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Christopher Briggs
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By email to: briggs@ramsar.org

3 June 2014

Dear Mr Briggs

Australia's obligations under the Convention on Wetlands of International Importance especially as Waterfowl Habitat 1971 (Ramsar Convention)

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 Wetlands of International Importance especially as Waterfowl Habitat 1971 (Ramsar Convention) as a party to the Convention. 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, Ramsar wetlands are only directly protected under the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act), with wetlands of international importance (listed under the Ramsar Convention) 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 the ecological character of a Ramsar wetland 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 Ramsar wetlands.

The States and Territories in Australia have much less emphasis on the protection of Ramsar wetlands. Victoria, Tasmania and South Australia make no reference at all to Ramsar in their

environmental planning or protection legislation.

In Queensland, Ramsar wetlands are only referred to under Sch 3A to the *Environment Protection Regulation 2008* as a location where certain mining activities may not occur.

In NSW, the legislative references to the Ramsar Convention comprise:

a. Schedule 4A of the Environmental Planning and Assessment Act 1979 deals with Ramsar wetlands as a 'sensitive coastal location' for the purpose of deciding whether coastal development proposals should be considered by a Joint Regional Planning Panel, rather than a local council;

b. Likewise the State Environmental Planning Policy (State and Regional Development) 2011 provides that certain development in Ramsar wetlands will follow the State significant development process (which does not itself make express reference to Ramsar wetlands as a matter for consideration);

c. A State Environmental Planning Policy does not permit Pond and tank based aquaculture in Ramsar wetlands; and

d. The Standard template local environmental plan does not permit exempt and complying development within 'environmental sensitive areas' which include Ramsar wetlands.

The States and Territories within Australia do not have international obligations under the Ramsar Convention. Rather, it is the Australian Government that has signed on to the Ramsar Convention 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 the 65 current Ramsar wetlands in Australia.

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 wetlands 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 the ecological character of a Ramsar wetland. 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 the wetlands.

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 the Australian Network of Environmental Defender's Offices (ANEDO) has found that no existing State or Territory major project assessment process meets the standards necessary for accreditation by the Australian Government.[1]

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

'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 a Ramsar site.

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:

> *"(iii) for the ecological character of a declared Ramsar wetland:*
> *(A) Australia's obligations under the Ramsar Convention;*
> *(B) the Australian Ramsar management principles;*
> *(C) a management plan that has been prepared for the wetland as described in section 333 of the EPBC Act;"*

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. It is not evident that the level of information being transferred by the States to the Australian Government will facilitate effective oversight of the manner in which Ramsar sites are being affected.

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 trigger appears to be far higher than the 'wise use' criterion in the Ramsar Convention and the 'significant impact' trigger within the EPBC Act.

In summary, having regard to the above matters, the approach by the Australian Government risks weakening the capacity for Australia to fulfil its protection obligations in relation to listed Ramsar sites by:

a. Giving away its role under Article 3(1) of the Ramsar Convention of promoting conservation and wise use of listed wetlands of international importance to State agencies that have a more localised planning and economy-based approach to natural resource management, and no legislative focus on the protection of Ramsar listed wetlands; and

b. Creating a situation where the Australian Government has a more limited capacity to establish the likely impacts on Ramsar listed wetlands, and thereby fulfil its role under Article 3(2) of the Convention.

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

Yours sincerely,

Michael Kennedy
Campaign Director