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14 December 2008

Secretariat
Independent Review of the EPBC Act 1999
GPO Box 787
Canberra ACT 2601
Australia

By email only to epbcreview@environment.gov.au

Dear EPBC Act Review Secretariat,

**Re: Submission to the independent review into the operation of the
*Environment Protection and Biodiversity Conservation Act 1999***

Introduction

I write in response to the request for public submissions to the independent review into the operation of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act) being carried out in accordance with s 522A of the Act (the review). I note the discussion paper released for the review and the 44 questions posed in it.¹

I note the review's terms of reference² and that it will examine in particular:

- (a) the operation of the EPBC Act generally;
- (b) the extent to which the objects of the EPBC Act have been achieved;
- (c) the appropriateness of current matters of National Environmental Significance; and
- (d) the effectiveness of the biodiversity and wildlife conservation arrangements.

I wish to focus briefly in this submission on two of the terms of reference, namely, the extent to which the objects of the EPBC Act have been achieved and the appropriateness of current matters of National Environmental Significance (NES). In particular, I wish to address the need for a climate change trigger and assessment criteria for climate change actions in the Act. I will also make several recommendations for amendments to the Act to reduce the obstacles for public interest litigants in enforcing the Act and improving the quality of decision-making under it.

¹ Available at <http://www.environment.gov.au/epbc/review/publications/pubs/discussion-paper.pdf> (viewed 13 December 2008).

² Available at <http://www.environment.gov.au/epbc/review/about/terms.html> (viewed 13 December 2008).

Basis for submission

The basis of my submission is my own experience of, and research into, the operation of the EPBC Act. I have acted as counsel for many clients in relation to the Act, including proponents of large developments seeking approval of their actions and third parties concerned about actions impacting on the matters protected by Part 3 of the Act and decision-making under the Act. I have acted as counsel in several Federal Court cases involving the Act³ and am currently acting in litigation against an alleged contravention of a condition of approval of the Paradise Dam under the Act.⁴

I have addressed the issues raised in the terms of reference in previous publications in relation to the EPBC Act concerning bilateral agreements,⁵ the Flying Fox Case,⁶ the Greentree Case,⁷ key concepts under the EPBC Act,⁸ Japanese Whaling Case,⁹ and the general operation of the Act.¹⁰ I have also recently published a review of public interest litigation under the EPBC Act,¹¹ which formed the basis of a submission¹² I made the current Senate Inquiry into the operation of the EPBC Act.¹³

In 2006 I reviewed the operation of the EPBC Act for the 2006 Australian State of the Environment Committee.¹⁴ I draw the methodology and findings of that review to your attention.

³ Including: *Booth v Bosworth and Bosworth* (2001) 114 FCR 39 (the Flying Fox Case); *Minister for the Environment & Heritage v Queensland Conservation Council* (2004) 139 FCR 24 (Nathan Dam Case); *Wildlife Preservation Society of Queensland Proserpine / Whitsunday Branch Inc v Minister for the Environment & Heritage* [2006] FCA 736; (2006) 232 ALR 510; and *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* (2006) 154 FCR 425; (2008) 165 FCR 510 (Japanese Whaling Case).

⁴ See *Wide Bay Burnett Conservation Council Inc v Burnett Water Pty Ltd* [2008] FCA 1900 (Logan J); and <http://www.envlaw.com.au/paradise.html> (viewed 11 December 2008).

⁵ McGrath C, "Bilateral Agreements: Are they enforceable?" (2000) 17 (6) EPLJ 485; and McGrath C, "The Queensland Assessment Bilateral Agreement under the EPBC Act" (2002/2003) 8 (38) QEPR 145.

⁶ McGrath C, "The Flying Fox Case" (2001) 18 (6) EPLJ 540.

⁷ McGrath C, "Casenote: Minister for the Environment & Heritage & Greentree [2003] FCA 857" (2003) 20 EPLJ 476; McGrath C, "Editorial commentary: Federal Issues: the Greentree Case" (2004) 21 EPLJ 249; McGrath C, "Appeal lodged against Greentree (No 3)" (2005) 22 EPLJ 5; McGrath C, "Greentree appeal dismissed" (2005) 22 EPLJ 325.

⁸ McGrath C, "Key concepts of the EPBC Act" (2005) 22 EPLJ 20.

⁹ McGrath C, "The Japanese Whaling Case" (2005) 22 (4) EPLJ 250; McGrath C, "Japanese Whaling Case appeal succeeds" (2006) 23 EPLJ 333; McGrath C, "Injunction granted in Japanese Whaling Case" (2008) 25 EPLJ 77.

¹⁰ McGrath C, "Applying the *Environment Protection and Biodiversity Conservation Act* 1999 (Qld): A case study of the Naturelink Cableway" (2001) 7 (33) QEPR 123; McGrath C, "Swirls in the stream of Australian environmental law: debate on the EPBC Act" (2006) 23 EPLJ 165.

¹¹ McGrath C, "Flying foxes, dams and whales: using federal environmental laws in the public interest" (2008) 25 EPLJ 324, available at

http://www.aph.gov.au/Senate/committee/eca_ctte/epbc_act/submissions/sub38att.pdf (viewed 10 December 2008).

¹² Available at http://www.aph.gov.au/Senate/committee/eca_ctte/epbc_act/submissions/sub38.pdf (viewed 10 December 2008).

¹³ See http://www.aph.gov.au/Senate/committee/eca_ctte/epbc_act/index.htm (viewed 1 December 2008).

¹⁴ McGrath C, "Review of the EPBC Act", paper prepared for the 2006 Australian State of the Environment Committee (Department of the Environment and Heritage, Canberra, 2006). Available at <http://www.environment.gov.au/soe/2006/publications/emerging/epbc-act/pubs/epbc-act.pdf> (viewed 10 December 2008).

The extent to which the objects of the EPBC Act have been achieved

I summarised the findings of my 2006 review of the operation of the EPBC Act for the 2006 Australian State of the Environment Committee as follows:

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) is by no means a panacea for Australia's environmental problems but it has made an important contribution to environmental protection and sustainable development in Australia during its first 5 years of operation. It is difficult to quantify the effectiveness of the Act but it appears to be achieving at least some good, though mixed, results in terms of environmental outcomes beyond what would otherwise be achieved under State and Territory laws. It has greatly improved public accountability and access to information about proposed development. The positive outcomes that are being achieved under the Act are counteracted by several negative aspects of its framework and implementation. The absence of a trigger for greenhouse gas emissions is a very significant gap in the regulatory framework of matters of national environmental significance. Inclusion of a greenhouse trigger in the Act is recommended to complement other greenhouse initiatives of the Australian Government. A negative aspect of implementation has been the length of time (in some cases, several years) taken in the listing of many threatened ecological communities and some threatened species of commercially exploited fish. Recent policy changes in listing threatened ecological communities may alleviate some of these problems, but a procedure for merits review of listing decisions would improve the public accountability and transparency of the operation of the Act.

While I still consider that the EPBC Act has made an important contribution to environmental protection and sustainable development in Australia, in my view there is no doubt that the objects of the EPBC Act are not being achieved. This is not merely the fault of the EPBC Act, but a systemic failure of the international and Australian environmental legal systems to prevent dangerous climate change and widespread biodiversity loss.

Our environmental legal system, including the EPBC Act, is clearly failing to achieve ecologically sustainable development and protection of matters of NES when:

- we expect climate change to cause significant loss of biodiversity to iconic ecosystems such as the Great Barrier Reef World Heritage Area and the Wet Tropics World Heritage Area by 2020;¹⁵ and
- by 2030, production from agriculture and forestry is projected to decline over much of southern and eastern Australia due to increased drought and fire.¹⁶

The targets proposed in the Carbon Pollution Reduction Scheme commencing in 2010 will not avoid severe impacts to Australia's major natural assets such as the Great Barrier Reef and, consequently, will not be effective in avoiding dangerous climate change.¹⁷ In my view it is important to recognise this failure and attempt to rectify it, rather than silently ignore it and pretend that the current or proposed response is effective.

¹⁵ Intergovernmental Panel on Climate Change (IPCC), *Climate Change 2007: Synthesis Report. Contribution of Working Groups I, II and III to the Fourth Assessment Report of the Intergovernmental Panel on Climate Change* [Pachauri RK and Reisinger A (eds)] (IPCC, Geneva, 2007), p 50, available at <http://www.ipcc.ch/ipccreports/ar4-syr.htm> (viewed 1 December 2008).

¹⁶ Intergovernmental Panel on Climate Change, n 15, p 50.

¹⁷ See McGrath C, "Will we leave the Great Barrier Reef for our children?" (IUCN, Bonn, 2008), available at http://cmsdata.iucn.org/downloads/cel_op_mcgrath.pdf (viewed 3 November 2008).

Appropriateness of the current matters of NES

While the EPBC Act cannot itself prevent dangerous climate change from severely impacting on Australian society and matters of NES such as the Great Barrier Reef, it should attempt to mitigate the impacts as much as possible within its scope of influence and complementing the Carbon Pollution Reduction Scheme. At present, the anomalous situation exists whereby the EPBC Act aims to protect matters of NES such as World Heritage properties, but does not effectively regulate the greatest threat to those matters – climate change. This is like having a comprehensive criminal law that does not address illegal drugs.

While in my view the current list of matters of NES could be applied to regulate large emissions of greenhouse gases contributing to climate change, experience under the EPBC Act indicates that the Commonwealth does not administer the Act in this way. The *Wildlife Whitsunday Case*¹⁸ and the *Anvil Hill Case*¹⁹ have shown that the Act is not applied to regulate even enormous sources of greenhouse gas emissions. In the *Anvil Hill Case*, for example, the mining operations and associated electricity production (scope 1 and 2 emissions) were estimated to produce an average of 219,094 tonnes of carbon dioxide equivalents (t CO₂-e) per annum for 20 years.²⁰ The burning of the 8 million tonnes of coal produced annually from the mine was estimated to produce approximately 12,414,387 t CO₂-e (scope 3 emissions) per annum for 20 years.²¹ Despite these enormous emissions, the mine was determined to not be a controlled action.

The reasoning shown by the Commonwealth in assessing projects under the EPBC Act indicates a specific trigger based on emissions alone is required if greenhouse emissions are to be regulated under the Act. This specific greenhouse trigger in the EPBC Act can be used to complement the Carbon Pollution Reduction Scheme by allowing comprehensive environmental impact assessment of new projects contributing to climate change, including means of mitigating those impacts. Due to ss 43A and 43B of the EPBC Act, it will not address emissions from projects approved prior to 16 July 2000. Many large emitters were approved prior to 16 July 2000, including most large coal-fired power stations. The Carbon Pollution Reduction Scheme will address emissions from already approved activities but the EPBC Act can and should play a role in environmental impact assessment of new projects.

The need for a greenhouse trigger in the EPBC Act has been debated since the passage of the Act.²² The government investigated a greenhouse trigger in 1999-2001. It released a consultation paper and draft regulations on the greenhouse trigger but failed to implement it. Under the draft regulation the trigger proposed was more than 500,000 t CO₂-e in any 12 month period. Similarly, the Shadow Environment Minister,

¹⁸ *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage* (2006) 232 ALR 510; [2006] FCA 736 (Dowsett J).

¹⁹ *Anvil Hill Project Watch Assn Inc v Minister for the Environment & Water Resources* (2007) 243 ALR 784; [2007] FCA 1480 (Stone J); *Anvil Hill Project Watch Assn Inc v Minister for the Environment & Heritage* (2008) 244 ALR 96; [2008] FCAFC 5 (Full Court).

²⁰ Umwelt Environmental Consultants, *Anvil Hill Project Environmental Assessment – Response to Submissions Part A* (October 2006).

²¹ Umwelt Environmental Consultants, n 20.

²² Macintosh A, “The Greenhouse Trigger: Where Did it Go and What of its Future?”, Ch 4 in Bonyhady T and Christoff P (eds), *Climate Law in Australia* (Federation Press, 2007).

Anthony Albanese MP, proposed a greenhouse trigger for the EPBC Act in a private members bill, *Avoiding Dangerous Climate Change (Climate Change Trigger) Bill 2005*. The Bill proposed amending the EPBC Act by inserting the following provisions:

25AA Requirement for approval of climate change actions

- (1) A person must not knowingly, intentionally or recklessly take a climate change action that has, will have, or be likely to have a significant impact on the environment.

...

25AB What is a climate change action?

A **climate change action** means any of the following:

- (a) establishing an industrial plant or other facility which emits, or is likely to emit, more than 500,000 tonnes of carbon dioxide or carbon dioxide equivalent per year; or
- (b) any other action, series of actions, or program of actions, which will lead, or are likely to lead, directly or indirectly to the emission of more than 500,000 tonnes of carbon dioxide or carbon dioxide equivalent per year.

The Bill was defeated by the then Coalition government, which did not support a greenhouse trigger in the EPBC Act; however, it is apparent that a greenhouse trigger similar to that proposed in 2005 would be likely to result in very little change to decisions under the EPBC Act. If the reasoning of the Minister's delegates in the *Wildlife Whitsunday Case* and the *Anvil Hill Case* were applied to this trigger, no action would be captured by such a trigger because establishing the link between the emission of 500,000 t CO₂-e and a significant impact on the environment will be impossible to prove. Proponents seeking approval of their actions will argue that 500,000 tonnes (or any figure of emissions from a single action) of emissions is a "drop in the ocean" of global greenhouse gas emissions and, therefore, their actions don't trigger the provision. Based on the reasoning in the *Wildlife Whitsunday Case* and *Anvil Hill Case*, proponents of projects adopting such an approach would be successful in avoiding liability under the trigger.

It is important that a threshold be set in the EPBC Act to avoid every action being a controlled action, even trivial things, and the threshold used in the other provisions of Part 3 is that the impact must be a "significant impact" and it must be "likely". However, a provision such as the proposed subs 25AA(1) effectively provides a further threshold, namely, the action must be a "climate change action" (emit over 500,000 t CO₂-e per year). The threshold that the action be a "climate change action" alone would be sufficient to exclude small emissions from requiring assessment under the Act (which is all that the trigger does – approval comes later under Part 9).

I note that the threshold of 500,000 t CO₂-e per year proposed in the *Avoiding Dangerous Climate Change (Climate Change Trigger) Bill 2005* is very high in comparison to the threshold for reporting under the *National Greenhouse and Energy Reporting Act 2007* (Cth) (NGER Act), which has a threshold for facilities of 25,000 t CO₂-e. In my view the threshold of 500,000 t CO₂-e is too high for the EPBC Act to play a meaningful role in regulating greenhouse gas emissions from new projects. In my view the threshold should be set between 25,000–100,000 t CO₂-e. The appropriate level for assessment under the EPBC Act requires more analysis and consideration but that can be informed by information obtained from reporting under the NGER Act.

Importantly for regulating greenhouse emissions from Australian coal mines, if an EPBC Act climate change trigger includes consideration of indirect greenhouse gas emissions (as the 2005 Bill did)²³ then it will capture emissions from the use of coal either in Australia or overseas. This would be an important way in which the EPBC Act could complement the Carbon Pollution Reduction Scheme. The proposed Carbon Pollution Reduction Scheme does not assess or regulate greenhouse gas emissions from Australian coal exports, yet these emissions exceed Australia's direct domestic emissions and regulation of them will be an important component of the future response to climate change.²⁴

In addition to inserting a greenhouse trigger into the EPBC Act, it is important to specify criteria against which assessment and approval of new projects will be considered. I will address this issue briefly in the following section.

Criteria for approval of climate change actions

If a climate change trigger is included in Part 3 of the EPBC Act, criteria for assessing climate change actions under Part 9 of the Act are needed to guide decision-makers and promote the objects of the Act. Sections 136-140A of the EPBC Act specify criteria for approval of controlled actions. There are no specific criteria for climate change actions.

Obviously any criteria for approval of climate change actions must allow for emissions to be made. The question then becomes, how to assess whether to allow the emissions or not and what conditions, if any, should be imposed? The general criteria in ss 136-140A provide little assistance as, once again, it is difficult to link the emissions from any particular action to impacts on World Heritage, Ramsar wetlands, the environment generally or other matters protected by Part 3 of the Act. The proponent's argument will always be, "this is a drop in the ocean of global emissions."

Logically and for consistency with ss 136-140A of the EPBC Act, the climate change trigger should be linked to Australia's obligations under the *United Nations Framework Convention on Climate Change 1992* (UNFCCC) and the Kyoto Protocol.

In addition, approval of climate change actions could be linked to flexible criteria such as "best practice environmental management" and "low emissions technology." Section 21 of the *Environmental Protection Act 1994* (Qld) provides a legislative definition of best practice environmental management as follows:²⁵

21 Best practice environmental management

(1) The "best practice environmental management" of an activity is the management of the activity to achieve an ongoing minimisation of the activity's environmental harm

²³ Based on the reference to direct and indirect emissions in the trigger and reflecting the reasoning in *Minister for the Environment & Heritage v Queensland Conservation Council* (2004) 139 FCR 24 (the Nathan Dam Case), and the subsequent s 527E of the EPBC Act.

²⁴ See McGrath C, "Regulating greenhouse gas emissions from Australian coal mines" (2008) 25 EPLJ 240 and Ch 14 in Gumley W and Daya-Winterbottom T, *Climate Change Law: Comparative, Contractual & Regulatory Considerations* (Lawbook Co, Sydney, 2008).

²⁵ "Best practicable environmental option" (BPEO) and "best available technology not entailing excessive cost" (BATNEEC) are terms that are used to similar effect in the United Kingdom. See generally Eyre N, "Setting the objectives for environmental regulation" in Smith HL and Woodward N, *Energy and Environment Regulation* (Macmillan Press Ltd, London, 1995), p 38.

through cost-effective measures assessed against the measures currently used nationally and internationally for the activity.

(2) In deciding the “**best practice environmental management**” of an activity, regard must be had to the following measures—

- (a) strategic planning by the person carrying out, or proposing to carry out, the activity;
- (b) administrative systems put into effect by the person, including staff training and monitoring and review of the systems;
- (c) public consultation carried out by the person;
- (d) product and process design;
- (e) waste prevention, treatment and disposal.

(3) Subsection (2) does not limit the measures to which regard may be had in deciding the “**best practice environmental management**” of an activity.

I recommend that the EPBC Act be amended to include a provision in Part 9 similar to the following:²⁶

141 Requirements for decisions about climate change actions

- (1) In deciding whether or not to approve for the purposes of section 25AA²⁷ the taking of an action, and what conditions to attach to such an approval, the Minister must not act inconsistently with Australia’s obligations under the United Nations Framework Convention on Climate Change and the Kyoto Protocol.
- (2) In deciding whether or not to approve for the purposes of section 25AA the taking of a climate control action, and what conditions to attach to such an approval, the Minister must consider whether the direct or indirect emissions of carbon dioxide or carbon dioxide equivalent that are likely to result from the action (whether the emissions will occur in Australia or overseas) will be minimised by the use of best practice environmental management and low emissions technology.
- (3) For the purpose of subsection (2), *best practice environmental management* and *low emissions technology* are management and technology to achieve an ongoing minimisation of the emissions of carbon dioxide or carbon dioxide equivalent through cost-effective measures assessed against the measures and technology currently used nationally and internationally.

The use of concepts such as “best practice environmental management” and “low emissions technology” for approval of climate change actions will provide a degree of substance to the measures that the Australian Government can take to comply with its obligations under the UNFCCC and Kyoto Protocol. In addition, such criteria are consistent with the *Asia-Pacific Partnership on Clean Development and Climate 2005*, noting that the vision statement of the agreement provides:

[The partnership will] develop, deploy and transfer cleaner, more efficient technologies and to meet national pollution reduction, energy security and climate change concerns, consistent with the principles of the U.N. Framework Convention on Climate Change.

The partnership will collaborate to promote and create an enabling environment for the development, diffusion, deployment and transfer of existing and emerging cost-effective, cleaner technologies and practices, through concrete and substantial cooperation so as to achieve practical results. Areas for collaboration may include, but not be limited to: energy

²⁶ Note: The UNFCCC is not defined in s 528 (Dictionary), but s 520(3)(k) authorises the making of regulations to give effect to “the Framework Convention on Climate Change done at New York on 9 May 1992”. Definitions of the UNFCCC and the Kyoto Protocol should be included in s 528 and the reference in s 520(3)(k) amended accordingly.

²⁷ I use s 25AA here for illustrative purposes. In my view the climate change trigger should have both a civil penalty provision and a criminal offence provision as for other matters of NES in Part 3 of the EPBC Act.

efficiency, clean coal, integrated gasification combined cycle, liquefied natural gas, carbon capture and storage, combined heat and power, methane capture and use, civilian nuclear power, geothermal, rural/village energy systems, advanced transportation, building and home construction and operation, bioenergy, agriculture and forestry, hydropower, wind power, solar power, and other renewables.

I note that I made a similar recommendation to include criteria for assessing climate change actions by inserting a new s 141 in 2005 to then Labor Shadow Environment Minister, Anthony Albanese MP. He adopted my recommendation in the *Avoiding Dangerous Climate Change (Climate Change Trigger) Bill 2005*.

Reducing the obstacles for public interest litigation

In addition to improving the substantive protection provided by the EPBC Act by including a climate change trigger, there is a need to improve the procedural aspects of the Act to improve the role that public interest litigants can play in enforcing the Act and improving decision-making under it.

I recently reviewed the opportunities and obstacles for public interest environmental litigation under the EPBC Act based on five case studies and a survey of all civil litigation under the Act.²⁸ The case studies show that there is an important role for public interest environmental litigation in Australia at a federal level in protecting the environment but also that there are significant obstacles to such litigation. The threat of adverse costs is the most significant obstacle to public interest environmental litigation at present. The lack of merits review is another significant obstacle that restricts the ability of public interest litigants to promote good decision-making under the EPBC Act. Resolving these issues to promote enforcement and good decision-making under the EPBC Act is important for the future operation and development of environmental law in Australia.

Peter Grabosky and Neil Gunningham emphasise in their leading work on designing environmental policy the important roles of public interest litigants in modern environmental legal systems, including their role as surrogate regulators. They suggest governments can promote these roles (and thereby improve the operation of environmental regulation) by directly subsidising public interest groups, making donations to community groups tax deductible, improving access to information, providing widened standing, and nurturing constructive engagement between business and non-government organisations (NGOs).²⁹

Based on the analysis presented in my article and the principles for environmental regulatory design advanced by Grabosky and Gunningham, the following measures would substantially promote enforcement of the EPBC Act and good decision-making under it:

- Insert a provision in the EPBC Act or in the *Federal Court Rules* allowing public interest litigants to apply to the Federal Court at the beginning of a case for a public interest costs order to avoid the usual rule as to costs as recommended by

²⁸ See McGrath, n 11.

²⁹ Gunningham N and Grabosky P, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998), pp 101-104, 408-413.

the Australian Law Reform Commission in 1995³⁰ or modelled on s 49 of the *Judicial Review Act 1991* (Qld).

- Re-insert s 478 into the EPBC Act to remove the requirement to provide an undertaking as to damages when seeking an interim or interlocutory injunction under the Act.
- Re-establish legal aid (i.e. government funding) for public interest environmental litigation at a federal level for cases having substantial legal merit and administer it in a similar manner to the existing New South Wales legal aid scheme.
- Provide merits review by the Administrative Appeals Tribunal of decisions under ss 75 and 133 of the EPBC Act in accordance with the recommendations of the Administrative Review Council.³¹

The first of these recommendations would be likely to be largely cost free for the government and would greatly alleviate the current threat of adverse costs orders for public interest environmental litigants.

Recommendations

In summary, based on the reasoning presented above, I recommend that:

1. The review should find that the EPBC Act is not achieving or likely to achieve its objectives of protecting matters of NES, ecologically sustainable development, and conservation of biodiversity in the context of the expected severe impacts of climate change to matters of NES such as the Great Barrier Reef and Wet Tropics World Heritage Areas.
2. The EPBC Act should be amended to include a specific greenhouse trigger in Part 3 to complement the Carbon Pollution Reduction Scheme by allowing comprehensive environmental impact assessment of new projects contributing to climate change, including means of mitigating those impacts.
3. The EPBC Act should be amended to include a new s 141 to provide criteria for decisions involving climate change actions based on consistency with Australia's obligations under the UNFCCC and the Kyoto Protocol and concepts such as "best practice environmental management" and "low emissions technology".
4. The EPBC Act or the *Federal Court Rules* should be amended to insert a provision allowing public interest litigants to apply to the Federal Court at the beginning of a case for a public interest costs order to avoid the usual rule as to costs as recommended by the Australian Law Reform Commission in 1995 or modelled on s 49 of the *Judicial Review Act 1991* (Qld).
5. The EPBC Act should be amended to re-insert s 478 into the EPBC Act to remove the requirement to provide an undertaking as to damages when seeking an interim or interlocutory injunction under the Act.

³⁰ Australian Law Reform Commission, *Costs Shifting – Who Pays for Litigation* (Report No 75, ALRC, Canberra, 1995), Ch 13 and Recommendations 45-49.

³¹ Administrative Review Council, *What Decisions Should be Subject to Merit Review?* (AGPS, Canberra, 1999) at [1.3], <http://www.ag.gov.au/agd/www/archome.nsf> (viewed 25 July 2008).

6. Legal aid for public interest environmental litigation at a federal level should be re-established for cases having substantial legal merit and it should be administered in a similar manner to the existing New South Wales legal aid scheme.
7. The EPBC Act should be amended to provide merits review by the Administrative Appeals Tribunal of decisions under ss 75 and 133 of the EPBC Act.

Conclusion

The EPBC Act has made an important contribution to environmental protection in Australia but there is no doubt based on what we expect to happen in coming decades to iconic ecosystems such as the Great Barrier Reef and Wet Tropics that our environmental legal system is not being effective in achieving ecologically sustainable development or protecting matters of NES. As part of this system, the EPBC Act is also failing to achieve its objectives.

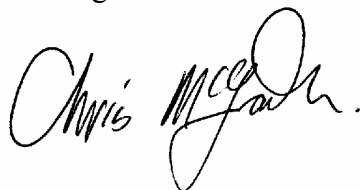
While the EPBC Act cannot itself prevent dangerous climate change from severely impacting on Australian society and matters of NES such as the Great Barrier Reef, it should attempt to mitigate the impacts as much as possible within its scope of influence and complementing the Carbon Pollution Reduction Scheme.

There is a need for a specific climate change trigger to be inserted into the EPBC Act if greenhouse emissions are to be regulated under the Act. The trigger should be based on a defined quantity of emissions alone, and not also require proof of a significant impact on the environment. The Act should also be amended to include criteria for assessing climate change impacts based on Australia's obligations under the UNFCCC and Kyoto Protocol and promoting best practice environmental management and low emissions technology.

Experience in the operation of the EPBC Act shows that there is an important role for public interest environmental litigation in protecting the environment and improving decision-making under the Act but also that there are significant obstacles to such litigation. The threat of adverse costs is the most significant obstacle to public interest environmental litigation at present. There is a need to reduce these obstacles to public interest litigation under the EPBC Act to promote public interest environmental litigation enforcing the Act and improving decision-making under it.

I would be happy to speak to the panel reviewing the EPBC Act should any clarification of these points be required or if I can assist the panel with any other aspects of the terms of reference of the review or the 44 questions posed in the discussion paper for the review.

Kind regards

A handwritten signature in black ink that reads "Chris McGrath". The signature is written in a cursive, flowing style.

Chris McGrath