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To:

Committee Secretary
Senate Standing Committees on Environment and Communications
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Dear Secretary

**Environment Protection and Biodiversity Conservation Amendment
(Reconsideration of Decisions) Bill 2024**

BirdLife Australia is an independent grassroots charity, with over 360,000 supporters across Australia. We have been the voice for Australia's birds for over a century, protecting native birds and their habitats with on-ground projects and advocacy, informed by rigorous science and sound academic partnerships. Our conservation programs adopt a multi-species landscape-scale approach that is supported by thousands of volunteers and citizen scientists. The reform of Australia's national environmental laws to ensure the protection of Australia's threatened birds and their habitat is a key priority.

BirdLife Australia welcomes the opportunity to make a submission to the Senate Environment and Communications Committee on the Environment Protection and Biodiversity Conservation Amendment (Reconsideration of Decisions) Bill 2024 (the Bill). We oppose the Bill and recommend that Parliament rejects it.

The Bill seeks to amend the *Environment Protection and Biodiversity and Conservation Act 1999* (the Act) to provide that a request for reconsideration of a decision under section 78A of the Act, if made after 36 months have elapsed, can only be made by a Minister of the relevant state or self-governing territory in which the action is proposed to be taken. Currently there are no limitations on who is able to make a request for reconsideration.

The ability to reconsider decisions contained in section 78 in the Act is essentially there to ensure that appropriate reconsideration can be made where there has been a substantive change in circumstances or substantial new information has come to light. This provision thereby ensures that supervening changes in circumstances or knowledge are factored into environmental decision making to

ensure that protected matters under the Act are able to remain adequately protected.

Given the complexity and dynamism of environmental issues, and the potential community and economic impacts of these decisions, there is broad support for the proposition that decision makers should be able to maintain this flexibility.

The Bill recognises this proposition. However, the amendment it proposes is problematic. It proposes that after the elapsing of 36 months, the request for reconsideration of the decision can *only* be made by a state or territory minister in the relevant state or territory. That is, after the passing of an arbitrary time interval, there would be an extremely radical narrowing down – to the political leaders of the relevant state or territory government - of who would be able to request a reconsideration: no research institutions, no community groups, nor scientific experts, only the relevant state or territory minister. Anyone seeking to raise new information or a change in circumstances with the decision-maker would be subject to a state or territory government veto.

As the Committee is aware, the Act is now almost-universally seen to have failed in its objectives to protect Australia's environment, while also failing to provide certainty and predictability for all stakeholders, whether they be experts, communities or businesses. These issues were lucidly laid out and analysed in the Samuel review. We remain waiting, years later, for the major legislative reforms needed to fix Australia's broken Federal environmental laws.

Professor Samuel's review made it clear that the current Act was not trusted by stakeholders, across the spectrum:

The community and industry do not trust the EPBC Act and the regulatory system that underpins its implementation. A dominant theme in the 30,000 or more contributions received by the Review is that many in the community do not trust the EPBC Act to deliver for the environment.

The community and industry fundamentally don't believe, with good reason, that decisions made under the EPBC Act can achieve the outcomes they want. The avenues for the community to substantively engage in decision-making are limited. Poor transparency further erodes trust.

The EPBC Act is not trusted by industry. They generally view it as cumbersome, pointing to duplication, slow decision-making, and legal challenges being used as a tool to delay projects and drive up costs for business (often called 'lawfare').¹

The proposed amendment would result in a further narrowing down of who

¹ P. 81, Independent Review of the EPBC Act – Final Report

would be able to request that a decision be reconsidered. This would further erode trust in the current system, and arguably further politicises it, moving it further away from the model proposed by Samuel of a system characterised by more openness, accountability, and based on more rigorous standards-based decision-making.

Professor Samuel also sounded a note of warning on centering more power in environmental processes to the states and territories in the absence of a full recasting of the Act:

Past attempts to accredit States and Territories to make approval decisions that are consistent with the EPBC Act have been unsuccessful, due to lack of defined outcomes and concerns that decisions would be inconsistent with the national interest.

Reforms recommended by the Review provide confidence for the Commonwealth to accredit the processes and decision-making of other parties. This includes National Environmental Standards that set clear outcomes, improved data and information, and a comprehensive framework for monitoring and evaluating environmental outcomes.²

Providing the states and territories with a veto power over seeking reconsideration of decisions increases the potential for outcomes to not be in the national interest, given that the priorities and responsibilities of state and territory governments are restricted to areas of their own jurisdiction.

We, like all stakeholders, are frustrated with the failure of the Act. However, we caution strongly against this proposed legislative short circuit to address a symptom of this failure, seeing it as essentially counterproductive, and contrary to the widely-supported principles of effective and sustainable environmental law reform. The only way to achieve long-term better protection for the environment, and more certainty for communities and businesses, is to complete the long-overdue recasting of the Act.

Yours sincerely

Erin Farley
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BirdLife Australia

² p. 96, Independent Review of the EPBC Act – Final Report