australian network of environmental defender's offices

Submission to the 10 year review of the *Environment Protection and Biodiversity Conservation Act 1999* – interim report

10 August 2009

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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Introduction

ANEDO is a network of nine community legal centres in each State and Territory, specialising in public interest environmental law and policy. We welcome the opportunity to provide additional comment to the EPBC Review Committee in response to the Interim Report. ANEDO has provided significant comment at each stage of the review process as well as to past inquiries into many aspects of the *Environment Protection and Biodiversity Conservation Act 1999* (EPBC Act).

Scope of Submission

Our detailed views on the review of the EPBC Act were outlined in our initial submission to the Review Committee in January 2009[1] as well as our subsequent meeting with the Review Committee on 31 March 2009. We have therefore limited our comments in this submission to areas where we think additional comment is valuable with regard to specific issues raised in the Interim Report. Previous submissions and comments ANEDO has made to the Review Committee continue to apply.

Key recommendations

Environmental Impact Assessment under bilateral agreements

- The Act should allow members of the community to make submissions to the Minister once the State or Territory environmental assessment has been received to highlight any shortcomings and/or deficiencies in the State or Territory assessment process. The Minister must be required to consider these submissions prior to making an approval decision under s 131 of the Act.
- The Act should be amended to require DEWHA to undertake a public consultation process and seek submissions on the State or Territory environmental assessment report prior to the Minister making an approval decision.
- An independent expert advisory panel should be established to provide advice to the Minister and to make recommendations after assessing the State or Territory environmental assessment.

Regional forestry agreements

- The RFA exemption should be removed from the Act.
- If the RFA exemption is not to be removed ANEDO agrees with the review committees' initial findings that significant improvements need to be made to ensure RFAs are properly implemented, they are monitored and enforced by the Commonwealth and where they are not properly implemented the protections in the EPBC Act will apply instead. In addition, the process for developing RFAs, as well as the provisions of RFAs themselves should be properly reviewed to ensure they are meeting or exceeding the requirements of the Act.

[1] See ANEDO submission to the 10 year review of the *Environment Protection and Biodiversity Conservation Act 1999* – January 2009 found at http://www.edo.org.au/policy/090219epbc.pdf

Strategic impact assessment

- The Act should be amended to require strategic impact assessments to be undertaken at the earliest stage of publicly accountable decision-making, and to require a proper consideration of alternatives and comply with other principles of good practice strategic assessment.

Threatened species and ecological communities

- The recommendations in the recent paper *Assessing the conservation status of ecological communities* should be considered as part of the Independent Review.

Governance and decision making

- The requirement to make decisions that are consistent with ESD should be expressly stated in the Act, not in guidelines or policy statements. Criteria or guidelines should be developed to support the application of that rule.
- The Act should require decision-makers to give reasons for all decisions made under the Act.

Review mechanisms and access to courts

- The merits review provisions should be reinstated.
- The Act should provide for open standing for review actions
- Section 478 of the Act which prevented a court from requiring an undertaking for damages on an interim injunction must be reinstated.
- The Act should prevent a court from ordering security for costs for public interest proceedings.
- The Act should allow applicants to apply to the court for a decision on whether their proceedings are 'public interest proceedings' at any stage of those proceedings, and require a public interest costs order to be made in all public interest proceedings.

Chapter 4 - Environmental Impact Assessment

ANEDO notes that with the finalisation of bilateral agreements with every state and territory, environmental assessments for Matters of National Environmental Significance will invariably occur at the State or Territory level. This means that the environmental impact assessment regime in Parts 6-8 of Chapter 4 of the *EPBC Act* is now largely redundant. As we highlighted in great detail in our initial submission, we have significant concerns with some of the bilateral agreements finalised, as many of the processes accredited (such as Part 3A in NSW and many of the assessments in Victoria) are not comprehensive and do not prescribe robust public consultation requirements.

With this in mind, ANEDO agrees with the Independent Review that bilateral agreements must be regularly reviewed to ensure that they only accredit high quality processes. However, we note that this requirement already exists under s 65 of the Act as the Minister is required to ensure that bilateral agreements are reviewed at least every 5 years. As 5 years is a significant gap, ANEDO submits that the review mechanism must be supplemented by amendments to the Act that ensure that the Minister has the best information possible on the environmental impacts of a proposed project before making an approval decision. ANEDO suggests two key mechanisms.

First, the Act should introduce the ability for members of the community to make submissions to the Minister once the State or Territory environmental assessment has been received to highlight any shortcomings and/or deficiencies in the State or Territory assessment process. The Minister must be required to consider these submissions prior to making an approval decision under s 131 of the Act. We endorse the Young Lawyers Environmental Law Committee submission in this regard.

An ability to make submissions is especially important in cases where the State or Territory process does not incorporate appropriate public participation processes such as Part 3A. Under Part 3A, the final assessment report which is sent to the Commonwealth Minister under the bilateral agreement does not have to include public submissions or even a summary of them.[2] Therefore, the Commonwealth Minister may not be aware of the public's concerns and any environmental impacts not covered in the assessment report when determining whether to approve the project. As a result, ANEDO submits that the Act should be amended to require DEWHA to undertake a public consultation process and seek submissions on the State or Territory environmental assessment report prior to the Minister making an approval decision. A lesser option is to amend bilateral agreements to require public submissions to be sent to DEWHA as part of the State or Territory assessment report.

Second, ANEDO agrees with the contention in paragraph 19.73 of the Interim Report that *'it is arguable that the approval of major projects is necessarily a political decision but the environmental assessment of major projects is best done free of political interference by an independent agency or body.'* As noted, this approach is adopted in Western Australia where the EPA, largely independent from ministerial direction, has the primary advisory role in relation to environmental assessments.

Given the concerns about the quality of environmental assessments under bilateral agreements that we and others have raised, ANEDO submits that an independent expert advisory panel should be established to provide advice to the Minister and to make recommendations after assessing the State or Territory environmental assessment. However, key regulations would need to be made to ensure that there is a range of technical and environmental expertise on the panel, that the panel is independent with its own staff and no direction from the Minister, and that the panel's recommendations to the Minister are made publicly available. Moreover, amendments are needed to ensure that the Minister must have due regard to the panels report and recommendations prior to making an approval decision.

In summary, we submit that the two mechanisms above would significantly improve the environmental impact assessment framework of the *EPBC Act*, especially in the context of wholesale bilateral agreements across the country.

[2] See *An Agreement Between the Commonwealth of Australia and the State of New South Wales Relating to Environmental Impact Assessment.*

Chapter 6 - Forestry

As detailed in our previous submissions[3] and in our presentation to the review committee, ANEDO believes that Regional Forestry Agreements (RFAs) do not provide a standard of protection for forests and forest species equal to the EPBC Act (as was originally intended) and therefore the RFA exemption should be removed from the Act.

The importance of forests as a tool for climate protection is now well recognised internationally and is being incorporated into international instruments through the REDD process (reducing emissions from deforestation and forest degradation in developing countries). The importance of Australian native forests in storing carbon has recently been confirmed, with old growth mountain ash forest in Victoria being discovered as the highest carbon-storing forest in the world.[4] The research found that a much higher amount of carbon was sequestered through protection of native forest, particularly old growth forest, than logging and regrowth. The EPBC Act must begin to recognise the importance and value of native forests as one measure to address climate change. This cannot be achieved with the present RFA exemption which allows logging of native forest without a proper assessment of its impacts.

The Review Committees' initial findings are that significant improvements need to be made to ensure RFAs achieve better environmental outcomes, although it does not indicate support at this stage for removal of the RFA exemption. Although ANEDO strongly believes that the RFA exemption should be removed in its entirety, the following comments are made in relation to the interim findings of the Committee.

If the RFA exemption is not to be removed ANEDO agrees with the review committees' initial findings that significant improvements need to be made to ensure:

- RFAs are properly implemented (6.76, 6.90, 6.91)
- they are monitored and enforced by the Commonwealth (6.83)
- where they are not properly implemented the protections in the EPBC Act will apply instead (6.76, 6.115)

As noted by the Review Committee, the Commonwealth should have an active monitoring role to ensure RFAs are being properly implemented and complied with. This power will only be effective however if there are consequences for non-compliance. If the RFA exemption is to remain, ANEDO supports inclusion of a power under the Act to remove the exemption where it is found that an RFA is not being complied with or where it is not providing adequate protection of NES matters to a standard at least equal to that of the Act. This determination should be made by an independent

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[3] The reasons for this view have been set out in previous ANEDO submissions and therefore will not be set out again here. See ANEDO submission to the 10 year review of the *Environment Protection and Biodiversity Conservation Act 1999* – January 2009 found at http://www.edo.org.au/policy/090219epbc.pdf and ANEDO submission to the Inquiry into the operation of the Environment Protection and Biodiversity Conservation Act 1999 – September 2008 found at: http://www.aph.gov.au/Senate/committee/eca_ctte/epbc_act/submissions/sub90_revised.pdf

[4] Heather Keith, Brendan G. Mackey and David B. Lindenmayer; *Re-evaluation of forest biomass carbon stocks and lessons from the world's most carbon-dense forests*, June 2009, accessed at http://www.pnas.org/content/106/28/11635.full?sid=de972ae9-8aa8-40c5-9ca2-c106ee55c7d3

committee that is free from the political influence of State Governments as suggested at 6.93.

If the RFA exemption is to remain, and the RFA process is to provide the required protection of NES matters, there is an additional area where significant improvements are required within the RFA process – the RFAs themselves. As noted by ANEDO previously and by many other submitters, the RFAs are inadequate and are not based on good science. If the RFA exemption it is not to be removed, the RFAs themselves must be improved. There is limited value in the Commonwealth having increased powers to monitor and enforce RFAs as provisionally supported in the interim report, when the requirements contained within the RFAs do not provide adequate protection of the environment.

Although the Committee notes that it cannot review the RFA Act, having RFAs that achieve the objects of the EPBC Act (and therefore that justify an exemption from the Act) is a central element of determining whether the EPBC Act is meeting its objectives. The Committee should therefore recommend that the process for developing RFAs, as well as the provisions of RFAs themselves, are properly reviewed to ensure they are meeting or exceeding the objectives of the Act in order to justify the continuation of the exemption from the provisions of the EPBC Act.

Chapter 10 - Strategic assessments and bioregional planning

While the Review Committee has indicated the possibility of some reform to the strategic assessment provisions under the Act[5] ANEDO believes that more significant amendments to the strategic impact assessment (SIA) provisions under the Act are required if strategic assessment is to achieve better environmental outcomes.

While ANEDO has provided substantial comment in this regard in our initial submission to this review (and has had the opportunity to provide additional information to the Review Committee) we wish to further expand on our comments in light of our experience with the recent SIA process relating to the Victorian Government's proposed Program to extend Melbourne's urban growth boundary (UGB).

As detailed in our earlier submission to the review, while ANEDO broadly supports the notion of strategic impact assessment, we caution that SIAs must be 'subject to robust and strict criteria' to effectively address cumulative effects and thus achieve the best environmental outcomes.[6] The recent SIA of the Victorian Government's proposed Program to extend Melbourne's UGB considerably demonstrates the need to significantly improve the rigour of the strategic assessment process under the Act. The process undertaken in Victoria plainly demonstrates the critical need to establish more

[5] For example, at paragraph 10.72: the possibility of a power to 'call in' plans, policies or programs (existing or under preparation) for strategic assessment; or for the Commonwealth to have the power to embark unilaterally on strategic planning. Also at paragraph 10.89: The possibility for the Minister to retain a role in monitoring the implementation of landscape assessments and taking action in cases where the terms of the relevant agreement, policy or plan have not been complied with or are no longer appropriate, or where new information arises that may need to be accommodated in a revised set of conditions for the plan.

[6] See ANEDO submission to the 10 year review of the *Environment Protection and Biodiversity Conservation Act 1999,* p 35: http://www.edo.org.au/policy/090219epbc.pdf

rigorous guidance or methodology for ensuring that SIAs are consistent with the ultimate objectives of strategic assessment and that they are conducted in accordance with internationally recognised principles of good practice strategic assessment.

Two particularly fundamental elements for good practice strategic assessment are expanded on below and should be prescribed in the Act to ensure the quality of these assessments. Failure to observe both these elements were major failings of the purported SIA process in Victoria.

(i) Strategic assessment must be conducted at the earliest stage of decision making

As the interim report recognises, acting in a genuinely proactive way is critical to strategic assessment[7]. It is thus critical that the Act ensures that the environmental consequences of policies, plans and programs are identified and assessed during their preparation and before their adoption.[8]

As Brown and Thérivel note:

> *SEA methodology should emphasise the role of SEA as a PPP formulation tool. It is at the stage of PPP formulation, rather than of appraisal of an already formulated PPP (for instance, green paper stage, review, public consultation) that SEA can be most effective. PPPs go through a complex process of evolution during their development, and SEA has a significant role to play in this [process]…*
>
> *SEA should start early in PPP formulation and be integrated, preferably as an active intervention in the PPP design process. The added value of the SEA is likely to be severely diminished if conducted too late in the formulation stage. As Hedo and Bina (1999) note in their description of the SEA of an irrigation plan in Spain, "… the scope of the proposed options [initiated by the SEA] was limited by the advanced stage of the plans' [the PPP] formulation …". Curran et al (1998) note, "… ideally, the [S]EA should be commenced at the beginning of formulation of the development plan and continued as an interactive and influential process throughout the evolution of strategy and policies of the plan".[9] [SEA, Strategic Environmental Assessment, is a synonym for SIA. PPP is a policy plan or program].*

(ii) The assessment must consider alternatives to the proposed plan, policy or program

A good practice SIA should consider alternative options and the Act must ensure this in practice. Thomas, citing the International Study on the Effectiveness of Environmental Assessment, notes that an SIA should:

- use a scoping process to identify key issues and alternatives, clarify objectives and to develop terms of reference for the SEA;
- elaborate and compare alternatives, including no action options to clarify implications and trade-offs;

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[7] EPBC Act Interim report, para 10.72.

[8] Ian Thomas, Environmental Impact Assessment in Australia: Theory and Practice (4th ed., 2001), p53.

[9] A L Brown and Riki Thérivel, 'Principles to guide the development of strategic environmental assessment methodology' (2000) 18 (3) *Impact Assessment and Project Appraisal* 183, p187.

- undertake an impact analysis or policy appraisal to examine effects (issues), evaluate alternatives, and identify mitigation and follow up measures[10]

Without any consideration of alternatives there is no basis for concluding that the proposed policy, plan or program has adequately avoided, mitigated or offset environmental consequences.

As outlined in EDO Victoria's submission to the Victorian Growth Areas Authority, the purported SIA recently undertaken in Victoria in relation to the Program to extend Melbourne's UGB did not meet these critical requirements and thus could not be properly regarded a SIA. Rather, the process essentially reflected a large-scale and reactive environmental impact assessment (of similar but distinct planning projects) that was initiated in response to an already announced plan, policy or program to extend Melbourne's UGB and accordingly did not canvas alternatives to the proposed program, including the 'do nothing' alternative. It was therefore submitted that the SIA report could not be considered an adequate basis for endorsement and approval of the Program.[11]

We submit that the rigor of strategic assessments under the Act could be improved by prescribing requirements in the Act to ensure that strategic impact assessments are undertaken at the earliest stage of publicly accountable decision-making, properly consider alternatives and comply with other principles of good practice strategic assessment. The Minister should not endorse plans, policies or programs on the basis of strategic impact assessments that do not demonstrate compliance with these fundamental requirements.

Chapter 12 - Threatened Species and Ecological Communities

ANEDO would like to raise two further issues in relation to the listing of threatened species and endangered communities.

Inconsistencies in the assessment of ecological communities compared to species

We have been made aware of a recent review of listing protocols for ecological communities (Nicholson, E, Keith, D.A, and Wilcove D.S (2009) 'Assessing the conservation status of ecological communities' *Conservation Biology* 23, 259-274). The review paper highlights a number of important issues related to the listing process. In particular, the review paper identifies that listing protocols that apply different thresholds and criteria for species as compared to ecological communities (such as occurs under the *EPBC Act*) tend to require greater declines and more restricted distributions for ecological communities compared to species for listing in equivalent threat categories. This is despite the fact that the categories are meant to represent the same risk of extinction. This suggests that risks to ecological communities are being underestimated.

[10] Ian Thomas, Environmental Impact Assessment in Australia: Theory and Practice (3rd ed., 2001), 68. See also Barry Sadler, Environmental Assessment in a Changing World: Evaluating Practice to Improve Performance (1996), Chapter 6.

[11] See EDO (Vic) submission in response to the Strategic Impact Assessment Report for *Environment Protection & Biodiversity Conservation Act 1999*: http://www.edo.org.au/edovic/policy/edo_vic_strategic_impact_assessment.pdf

The review paper provides some recommendations as to how this issue could be addressed. We feel this issue should be considered as part of the Independent Review, particularly given the importance of protecting ecological communities as an approach to biodiversity conservation.

Condition of ecological communities

In response to the section beginning at 12.84 in the Interim Report, we believe that the current approach to listing under the *EPBC Act*, which uses condition thresholds to narrow the definitions of ecological communities (meaning that the listing only applies to stands of an ecological community in better condition), is problematic and should be re-considered as part of the Independent Review. The current approach effectively confounds the risk of extinction with prioritisation.

ANEDO submits that while consideration of the condition of a stand is relevant in determining recovery priorities or the significance of an impact on an ecological community on a case by case basis, it is a not relevant factor in determining the risk of extinction, which is the aim of the listing process.

Chapter 19 - Governance and decision-making

As we identified in our original submission, ANEDO submits that fettering ministerial discretion remains a key challenge under the *EPBC Act*. However, contrary to assertions in Chapter 19 of *Interim Report*,[12] we believe that any attempts to reduce ministerial discretion would not come at the expense of flexibility and would not lead to decisions that are detrimental for the environment.

The interim report identifies three suggested methods of reducing ministerial discretion under the Act – decision-making by independent panels, the preparation of prescriptive policy statements and guidelines and the requirement to give reasons for all decisions made under the Act. These will be discussed in turn.

Independent Panels

ANEDO has concerns over the suggestion that decision-making under the Act be divested to new decision-making bodies or panels. We submit that this would not address the problem of unfettered ministerial discretion under the Act.

First, although ANEDO recognises that it is important for relevant expertise to inform the process of development assessment, there are key problems with an approach that is unduly focused on technocratic decision-making through expert-based panels. Such panels are likely to assess projects through the application of technical expertise alone. However, development assessment is not simply an application of expertise, but a value-laden decision that much balance and weigh technical considerations against economic, social and environmental factors. There is therefore a danger that panels will not make balanced decisions because technical experts do not necessarily have the expertise to weigh the social, economic and environmental impacts of projects.

[12] Page 307, *Interim Report*.

Second, the ANEDO echoes the concerns of the Independent Review that giving over decision-making power to panels would make the Government less accountable for decisions made under the Act. This is because the Minister will have no responsibility over any approval or refusal decisions made in relation to particular MNES.

Finally, the introduction of decision-making panels would need to be accompanied by strict criteria and regulations to ensure the independence of panel members, broad expertise, mandatory environmental expertise and community representatives and also meaningful public participation processes which may increase the administrative complexity of the Act with no necessary improvement to decisions made.

ANEDO therefore submits that the creation of independent panels to make decisions is not a solution to broad discretion under the Act. The key problem is the legislative framework within which decisions are made. The *process* of decision-making must therefore be addressed. As we indicated in our initial submission, we believe that requiring the Minister to act consistently with ESD would be an appropriate fetter on ministerial discretion. This is discussed in more detail below.

Guidelines for decision-making

ANEDO welcomes the Independent Review's suggestion in the Interim Report that 'there may be a need for criteria or guidelines to be developed to better guide decision-making under the Act, in particular, the application of the principles of ecologically sustainable development (ESD)'.[13] This is consistent with our recommendations in the initial submission where we suggested that all decision-making under the Act should be made within an overarching ESD framework.

However, we submit that a requirement to make decisions that are consistent with ESD should be expressly stated in the Act, not in guidelines or policy statements. Such documents would be useful to provide support and guidance to the Minister and other decision-makers, but they should be complementary to a clearly stated requirement in the Act that all decisions must be made consistently with ESD. It is important that there is no argument over the legal enforceability of this requirement.

ANEDO notes that paragraph 19.145 of the Interim Report raises the argument that 'any prescriptive fettering of the parameters of Ministerial decision-making may come at the price of flexibility in terms of the decisions made under the Act. This may not always have a positive outcome for society or the environment'.[14] ANEDO strongly disagrees with this view. Indeed, it is difficult to see how any prescriptive fettering of the Minister's discretion through guidelines or mandatory adherence to ESD may lead to negative outcomes for society and the environment. In fact this should have the opposite effect.

The way the Act is currently framed and the wide discretion granted to decision-makers, has allowed governments to take vastly different interpretations of the Act. For example, since the Labor Government was elected into office in late 2007, more projects have been refused and there has been greater ministerial involvement in the Act by Minister Garrett than by the previous Liberal Government, which refused very few projects in the first 7 years of the Act. As we indicated in our initial submission, this 'flexibility' is an

[13] p286, *Interim Report*.
[14] Page 307, *Interim Report*.

inherent weakness of the Act. This is because vastly different outcomes and priorities are possible from the same piece of legislation even though the Act has as a primary goal the protection of Matters of National Environmental Significance. Whilst it is important that a decision-maker be able to make an individual decision based on the particular circumstances of each case and to weigh different priorities, it is clear that the Act does not provide enough guidance for decision-makers which has lead to vastly different outcomes.

Requiring adherence to ESD would not mean that flexibility is removed from the Act. Instead, it provides the legislative bounds within which such flexibility can be exercised. Indeed, it is important to remember that ESD does not dictate that every decision that has the potential to impact on MNES must be refused. Instead, it requires an explicit balancing and integration of social, economic and environmental factors. Therefore, mandatory adherence to ESD will require decision-makers to turn their mind to all aspects of a proposed development or activity and to demonstrate that a genuine attempt has been made to reconcile and accommodate the 'competing' interests of society, the environment and the economy.

Currently, ESD is simply another unprioritised consideration that can be disregarded once it has been considered. This is despite the fact that the ESD is itself meant to be the means by which competing considerations are weighed against each other. The current broad discretion afforded the Minister, with no requirement to adhere to ESD, means that decisions are made based on unarticulated factors which leaves the Act open to abuse. As such, decisions are often made that are detrimental to society, the economy and the environment.

Requiring the Minister to make decisions consistent with ESD will not eliminate the difficult nature of some decisions. However, the delicate balancing of environmental, economic and social factors will become more explicit, since the Minister will have to demonstrate how ESD will be achieved in relation to a particular project before it can be approved. This will ensure that only sustainable decisions are made under the Act.

Reasons for decisions

As we indicated in our initial submission, ANEDO supports a requirement for decision-makers to give reasons for all decisions made under the Act. However, this should operate in conjunction with a mandatory requirement to adhere to ESD in all decision-making under the Act. In and of itself, a requirement to publish reasons for all decisions does not address the broad discretion granted to the Minister.

On the other hand, a requirement to publish reasons for all decisions made under the Act will dramatically improve transparency and accountability, since a decision-maker will have to make public the factors that lead to a particular decision being made and how environmental, social and economic considerations have been balanced and integrated in any approvals given.

Chapter 20 - Review mechanisms under the Act and access to Courts

Merits Review

ANEDO supports that comments made in paragraphs 20.49 to 20.52 and 20.69, and the recommendation of the Senate Committee in paragraph 20.59 of the Interim Report.

ANEDO notes the Minister's grounds for the 2006 amendment revoking merits review for Ministerial decisions that 'where decisions are sufficiently important to be taken by the Minister as an elected representative, those judgment should not be overturned by an unelected tribunal such as the AAT'.[15]

ANEDO submits, however, that merits review plays an important role in ensuring accountable and transparent decisions are made under the Act. Furthermore, the availability of merits review for significant decisions will ensure that better decisions are made, which will lead to a greater public confidence in the operation of the Act.

The Interim Report also outlines 4 options for consideration when deliberating on any expanded merits review.[16] ANEDO supports options 1-3 as good complementary measures to any expanded opportunity for merits review but not as an alternative to merits review.

Legal standing

ANEDO supports paragraph 20.123 of the Interim Report which supports 'open standing' being incorporated into the Act. There is a common misconception that open standing could result in a plethora of unfounded environmental law action taken by the public. In ANEDO's 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 due to the costs of doing so.

Undertaking for damages

ANEDO supports paragraphs 20.126 – 20.128 of the Interim Report.

ANEDO submits that 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.

[15] Referred to in paragraphs 20.57and 20.63 of the Interim Report
[16] Referred to in paragraph 20.70 of the Interim Report

Security for costs

ANEDO supports paragraph 20.129. ANEDO submits that security for costs should not be available against public interest applicants. 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 parties, as a very real potential exists that such an order would quash the litigation prior to the case commencing. Recent amendments in the NSW Land and Environment Court recognise the importance of public interest litigation and allow a judge to refuse to order security for costs in public interest matters.[17]

ANEDO also submits that the *Federal Court Rules* and judicial precedent are not effective in preventing the inappropriate use of security for costs applications.

The EPBC Act should prevent a court from ordering security for costs for public interest proceedings.

Public Interest Cost Orders

As indicated in the interim report at 20.131, provisions should be included in the EPBC Act to ensure that meritorious public interest litigation is not discouraged due to concerns over costs. Our previous submissions have supported this view. ANEDO has recently been engaged in significant research to determine the most effective form of public interest costs orders in the Federal jurisdiction, in particular under the EPBC Act. As a result of this research we believe that amendments to the EPBC Act to specifically allow public interest costs orders would be valuable and effective. The interim report at 20.134 invites further comment on the value and form of public interest cost provisions. The following section therefore summarises our research on the background, rationale and recommendations for public interest cost order provisions in the EPBC Act.

Current law on costs

In Australia, Canada and England and Wales, the basic costs rule is that the successful party receives costs from the unsuccessful party. Although this approach is 'intuitively attractive',[18] it has been described as the 'single largest barrier to environmental justice'[19]

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[17] See rule 4.2 *Land and Environment Court Rules 2007* (NSW).

[18] *Ruddock v Vardalis* (2001) 115 FCR 229, [13] per Black CJ and French J. Justice Beaumont, who dissented, saw no basis for departing from the general rule where the defendant was wholly successful, although he would have provided statutory relief to the plaintiff under the *Federal Proceedings (Costs) Act 1981* (Cth).

[19] Environmental Justice Project, *Environmental Justice* (2004), [68]. Available at <http://www.ukela.org/content/doclib/116.pdf> on 21 March 2009. That Report deals with England specifically, but the principle holds true elsewhere. See, in the Australia context, Lisa Ogle, "Community Experience of the Court", Promises, Perception, Problems and Remedies, Land and Environment Court and Environmental Law 1979-1999, Conference proceedings, pg. 26 Kirsty Ruddock, "The Bowen Basin case" in Bonyhady T & Christoff P (eds), *Climate Law in Australia*, MUP, 2007, pg 185. In Canada, see generally, Chris Tollefson, Darlene Gilliland and Jerry DeMarco, 'Towards a Costs Jurisprudence in Public Interest Litigation' (2004) 83 *Canadian Bar Review* 474

in jurisdictions where it is applied. In a frequently quoted statement,[20] Justice Toohey stated:

> there is little point in opening the door to the courts if litigants cannot afford to come in. The general rule in litigation that "costs follow the event" is in point. 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 cases to court. In any event, it will be a factor that looms large in any consideration to initiate litigation.[21]

Proponents of the rule suggest that it discourages unmeritorious litigation, a proposition which may have some merit.[22] However, the rule does not discriminate between claims that almost succeeded and those that could never have succeeded. As such, it is likely that the rule discourages claims wherever the applicant would not be able to cope with the impact of an adverse costs order, regardless of their merit. This 'deterrence' effect is likely to be particularly pronounced where the potential applicant has no financial or personal interest in the proceedings, as is usually the case with public interest litigants.[23]

Moreover, where a public interest litigant does commence legal action, they have a limited ability to control the costs of that litigation. The public interest litigant's own costs can usually be estimated in advance with a reasonable degree of accuracy and kept low through capped fee arrangements. On the other hand, the costs which will be incurred by other parties are an unknown quantity. The spectre of potentially hundreds of thousands of dollars in costs incurred by respondents will deter most public interest litigants from bringing a case in an individual capacity, even where the prospects of success are very strong.

In the context of the *EPBC Act*, public interest applicants are likely to be community organisations or other non-governmental organisations (*NGOs*) with limited financial resources to fall back on. For the reasons outlined above, the ordinary rule as to costs is

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[20] This passage has been quoted many times in many places, including the first instance judgment by Stein J in *Oshlack* (1994) 82 LGERA 236 and the Australian Law Reform Commission's report on costs, *Costs Shifting – who pays for litigation?* Report 75 (1995) [13.9].

[21] Address to NELA Conference, 1989 quoted in Stein, P, "The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest Environmental Law" (1996) *Environmental Planning Law Journal* 179 at 180-181.

[22] The Australian Law Reform Commission stated '[i]t is not possible to measure accurately the extent to which the costs indemnity rule deters claims and defences that may be frivolous, vexatious or without merit. Although it seems that the rule deters a proportion of these claims and defences, it also appears that people who wish to pursue these claims or defences will often not be deterred by the risk of an adverse costs order.' Australian Law Reform Commission, *Costs Shifting – Who pays for litigation?* Report 75 (1995) [4.12].

[23] The Australian Law Reform Commission commented that '[s]ubmissions to the Commission indicate that the [ordinary costs] rule is most likely to deter … people or organisations involved in public interest litigation who have little or no personal interest in the matter.' Ibid [4.14]. See also Chris Tollefson, Darlene Gilliland and Jerry DeMarco, 'Towards a Costs Jurisprudence in Public Interest Litigation' (2004) 83 *Canadian Bar Review* 474, 485, quoting the 1974 Report of the Ontario Task Force on Legal Aid, which notes the ordinary costs rule 'operates unequally as a deterrent … [particularly] against groups who seek to take public or litigious initiatives in the enforcement of statutory or common law rights when the members of the group have no particular or individual private interest at stake.'

particularly likely to deter them from bringing cases, whether meritorious or not. For example, in the 'Bowen Basin' case,[24] the public interest litigant was presented with bills amounting to over $300,000 in costs at the end of the proceedings.

In recognition of the difficulties faced by applicants with limited means (although not necessarily in the context of EPBC litigation), a variety of approaches have been adopted in different jurisdictions:

- The decision of the High Court in *Oshlack v Richmond River Council* held that, in certain public interest cases, it would be appropriate to make 'no order' as to costs, meaning that neither party pay the other's costs.
- In the Federal Court, Order 62A of the Federal Court Rules permits a court to make an order capping the maximum costs recoverable by the successful party.
- In Queensland, s 49 of the *Judicial Review Act 1991* (Qld) allows an applicant for judicial review to seek an order either that the applicant is liable only for their own costs or that the applicant's costs be indemnified by another party to the proceedings.
- In England and Wales, the courts have developed 'protective costs orders' (*PCOs*) to shield public interest litigants from the impact of the ordinary rule. These orders may protect one or both parties.
- In Canada, the Supreme Court has taken the extraordinary step of granting a costs order in favour of the applicant prior to the hearing of the substantive claim. The purpose of that order was to make it possible for the applicant to bring the claim.
- In many Australian jurisdictions, specialist planning and environmental tribunals exist. In proceedings before these tribunals, the general rule is that each party will only pay their own costs, unless one of the parties behaves improperly.

Current approaches to public interest costs in EPBC litigation

Both the *Oshlack* and Order 62A approaches are potentially available in EPBC litigation. Both have limitations, however, that mean that they are not ideal for public interest litigants.

The primary problem with *Oshlack* is that its application is highly uncertain. It has seldom been applied by the courts in favour of public interest applicants.[25] In fact, in only one case under the EPBC Act has such an order been made. The case law in the High Court and the Federal Court suggests that a public interest in the litigation is not by itself enough to justify a protective costs order and special circumstances are required. In *Blue Wedges Inc. v Minister for the Environment, Heritage and the Arts (No. 2)*,[26] Justice North phrased the position as follows:

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[24] *Wildlife Preservation Society of Queensland Proserpine / Whitsunday Branch Inc. v Minister for Environment and Heritage* [2006] FCA 736.

[25] See *Anderson on behalf of Numbahjing Clan within the Bundjalung Nation v Director-General of the Department of Environment and Climate Change* [2008] NSWLEC 299, *Donnelly v Delta Gold Pty Ltd* [2002] NSWLEC 44 at [56] per Bignold J; *Engadine Area Traffic Action Group Inc v Sutherland Shire Council (No 2)* (2004) 136 LGERA 365; *Roy Kennedy v Director-General of the Department of Environment and Conservation (No 2)* [2007] NSWLEC 271, *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 8.

[26] [2008] FCA 1106.

> In [Oshlack], a majority of the High Court held that the usual rule could be displaced in public interest litigation in environmental cases if special circumstances were shown. (Internal citation omitted)[27]

Courts considering *Oshlack* have identified a number of 'special circumstances' which may justify a departure from the ordinary rule, including whether the case raises a novel question of law of general importance or whether the subject matter of the dispute is a matter of public debate. These criteria, however, appear to be inconsistently applied. Different weight is given to different factors, apparently depending on the composition of the Court. For example, *Blue Wedges Inc. v Minister for Environment Heritage and the Arts*,[28] *Wilderness Society v the Hon. Malcolm Turnbull, Minister for Environment and Water Resources*[29] and *Lawyers for Forests Inc. v Minister for Environment, Heritage and the Arts (No. 2)*,[30] each raised novel questions of the construction of the EPBC Act. As the Full Court stated in *Wilderness Society*,

> [t]he principal issues to be determined on this appeal concerned the proper construction of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("the EPBC Act"). They were thus issues of critical importance to the Minister in the performance of his responsibilities as the Minister responsible for the administration of that Act.[31]

Yet in *Blue Wedges*, no order for costs was made; in *Wilderness Society*, a reduced costs order was made and in *Lawyers for Forests*, an ordinary costs order was made. Although, in each case, other factors were present and influenced the order made, it is significant that an issue 'of critical importance' can be present and still produce such differing outcomes. This only furthers the uncertainty associated with *Oshlack*. This problem is exacerbated by the fact that such orders are made at the end of trials, by which time substantial costs have been incurred.[32]

The second problem with the *Oshlack* approach is that, when it is applied, it typically results in a 'no costs' order, meaning each side bears its own costs. Whilst ostensibly fair, such an order leaves it open for well-resourced defendants to extend proceedings unnecessarily in the hope of causing the applicant to withdraw. Although such behaviour might form the basis for an adverse costs order, it would be difficult for the applicant to prove bad faith making such orders hard to obtain.[33] Equally, as the UK

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[27] Ibid, [2]. See also [5] and [6], where North J states that the respondent 'did not seriously contend' that the litigation was not 'public interest litigation' and then asks whether there are sufficient 'special circumstances' to justify a departure from the ordinary rule.

[28] [2008] FCA 8.

[29] [2008] FCAFC 19

[30] [2009] FCA 466.

[31] [2008] FCAFC 19, [8].

[32] Many courts, including the Federal Court, are empowered to make an award of costs at any time. See, e.g, O 62 r 3 of the *Federal Court Rules*. In practice, however, we are unaware of a costs order being made at any time other than after the conclusion of the substantive case, except in respect of particular interlocutory applications or where the case belongs to a narrow class of cases in which such awards have been traditionally made (as to which, see fn 15 below and associated text).

[33] The Australian Law Reform Commission states that 'very occasionally' costs orders are made to 'sanction a party's legal representatives for unnecessary delay or failure to comply with directions': Australian Law Reform Commission, *Costs Shifting – Who pays for litigation?* Report 75 (1995) [3.12].

Working Group on Access to Environmental Justice recognised, a 'no costs' order may be acceptable for wealthy individuals or NGOs that can bear the costs of litigating, but will be inadequate when the plaintiff needs to recover some of the costs of the case in order to continue to function.[34] In those circumstances, a 'no costs' order may be a Pyrrhic victory.

Order 62A represents a significant improvement over the *Oshlack* approach. It mitigates the problem of uncertainty that plagues *Oshlack* by providing that a maximum costs order may be made at a directions hearing.[35] The jurisprudence in the area suggests that such applications should be made as early as possible.[36]

Order 62A also provides certainty about the costs of litigation by clearly identifying the maximum liability for costs that a party may face. By doing so, it enables applicants to make an informed decision about whether to continue the litigation, given their financial exposure. It may also encourage defendants not to overspend on their defence, given that they are unlikely to recover in excess of the amount specified in the order.[37] This addresses the concern identified above that a stronger litigant may out-manoeuvre a weaker one through deliberate delay tactics. In addition, it simultaneously addresses the most powerful argument against the *Oshlack* rule, which is that it is unfair that a successful litigant must bear all their own costs, because it provides an opportunity for litigants at an early stage of the proceeding to tailor their case according to the value of the cap.

Before an order may be made under O 62A, however, it must be shown that the case is an appropriate one. There is limited jurisprudence in this area, with only ten reported decisions since 1992. The main problem with O 62A appears to be the infrequency of its application, although its use may be underreported, as orders under O 62A are made at directions hearings.

Another limitation on the usefulness of O 62A, however, is that it only allows for two-way cost capping. In other words, it is not open to a court to make an order that permits one party to recover if successful, but prohibits recovery against the same party if they are unsuccessful.

Alternative approaches to public interest costs orders

Queensland, England and Wales and Canada have all taken steps to mitigate the impact of the ordinary costs rule in public interest proceedings. While not currently applicable to EPBC litigation in the Federal Court, these approaches inform our discussion and recommendations.

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[34] Working Group on Access to Environmental Justice, *Ensuring Access to Environmental Justice* (2008), 42.

[35] Order 62A, rule 1, *Federal Court Rules*.

[36] *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864, [15]-[17]; see also *Sacks v Permanent Trustee Australia Ltd* (1993) 45 FCR 509, 511.

[37] Order 62A permits a party to recover costs in excess of those specified in the order if those excess costs where those costs are incurred through other party's failure to conduct the litigation in an effective and efficient fashion. See below.

In Queensland, s 49 of the *Judicial Review Act 1991* (Qld) allows a party[38] to judicial review proceedings to apply to make a 'costs application'. On such an application, the court may either make a 'no costs' order or require another party to pay the costs of the applicant. 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.[39] 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. The costs order was made and this remained despite the fact that ultimately the litigation was unsuccessful.

The utility of s 49 as a costs control mechanism is enhanced by its identification, in broad terms, of relevant criteria[40] to exercise of the power. Section 49(2) provides:

> 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.

The existence of a section like s 49(2) is useful, both in guiding the Court's discretion and in enabling litigants to estimate the likelihood of obtaining the order sought.

Like O 62A, s 49 represents an improvement over *Oshlack* by providing a concrete mechanism for applicants to seek costs protection at an early stage, enabling them to make an informed decision about whether and how to proceed. The possibility of a costs indemnity means that, in some cases, it may be more beneficial to a public interest litigant than O 62A.

The English 'Protective Costs Orders' approach represents the most comprehensive non-statutory response to the issue of public interest costs. As under O 62A and the *Judicial Review Act 1991* (Qld), applicants are permitted to apply for an order at any stage of proceedings. Indeed, the court has stated that an application should be made on the documents commencing the application for judicial review.

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[38] Other than the party whose decision, failure to make a decision or conduct engaged in for the purpose of making a decision is under review: s 49(1), *Judicial Review Act 1991* (Qld).
[39] *Alliance to Save Hinchinbrook Inc v Cook & Ors* [2005] QSC 355.
[40] The factors identified in s 49(2) are not exhaustive: See *Sharples v Council of the Queensland Law Society Inc* [2000] QSC 392, [21] – [26] and cases cited there.

PCOs are also more flexible than other approaches in terms of the costs orders that may be made. Essentially, it allows trial judges to make any of the orders available under *Oshlack* or O 62A in an appropriate case, as well as making 'one way' cost shifting and cost capping orders.

The English approach has been noted and referred to in Australian case law, but there is no indication that Australian courts are likely to adopt it in the absence of some outside force.[41]

The final approach is the Canadian approach. It is novel in the limited sense that a party might be granted a favourable costs order prior to the hearing of the substantive matter. Even in Canada, however, such orders are extremely rare.[42] They represent the outer limit of the costs discretion and it is questionable whether they will be adopted outside Canada. The English Court of Appeal has indicated that it does not believe it has the power to make such an order.[43]

Costs in Specialist Environmental Tribunals

All Australian States now have a court or tribunal that handles environmental matters.[44] These bodies generally perform merits review of administrative decisions, although some of them have the jurisdiction to perform judicial review as well.[45]

Part of the impetus for these tribunals has been a need to enhance access to justice and access to environmental justice in particular. As part of this, the majority of the identified tribunals have abrogated the ordinary common law costs rule. In Victoria, New South Wales, Queensland, South Australia and Tasmania, the ordinary rule in the relevant

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41 *Save the Ridge Inc v Commonwealth* (2006) 230 ALR 411, 416.

42 The power to make an 'interim costs' award is well-established (in Australia, England and Canada) with respect of a limited class of cases, such as cases brought by trustees over the proper administration of a trust. See, e.g., *Re Beddoe* [1893] 1 Ch. 543. In *British Columbia (Minister of Forests) v Okanagan Indian Band* [2003] SCC 71, the Supreme Court of Canada appeared to extend the power to make interim costs awards beyond that limited class of cases. So far as we are aware, however, no further interim costs awards have been made outside that class.

43 In *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600, [77], Lord Philips MR called such an order 'judicial legislation'. Interestingly, this statement was described as 'unconvincing' by Finkelstein J in *Australian Securities and Investment Commission v GDK Financial Solutions Pty Ltd (in liq) (No. 4)* (2008) ALR 766, [21]. The making of an interim costs award in that case, however, appeared to be consistent with the limited class of cases referred to ibid.

44 In New South Wales, there is the Land and Environment Court; in Victoria the Victorian Civil and Administrative Tribunal (VCAT), which has a Planning and Environment List; in Queensland the Planning and Environment Court; in South Australia the Environment, Resources and Development Court; and, in Tasmania the Resource Management and Planning Appeal Tribunal. Western Australia has the State Administrative Tribunal, however, that Tribunal provides no third party appeal rights against development decisions and will not be considered further.

45 The New South Wales Land and Environment Court is empowered to perform judicial review. The Queensland Planning and Environment Court does not formally perform judicial review, but can make declarations on the lawfulness of a process: see, for example, *Westfield Management Pty Ltd v Brisbane City Council* [2003] QPEC 10; *SOS Community Action Group and Anor v Reefco Resort Ltd and Cairns City Council* [2006] QPEC 69.

specialist tribunal is that each party will bear its own costs, in the absence of some misconduct.[46]

The existence of these tribunals suggests that the States are alive to the importance of public participation in environmental decision-making and have recognised the significance of adverse costs orders in deterring that participation. By contrast, the Commonwealth Administrative Appeals Tribunal is empowered to review a number of decisions under the EPBC Act, but not those relating to approval of actions with the potential to have a significant impact on matters of national environmental significance.[47] As such, the only option for review of these decisions is through the process of judicial review in the Federal Court. Given this, the need for some form of public interest costs regime is heightened.

Response

In our reading, the primary problem faced by public interest litigants is one of uncertainty. Litigants cannot know whether they will have to pay costs nor can they know (or control) their potential costs exposure if unsuccessful. The problem is exacerbated by the fact that litigants will generally not know if *Oshlack* applies until the conclusion of the substantive trial, at which point most of the expenditure will have been incurred.

A secondary issue is the limited kind of public interest orders available under *Oshlack* and O 62A. By only permitting one kind of order to be made under each approach, these approaches arguably restrict courts to make such orders only in the most clear cut public interest cases. In jurisdictions such as Queensland and England and Wales, where more kinds of orders are available, the courts have been willing to tailor the degree of protection to the degree of public interest in the case, resulting in a broader class of cases receiving public interest protection.

An ideal response to these problems would include the following key elements:

- A mechanism permitting applicants to apply to the court for a decision on whether their proceedings are 'public interest proceedings' at any stage of those proceedings;
- If proceedings are declared to be public interest proceedings, then the court hearing the application should be prohibited from ordering that costs follow the event. Instead, they should be required to make some form of public interest costs order (i.e. a 'no costs' order, a capped costs order, a one-way cost shifting order or an indemnity). This order must be made at the same time as the ruling on whether proceedings are public interest proceedings.

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[46] See s 109, *Victorian Civil and Administrative Tribunal Act 1998* (Vic); s 4.1.23, *Integrated Planning Act 1997* (Qld); s 29, *Environment, Resources and Development Court 1993* (SA); and s 28, *Resource Management and Planning Appeals Tribunal 1993* (Tas). Note that in NSW in the merits jurisdiction the court can award costs but the general rule is that costs are not awarded unless there are exceptional circumstances. In the NSW judicial review jurisdiction the general rule is that costs follow the event however public interest litigation is recognised and the court can decline to make any costs order – see rule 3.7 & 4.2 *Land and Environment Court Rules 2007* (NSW).

[47] Note that the Administrative Appeals Tribunal also makes no orders as to costs in environmental matters.

- Clarification in the legislation of what 'public interest proceedings' are and whether a public interest costs order should apply.

The first element, to allow an application of whether a proceeding is a public interest proceeding, is meant to allow litigants to receive a ruling on whether their proceedings are in the public interest at an early stage in proceedings. Such a ruling would make it possible for litigants to know if they were at risk of exposure to the other party's costs and to make an informed decision about whether to proceed with the litigation. As with any decision, there should be the capacity to appeal against the decision, subject to the usual restrictions associated with appeals from discretionary decisions.

The second element, the prohibition from ordering that costs follow the event is again aimed at enhancing certainty for public interest litigants. It is essential that this ruling is made at the same time as the ruling over whether a proceeding is a public interest proceeding, so that litigants know what costs rule will apply. Given that an applicant can control their own costs, knowing the extent of their potential exposure should make it possible to make a rational decision about whether to proceed with the litigation. Similar considerations apply to respondents. An order specifying the applicant's potential liability will enable respondents to make a decision about what resources to devote to a particular matter. By requiring the making of a public interest costs order, a public interest litigant would, at a minimum, have the certainty of having their costs liability capped. This again makes it much easier for public interest litigants to make an informed decision about how they wish to proceed. By allowing for the making of any kind of public interest costs order, it also enables the court to tailor the order to the degree of public interest in the case, potentially expanding the class of cases in which public interest costs orders will be made.

The third element, clarification in the legislation of what a public interest proceeding is, is aimed at making it easier for litigants to decide ahead of time whether their proceedings are likely to be in the public interest and, hence, whether to apply for a decision on whether the proceedings are in the public interest.

Recommendation

In order to reduce the barriers to meritorious public interest litigation under the EPBC Act and provide more certainty for both parties, we propose that the EPBC Act be amended to allow the Court to make public interest costs orders in appropriate cases. This would consist of a two step process:

1. An initial determination as to whether the proceedings are 'public interest proceedings'. Characteristics of the plaintiff, such as financial position or private interest should not be taken into account in the first step of the process.
2. A second determination is then immediately made regarding what kind of public interest costs order will apply. If a proceeding is declared a public interest proceeding, a public interest costs order must be made. In deciding what form of public interest costs order to make, the court may have regard to the factors relevant to the determination of whether the proceedings are in the public interest, as well as the financial resources of the applicant and existence of any personal interest on the part of the applicant in the outcome of proceedings.

In light of the above we recommend the following amendments be made to the EPBC Act:

- The EPBC Act should be amended to incorporate a mechanism to allow applicants in proceedings for judicial review of a decision under the Act to apply to the court for a decision on whether the substantive proceedings are 'public interest proceedings'.

- In order to determine whether proceedings are 'public interest proceedings' the Act should include a definition stating that 'public interest proceedings' means *a proceeding concerning a matter within the jurisdiction of the Court that is instituted by a person or persons whose predominant purpose is to advance or protect a perceived interest, including a non-financial interest, of members of the public generally or a significant segment of the public. A proceeding does not fail to be a public interest proceeding simply because the applicant or applicants, or some of them, share the public interest benefit in greater or lesser degree.*

- The EPBC Act should be amended to require that, if the court decides that a proceeding is a 'public interest proceeding' the court is prohibited from ordering that costs follow the event and instead must make some form of 'public interest costs order' (i.e. a 'no costs' order, a capped costs order, a one-way cost shifting order or an indemnity). The order must be made at the same time as the proceedings are declared public interest proceedings.

- In determining what public interest costs order to make the court may consider:
    - The financial resources of the applicant;
    - The existence of any personal interest on the part of the applicant in the outcome of proceedings;
    - The timing of the application.