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28 August 2009

Dr Allan Hawke
Independent review of the EPBC Act 1999
GPO Box 787
Canberra ACT 2601
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Dear Mr Hawke,

Standing and merits review under the EPBC Act

Following on from the meeting we attended with you on the 13th of August, the EPBC Review Panel has asked ANEDO to provide further information additional to the submissions we have provided in relation to the 10 year review of the *Environment Protection and Biodiversity Conservation Act 1999* (*EPBC Act*). The two issues for clarification relate to open standing and merits appeals. We discuss these in turn.

1.Standing under the Act

The Review Panel seeks further clarification in relation to our call for open standing under the Act. In particular, you seek evidence from ANEDO to show that the current standing rule has posed an impediment to individuals or organisations seeking to take action under the *EPBC Act*. We provide this information herewith.

EDO offices have indeed observed that the current standing rule in s487 of the Act imposes evidentiary barriers that prevent some applicants from obtaining standing in addition to posing a practical burden in the preparation of proceedings.

Firstly, EDO offices have observed that the requirements in s487 have prevented some important public interest cases from proceeding. These cases often seek to raise important public interest issues yet were circumvented by the narrow standing rules. For example, a group called *Save the Mary River* who considered

challenging the proposed Traveston Dam, could not do so under the *EPBC Act* because at the time the decision was made they had not finalised a constitution which established that the object or purpose of the organisation was the protection or conservation of the environment even though they had engaged in a series of activities for the protection of the environment within the preceding 2 years before the decision was made.

Second, a lot of community groups are not necessarily formed for the purpose of the protection of the environment, yet they often wish to take public interest proceedings on the basis that the approved action will be detrimental to the environment and the community. For example, some Indigenous groups such as Local Aboriginal Land Councils (particularly those without native title rights) who are concerned about their cultural heritage may be prevented from obtaining standing under s487 as they are not formed expressly for the protection of the environment.

Third, to establish standing once judicial review or enforcement proceedings are commenced, applicants are required to complete an affidavit to support their application. This is often a cumbersome process as it requires quite detailed evidence of the activities undertaken by the applicant in order to meet the requirements in s487. This diverts resources and time away from preparing for the substance of the proceedings. This was the case for EDO Queensland in *Wide Bay Conservation Council Inc v Burnett Water Pty Ltd (No 2) [2009] FCA 237 (18 March 2009).*

In light of our comments above, ANEDO reiterates its call for open standing. In the alternative, one way to overcome some of the hurdles - short of introducing open standing - is to amend s487 to insert 'or' instead of 'and' in between (b) and (c) of s487(3). This would alleviate some of the impediments by only requiring organisations to meet two of the three requirements in order to establish standing.

Finally, our concern is that if standing is not considered a key issue in the final recommendations of the panel, then there is potential for the standing rules to be tightened further. In this regard ANEDO recommends that at the very least the current standing rule in s487 should remain in its current form.

2. Merits Appeals

The panel seeks further information from ANEDO in relation to our call for the introduction of broad third party merits appeals. In particular, the panel wants information on what the scope of such merits review should be and in relation to which decisions made under the Act.

As ANEDO has submitted on numerous occasions, merits appeals for third parties have the capacity to deliver better environmental outcomes under the Act as well as increasing the transparency and accountability of decision-making. ANEDO stands by the evident value of this. However, the recommendations we provide below are made in the context of the present appeal structure with any merits

appeals being heard by the AAT and in consideration of the largely unfettered decision-making processes in the Act.

The Review Panel has indicated that it is not considering the incorporation of a separate body to consider merits appeals. We therefore provide our recommendations in the context of the AAT remaining as the merits appeal body. As ANEDO has submitted previously, we have concerns about the ability of the AAT to deal with environmental matters due to a lack of environmental expertise and a specific environmental list. Indeed, the majority of third party appeals to the AAT have to date not delivered significantly improved environmental outcomes.

Furthermore, our recommendations are based on a consideration of the current assessment processes in the Act. As we have pointed out previously, the Act currently provides little guidance to decision-makers in many contexts, with decisions often made under a wide discretion. Therefore, we submit that caution should be exercised before simply passing these structural problems on to another body.

With the above context in mind, we submit that the following decisions should be subject to merits review by objectors:

- ANEDO strongly supports the reinstatement of the merits appeal rights that were taken away by the 2006 amendments;

- Consistent with our initial submission, we call for merits appeal rights to be extended to include listing decisions;[1] and

- We submit that merits appeal rights should be granted in relation to the Minister's decision whether to make a recovery plan or threat abatement plan. These are currently discretionary and the decision has significant consequences for listed threatened species and key threatening processes.

ANEDO did consider whether merits appeals should also be extended to strategic impact assessments and bioregional plans. However, given the lack of a structured decision-making framework around such assessments as well as the resource intensity involved, merits appeal rights may be counterproductive in this context. Until the decision-making framework for strategic impact assessments and bioregional plans is improved there is likely to be little value in providing merits appeals for these decisions. As such we do not push for merits appeals for strategic assessments and bioregional plans at this time.

Finally, ANEDO submits that there should be an overarching joinder provision whereby a person or group may apply to join proceedings in the AAT where it is

[1] We note that ANEDO has called for listing decisions to be made by an appropriately constituted Scientific Committee rather than the Minister. If this recommendation is adopted and all listing decisions are made by an expert scientific body, then we would not push for merits appeal rights in such a circumstance.

interests of justice or the public interest, or if the person or group is able to raise fresh issues. A similar provision is in operation in NSW.

Please contact me at any time if you seek further information on (02) 9262 6989 or Jeffrey.smith@edo.org.au .

Yours sincerely
Australian Network of Environmental Defender's Offices

Jeff Smith
Director of EDO NSW on behalf of ANEDO