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Northern Territory – Environmental Regulatory Reform Discussion Paper May 2017

ENVIRONMENTAL DEFENDERS OFFICE NORTHERN TERRITORY RESPONSE

Introduction

The Environmental Defenders Office Northern Territory (**EDO**) welcomes the opportunity to provide a response to the *Environmental Regulatory Reform Discussion Paper (**Discussion Paper**)*. Additionally, The EDO acknowledges the extension of time granted, which has allowed us the opportunity to provide this comment on the Discussion Paper

This response is relatively brief as much of what we have to say in this area has already been captured in our response to the *Balanced Environment Strategy* (Attachment A) and our detailed comment on the *Draft Advice of the NTEPA about Recommended Reforms for the Territory's Environment Legislation* (Attachment B).

Guiding principles

The EDO is generally supportive of the Department's guiding principles for environmental reform. We have three minor points to raise in relation to those principles. Firstly, the system needs to not only address environmental outcomes, but also cultural and social outcomes. In that regard, all decisions should be guided by the principles of ecologically sustainable development including, where appropriate, the precautionary principle. It is evident from other parts of the Discussion Paper that this is the general approach that has been.[1]

Secondly, with regard to public participation, the reform should do more than encourage and support public participation it should enshrine in legislation rights to participate in the process.

Thirdly, the EDO is supportive of the inclusion of a guiding principle that relates to the achievement of environmental justice through the environmental assessment regime. Further details about this concept can be read in the work of the *Australian Panel of Experts on Environmental Law* (APEEL) available here.

Proposed arrangements

Use of Territory Environmental Objectives

The EDO supports, in principle, the inclusion of well-defined objectives in the regulatory regime.[2] We caveat that support by noting concerns raised with the use of objectives in the Western

[1] See for example, p5 under 'What our system is designed to achieve'.
[2] The level of detail provided in the discussion paper about the Territory Environmental Objectives makes it difficult to provide anything other than in-principle support for the inclusion of objectives.
[3] Jones M and D Morrison-Saunders, A (2016), *Making decisions for Territory Environmental Objectives* makes it difficult to provide anything other than in-principle support for the inclusion of objectives.
[4] Dhalitz V and A Morrison-Saunders (2015), *Assessing the utility of environmental factors and objectives in*

Australia (**WA**) context, namely that the use of objectives risks being reductionist. We refer the Department to the 2016 paper by Jones M and Morrison-Saunders – *Making sense of significance in Environmental Impact Assessment* and particularly the following statement in that paper:

> *However, as a fundamentally subjective exercise this 'risks being reductionist' as prescriptive guidance material directs proposals to be compartmentalised into environmental factors that can be described in objective terms, excluding those more subjective characteristics that together form the environment.*
>
> *To mitigate against this risk Dahlitz and Morrison-Saunders (2015) recommend a more consultative approach to the use of factors and objectives rather than continued reliance on regulator guidance only. In the context of cumulative effects, it is possible for overall levels of public concern regarding a proposal to be high, even where individual factors are individually considered to be acceptable by the EPA.*[3]

Recommendation 1: The regulatory regime build in safety mechanisms to ensure that use of objectives is not overly prescriptive and that a whole of project and whole of landscape approach to impacts is considered.

On a general level, however, the inclusion of objectives will bring clarity to the framework and will assist in transparent decision-making that can be understood by the public. In a 2015 paper *Assessing the utility of environmental factors and objectives in environmental impact assessment practice: Western Australian Insights,* the key benefits of using objectives were described as "providing clear focus, structure and communication"[4]. It is the EDOs hope that appropriately formulated objectives will allow consistent and transparent decisions throughout the EIS process..

Early Go – No-Go decision point

The EDO supports the NTEPA having the power to refuse a project that is clearly unacceptable at an early stage. However, it must be made clear that this is only a power that will be exercised to remove clearly unacceptable projects from the regime. A "go" decision at this point should be clearly understood as only progressing a project through to the impact assessment stage.

Third party referrals

The EDO supports the inclusion of third party referral powers in the statutory framework. So far there has not been a compelling argument put to us as to why broad third party referrals should be restricted in any way. It would seem unlikely that this power would be unduly burdensome and provides a substantial safety net to ensure that all projects that should undergo assessment are. The NT's context with regards its small population and vast geographic size are particularly relevant in this instance.

Rather than placing restrictions on who can make a referral to the NTEPA, a better strategy would be to require referrals to have an adequate level of specificity. For example, a referral might need to provide details of the location of the proposed (or already begun) project and the matters the referrer believes are of potential environmental significance. This would bring the referral process into line with the WA model, which allows any person to refer a significant proposal.

[3] Jones M and Morrison-Saunders, A (2016), *Making sense of significance in Environmental Impact Assessment.* Impact Assessment and Project Appraisal, 34(1).pp.87-93.
[4] Dhalitz V and A Morrison-Saunders (2015), *Assessing the utility of environmental factors and objectives in environmental impact assessment practice: Western Australian Insights.* Impact Assessment and Project Appraisal. 33(2):142-147

Minister's power to impose conditions to manage environmental impacts

The EDO supports the Environment Minister having the power to impose conditions on projects and for the NTEPA to be responsible for ensuring compliance with those conditions. We note again that adequate resourcing of the NTEPA will be of paramount importance in those conditions achieving what they are intended to.

Compliance

In terms of the specific measures the EDO believes should be included in the reform related to compliance they are as follows:

- Offence provision for failing to comply with a call in direction
- Offence provision for commencing work prior to a decision on referral
- Offence provision for failing to comply with an approval or commencing work without approval

To overcome potential prosecutorial difficulties, we recommend that the offences for commencing work without an approval or commencing work prior to a decision on a referral be offences of *absolute liability* under the *NT Criminal Code*. So, while the TEOs may provide guidance about when a project requires referral, there is a significant disincentive for a proponent to play the percentages because if they get it wrong, a prosecution will be possible regardless of what the proponent may say about the application of guidelines and TEOs.

I support an independent NTEPA being responsible for the monitoring, compliance and enforcement of the assessment regime and approval conditions. To do that effectively, the NTEPA's compliance staff must be furnished with adequate powers and adequate resources. From a perception point of view, it must be independent of government department – both physically and economically.

Finally, I strongly support the measure proposed in the NTEPA Roadmap, namely that proponents be required to provide annual compliance reports on the implementation of their environmental conditions. These should be publicly available

Quality of information used in decision-making processes

The EDO supports the measures proposed on page 12 to facilitate greater transparency through the EIS process. The EDO adds the following:

- In relation to information provided to support assessments, additional information should be required to provide information about how climate change impacts will affect a particular project/proposal.

- The EDO supports the inclusion of a fit-and-proper person test through an *environmental history* requirement or something like it.[5]
- Additionally, the EDO suggests the inclusion of provisions, similar to those found in consumer protection law, in relation to the quality of EIS materials. I.e that materials must be fit for purpose and not misleading or deceptive. This would lead to far more transparency within EIS documents about the absence or insufficiency of the information at hand affording a greater opportunity for decision makers to apply the precautionary principle.
- Additionally, or alternatively, to the above, the use of a scorecard is supported and a statutory requirement for peer review of EIS documents would be valuable mechanisms for upgrading/ensuring the high standard of documentation and data relied on by decision makers.
- The EDO suggests that consideration be given to the inclusion of a legislative mechanism for the integration of Indigenous bicultural knowledge into the framework. Such a mechanism might be modelled on Division 2B of the *Environment Protection and Biodiversity Conservation Act* 1999, which establishes an Independent Expert Scientific Committee on CSG and large coal mining developments.

Strategic environmental assessment

It is trite to say that a new approach to environmental assessment is well overdue. There are many reasons for this, but the most important is that our current system of project-based assessment is failing to avoid unacceptable environmental outcomes.

A new way forward where landscape scale assessment is given primacy over particular projects will be paramount in ensuring that the quality of our environment in the NT is retained and remains resilient in the face of numerous threats, many of which are not fully understood.

Looking at individual projects in isolation is not an effective way of ensuring acceptable environmental outcomes. Impacts from a project may in isolation seem insignificant, however, when considered in light of the other loads or pressures on a system it may become quite significant.

The nice analogy that was used by a Federal Court judge to explain the meaning of "significant impact having regard to its context and intensity" in relation to the EPBC Act is useful to rehash here. In any context a fractured skull is significant – that is an injury of significant intensity. On the other hand the common cold is not of great significance in most contexts. However, if it were being experienced by a 95 year old with a history of pneumonia – it most certainly would be significant.

Unsurprisingly the environmental law has developed significantly since 1982 when the EA was enacted. But importantly, the world is currently undergoing another enormous leap in how it approaches environmental assessment. There is growing awareness and acceptance that Australia's major piece of national environmental legislation the EPBC Act was written at a time when threats to our environment were less well known and understood. The need for adaptive management and the reality of cumulative impacts were not adequately considered, nor were the impacts of global warming.

So, the risk of the NT missing this opportunity to have a leading environmental assessment act is a great one. It is not difficult to see the NT simply upgrade our current system to bring it into line with other legislation around Australia that is all too quickly – if it is not already - becoming out of date.

[5] See s136 *Environment Protection and Biodiversity Conservation Act* 1999

Strategic Impact Assessments can be implemented through a planning type structure which then guides future development. Examples of these types of strategic initiatives are coastal development strategies – which address increasing pressures of coastal natural resources. Aquifer or catchment development strategies, which guide the sustainable use of resources and constrain the maximum load on a particular system. And recently, the trial of play based regulation of the oil and gas industry.

SIA is the long game. It is will not be possible in the short term to put all development on hold until these high level strategic plans are put in place – but their absence provides an even greater incentive for a precautionary approach. In spite of the absence of strategic plans, in fact because of it, it is critically important that this reform specifically contemplate the creation and increasing importance of strategic or regional based impact assessments.

Future expansion of TEOs to *regional environmental objectives* which would be an excellent tool to operationalize future strategic environmental assessments.

In order to implement cumulative assessments into EIA – we urge the following;

- Include CEA considerations in terms of reference for most projects which go to an EIS.
    - Identify project environmental effects relevant to the assessment;
    - Identify other projects/actions/naturally occurring phenomenon's with effects to which the project would contribute incrementally;
    - Identify the geographic scope of the project CEA;
    - Analyse the scale of the cumulative environmental effects to determine the need for mitigative measures;
    - List mitigation measures;
    - Define a post-construction monitoring program to assess the accuracy of the CEA.
- Require the proponent to adequately scope their CEA and put it out for public comment.
- Link the project CEA to any strategic plan developed through SIA.

Encouraging public participation

The new regulatory regime should not only encourage public participation, it should provide for broad and meaningful statutory rights of public participation through the introduction of merits review.

Third party review rights

The benefits of broad rights for third party merits review of decisions are well documented.[6] The benefits include:

- Increasing public confidence in government processes.
- Greater consistency and quality of decisions.

[6] See for example: EDONSW Merits in Planning

- Improving accountability of decision makers.
- The creation of jurisprudence.

Additionally, third party review rights are uniquely placed to operationalize the precautionary principle. We refer the Department to an article by Sydney University Academic Andrew Edgar (see attachment C)

Rights to reasons

The EDO supports the inclusion of provisions, which give the public a statutory right to reasons. The EDO suggests that the statutory wording of the right to reasons be similar to that contained within s 13 of the *Administrative Decisions (Judicial Review) Act* 1977(Cth). That is to ensure that the reasons given for decisions are adequate to allow the reader to understand the intellectual process that underpinned the decision. The EDO has found numerous examples of decisions in the NT for which reasons have been given, however, those reasons have fallen far short of what would be considered adequate.

Availability of draft reports

The EDO supports the ability for the public to provide comment on a proponent's EIA supplement.

The EDO would need to understand the rationale for making available to proponents the Draft Environmental Assessment report without making it available to the public more generally. If it were seen as desirable to publish a draft, to allow for the correction of errors or the like then the Draft should be available publicly so that any questions about the integrity of the process are avoided.

Management of timeframes

In our experience projects are more often held up by delays on behalf of the proponent as opposed to delays associated with public comment periods. In our view incorporating timeframes for public comment into the overall timeframe within which the NTEPA must deliever an assessment report is inappropriate and may place the NTEPA in ,at times, difficult and undesirable positions.

This could to some extent be mitigated through the inclusion in the regime of a discretion for the NTEPA to extend timeframes unilaterally for a project where it deems it necessary – this discretion should be able to be exercised for matters of great public interest or for projects of significant complexity.

Offsets

The EDO agrees that the use of offsets should be a measure of last resort. The use of biodiversity offsetting, to allow significant residual impacts of projects to be compensated for by conservation action elsewhere, is controversial and is not generally supported by the EDONT. While the EDO understands the attractiveness of offsetting, their benefits and ability to adequately compensate for environmental damage do not stand up to scientific scrutiny.[7]

[7] R. Hobbs et al, Intervention Ecology: Applying Ecological Science in the Twenty-First Century (2011) 61 *BioScience* 442, 444.

If offsetting is a required reality in any particular instance, the EDO prefers that proponents be required to rehabilitate land which has already been damaged, as opposed to agreeing to conserve or "ring-fence" a piece of land that might in fact remain undeveloped. The latter is problematic because the conservational undertaking is predicated on the presumption that the land will be damaged in the future otherwise.

Strict guidelines must be in place to ensure that offsets are only used as a last resort and effective regulation, monitoring and enforcement are critical to ensure that any offsets agreed are maintained by the proponent. We note with concern the recent attempts by the INPEX operation to avoid certain offset conditions that were included on their project approval.[8]

[8] See for example: http://www.abc.net.au/news/2016-03-31/inpex-joint-venture-seeks-to-dump-federal-environmental-projects/7289310 - https://www.theguardian.com/environment/2016/apr/02/natural-gas-project-operator-attempts-to-walk-away-from-environmental-offsets

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8 April 2016

Northern Territory Balanced Environment Strategy – Discussion Draft:
ENVIRONMENTAL DEFENDERS OFFICE NORTHERN TERRITORY RESPONSE

Introduction

The Environmental Defenders Office Northern Territory (**EDO**) welcomes the opportunity to provide a response to the discussion draft of the *Northern Territory Balanced Environment Strategy* (**the Strategy**). Additionally, The EDO acknowledges the extension of time granted, which has allowed us the opportunity to provide this comment on the Strategy.

At the outset we would like to acknowledge the recent consultation we had with Nerida Bradley and Jocelyn Cull in relation to legislative reform in this area. That meeting was, in our view, incredibly productive and represented the best way for us to be positively engaged by Government on proposed legislative reform in this area.

That is not to say that strategy is not important. On the contrary, strategy sets the scene for future law reform and government policy and programs. We commend the government for attempting to set a strategy in this area and hope that our comments are taken in the way they are intended - as constructive criticism.

Overall comments

The first, and perhaps most important point to raise, is that the current management of the Northern Territory's environment is currently out of balance - hence the need for this Strategy.

The Strategy's vision is solid, save for the uncomfortably vague, and undefined, term, "sustainable use". We would prefer to see the vision simplified to state, *"To ensure that development and land use in the Northern Territory's causes no further biodiversity loss and the environment is both healthy and resilient".*

The Strategy's principles are generally sound.[1] Each of the nine principles are important concepts, all of which should be integrated into legislation, subordinate legislation, and government policy and programs. Currently they are not. As a result, the EDO has concerns that the Strategy's vision will not be realised.

The Strategy's failure to acknowledge climate change impacts including biodiversity loss and extreme weather events (in all but the most cursory of manners), makes it difficult to take seriously. The Strategy's failure to recognise the alarming rate of biodiversity decline in the

[1] However, we suggest some minor amendments to the Principles. We also note that the Principles reflect some important concepts found in customary international law, for example, Principle 5, intergenerational equity and, Principle 9, the polluter pays principle. However, we note with concern that these important principles do not seem to have been adequately incorporated into the bulk of the Strategy. This is addressed in greater detail below.

Northern Territory is equally significant. For example, a recent article noted that "native mammal fauna of Kakadu National Park is in rapid and severe decline".[2]

The Strategy's failure to put a strong focus on the diversification of the energy mix in the Northern Territory to include a greater emphasis on renewable energy (aside from just in remote communities), is a major oversight.

While the Strategy sets an admirable (albeit vague) vision and outlines strong sensible principles, it lacks mechanisms that would see it a truly effective document. It is, in our opinion, a two-dimensional document. Like the 2015 *Our Water Future – Discussion Paper,* the Strategy lacks substantive detail that would allow it to deliver on the huge promises it sets out.

Good strategy

For any strategy to be effective it needs to contain a range of elements. The first is a strong vision. The Strategy has that. Other elements of effective strategy are missing, for example:

- ***Critical reflection:***

  The Strategy does not contain any sharp, critical reflection using real life examples. This type of reflection provides the impetus for the change in strategy. It should honestly assess problem areas and the need for change. The '*What are our challenges'* and *'Our current context'* sections of the Strategy, found on pages 8-9, do not identify any of the problematic failings of the current environmental management context; both in terms of community confidence and environmental impacts.

- ***Balancing the forest and the trees***

  Strategy documents should zoom out to the big picture. This Strategy does that. However, effective strategy also zooms in and identifies the specific needs to achieve the big picture. The Strategy is out of balance. Too much emphasis is placed on big picture ideas and broad statements. Not enough emphasis is placed on what needs to change to implement and achieve the Strategy's vision. That leads into our next two points.

- ***Avoidance of 'fluff' and 'weasel words'***

  It is easy in strategy documents to fill up pages with vague, wish-washy language and weasel words.[3] A strategy is not a marketing campaign and this Strategy at times feels like one. The Strategy must serve as an effective plan to move the Northern Territory's environmental management regime forward. The Strategy would benefit enormously from the culling of fluff and weasel words, replacing those areas with language and actions which are crisp, concise, clear, direct and specific.

- ***Linking to process***

  The Strategy does not sufficiently link to process. Save for the references throughout the Strategy to planned reform of the regulatory scheme, scant information is provided as to how the goals of the Strategy will be achieved. That has occurred largely because the

[2] Woinarski, J.C. Z et all (2010) *Monitoring indicates rapid and severe decline of native mammals in Kakadu National Park, northern Australia,* published Wildlife Research 37(2) 116-126.
[3] A "weasel word" refers to words or phrases aimed at creating an impression that a specific and/or meaningful statement has been made, when only a vague or ambiguous claim has been communicated, enabling the specific meaning to be denied if the statement is challenged.

goals themselves lack the attributes found in S.M.A.R.T goals.[4] Correspondingly, it will be difficult to assess whether these goals have been achieved in the future. Further, the 'actions' specified to meet each goal are often so vague as to be devoid of meaning.

- ***Setting timeframes***

  The Strategy fails to set any timeframes for achieving its vision. This is a significant omission from the document.

Recommendation 1:
The Strategy's vision should be re-worded to eliminate uncertainty in its objective.

Recommendation 2:
The Strategy should be reworked to include the elements of good strategy identified above; including the reformulation of goals to ensure they are S.M.A.R.T goals.

Specific comment

Principle 4 & Principle 6

These two Principles should be reworded to be broader that they currently are.

Principle 4, Engagement, should encompass engagement by both industry and government and should not be restricted to decision making.

Principle 6, Transparency, should apply to both government and industry and should not be restricted to transparency about decisions, but also about operations and issues.

Recommendation 3:
The Principles above should be amended as suggested.

The principles are not adequately integrated into the Strategy

For instance, Principle 8 of the Strategy, *Polluter Pays*, means that the costs of environmental pollution are the responsibility of the polluter. This is an internationally recognised principle of environmental law (and corporate accountability). Yet it is undermined in the Strategy in the section "Contemporary Management Practices" (pages 18-19). This section documents a much-diminished aim, to simply "encourage" industry to remediate and rehabilitate the environment. This is incongruous with Principle 8 of the Strategy. The word "encourage" contemplates a lower standard and can be considered a 'weasel word'.

Additionally, Principle 1 (Balance), 2 (Stewardship) and 9 (Leadership) and potentially others, seem to be absent from the Strategy's section "Environmental Responsibility". We say this because none of the identified aims or actions specifically state that it is the Government's responsibility to put in place a robust and effective regulatory framework. It is not sufficient to state simply that "*business and industry are responsible for ensuring that their operations are ethical and sustainable and do not adversely impact the environment by practicing good environmental management that complies with environmental laws*".

[4] Internationally recognised practice around goal development recommends that goals be Specific, Measurable, Attainable, Realistic and Timely (SMART).

We are concerned that the Strategy evinces a continued over-reliance on corporate entities doing the right thing to protect the environment. This over-reliance has seen significant environmental damage in the Northern Territory. Some businesses demonstrate a strong commitment to environmental protection, but others do not. It is important to recognise that the legal framework within which corporations operate requires them to undertake a cost benefit analysis in relation to environmental protection outcomes. That being the case it is critical that the Strategy is clear about how government will ensure that unacceptable environmental damage does not occur from the activities of corporations; either through incentives or disincentives.

Recommendation 4:
The Strategy should be reviewed to ensure that it's Goals, Aims and Actions reflect the principles in their truest form, not a watered down version.

The connection Aboriginal people have with the land and their role in land management

The EDO applauds the Strategy's recognition of the role and connection that Aboriginal Territorians have with the land. The Strategy highlights, on page 7, *"the cultural and resource value of the environment runs far deeper than the lifestyle we derive from it"* and that *"many remote communities enjoy a unique, culturally rich lifestyle and a strong spiritual and cultural connection to traditional lands".*

Recommendation 5:
The Strategy should specifically refer to obligations under international law, specifically, the Declaration on the Rights of Indigenous Peoples, which highlight the free, prior and informed consent and consultation requirements that are imposed on governments where Indigenous People are concerned.[5]

The role of industry in environmental management and protection

The EDO agrees that everyone has a responsibility in protecting, conserving, sustainably using and enjoying our environment. However, it is trite to say that some stakeholders have more of a responsibility than others, given the greater impact of their actions.

We noted above that industry should not be relied upon to protect the environment, absent effective enforcement or incentive mechanisms. The Strategy's current wording, in relation to the responsibilities of industry, is characterised by vagaries and 'weasel words'. For example, on page 13, the Strategy identifies that industry's role is to:

- ***Support*** research and innovation and ***commit*** to good environment practice. This isn't enough to ensure that good, effective environmental practice will be forefront in the actions of business and industry;

- Be responsible and accountable and ***minimise*** adverse impacts on our natural environment. This recognises that business and industry can adversely impact on our natural environment so long as it ***minimises*** those adverse impacts. There is no indication in the Strategy as to how industry must minimise its impacts or a requirement that the impact, once minimised, must be acceptable to the community.

[5] See Articles 15, 18, 20, 23, 25-29 and 32 of the UN Declaration of the Rights of Indigenous Peoples

- Keep the community informed about ***good*** environmental performance and outcomes. This statement is in complete contradiction to the Principle 4, Engagement (consultative and inclusive decision-making) and Principle 6, Transparency.[6] The community should be provided with information about all environmental performances (good and bad) and outcomes measured (or not) by industry. How else can community keep industry and government accountable for good environmental practice and management? Industry has substantially greater funding to measure their own ongoing performance, environmental practice, and management. The community is often left in the dark about hazardous environment practices and management, until it impacts directly upon them, through the pollution of their water source, illness in their community, fires and/or air pollution that severely impact on their health and environment.

- ***Build its social licence*** by incorporating healthy environment and community well-being objectives into business practices does not factor genuine community consultation and engagement (ideally reflecting Principle 4).

Recommendation 6
The Strategy must clarify the role of industry and make strong, clear and precise statements about the responsibility of industry.

The role of community in environmental management and protection

The Strategy specifically recognises the community's role to "hold industry and government accountable for good environmental practice and management". However, most of the tools that could be used to do so, do not exist in our current regulatory framework. For example, third party review rights are absent in most environmental laws; private prosecutions are excluded from most environmental laws; and, public rights to reasons and other critical documents are often absent from environmental laws.

Recommendation 7:
The Strategy should note the Government's role in providing (and include steps to achieve) an adequate framework to allow the community to effectively participate and undertake this important role, which the Strategy highlights.

The role of the government in environmental management and protection

It is difficult to ascertain with clarity the scope of government's role in environmental management and protection. This is highlighted by point 3 on page 13 of the Strategy, which suggests government's role is to "establish and maintain governance systems that support our goals for a balanced environment". Clearer specification is needed, given the lack of definition of a 'balanced environment'.

Further, point 5 (on the same page) states it is the government's role to "support research and innovation, promote access to information and educate industry and the community". These are all very different concepts and each carries an important responsibility for government. For example, transparency, accountability and engagement requires more than just "promotion of access to information" – it requires actual access to information through freedom of information and other legislation. However, it is has been our experience that any sort of information requested through Freedom of Information legislation has been difficult to obtain, due to long delays and exorbitant fees.

Recommendation 8:

[6] As we propose they are amended.

The Strategy must clarify the role of government and make strong, clear and precise statements about the responsibility of government.

The Goals for a balanced environment

The Strategy sets out six broad (non S.M.A.R.T) goals. Below we highlight some key points about each.

- *Healthy water, catchments and waterways:*

  - Aims and actions need to reflect the intention to minimise water-intensive developments. The Strategy highlights, on page 15, the reliance on extensive groundwater systems to meet the Northern Territory's basic needs and its unpredictable renewable capabilities. However, there is no mention in the Strategy of the minimisation of water use and water-intensive developments.

- *Resilient ecosystems:*

  - This Goal reflects a misunderstanding of the function of ecosystem services. In it, the strategy sets out a desire to "achieve a balance between sustaining vital ecosystem services and pursing the worthy goals of economic development".

  - The Strategy disproportionately values economic development over ecosystem services. This is despite the fact that degradation of an ecosystem has deleterious effects on flora and fauna species, community health and well-being and, as set out in the Strategy itself, the significant cultural and spiritual ties of Aboriginal Territorians.

  - This goal it fails to take into account Principle 5, Intergenerational Equity, which necessitates consideration of the short- and long-term impacts on environmental impacts.

- *Contemporary management practices*:

  - Whilst lengthy, this goal lacks substance.

  - This goal omits the significant role of consultation in contemporary management practices.

  - The Strategy's aim to "**encourage** industry to remediate and rehabilitate" conflicts with Principle 8, Polluter pays, as to "encourage" doesn't reflect any obligation for industry to remediate and rehabilitate the environment once damaged.

  - The Strategy's actions to "use appropriate enforcement tools to manage unauthorised waste disposal" should also include a reference to "unauthorised extraction and development". We note the Northern Territory EPA was left without any enforcement mechanisms to hold the operators of the Port Melville development to account for commencing construction without having first obtained proper environmental approval.

  - The Strategy does not refer to climate change impacts.

- *Environmental responsibility*

- This section is problematic. It acknowledges that *"business and industry are responsible for ensuring that their operations are ethical and sustainable and do not adversely impact the environment"* and there is a reference to business and industry necessarily complying with environmental laws, However our current environmental laws, as pointed out in the Strategy, are drastically outdated and do not reflect the current environmental regulation needs in the Northern Territory. Despite this, there is no specific reference in this section to the intention to reform legislation and regulation, which falls within the role of the government. This is a major oversight and should be included in the 'our actions' section.

- Despite the major role that business and industry play in environment degradation, the environmental responsibility goal does not reflect any obligation on business and industry to protect the environment and act responsibly. This is evident by the absence of any reference to business and industry in either the aims or actions in that section. Indeed, environmental responsibility is unfairly and disproportionately placed on the community, arguably the stakeholder with the least adverse impact on the environment.

- This section should note the aim of achieving no further biodiversity loss.

Recommendation 9

Take the above specific comments into account (as well as the more general comments referenced elsewhere in this response) when reformulating the Goals, Aims and Actions in the Strategy.

How we will achieve a balanced environment

- *Improving the environmental regulatory system*

  - This section of the Strategy should recognise and refer to additional law reform (in addition to the EIA framework) to achieve the Strategy's vision. This includes legislation regulating water, mining, freedom of information, heritage, flora and fauna and protected areas.

- Improving our engagement with the community and industry

  - The Strategy states that the Government is improving transparency and consultation in the environmental regulatory process. We assume this a reference to the intended regulatory reform, following Hawke II. There is a lack of clarity as to how the government is "improving transparency and consultation in the environmental regulatory process". It is trite to say that consultation must be meaningful.

  - The strategy outlines the government's commitment to "effective relationships with industry to ***encourage*** project proponents to become owners of environmental outcomes". This is simply not good enough. Project proponents must have a responsibility under legislation to protect, maintain, rehabilitate and restore the environment. It is not enough to encourage project proponents to be responsible for their environmental outcomes. This also conflicts with Principle 8, polluter pays.

  - The Strategy should include references to enhancing industry engagement. Currently the Strategy provides very little reference to business and industry obligations to consult with communities with respect to new or existing projects.

Recommendation 10:

The Strategy in this section should be specific and provide linkages to process. Currently it broad, vague, uncertain and fails to provide specific targets. This should be addressed in the final Strategy.

ENVIRONMENTAL DEFENDERS OFFICE NT – RESPONSE TO THE DRAFT ADVICE OF THE NT EPA ABOUT RECOMMENDED REFORMS FOR THE TERRITORY'S ENVIRONMENT LEGISLATION

Table of Contents

Executive summary

The Environmental Defenders Office NT Inc (**the EDO**) welcomes the opportunity to provide comment on the '*Draft Advice regarding Dr Allan Hawke's Review of the Northern Territory's Environmental Assessment and Approval Processes'* (**Draft Advice**). The importance of regulatory reform of the Northern Territory's (**NT**) environmental assessment regime cannot be understated, particularly with an increasing push to "develop the north". At the outset the EDO wishes to commend the NTEPA for the work it has done in preparing the Draft Advice.

In the EDO's view, the goal of the NT's reform agenda should be to develop a world leading regulatory framework for environmental assessment. There is very little to be critical of in the Draft Advice, indeed, the EDO believes that it provides a strong basis upon which to develop a world leading regulatory framework for environmental assessment.

In summary, the EDO has taken the following position on the 7 summary recommendations in the Draft Advice:

1. The EDO strongly supports Recommendations 1-3 in the Draft Advice, which urge a move to a *single environmental approval* framework in which the Environment Minister issues an overarching environmental approval for all projects, which will, or may, have a significant impact on the environment.

2. The EDO strongly supports Recommendation 4 in the Draft Advice, which recommends the urgent reform of the *Environmental Assessment Act.* Broadly speaking the EDO supports reforms which will ensure:

    a. no action in the Northern Territory has an unacceptable impact on the environment[1] now and/or into the future; and

    b. all actions in the Northern Territory, that may have a significant - direct or indirect impact - on the environment, are assessed, planned and conducted so as to avoid significant adverse impacts to the Northern Territory environment, taking into account the potential for more desirable alternatives, principles of ecologically sustainable development and ecosystem based management.

    The Draft Advice provides excellent preliminary draft instructions that go along way to achieving the aim of world leading environmental impact assessment. Particularly the EDO supports the inclusion of third party review rights, offence provisions and requirements for reasons for decisions to be made publicly available.

    While there is a lot to like about the Draft Advice preliminary drafting instructions, the EDO does make non-exhaustive recommendations in this comment which articulate an innovative approach to areas in which current environmental assessment regimes are failing, particularly with regard to the adequacy of science in EIS documents, the accountability of decision makers, the development of stringent criteria and the consideration of cumulative impacts of actions.

3. The EDO provides in principle support to Recommendation 5 in the Draft Advice. It is the EDO's view, that a well-resourced independent NTEPA (**with the necessary checks and balances on its own power**) provides an additional layer of accountability, credibility and independence in a jurisdiction, which, because of its size, is often challenged by perceptions of bias and political interference.

4. The EDO provides in principles support to Recommendations 6 & 7 in the Draft Advice but will consider those matters in greater detail during the reform process proper.

The EDO's detailed comments on the Draft Advice are provided below.

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[1] A broad definition of environment should be included in the Act, encompassing socio-economic and cultural factors.

Introduction

The Environmental Defenders Office NT (**the EDO**) welcomes the opportunity to provide its comments on the Northern Territory Environment Protection Authority's (**NT EPA**) Draft Advice about reforms recommended for the Northern Territory's (**NT**) environmental assessment legislation.

There are numerous examples, which illustrate the problems with the current NT approach to environmental assessment of projects, and the EDO agrees that comprehensive reform of the *Environmental Assessment Act* (NT) is urgently needed. This fact has been known for many years and it is disappointing that successive governments have not taken steps to address the many failings of the NT environmental assessment regime. Having said that, the EDO is heartened by the apparent momentum for change in this area.

It worth stating that while it is critical that the environment assessment regime be overhauled, it is a major reform that should not be rushed. This, as the NTEPA notes, is a "rare" opportunity for major reform. We don't want to lose the opportunity to put in place a leading framework that will stand up over the next 10-20 years because of undue haste during the reform process. What we're saying is this, the opportunity that presents itself is one in which the NT can opt to lead on environmental assessment best practice. It is an opportunity to develop new ideas that others may follow, rather than simply playing catch-up. The little-acknowledged reality is that, environmental assessment laws across Australia are failing to achieve their aims.

On the subject of reform, the EDO takes the opportunity to note our continued opposition to a bilateral agreement, which would see the Territory assume responsibility for approval of actions, which trigger the Commonwealth environmental assessment regime. The views of the EDO are captured in a recent Environmental Defenders Offices NSW article 'Australia's Environment: Breaking the One-Stop-Shop deadlock.[2]

The EDO hopes that the substantive reform process will include appropriate timeframes for public comment. In our view, 30 days will be too short a period to put forward reports/comments of real substance. Additionally, we would support the creation of a community working group with experts in the field providing input and ideas into the reform process.

The Hawke Review, and the Draft Advice which critiques it broadly examine two things, first (and primarily) the best structure for the environmental assessment regime in the NT, second various other reforms required to give rigour and effectiveness to the process.

The structures recommended in the Hawke Review and the Draft Advice vary markedly with each urging a different immediate way forward. Interestingly, the approach advocated in the Draft Advice is actually the "aspirational model" identified by the Hawke Review.

In our view, the simplest way to provide comment on the NTEPA's comprehensive advice is to break the work down to examine the two sections, a) the best structure for the environmental assessment process; and b) other reforms required to give rigour and credibility to the current EIA process.

[2] https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/2664/attachments/original/1457483376/IMPACT_ISSUE_97.pdf?1457483376

The starting point for any reform discussion

Before we begin our substantive comments on the Draft Advice, we think it is important to record our view that the starting point for any discussion about reform in this area should be guided by the answer to this question - ***what is it the environmental assessment regime supposed to achieve?***

Until that very simply question is answered for the NT, reform in this area will lack direction.

The EDO proposes that a sensible answer to that question would be something like:

> **The Northern Territory's Environmental Assessment regime should ensure that:**
>
> - **no action in the Northern Territory has an unacceptable impact on the environment[3] now and/or into the future; and**
>
> - **all actions in the Northern Territory, that may have a significant direct or indirect impact on the environment, are assessed, planned and conducted so as to avoid significant adverse impacts to the Northern Territory environment, taking into account the potential for more desirable alternatives, principles of ecologically sustainable development and ecosystem based management.**

The Draft Advice's first preliminary drafting instruction (**PDI**) provides some guidance on how the NTEPA believes this question should be answered. Ultimately, the Draft Advice provides that the primary objective of the Act should be "to ensure ecologically sustainable development" and then states that this objective will be achieved by:

- Applying the core objectives and principles of ecologically sustainable development
- Application of the avoid, mitigate, offset hierarchy
- Establishing risk management as a fundamental component of environmental assessment and management processes
- Adopting processes that require impacts to be reduced to 'as low as reasonably practicable' (ALARP) and to be acceptable.
- Implementing an environmental approval issued by the Minister for the Environment following an environmental impact assessment.
- Ensuring appropriate protection of the environment from the impacts of waste and pollution through, for example, licencing and a general duty of environmental management and protection.

The EDO commends the PDI, however, it recommends that the Acts objective should be, first and foremost to ensure that no development has an unacceptable environmental impact and where development occurs, that it is ecologically sustainable development.

Consideration could be given to the desirability and utility of articulating various principles in greater detail than set out in PDI 1, for example, see section 1B-1L of the *Environment Protection Act* 1970 (Vic).

[3] A broad definition of environment should be included in the Act, encompassing socio-economic and cultural factors.

PART 1: THE EDO's VIEW ON THE PROPOSED ENVIRONMENTAL IMPACT STRUCTURAL REFORM

Single environmental approval or sectoral approval [4]

The EDO is strongly in favour of the Northern Territory moving, as quickly as is reasonably possible, to a *single environmental approval* framework as proposed in the Draft Advice. The EDO sees no benefit whatsoever in an interim move to a *sectoral environmental approval* (**Sectoral framework**) framework as proposed by the Hawke Review.

The Draft Advice sets out clearly the disadvantages of both the current regime and the Hawke proposed, Sectoral Framework. Broadly, the Draft Advice identifies that the current system and the Sectoral Framework:

- are highly fragmented across numerous inconsistent pieces of legislation and a patchwork of different agencies with different aims;
- promote inefficiency and ineffectiveness;
- feature unacceptable conflicts of interest/perceived conflicts of interest; and
- results in/is likely to result in the continued ineffectiveness of environmental assessment in the NT.

The EDO accepts and agrees with the criticism the Draft Advice makes of the Sectoral Framework. We also agree that it is difficult to understand the rationale for the Sectoral Framework which will require more work, generate greater uncertainty and will fail to eliminate many of the problems (particularly related to conflicts) with the current regime.

The EDO agrees with the benefits of the *single approval framework*. Particularly, this framework will provide a clear line of accountability, remove the current conflicts which plague the current system and will essentially provide a far simpler arrangement for environmental assessment in the NT.

The EDO is in favour of a framework where the Minister for the Environment provides an overarching 'environmental approval' for all actions, which trigger the environmental assessment process (we will discuss our view on how the assessment regime should be triggered in Part 2). Obviously, other operational approvals will still be required, but the Minister for the Environment will, quite deliberately, have a far more powerful role under this framework – as is the case with the Commonwealth environmental assessment regime.

Who should decide if a project needs assessment? Who should do the assessment work?

If appropriate constraints on the exercise of power - related to decisions in the assessment process - are built into the legislation, then the question of who undertakes the assessment work (Whether the NT EPA (as is the case in Western Australia) or the Department of the Environment (as is the case in New South Wales)) becomes less important. Therefore, the critical considerations for the reform are the constraints, guidance and criteria that need to be applied by whoever the decision maker is. The Draft Advice makes excellent recommendations in this regard (albeit from the standing assumption that it will be the NTEPA who undertakes the assessment work.)[5] These recommendations, and the EDO's views, are discussed in Part 2 of this comment below.

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[4] The EDO opposes any move to hand Commonwealth environmental approvals to the NT. https://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/2664/attachments/original/1457483376/IMPACT_ISSUE_97.pdf?1457483376

[5] It is the EDO's view, that a well-resourced independent NTEPA (with the necessary checks and balances on its own power) would provide an additional layer of accountability, credibility and independence in a jurisdiction, which, because of its size, is often challenged by perceptions of bias and political interference.

PART 2: THE EDO's VIEW ON THE SUPPORTING RECOMMENDATIONS MADE IN THE DRAFT ADVICE

Part 2A: The three time points

There are three points in time during the assessment regime, which seem to us more critical than all the others. At each of these three points, the legislation must set out effective criteria for decision making, provide a transparent framework and have in place accountability mechanisms. We have assessed the Draft Advice's effectiveness in relation to these three critical points in time below:

1. The act of referral. How a project is directed into the regime.
2. The decision about whether an assessment is required for a matter and at what level.
3. The decision whether or not to approve the matter and, if approved, what conditions to impose.

Accountability factors important at more than one time point

Third Party Review Rights

The EDO strongly supports the Draft Advice's apparent support for third party merits review to the Northern Territory Civil and Administrative Tribunal throughout the assessment process.

1. PDI 88 recommends that the Act should provide for appeals directed to the Northern Territory Civil and Administrative Tribunal. Appeals should be on decisions made by the NTEPA, and the by the Minister for the Environment.

   In the EDO's view PDI 88 should be amended to specifically note the intention for decisions to be subject to merits review by the Tribunal and also to specifically allow third party appeals for a broad cross-section of the community. This could be achieved by providing for broad standing provisions, e.g. open or expanded standing[6], or standing for anyone who has made a submission, is a person aggrieved or has a relevant interest.

   The EDO notes that in addition to 'assessment decisions' (made by the NTEPA) and 'approval' decisions (by the Minister) a right of merits review should also be available to the power outlined in PDI 71 to allow significant amendment of an approval or condition.

   This particular PDI is critical because it provides a legislated procedure to challenge an approval and any "no significant impact" finding on its merits.

2. The EDO recommends that the timeframe for bringing a merits review of any decision under the act be at least 45 days (preferably 60), rather than 28 days.

Adequacy of reasons

3. PDIs 20 & 71 require that reasons be published publicly in relation to 'assessment decisions' and approval decisions, respectively. The Act should do more than require a statement of reasons. It should require that a statement of reasons be adequate to allow the reader to understand the intellectual process that underpinned the decision.

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[6] See section 487 of the *Environment Protection and Biodiversity Conservation Act* 1999 (Cth) for an example 'expanded standing' provision, albeit for judicial review proceeding rather than merits review proceedings.

The EDO recommends that the Act adopt similar wording to that found in the Administrative Decisions Judicial Review Act (Cth), that is the provisions of reasons "setting out the findings of fact, referring to the evidence or other material on which those findings were based and giving reasons for the decision". [i]

Time point 1 – the Act of referral

4. The Draft Advice outlines comprehensively the current regime's difficulties with ensuring projects are referred for assessment when required. Indeed the Draft Advice notes that a number of projects, which should have been referred, have not.

   To rectify the above failures, the EDO agrees with PDIs 4 – 8 set out in page 99 of the Draft Advice.

5. The Act should provide for "any person" to seek an injunction restraining a person from undertaking work where that person has, by contravening the Act, has caused, is causing or will cause damage to the environment. Specifically this provision should be used to restrain a proponent that has begun work without the referral of a matter.

Time point 2 – assessment decision

As noted in the Introduction, it is crucial that the 'gateway' to the environmental assessment process be attended by transparency, stated criteria and accountability mechanisms for the decision maker. In the EDO's view the reforms recommended in the Draft Advice PDIs generally achieve those things. The EDO's opinions and suggested additions, amendments are detailed below.

Assessment and comments on the PDI

6. PDI 2: This PDI notes the need to define '*significant impact*'. It is important to note that this term escapes easy definition and has been the subject of various consideration by courts. A potential option would be to use the definition as interpreted by the Federal Court in various cases[7] and referenced in the EPBC Act Significant Impact Guidelines, namely a significant impact is one that is "important, notable or of consequence, having regard to its context and intensity". The EDO notes that the current NTEPA Draft Guideline would be a poor template to use for constructing an appropriate definition.[8]

   The EDO suggests it is also important to include a definition of "impact", albeit preferably one with greater simplicity than the definition of impact set out in section 527E of the EPBC Act. This definition should make it clear that impacts of an action extend to impacts that do not directly arise from the action itself. Additionally consideration will need to be given to how the definitions encompass short, medium and long-term impacts, an impact that could be insignificant in the short term could be substantial in the long term. Cumulative impacts should also be considered, particularly where strategic impact assessment has not been conducted. Significant work on these definitions will be required.

7. The EDO is generally supportive of PDI 3, however it will need to be the subject of detailed consideration and community engagement during the reform process.

8. The EDO is generally supportive of PDIs 11-16. Notably, PDI 7 & 8 are critical accountability mechanisms, the absence of offence provisions in the current regime, along with the necessity for a 'responsible minister', are two of the biggest failings of the current regime.

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[7] See for example Booth v Bosworth [2001] FCA 1453

[8] See the EDO's recent comment on the Draft Guideline for 'Significant Impacts'.

PDI 9 is in our view, still a little unclear. In the EDO's view it would be simpler and more consistent to adopt the definition of '*action*' found in the EPBC Act. Additionally, the EDO suggests that (similar to provisions found in Victoria) the amendment of a planning scheme should be explicitly mentioned in the Act as a matter, which can attract the assessment provisions of the Act.

PDI 11 promotes flexibility and efficiency and it is sensible to remove the provisions related to PER as recommended in PDI 12.

9. PDI 19: The EDO suggests more detail be required in terms of the kinds of impacts that need to be covered. These should include a requirement to specifically recognise impacts that arise through opportunity costs (potentially to stop more desirable alternative land uses), impacts to air quality, impacts to health, socio-economic and cultural impacts.

   These additions will provide greater scope for the NTEPA (or other decision maker) to assess whether an environmental assessment is required.

10. PDI 24: The EDO is generally supportive of the increased use of Strategic Impact Assessments and ecosystem based management strategies.

11. PDI 62: There should be powers for the NT EPA to extend timeframes unilaterally where:

    i. the proposal is of such significant impact or public interest that the NTEPA is of the opinion that additional time is required (reasons should be given for forming this opinion).
    ii. Insufficient information is provided to enable the NTEPA to make recommendations; or
    iii. Where agreed in consultation with the proponent.

    EDONT note: This safeguard is important to allow flexibility. Particularly it redresses the problems that may arise where the NTEPA (or other decision maker) can be inundated with EIS material but is forced to comply with strict timeframes.

    The EDO notes that the reformed act will need a strong definition of "substantially commenced". Problems associated with this have been observed in other jurisdictions.

Ideas for consideration and potential addition to reform

12. The Act should specify matters, which must be included in an EIA. This could be done by way of schedule, or regulation. This will provide strong minimum standards and requirements for the conduct of EIAs, clarifying their definition, scope and content. This would include mandating the requirement to consider and outline possible more desirable alternatives and a proponents (and any subsidiary's) *environmental history* both within this jurisdiction and outside of it.

13. The current Draft Advice doesn't adequately deal with cumulative impacts and adaptive management of projects. These topics will require significant attention during the reform process.

Time point 3 – approval decision

In a single environmental approval framework the approval decision is, quite obviously, the most important one. So, again, the decision maker (in this case the Minister) must be guided by criteria which allows flexibility, but not complete discretion that might be influenced by political rather than merits based considerations. It is equally important that the Minister must provide reasons for his/her decision and that there are accountability mechanisms available.

Generally speaking the EDO is in favour of the reforms proposed by the Draft Advice's PDIs as they relate to the approval decision. We do, however, have a number of comments/recommendations.

Assessment and comment on specific PDIs

14. PDI 64. The EDO does not understand the necessity of PDI 64. If the draft environmental approval, or draft statement of unacceptability is provided to the proponent and relevant government agencies for comment, then that opens up the possibility for the Minister to be 'lobbied' by both a proponent or a relevant government agency or other Minister prior to having seen the NTEPA's recommendations. The proposed PDIs don't seem to contemplate amendments to the draft environmental approval or statement of unacceptability following its provision to the proponent/government agencies.

    A preferable approach would be to provide the draft approval or statement of unacceptability and allow the Minister for the Environment to seek comment on particular aspects of an approval – for example, he may wish to ascertain, in any event, this seems to be covered adequately and appropriately in PDI 66. Alternatively, any comments provided in response to the draft environmental approval or statement of unacceptability, by a proponent or relevant government agency should be made public to avoid any perception of over-reach into the process.

15. PDI 82. The EDO supports a requirement that prohibits decision makers from issuing project specific sectoral approvals that are in conflict with the Minister's environmental approval and conditions.

Ideas for consideration and potential addition to reform

16. The NT Act should provide specific criteria which the Minister must consider before issuing an approval. This should include specific requirements for the Minister to consider:

    b. The object of the Act;

    c. The potential cumulative impacts of the proposal considering the nature and location of the action;

    d. The societal distribution of burdens and benefits associated with a proposal;

    e. The opportunity cost of approving a project and the potentially more desirable alternatives to the project;

    f. The impacts of climate change on the project, and the project's impact on climate change; and

    g. a proponent's *environmental history.* As noted above, the EDO believes that a statement of environmental history should be included as part of the EIS document.

17. The approval decision should always build in a requirement for adaptive management of the approval. So, where appropriate, an approval should require the monitoring of key environmental indicators, reporting provisions and trigger points which will see the adjustment or termination of an approval to ensure environmental impacts are limited to those that have been approved. This will be just as important in responding to a changing climate as it will be for ensuring a proponent's compliance with its environmental approvals.

Part 2B Additional matters of importance throughout the framework

The adequacy of the scientific information presented in the EIS

It is difficult to think of other circumstances in which major scientific reports are presented as fact without peer review, yet this is the case for EIS documents. It is a major concern given the enormous reliance that is placed upon the science presented in any given EIS. Often members of the public, and indeed government agencies will have insufficient expertise to make an adequate assessment of the reliability and accuracy of data presented in an EIS.

18. To address these issues, the EDO supports:

    - PDI 34 - which introduces the concept of an adequacy report.
    - PDI 44 – which gives the NTEPA power to establish a panel of experts or require certain information to be peer reviewed at the cost of the proponent.

In addition to the above, the EDO recommends that:

19. The Act introduce provisions, similar to those found in the *Environment Protection and Biodiversity Conservation Act* 1999, which make it an offence to provide false or misleading information.

20. The Act introduce one or all of the following accountability mechanisms for consultants undertaking EIS related work:

    i. The Act specifically identify that environmental consultants are a person who can be prosecuted for providing false, or misleading information in an EIS; and/or

    ii. Consultants used to undertake EIS work require some form of accreditation; and/or

    iii. The introduction of a panel of accredited consultants in various areas, who will be randomly, allocated work by the government. This will break the direct nexus between proponents and their environmental consultants.

Offences & non-compliance

21. In relation to the PDIs relating to offences (PDI 6 (failure to comply with a call in direction), PDI 8 (commencing work prior to decision on referral) PDI 75 (failure to comply with an approval or commencing work without approval & 83 (failure to comply with standards). However, we would suggest that where work commences in the absence of an environmental approval, this office should be an offence of *absolute liability offence* under the *Northern Territory Criminal Code.* So, while there might be guidelines, a proponent takes the risk totally of their own volition if they choose not to refer a project. If they get it wrong and their action is later found to have been an action that did require referral, they have committed an offence – regardless of any statements they may make about the application of guidelines. Indeed, this is one of the dangers of guidelines.

22. PDI 76: The EDO supports the NTEPA having powers to enforce the environmental approval on behalf of the Minister for the Environment. These enforcement powers should be guided by a clearly defined enforcement policy.

Public comment & transparency provisions

23. The EDO supports the inclusion of public comment periods throughout the assessment process and written into the Draft Advice, however, timeframes for public comment should be at a minimum 45 days, preferably 60 days.
24. The EDO also notes the importance of PDI 62, which provides for the NTEPA to unilaterally extend timeframes. The EDO also suggests that this mechanism be expanded to allow for specified classes of people, including peak environmental NGOs to request extensions of time for making comment in exceptional circumstances.

EMPs

25. The EDO supports PDIs 79-81 which deal with environmental management plans (**EMP**), however, the EDO suggests that an addition could be made to PDI 81 to include 'subsistence management plans' as an additional matter than can be included in an EMP.

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[i] Section 13, *Administrative Decisions (Judicial Review) Act* 1977 (Cth)

INSTITUTIONS AND SUSTAINABILITY: MERITS REVIEW TRIBUNALS AND THE PRECAUTIONARY PRINCIPLE

ANDREW EDGAR*

ABSTRACT: Now that ecologically sustainable development has been implemented broadly in Australian environmental legislation, the major challenge has turned to making sustainability principles operational. The environmental management and policy literature has raised concerns that constraints inherent in political institutions tend to restrict the operationalisation of sustainability principles. This article examines such concerns for legal institutions, in particular merits review tribunals. It concludes that merits review has characteristics that make it highly suited to operationalising the precautionary principle and therefore to supporting sustainable development. However, merits review also has inherent weaknesses and practical constraints that can inhibit its ability to manage precautionary decision-making. These limitations are also examined.

CONTENTS

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I INTRODUCTION

There is a theme in the environmental management and policy literature that institutional constraints inhibit the operationalisation of sustainability principles.[1] The point is commonly made about political institutions. The concerns are that such institutions can be resistant to the fundamental changes required for implementing sustainability,[2] tend to simplify complex sustainability problems by utilising 'black or white' frameworks,[3] and can be restricted by executive control of decision-making processes.[4] But what of legal institutions — what institutional characteristics do they have that enhances or limits their ability to implement sustainability principles?

This article seeks to answer that question by examining merits review as both a decision-making process and a form of legal accountability that contributes to the operationalisation of the precautionary principle — the principle of sustainable development that is most commonly raised and applied in merits review decisions.[5] The precautionary principle is often included as an object of environmental legislation,[6] or included within planning instruments[7] and policies.[8] The version of the precautionary principle that is included in the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) is a good example of how it is implemented in Australian environmental legislation. Section 391 of that Act provides that:

> The *precautionary principle* is that lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of

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1 Ronnie Harding, Carolyn M Hendricks and Mehreen Faruqi, *Environmental Decision-Making: Exploring Complexity and Context* (Federation Press, 2009) 108; Stephen Dovers, *Environment and Sustainability Policy: Creation, Implementation, Evaluation* (Federation Press, 2005) 174.

2 Dovers, above n 1, 175.

3 Harding, Hendricks and Faruqi, above n 1, 265. See also Stephen Breyer and Veerle Heyvaert, 'Institutions for Regulating Risk' in Richard L Revesz, Phillipe Sands and Richard B Stewart (eds), *Environmental Law, the Economy and Sustainable Development* (Cambridge University Press, 2000) 283, 291.

4 Robyn Eckersley, 'Politics and Policy' in Stephen Dovers and Su Wild River (eds), *Managing Australia's Environment* (Federation Press, 2003) 485, 494.

5 The case survey for this article identified 199 cases in Australian tribunals in which the precautionary principle was applied. On the other hand, a search on AUSTLII for 'intergenerational equity' came up with 43 cases in merits review tribunals, and for the 'polluter pays' principle, 23 cases (searches undertaken on 21 February 2013).

6 Eg, *Environment Protection and Biodiversity Act 1999* (Cth) s 3A; *Environmental Planning and Assessment Act 1979* (NSW) s 5; *Environment Protection Act 1970* (Vic) ss 1A–1C.

7 Eg, *Blue Mountains Local Environmental Plan 2005* (NSW) cl 11(2)(c).

8 Eg, the Victorian "Code of Practice for Timber Production" examined in *Environment East Gippsland Inc v VicForests* [2010] VSC 335.

> the environment where there are threats of serious or irreversible environmental damage.

The precautionary principle is commonly relevant to decisions regarding whether consents, permits or approvals should be granted and is, in particular, relevant to the consideration of environmental impacts. It is often characterised as a decision-making 'process' rather than a rule that produces particular outcomes,[9] yet it does have a substantive aspect. The principle indicates that the decision-maker should impose a 'measure to *prevent* degradation' where there is scientific uncertainty and potentially serious environmental harm. This is substantially different to the primary norm of environmental assessment that otherwise applies, which enables projects to proceed as long as the environmental harm is 'acceptable' or can be mitigated to a level of acceptability by measures imposed by conditions.[10] The precautionary principle therefore imposes more onerous requirements on developers, because 'preventive measures' are likely to require the proposed development to be refused or be subject to additional, restrictive conditions.

Environmental decisions can potentially be challenged for failure to apply the precautionary principle (or failure to apply it in a proper manner) in two types of legal proceedings — merits review and judicial review. Judicial review requires a court to review administrative decisions for whether legal standards have been breached. The factual and discretionary aspects of the administrative decision are generally beyond the court's scope of review. This seriously restricts a court's ability to ensure that decisions satisfy sustainability principles and that decision-makers have applied the precautionary principle properly.[11]

Merits review, on the other hand, has been recognised as a particularly useful institution for examining the precautionary principle in practice.[12] It is a form of review that is usually carried out by administrative tribunals,[13] although in some

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9 Elizabeth Fisher, *Risk Regulation and Administrative Constitutionalism* (Hart Publishing, 2007) 41; Jacqueline Peel, *The Precautionary Principle in Practice: Environmental Decision-Making and Scientific Uncertainty* (Federation Press, 2005) 156–7.

10 Christopher Wood, *Environmental Impact Assessment: A Comparative Review* (Prentice Hall, 1995) 1, 212; Harding, Hendricks and Faruqi, above n 1, 236–8.

11 See Andrew Edgar, 'Between Rules and Discretion: Legislative Principles and the Relevant Considerations Ground of Review' (2013) *Australian Journal of Administrative Law* (forthcoming). See also Lee Godden and Jacqueline Peel, *Environmental Law: Scientific Policy and Regulatory Dimensions* (Oxford University Press, 2010) 95–6; Breyer and Heyvaert, above n 3, 298–301; Joakim Zander, *The Application of the Precautionary Principle in Practice: Comparative Dimensions* (Cambridge University Press, 2010) 149–50.

12 Peel, *The Precautionary Principle in Practice*, above n 9, 85, 107.

13 For convenience I will refer to 'merits review tribunals' rather than the more accurate 'merits review courts and tribunals'.

Australian states it is undertaken by courts.[14] Merits review has very different characteristics to judicial review. Unlike judicial review, it involves review of the information base, findings of fact and any discretionary judgments. A merits review tribunal can also substitute a decision of its own for the decision of the primary decision-maker — a remedy that is not available in judicial review proceedings.[15] We will see that these aspects of merits review are inherently suited to operationalising the precautionary principle. However, it also has significant limitations. Some of these are fundamental, inherent weaknesses and others are more practical.

The article is based on a survey of merits review decisions in each Australian jurisdiction[16] in which the precautionary principle was applied.[17] After filtering out the decisions in which the precautionary principle was merely referred to in passing,[18] 199 cases were examined,[19] starting with Justice Stein's decision in *Leatch v National Parks & Wildlife Service*[20] in 1993 and encompassing decisions up to and including those handed down in 2012.[21] Each decision was read to ascertain how the precautionary principle was applied. This methodology enables the researcher to see how the tribunal analyses the evidence and applies rules, policies and principles to make findings and draw conclusions. The case survey methodology was supplemented by an examination of the administrative law academic literature regarding the functions and procedures of merits review.

The article concludes that merits review has institutional characteristics that make it highly suited to operationalising precautionary decision-making. It does,

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14 Eg, the Land and Environment Court of New South Wales, the Environment, Resources and Development Court of South Australia, and Planning and Environment Court, Queensland.

15 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* (1986) 162 CLR 24, 40–1; Mark Aronson and Matthew Groves, *Judicial Review of Administrative Action* (Lawbook, 5th ed, 2013) 161.

16 No decisions of the Lands, Planning and Mining Tribunal (NT) could be found in which the precautionary principle was applied: Northern Territory Government Department of Attorney-General and Justice, *Mediation and Settlement* <http://www.nt.gov.au/justice/courtsupp/landplantrib/decisions.shtml>.

17 The spreadsheets that were developed for the case survey are on file with the author and can be made available upon request.

18 The filtering is a subjective process. It was carried out by a final year law student who had completed the Environmental Law unit at the University of Sydney. Her work was reviewed by the author. This form of research has been utilised in studies of judicial review by courts: Robin Creyke and John McMillan, 'Judicial Review Outcomes – An Empirical Study' (2004) 11 *Australian Journal of Administrative Law* 82, 96.

19 These comprised 62 from NSW, 68 from Victoria, 19 from Queensland, 13 from South Australia, 11 from Tasmania, 8 from Western Australia, 3 from the Australian Capital Territory and 15 from the Commonwealth Administrative Appeals Tribunal.

20 (1993) 81 LGERA 270.

21 Eg, *Xstrata Coal Qld Pty Ltd v Friends of the Earth Brisbane Co-Op Ltd* [2012] QLC 13; *Dual Gas v Environmental Protection Authority* [2012] VCAT 308; *Mansfield v Minister for Planning and Hanson Construction Materials Pty Ltd* [2012] NSWLEC 1063.

however, have weaknesses and constraints that can restrict its institutional advantages.

II INSTITUTIONS, MERITS REVIEW AND SUSTAINABILITY

Before introducing the primary concerns that have been raised regarding sustainability and decision-making institutions, it is convenient to make a number of background points.

The first is that I will use the concept of institutions in the sense that it is used in the environmental management and policy literature. That is, as Professor Dovers has stated, as a set of 'persistent, predictable arrangements, laws, processes or customs serving to structure political, social, cultural or economic transactions and relationships'.[22] I will treat merits review in this sense rather than focus on any particular institution with merits review functions such as the Land and Environment Court or the Victorian Civil and Administrative Tribunal.

The second background point is that there are limitations regarding institutional analyses that should be acknowledged. First, institutional analyses do not focus on the individuals who participate within the institution. It has been recognised that the views and preferences of individual decision-makers are highly significant in precautionary decision-making.[23] There are many points in environmental decision-making processes in which discretionary judgments are made, including in the application of the precautionary principle. At these points, the personal views and preferences of the decision-maker are likely to be highly influential. Secondly, it has been recognised that institutional change is unlikely to be sufficient for operationalising sustainability — non-government actors need to play a large role as well.[24]

While such limitations must be acknowledged they do not undermine the legitimacy of an institutional analysis.

The third background point is that merits review is an accountability mechanism rather than a primary decision-maker. It has a role to play in environmental decision-making systems but as a legal accountability institution this role is limited to a fraction of the decisions that are made within such systems. Moreover, merits review tribunals do not and cannot control primary decision-makers in any direct manner by establishing enforceable standards or policies.

What then are the primary problems with environmental decision-making institutions and what are the characteristics that will resolve these problems?

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22 Dovers, above n 1, 174.

23 Lucas Bergkamp and Turner J Smith, 'Legal and Administrative Systems: Implications for Precautionary Regulation' in Jonathan B Wiener et al (eds), *The Reality of Precaution: Comparing Risk Regulation in the United States and Europe* (RFF Press, 2011) 434, 435.

24 Harding, Hendricks and Faruqi, above n 1, 108.

After reviewing the environmental management and policy literature,[25] the following four factors come to the foreground.

1. *Institutions should be flexible enough to adopt sustainability norms*: This is a response to concerns that institutions are resistant to change. Such concerns were raised in the 1990s about the Land and Environment Court[26] but since then a substantial number of the merits review decisions in Australian jurisdictions have utilised the precautionary principle in their decision-making process, and some influential lines of case law have developed. Moreover, numerous studies have recognised merits review to be a rich source of precautionary decision-making.[27] It is therefore necessary to recognise flexibility as a factor for institutions generally, but it does not need to be addressed further in this article as merits review tribunals do not seem to be resistant to change. The more important questions arise in relation to the following factors.
2. *Institutions must be able to manage complex issues*: The concern that is raised here is that the issues that engage the precautionary principle are complex primarily because they require the decision-maker to respond to environmental risks and scientific uncertainty. According to Drs Harding, Hendriks and Faruqi, political institutions tend to reduce such issues to 'simplistic frames of black and white'.[28] The question for this article is whether merits review can manage complex issues in a satisfactory manner.
3. *Institutions should facilitate public participation*: The issue for this factor is that precautionary decision-making includes matters of discretionary judgment — such as, for example, the acceptability of environmental risks and the adequacy of measures to prevent harms — and members of the public should be able to influence the judgments that are made by the decision-maker.[29] The question is whether and how merits review tribunals enable participation by members of the public.
4. *Decisions should be made by transparent and accountable institutions*: It is convenient to deal with transparency and accountability together. They are relevant to governmental institutions generally but have heightened

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25 In particular, Harding, Hendricks and Faruqi, above n 1, chs 4 and 10; Dovers, above n 1, chs 3, 9; Eckersley, above n 4.

26 See Brian Preston and Jeff Smith, 'Legislation Needed for an Effective Court' (Paper presented at Promises, Perceptions, Problems and Remedies – The Land and Environment Court and Environmental Law 1979–1999, Sydney, 27–28 August 1999).

27 Eg, Peel, *The Precautionary Principle in Practice*, above n 9, 85, 107; Elisa de Wit and Rachael Webb, 'Planning for Coastal Climate Change in Victoria' (2010) 27 *Environmental and Planning Law Journal* 23, 31–3; David Parry, 'Ecologically Sustainable Development in Western Australian Planning Cases' (2009) 26 *Environmental and Planning Law Journa*l 375; Gerry Bates, *Environmental Law in Australia* (LexisNexis Butterworths, 7th ed, 2010) 225.

28 Harding, Hendricks and Faruqi, above n 1, 265. See also Breyer and Heyvaert, above n 3, 291.

29 Bergkamp and Smith, above n 23, 435.

importance due to the public interest characteristics of decisions that raise sustainability issues in regard to air quality, threatened species, and water resources.[30] There is a question as to how the concepts of transparency and accountability operate with regard to merits review tribunals in the context of sustainability issues.

The remainder of this article examines merits review against factors two, three and four.

III MANAGING COMPLEXITY: TESTING THE EVIDENTIARY BASIS OF DECISIONS

One of the most significant attributes of merits review is that the factual basis for a decision can be fully examined and tested by the parties.[31] This is particularly important for the application of the precautionary principle since the principle is designed to guide decision-making in the context of scientific uncertainty. It requires a detailed assessment of the evidence to determine whether there is scientific uncertainty in relation to the likely environmental harms and how such uncertainty can be managed.[32]

Merits review has a number of characteristics that makes it suited to dealing with scientific uncertainty. The first is that, unlike courts exercising judicial review, merits review tribunals do not scrutinise the primary decision-maker's decision to determine whether a legal error has been made — they directly examine the available information for whether a permit or approval should (or should not) be granted. They therefore go to the heart of the matter — the information base and the findings that can be drawn from it.

Secondly, in most forms of merits review the tribunal considers fresh evidence[33] — evidence that was not before the primary decision-maker. The information base can, therefore, be supplemented in merits review proceedings by more detailed information and the contributions of expert witnesses. These aspects of merits review enable tribunals to provide a better forum for detailed examination of complex evidence than the initial council or departmental decision-making process.[34]

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30 Dovers, above n 1, 157.

31 John McMillan, 'Merits Review and the AAT: A Concept Develops' in John McMillan (ed), *The AAT – Twenty Years Forward* (Australian Institute of Administrative Law, 1998) 32, 42.

32 Peel, *The Precautionary Principle in Practice*, above n 9, 222–3.

33 Peter Cane, *Administrative Tribunals and Adjudication* (Hart Publishing, 2009) 167; Leslie A Stein, *Principles of Planning Law* (Oxford University Press, 2008) 265. Cf *Pilbara Infrastructure Pty Ltd v Australian Competition Tribunal* (2012) 86 ALJR 1126, 1139 [65].

34 Merits review is sometimes said to 'cure' any defects in the primary decision-making process: Cane, above n 33, 150.

The cases examined for this article revealed that the most common way in which the information base is tested in merits review tribunals is by expert evidence. This tends to operate in the cases by the parties providing opposing expert evidence to the tribunal. Opposing expert evidence can make a significant contribution to the application of the precautionary principle. In some cases the mere fact that the experts disagreed provided the basis for the tribunal's finding that scientific uncertainty was established, therefore requiring the precautionary principle to be applied.[35] However, this was not always the case. In one decision the tribunal determined that the difference between the experts was marginal and insufficient to raise scientific uncertainty;[36] and, in another, one expert was preferred over the other with the consequence that the scientific uncertainty dissipated.[37] In many cases, however, the conflicting expert evidence was a crucial reason for applying the precautionary principle.

There were numerous other ways in the case survey in which expert evidence influenced the application of the precautionary principle. Expert evidence was used to establish scientific uncertainty by undermining the claims made by a developer that the potential environmental harm was known, and also minimal and acceptable.[38] Expert evidence was also used by developers to respond to claims made by councils and members of the public that the precautionary principle should be applied, but where such claims were made without supporting evidence that there was a threat of serious environmental harm.[39] Expert evidence was also used to test proposed preventive measures.[40] It is clear therefore that expert evidence is commonly utilised in merits review proceedings, and that it enables the complexities that arise in precautionary decision-making to be debated and deliberated upon in a relatively sophisticated manner.

There are, however, limitations inherent within merits review processes that can affect the management of expert evidence. For example, Jerrold Cripps QC, a former Chief Judge of the Land and Environment Court, noted in his review of that Court that reliance on expert witnesses contributes to the excessive burden of costs on the parties to merits review proceedings.[41] It has also been pointed out

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35 See, eg, *Gales Holdings Pty Limited v Tweed Shire Council* [2006] NSWLEC 212 [46]; *Providence Projects Pty Ltd v Gosford City Council* [2006] NSWLEC 52 [76]–[77]; *Yamauchi v Jondaryan Shire Council* (1998) QPELR 452, 457–460; *Rashleigh v Environment Protection Authority* [2004] ACTAAT 31 [74]–[82].

36 *Aldekerk Pty Ltd v City of Port Adelaide Enfield* [2000] SAERDC 47 [25].

37 *Cooroy Golf Club v Noosa Shire Council* [2005] QPEC 16 [108]–[127].

38 *Shannon Pacific v Minister for Planning* [2007] NSWLEC 669 [32]-[41]; *Brooks Lark and Carrick v Clarence City Council* [1997] TASRMPAT 61, 7; *Southsea Securities Pty Ltd v Western Australian Planning Commission* [2005] WASAT 200 [31], [37]–[40].

39 *Heiermann v Sorell Council* [1998] TASRMPAT 7, 4; *Primewest Management Ltd v City of Swan* [2010] WASAT 2 [41]–[46].

40 *Histpark Pty Ltd v Maroochy Shire Council* [2001] QPEC 59 [47]–[69]; *Shannon Pacific v Minister for Planning* [2007] NSWLEC 669 [32]–[41].

41 J S Cripps QC, *Report of the Land and Environment Court Working Party* (2001) 57.

that the parties representing public interest (such as local councils and objectors) are likely to have insufficient resources to match developers' experts in number and expertise.[42] This is because local councils are drawn into merits review proceedings whenever appeals are brought against their decisions. They are 'repeat players' in merits review litigation[43] with multiple demands on their budgets. Objectors, who are generally individual members of the public, are unlikely to have the budget that developers can utilise in litigating their case. The consequence of such imbalances in parties' resources is that the expert evidence relied on by the developer may not be adequately tested by opposing experts.

Concerns are also sometimes expressed that tribunal members lack sufficient expertise to manage the complexity of decisions that engage sustainability principles.[44] The fact that the parties provide opposing expert evidence will not necessarily help as tribunal members are placed in the difficult position of deciding between them. It could, for example, be a difficult judgment to determine whether a council's expert has undermined the claimed certainties regarding environmental impacts expressed by a developer's expert.

Such limitations in merits review processes do not necessarily undermine merits review's advantages. As we have seen, merits review includes processes that enable it to manage the complexities of precautionary decision-making for particular developments. However, in practice the parties have greater or lesser resources and tribunal members have greater or lesser experience and expertise. Such weaknesses and imbalances are inevitable for institutions. They are significant and need to be managed but should not be regarded as undermining the benefits of merits review.

IV RISK ASSESSMENTS AND PUBLIC PARTICIPATION

The next important question regarding merits review as an institution is whether it facilitates public participation. Public participation is particularly relevant to the application of the precautionary principle for the discretionary judgments that are made regarding the seriousness of environmental harms and the adequacy of preventive measures. Community participation is usually facilitated in environmental decision-making by public consultation processes. This involves public notice of land developments and the opportunity to lodge submissions that are considered by the decision-maker. This is a very simple

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42 Simon Molesworth, 'The New Victorian Civil and Administrative Tribunal: Is It a Model for Resolving Expert Evidence?' (1999) 4 *Judicial Review* 153, 171.

43 Stephen Willey, 'Planning Appeal Processes: Reflections on a Comparative Study' (2007) 39(7) *Environment and Planning A* 1676, 1685–6.

44 Peel, *The Precautionary Principle in Practice*, above n 9, 223; Rachael de Hosson, 'The Limits of Merits Review and the EPBC Act: Grey Nurse Sharks, Fisheries and the AAT' (2010) 27 *Environmental and Planning Law Journal* 223, 236–7, 239.

means of identifying and collating community interests. The question for this part of the article is: How can members of the community participate in merits review processes to influence the discretionary judgments made in the application of the precautionary principle?

It is possible for members of the public to play a direct role in merits review decision-making processes by participating in the proceedings as a party or, if that is not possible under the rules of the particular tribunal, as a witness for the decision-making agency.[45] These forms of participation can enable members of the public to directly influence the application of the precautionary principle. For example, in *New Oakleigh Coal Pty Ltd v Hardy*,[46] a member of the public gave evidence based on being a long-term resident in the area. The resident's family had been living in the particular area for approximately 120 years which was recognised as providing her with a particularly useful perspective on the frequency of droughts there. The resident's evidence contradicted expert evidence and led the Queensland Planning and Environment Court to conclude that there was scientific uncertainty and that the precautionary principle should be applied.[47] The precautionary principle was relevant in this case due to the inclusion of ESD principles in s 223(c) and Sch 3 of the *Environmental Protection Act 1994* (Qld) as a mandatory consideration for the particular decision.[48] In other cases, however, the input of objectors is given little weight. This is particularly apparent when members of the public claimed that the precautionary principle had to be applied, presumably due to the expectation that the development would be refused. Tribunals commonly found in such cases that the claimed risk of serious environmental harm and scientific uncertainty were not substantiated.[49]

There are also more indirect methods of participation or, at least, methods by which tribunal members can gauge the public interest related to the discretionary judgments that are made in the application of the precautionary principle. One example of this in the case survey involved tribunal members relying on extrinsic materials used in legislative reform processes. In *Alanvale Pty Ltd v Southern Rural Water*[50] the members of the Victorian Civil and Administrative Tribunal referred to a 'restrained, cautious approach' being recommended in a government white paper for reforms to the *Water Act 1989* (Vic). This was reflected in the

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45 For the differences between such participation, see Andrew Edgar, 'Participation and Responsiveness in Merits Review of Polycentric Decisions: A Comparison of Development Assessment Appeals' (2010) 27 *Environmental and Planning Law Journal* 36.

46 *New Oakleigh Coal Pty Ltd v Hardy* [2003] QLRT 24.

47 Ibid [76]–[84].

48 Ibid [65]–[70].

49 *Denison v Townsville City Council* [2006] QPEC 118 [33]–[59]; *Mol Pty Ltd v City of Mitcham* [2002] SAERDC 55 [2], [99]; *Porter v District Council of Grant* [2007] SAERDC 17 [33]–[36]. See also Peel, *The Precautionary Principle in Practice*, above n 9, 120–1.

50 [2010] VCAT 480.

Tribunal's decision to refuse a groundwater extraction licence as the preventive measure resulting from the application of the precautionary principle.[51] The precautionary principle was to be considered in this case due to it being, in the terms of the tribunal members, 'embodied' in two environmental policies that were required by the Act to be taken into account.[52]

In other cases, tribunal members referred to planning instruments and policy documents to support findings that some types of environmental harms were particularly serious and required relatively onerous preventive measures.[53] The point to be taken from these cases is that direct participation in merits review proceedings is not the only way in which 'the public' influences merits review decision-making. Public perceptions of environmental harms may influence the application of the precautionary principle through reference by tribunal members to extrinsic legislative materials, government policies and planning instruments.

Gauging the public interest is a difficult and uncertain task. Moreover, while elected officials, such as local councils and the Ministers who are commonly the primary decision-makers for environmental decisions have claims to represent the public interest, the legitimacy of merits review tribunals is based on the expertise of tribunal members and the processes for adducing and testing expert evidence provided by the parties. In this context the best option for members of the public to influence the application of the precautionary principle is by direct participation in the proceedings as a party or a witness. But as we have seen, these are not the only ways in which the public can influence the decision-making process. If public participation may seem at first sight to be a weakness of merits review as an institution, there are processes and decision-making methods by which this can be rebalanced.

V TRANSPARENCY AND ACCOUNTABILITY

We saw in Part II that transparency and accountability have been raised as important factors for institutions with environmental decision-making responsibilities. Merits review is a mechanism for holding primary decision-makers accountable for the legal, factual and discretionary aspects of a decision.[54] This occurs in a relatively transparent manner — interested persons can often participate as parties or attend hearings, and the tribunal's reasons for decision

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51 Ibid [15], [159], [200].

52 *Alanvale Pty Ltd v Southern Rural Water* [2010] VCAT 480 [153].

53 *Archibald v Moorabool Shire Council* [2010] VCAT 163 [10], [14], [18]-[20], [35]; *Cabbabe v Baw Baw Shire Council* [2001] VCAT 747 [16]–[21].

54 Peter Cane and Leighton McDonald, *Principles of Administrative Law: Legal Regulation of Governance* (Oxford University Press, 2nd ed, 2012) 231–3.

are usually published on the internet and in law reports.[55] How then do these characteristics of merits review support or possibly inhibit precautionary decision-making?

A *Interpreting the Elements of the Precautionary Principle*

Merits review tribunals are particularly well-placed to interpret statutory terminology in a manner that is transparent and holds primary decision-makers accountable for their interpretation of laws. In some ways they are better placed than courts with regard to holding primary decision-makers accountable for statutory interpretation. This is because courts, at times, regard the meaning of statutory language as a question of fact to be determined by the primary decision-maker, rather than by the court in review proceedings. This is particularly the case when the statutory terminology involves 'ordinary words' rather than words with a specific legal meaning.[56] Merits review tribunals can clarify the meaning of vague statutory terminology and thereby provide guidance for primary decision-makers.[57] Their interpretations of statutory language are, of course, potentially subject to review by the courts.

The cases examined in the case survey reveal the ways in which merits review tribunals are a forum for interpreting the different elements of the precautionary principle. The case survey made it clear that Australian courts and tribunals have moved a long way from the debates in the 1990s concerning whether the precautionary principle must be considered and whether it is a beneficial addition to environmental assessment.[58] The debate and discussion in the cases since then has tended to relate directly to the elements of the precautionary principle.

Chief Justice Preston's decision in *Telstra Corporation Ltd v Hornsby Shire Council*[59] is commonly cited for its comprehensive analysis of the terminology and objectives of the precautionary principle.[60] It is, however, an unusual case. There seemed to be little need for such an analysis due to the issue being in

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55 Robin Creyke, 'The Special Place of Tribunals in the System of Justice: How Can Tribunals Make a Difference?' (2004) 15 *Public Law Review* 220, 234–5.

56 *Collector of Customs v Agfa-Gevaert Ltd* (1996) 186 CLR 389, 395; *Collector of Customs v Pozzolanic Enterprises Pty Ltd* (1993) 43 FCR 280, 286–8.

57 McMillan, above n 31, 40.

58 See *Leatch v National Parks & Wildlife Service* (1993) 81 LGERA 270, 282-283; *Nicholls v Director-General of National Parks and Wildlife* (1994) 84 LGERA 397, 418–19; Preston and Smith, above n 26, 112–17; Linda Pearson, 'Incorporating ESD Principles in Land-Use Decision-Making: Some Issues after Teoh' (1996) 13 *Environmental and Planning Law Journal* 47, 50.

59 (2006) 67 NSWLR 256.

60 AUSTLII's LawCite identifies 61 cases in which the *Telstra* case has been cited. Westlaw Australia's Firstpoint identifies 28 such cases and LexisNexis's Casebase identifies 51 cases (as at 21 February 2013).

regard to an application of the precautionary principle that appeared straightforward.[61] Much of the explanation was separated from the issues in the particular case and was drawn from academic literature.[62] While the explanation has value and has been influential, it differs from the way that courts and tribunals usually interpret statutory language as a way of resolving disputes about its meaning. Adjudication according to legal processes (such as those utilised by merits review tribunals) is usually regarded as enabling the development of norms incrementally through the resolution of very specific disputes.

There are now many cases that have interpreted the elements of the precautionary principle as part of the resolution of the issues raised. The following examples are not intended to be comprehensive — they provide an indication of how merits review tribunals have understood the terminology used in regard to the precautionary principle.

- *Threat of environmental damage*: The cases have determined that the precautionary principle does not apply when there is no threatened harm,[63] the threatened harm is negligible,[64] or there is only a 'bare possibility' of environmental damage.[65]
- *Serious or irreversible environmental damage*: The reference to 'irreversible' harm has been interpreted as not being a strict limiting requirement. The precautionary principle can be utilised when the risk is of serious harm.[66]
- *Environmental damage*: There has been some discussion of whether the precautionary principle may be employed for what may be termed 'social impacts'. In one case, the judge referred to the precautionary principle as being 'concerned with environmental damage, not with danger to human life'.[67] In other cases however, the reference to 'environmental' damage has been regarded as being broad enough to apply to social impacts, such as public health and safety risks relating to the conduct of a major public event[68] and the location of a tavern near public housing that accommodated people with alcohol and gambling problems.[69]

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61 For instance, Preston CJ's analysis of the precautionary principle took 58 paragraphs but his reasoning in relation to its application involved just 5 paragraphs: *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256, 268–281[125]–[188].

62 As was acknowledged by Preston CJ: Ibid 256, 269 [127].

63 *Telstra Corporation Limited v Pine Rivers Shire Council* [2001] QPELR 350 [121].

64 *Telstra Corporation Ltd v Hornsby Shire Council* (2006) 67 NSWLR 256, 280 [184].

65 *Theo v Caboolture Shire Council* [2000] QPE 059 [42].

66 See *Western Water v Rozen (2008) 24 VR 133*, 151 [103]; *Rozen v Macedon Ranges Shire Council* [2009] VCAT 2746 [15]–[16]. Cf *Rozen v Macedon Ranges Shire Council* [2007] VCAT 1814 [127]–[128].

67 *Theo v Caboolture Shire Council* [2000] QPE 59 [42].

68 *Good Trix Pty Ltd v Greater Shepparton City Council* [2005] VCAT 2009 [15], [32].

69 *Graham Richter and Associates Pty Ltd v Campbelltown City Council* (Unreported, Land and Environment Court of New South Wales, Commissioner Roseth, 10 July 2000) [36].

- *Measures to prevent environmental degradation*: Merits review tribunals have given a substantial degree of attention to what may count as preventive measures that are less than outright refusal of proposals. The primary question is whether conditions can be imposed that require monitoring of the development and steps to be taken when information addressing the relevant scientific uncertainties comes to hand. Such conditions have been recognised to be preventive measures for the purpose of the precautionary principle.[70] On the other hand, monitoring conditions have also been regarded as being an inappropriate measure when the relevant legislation does not enable changes to be made to the conditions, or does not authorise revocation of the permit, when actual environmental degradation is identified.[71]

The significance of the findings made in these cases is that merits review tribunals operate as a forum for debating the meaning of the terminology included in the precautionary principle. The interpretations are 'forged in the fire' of particular disputes. The resolution of these disputes and the publication of the tribunal members' reasons enables lawyers, environmental consultants, planners, and government officials who participate in environmental management systems to gain a better appreciation of the meaning of the precautionary principle. It also enables academics to criticise the interpretations that have been developed.[72] In this way merits review is an institution in which issues regarding interpretation of the precautionary principles can be resolved for the particular case and in a manner that provides guidance to other persons.

B *Setting an Example*

Merits review tribunals not only enhance transparency and accountability by *interpreting* aspects of the precautionary principle but can also provide guidance for primary decision-makers by *applying* the principle to new land use problems. This is referred to in the administrative law literature as the 'normative effect'.[73]

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70 *Newcastle and Hunter Valley Speleological Society Inc v Upper Hunter Shire Council* [2010] NSWLEC 48 [183]–[189]. See also *Mansfield v Minister for Planning and Hanson Construction Materials Pty Ltd* [2012] NSWLEC 1063 [88–[89]; *St Ives Development Pty Ltd v City of Mandurah* [2003] WATPAT 5 [64]–[65]; *North Queensland Conservation Council v Great Barrier Reef Marine Park Authority* [2000] AATA 925 [171]–[172], [219]–[221], [228].

71 *Conservation Council of South Australia Inc v Development Assessment Commission* [1999] SAERDC 86 [35]–[41]; *Alanvale Pty Ltd v Southern Rural Water* [2010] VCAT 480 [201]–[204].

72 See, eg, Jacqueline Peel, 'When (Scientific) Rationality Rules: (Mis) Application of the Precautionary Principle in Australian Mobile Phone Tower Cases: *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133' (2007) 19 *Journal of Environmental Law* 103.

73 Administrative Review Council, *Better Decisions: Review of Commonwealth Merits Review Tribunals*, Report No 39 (1995) [2.11].

While having no technical precedent value, the decisions made by merits review tribunals are intended to guide future decision-making by primary decision-makers and to be taken into account in the development of policy and legislation.[74] This aspect of merits review should, however, be understood as secondary to, or a consequence of, its primary function of review of the legal, factual and discretionary aspects of decisions regarding licences, approvals and entitlements.[75]

Before examining the connections between the normative effect and the precautionary principle, it is worthwhile briefly saying something more about the normative effect's operation. It is largely accepted that understanding its operation in practice requires empirical research of primary decision-makers' responses to merits review decisions,[76] which is beyond the scope of this article. On the other hand, it is relatively easy to see the influence of a merits review decision on subsequent decisions of the particular merits review tribunal. The initial decision of a tribunal on an issue will often be referred to in later decisions and its reasoning followed.[77] This was apparent in the case survey for this article and would be apparent to legal practitioners who research the decisions of tribunals. Moreover, if a merits review tribunal takes a consistent approach to a particular matter, it is not a large step to think that this approach will influence primary decision-makers. This is because the primary decision-maker will risk being overturned on appeal if they employ a clearly different reasoning process to the consistent approach developed by the tribunal.[78] Consistent tribunal decision-making is therefore likely to have a normative effect by setting an example[79] for primary decision-makers to follow.

There was a series of decisions in the case survey that used the precautionary principle to develop a consistent line of cases dealing with a recurring land-use problem — locating new developments in coastal areas that are at risk of sea level rise and storm-related harms. These cases were determined by the Victorian Civil and Administrative Tribunal. The initial case was the Tribunal's decision in

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74 Creyke, above n 55, 234–5. See also Linda Pearson, 'Policy, Principles and Guidance: Tribunal Rule-Making' (2012) 23 *Public Law Review* 16.

75 *Re Drake v Minister for Immigration and Ethnic Affairs (No 2)* (1979) 2 ALD 634, 644; Cane, above n 33, 185.

76 Cane, above n 33, 185–7; Linda Pearson, 'The Impact of External Administrative Law: Tribunals' (2007) 55 *Australian Institute of Administrative Law Forum* 29, 36.

77 For discussion of consistency of tribunal decision-making and the significance of the first case on a particular issue, see Rosemary Balmford, 'The Life of the Administrative Appeals Tribunal – Logic or Experience' in Robin Creyke (ed), *Administrative Tribunals: Taking Stock* (Centre for International and Public Law, 1992) 50, 77–8.

78 Regarding the potential for holding an official accountable and its impact on their actions, see Richard Mulgan, *Holding Power to Account: Accountability in Modern Democracies* (Palgrave McMillan, 2003) 10–11.

79 Cane, above n 33, 182–3.

Gippsland Coastal Board v South Gippsland Shire Council (No 2).[80] The case related to a council's decision to grant a permit for a dwelling in a farming zone. The land was referred to by the Tribunal as 'low-lying, prone to high water tables and water logging, subject to flooding, and is at risk of inundation from sea level rise and coastal subsidence'.[81] It was therefore vulnerable to sea level rise yet the relevant planning instruments did not deal with such matters.[82] The Tribunal ultimately determined that the land was unsuited to the particular development and refused the permit application.[83] This determination was directly based on the Tribunal's application of the precautionary principle.[84] While there was scientific uncertainty about the extent of sea level rise and its impacts, the evidence suggested that sea level rise should be expected.[85]

The *Gippsland Coastal Board* case has been recognised in the environmental law literature for its influence on decisions regarding land use developments at risk of sea level rise.[86] Its initial significance was that it applied the precautionary principle to guide its reasoning process where there was a legal and policy gap regarding the particular problem. While the planning instruments and government policies were subsequently updated to set standards regarding sea level rise and require application of the precautionary principle to coastal developments,[87] the *Gippsland Coastal Board* case has influenced the relatively strict approach to the precautionary principle by the Victorian Civil and Administrative Tribunal. In subsequent cases the precautionary principle was applied by members of that Tribunal in a way that led to applications being refused,[88] deferred while the applicant prepared a 'coastal vulnerability

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80 [2008] VCAT 1545.

81 *Gippsland Coastal Board v South Gippsland Shire Council (No 2)* [2008] VCAT 1545 [3].

82 Ibid [35]–[36].

83 Ibid [53].

84 The Tribunal members did not identify a particular legislative provision that required it to consider or apply the precautionary principle. Instead they referred to the Victorian State Planning Policy Framework and its reference to the Inter-Governmental Agreement on the Environment: [2008] VCAT 1545, [41] n 14.

85 [2008] VCAT 1545 [41]-[42], [48].

86 Brian J Preston, 'The Role of the Courts in Relation to Adaptation to Climate Change' in Tim Bonyhady, Andrew Macintosh and Jan McDonald (eds) *Adaptation to Climate Change: Law and Policy* (Federation Press, 2010) 198; de Wit and Webb, above n 27, 31. See also Felicity Millner and Kirsty Ruddock, 'Climate Litigation: Lessons Learned and Future Opportunities' (2011) 36 *Alternative Law Journal* 27, 30.

87 *Victorian Planning Provisions*, cl 13.01-1 and the Victorian Coastal Council, (10 December 2008) *The Victorian Coastal Strategy* <http://www.vcc.vic.gov.au/resources/VCS2008/home.htm>. See also de Wit and Webb, above n 27, 23–7.

88 Eg, *Taip v East Gippsland Shire Council* [2010] VCAT 1222 [111]–[118]; *Findlay v Surf Coast Shire Council* [2011] VCAT 1919 [17], [40]–[41]. For a case that came to the same result without expressly invoking the precautionary principle, see *Wade v Warnambool City Council* [2009] VCAT 2177 [15].

assessment',[89] and referred to a relevant agency for assessment of the coastal hazards.[90] The Tribunal only granted permits subject to modifications to address the relevant risks,[91] or when the applicant had already taken such measures.[92] Some Tribunal members were so mindful of the need for precautionary decision-making for developments on coastal land that they raised it as an issue when it had not been raised by the parties.[93]

The *Gippsland Coastal Board* case has apparently set an example as to how the precautionary principle should be applied to coastal developments at risk of sea level rise. While it was not the only influence on the subsequent decisions, since as stated earlier there were planning instruments and policies that were also influential, it has been recognised as putting the precautionary principle on the agenda for the assessment of coastal developments and influenced Tribunal members to apply it in a relatively strict manner.

This relatively strict application of the precautionary principle has significance beyond it being a consistent approach by the Victorian Civil and Administrative Tribunal. It is likely to have significance for primary decision-makers as well. This is because a consistent approach to a particular issue by a merits review tribunal will put pressure on primary decision-makers to adopt the same approach. The potential for decisions to be appealed to a tribunal puts the primary decision-maker in the position of having the tribunal 'over its shoulder'.[94] This should act as a deterrent to primary decision-makers avoiding the application of the precautionary principle or applying it in a tokenistic, weak manner as the primary decision-maker would be at risk of being drawn into a merits appeal with low prospects of success. For the same reason it is also likely to support members of the public and officials in their efforts to persuade primary

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89 Eg, *Myers v South Gippsland Shire Council* [2009] VCAT 1022 [11], [31]–[32]; *Ronchi v Wellington Shire Council* [2009] VCAT 1206 [17]–[21]; *Cooke v Greater Geelong City Council* [2010] VCAT 60 [63]–[64], [81]. See also *Owen v Casey City Council* [2009] VCAT 1946 [9], [19]; *Bock v Moyne Shire Council* [2010] VCAT 1905 [8].

90 *Keogh v Kingston City Council* [2010] VCAT 65 [20]–[23]; *Rushworth v Kingston City Council* [2011] VCAT 2137 [28]–[30].

91 Eg, *Seifert v Colac-Otway Shire Council* [2009] VCAT 1453 [49]–[50]; *Cadzow Enterprises Pty Ltd v Port Phillip City Council* [2010] VCAT 634 [35]–[37]; *Restall v Hobsons Bay City Council* [2010] VCAT 1348 [6]–[8]; *Kala Developments Pty Ltd v Surf Coast Shire Council* [2011] VCAT 513 [72]–[73].

92 *Suburban Blue Print Pty Ltd v Hobsons Bay City Council* [2010] VCAT 1272 [7]–[11]; *Good v Bass Coast Shire Council* [2010] VCAT 1451 [20].

93 *Cooke v Greater Geelong City Council* [2010] VCAT 60 [59]-–[64]; *Cadzow Enterprises Pty Ltd v Port Phillip City Council* [2010] VCAT 634 [14]-–[15], [31]–[37].

94 This terminology has been used in relation to judicial review of administrative action but seems equally applicable to merits review: Treasury Solicitor's Department, *The Judge over Your Shoulder (4th ed*, January 2006) Treasury Solicitor's Department <http://www.tsol.gov.uk/Publications/Scheme_Publications/judge.pdf>); Thomas McGarity, 'Some Thoughts on "Deossifying" the Rulemaking Process' (1992) 41 *Duke Law Journal* 1385, 1412.

decision-makers into taking precaution seriously.[95] The tribunal's case law can be used by them to argue that a precaution-based approach should be adopted by councils and other officials.

We may conclude that merits review tribunals can support precautionary decision-making through establishing consistent lines of case law on a particular issue and may also set an example for primary decision-makers. Whether that example is followed or not by primary decision-makers is an empirical question that is beyond the scope of this article. What may be said, however, is that the institutional relationship between primary decision-makers and merits review tribunals suggests that a consistent line of decisions by a tribunal should deter primary decision-makers from taking an approach that differs from the tribunal.

C *Merits Review's Primary Weakness – Legislative Control*

There is however a weakness within merits review that is significant for it generally as an institution and also for its operation regarding the precautionary principle. This is that it is a legal accountability mechanism that is not always available. Unlike judicial review, which is generally available for review of administrative decisions and is constitutionally protected,[96] merits review must be specifically provided for by legislation. It is therefore a simple matter for it to not be available — regulatory statutes can merely not include it or can provide for it in a restricted manner.

The most significant example in Australia of merits review being excluded for environmental decisions is the system established by parts one to nine of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) for assessing activities with adverse impacts on matters of national environmental significance. The Act does not include merits appeal entitlements for these decisions and instead facilitates access to the courts through an extended standing provision for judicial review challenges.[97] The Commonwealth Government has recently not agreed to a review committee's recommendation that merits review should be included for these decisions.[98] The committee recommended that merits review be considered by the government following submissions by

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95 For this idea in a different context, see Peter Strauss, 'Overseers or "The Deciders" – The Courts in Administrative Law' (2008) 75 *University of Chicago Law Review* 815, 824–5.

96 *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, 513 [103]–[104]; *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, 579–81 [95]–[99].

97 *Environment Protection and Biodiversity Conservation Act 1999* (Cth), s 487.

98 Australian Government, *Australian Government Response to the Report of the Independent Review of the Environment Protection and Biodiversity Conservation ACT 1999 (Department of Sustainability, Environment, Water, Population and Communities, Parliament of Australia, 2011) 89*; Allan Hawke, *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999: Interim Report* (Department of the Environment, Water and Heritage and the Arts, Parliament of Australia, 2009)) 259.

environmental groups that claimed that it would enhance transparency and accountability.[99] Such groups also claimed that judicial review is inadequate as courts are limited in the scope of their review of environmental decisions.[100] The Commonwealth Government's response emphasised that merits review could frustrate 'an efficient and timely process'.[101] This highlights a major weakness with merits review — that governments may see it as inappropriate for it to be included. If this is the case, an institution that is well-suited to operationalising precaution-based decision-making would then just not be made available.

There are other consequences that can arise due to merits review having to be specifically established by legislation. It may be the case that merits review is provided by legislation but the entitlements to bring proceedings are limited primarily to aggrieved developers[102] rather than to objectors. This is the situation in New South Wales where objectors have limited entitlements to bring merits review proceedings.[103] In the case survey only 8 of the 62 cases (13 per cent) in New South Wales were brought by objectors whereas in Victoria (which has historically included broad scope for third party appeals)[104] 19 of 71 cases (27 per cent) were brought by objectors. When objectors have no right to bring merits review proceedings, their potential legal accountability options for concerns about improper application of sustainability principles are reduced to judicial review proceedings.[105] Environmental laws that enable broad merits appeal rights for developers but narrow appeal rights for objectors can be regarded as being 'asymmetrical'.[106]

The consequences of asymmetrical merits appeal entitlements on precautionary decision-making can be examined by reference to a distinction made by Dr Heyvaert regarding precautionary principle cases in the European Union courts.[107] She distinguishes between cases in which the applicant claims

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99 Hawke, above n 98, 315–16.

100 Ibid 314.

101 Australian Government, above n 98, 89.

102 Because they have been denied an approval by the primary decision-maker or have been granted an approval subject to restrictive conditions.

103 *Environmental Planning and Assessment Act 1979* (NSW), s 98. See also Edgar, 'Participation and Responsiveness', above n 45, 36.

104 Murray Raff, 'A History of Land Use Planning and Rights of Objection in Victoria' (1996) 22 *Monash University Law Review* 90; Justice Stuart Morris, 'Third Party Participation in the Planning Permit Process' (Speech delivered at 'Environmental Sustainability, the Community and Legal Advocacy' Victoria University, 4 March 2005).

105 See, eg, *Gray v Minister for Planning* (2006) 152 LGERA 258; *Minister for Planning v Walker* (2008) 161 LGERA 423; *Aldous v Greater Taree City Council* (2009) 167 LGERA 13. See also Edgar, 'Participation and Responsiveness', above n 45.

106 Roger Douglas, 'Uses of Standing Rules 1980-2006' (2006) 14 *Australian Journal of Administrative Law* 22, 36.

107 Veerle Heyvaert, 'Facing the Consequences of the Precautionary Principle in European Community Law' (2006) 31 *European Law Review* 185.

that the primary decision-maker exercised 'insufficient precaution' from claims that the primary decision-maker exercised 'excessive precaution'. The distinction helps to highlight the different types of claim being made in merits review cases regarding the precautionary principle and the different issues faced in them. The insufficient precaution cases discussed by Dr Heyvaert were commonly brought by public interest groups[108] claiming that a higher degree of precaution should have been applied by the decision-maker or implemented into a regulation. The excessive precaution cases, on the other hand, were commonly brought by businesses that were affected by precautionary decisions.[109] These claims were brought on the basis that the degree of precaution employed by officials was overly restrictive of the businesses' operations. When Dr Heyvaert's distinction is applied to merits appeal entitlements that are asymmetrical, it highlights the point that such systems favour the 'excessive precaution' challenges brought by developers over the 'insufficient precaution' cases brought by objectors.

Asymmetrical appeal entitlements must also make a difference to the deterrence effect discussed above in Part VB. Primary decision-makers will only be deterred from applying the precautionary principle in a weak, ineffective, manner if members of the public are entitled to bring merits review proceedings to challenge such decisions. Only then will primary decision-makers face the prospect of having to justify, in a legal forum, why the degree of precaution that they exercised was, in their view, *sufficient* on the available information. When objector appeals are not available, the risk of merits review litigation comes from a single, and very different, direction. Primary decision-makers will only face the prospect of having to explain to a merits review tribunal that the degree of precaution was *not excessive* on the available information. The consequence for councils and officials who make the primary decisions —there being no third party appeal rights — is that they are likely to only be deterred from applying the precautionary principle in an excessive manner. Accountability on the basis of insufficient precaution will be left to political forms of accountability and judicial review, the latter being a poor forum for reviewing degrees of precaution.[110]

The broader benefits of merits review as an accountability mechanism are therefore only realised when appeal entitlements are granted equally to developers and objectors. If this is not the case, developers will be entitled to bring merits review proceedings to challenge decisions that are claimed to be excessively precautionary but objectors will not be entitled to uphold the public interest in sustainability by bringing merits review proceedings to challenge weak, tokenistic applications of the precautionary principle.

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108 Ibid 190–2.

109 Ibid 196–9.

110 The degree of precaution is likely to be seen as within the merits of the decision and off limits to the court. See Edgar, 'Between Rules and Discretion', above n 11.

VI CONCLUSIONS

While institutional factors may be a recognised limitation on operationalising sustainability and precautionary decision-making, it turns out that merits review is generally an institution with features that are a highly supportive of them. This is particularly due to merits review tribunals dealing with concrete disputes and issues, and having a hard look at the information base for a decision. They are therefore particularly well-placed to uncover scientific uncertainty and to devise measures to prevent threatened environmental harm.

However, merits review's limitations must also be acknowledged. Merits review tribunals do not develop laws and policies or review them. Rather, they apply sustainability principles included in environmental laws and policies to the deliberative processes for particular land-use developments. This role enables them to set an example as to how to resolve sustainability issues, and can operate to deter primary decision-makers from avoiding applying sustainability principles. It is, however, quite different to the important task of implementing sustainability into specific laws and policies. Moreover, the deterrence effect is only likely to be effective if both developers and objectors have merits appeal rights. This is something that should be kept in mind when environmental legislation is under review and reform options are being considered.

There are also practical constraints on merits review tribunals that are likely to limit their effectiveness in relation to operationalising the precautionary principle. There are concerns about the expense to the parties of challenging expert evidence and that tribunal members may not always have the expertise that is necessary to handle the relevant science and its uncertainties. Such constraints are largely inevitable and need to be managed by tribunals. They detract from the ability of merits review tribunals to manage sustainability challenges but should not be regarded as fundamental limitations.