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Submission on the Environment Legislation Amendment Bill 2013

WWF-Australia welcomes the opportunity to contribute to the work of the Senate Standing Committee on Environment and Communications (the Committee), in particular to contribute to the Committee's inquiry into the Environment Legislation Amendment Bill 2013 (the Bill).

Schedule 1

We understand that Schedule 1 of the Bill is designed to address implications for the Government arising from the Federal Court's decision to set aside the Minister's decision to approve a proposed action by Shree Minerals Limited, as detailed in the referral EPBC 2011/5846. While there are likely broader issues of environmental sustainability to be considered in the context of the proposed development, this submission focusses primarily on the legislative amendment proposed through Schedule One of the Bill, and the degree to which it sets out to exculpate the government from at least one instance of serious administrative oversight.

As the Federal Court's judgment in the case *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities*[1] (the Judgment) makes clear (paragraph 24), the Court found that the Minister failed to have regard to a mandatory consideration in section 139(2) of the *Environment Protection and Biodiversity Conservation Act 1999* (the Act), that is:

> *…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*.

[1] Federal Court of Australia, *Tarkine National Coalition Incorporated v Minister for Sustainability, Environment, Water, Population and Communities [2013] FCA 694*, July 2013

In this instance, the Federal Court found that the Minister failed to have regard to the Australian Government's own Approved Conservation Advice[2] for the Tasmanian devil.

The Judgment (paragraph 24) notes:

> *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.*

The Judgment goes on to note (paragraph 35):

> *The approved conservation advice was not contained in the proposed decision brief provided to the Minister in November 2012 or in the final decision brief provided to the Minister in December 2012. It was not provided to the Minister at all for the purposes of making his decision and he did not have a copy of the document before him for any such purpose.*

In response to the Judgment, this Bill attempts to make valid all decisions that have occurred prior to December 2013 where the Minister has failed to have adequate regard to approved conservation advice as required by the Act.

In undertaking an inquiry into the Bill:

- **WWF-Australia urges Committee to request further detail from the Minister on which approvals have been given in the absence of approved conservation advice, including details of the species that may have been disadvantaged and, in particular, which approvals would likely be overturned should the Bill not proceed.**

In considering the implications of the Bill, it is important to keep in mind the objects of the Act. It is designed to empower the Australian Government, through the Minister for the Environment, to consider likely impacts of proposed actions on nationally-listed threatened species and ecological communities.

The Federal Court examines the centrality of the approved conservation advice in paragraphs 37 to 49 of the Judgment, and reiterates its importance in paragraph 59:

> *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.*

If the Australian Government has failed to meet straightforward mandatory requirements regarding information provision, there may be deeper issues with the Government's capacity effectively administer the Act.

- **WWF-Australia urges the Committee to request details of any internal processes of review within the Commonwealth bureaucracy that occurred as a result of the Judgment, in order to consider more fully the issues which meant the Minister was not provided with the approved conservation advice, and led to the Federal Court's decision to set aside the Australian Government's decision.**

[2] Department of Environment, Approved Conservation Advice for *Sarcophilis harrisii* (Tasmanian Devil), May 2009

In its ruling, the Federal Court considered only whether the decision itself was administratively robust, and did not have grounds to consider further whether the Minister may have erred by identifying and imposing conditions on the approval in the absence of approved conservation advice.

However WWF-Australia considers this question a logical extension of the Court's judgment, and encourages the Committee to investigate whether the Government has been making decisions on the design and implementation of conditions on approvals that aim to ameliorate significant impacts on nationally-listed species in the absence of approved conservation advice.

The Australian National Audit Office is also currently undertaking an assessment *Managing Compliance with EPBC Act 1999 Conditions of Approvals* [3]which may provide evidence relevant to the Committee's work in understanding the implications of decisions, which have set conditions aimed to ameliorate impacts on threatened species but have been made without the benefit of approved conservation advice.

- **WWF-Australia encourages the Committee to seek advice from the Minister on how he developed conditions of approvals in the absence of approved conservation advice on the Tasmanian Devil in the case of referral EPBC 2011/5846, and**

- **WWF-Australia encourages the Committee to seek advice from the Minister on which other approvals, made in the absence of approved conservation active, also include conditions designed to mitigate significant impacts on matters of national environmental significance, and the process by which the Minister identified and arrived at those conditions.**

A number of previous inquiries, including the *Inquiry into the Operation of the Environment Protection and Biodiversity Conservation Act 1999*[4] undertaken in 2009 by the Senate Standing Committee on Environment and Communications, the *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*[5] undertaken by Dr Allan Hawke and completed in 2009, and the assessment by the Australian National Audit Office on *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999*[6] tabled in Parliament in 2003, have suggested substantial improvements can be made to the operation and administration of the Act.

This Bill provides the Committee with an opportunity to look more deeply at issues surrounding the Act, its effectiveness and operation, and to re-visit the recommendations of past Senate inquiries and reports which are likely, in most part, to be both current and relevant.

- **WWF-Australia urges the Committee to consider the Bill in the broader context of proposals for changes to the Act that have arisen from Parliamentary and other**

[3] Australian National Audit Office, *Audits in progress – Managing Compliance with the EPBC Act Conditions of Approvals – invitations for contributions*, January 2014

[4] Commonwealth of Australia, *Inquiry into the Operation of the Environment Protection and Biodiversity Conservation Act 1999*, April 2009

[5] Department of Environment, Water, Heritage and the Arts, *The Australian Environment Act: Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*, December 2009

[6] Australian National Audit Office, *Referrals, Assessments and Approvals under the Environment Protections and Biodiversity Conservation Act 1999*, April 2003

inquiries, and to assess whether passage of the Bill will allow the Australian Government greater capacity to effective administer the Act.

Schedule 2

WWF-Australia welcomes the increase in penalties and closer application of strict liability associated with offences related to protection of dugongs and turtles proposed in Schedule 2 of the Bill, and acknowledges this Schedule is designed to partially implement the Coalition's commitments under its "*Dugong and Turtle Protection Plan*[7]".

However:

- **WWF-Australia encourages the Committee to seek further information from the Minister on the number of successful prosecutions brought by the Commonwealth Government for offences related to illegal killing or injuring of dugongs and turtles in Commonwealth areas since the Act came into force in 1999, in order to assess more clearly the likely implications of the changes.**

Other matters

We believe that the broader context of the administration of environmental regulation should be considered as the Committee assesses the implications of this Bill.

WWF-Australia is concerned that significant pressures continue to be brought to bear on Australian governments, both national and state, as they seek to administer regulation designed to protect public health and environmental values. In particular, we are concerned that there is a misplaced belief that speed of approval should be prioritized over quality of assessment.

As Professor John Quiggan from the University of Queensland's School of Economics notes[8], mining companies operating in Australia are uniquely privileged in that the regulatory regime allows them to explore and exploit publicly-owned resources on private land without the consent of the land-owners. As a result Australian governments, both national and state, retain an important role in protecting public health and safeguarding environmental assets.

Concerns have been raised, for example by then Leader of the Opposition Tony Abbott[9], that the regulatory regimes designed to protect Australia's most precious environmental assets delay the plans of mining companies by up to three years, and to the extent that investment in their operation may become unviable. However, most projects subject to the Federal process are approved in less than twelve months, and mining investment has tripled since 2007[10].

It is of particular concern that debate around approvals for large and likely environmentally damaging projects is focused on how quickly the approvals should be given, rather than on how effectively the Australian Government is carrying its responsibility to administer a regulatory regime that government to prevent projects with unacceptable environmental impacts from progressing.

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[7] Minister for the Environment Greg Hunt, *Coalition announces Dugong and Turtle Protection Plan* media release, 15 August 2013

[8] The Conversation, *Factcheck: does it take three years to get approval for a mine?* 7 July 2013

[9] Liberal Party, Tony Abbott: *Address to Victorian Federal Campaign Rally*, Melbourne Victoria, 2 July 2013

[10] Australian Bureau of Statistics, *Actual and Expected New Capital Expenditure*, March 2012

- **We request that the Committee, and the Australian Government, take this opportunity to consider more deeply how to provide effective stewardship for public health and environment assets, and how to guarantee the need for protection is balanced against pressures to streamline environmental regulation and speed approvals for environmentally-damaging developments.**