

**Submission of
New South Wales Young Lawyers**

Environmental Law Committee



**Independent review of the Environmental Protection and Biodiversity
Conservation Act 1999 (Discussion Paper)**

19 December 2008



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19 December 2008

Dear Secretariat

Submission on the Independent Review of the EPBC Act

New South Wales Young Lawyers is grateful for the opportunity to make this submission.

New South Wales Young Lawyers is an Australian organisation based in Sydney, made up of law students, and legal practitioners who are in their first 5 years of practice or under the age of 36. Hundreds of members participate on a volunteer basis in committees specific to particular areas of law.

This submission was authored by the members of the Environmental Law Committee of New South Wales Young Lawyers.

The Environmental Law Committee is concerned with educating and raising awareness in the community and the legal profession about the importance of environmental law and protection of the environment.

If you have any questions in relation to the matters raised in this submission, please contact me at envirolaw.chair@younglawyers.com.au

Yours faithfully

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Introduction

The NSW Young Lawyers Environmental Law Committee (the Committee) would like to thank the Minister for the Environment, Heritage and the Arts for commissioning the review of the Environment Protection and Biodiversity Act 1999 (Cth) (the EPBC Act) and for providing the opportunity to make a submission on the Act.

The Committee recognizes the need for urgent action on climate change and the focus of this submission is on Question 19 posed by the Discussion Paper:

“Does the Act provide an appropriate and responsive legislative framework for addressing climate change and other emerging pressures in the context of environmental protection and biodiversity conservation? If not, how can such matters be considered when making decisions under the Act?”

Implementing a Greenhouse Gas Trigger

A widely held criticism of the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) is that its current Assessment criteria of “matters of national environmental significance” fails to address climate change issues.

Any genuine and progressive commitment to the Kyoto Protocol means direct implementation of statutory triggers, which can effectively catch and address projects posing serious threat to carbon reductions.

The Committee submits that the operation of a greenhouse gas emissions trigger is a vital step forward in aiding the legislation to meet its policy objectives and to operate successfully. The sufficiency of protection afforded by existing federal laws will be brought to question. Entrusting the entirety of the carbon emissions job to the recently announced Carbon Pollution Reduction Scheme (**CPRS**) will also be discussed as an inadequate approach in light of its modest objectives.

Not only have its weak targets been deemed by the Reef and Rainforest Research Centre as falling well short of the level of protection needed to save the Great Barrier Reef¹ but the scheme itself will fail to account for significant sources of greenhouse gas (**GHG**) emissions, most notably agricultural activities will be excluded from the scheme until at least 2015. With the heightened fragility of Australia’s landmark heritage site and the transparency of the CPRS’s limits, it would be prudent for the review to utilize the machinery of the EPBC Act as an effective statutory avenue for tackling potential carbon impact threats.

¹ *Emissions scheme ‘not enough’ to save reef* (2008) ABC News
<<http://www.abc.net.au/news/stories/2008/12/16/2447618.htm>> at 16 December 2008.

Political climate of GHG trigger rejection in 2000

The Committee recalls that the GHG emission trigger was initially on the federal legislation agenda in 2000.

On this occasion the proposal was rejected due to a number of outdated objections that were clouding the political climate. Primarily the argument was that trading in carbon credits and emissions would constitute enough state action to meet Kyoto targets.² The other main rebuttal was that introducing such a trigger in addition to the carbon emission-trading scheme would not be economically viable and would hasten the adverse costs of investing in climate change abatement by way of threatening major industries and development proposals.³

Today, Australia is the largest per capita carbon emitter in the developed world⁴ and the conservative targets announced in the White Paper reflect a step backwards in the national effort to prioritise state action in propelling carbon reductions.

The nation has truly felt the effects of a global economic recession without any help from costs associated with addressing climate change. In the contemporary context the past objections to a greenhouse gas trigger are no longer applicable and the lessened burdens of the country under the CPRS plan should be taken as leeway for calling upon other statutory schemes to implement independent trigger mechanisms to monitor and abate carbon emissions.

Sufficiency of current federal law

Decisions such as the Nathan Dam case demonstrate that the EPBC Act may catch certain greenhouse intensive projects indirectly. This decision held that the adverse impacts associated with building a dam could entail indirect downstream impacts on the Great Barrier Reef, a world heritage area.⁵ However for such a pressing global issue like climate change the law should not be required to be twisted and loopholed to seek its protection. Rather a direct and facilitative approach is in order and the introduction of a greenhouse gas trigger to utilise the Act's jurisdiction under Assessment and Approvals would constitute an effective control device.

In context of the CPRS White Paper

The recent announcement of the 5%-15% carbon emission reduction target (the lowest bracket) adopted by the Australian government has aroused heated debate and protest from the

² Philip Williams, *Coalition ministers lock horns over greenhouse gas emissions* (2000) AM Archive < <http://www.abc.net.au/am/stories/s130058.htm> > at 15 December 2008.

³ *ibid*

⁴ Asa Wahlquist, *Australia tops skewed list as largest per capita emitter of greenhouse gases* (2008) One Degree < <http://www.1degree.com.au/node/787> > at 15 December 2008.

⁵ Chris McGrath, *Federal environmental laws consider direct and in direct impacts of an action* (2005) Environmental Law Publishing <<http://www.envlaw.com.au/nathandam6.pdf>> at 16 December 2008.

community and prominent environmental groups. The scheme aspires to minimal overall reduction results notwithstanding its failure to address emissions produced by the second largest sector of carbon pollution following energy: agricultural activity.

The agriculture sector accounts for 17% of Australia's national GHG emissions⁶ and addressing emissions from deforestation and farming land use will not enter into the CPRS plan until 2015 at the earliest. It is therefore vital that a greenhouse gas trigger in the EPBC Act be included to fill the gaps of the federal scheme and simultaneously address carbon emissions in these excluded sectors. It should be stressed that the committee intends such a trigger to prove as a useful precautionary tool for subjecting potentially hazardous projects to proper assessment and consideration before the Minister. It is not intended to dictate outcomes or apply unconditionally on all projects caught in its jurisdiction.

The Committee recommends the implementation of a GHG trigger to attract all projects which emit above 500 000 tonnes in carbon dioxide annually and subject them to federal assessment and approval under the Act.

The impact of climate change on biodiversity conservation

Biodiversity refers to the variability among living organisms from all sources (including terrestrial, marine and other aquatic ecosystems and the ecological complexes of which they are part). The Act explains that it includes diversity within species and between species; and diversity of ecosystems.

Globally, there are 1.75 million described species from viruses to vertebrates and the habitats they occupy.⁷ Biodiversity conservation is important for the maintenance of ecosystem functions and the safeguarding the ability of human beings to rely upon such biodiversity for healthy life.

The EPBC Act is the primary Commonwealth legislation on environmental protection and biodiversity conservation. In 2006, the Department of the Environment and Heritage commissioned a review of the Act undertaken by barrister Chris McGrath.⁸ McGrath found that "Native vegetation and human-induced climate change (or which greenhouse gas emissions is an

⁶ *Farming and the national environmental law: EPBC Act (2008)* Australian Government: Department of the Environment, Water, Heritage and the Arts <<http://www.environment.gov.au/epbc/publications/farming-epbc.html>> at 16 December 2008.

⁷ Alonso, A., Dallmeier, F., Granek, E., and Raven, P. *Biodiversity: Connecting with the Tapestry of Life*, Smithsonian Institution/Monitoring and Assessment of Biodiversity Program and President's Committee of Advisors on Science and Technology, Washington, D.C., 2001.

⁸ McGrath C 2006, 'Review of the EPBC Act', paper prepared for the 2006 Australian State of the Environment Committee, Department of the Environment and Heritage, Canberra,

<<http://www.deh.gov.au/soe/2006/emerging/epbcact/index.html>>.

indicator) were recognised by the 2001 SoE report as two of the most important issues affecting the conservation of biodiversity in Australia.”⁹

Given the importance of climate change as one of the two most important issues affecting conservation of biodiversity in Australia, it is essential that the current review process consider how climate change may be better addressed, particularly in the conservation of biodiversity.

Limitations of the Act in addressing climate change in the context of biodiversity conservation

There are a number of limitations under the EPBC Act that severely impact the Act’s ability to regulate greenhouse gas emissions¹⁰ and hence protect the impacts of climate change upon biodiversity conservation. The following example will highlight a specific limitation of the Act in addressing climate change in the context of biodiversity conservation.

Cumulative environmental impacts

The Act does not regulate small activities (e.g. individual traffic movements or developments) that collectively have major, cumulative environmental impacts.¹¹ The Australian Network of Environmental Defender’s Offices made a Submission to the Inquiry into the operation of the EPBC Act in September 2008 (EDO Submission), noting that:

“While amendments to the Act have enabled a development to be considered as a whole rather than in stages (where approval may often be granted in stages through State laws), there is no assessment of the overall impact of a series of unrelated developments, for example on critical habitat for certain species or World Heritage values. For example, in the context of the Great Barrier Reef World Heritage Area, which extends over 2000 km, a development proponent may argue that one development will not impact significantly on the values. This conclusion would be different if cumulative development impacts were properly assessed. Similarly, if the impacts of several developments on migratory birds are each assessed in isolation, it is difficult to prove that any one development will have a significant impact on a particular species. However, if considered cumulatively, there may clearly be a significant impact.”¹²

⁹ Ibid, p. p.3. See Williams J, Read C, Norton A, Dovers S, Burgman M, Proctor W, and Anderson H, *Biodiversity: Australian State of the Environment Report 2001 (Theme Report)* (CSIRO Publishing, Melbourne, 2001), pp 4457 and 96100.

¹⁰ Climate Change and the Great Barrier Reef World Heritage Area, the failure of Australia to meet it’s obligations under the World Heritage Convention, Millar and Holden, 2006

¹¹ See the criticisms of McIntosh A, “Why the EPBC Act’s referral, assessment and approval process is failing to achieve its environmental objectives” (2004) 21 EPLJ 288.

¹² Australian Network of Environmental Defender’s Offices, *Submission to the Inquiry into the operation of the Environment Protection and Biodiversity Conservation Act 1999* (September 2008), p.32.

Recommendation for reform for addressing climate change in the context of biodiversity conservation

The following recommendation is made in order for the EPBC Act to better address climate change in the context of biodiversity conservation:

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

Climate Change and Public Interest Litigation under the Act

Public interest litigation performs an important function in promoting enforcement and effective decision-making. Appropriate and effective decision-making to address climate change under the Act would be promoted through ensuring that provisions of the Act itself do not create unnecessary barriers for public interest litigants.

A recent article by Chris McGrath¹³ found that public interest environmental litigation plays an important role in protecting the environment under the Act but that currently there are significant obstacles to this litigation. McGrath concludes that the most significant obstacle is the threat of adverse costs.

Recommendations for Reform for Addressing Climate Change in the Context of Public Interest Litigation

The following recommendations are made in order for the EPBC Act to better address climate change in the context of public interest litigation:

1. The retention of the current standing provisions;
2. The incorporation of provisions that alleviate adverse costs orders upon public interest litigants;
3. The reinstatement of s 478 to ensure that applicants are not required to provide an undertaking for damages to successfully obtain an interim or interlocutory injunction;
4. The removal of applications for security for costs against public interest litigants;
5. The incorporation of a provision to allow public interest litigants to apply to the Federal Court at the beginning of a case for public interest costs order as recommended by the Australian Law Reform Commission;¹⁴

¹³ McGrath C, "Flying foxes, dams and whales: Using federal environmental laws in the public interest" (2008) 25 EPLJ 324.

¹⁴ Australian Law Reform Commission, *Costs Shifting – Who Pays for Litigation* (Report No 75, ALRC, Canberra, 1995), Ch 13 and Recommendations 45-49.

6. The re-instatement of government funding (legal aid) for public interest litigation at federal level for cases that have substantial legal merit,¹⁵ and
7. The incorporation of provisions that provide merits review by the Administrative Appeals Tribunal of decisions that affect matters of national environmental significance.¹⁶

¹⁵ McGrath C, *Submission on inquiry into operation of the EPBC Act* (19 September 2008), p.2.

¹⁶ 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> (accessed 18 December 2008).