriate response to the decision of the Federal Court in *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694 ('the Tarkine decision'). The Federal Court found the former Minister's decision to approve a mine was invalid because he had failed to consider an "approved conservation advice", even where the Commonwealth argued that the substance of the advice had been considered in the content of briefings to the Minister.

The amendment proposed in Schedule 1 potentially undermines an important obligation in the *Environment Protection and Biodiversity Conservation Act 1999* ('the EPBC Act') for the Minister to have regard to an approved conservation advice. While retaining the words of obligation in the EPBC Act, the proposed amendment expressly removes any consequence for decisions made prior to 31 December 2013 if the Minister failed to consider the advice. As currently worded, the Bill may generate legal uncertainty as to its prospective application. Such uncertainty is undesirable and, to the extent that the Bill could assist in weakening the requirement to genuinely consider an approved conservation advice, it undermines the objects of the EPBC Act.

In regard to Schedules 2 and 3, whilst NELA welcomes the strengthening of penalties for offences in relation to turtles and dugong, we believe that the government also needs to increase efforts to address other, more significant, impacts on these species as a matter of urgency.

Genuine consideration of approved conservation advice is essential

The objects of the EPBC Act include at s 3(1)(a) "to provide for the protection of the environment, especially those aspects of the environment that are matters of national environmental significance...". Referring to ss.(3)(2)(d) and (e), the Federal Court noted in the Tarkine decision:

reference is made to achieving the objects of the Act, by, among other things, adopting an environmental assessment and approval process that will ensure activities that are likely to have significant impacts on the environment are properly assessed; and enhancing Australia's capacity to ensure the conservation of its biodiversity by including provisions to:

- (i) protect native species (and in particular prevent the extinction, and promote the recovery, of threatened species) and ensure the conservation of migratory species..

NELA believes that a legal consequence for failing to consider to an approved conservation advice is an essential step in seeking to achieve this aspect of the objects of the Act. Taking away a legal consequence would undermine environmental protection and also remove a measure that provides accountability of decision makers through access to administrative law remedies.

The Tarkine decision set aside the decision of the former Environment Minister Tony Burke to approve the Shree Minerals mine in the Tarkine region. It was successfully argued by the applicants that failure to adhere to section 139(2) of the EPBC Act, which provides that the Minister "must have regard to" any relevant approved conservation advice in deciding whether to approve the taking of an action, was a ground for invalidity. The Court stated:

The approved conservation advice is given an important status in the Act. It is a document which is approved by the Minister after advice from a scientific committee. Such an advice, prepared specifically in relation to a threatened species, would ordinarily be expected to be a significant document to take into account in making a decision which has the capacity to affect that species.¹

The Court was of the view that, given this significance, the Minister was "obliged to give genuine consideration to the document" and that

[s]ection 139(2) in mandatory language requires that, in deciding whether to approve the taking of the action, the Minister *must* have regard to any approved conservation advice for the species. Given the significance of the approved conservation advice in the context of the Act, it is not enough that the vast majority of the material provided to the Minister by his department overlapped with material in the approved conservation advice. The Minister was obliged to give genuine consideration to the document. Simply to say in a statement of reasons that he took into account "any relevant conservation advice" does not answer the question whether he considered that the approved conservation advice in relation to the Tasmanian devil was relevant to his decision.²

Furthermore, the Court held:

Given the Court's view of the significance of the approved conservation advice in the Minister's decision-making process in the statutory scheme, it is irrelevant for the purposes of s 139(2) that most of the material in the advice was before the Minister by other means.³

NELA believes that any proposal to remove a consequence for failure to consider the advice would render the obligation on the Minister to consider approved conservation advice meaningless. As a result, it would seriously undermine achievement of the objects of the Act.

However, NELA also appreciates the government's concern to limit any resultant legal uncertainty from the Tarkine decision in relation to past Ministerial decisions and, for this reason, we do not oppose Item 1 in Schedule 1. That said, the government's proposal suggests that similar omissions are not uncommon. Accordingly, there should be some public disclosure about the extent to which this has occurred, the consequences for listed species, and measures that will be taken to ensure that Australia's obligations under the Convention on Biological Diversity are still being met.

Schedule 1 – uncertainty as to prospective operation needs to be removed

Item 1 in Schedule 1 has been amended to limit its application to decisions made prior to 31 December 2013. NELA recommends that Item 2 in Schedule 1, be similarly amended to expressly restrict its operation to the doing of things (or anything related to things) prior to 31 December 2013.

To quote from the Minister's second reading speech:

The amendments apply retrospectively to ensure that past decisions are not put at risk of being invalid. This will provide certainty for industry stakeholders with existing decisions and the projects that rely on those decisions. The amendments will also apply to future decisions to avoid similar issues arising.⁴

¹ *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694 per Marshall J at [46]

² *Ibid* at [47].

³ *Ibid* at [49].

⁴ Hon Greg Hunt MP, Minister for the Environment, Second Reading Speech on the *Environmental Legislation Amendment Bill 2013*, House of Representatives, 14 November 2013.

The government subsequently amended the Bill to restrict the operation of Schedule 1 to decisions made before 31 December 2013. In his second reading speech response on 9 December 2013, Minister Hunt stated:

[W]e will, in good faith, put in place a sunset clause of 31 December—no tricks, no games. Therefore, all decisions made by the previous government will be closed and covered and protected against a technical deficiency. On our watch, in our time, on our responsibility we are not seeking that protection for all decisions after 31 December.⁵

The second reading speech of Senator Arthur Sinodinos when introducing the Bill to the Senate on 11 December confirmed this restriction, saying the “provision does not apply to decisions made after 31 December 2013.”⁶

However, Item 2 continues to provide that a ‘thing’ is valid and effective even if regard was not had to any relevant approved conservation advice – there is no time limit on the operation of that clause. Furthermore, Clause 3 of the Bill provides that an item in a Schedule has effect “according to its terms”. As a result, whilst Schedule 1, Item 1 (as amended) effectively restricts its operation to decisions made prior to 31 December 2013, there remains some uncertainty as to the operation of Item 2.

Schedules 2 and 3 - turtles and dugong need wider protection as well as increased penalties

Schedules 2 and 3 of the Bill propose to amend the EPBC Act and the *Great Barrier Reef Marine Park Act 1975* to impose higher penalties for offences relating to the unauthorised taking of marine turtles and dugong.

NELA acknowledges that these are serious offences that warrant appropriate penalties, and supports the proposed amendments.

However, NELA believes that increasing penalties alone will not address the most significant threats to these species. For example, the Dugong Demonstration Case Study detailed in Chapter 9 of the *Draft Great Barrier Reef Regional Strategic Assessment*⁷ states (at 9-7):

Currently, the greatest impacts on dugong populations in the World Heritage Area are habitat loss and degradation including impacts from: cyclone activity and extreme weather; nutrients, pesticides and sediment from catchment run-off; clearing or modifying of coastal habitats; coastal reclamation; direct impacts of dredging; dumping and resuspension of dredge material. Dugongs are also affected directly by disease, their incidental capture in nets (death of discarded species from the commercial net fishery and the Queensland Shark Control Program), marine debris, boat strike, illegal fishing and poaching, and hunting for traditional use to varying degrees.

NELA urges the government to increase efforts to address this range of other significant impacts on marine turtles and dugong as a matter of urgency.

Yours faithfully

✓ Amanda Cornwall
President
National Environment Law Association

⁵ Hon Greg Hunt MP, Minister for the Environment, Second Reading Speech on the *Environmental Legislation Amendment Bill 2013*, House of Representatives, 9 December 2013.

⁶ Hon Senator Arthur Sinodinos, Second Reading Speech on the *Environmental Legislation Amendment Bill 2013*, Senate, 11 December 2013.

⁷ Available at www.reefhaveyoursay.com.au/files/GBRMPA%20Strategic%20Assessment%20Report/GBRRegion-StrategicAssessment-DraftChapter9.pdf