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19 September 2008

The Secretary

Senate Standing Committee on the Environment, Communications and the Arts

PO Box 6100

Parliament House

Canberra ACT 2600

By email only to eca.sen@aph.gov.au

Dear Committee Secretary,

Re: Submission on inquiry into the operation of the EPBC Act

I write in response to the Committee's invitation for public submissions in relation to the inquiry into the operation of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (EPBC Act).

I note the Committee's terms of reference.¹ I have addressed several of the issues raised in the terms of reference in previous publications in relation to the EPBC Act concerning bilateral agreements,² the Flying Fox Case,³ the Greentree Case,⁴ key concepts under the EPBC Act,⁵ Japanese Whaling Case,⁶ and the general operation of the Act.⁷ In 2006 I reviewed the operation of the EPBC Act for the 2006 Australian State of the Environment Committee.⁸

¹ Available at http://www.aph.gov.au/Senate/committee/eca_ctte/epbc_act/tor.htm (viewed 18 September 2008).

² McGrath C, "Bilateral Agreements: Are they enforceable?" (2000) 17 (6) EPLJ 485; and McGrath C, "The Queensland Assessment Bilateral Agreement under the EPBC Act" (2002/2003) 8 (38) QEPR 145.

³ McGrath C, "The Flying Fox Case" (2001) 18 (6) EPLJ 540.

⁴ McGrath C, "Casenote: Minister for the Environment & Heritage & Greentree [2003] FCA 857" (2003) 20 EPLJ 476; McGrath C, "Editorial commentary: Federal Issues: the Greentree Case" (2004) 21 EPLJ 249; McGrath C, "Appeal lodged against Greentree (No 3)" (2005) 22 EPLJ 5; McGrath C, "Greentree appeal dismissed" (2005) 22 EPLJ 325.

⁵ McGrath C, "Key concepts of the EPBC Act" (2005) 22 EPLJ 20.

⁶ McGrath C, "The Japanese Whaling Case" (2005) 22 (4) EPLJ 250; McGrath C, "Japanese Whaling Case appeal succeeds" (2006) 23 EPLJ 333; McGrath C, "Injunction granted in Japanese Whaling Case" (2008) 25 EPLJ 77.

⁷ McGrath C, "Applying the *Environment Protection and Biodiversity Conservation Act 1999* (Qld): A case study of the Naturelink Cableway" (2001) 7 (33) QEPR 123; McGrath C, "Swirls in the stream of Australian environmental law: debate on the EPBC Act" (2006) 23 EPLJ 165.

⁸ McGrath C, "Review of the EPBC Act", paper prepared for the 2006 Australian State of the Environment Committee (Department of the Environment and Heritage, Canberra, 2006). Available at <http://www.environment.gov.au/soe/2006/publications/emerging/epbc-act/pubs/epbc-act.pdf> (viewed 5 March 2007).

I wish to limit my submission to the inquiry to the lessons learnt during the first 10 years of the operation of the Act regarding the importance of public interest litigation to promote enforcement and better decision-making under the Act. These matters relate generally to the operation of the EPBC Act rather than the seven particular aspects of the operation of the Act set out in the terms of reference.

In a recent article, a copy of which I have attached to this submission, I reviewed the opportunities and obstacles for public interest environmental litigation under the EPBC Act based on five case studies and a survey of all civil litigation under the Act.⁹ The case studies show that there is an important role for public interest environmental litigation in Australia at a federal level in protecting the environment but also that there are significant obstacles to such litigation. The threat of adverse costs is the most significant obstacle to public interest environmental litigation at present. The lack of merits review is another significant obstacle that restricts the ability of public interest litigants to promote good decision-making under the EPBC Act. Resolving these issues to promote enforcement and good decision-making under the EPBC Act is important for the future operation and development of environmental law in Australia.

Peter Grabosky and Neil Gunningham emphasise in their leading work on designing environmental policy the important roles of public interest litigants in modern environmental legal systems, including their role as surrogate regulators. They suggest governments can promote these roles (and thereby improve the operation of environmental regulation) by directly subsidising public interest groups, making donations to community groups tax deductible, improving access to information, providing widened standing, and nurturing constructive engagement between business and non-government organisations (NGOs).¹⁰

Based on the analysis presented in my article and the principles for environmental regulatory design advanced by Grabosky and Gunningham, the following measures would substantially promote enforcement of the EPBC Act and good decision-making under it:

1. Insert a provision in the EPBC Act or in the *Federal Court Rules* allowing public interest litigants to apply to the Federal Court at the beginning of a case for a public interest costs order to avoid the usual rule as to costs as recommended by the Australian Law Reform Commission in 1995¹¹ or modelled on s 49 of the *Judicial Review Act 1991* (Qld).
2. Re-insert s 478 into the EPBC Act to remove the requirement to provide an undertaking as to damages when seeking an interim or interlocutory injunction under the Act.
3. Re-establish government funding (legal aid) for public interest environmental litigation at a federal level for cases having substantial legal merit and administer it in a similar manner to the existing New South Wales Legal Aid scheme.

⁹ McGrath C, "Flying foxes, dams and whales: Using federal environmental laws in the public interest" (2008) 25 EPLJ 324.

¹⁰ Gunningham N and Grabosky P, *Smart Regulation: Designing Environmental Policy* (Oxford University Press, 1998), pp 101-104, 408-413.

¹¹ Australian Law Reform Commission, *Costs Shifting – Who Pays for Litigation* (Report No 75, ALRC, Canberra, 1995), Ch 13 and Recommendations 45-49.

4. Provide merits review by the Administrative Appeals Tribunal of decisions under ss 75 and 133 of the EPBC Act in accordance with the recommendations of the Administrative Review Council.¹²

The first of these recommendations would be likely to be largely cost free for the government and would greatly alleviate the current threat of adverse costs orders for public interest environmental litigants.

I would be happy to speak to the Committee should any clarification of these recommendations be required or if I can assist the Committee with any other aspects of the terms of reference of the inquiry.

Kind regards

A handwritten signature in black ink that reads "Chris McGrath". The signature is written in a cursive, flowing style.

Chris McGrath

¹² Administrative Review Council, *What Decisions Should be Subject to Merit Review?* (AGPS, Canberra, 1999) at [1.3], <http://www.ag.gov.au/agd/www/archome.nsf> (viewed 25 July 2008).