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Senate Standing Committees on Environment and Communications  
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REG. No. A31

***INQUIRY INTO THE ENVIRONMENT PROTECTION AND BIODIVERSITY  
CONSERVATION AMENDMENT (RECONSIDERATION OF DECISIONS) BILL  
2024***

**Submission – October 2024**

The Monash Law School’s Climate Justice Clinic (**CJC**),<sup>1</sup> engages law students in climate justice work and is uniquely placed to provide a valuable perspective on the impacts of the proposed Bill, including on young people and future generations.

This submission has been prepared by students of the CJC.<sup>2</sup> We request an opportunity to be heard in respect of our submission.

**Executive Summary**

- A. The Committee should not recommend the Bill be passed.
- B. Alternatively, the Committee should recommend additional consultation occur to properly understand the impact of reconsideration on the Government and its decisions, including both current administrative impacts of reconsideration and the consequences of limiting reconsideration on original approval decision making.

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<sup>1</sup> Monash University, ‘The Climate Justice Clinic’, *Faculty of Law* (Web Page)  
<<https://www.monash.edu/law/home/cle/archive/clinics/The-Climate-Justice-Clinic>>.

<sup>2</sup> Belinda Dennis, Bronte Macan and Avishay Ram with the assistance of supervisor Hubert Algje.

- C. The reconsideration power in s78 of the *Environment Protection and Biodiversity Act 1999* (‘the **EPBC Act**’) exists to allow the Federal Environment Minister to revisit decisions made under s75(1) and where appropriate, revoke and substitute these decisions with new ones.
- D. This unique reconsideration power reflects the complexity and often unknown nature of the risks faced by Matters of National Environmental Significance under EPBC Act. New information about impacts on Matters of National Environmental Significance frequently arise long after the original decision is made, and the existence of the reconsideration power purposefully embeds an ability for these decisions to adapt to changing circumstances.
- E. While certainty in decision making is important, the reconsideration power plays an important role in the EPBC Act by:
- Providing flexibility to decision makers both at the time of making the decision (to accept a level of risk); and
  - Over time by responding to changing or evolving information.
- F. The proposed limitations, set out in the *Environment Protection and Biodiversity Conservation Amendment (Reconsideration of Decisions) Bill 2024* (‘**the Bill**’), reflect a reaction in part to one particular instance of reconsideration. A knee jerk reaction to one instance of reconsideration is not a proper or orderly basis for law reform.
- G. The Committee should exercise caution in its consideration of this Bill because:
1. The purpose of the EPBC Act reflects the social licence given to the Federal Government to protect Matters of National Environmental Significance, this social licence should not be traded in for short term approval holder comfort/certainty.
  2. Ministerial decision making should retain necessary flexibility to both approve and reconsider where uncertainty exists. Overly rigid decision making requirements, as proposed, may undermine the overall approval process in unexpected ways.
  3. The Bill fails to consider longer term impacts of limiting reconsideration. Such as requiring approval holders to provide greater certainty as to likely future impacts when seeking an original approval. Creating by stealth, a higher standard on decision makers in the first instance and opening more decisions to legal challenge.
  4. Third party involvement in reconsideration should not be limited. Reconsideration to our knowledge is not a cause of high volumes of departmental or judicial review.

When considering amending the EPBC Act, preference should be given to maintain not limit community involvement, in accordance with the Objectives of the EPBC Act.

### **Relevant considerations for this Parliamentary Inquiry**

1. This submission sets out relevant case law and policy considerations, to assist the Committee in its consideration of the Bill. It addresses four important topics relevant to the Bill being:
  - a. The purpose of the EPBC Act
  - b. Flexibility in decision making
  - c. The Precautionary Principle
  - d. Third Party Standing and community involvement with the EBPC Act

#### The purpose of the EPBC Act

2. A core objective of the Minister under the EPBC Act is to protect endangered species or Matters of National Environmental Significance.
3. In *Tarkine National Coalition Inc v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694 the Federal Court noted that:

*‘a fundamental aspect of the Minister’s role in protecting endangered species in the context of an Act which has the achievement of such a purpose as one of its central tenets’.*<sup>3</sup>
4. Furthermore, Justice Besanko stated in *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 2)* [2012] FCA 403 (*‘Buzzacott’*) that:

*‘...there are always risks to the environment, particularly with major developments, and that conditions or circumstances change and the operation of an approved*

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<sup>3</sup> *Tarkine National Coalition Inc v Minister for Sustainability, Environment, Water, Population and Communities* [2013] FCA 694 [61].

*action needs to recognise the risks and changing conditions and circumstances and adapt to them*'.<sup>4</sup> (emphasis added)

5. Fulfilling the purpose of the EPBC Act to protect the environment involves a necessary inference that a Minister can respond dynamically to new information as it comes to light,<sup>5</sup> including in the form of reconsidering decisions previously made when such information becomes available.
6. The Bill impinges on this decision making dynamism.
7. The proposed 36-month time limit, in our view, unnecessarily limits the ability of the Minister to fulfill the purpose of the EPBC Act, particularly where no immediate wider social or environmental need justifies this amendment.
8. Certainty for approval holders, is not a purposive goal of the EPBC Act and should not be prioritised over protection of Matters of National Environmental Significance, who cannot advocate in their own right as to changing impacts.

#### Flexibility in decision making

9. The Minister is given flexibility to decide whether to approve an action and to set conditions for it.<sup>6</sup> This means that the original decision maker does not need to address every issue at the time of the decision, and an approval remains valid even if specific considerations were not initially included.<sup>7</sup> This flexibility demonstrates the value of the reconsideration power in s78, as it allows unaddressed issues to be incorporated and revisited at a later stage.

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<sup>4</sup> *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 2)* [2012] FCA 403 [58].

<sup>5</sup> See *Newcastle and Hunter Valley Speleological Society Inc v Upper Hunter Shire Council* [2010] NSWLEC 48, 148.

<sup>6</sup> See *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 36 ('EPBC Act').

<sup>7</sup> *Northern Inland Council for the Environment Inc v Minister for the Environment* (2013) 218 FCR 491, 30 'conditions may have been different if the Minister had made the decision to approve the project at a later time does not establish error'.

10. In *Buzzacott*, Justice Besanko made the following observations about the Minister’s power to impose conditions under the EPBC Act:

***‘It cannot be doubted that the power to impose conditions under the EPBC Act is a very wide one. The Minister may attach a condition to an approval if he or she is satisfied that it is “necessary or convenient” to do so within ss 134(1) and (2). The breadth of the power can be seen from the terms of s 134(3) which sets out examples of the types of conditions which may be imposed. Paragraph (e) authorises a condition for the preparation, approval and implementation of a plan for managing the impacts of the approved action. The concept of management is a very wide one and includes matters such as monitoring and testing, reporting, preventative measures and remedial action. One thing seems to me to be clear and that is that the power is broad enough to encompass significant additions or variations to the approved action. Paragraph (f) authorises conditions requiring specified environmental monitoring or testing to be carried out. This power recognises that there are always risks to the environment, particularly with major developments, and that conditions or circumstances change and the operation of an approved action needs to recognise the risks and changing conditions and circumstances and adapt to them.’***<sup>8</sup>  
(emphasis added)

11. This reference to evolving environmental risks and standards is important in the context of the reconsideration of decisions. It shows that certain risks may not be anticipated when an approval is granted, and that the Minister’s discretion under the EPBC Act is importantly flexible to adapt to these changing risks.
12. This decision making flexibility, to consider *‘the availability of substantial new information’*<sup>9</sup> when it becomes available was considered in *Environment Council of Central Queensland Inc v Minister for the Environment and Water (No 2)* [2023] FCA 1208 (*‘Living Wonders’*). Justice McElwaine reinforced that where there is substantial new information, *‘it is a matter for the Minister to make an informed judgement on the*

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<sup>8</sup> *Buzzacott v Minister for Sustainability, Environment, Water, Population and Communities (No 2)* [2012] FCA 403 [58].

<sup>9</sup> *Environment Council of Central Queensland Inc v Minister for the Environment and Water (No 2)* [2023] FCA 1208 (*‘Living Wonders’*) [73].

*question of substantial cause*,<sup>10</sup> and that it was ‘*open to the Minister*’ in that case to determine that an increase in global GHG emissions would not be a ‘*substantial*’ cause of adverse impacts.<sup>11</sup>

13. Furthermore, the Court expanded on the Minister’s discretion by holding that Parliament did not intend to dictate how the Minister should conduct their assessment and the factors to be considered.<sup>12</sup>
14. These considerations highlight the Minister’s broad discretion when determining the relevance of substantial new information under s78 of the EPBC Act.<sup>13</sup>
15. Discretion exists to allow for new information to inform and update the Minister’s consideration of complex and long-term environmental matters.
16. Limiting reconsideration unnecessarily removes an important tool available to the Minister to deal with new information for the purpose of protecting the Matter of National Environmental Significance.
17. Further, this case demonstrates that the EPBC Act anticipates that there may be circumstances where new information comes to light after a decision is made, and that the Minister has discretion and flexibility to review this information at the time it becomes available.

#### The Precautionary Principle

18. The precautionary principle<sup>14</sup> recognises that full scientific certainty may not be available at the time a decision is made and that where there is a risk of serious and irreversible environmental damage, the Minister should be mindful to err on the side of caution.

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<sup>10</sup> Ibid [153].

<sup>11</sup> See Ibid [155].

<sup>12</sup> See Ibid [74].

<sup>13</sup> See EPBC Act s78.

<sup>14</sup> Defined in s391(2) of the EPBC Act as the principle ‘*that a lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible environmental damage.*’

19. Reconsideration is an important manifestation of the precautionary principle. It allows approvals whose impact may be not fully certain at that time to be approved and in turn, it provides the community comfort that should more information become available clarifying a significant impact, that approval can and will be reconsidered.
20. The precautionary principle is crucial to the imposition of conditions. *Friends of the Gelorup Corridor Inc v Minister for the Environment and Water* [2023] FCAFC 139 (*'Gelorup'*) clarifies how the precautionary principle is interpreted. In a joint judgment, Justice Jackson and Justice Kennett note:

*'the Minister in making a decision under s 133 and formulating conditions under s 134 must be aware of the precautionary principle and mindful of its place in the statutory scheme (including as part of the principles of ecologically sustainable development, whose promotion is part of the objects of the EPBC Act (s 3(1)(b))'*.<sup>15</sup>  
(emphasis added)
21. The precautionary principle and other measures embody the principles of ecologically sustainable development and are recognised as integral in the objects of the EPBC Act.
22. Adani's Carmichael coalmine in Queensland illustrates the clear environmental risks of introducing a 36-month timeframe for parties to request reconsideration of decisions under s75(1).
23. A recent study which took over four years to complete<sup>16</sup> indicated that the coalmine likely diverts water from protected ancient springs.<sup>17</sup> This example illustrates that by shortening the timeframe for reconsideration the Bill risks undermining the quality of environmental assessments. This may undermine the integrity of submissions to the Minister, ultimately leading to suboptimal decision making and increased environmental risks.

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<sup>15</sup> *Friends of the Gelorup Corridor Inc v Minister for the Environment and Water* [2023] FCAFC 139 [92].

<sup>16</sup> See Angus Campbell, et al, 'Multiple Isotope Tracers Reveal the Sources of Water Sustaining Ecologically and Culturally Significant Springs, and Their Vulnerability to Mining Development' (2024) 645 *Journal of Hydrology* 1.

<sup>17</sup> See Josh Robertson, 'Adani launches Attack on Scientists who Revealed New Evidence of Mining Risks to the Protected Doongmabulla Springs' *ABC News* (Online, 22 October 2024)

<<https://www.abc.net.au/news/2024-10-22/adani-doongmabulla-springs-half-million-year-old-water/104456500>>.

24. Environmental approvals should not be a matter of set and forget.
25. The Bill formalises a timeline for new information (which has no bearing on how long scientific data or studies take) and would in effect legislate an end point for the precautionary principle to apply.

Third Party Standing and community involvement with the EPBC Act

26. Third parties play an important role under the EPBC Act when decisions are first made<sup>18</sup> and the list of parties who can request a variation or review of a decision is informed by principles of standing throughout the EPBC Act, including:
  - (i) ‘Interested person(s)’ can seek injunctive relief from a contravention of the EPBC Act.<sup>19</sup> This injunctive right for third parties falls within Chapter 6, ‘Administration’ and could be read to apply to the administration of the EPBC Act as a whole.
  - (ii) As explored in *Gelorup*,<sup>20</sup> the ‘Minister...[is] empowered to invite comments from the public at large’, reflecting that public interest in a healthy environment can outweigh the private interests of other parties.<sup>21</sup>
  - (iii) The judicial review process allows third parties to seek reviews of a Minister’s Approval decision.<sup>22</sup>
27. The objects of the EPBC Act expressly recognise the need for community involvement:<sup>23</sup>

*‘... (d) to promote a co-operative approach to the protection and management of the environment involving governments, the community, land-holders and indigenous peoples; and*

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<sup>18</sup> See EPBC Act s131A.

<sup>19</sup> See EPBC Act s475.

<sup>20</sup> *Friends of the Gelorup Corridor Inc v Minister for the Environment and Water* [2023] FCAFC 139 [19].

<sup>21</sup> ‘Then the need to protect the private interests of the plaintiff must be weighed against the public interest in avoiding injury to the environment.’ - *Castlemaine Tooheys v South Australia* [1986] HCA 58; (1986) 161 CLR 148, [155].

<sup>22</sup> See EPBC Act s487(2).

<sup>23</sup> See EPBC Act s3(d)-(e).



*(e) to assist in the co-operative implementation of Australia's international environmental responsibilities...*

28. Community involvement is provided for in the decision making process and should continue in the other stages of the EPBC Act, including the reconsideration power under s78.
29. The express reference to public comment in the EPBC Act<sup>24</sup> highlights the importance of third party review rights. These allow for an open government, which empowers an informed public to engage in the democratic process and contribute meaningfully to public policy.<sup>25</sup>
30. In our view, it may logically follow that an application for a reconsideration (which could substantially change the character of an approved license) should maintain similar rights for third parties. The Bill's proposal to limit the class of people who may request a reconsideration should be considered in light of the principles of standing for third parties.
31. Third parties are not a threat to good decision making, certainty for approval holders, or the purposes of the EPBC Act. Efforts to limit third parties' involvement should be rejected.
32. Third parties play an important role in raising important community and lived experiences with the Minister.
33. Should limits be appropriate, they should be based on the substance and salient features of the reconsideration request. As Justice Brennan in *Minister for Aboriginal Affairs v Peko-Wallsend LTD*,<sup>26</sup> confirmed a Minister's duty to inquire into the availability of further information, stating that where the:

*'validity of the Minister's decision depends upon his having had regard to the salient facts, his ignorance of the facts does not protect the decision'.<sup>27</sup>*

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<sup>24</sup> See EPBC Act s131A(b).

<sup>25</sup> Sven Bluemmel, 'How Transparency and Privacy Build Trust in Government' (Media Release Office of the Victorian Information Commissioner, 23 March 2022).

<sup>26</sup> *Minister for Aboriginal Affairs v Peko-Wallsend LTD* (1986) 162 CLR 24.

<sup>27</sup> *Ibid* 66.

34. Accordingly, where a reconsideration request includes salient facts relevant to the scope, purpose of the EPBC Act and decision making power, a Minister is obliged to consider that information.
35. As outlined by the Centre for Law and Democracy:  
*‘there is a strong international law foundation for accountability, most particularly based on the right to participate in public affairs...’*<sup>28</sup>
36. This foundation in international law, as well as the express reference to third party comments in the EPBC Act emphasises the principle that third parties keep governments accountable.
37. A Minister’s ability to consider new information provided by third parties ensures compliance with the rule of law.
38. Community involvement should not be construed as an impediment. It has valuable use in explaining and recognising wider social impacts, and while the EPBC Act is not specifically concerned with social impact, judges have recognised the value of listening to local communities. For example, in *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7, Chief Justice Preston noted the importance of hearing from the local community when considering the proposal for a coal mine to be established. His Honour commented:  
*‘The evidence of the local people... amply and persuasively demonstrated people’s strong attraction and attachment to Gloucester as a place and the major negative impacts that the Project has had, is having and will have on their psychoterratic relationship to this place. The local people’s evidence also explained the major negative impacts of the Project on community composition, cohesion and character.’*<sup>29</sup>
39. Limiting third parties rights to seek reconsideration appears disconnected from the basis of legislative reform and unjustified in practice. Reconsideration is not a highly litigated or regular avenue for third party disputes.

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<sup>28</sup> Centre for Law and Democracy, *International standards on transparency and accountability* (Briefing Paper 47, March 2014).

<sup>29</sup> *Gloucester Resources Limited v Minister for Planning* [2019] NSWLEC 7 [320].

40. The value of limiting third parties to request a reconsideration is entirely unclear and unjustified.
41. Limiting the class of people permitted to request reconsideration decisions is inconsistent with the recognised need for community involvement in the objects of the EPBC Act.

**Climate Justice Clinic**

**Monash Law Clinics**