PILCH Response to the Interim Report to the Independent 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 provide this response to the Secretariat's Interim Report on the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (**the Interim Report**).

PILCH made an original submission to the Review Secretariat on 24 April 2009 (**Original Submission**). Whilst PILCH was unable to lodge its Original Submission at the time papers were received, the Review Panel kindly consented to its late submission. The Original Submission advanced what the Panel described as novel arguments based on a human rights perspective. Unfortunately, due to the late submission, we understand it might not have been possible to address these arguments in forming the Interim Report.

In addition to providing further commentary in this document, we therefore attach a copy of the Original Submission at Appendix 1, which, among other points, advocated for:

- climate change to be incorporated as a National Environmental Significance (**NES**) trigger within Chapter 2 of the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (the **Act**) on the basis of Australia's obligations under international human rights law; and
- increased public participation in environmental governance under the Act by:
    - amendment of the Act to allow for merits review of significant decisions made under the Act;
    - inclusion of a public interest protective cost order provision into the Act;
    - reinstatement of section 478 of the Act (as repealed by the *Environment and Heritage Legislation Amendment Act (No.1) 2006)*, which prevented the Court from ordering undertakings for damages in proceedings for an interim injunction; and
    - retaining the current standing criteria for judicial review proceedings.

1.2 Scope of Further Response

The purpose of this further response is to:

- clarify and reinforce the *human rights* imperative and logic for the introduction of a climate change trigger, which was not addressed in the Interim Report;
- emphasise the importance of mechanisms under the Act which facilitate appropriate public participation in managing the environment, (in addition to government and industry participation); and
- comment upon aspects of the Interim Report which relate to the Original Submission and to the extent that PILCH agrees or disagrees with those aspects, provide reasons justifying its view.

1.3 Summary of Further Response Recommendations

In order for the Australian Government to adequately fulfil its obligations under 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 response to the Interim Report:

1 climate change should be included as a matter of National Environmental Significance under the Act, and the assessment of whether to approve projects that exceed the applicable threshold should include human rights considerations;

2 the scope of merits review under the Act should be increased to include key decisions made under the Act and decisions made by the Minister, which are currently excluded;

3 section 478 of the Act should be reinstated, prohibiting the granting of an undertaking as to damages;

4 a provision should be inserted into the Act, expressly stating the court's power to refuse a security for costs application for where the proceedings are brought in the public interest;

5 Commonwealth legal aid funding for public interest environmental litigation should be re-established; and

6 the Act should be amended to include a public interest, protective cost order provision, in the form recommended by the ALRC in 1995.[1]

2 The international human rights imperative and logic for a climate change trigger under the Act

2.1 PILCH position

PILCH agrees with clause 3.32 of the Interim Report that existing matters of NES under the Act are insufficient and not framed to address or manage the detrimental impacts of, and contributors to, climate change.

PILCH supports the introduction of a greenhouse trigger as discussed in Chapter 8 of the Interim Report and in the form specified at clause 8.16.

In response to clause 8.20 of the Interim Report (identifying the need for specific criteria to guide the assessment of a project meeting the greenhouse trigger threshold), PILCH submits that climate change implications upon human rights should inform the assessment framework.

PILCH considers that the use of internationally recognised human rights as part of an assessment framework will alleviate 'the difficulty in causally linking greenhouse emissions and a significant impact on a protected matter'.[2]

This is not to say that human rights should be the sole criteria by which to make an assessment. Human rights address economic social and cultural impacts of climate change, and are a complimentary tool to other assessment indicators, such as use of

[1] Australian Law reform Commission, *Costs Shifting – Who Pays for* Litigation, Report No 75 (1995), Ch 13, Recommendations 45 - 49

[2] Clause 8.13 Interim Report; Explored in a detailed discussion of the case *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment & Heritage* [2006] FCA 736; Contained in submission 190: Friends of the Earth (Australia).

best available technology, carbon offset measures and research and development initiatives.

2.2 Basis for human rights considerations in assessing projects that exceed the greenhouse trigger

In our Original Submission, we argued for a climate change trigger to be inserted into the Act based on human rights considerations. We refer to such Original Submission

We submit further that the Minister's assessment, whether to approve a controlled action that exceeds the greenhouse trigger, should be partly based on human rights. This is for the following reasons:

(a) Furthering the objects of the Act

Human rights provide a mechanism for consideration of the economic, social and cultural impacts of climate change. These are applicable to the integration of economic, social, cultural and environmental objects under the Act at section 3, for example:

- Section 3(1)(b), which promotes ecologically sustainable development through the conservation and ecologically sustainable use of natural resources;
- Section 3(1)(ca), which provides for the protection and conservation of heritage;
- Section 3(1)(d), which promotes a cooperative approach, involving the community and land owners; and
- Section 3(1)(d), (f) & (g), which recognises the role of indigenous people.

(b) ESD principles under the Act

The principles of ecologically sustainable development (**ESD**) are at the core of the Act. For example, ESD is an object of the Act[3], and a relevant consideration for all approvals and any conditions of an approval under section 136(2) of the Act.

Including human rights as a framework to assess projects that meet the greenhouse trigger would also advance the principles of ESD contained in section 3A of the Act. For example:

- Section 3A(a): '*decision making processes should integrate both long term and short term economic, environmental, social and equitable considerations'*.

  A human rights approach can be utilised to protect both long-term and short-term affects of climate change. For example, right to life considerations can address human loss and quality of life from short-term extreme weather events, and from long-term increased incidence of infectious disease and air pollution.

  Human rights also address the 'social and equitable' affects of climate change, to the extent they are based upon 'the equal and inalienable rights of all members of the human family'[4] and aim to 'promote social progress and better standards of life'.[5] For example, consideration of the right to adequate housing[6] can be applied to address demographic pressures from climate change due to reduced availability of water and food production.

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[3] Section 3(1)(b) of the Act.

[4] Universal Declaration of Human Rights, Preamble.

[5] Universal Declaration of Human Rights, Preamble.

[6] 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.

The impact upon Australian Indigenous peoples is also specifically addressed in the right to self determination of Indigenous peoples;[7] and

- Section 3A(c): *'the principles of inter-generational equality – that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations'*.

  Human rights law considers generations to come by providing a framework to respect, protect and fulfil rights into the future. Emphasis is placed upon the 'health, diversity and productivity of the environment' in order to ensure fulfilment of fundamental human rights, such as the right to adequate food, the right to water, right to be free from hunger and right to the highest attainable standard of physical and mental health.

(c) A rights-based approach to understanding ecologically sustainable development

The principles of ecologically sustainable development (including concepts of intergenerational equity[8]) and the integration of 'both long-term and short-term economic, environmental, social and equitable considerations'[9] are difficult to apply in practice.

As illustrated at 2.2(a) & (b) above, human rights can be used to address this difficulty. For example, the Minister might ask the following question when assessing a project:

> Is a future generation's right to water likely to be decreased by the project as compared to our current generation's right to water?

The answer would be an apposite indicator of whether the project promotes inter-generational equity.

The right to water can be substituted for any other recognised human right in a treaty ratified by Australia that is impacted by climate change (such as the right to adequate food, the right to health and the right to adequate housing).

(d) Complementary to other carbon reduction mechanisms

Incorporation of human rights within the Act complements other Australian government proposed climate change initiatives, including the Carbon Pollution Reduction Scheme (**CPRS**). Whilst he CPRS provides a market-based mechanism to manage and reduce Australia's greenhouse gas emissions, it does not directly take into consideration the broader ramifications of climate change, such as its impacts on Australia's social wellbeing. The same is true for 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 other legal and policy mechanisms if Australia is to meet its Kyoto targets.

In this regard PILCH agrees with clause 8.31, 8.32, 8.33 and 8.34 of the Interim Report.

(e) Appropriate mechanism for incorporation of human rights

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[7] 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.

[8] See section 3A(c) of the Act.

[9] See section 3A(a) of the Act.

The Constitutional basis of the Act, and its current incorporation of international legal obligations in order to protect the environment, makes it an appropriate instrument to effect Australia's international human rights obligations.

Environmental protection under the Act is essential for the survival flora, fauna, biodiversity and ecosystems, and finally, for the quality of human existence. International environmental obligations incorporated within the Act[10] are advanced by human rights insofar as they promote and protect rights fundamental to human existence.

In this regard PILCH notes the lack of reference to international human rights instruments in Chapter 2, specifically clauses 2.16, 2.17 and 2.20 – 2.28 and submits that international human rights instruments are relevant to the objects of the Act.

(f) Adaptive capabilities of framework

International human rights instruments provide an adaptive reference by which projects may be assessed under the Act. Section 3A(b) recognises that our current scientific understanding should not limit postponing measures to protect the environment. Human rights law is appropriately broad and adaptable to address the consequences of climate change as its impacts are better understood and in the event they become more extreme.

2.3 Effecting the incorporation of human rights within the Act

Applying human rights standards to the assessment framework would involve consideration of the effects of a project (once it has been determined that the project exceeds the greenhouse trigger, either individually or cumulatively), on rights contained in international instruments ratified by Australia including:

- the *right to life*[11] and *right to the highest attainable standard of physical and mental health*.[12] These raise consideration of a project's potential contribution, for example, to loss of life due to extreme weather events, increases in infectious disease, increases in air pollution, availability to safe drinking water, and impacts on food production;
- the *right to adequate food and right to be free from hunger*.[13] These raise consideration of a project's contribution to effects such as, increased extreme weather events, temperature increases, shifts in rainfall patterns, land degradation, desertification, and rising sea levels;

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[10] Section 3(1)(e), 3(2)(f) of the Act

[11] 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.

[12] 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.

[13] 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.

- the *right to water*.[14] This involves consideration of a project's impact, for example, on water availability and quality, and shifts in rainfall patterns.
- the *right to adequate housing*.[15] This involves consideration of the project's contribution to effects such as, relocation due to changes in environment or extreme weather events and sea level rises; and
- the *right to self-determination of Indigenous peoples*.[16] This involves consideration of the project's contribution to effects such as, degrading Indigenous health, harm to traditional lands and ways of life and impacts on the viability of remote Indigenous communities.

These considerations could be incorporated into Part 9 of Chapter 4 by enactment of a new section 138A, as follows:

> ***138A Requirements for decisions about projects that exceed the Greenhouse Trigger***
>
> *In deciding whether or not to approve for the purposes of [insert section relating to an approval of a project that exceeds the greenhouse trigger], the taking of an action, and what conditions to attach to such an approval, the Minister must, in considering the principles of ecologically sustainable development pursuant to section 136(2)(a) of this Act, take into account the following rights of current and future generations contained in treaties ratified by the Commonwealth Government of Australia, including:*
>
> *a) the right to life (under Article 6 of the International Covenant on Civil and Political Rights or other treaties);*
>
> *b) the right to the highest attainable standard of physical and mental health (under Article 12 of the International Covenant on Economic, Social and Cultural Rights or other treaties);*
>
> *c) the right to adequate food and the right to be free from hunger (under Article 11 of the International Covenant on Economic, Social and Cultural Rights or other treaties);*
>
> *d) the right to water (under Articles 11 and 12 of the International Covenant on Economic, Social and Cultural Rights or other treaties);*
>
> *e) the right to adequate housing (under Article 11 of the International Covenant on Economic, Social and Cultural Rights or other treaties); and*
>
> *f) the right to self-determination of Indigenous peoples (under Article 1 of the International Covenant on Civil and Political Rights or other treaties).*

[14] 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.

[15] 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.

[16] 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.

3 Public participation in the Act

3.1 Review mechanisms under the Act

(a) Judicial Review

PILCH supports the views expressed in clauses 20.34 and 20.35 of the Interim Report.

(b) Merits review

PILCH supports the views expressed in clauses 20.49 – 20.52 and 20.69, and the recommendation of the Senate Committee in clause 20.59 of the Interim Report.

PILCH has had regard to the Minister's reasons for the 2006 amendment revoking merits review for Ministerial decisions, namely that 'where decisions are sufficiently important to be taken by the Minister as an elected representative, those judgments should not be overturned by an unelected tribunal such as the AAT',[17]

PILCH considers, however, that merits review are important to the proper functioning of the Act and access to justice principles. The availability of merits review for significant decisions made under the Act promotes quality decision-making, advances the rule of law, and enhances public confidence in the operation of the Act, by providing accountability and transparency.

3.2 Access to the courts

PILCH supports the views expressed in clauses 20.103 and 20.104 of the Interim Report.

(a) Undertakings as to damages

PILCH supports the views expressed in clauses 20.110, 20.111 and 20.127 of the Interim Report.

In regard to the removal of section 478, (which prohibited the granting of an undertaking as to damages), PILCH submits that:

- The rationale provided for the removal of the section in the Explanatory Memorandum (referred to at clause 20.125 of the Interim Report) is not wholly justified. Environmental protection affects all persons and the public plays a recognised and legitimate role in its enforcement and regulation. Allowing undertakings as to damages has the potential to significantly inhibit the valuable oversight role undertaken by the public in this field.
- The law governing exercise of the court's discretion on undertakings is unclear, and absent of such clarity is likely to favour defendants.

  Under general equitable principles, if an applicant for an interim injunction does not satisfy an undertaking as to damages, it will rarely be proper for a court to grant relief.[18] PILCH understands the rationale for these undertakings in general litigation, without which a successful defendant would be unable to recover damages for loss suffered by complying with an interlocutory injunction.[19]

[17] Referred to in clauses 20.57 and 20.63 of the Interim Report.

[18] 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).

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

Justice Mandie in *Blue Wedges Inc v Port of Melbourne Corporation*,[20] when considering a similar state-based environmental assessment and approval statute,[21] outlined that *save in exceptional circumstances*, undertakings as to damages are required before the Court will decide to issue a statutory interlocutory injunction.[22] The types of exceptional circumstances are explored in a number of cases[23], but PILCH submits that in the context of a statutory interim injunction aimed at protecting environmental degradation, different considerations are likely to apply, and these circumstances are inappropriately narrow.

- If an applicant, acting bona fide and in the public interest, can satisfy a Court that an interim injunction should be granted to prevent damage or possible damage to a public good, it is not justifiable that they should be required to provide financial security in order to compensate a proponent in the event of an unsuccessful final hearing. The obstruction to justice of such undertakings is unnecessary given that the courts do not grant interim injunctions readily.
- The reinstatement of section 478 would be consistent with the Labour Party's opposition to its repeal while in opposition.[24]

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

(b) Security for costs

PILCH supports the views expressed in clauses 20.34 and 20.35 of the Interim Report.

In response to clause 20.130 of the Interim Report, with regard to the sufficiency of existing protections in the *Federal Court Rules* and judicial precedent designed to prevent the inappropriate use of security for costs applications, PILCH submits that:

- A provision explicitly stating that the court may refuse to order security for costs, where it is satisfied that the proceedings were brought in the public interest, is required to alleviate the obstacle that security for costs orders place on public interest litigation under the Act. See for example Rule 4.2(2) of the *Land and Environment Court Rules 2007 (NSW)*;
- Section 56 of the *Federal Court Act* (**FCA**) and Order 28 of the *Federal Court Rules* do not provide specific direction for refusing applications for security for costs against public interest applicants.[25] This is of particular concern to the governance of the Act, as significant applications brought under the Act have been initiated by third party public interest litigants.[26]

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[20] [2005] VSC 305.

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

[22] at [28].

[23] *Metroll Victoria Pty Ltd v Wyndham City Council* (2007) 152 LGERA 437 (**Metroll**), per Gibson DP, at [112]. Ross v State Rail Authority of NSW (1987) 70 LGRA 91, at 100, per Cripps CJ.

[24] 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.

[25] Except to the extent that Order 28 rule 3(1)(b) of the FCR states that the Court may consider the fact that an applicant 'is suing, not for the applicant's own benefit, but for the benefit of some other person and the Court has reason to believe that the applicant will be unable to pay the costs of the respondent if ordered to do so'.

[26] Rachel Baird, 'Public Interest Litigation and the Environment Protection and Biodiversity Conservation Act' (2008) 25 *Environment and Planning Journal*, 410, 410.

The relevant considerations for the court to take into account when exercising its discretion under section 56 of the FCA are provided by judicial authority,[27] and were set out in the case of *Wyong-Gosford Progressive Community Radio Inc v Australian Communications & Media Authority*:[28] The considerations are broad and include any matters relevant to the discretion.

Despite the considerations being so broad, impecuniosity itself is a substantial hurdle to litigants successfully defending an application for security for costs under the general law. For example, in the Truth About Motorways[29] case (applied in Save the Ridge[30]) Hely J considered that impecuniosity (combined with the fact that no private right or special interest of the applicants was involved in the proceedings), made it appropriate that security for costs be provided.

Environmental law proceedings are frequently brought by not for profit community organisations with limited financial means, and an inability to provide security limits their access to the courts under the current regime, notwithstanding genuine public interest attributes. See for example the Save the Ridge Case[31] in which a community group was ordered to provide security for costs of $50,000, and a further $10,000 in the appeal.

The weight to be attributed to public interest litigation is dependent on the context of the legislation under which it is brought,[32] yet no judicial authority places substantial weight on this consideration in the context of the Act.

Due to the uncertainty regarding the weight to be attributed to public interest proceedings and judicial emphasis on impecuniosity as a justification for an order for security for costs, a provision specifying that the court may refuse to grant an order for security for costs in public interest litigation is warranted to facilitate the vital role of the public in the governance of the Act.

Concerns raised in some quarters about frivolous proceedings being launched at the expense of defendants are unfounded; Applicants are likely to face significant costs of their own, irrespective of whether an order for security is made, and the court rules, such as order 20 rule 5 of the Federal Court Rules allows the court to strike out any frivolous claims. It must also be borne in mind that under PILCH's proposal, an applicant would need to demonstrate to the court public interest and further, demonstration of public interest only provides an additional consideration in the exercise of the discretion by the court.

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[27] See for example Wyong-Gosford Progressive Community Radio Inc v Australian Communications & Media Authority [2006] FCA 625 per Cowdroy J; *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment Management Ltd* (2000) 34 ASCR 673 at 678-681; Equity Access Ltd v Westpac Banking Corporation & Ors (1989) ATPR 40-972 per Hill J; KP Cable Investments Pty Ltd v Meltglow Pty Ltd and Ors (1995) 56 FCR 189 at 197-8 per Beazley J; Cultivaust Pty Ltd v Grain Pool Pty Ltd [2004] FCA 1366 at [13] per Finn J; Chapman v Luminis Pty Ltd [2002] FCA 496 at [13] per Tamberlin J; Croker v Sydney Institute of TAFE (State of New South Wales) [2003] FCA 942 per Bennett J.

[28] [2006] FCA 625 at [11].

The considerations listed are: the chances of success of the applicant and whether the claim is bona fide; the risk that the applicant could not satisfy a costs order; whether the application for security for costs has been promptly brought; whether the application for security for costs is being used oppressively to deny an impecunious litigant access to the court; whether the applicant's impecuniosity arises out of the act in respect of which relief is sought; whether there are third parties standing behind the applicant who are likely to benefit from the litigation and if so, whether they have proffered security for the costs of the litigation; whether an order for security for costs would frustrate the litigation; whether there are any public interest considerations to be taken into account; and any matters relevant to the discretion which are distinctive to the circumstances of the case.

[29] *Truth About Motorways Pty Ltd v Macquarie Infrastructure Investment management Ltd* [2000] FCA 918; [2001] FCA 1231.

[30] *Save the Ridge Inc v Commonwealth* [2004] FCA 1167; [2004] FCA 1289; [2005] FCA 355.

[31] *Save the Ridge Inc v Commonwealth* [2004] FCA 1167; [2004] FCA 1289; [2005] FCA 355.

[32] see for example, the *Friends of Hinchinbrook* case (*Friends of Hinchinbrook Society Inc v Minister for Environment (No 1)* (1996) 60 FCA 1 at 21-2; 45 ALD 532) in which Branson J rejected an order for security for costs on the basis that legitimate organisations should be able to agitate issues 'in the interests of justice' under the *World Heritage Properties Conservation Act 1983 (Cth).*

(c) Costs

PILCH supports the views expressed in clauses 20.112 to 20.120 of the Interim Report.

In response to clauses 20.133 and 20.134 of the Interim Report, with regard to public interest cost orders, PILCH submits that:

- re-establishing Commonwealth legal aid funding for public interest environmental litigation would best alleviate the obstacle of litigation costs and costs orders to public participation in the governance of the Act;
- to the extent that the Commonwealth government remains unwilling or unable to reinstate adequate legal aid for these purposes, PILCH submits that the Act should be amended to allow public interest litigants (to be defined in the Act) to seek a public interest order at any time during or at the commencement of the proceedings; and
- PILCH supports the form of the public interest cost order recommended by the ALRC in 1995.[33] This mechanism provides the court with discretion to make cost orders particular to the matter in dispute and litigants involved. It provides public interest groups greater certainty as to costs and may disincentivise 'attrition style' litigation.
- PILCH notes the importance of clearly stating the matters to which the court may take into consideration in making a cost order and also the object of the provision to ensure that the discretion is exercised to facilitate legitimate public interest litigation. These are addressed in our Original Submission

[33] Australian Law reform Commission, *Costs Shifting – Who Pays for* Litigation, Report No 75 (1995), Ch 13, Recommendations 45 - 49

Appendix 1 – Original Submission

PILCH Submission to the Review Secretariat

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

24 April 2009

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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 treaties[1].

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 $CO_{2.}$

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 Child[4]

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

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[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 life[8] and the right to the highest attainable standard of physical and mental health[9]

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 hunger[11]

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.

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[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 50[20] 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.[21]

(5) The right to self-determination of Indigenous peoples[22]

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'.[23]

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

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[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] Australian Government Department of Climate Change, 'Climate change adaptation in Australia's Coasts', http://www.climatechange.gov.au/impacts/coasts.html, updated 27 February 2009

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

[22] 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.

[23] 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.

of employment.[24] Indigenous Australians may be deprived of their traditional territories, cultural heritage and connection to country.

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.[25] 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 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**).[26] 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 govenrment

[24] 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

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

[26] (1995) 183 CLR 273.

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 Court in *Re Minister for Immigration and Multicultural Affairs; Ex parte Lam*[27], *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.[28]

[27] (2003) 214 CLR 1.

[28] 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).

Consequently, certain actions that may have a significant impact on a matter of NES may 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.[29]

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.[30] 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.[31]

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[29] 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.

[30] 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.

[31] See section 475(6)&(7) EPBC Act

This position reflects a sound policy of the Commonwealth Government to allow substantial public participation in the environmental assessment and enforcement 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.'[32]

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 permits[33] and notices of advice regarding the contravention of conservation orders.[34] 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.'[35] Lack of merits review under the Act has been noted by some commentators as 'the major deficiency in the EPBC Act.'[36]

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.

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

[33] Sections 206A, 221A, 243A, 263A, 303GJ EPBC Act.

[34] Section 473 EPBC Act.

[35] 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.

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

4.2 PILCH's position

PILCH submits that:

- 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:[37]

- 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.[38]

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

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

[38] *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

Environmental Law Association conference that, 'there is very little point in opening the doors to the courts if litigants cannot afford to come in'.[39]

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.[40] Costs are intended to compensate the successful party for costs incurred as a result of the litigation.[41]

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,[42] and evidence of matters common to all public interest litigation will be insufficient to warrant reversal of the rule. Insufficient common matters will include:[43]

- 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*[44] 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*[45] 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*.[46]

(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;

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

[40] *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.

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

[42] *Oshlack v Richmond River Council* (1998) 193 CLR 72

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

[44] [2008] FCAFC 19

[45] [2008] FCAFC 19

[46] [2008] FCA 900 at [3], [7].

- 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;
- 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.'[47]

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.[48] The importance of the undertaking in equity is that without it, a defendant that is ultimately successful at a final hearing would

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

[48] 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).

be unable to recover damages for any loss suffered in complying with the interlocutory injunction.[49]

For example, Justice Mandie in *Blue Wedges Inc v Port of Melbourne Corporation*,[50] when considering a similar state-based environmental assessment and approval statute,[51] outlined that save in exceptional circumstances, undertakings as to damages are required before the Court will decide to issue a statutory interlocutory injunction.[52]

'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.[53] It may also be material whether there is a continuing breach, or whether there is merely a threat of a breach in the future.[54] 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.[55] The potential quantum of the damages may be a factor, but is not determinative.[56] 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.[57] Any statutory words which allow the court to grant an interim injunction are also important.[58]

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.[59] 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.[60]

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

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

[50] [2005] VSC 305.

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

[52] at [28].

[53] Ibid.

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

[55] Ibid.

[56] Ibid.

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

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

[59] *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.

[60] 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 Minster for consideration under the Act should be assessed as a controlled action if the project will emit over 500,000 tonnes of CO_2 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.