



PILCH Submission to the Review Secretariat

Review of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*

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1 Introduction

1.1 Introduction

The Public Interest Law Clearing House (VIC) Inc. (**PILCH**) thanks the Review Secretariat for the opportunity to make this submission to its independent review on the scope and operation of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth) (Act)*.

This submission is intended to inform and complement PILCH's public consultation with the Review Secretariat, scheduled to take place at 2pm on 7 May 2009.

1.2 Summary

The Act operates to integrate international environmental legal obligations into Australian domestic law. PILCH submits that the purposes of the Act should be advanced by recognition of the potential negative implications for human rights as a result of environmental climate change.

Climate change recognition would appropriately allow for human rights considerations to be addressed when reviewing environmental actions under the Act, and also addresses the Australian Government's obligations to fulfill its commitment as a party to principal international human rights treaties¹.

PILCH also submits that the EBPC Act should operate in a transparent manner consistent with the principles of access to justice, and which supports public interest litigation opportunities. These principles are particularly important having regard to the important environmental consequences and increasing public interest in actions which come under the provisions of the Act.

To this end, PILCH submits on the following aspects of the Act:

- The need for climate change to be identified as matter of national environmental significance (**NES**) as listed in Chapter 2 of the Act;
- Issues relating to standing and public participation under the Act; and
- Issues relating to costs and undertakings as to damages under the Act.

1.3 About PILCH

PILCH is a leading Victorian, not-for-profit organisation which is committed to furthering the public interest, improving access to justice and protecting human rights by facilitating the provision of pro bono legal services and undertaking law reform, policy work and legal education.

PILCH coordinates the delivery of pro bono legal services through six schemes:

- i) the Public Interest Law Scheme (**PILS**);
- ii) the Victorian Bar Legal Assistance Scheme (**VBLAS**);
- iii) the Law Institute of Victoria Legal Assistance Scheme (**LIVLAS**);
- iv) PILCH Connect (**Connect**);
- v) the Homeless Persons' Legal Clinic (**HPLC**); and

¹ Detailed in the body of this submission

- vi) Seniors Rights Victoria (**SRV**).

PILCH's objectives are to:

- i) improve access to justice and the legal system for those who are disadvantaged or marginalised;
- ii) identify matters of public interest requiring legal assistance;
- iii) seek redress in matters of public interest for those who are disadvantaged or marginalised;
- iv) refer individuals, community groups, and not for profit organisations to lawyers in private practice, and to others in ancillary or related fields, who are willing to provide their services without charge;
- v) support community organisations to pursue the interests of the communities they seek to represent; and
- vi) encourage, foster and support the work and expertise of the legal profession in pro bono and/or public interest law.

2 The introduction of a new matter of National Environmental Significance – Climate change

2.1 Key Question

Discussion question 1(c): *Are the existing matters of national environmental significance (NES) appropriate? Do you think that there should be any additional matters of NES, and if so, how should such matters be framed?*

2.2 PILCH's Position

Matters of NES under the Act regulate which developments will require Ministerial assessment under its operative provisions. Existing matters of NES under the Act are insufficient (and not framed) to address detrimental climate change impacts on the environment.

PILCH submits that the Act should be reformed to pick up climate change as a new matter of NES, by application of a greenhouse gas emissions trigger. Incorporation of such a trigger is warranted for the following reasons:

- It will fulfil Australia's human rights obligations in international law;
- It will further advance the indirect human rights objects of the Act; and
- It will complement and strengthen the other major climate change initiatives proposed by the Commonwealth Government.
- It will ensure that administrative decision-makers act according to the legitimate expectations of the Australian public;

These grounds are discussed in detail within this section.

With respect to the proposed greenhouse trigger, PILCH submits that a development should be assessed as a controlled action if it emits over 500,000 tonnes of CO₂.

equivalent per year. This design is known as a 'quantitative metric' system, and is also consistent with the Australian Labour Party's position in 1999, 2000, 2003, 2005, and 2006.²

2.3 Fulfilling Australia's human rights obligations

(a) *Human rights obligations*

Australia has an obligation at international law to ensure that human rights are protected. These obligations arise through Australia's ratification of various international human rights instruments, pursuant to which it has agreed to respect, protect and fulfil the rights contained therein.³ These instruments include:

- The International Covenant on Civil and Political Rights (**ICCPR**);
- The International Covenant on Economic, Social and Cultural Rights (**ICESCR**);
- The Convention on the Rights of the Child⁴

The obligation to 'fulfil' rights requires signatory States to take positive action to facilitate the enjoyment of basic human rights.⁵ Australia, therefore, has a positive obligation to use those means within its disposal to uphold human rights enshrined in treaties to which it is party.⁶

PILCH submits that the insertion of a greenhouse trigger into the Act will help address and fulfil Australia's international treaty obligations, by raising consideration of climate change, and implicitly, human rights issues, during assessment under the Act.

PILCH acknowledges the existence of other mechanisms, such as the Commonwealth Government's Carbon Pollution Reduction Scheme (**CPRS**), which aim to reduce anthropogenic (manmade) greenhouse gases in Australia. PILCH submits that the inclusion of the greenhouse trigger under the Act should be a complementary measure to such schemes, which do not explicitly require the consideration of human rights impacts of climate change in their operation. This point is discussed in more detail at paragraph 2.5.

(b) *Human rights consequences of climate change*

The International Panel on Climate Change now considers that global warming is 'unequivocal' and that most of the warming observed over the past 50 years is attributable to anthropogenic greenhouse gas emissions. The physical impacts of climate change (for example, extreme weather events and sea level rises) have the potential to severely impact the most basic of human rights.

The United Nations (UN) and others have extensively documented the human rights impacts of climate change. The UN has identified the main areas where the physical

² Senate Hansard, 23 June 1999, pp 6057, 6093-95, and 6110-11; Senate Hansard, 14 August 2000, pp16290-91; Senate Hansard, 19 August 2003, p13889; Avoiding Dangerous Climate Change (Climate Change Trigger) Bill 2005; Senate Hansard, 1 December 2006, pp91-93; and House Hansard, 30 October 2006, pp116-17.

³ UN Office of the High Commissioner for Human Rights, What are Human Rights? (2008) at: <http://www.ohchr.org/EN/Issues/Pages/WhatareHumanRights.aspx>

⁴ Australia is a party to the seven key human rights treaties. See http://www.ag.gov.au/www/agd/agd.nsf/Page/Humanrightsandanti-discrimination_Humanrights

⁵ See UN Committee on the Rights of the Child, General Comment No 5 – General Measures of Implementation of the Convention on the Rights of the Child (2003) UN Doc CRC/GC/2003/5; UN Committee on Economic, Social and Cultural Rights, General Comment No 9 – the Domestic Application of the Covenant (1998) UN Doc E/C.12/1998/24; UN Human Rights Committee, General Comment No 31 – Nature of the General Legal Obligation imposed on State Parties to the Covenant (2004) UN Doc CCPR/C/21/Rev.1/Add.13.

⁶ UN Committee on Economic, Social and Cultural Rights, General Comment No. 3 - On the Nature of State Parties' Obligations (1990) UN Doc, E/1991/23, annex III.

climate will impact on human lives, as follows: ecosystems; food; water; health; coasts; industry; settlement; and society.⁷

The following are principle human rights which are subject to degradation as a result of climate change.

- (1) *The right to life⁸ and the right to the highest attainable standard of physical and mental health⁹*

Climate change may have both direct and indirect impacts on the right to life. Direct affects may include the loss of life due to extreme weather events (such as heatwaves, flash-floods and bushfires). Indirect impacts (which are directed at the *quality* of life) include an increased number of infectious diseases, the gradual deterioration in health, increased air pollution (and therefore allergic diseases), reduced access to safe drinking water, increased susceptibility to disease and increased hunger and malnutrition.¹⁰

These impacts also have potential to reduce the ability of people to enjoy the highest attainable standard of physical and mental health.

- (2) *The right to adequate food and right to be free from hunger¹¹*

Full enjoyment of the rights to adequate food and to be free from hunger are likely to be reduced due to decreased food production. Climate change is likely to impede food production due to:¹²

- an increase in the frequency of extreme weather events disrupting agriculture;
- increased temperatures accelerating grain sterility and reducing crop yields;
- a shift in rainfall patterns rendering previously productive land infertile, and reducing crop and livestock yields;
- land degradation issues, such as erosion;
- desertification reducing crop and livestock yields;
- rising sea levels making coastal land unusable; and
- changes the migratory patterns of fish stocks and fish mortality.

⁷ Report of the Office of the United Nations High Commissioner for Human Rights on the relationship between climate change and human rights, 15 January 2009 (A/HRC/10/61) p 5.

⁸ The right to life is contained in Article 6 International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force 23 March 1976) (**ICCPR**), Article 6 Convention on the Rights of the Child, opened for signature 20 November 1989, 1577 UNTS 3 (entered into force 2 September 1990) (**CRC**) and Article 3 of the Universal Declaration of Human Rights, GA Resolution 217A(III), UN Doc A/810 at 71 (1948) (**UDHR**). Australia ratified the ICCPR on 13 August 1980 and the CRC on 17 December 1990.

⁹ The right to health is referred to in Articles 7(b), 10 and 12 ICESCR, Articles 12 and 14, paragraph 2(b) CEDAW, Article 25 UDHR; Article 5(e)(iv) ICERD, Article 24 CRC, Articles 16, paragraph 4, 22, paragraph 2 and 25 CRPD and Articles 43, paragraph 1(e), 45, paragraph 1(c) and 70 International Convention on the Protection of the Rights of All Migrant Workers, opened for signature December 18 1990 (entered into force July 1, 2003) (**ICRMW**). Australia ratified the ICRMW on 2 October 1990.

¹⁰ Intergovernmental Panel for Climate Change AR4 Working Group II (WGII) Report, p. 393; Professor Ross Garnaut, Garnaut Climate Change Review, 2008, Chapter 6; Human Rights and Equal Opportunity Commission, 'Human Rights and Climate Change', Background Paper, 2008.

¹¹ The right to adequate food is contained in Article 24(c)CRC, Articles 25(f), and 28, paragraph 1 Convention on the Rights of Persons with Disabilities, opened for signature 30 March 2007, (entered into force 3 May 2008) (**CRPD**), Article 14, paragraph 2(h) Convention on the Elimination of All Forms of Discrimination against Women, opened for signature 18 December 1979, 1249 UNTS 13 (entered into force 3 August 1981) (**CEDAW**), Article 5(e) International Convention on the Elimination of All Forms of Racial Discrimination, opened for signature December 21 1965, 660 UNTS 195 (entered into force Jan. 4, 1969) (**ICERD**) and Article 25 UDHR. The right to be free from hunger is enshrined in Article 11, paragraph 2 International Covenant on Economic, Social and Cultural Rights, opened for signature 16 December 1966, 993 UNTS 3 (entered into force 3 January 1976) (**ICESCR**). Australia ratified the CRPD on 17 July 2008, the CEDAW on 28 July 1983, the ICERD on 30 September 1975 and the ICESCR on 10 December 1975.

¹² Professor Ross Garnaut, Garnaut Climate Change Review, 2008, Chapter 6; Human Rights and Equal Opportunity Commission, 'Human Rights and Climate Change', Background Paper, 2008.

(3) *The right to water*¹³

Water availability and quality is likely to be reduced due to climate change. Lower and more erratic rainfall in the tropical and sub-tropical areas of Asia and the Pacific is predicted to result from climate change.¹⁴ A major potential impact in Australia is the restriction of water supply in urban areas and limited availability of water for agriculture. Almost all Australian capital cities have already implemented strict water restrictions.¹⁵ According to Professor Ross Garnaut, violent conflicts over water are likely to become more severe and widespread, and alternate water supplies will need to be developed.¹⁶

(4) *The right to adequate housing*¹⁷

The right to adequate housing may be affected in multiple ways by climate change. People may be forced to relocate due to gradual changes or deterioration of the environment, or due to short-term events, such as, bush fires or extreme weather.¹⁸ A rise in sea level and storm surges will have a direct impact on housing arrangements in many coastal settlements.¹⁹ Over 80% of the Australian Population lives within 3 kilometres of the coast line. The Commonwealth Department of Climate Change estimates that in NSW alone as many as 269,505 homes will be affected by sea level rise.²⁰

(5) *The right to self-determination of Indigenous peoples*²¹

In September 2007 the Interagency Support Group on Indigenous Issues pointed out that 'the most advanced scientific research has concluded that changes in climate will gravely harm the health of indigenous peoples, traditional lands and waters and that many of plants and animals upon which they depend for survival will be threatened by the immediate impacts of climate change'.²²

Indigenous persons can be particularly vulnerable to the effects of climate due to the remoteness of their communities and subsequent infrastructure, health services and level of employment.²³ Indigenous Australians may be deprived of their traditional territories, cultural heritage and connection to country.

¹³ The right to water is contained (in various forms) in Articles 11 and 12 ICESCR, Article 14, paragraph 2(h) CEDAW, Article 28, paragraph 2(a) CRPD and Article 24, paragraph 2(c) CRC. The right to water is not explicitly mentioned in ICESCR, however it is seen to be implicit in Articles 11 and 12 (CESCR General Comment No. 15 (2002), paragraph 2). CEDAW and CRPD explicitly refer to adequate standard of living provisions. The CRC refers to the provision of 'clean drinking water' to combat disease and malnutrition.

¹⁴ Human Rights and Equal Opportunity Commission, 'Climate Change and Human Rights' at http://www.hreoc.gov.au/Human_Rights/climate_change/index.html.

¹⁵ Not including Hobart and Darwin.

¹⁶ Professor Ross Garnaut, Garnaut Climate Change Review, 2008, Chapter 6; Human Rights and Equal Opportunity Commission, 'Human Rights and Climate Change', Background Paper, 2008.

¹⁷ The right to adequate housing is contained in Article 11 ICESCR, Article 5(e)(iii) ICERD, Article 14, paragraph 2 CEDAW, Article 27 paragraph 3 CRC, Article 43 paragraph 1(d) ICRMW, Articles 9, paragraph 1(a), 28, paragraphs 1 and 2(d) CRPD and Articles 25 UDHR.

¹⁸ Professor Ross Garnaut, Garnaut Climate Change Review, 2008, Chapter 6; Human Rights and Equal Opportunity Commission, 'Human Rights and Climate Change', Background Paper, 2008.

¹⁹ IPCC AR4 WGII Report, p. 333.

²⁰ Tara Ravens, Thousands of waterfront homes in danger: scientists, AAP, August 20, 2008

²¹ The right to self determination is contained in Article 1, paragraph 1 ICESCR, Article 1, paragraph 1 ICCPR, Articles 1 and 55 United Nations Charter, Article 1, paragraph 2 Declaration on the Right to Development and Articles 3 and 4 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). Indigenous peoples, both collectively and individually, also have the right to full enjoyment of all human rights and fundamental freedoms recognised in the Charter of the United Nations, UDHR and international human rights law: Article 1 UNDRIP.

²² Inter-Agency Support Group On Indigenous Peoples' Issues Collated Paper On Indigenous Peoples And Climate Change, 7 February 2008, E/C.19/2008/CRP.2.

²³ UN Office of the High Commissioner for Human Rights, What are Human Rights? (2008) p 17 at <http://www.ohchr.org/EN/Issues/Pages/WhatAreHumanRights.aspx>; Australian Government Submission to the Office of the High Commissioner for Human Rights on the Relationship between Climate Change and Human Rights, p 2

2.4 Advancing the implicit human rights objects of the Act

As noted above, climate change will have a significant impact on a number of internationally recognised human rights. The introduction of a greenhouse trigger into the Act will mitigate these impacts by ensuring that inappropriate carbon intensive development is appropriately assessed. This will mean that the implicit human rights objects of the Act will be progressed.²⁴ These include:

- *Intra-generational equity*: ensuring that human rights are fulfilled equally within each generation. This is relevant by virtue of the section 3(1)(b) Act object, which states that it is an object of the Act to 'promote ecologically sustainable development through the conservation and ecologically sustainable use of natural resources.' Intra-generational equity is a fundamental principle of ecologically sustainable development; and
- *Inter-generational equity*: ensuring that human rights are fulfilled, maintained and developed progressively between generations. This is also relevant by virtue of the reference to ecologically sustainable development in section 3(1)(b) of the Act. Inter-generational equity is also a fundamental principle of ecologically sustainable development.

2.5 Complementing and strengthening other major climate change initiatives proposed by the Commonwealth Government

The introduction of a greenhouse trigger within the Act would supplement a number of climate change initiatives proposed by the Commonwealth Government, including the CPRS. Whilst PILCH acknowledges operation of the CPRS to address Australia's greenhouse gas emissions, it does not take into direct consideration the broader ramifications of climate change, such as its impacts on human rights and Australia's social wellbeing. A similar argument can be made against other climate change related market-based mechanisms, such as the Mandatory Renewable Energy Target, and the proposed expanded Renewable Energy Target.

Further, given the modest carbon reduction targets set under the CPRS, there is a clear need to complement the CPRS with additional legal and policy mechanisms, if Australia is to meet its Kyoto or potential Copenhagen targets.

2.6 Ensuring that administrative decision-makers act according to the legitimate expectations of the Australian public

The general position under Australian law is that treaties which Australia becomes party to are not automatically incorporated into domestic law. Signature and ratification alone do not impose obligations on individuals nor generate legal rights. Treaty obligations must be incorporated through legislation.

The leading case stipulating the relationship between international and domestic law in Australia is *Minister for Immigration and Ethnic Affairs v Teoh (Teoh)*.²⁵ In this case the High Court of Australia held that in decisions made under domestic laws by the executive arm of government, people in Australia had a 'legitimate expectation' that government would act in accordance with Australia's international treaty obligations, even when the treaty had not been enacted into domestic law. Despite subsequent attempts by the government to override the effects of *Teoh* and subsequent dicta remarks of the High

²⁴ This will be in addition to the clear environmental objects that will be advanced by containing a greenhouse trigger in the Act.

²⁵ (1995) 183 CLR 273.

Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*²⁶, *Teoh* has not been overturned and remains the state of the law.

There exists, therefore, a legitimate expectation that decision-makers implementing the Act will act in conformity with Australia's human rights obligations in considering the effects of climate change projects referred and assessed under the Act. Implementing a greenhouse trigger as a matter of NES would be a positive mechanism to ensure bureaucrats act in accordance with Australia's international human rights treaty obligations, and in consideration of those rights which are likely to be impacted by climate change.

3 Public participation and standing under the Act

3.1 Key question

Discussion question 41: *Does the Act provide the appropriate opportunity for external input and scrutiny of decisions made under the Act? Is there sufficient transparency? Are the periods for public consultation adequate?*

Discussion question 42: *Should there be more scope for merits review under the Act? Would the disadvantages of this process – in terms of costs and delays - be outweighed by the advantages?*

3.2 PILCH's position

PILCH, in acting on behalf of its client base, seeks to ensure that legislative regimes in Australia allow for individuals and community organisations to commence and participate in public interest cases.

PILCH submits that appropriate standing provisions should be vested in courts and tribunals to recognise a party's right to institute and maintain proceedings in matters which have the potential to significantly impact a class of people or a community.

In order to ensure adequate public participation in procedures under the Act, PILCH submits that:

- Interested persons should be permitted to refer actions for controlled action assessment under the Act;
- The broad approach to standing to seek judicial review proceedings, and standing to enforce the provisions of the Act, should be retained; and
- Merits review should be adopted for significant decisions under the Act.

These submissions are discussed in detail within this section.

3.3 Allowing interested persons to refer actions for controlled action assessment

Currently, individuals or community groups are unable to refer a proposed action directly to the Minister for assessment as to whether it may be a controlled action.²⁷ Consequently, certain actions that may have a significant impact on a matter of NES may

²⁶ (2003) 214 CLR 1.

²⁷ Referrals can only be made by the person or organisation proposing to take the action (section 68 (on their own accord) & section 70 (after a request from the Minister)); State or Territory Governments (section 69); Agencies of State Governments or Territories (section 69); or a Commonwealth agency (section 71).

escape assessment under the Act. As outlined by the Australia Institute, this has contributed to a lack of referrals, particularly in the agricultural and fishery sectors.²⁸

The current framing of the Act creates a significant inconsistency between its scope and enforcement. Given that interested parties can protect matters of NES by obtaining a statutory injunction to enforce the application of the Act, it follows that they should also be able to protect matters of NES by ensuring that the right types of actions are referred under it.

PILCH recommends that the Act be amended to allow persons with a relevant interest (which should be defined similarly to a 'person aggrieved' in section 487) to refer proposed actions or developments for an assessment as to whether they are a controlled action under the Act.

If this recommendation were to be adopted, the prohibition contained in section 67A (a prohibition on taking a controlled action without approval), and the offence outlined in section 74AA (an offence relating to taking an action before a decision is made) would need to be amended.

PILCH understands the importance of reaching an adequate balance between allowing third party initiated controlled action assessments, and protecting project proponents from abuse of purpose to halt their actions through use of the Act. It is also important to ensure that the courts do not become overburdened by procedure or litigation.

We suggest that in the case of an interested party controlled action referral, an interim merits decision mechanism should be introduced. This could entail an *a priori* evaluation of the strengths of the submissions, and in particular, the potential environmental impact. In certain cases the proponent might be permitted to continue with the action until assessment is completed. In those cases, any detrimental environmental consequences would be sanctioned by standard environmental protection legislation.

3.4 Retaining the current standing provisions to bring judicial review proceedings and to enforce the provisions of the Act

Under the *Administrative Decisions (Judicial Review) Act 1977* (Cth) (**ADJR Act**), an individual or group does not have standing to seek judicial review of an administrative decision unless it has had a private right affected by the decision.²⁹ Absent of a private right, individuals or groups are usually required to demonstrate a 'special interest' in the subject matter of the decision, above that of the general public, to obtain standing.

The Act currently extends the ADJR Act test of standing to enable a 'person aggrieved' to bring judicial review proceedings to challenge the validity of certain decisions made under the Act. A 'person aggrieved' pursuant to section 487, is generally taken to be a person who 'has engaged in a series of activities in Australia or an external Territory for the protection or conservation of, or research into, the environment' at any time in the two years immediately preceding the decision. An 'aggrieved organisation' is defined similarly, and must also have had 'objects or purposes which included the protection or conservation of, or research into the environment,' at the time of the decision. Similar standing requirements apply for parties seeking to enforce the provisions of the Act by way of injunction.³⁰

This position reflects a sound policy of the Commonwealth Government to allow substantial public participation in the environmental assessment and enforcement

²⁸ Andrew Macintosh, *Environment Protection and Biodiversity Conservation Act: An Ongoing Failure*, The Australia Institute Ltd, Discussion Paper, July 2006; A. Macintosh and D. Wilkinson, *Environment Protection and Biodiversity Conservation Act: A Five Year Assessment*, The Australia Institute Ltd, Discussion Paper No. 18, July 2005.

²⁹ A person or organisation with a 'mere emotional or intellectual concern' or belief affected by the administrative action does not have standing to seek review. See for example, *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27, and *North Coast Environmental Council Inc v Minister for Resources* (1994) 55 FCR 492.

³⁰ See section 475(6)&(7) EPBC Act

processes under the Act. As McGrath notes, '[e]xperience under the Act indicates that providing standing for public interest litigants to enforce legislation significantly promotes enforcement.'³¹

PILCH recommends that the current criteria for standing to bring judicial review proceedings and standing to enforce the provisions of the Act be retained. It is important that these provisions are retained in their current form to ensure that individuals and community groups continue to have the opportunity under the Act to pursue matters of public interest.

3.5 Merits review for controlled action assessments and approvals

The Act allows only very few decisions to be reviewed on their merits. These include decisions relating to permits³² and notices of advice regarding the contravention of conservation orders.³³ Even in these narrow circumstances, review provisions do not extend to decisions made personally by the Minister, but only to decisions made by a delegate of the Minister.

The current position means that there is a significant lack of transparency for administrative decisions made under the Act, and that the decision-making process is open to political influence. Allowing merits review assists in the 'fair treatment of all persons affected by a decision and also has a broader, long-term objective of improving the quality and consistency of the decisions of primary decision-makers, as well as enhancing the openness and accountability of decisions made by government.'³⁴ Lack of merits review under the Act has been noted by some commentators as 'the major deficiency in the EPBC Act.'³⁵

PILCH submits that in order to transparently assess the merits of a project, merits review should be available for decisions:

- Deciding whether an action is a controlled action under Chapter 4, Part 7 Act; and
- Assessing whether an action should be approved under Chapter 4, Part 9 of the Act.

4 Costs

4.1 Key question

PILCH believes it is in the public interest to make a submission on issues relating to costs.

4.2 PILCH's position

PILCH submits that:

³¹ Chris McGrath, *Flying Foxes, dams and whales: using federal environmental laws in the public interest* (2008) *Environment Planning Law Journal* 324, 334.

³² Sections 206A, 221A, 243A, 263A, 303GJ EPBC Act.

³³ Section 473 EPBC Act.

³⁴ Administrative Review Council, *What Decisions Should be Subject to Merit Review?* (AGPS, Canberra, 1999) at [1.4] and [1.5], cited in Chris McGrath, *Flying Foxes, dams and whales: using federal environmental laws in the public interest* (2008) *Environment Planning Law Journal* 324, 330.

³⁵ Chris McGrath, *Flying Foxes, dams and whales: using federal environmental laws in the public interest* (2008) *Environment Planning Law Journal* 324, 332.

- The general rule that costs follow the event be statutorily amended to allow protective public interest costs orders; and
- The prohibition on ordering an undertaking as to damages be reinserted into the Act.

These positions are addressed in detail within this section.

4.3 Rationale

(a) *Costs act as an inappropriate disincentive*

In its role as a pro bono referral service for public interest matters, PILCH has observed that many meritorious public interest matters are ultimately not pursued because of the risk of an adverse costs order. In this way, the costs regime in the Federal Court (and in most Australian jurisdictions) acts as a disincentive to public interest litigation, particularly for not for profit or community organisations.

This is particularly the case where the matter involves an unresolved area of law, in the nature of a test case, such that legal advisors are not able to recommend with any degree of certainty the likely outcome of the litigation. This uncertainty increases the risk of an adverse costs order and therefore reduces the likelihood that a not-for-profit or community organisation applicant will pursue important test cases.

(b) *The benefits of public interest litigation*

PILCH believes that public interest litigation is beneficial to achieving the objects of the Act because it enhances its application and enforcement. Additionally, public interest litigation:³⁶

- Enhances the democratic process;
- Encourages good governance by enforcing legality, promoting quality and integrity in decision-making, maintaining institutional integrity and ensuring executive accountability;
- Facilitates the progressive and principled development of environmental law and policy;
- Exposes weaknesses in the law, prompting constructive law reform;
- Instigates environmental public debate and empowers public interest concerns in a proper forum; and
- Fosters environmental awareness and environmental practice in society.

Despite this, the potential costs associated with losing a case makes public interest litigation under the Act largely prohibitive. For example, in a test case of climate change under the Act, costs were awarded against the unsuccessful litigant conservation group of approximately \$332,000 resulting in their wind up.³⁷

Potential litigants may therefore decide not to commence proceedings, or may end up discontinuing proceedings, due to the threat of an adverse cost order being made against them. In this context, Justice Toohey aptly stated in his address to the 1989 National Environmental Law Association conference that, 'there is very little point in opening the doors to the courts if litigants cannot afford to come in'.³⁸

³⁶ Justice Brian J Preston, 'The role of public interest environmental litigation' (2006) 23 EPLJ 337

³⁷ *WPSQ Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage* [2006] FCA 736 at Chris McGrath, 'Flying foxes, dams and whales: using federal environmental laws in the public interest', (2008) 25 EPLJ 324, 336

³⁸ Quoted in Chris McGrath, 'Flying foxes, dams and whales: using federal environmental laws in the public interest', (2008) 25 EPLJ 324, 335.

4.4 Public Interest Cost Orders

(a) Current law

The Federal Court has a broad discretion to award costs pursuant to section 43 of the *Federal Court of Australia Act 1976* (Cth). The discretion is to be exercised judicially, that is, based upon reasons connected to or leading up to the litigation.³⁹ Costs are intended to compensate the successful party for costs incurred as a result of the litigation.⁴⁰

In the absence of special circumstances, costs generally follow the event. For the court to make a cost order in the alternative, a public interest litigant must demonstrate that special circumstances exist warranting a departure from the usual order. There is no general 'public interest' exception to the costs rule,⁴¹ and evidence of matters common to all public interest litigation will be insufficient to warrant reversal of the rule. Insufficient common matters will include:⁴²

- Litigation being brought for a public interest purpose (as opposed to protecting or vindicating a private right), such as the protection of the environment;
- Facilitation of the proper administration of legislation; and
- Altruistic motives in commencing litigation.

Cases in which special circumstances have been held to exist, allowing a departure from the general rule that costs follow the event, include:

- Where a successful party played a larger role in the litigation than was necessary. For example, in *Wilderness Society Inc v Turnbull, Minister for Environment and Water Resources*⁴³ costs were reduced by 40%;
- Clarification of the law is of general importance, for example, in *Wilderness Society Inc v Turnbull, Minister for Environment and Water Resources*⁴⁴ the costs order was reduced to 70% due to the importance to the Minister and to the public that the provisions of the Act were clarified; and
- Where a matter of 'high public concern' is raised in conjunction with 'novel questions of general importance' regarding the Act, for example, in *Blue Wedges Inc v Minister for the Environment, Heritage & the Arts*.⁴⁵

(b) PILCH's proposed structure

PILCH recommends the incorporation of a public interest cost order provision into the Act. Under this proposal, 'a public interest litigant' (see below) may make an application for a public interest costs order which would include one or more of the following orders:

- An order that each party to the proceedings will bear their own costs;
- A protective costs order whereby a party to the proceedings, regardless of the outcome of the proceedings, will not be liable for the other party's costs;

³⁹ *Donald Campbell & Co Ltd v Pollak* [1927] AC 732; *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229; *Latoudis v Casey* (1990) 170 CLR 534; *Oshlack v Richmond River Council* (1998) 193 CLR 72.

⁴⁰ *Ruddock v Vadarlis (No 2)* (2001) 115 FCR 229 at [12] per Black CJ and French J.

⁴¹ *Oshlack v Richmond River Council* (1998) 193 CLR 72

⁴² *The Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources* [2007] FCA 1863 at [31].

⁴³ [2008] FCAFC 19

⁴⁴ [2008] FCAFC 19

⁴⁵ [2008] FCA 900 at [3], [7].

- A maximum costs order, whereby a party to the proceedings, regardless of the outcome of the proceedings, will only be liable for a certain percentage or maximum amount of the other party's costs;
- A party to the proceedings, regardless of the outcome of the proceedings, will be able to recover all or part of their costs from the other party; or
- An order preventing a party to the proceedings applying for security for costs against a public interest litigant.

In making a costs order the court may have regard to:

- The resources of the parties, including the ability of each party to pay an adverse costs order and any relevant factors that effect this ability such as insurance, legal aid, tax deductibility, donations, private financing arrangement or any other factor;
- The legal significance of the proceedings;
- The significance of the proceedings to the objects of the Act;
- The likely cost of the proceedings to each party;
- The extent of any private or commercial interest a party may have in the proceeding;
- The conduct of the parties during the proceeding;
- The ability of each party to present his or her case or to reach a fair settlement;
- Any other matters that the court considers relevant.

A public interest litigant would need to be defined in the Act, and this might be achieved by consideration of matters addressed in section 487 relating to aggrieved persons and organization. Similar considerations to those set out directly above might also be applied to assess a public interest basis (such as whether a party has a private commercial interest).

4.5 Reinserting the prohibition on ordering an undertaking as to damages for an interim injunction

Prior to 15 January 2007, section 478 of the Act prevented the Federal Court from seeking an undertaking as to damages as a condition of granting an interim injunction.

This section was repealed by the *Environment and Heritage Legislation Amendment Act (No.1)* 2006. The reason for removing this prohibition was to 'bring the Act into line with other Commonwealth legislation where the Federal Court has the discretion whether or not to require an applicant for an injunction to give an undertaking as to damages as a condition of granting an interim injunction.'⁴⁶

The law governing the exercise of this type of discretion is by no means clear, however, and it is yet to be determined in the context of the Act. Some guidance can be obtained from the general equitable principles that govern exercise of the discretion to order an undertaking as to damages for an interim injunction. Following those principles, it will hardly ever be proper for a court to grant relief to an applicant seeking an interim injunction, without an undertaking as to damages.⁴⁷ The importance of the undertaking in equity is that without it, a defendant that is ultimately successful at a final hearing would be unable to recover damages for any loss suffered in complying with the interlocutory injunction.⁴⁸

⁴⁶ House of Representatives, *Environment and Heritage Legislation Amendment Bill (No.1) 2006 Explanatory Memorandum*.

⁴⁷ See for example the discussion by the Appeal Division of the Victorian Supreme Court in *National Australia Bank Ltd v Bond Brewing Holdings Ltd* [1991] 1 VR 530 (subsequently confirmed by the High Court: (1990) 169 CLR 271).

⁴⁸ *Combet v Commonwealth* (2005) 224 CLR 494, Heydon J at 115.

For example, Justice Mandie in *Blue Wedges Inc v Port of Melbourne Corporation*,⁴⁹ when considering a similar state-based environmental assessment and approval statute,⁵⁰ outlined that save in exceptional circumstances, undertakings as to damages are required before the Court will decide to issue a statutory interlocutory injunction.⁵¹

'Exceptional circumstances' may include where there is a threatened manifest breach of the environmental protection law, or where there is a proven danger of irremediable harm or serious damage to the environment.⁵² It may also be material whether there is a continuing breach, or whether there is merely a threat of a breach in the future.⁵³ Further, issues such as justice, the public interest, the relative means and roles of the parties and the strength of the applicant's case may be relevant.⁵⁴ The potential quantum of the damages may be a factor, but is not determinative.⁵⁵ Some cases have suggested that a failure to give an undertaking as to damages is a factor to be taken into account when considering whether to issue an injunction, rather than treating the capacity to provide an undertaking as a separate consideration.⁵⁶ Any statutory words which allow the court to grant an interim injunction are also important.⁵⁷

However, these principles mostly apply to private law matters, where a party is relying solely on the equitable jurisdiction of the court. In the context of a statutory interim injunction aimed at protecting environmental degradation, different considerations are likely to apply.

The removal of section 478 has significantly complicated the law, and has also imported a very defendant-friendly discretion to be exercised by the Court. The high likelihood of being required to provide an undertaking for damages is a considerable disincentive for public law to be monitored and enforced by the public.

The stifling consequence of repealing section 478 can be seen empirically. When the section was in force, four applications for interim injunctions were made under the Act.⁵⁸ Since the repeal of section 478, no applications have been made.

PILCH submits that the obstruction to justice occasioned by financial security undertakings under the Act is unwarranted, given that the courts do not grant interim injunctions readily.

Finally, PILCH submits that the reinstatement of section 478 would be consistent with the Labour Party's opposition to its repeal while in opposition.⁵⁹

For these reasons, PILCH recommends that section 478 be reinstated.

⁴⁹ [2005] VSC 305.

⁵⁰ Specifically, section 6(2) of the *Environment Effects Act 1978 (Vic)*.

⁵¹ at [28].

⁵² *Ibid.*

⁵³ *Metroll Victoria Pty Ltd v Wyndham City Council* (2007) 152 LGERA 437 (**Metroll**), per Gibson DP, at [112].

⁵⁴ *Ibid.*

⁵⁵ *Ibid.*

⁵⁶ *Ross v State Rail Authority of NSW* (1987) 70 LGRA 91, at 100, per Cripps CJ.

⁵⁷ *Metroll*, above n.XX, per Gibson DP, at [112].

⁵⁸ *Booth v Bosworth* [2000] FCA 1878; *Schneiders v Queensland* [2001] FCA 553; *Jones v Queensland* [2001] FCA 756; *Save the Ridge Inc v National Capital Authority* [2004] FCA 996; [2004] FCAFC 209.

⁵⁹ Senate Standing Committee on Environment, Communications, Information Technology and the Arts, *Report on the Environment and Heritage Legislation Amendment Bill (No 1) 2006 [Provisions]* (Senate Printing Unit, 2006) pp 71-72.

5 Conclusion

In order for the Australian Government to adequately fulfil its obligations under the various international human rights treaties to which it is a party, and having regard to public participation and public interest litigation principles, PILCH makes the following recommendations in respect of the Act review:

(a) Climate change should be included as a matter of National Environmental Significance under the Act.

A project or development referred to the Minister for consideration under the Act should be assessed as a controlled action if the project will emit over 500,000 tonnes of CO₂ equivalent per year.

(b) The Act be amended to allow persons with a relevant interest to refer proposed actions or developments for an assessment as to whether they are a controlled action under the Act.

(c) The standing criteria to bring judicial review proceedings and to enforce the provisions of the Act should be retained in their current form.

(d) The Act should be amended to give the right to a merits review of decisions that:

- **decide whether an action is a controlled action under Chapter 4, Part 7 Act; and**
- **assess whether an action should be approved under Chapter 4, Part 9 of the Act.**

(e) The Act should be amended to include a public interest cost order provision.

(f) Section 478 (as repealed by the *Environment and Heritage Legislation Amendment Act (No.1) 2006*) should be reinstated.