australian network of environmental defender's offices

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5 March 2008

Mr Peter Garrett MP
Minister for the Environment
PO Box 249
Maroubra NSW 2035

Dear Minister,

Amendments to the
Environment Protection and Biodiversity Conservation Act 1999

As you know, the Australian Network of Environmental Defender's Offices (ANEDO) is a coalition of community legal centres from each state and territory that specialise in public interest environmental law. As the Government begins to formalise those strategies that will define its initial period in power, it is an opportune time for ANEDO to bring to your attention some of the key inadequacies that exist within the federal environmental legislation.

The Labor Government has started strongly in recognising the importance of proactive decision making in regard to addressing those issues of environmental significance. The new Government, in making the ratification of the Kyoto Protocol it's first official act, has not only demonstrated to the international community a commitment to the reduction of greenhouse gas emissions, but has additionally highlighted that this Government is clearly aware of the interest the Australian public has for those matters of environmental concern.

What is now required is a continuation of this demonstrated commitment to addressing those environmental issues of paramount importance through the instigation of measures on a domestic basis; namely the undertaking of much needed reform of the federal environmental legislation. Such "robust and forward looking policy development on the environment ... is at the heart of what political parties should do and should always be doing".[1]

[1] Garrett. P, 6 April 2005, *Australia: After Kyoto,* Address to the Sydney Institute

The *Environment Protection and Biodiversity Conservation Act 1999* (the Act) is the principal piece of national environmental legislation concerning matters of national environmental significance. In its current form, the Act fails to ensure that the decision making process is undertaken in such a way as to guarantee that all matters of national environmental significance are addressed, with adherence to sufficient safeguards in a transparent and accountable manner.

Our key areas for reform are:

1. **Comprehensive coverage of matters of national environmental significance**
   - The incorporation of an effective greenhouse trigger into the Act to both monitor and regulate those projects that contribute to significant amounts of CO2 emissions.
   - The consideration of cumulative impacts when assessing matters of national environmental significance.
2. **Public participation** - The establishment of a solid platform upon which public involvement can be incorporated into the environmental decision making process. This broader concept of greater public involvement will require:
   - a retention of the current standing provisions contained in the Act,
   - the incorporation of provisions that alleviate adverse costs orders upon potential environmental public interest litigants,
   - the reinstatement of section 478 to amend the current situation in which applicants are required to provide an undertaking for damages to successfully obtain an interim or interlocutory injunction,
   - the removal of applications for security for costs against public interest litigants,
   - the opportunity for third parties and applicants to obtain merits review on decisions that effect matters of national environmental significance, and
   - the opportunity for public interest litigants to apply for an upfront costs order prior to commencing the litigation process.
3. **Comprehensive review** – There is a need to review the role of the Commonwealth in environmental matters, especially in light of the cross-jurisdictional challenges of climate change, natural resource management and environmental protection. There are also a range of additional amendments that we have previously recommended to improve the Act, for example in relation to listing processes,[2] that should be considered as part of a comprehensive review.

The rationale for the proposed reforms is set out in the attached Background Paper.

[2] Our previous submissions may be found at http://www.edo.org.au/edonsw/site/policy.php.

We seek a meeting with your office to discuss ways to strengthen the EPBC Act further. Should you require further information, please contact Richard Haworth on richard.haworth@edo.org.au or (02) 9262 6989.

Yours sincerely
Environmental Defender's Office (NSW) Ltd

Rachel Walmsley
Policy Director

Environment Protection and Biodiversity Conservation Act 1999: Recommendations for Reform

The ANEDO recommendations for reform of the EPBC Act relate to 3 main areas:

1. **Comprehensive coverage of matters of national environmental significance**
    - 1.1 Greenhouse trigger
    - 1.2 Other triggers
    - 1.3 Consideration of cumulative impacts

2. **Public participation**
    - 2.1 Standing
    - 2.2 Costs
    - 2.3 Undertakings for damages
    - 2.4 Merits review

3. **Comprehensive review**
    - 3.1 Commonwealth role on environmental issues
    - 3.2 Additional amendments

1. Comprehensive coverage of matters of national environmental significance

1.1 Greenhouse Trigger

Undoubtedly one of the more prominent absences from an Act that purports to regulate matters of national environmental significance has been the lack of an effective "greenhouse trigger". The Intergovernmental Panel on Climate Change found that:

> "warming of the climate system is unequivocal, as is now evident from observations of increases in global average air and ocean temperatures, widespread melting of snow and ice, and rising global mean sea level"

and further:

> "most of the observed increase in globally average temperature since the mid-20th century is very likely due to the observed increase in anthropogenic greenhouse gas concentrations." [3]

Over recent years, ANEDO has recommended the incorporation of a trigger that would require referral and approval by the federal government for new proposals which emit over 100,000 tonnes of greenhouse gases or equivalent per 12 month period. In addition ANEDO has submitted that any such trigger should:

> "be supplemented by provision for all projects on a designated development list (including expansion of existing projects and significant land use change, including land clearing and motorway projects) to trigger approval provisions."[4]

This would ensure the trigger was more comprehensive in capturing diffuse emissions.

In Opposition, the Labor party has consistently supported the inclusion of a climate change trigger. It was documented in the Minority Report by Labor and Australian Greens Senators in response to the *Environment and Heritage Legislation Amendment Bill (No.1) 2006,* that "Labor and Australian Green Senators strongly support the inclusion of a climate change trigger in the EPBC Act."[5] Additionally, in an address to the Sydney Institute in April 2005, the need was specifically recognised "to have a greenhouse trigger in the EPBC Act."[6] Further more, Mr Albanese in a speech regarding the *Environment and Heritage Legislation Amendment Bill (No. 1) 2006*, moved that an amendment be inserted to "establish a climate change trigger to ensure that large scale greenhouse polluting projects are assessed by the Federal Government"[7].

Labor has now been given the opportunity to strengthen this fundamentally important piece of environmental legislation and ensure that this issue that has been so widely recognised as being of key importance, is now incorporated into the Act.

Recommendation:

(i) The incorporation of a greenhouse gas emission trigger that recognises any

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[3] IPPC, 'Climate Change 2007: The Physical Science Basis: Summary for Policy Makers, Contribution of Working Group I to the Fourth Assessment report of the Intergovernmental Panel on Climate Change (IPCC Secretariat Geneva, 2007) available at http://www.ipcc.ch/SPM2febo7.pdf

[4] Bonyhady, T. & Christoff, P. (eds) 2007, *Climate Law in Australia,* The Federation Press, Sydney.

[5] The senate, Standing Committee on Environment, Communications, Information Technology and the Arts. *Environment and Heritage Legislation Bill (no.1) 2006 [Provisions],* at pg 70.

[6] Garrett. P., 6 April 2005, *Australia: After Kyoto,* Address to the Sydney Institute.

[7] Albanese A, Speech given 30 October 2006 'Environment and Heritage Legislation Amendment Bill (No. 1) 2006, Consideration in Detail
Available at:
www.anthonyalbanese.com.au/file.php?file=/news/NPZGSOUJUWTLSLZHVLEFXUQQ/index.html

development that produces over 100,000 tonnes of CO2 equivalent per year as a matter of national environmental significance.

(ii) Supplement the trigger with a provision for all projects on a designated development list (including expansion of existing projects and significant land use change, including significant land clearing and motorway projects) to trigger the approval provisions.

1.2 Other triggers

There are a range of other triggers that would improve the efficacy and comprehensive coverage of the EPBC Act. Matters that should properly be considered as matters of national environmental significance and therefore trigger a federal assessment role include:

- Water extraction
- Dioxin emissions
- Wilderness
- Land clearing
- Wild rivers

For further details on these triggers and other possible matters of national environmental significance, please refer to our previous submission: *Possible new matters of National Environmental Significance under the EPBC Act 1999* - May 2005.[8]

1.3 Cumulative Impacts

There is currently no adequate process under the EPBC Act to assess the cumulative impacts of developments. While amendments to the Act have enabled a development to be considered as a whole rather than in stages (where approval may often be granted in stages through State laws), there is no assessment of the overall impact of a series of unrelated developments, for example on critical habitat for certain species or World Heritage values. For example, if the impacts of several developments on migratory birds are each assessed in isolation, it is difficult to prove that any one development will have a significant impact on a particular species. However, if considered cumulatively, there may clearly be a significant impact.

This approach also affects the assessment of impacts on World Heritage values. For example, in the context of the Great Barrier Reef World Heritage Area, which extends over 2000 km, the proponent may argue that one development will not impact significantly on the values. This conclusion would be different if cumulative development impacts were properly assessed.

[8] Available at: http://www.edo.org.au/edonsw/site/policy.php.

Recommendation:

The incorporation into the EPBC Act of a transparent assessment process that takes into account the cumulative impacts of development in an area, as opposed to assessing individual developments in isolation.

2. Public participation

The role of public participation in environmental decision-making to achieve environmental protection is paramount. Its vital importance is encapsulated in the following statement:

> "The fundamental reason why public interest environmental litigation is important is it promotes the environmental legal system's overarching objective of sustainable development by helping to protect the environment. It does this by enhancing transparency, rigour, and independence from politics in the regulation of human activities impacting on the environment."[9]

Public participation is crucial in ensuring the environmental decision making process is conducted in such a way as to obtain the best possible environmental outcomes in a legitimate and accountable manner. It is to these issues that we now turn.

2.1 Standing

The objects of the Act are set out in s 3(1) and include:

> "(d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous people"

Reflecting this objective, ss475 and 487 provide wide standing for parties that wish to seek injunctions to restrain offences against the Act or seek judicial review. Over the past eight years, community groups have used these provisions judiciously to improve the operation of the Act, assist in its interpretation and achieve environmental outcomes. Benefits from such participation have been noted in other jurisdictions. The Hon Justice Peter McClellan of the NSW Supreme Court in an address to the Commonwealth Law Conference in 2005, made the comment that:

> "It is apparent from the many cases in relation to the exploitation of natural resources, particularly forestry, that the opportunity for a plaintiff to bring proceedings without having to establish standing has meant that it has been possible to use the plaintiffs, sometimes limited, resources to debate matters relating to the operation of the relevant planning laws rather than debating issues of standing. Many of these cases have significantly enhanced the quality of environmental decision-making within New South Wales"[10]

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[9] McGrath. C. 2008 "Using federal environmental laws in the public interest" 25 *Environmental and Planning Law Journal* (forthcoming).

[10] McClellan, P. 2005 'Access to Justice in Environmental Law – an Australian Perspective' address to the Commonwealth Law Conference available at http://www.lawlink.nsw.gov.au/lawlink/Supreme_Court/ll_sc.nsf/pages/SCO_mcclellan120905

There is a common misconception that open standing could result in a plethora of unfounded environmental law action taken by the public. In our experience, this concern is unfounded. The commitment of time and resources involved in bringing public interest proceedings is such that they are never ventured upon lightly, even in jurisdictions where each party bears their own costs. Environmental groups tend to prioritise only the most strategic cases for bringing public interest proceedings. Under the current EPBC Act regime, many worthy cases with reasonable prospects of success are not brought because conservation groups are not prepared to expose themselves to the risk of adverse costs orders running to hundreds of thousands of dollars.

This being the case, it is essential that the legislative parameters that govern the eligibility of those parties who wish to become involved in public interest environmental litigation, are expanded rather than restricted, and that practical obstacles, such as the risk of an adverse costs order, be ameliorated

2.2 Costs

> "[T]he significant benefits of public interest litigation mean it should not be impeded by the costs allocation rules." [11]

Despite the broad standing provisions incorporated into the Act, the financial consequences associated with the litigation process equate to an obstacle that many environmental, public interest and community oriented parties are unable to surpass. Toohey J made the comment that:

> "there is little point in opening the doors to the courts if litigants cannot afford to come in. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of case to court. In any event, it will be a factor that looms large in any consideration to initiate litigation."[12]

These financial repercussions to which a potential litigant may expose themselves as a result of an adverse costs order, often provides a sufficient disincentive for such a party to even initiate the litigation process.

The situation that currently exists in federal public interest environmental litigation in regard to costs, is one where costs follow the event; i.e. in addition to paying their own legal costs, an unsuccessful litigant is additionally required to pay the legal costs incurred by the opposing party.[13] This concept is generally accepted

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[11] Australian Law Reform Commission, Report 75, Costs Shifting - who pays for litigation (1995), section 13, available at www.alrc.gov.au

[12] Toohey, J. 1989, Address to the National Environmental Law Association Conference.

[13] In the case of *Latoudis v Casey* McHugh J clarified that "the rationale of making a costs order is that it is just and reasonable that the successful party should be reimbursed for the costs incurred in bringing or defending the action": Unreported decision of the High Court, 25 February 1998 at 566.

as being a fair and rational approach to managing the issue of costs where the matter is "between two parties having individual and typically financial interests to advance,"[14] but is thoroughly inadequate when dealing with the issue of public interest litigation.

It is often the case that the opposition to those parties bringing an action in the public interest, will be in the form of a financially strong corporation or alternatively an arm of government. Both these entities are likely to be equipped with adequate funding which generally ensures that an adverse cost order would most likely not result in financial ruin. On the other hand, the reality of financial ruin for public interest litigants following an adverse costs order, is well with within the realms of possibility. An example of this can be observed in the case of *Wildlife Preservation Society of Queensland Proserpine / Whitsunday Branch Inc v Minister for the Environment and Heritage*[15]. In that case, Dowsett J awarded costs totalling $332,000 against the unsuccessful environmental litigant (a conservation group with assets totalling $200), resulting in the group being wound up.

It is worth noting that the recognition of an adequate way in which to approach the issue of costs in public interest litigation when challenging governmental decisions is by no means a recent notion. In 1973 Fox J made the comment that:

> "It seems to me undesirable that responsible citizens with a reasonable grievance who wish to challenge government action should only be able to do so at risk of paying costs to the government if they fail." [16]

The Labor Government has the opportunity to rectify the current inadequacies relating to costs that exist within the Act, and further demonstrate their recognition of the importance of those issues affecting the environment. Such avenues may include the incorporation of an own costs order rule into the Act, whereby both party's to a proceeding are liable solely for their own costs. This is by no means a novel concept in Australia, and has successfully been incorporated into the *Integrated Planning Act* 1997 (Qld).[17] This piece of legislation provides (section 4.1.23) an own costs rule for proceedings in the Queensland Planning and Environment Court:

> "Each party to a proceeding in the court must bear the party's own costs for the proceeding."

It is worth noting that the incorporation of this section into the *Integrated Planning Act* 1997 (QLD) has not resulted in an 'opening of the floodgates' response that is so often offer tendered as a potential consequence of any action that facilitates public access to the litigation process.

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[14] Unreported decision of the High Court, 25 February 1998 at 117.
[15] [2006] FCA 736.
[16] *Kent v Cavanah* (1973) 1 ACTR 43 at 55.
[17] Section 4.1.23, *Integrated Planning Act 1997 (Qld).*

Additionally under Section 49 of the *Judicial Review Act 1991* (QLD), an applicant is given the opportunity to make an application in public interest proceedings that each party pays its own costs.[18] Usually these orders are made at the start of proceedings.

Section 49 orders have only been used in a handful of cases in Queensland because the courts have taken a strict view in interpreting what meets the public interest criteria.[19] The creation of such a provision therefore would not open the floodgates to litigation. One environmental group who has used the provision is the Alliance to Save Hinchinbrook. They successfully sought an upfront costs order under s.49 of the *Judicial Review Act* on the basis that they would not otherwise be able to afford to conduct the litigation.[20] The Supreme Court also found that the group has a significant interest and reasonable case to review a decision of the EPA to allow the building of a breakwater in the Hinchinbrook channel opposite the Great Barrier Reef World Heritage area in North Queensland.

Inclusion of a section 49 style provision into the EPBC Act would make significant inroads toward removing prohibitive monetary obstacles to justice through the courts. Without such a mechanism, the financial uncertainties facing potential

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[18] Section 49 Costs--review application.
(1) If an application (the costs application) is made to the court by a person (the relevant applicant) who--
(a) has made a review application; or
(b) has been made a party to a review application under section 28; or
(c) is otherwise a party to a review application and is not the person whose decision, conduct, or failure to make a decision or perform a duty according to law, is the subject of the application;
the court may make an order--
(d) that another party to the review application indemnify the relevant applicant in relation to the costs properly incurred in the review application by the relevant applicant, on a party and party basis, from the time the costs application was made; or
(e) that a party to the review application is to bear only that party's own costs of the proceeding, regardless of the outcome of the proceeding.
(2) In considering the costs application, the court is to have regard to--
(a) the financial resources of--
(i) the relevant applicant; or
(ii) any person associated with the relevant applicant who has an interest in the outcome of the proceeding; and
(b) whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the relevant applicant; and
(c) if the relevant applicant is a person mentioned in subsection (1)(a)--whether the proceeding discloses a reasonable basis for the review application; and
(d) if the relevant applicant is a person mentioned in subsection (1)(b) or (c)--whether the case in the review application of the relevant applicant can be supported on a reasonable basis.
(3) The court may, at any time, of its own motion or on the application of a party, having regard to-
(a) any conduct of the relevant applicant (including, if the relevant applicant is the applicant in the review application, any failure to prosecute the proceeding with due diligence); or
(b) any significant change affecting the matters mentioned in subsection (2);
revoke or vary, or suspend the operation of, an order made by it under this section.

[19] *South East Queensland Progress Association v Greta Dorethea Anghel & Ors* [1995] 2 Qd R 454, *Save Bell Park Group v Kennedy* [2002] QSC 174

[20] *Alliance to Save Hinchinbrook Inc v Cook & Ors* [2005] QSC 355.

litigants will continue to restrain the potential of the court to serve the public interest.

An alternative method in which the issue of costs can be addressed, is through the incorporation of "protective costs orders" (PCO's) into the legislation; a concept that has been effectively incorporated into the English judicial system. PCO's operate in the following way:

> "In an early stage in the litigation, the Court can be invited to make an order prospectively affirming that the Claimant will not, regardless of the outcome of the case, be required to pay the costs of the Defendant or any third party."[21]

English courts have established criteria to be satisfied in order for an individual to be considered eligible to apply for a PCO.[22]

It is important to recognise that whilst the Federal Court Rules do provide for the court to make a maximum costs order[23] at a directions hearing, it is rarely implemented. A specific reference in the legislation for such an opportunity to exist purely for those parties acting in the public interest, would potentially lead to greater access to the legal system, and subsequently improve both accountability and public confidence in the environmental decision making process.

The final suggestion for reform in regard to costs, concerns the matter of applications for security for costs against public interest applicants. As discussed above, the limited financial resources of an individual or group acting in the public interest should not provide a barrier to the litigation process. As such, an application for security for costs should not be an option against public interest

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[21] Presentation by Blackstone Chambers in association with Liberty, "Focus on Public Law and Human Rights" 18 November 2005.
Available at www.blackstonechambers.com/pdfFiles/Blackstones_BJ.pdf

[22] The English criteria are:
The court must be satisfied that the issues raised are of general public importance;
that the public interest requires those issues to be resolved;
that the applicant has no private interest in the outcome of the case;
that having regard to the parties' resources and the likely costs it is fair and just to make the order; and,
that without the order, the applicant is likely to discontinue the proceedings and is reasonable in doing so (See: www.publiclawproject.org.uk/Downloads/CornerHouse.pdf)
The court elucidated those reasons for the inclusion of a PCO in (Corner House Research) v The Secretary of State for Trade and Industry[22], in stating: "The overriding purpose of exercising this jurisdiction is to enable the applicant to present its case to the court with a reasonably competent advocate without being exposed to such serious financial risks that would deter it from advancing a case of general public importance at all, where the court considers that it is in the public interest that an order should be made": (Corner House Research) v The Secretary of State for Trade and Industry [2005] EWCA Civ 192 [76]. We appreciate that changes to rules governing costs etc could be done either by amending the EPBC Act or by cognate reforms to relevant legislation dealing with costs.

[23] Federal Court Rules Order 62A Rule 1 Power to order maximum costs: The Court may, by order made at a directions hearing, specify the maximum costs that may be recovered on a party and party basis.

parties, as a very real potential exists that such an order would quash the litigation prior to the case commencing.

In summary, public participation is fundamental to ensuring that the environmental decision making process is one that encourages transparency, accountability and procedural fairness. It therefore seems illogical for the Act to potentially provide such a broad basis for standing, yet have a situation develop whereby financial constraints greatly limit the opportunity for public participation. Unless amendments are made to the current position whereby costs follow the event, the situation of limited access to the litigation process will continue to as a significant barrier to the transparent and accountable functioning of the Act.

Recommendation:

(i) The insertion of a provision into the Act that allows the court to consider granting an order that each party to a proceeding bear their own costs.
(ii) The insertion of a provision into the Act that allows the court to consider granting a protective costs order to a party to the proceeding.
(iii) The insertion of a provision into the Act allowing public interest parties to apply for a maximum costs order.
(iv) The insertion of a provision into the Act that prevents a party from making an application for security for costs against a public interest applicant.

2.3 Undertaking for Damages

On 15 January 2007, in the face of extensive criticism, section 478 of the EPBC Act was repealed. When in existence, this section prevented the Federal Court from requiring undertakings for damages as a condition of granting an interlocutory or interim injunction.

The explanation offered by the Government for repealing the section was to "bring the Act into line with other Commonwealth legislation"[24] and allow "the Federal Court to exercise its discretion to require an applicant for an injunction to give an undertaking as to damages, as a condition of granting an interim injunction."[25]

The reality however was that such an amendment established "a significant deterrent and barrier for 3rd parties,"[26] acted "as a disincentive for people seeking injunctions under the EPBC Act"[27] and removed "a considerable measure of

[24] Environmental legislative developments November 2006
Available at: http://www.freehills.com.au/publications/publications_6219.asp
[25] Explanation of EPBC Act amendments
Available at: http://www.environment.gov.au/epbc/about/history/explanation.html
[26] Submission to EPBC Ammendments Act Inquiry
Available at:
http://nccnsw.org.au/index.php?option=com_content&task=view&id=2021&Itemid=946
[27] Environmental legislative developments February 2007
Available at http://www.freehills.com.au/publications/publications_6376.asp

protection for conservation groups."[28] Submissions also highlighted the fact that the repeal of section 478 sent "a message that the government is not supportive of greater transparency and accountability for development proponents under the Act; a message at odds with the guiding ESD principles of the legislation."[29]

The reintroduction of section 478 into the Act is crucial. As the Act currently stands, the inability to provide an undertaking to pay damages will generally cause an application for an interim or interlocutory injunction to fail. As a result of this, any judgment obtained following a lengthy court hearing may well be useless, as the damage to the environment, which is most likely the subject of the injunction, may already have been done.

Recommendation:

(i) Reinstate the repealed section 478 into the Act in its original form:

478 No undertaking as to damages

The Federal Court is not to require an applicant for an injunction to give an undertaking as to damages as a condition of granting an interim injunction.

2.4 Merits Review

> "Merits review undertaken by review tribunals involves the capacity to 'step into the shoes' of government decision makers and to remake administrative decisions according to the merits of individual cases."[30]

Once a "controlled action" or approval decision has been made by a Minister, there are two possible methods of review, through an internal review by the Minister, and through Judicial Review to the Federal Court. Whilst it is important that opportunity for judicial review is retained to ensure that legal procedures are correctly followed, what is really required in the environmental decision making process is the opportunity for both applicants and third parties to apply for a review of a decision based on the merits of a case; i.e. was the correct decision made on the facts presented.

It cannot be said that there is no opportunity for merits appeal to the AAT under the EPBC Act, as appeals are available in regard to Parts 13, 13A and 15. These

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[28] Australian Council Of National Trusts, Submission To The Senate Committee Examining The EPBC Amending Bill 2006
Available at: http://www.nationaltrust.org.au/documents/SUBMISSION.pdf

[29] Peel, J. & Godden, L. 20006, Letter re 'Environment & Heritage Legislation Amendment Bill (No.1) 2006 Available at:
http://www.aph.gov.au/senate/committee/ecita_ctte/environment_heritage/submissions/sub15.pdf

[30] ARC, See also the discussion of the objectives of merits review in Chapter 2 of ARC, *Better Decisions: review of Commonwealth Merits Review Tribunals - Report No. 39* (AGPS, Canberra, 1995). Available at http://www.ag.gov.au/agd/www/archome.nsf (viewed 8 May 2005).

sections however, comprise only of "relatively minor permits, plans and conservation orders."[31]

The Labor Government whilst in Opposition, demonstrated significant concern for the effect the *Environment and Heritage Legislation Bill (No.1) 2006* would have on the rights of community groups to appeal Ministerial decisions to the AAT based on a merits review. During the second reading of the Bill, Mr Albanese made the following comments:

> "I am appalled that the government is making it even harder for community groups, including environment groups, to protect our natural flora and fauna by stopping appeals to the Administrative Appeals Tribunal. Labor will seek to restore AAT appeal rights"[32].

Furthermore, Mr Albanese made the statement that:

> "The checks and balances and transparency that were said to be such an integral part of the act are fast disappearing. Labor will restore that transparency. We will move amendments to repeal those sections of this amendment bill that remove the right to appeal ministerial decisions to the Administrative Appeals Tribunal"[33].

During another speech Mr Albanese gave, which further considered the impact of the Bill, he outlined that Labor had,

> "moved amendments which would repeal the proposals contained in this bill that will curtail third party appeal rights, undermine public consultation processes and further politicise decision-making processes"[34].

Labor now has the opportunity to follow through with these proposed amendments and reinstate those provisions that were removed from the EPBC Act following the implementation of the Bill.

It has been noted that:

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[31] McGrath. C. 2008 "Using federal environmental laws in the public interest" 25 *Environmental and Planning Law Journal* (forthcoming).

[32] Albanese A, Speech given 18 October 2006 'Environment and Heritage Legislation Amendment Bill (No. 1) 2006, Second Reading
Available at:
www.anthonyalbanese.com.au/file.php?file=/news/PNZFZLANIJILHMKPCYFKJQYD/index.html

[33] Albanese A, Speech given 18 October 2006 'Environment and Heritage Legislation Amendment Bill (No. 1) 2006, Second Reading
Available at:
www.anthonyalbanese.com.au/file.php?file=/news/PNZFZLANIJILHMKPCYFKJQYD/index.html

[34] Albanese A, Speech given 30 October 2006 'Environment and Heritage Legislation Amendment Bill (No. 1) 2006, Consideration in Detail
Available at:
www.anthonyalbanese.com.au/file.php?file=/news/NPZGSOUJUWTLSLZHVLEFXUQQ/index.html

> "a major limitation to the public accountability of decision making under the EPBC Act is the lack of a general ability to seek merits review of decisions (particularly decisions about controlled actions under Parts 7-9)."[35]

The lack of a merits review, particularly of those matters concerning "controlled actions", effectively allows the Minister to make a decision, taking into account purely subjective criteria, with no safeguards in place to ensure accountability or transparency. In addition to the absence of the availability of a merits review for "controlled actions" under Parts 7-9, "[T]he lack of merits review of decisions under section 184 of the EPBC Act contributes to listing processes not being fully accountable."[36]

The absence of an effective avenue for merits review, in particular for those decisions regarding the listing process, and those projects that amount to a "controlled action", "has greatly reduced the reach of the EAA provisions and their ability to assist conservation of biodiversity and heritage."[37]

Recommendation:

(i) The insertion of a provision into the Act that allows the court to grant the opportunity for third parties and applicants to obtain merits review on decisions regarding "controlled actions" under Parts 7-9 of the Act.

(ii) The insertion of a provision into the Act that allows the court to grant the opportunity for third parties and applicants to obtain merits review on decisions regarding the "listing process" under section 184 of the Act.

(iii) The repeal of the amendments made to the following sections as a result of the Environment and Heritage Legislation Bill (No.1) 2006 that abolish the right of appeal to the AAT: 206A, 221A, 243A, 263A, 303GJ, 472 and 473.

[35] McGrath, C. 2006, 'Review of the EPBC Act', paper prepared for the 2006 Australian State of the Environment Committee, Department of the Environment and Heritage, Canberra
Available at: http://www.deh.gov.au/soe/2006/emerging/epbcact/ index.htm

[36] McGrath, C. 2006, 'Review of the EPBC Act', paper prepared for the 2006 Australian State of the Environment Committee, Department of the Environment and Heritage, Canberra
Available at: http://www.deh.gov.au/soe/2006/emerging/epbcact/ index.htm

[37] Macintosh, A. & Wilkinson, D. 2005, 'EPBC Act – The Case For Reform', *The Australasian Journal of Natural Resources Law and Policy*, vol 10, no. 1.

3. Comprehensive review

3.1 Role of the Commonwealth in environmental matters

There has been a fundamental shift in recent years towards the 'nationalisation' of environmental issues. Governments have recognised that proper environmental protection is predicated upon a uniform and consistent approach to the environment. At the same time, climate change has emerged as the critical global environmental issue deserving attention. Increasingly, the linkages between climate change, environmental protection, natural resource management and biodiversity conservation are being recognised and better understood. Recognition and management of such linkages will require changes to the regulatory architecture, and should underpin the EPBC Act review process.

3.2 Additional Amendments

ANEDO and individual EDO offices, in cooperation with peak environment groups have made a number of submissions relating to ways in which the EPBC Act could be improved. For example, in 1998 EDO NSW drafted a submission on the original EPBC Bill on behalf of 30 environment groups.

Our *Submission on the Environment and Heritage Legislation Amendment Bill (No. 1) 2006* - 27 October 2006,[38] outlined concerns with the substantial raft of amendments made by the former Government. Some of the amendments passed constituted retrograde steps and are in need of reform. For example, a robust, comprehensive and transparent listing process for heritage and threatened species should be reinstated.

Environment groups have also identified areas for reform. A range of important amendments were articulated in 2002 by peak environment groups in *Further Strengthening the Environment Protection and Biodiversity Conservation Act 1999 and regulations – A proposed Set of Amendments*, February 2002.[39] The amendments outlined in the document warrant further discussion and consideration to ensure that the necessary amendment package is comprehensive in strengthening the Act's fundamental purpose of environmental protection and biodiversity conservation.

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[38] Available at: http://www.edo.org.au/edonsw/site/policy.php.

[39] Jointly submitted by: ACEL (ANU), ACF, Birds Australia, CCSA, CCWA, Environs Australia, HSI, NPA (NSW), NPA (Qld), NPAC, NCC (NSW), Tasmanian Conservation Trust, TWS, WDCS, WPS (Qld) and WWF-Australia.