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15 December 2008

The Hon. Peter Garrett  
 Department of Environment, Water, Heritage and the Arts  
 John Gorton Building - Environment entrance  
 King Edward Terrace  
 Parkes ACT 2600 Australia

Dear Minister,

### **Sustainability reporting by Commonwealth agencies**

The Environmental Defender's Office of NSW (EDO) is a community legal centre specialising in public interest environmental law. We are writing to you in relation to sustainability reporting by Commonwealth agencies as required by Section 516A of the *Environment Protection and Biodiversity Conservation Act 1999* ('EPBC Act').

The EDO has examined the reports of over 20 agencies and departments from the 2001-02 reporting period to the 2007-08 reporting period. We have observed that the quality of reporting varies considerably, which makes it difficult for the public to gauge the implementation of ESD at a whole-of-Commonwealth level. Our analysis has highlighted that some agencies are arguably not complying with the requirements of s516A.

#### **1. Background**

The Commonwealth Government is committed to the principles of ecologically sustainable development (ESD) through the *National Strategy on Ecologically Sustainable Development 1992* and the 2002 *World Summit for Sustainable Development*. The implementation of ESD in Australia requires the establishment of a framework that aims to achieve economic and social development while maintaining the long-term integrity of ecological systems.<sup>1</sup> A key element of this framework is the establishment of a system of triple bottom line reporting by government agencies against environmental, social and economic indicators. To this end, section 516A was introduced into the *EPBC Act* to ensure that Commonwealth government instrumentalities implement the principles of ESD and set sustainability targets.

The introduction of s516A also stemmed from a recognition that the Commonwealth government has an important role to play in setting a strong example for the corporate sector on sustainability reporting and corporate social responsibility. However, the introduction of s516A has failed to translate to robust and meaningful sustainability reporting by Commonwealth agencies, and is therefore undermining this important role.

In 2003, the Australian National Audit Office (ANAO) conducted an audit to provide an independent assessment of the quality of the first two years of annual reporting on ESD under s516A.<sup>2</sup> ANAO found that there were clear breaches of s516A:

<sup>1</sup> Ronnie Harding, *Environmental Decision-making: the role of scientists, engineers and the public* (2<sup>nd</sup> edition, 2002) at 17.

<sup>2</sup> Australian National Audit Office (2003), *Annual Reporting on Ecologically Sustainable Development*, Audit-Report No.41.



*Overall, the ANAO considers that the quality of reporting on ESD and environmental performance could be improved by providing more comprehensive, consistent and balanced reports. In addition, there were a significant number of instances of non-reporting of elements required under the EPBC Act.<sup>3</sup>*

Also:

*There is considerable scope for improvement in relation to the quality of agencies' annual reports; especially in relation to compliance with the EPBC Act and articulating agencies' contribution to broader ESD outcomes.<sup>4</sup>*

Although ANAO observed that the quality of reporting was poor, ANAO concluded that it was 'understandable' that some agencies were not reporting properly since the legislation was new at the time and reporting frameworks were still being established. However, 516A reporting has not improved since 2003. Since s516A has been in operation for 8 years, agencies should by now have established internal sustainability frameworks in order to properly report on their implementation of ESD.

## 2. Observations in relation to reporting

The EDO has observed key deficiencies in the s516A reporting undertaken by Commonwealth agencies. Put simply, many agencies are not complying with their legislative requirements. This is despite the presence of good government guidelines that provide generic ESD and environmental performance indicators for Commonwealth organisations.<sup>5</sup>

Section 516A reporting has 5 elements. Commonwealth agencies are required to:

- (a) include a report on how the activities of, and the administration (if any) of legislation by, the reporter during the period accorded with the principles of ecologically sustainable development; and*
- (b) identify how the outcomes (if any) specified for the reporter in an Appropriations Act relating to the period contribute to ecologically sustainable development; and*
- (c) document the effect of the reporter's activities on the environment; and*
- (d) identify any measures the reporter is taking to minimise the impact of activities by the reporter on the environment; and*
- (e) identify the mechanisms (if any) for reviewing and increasing the effectiveness of those measures.*

We address these in turn.

(a) include a report on how the activities of, and the administration (if any) of legislation by, the reporter during the period accorded with the principles of ecologically sustainable development

This section requires agencies to report on how their activities accord with the principles of ESD. However, some agencies simply adopt a 'tick a box' approach in relation to their activities and programs rather than explaining how these activities are consistent with the principles of ESD. As ANAO observed in 2003:

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<sup>3</sup> *Ibid*, p24.

<sup>4</sup> *Ibid*, p15.

<sup>5</sup> Department of the Environment and Heritage, (2003), *Generic ESD and Environmental Performance Indicators for Commonwealth Organisations*. Found at: <http://www.environment.gov.au/epbc/publications/esd-indicators.html> (22 October 2008).



*There has been a tendency just to list a range of activities, of varying size and significance. Few agencies attempt to provide a clear picture of their overall operational environmental impacts and the contribution of their policies, programs and legislation to ESD.<sup>6</sup>*

This is still the case five years on. For example, the Department of Agriculture, Forestry and Fisheries (DAFF) in its 2007-08 report determines the contribution of the department's activities to ESD by simply assigning a percentage figure under economic, social and environmental columns.<sup>7</sup> Similarly, DAFF's 2005-06 report determines the department's contribution to ESD by listing all its programs and policies and placing a tick under economic, social and environmental categories.<sup>8</sup>

This level of reporting is insufficient. Indeed, simply demonstrating that an agency policy or activity has economic, social or environmental ramifications is not of itself evidence that the policy or program accords with ESD. ESD requires the integration of all three considerations into decision-making. It must be evident that an agency's programs and decision-making frameworks seek to reconcile economic gains and environmental sustainability. A 'balance' must be apparent.

The DAFF report also provides a table of legislation administered by the Department that is relevant to ESD but with no discussion on how agencies' administration of the legislation accords with ESD, or which principles of ESD are promoted. Similarly, the Department of Foreign Affairs and Trade in its 2007-08 report<sup>9</sup> simply states: "the department sought to the extent possible to ensure its policy activities and other operations accorded with and contributed to the principles of ecologically sustainable development". No detail is provided about specific activities or how the department has promoted ESD through conducting or approving these activities.

(b) identify how the outcomes (if any) specified for the reporter in an Appropriations Act relating to the period contribute to ecologically sustainable development

The EDO has observed very little discussion in s516A reports on how agency outcomes contribute to ESD. Under subsection (b), agencies must demonstrate how ESD is implemented in decision-making and how it has been influential in modifying decisions.<sup>10</sup> Indeed, ESD is not meant to be simply a process. It is meant to ensure that the *outcome* of an activity fully integrates economic, social and environmental considerations. For example, a decision to approve a development should demonstrate that in addition to having economic benefits, the development approval incorporates appropriate environmental conditions, including buffer zones and the requirement for rehabilitation and monitoring. This level of analysis is not apparent in s516A reports.

As ANAO observed:

*The EPBC Act's strong emphasis on the importance of integrating the social, economic and environmental elements of ESD in decision making is, consequently, not yet being implemented by a significant number of agencies.<sup>11</sup>*

<sup>6</sup> Australian National Audit Office (2003), *Annual Reporting on Ecologically Sustainable Development*, Audit-Report No.41.

<sup>7</sup> Department of Agriculture Forestry and Fisheries, *Annual Report 2007-08*, Appendix 4. Found at: <http://www.daff.gov.au/about/annualreport/2007-2008/appendixes#app4>

<sup>8</sup> Department of Agriculture Forestry and Fisheries, *Annual Report 2007-08*. Found at: [http://www.dfat.gov.au/dept/annual\\_reports/07\\_08/s4.pdf](http://www.dfat.gov.au/dept/annual_reports/07_08/s4.pdf) (26 November 2008).

<sup>9</sup> Department of Foreign Affairs and Trade, *Annual Report 2005-06*, Appendix 7. Found at: [http://www.dfat.gov.au/dept/annual\\_reports/05\\_06/index.html](http://www.dfat.gov.au/dept/annual_reports/05_06/index.html) (22 October 2008).

<sup>10</sup> Department of the Environment and Heritage, (2003), *Generic ESD and Environmental Performance Indicators for Commonwealth Organisations*. Found at: <http://www.environment.gov.au/epbc/publications/esd-indicators.html> (22 October 2008).

<sup>11</sup> Australian National Audit Office (2003), *Annual Reporting on Ecologically Sustainable Development*, Audit-Report No.41.



A failure to comply with (b) means that the public cannot get a true picture of how ESD is being factored in to decision-making and affecting outcomes.

(c) document the effect of the reporter's activities on the environment

This section requires agencies to provide details on how their activities directly impact on the environment. This has two components. First, agencies should report on how their operational activities directly impact on the environment, such as its waste output, greenhouse gas emissions, water use, etc. Second, the agency is required to report on how its actual business, including its administration of legislation and its broader activities, are affecting the environment. Indeed, the *EPBC Act* defines activities broadly to include:

- (a) developing and implementing policies, plans, programs and legislation; and*
- (b) the operations of a department, authority, company or agency referred to in this section.<sup>12</sup>*

The EDO has observed that although operational impacts are generally well reported, some agencies are still not reporting on the full environmental effects of their operational activities. For example, the Department of Defence report of 2007-8 does not contain information on total GHG emissions, water use, waste generation and transportation.<sup>13</sup>

Moreover, we have seen that of those agencies that do report on their environmental impacts, none of them report on the environmental impacts of their broader activities. For example, the Department of Human Services in its 2007-08 report provides an excellent summary of the environmental impacts of the department's operational activities.<sup>14</sup> However, there is no discussion of how its legislative activities and its broader plans and policies have contributed to ESD. This observation is consistent with ANAO's finding in 2003 that "more activity is underway to manage operational environmental impacts than to manage agencies' broader contributions to ESD".<sup>15</sup>

The government's reporting guidelines provide examples of broader agency activities which may have environmental effects that should be reported such as:

- *Providing advice to a Minister recommending a course of action that is expected to have an effect, either positive or negative, on the environment;*
- *Issuing permits or licenses which authorise clients to take actions which have environmental impacts;*
- *Administering grants or other government funding which enables clients to take actions which have environmental impacts;*
- *Regulatory or other requirements imposed on clients which may have environmental impacts (for example, requiring a business to reduce its pollutant emissions or requiring recipients of funding to undertake travel which results in emissions of pollutants)<sup>16</sup>*

Despite these clear guidelines which have been available since 2003, the EDO has not observed reporting at this level. As mentioned above, environmental impact reporting at present appears limited

<sup>12</sup> Section 516A(7), *Environment Protection and Biodiversity Conservation Act 1999*.

<sup>13</sup> Department of Defence, *Annual Report 2005-06*. Found at: [http://www.defence.gov.au/budget/07-08/dar/2007-2008\\_Defence\\_DAR\\_05\\_v1\\_append.pdf](http://www.defence.gov.au/budget/07-08/dar/2007-2008_Defence_DAR_05_v1_append.pdf) (26 November 2008).

<sup>14</sup> Department of Human Services, *Annual Report 2007-08*. Found at: <http://www.humanservices.gov.au/dhs/publications/annual-reports/0708/part6/appendix6.html> (26 November 2008).

<sup>15</sup> Australian National Audit Office (2003), *Annual Reporting on Ecologically Sustainable Development*, Audit-Report No.41.

<sup>16</sup> Department of the Environment and Heritage, (2003), *Generic ESD and Environmental Performance Indicators for Commonwealth Organisations*. Found at: <http://www.environment.gov.au/epbc/publications/esd-indicators.html> (22 October 2008).



to operational impacts. Although reporting on the environmental impact of operational activities undertaken by agencies is of course important, we believe that the environmental impact of an agency's broader activities such as those detailed above, provide a better reflection of an agency's performance in terms of ESD. An example is approvals granted by the Minister for Environment under the *EPBC Act* to undertake development that may have a significant impact on matters of national environmental significance. Section 516A requires that the environmental degradation resulting from these approvals should be reported. Despite this, the Department of Environment, Water, Heritage and the Arts (DEWHA) is not reporting on the environmental impacts resulting from its approvals under the *EPBC Act*. DEWHA's report of 2007-08 lists the environmental impacts for all its buildings, but not its wider activities.<sup>17</sup> Its 2006-07 report does provide some information on its wider activities:

*A total of 44 actions were approved in 2006-07 with a range of conditions to ensure that matters of national environmental significance and the environment were protected. No proposals were approved without conditions and one proposal was rejected. At 30 June 2007, 110 actions affecting matters protected by the EPBC Act were under assessment; that is, a decision had been made on the assessment approach, but the assessment was still to be completed. These ongoing assessments include 39 assessments conducted under bilateral agreements and 25 assessments conducted under state or territory processes that have been accredited on a case-by-case basis.*

However, this is simply an overview of DEWHA's approval activities. What is required by s516A are, for example, summaries of the amount of vegetation cleared as a result of approvals granted, the greenhouse gas emissions associated with such projects, etc. This would provide a true reflection of the broader environmental impacts of government decision-making.

(d) identify any measures the reporter is taking to minimise the impact of activities by the reporter on the environment

This section requires the agency to demonstrate how it is attempting to minimise the environmental impact of its activities – both operational activities and broader legislative activities. This section is reported fairly well, but only in relation to operational impacts. There is no reporting on how agencies seek to minimise the environmental impacts of their legislative activities, such as issuing licences and development consent to conduct activities that will lead to environmental impacts. Even DEWHA, in its 2007-08 report, reports simply on how it will reduce the environmental impacts of its operational activities at all its facilities.<sup>18</sup> There is no discussion on how the department will minimise or address the environmental impacts of its decision-making and determinative functions.

(e) identify the mechanisms (if any) for reviewing and increasing the effectiveness of those measures

A key element of ensuring that sustainable practices are implemented in agencies is a review mechanism to monitor whether measures taken to ameliorate the environmental effects of agencies' activities have been effective. Moreover, in order to monitor performance, agencies need robust performance indicators, targets and management information systems.<sup>19</sup>

We note that some agencies have established Environmental Management Systems (EMS) that provide a good mechanism for the ongoing review of the effectiveness of any measures taken to minimise adverse environmental impacts. However, not all agencies have an EMS in place which may to some extent explain the problems with reporting at present. As ANAO observed in 2003:

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<sup>17</sup> Department of Environment, Water, Heritage and the Arts, *Annual Report 2007-08*. Found at: <http://www.environment.gov.au/about/publications/annual-report/07-08/pubs/vol1-managing-department.pdf> (26 November 2008).

<sup>18</sup> *Ibid.*

<sup>19</sup> Australian National Audit Office (2003), *Annual Reporting on Ecologically Sustainable Development*, Audit-Report No.41.

*In order to prepare a quality annual report on ESD and environmental matters, agencies should have appropriate management and reporting frameworks in place.*<sup>20</sup>

Hence, a good way to improve reporting is to require all agencies to establish EMS as a mandatory requirement. This will allow agencies to report systematically rather than in an ad hoc and piecemeal manner.

### Summary

The current quality of reporting seems to indicate that some agencies view ESD reporting requirements as an administrative burden rather than an opportunity to demonstrate their positive environmental initiatives and progress towards ecologically sustainable outcomes. What is clearly apparent is that a genuine ESD culture has not filtered through into Commonwealth agencies. As a result, there is a danger that s516A will be perceived as a tokenistic measure to implement ESD unless reporting improves markedly. The EDO submits that in order to comply with *EPBC Act*, the content of reports should be comprehensive and provide an holistic summary of how the department's activities implement ESD, how the activities of the agency are impacting on the environment, and what measures the agency is taking to genuinely implement ESD and reduce the environmental impact of its activities. This will enable the public to gauge progress towards sustainability on a whole-of-Commonwealth level.

### 3. Regulations

A clear problem with s516A is the lack of criteria or performance indicators in the Act. As has been observed, "the Act's provisions are tentative and weak, leaving much for administrative clarification".<sup>21</sup> We note that the former Environment Australia produced *Generic ESD and Environmental Performance Indicators for Commonwealth Organisations* in 2003 to address this gap. These guidelines were drafted to assist agencies in effectively reporting on the environmental consequences of its organisational activities and the broader implications of its activities (such as administering legislation) on the environment. The guidelines provide key performance indicators that agencies should report against. However, despite the presence of these guidelines, reporting has not improved since 2003.

In our opinion, a better approach would be to place performance indicators into the regulations to the *EPBC Act*. This would strengthen reporting by providing a robust reporting framework, while at the same time a measure of flexibility is provided to update the criteria as required. Importantly, the provisions of the regulations are legally enforceable, unlike guidelines.

These regulations should also include best practice targets for various categories, such as greenhouse gas emissions, paper use, etc. Agencies should be required to report against these targets to enable their environmental performance to be genuinely compared to best practice. This is done in Canada, where agencies report on their progress against sustainability targets.<sup>22</sup>

### 4. Role of government agencies

#### a) DEHWA

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<sup>20</sup> *Ibid.*

<sup>21</sup> Gregory Rose, "Environmental Performance Auditing Government – the Role for an Australian Commissioner for the Environment" (2001) 18(2) *Environmental and Planning Law Journal*, 129-149 at 148.

<sup>22</sup> Australian National Audit Office (2003), *Annual Reporting on Ecologically Sustainable Development*, Audit-Report No.41, p72.



In light of current poor reporting, we believe that DEWHA must go beyond providing guidelines. DEWHA, as the agency responsible for the *EPBC Act*, needs to play an active role in ensuring that the ESD performance of the Commonwealth can be adequately gauged from its annual reports.

For example, DEWHA could provide examples of best practice reporting to all agencies. Furthermore, DEWHA could formulate best practice targets (ideally to be placed in regulations as above) for operational environmental impacts. This will provide agencies with clear sustainability goals. We also believe DEWHA should conduct systematic reviews of s516A reports and provide feedback to agencies to ensure meaningful and consistent reporting, and to assist a new Sustainability Commissioner (discussed below).

*b) other agencies*

There is no doubt that the reports of s516A are far-reaching. To fully comply, agencies need to actively consider recruiting sustainability officers to liaise with DEWHA and the proposed Sustainability Commissioner, as well as to provide agency training and education in sustainability practices and reporting.

### 5. Sustainability Commissioner

The Australian National Audit Office has conducted one performance audit of Commonwealth organisations' compliance with the requirements of s516A in 2003. There has been no further audit since that time. We note that under section 8(4) of the *Auditor-General Act 1997* the government cannot direct the Auditor-General to conduct a specific audit. This means that although ANAO is empowered to conduct s516A reviews, whether a review is undertaken is dependent on ANAO priorities and the Auditor-General's discretion. However, ANAO does not have a dedicated program of environmental performance auditing at present. In the EDO's opinion, given the importance of promoting ESD among Commonwealth agencies, and the current quality of s516A reporting, a more systematic and consistent system of review is required to ensure that agency reports are accurate and meaningful. As has been observed by an academic commentator:

*All indications are that some new, external impetus would be necessary for a more systematic and pervasive ANAO approach to environmental performance auditing.*<sup>23</sup>

In light of the above, and consistent with our previous submissions prior to the commencement of the *EPBC Act*, the EDO submits that a new Sustainability Commissioner (or some similar entity) should be created through amendments to the *Auditor-General Act 1997* to introduce a robust system of environmental performance auditing of Commonwealth agencies. A Sustainability Commissioner is not a new concept, with Canada, Victoria and the Australian Capital Territory all having an appointed Commissioner to oversee the governments' implementation of ESD and to monitor compliance with sustainable development strategies.

A new Sustainability Commissioner could be appointed by the Auditor-General and could operate within ANAO in the context of a specific environmental mandate.<sup>24</sup> The Commissioner's key role, *inter alia*, should be to review the performance of Commonwealth agencies in implementing their ESD strategies, meeting sustainability objectives and complying with Section 516A of the *EPBC Act*. Such a

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<sup>23</sup> Gregory Rose, "Environmental performance auditing government – the role for an Australian Commissioner for the Environment" (2001) 18(2) *Environmental and Planning Law Journal*, 129-149 at 136.

<sup>24</sup> *Ibid.*

position would lift the profile and importance of ESD performance by Commonwealth agencies and will ensure that reporting is consistent with the requirements of s516A.

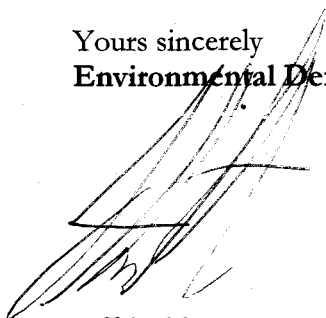
The Commissioner should be granted wide audit, investigative and review powers over Commonwealth agencies similar to the Ombudsman's powers. This would include the power to make orders to Commonwealth agencies to re-submit their reports if they are found to be inconsistent with the requirements of s516A. The Commissioner should also be required to report annually to Parliament about the progress of s516A reporting and any other matter that the Commissioner considers should be brought to Parliament's attention in relation to the implementation of ESD by Commonwealth agencies.

We believe that a Sustainability Commissioner is fundamentally necessary, especially given the projected impacts of climate change and the increasing loss of biodiversity in Australia. Moreover, it is crucial that the Commonwealth Government implements ESD in a genuine and committed manner in order to set an example to industry and the community at large, and to promote sustainable practices and behaviour. The only way to achieve this is through the establishment of a systematic review and audit process administered by an independent body with a specific sustainability mandate.

We note that the 10 year review of the EPBC Act has commenced, which provides a timely opportunity to introduce the amendments necessary to ensure that s516A achieves its intended result.

We are keen to discuss this with you further and are available at your convenience. Should you have any queries, please do not hesitate to contact me on 9262 6989.

Yours sincerely  
**Environmental Defender's Office (NSW) Ltd**



Jeff Smith  
Director

