7.12.2011

Statement of the Party concerned to the "*Draft findings and recommendations*" of the Compliance Committee of 10 November 2011

In reply to the letter of the ACCC of 10 November 2011, the Party concerned would like to inform you that it took note of the second set of the draft findings and recommendations of the Compliance Committee and that - while acknowledging that considerable improvements have been made in comparison to the first set of draft findings and recommendations of 18 August 2011 - the Party concerned still does not agree with some of its parts since they do not seem to correctly reflect the Austrian legal system. These aspects are dealt with in further detail below.

Para 17:

The Party concerned approves that the Committee this time also puts emphasize on the institution of the ombudsman for the environment. However, when explaining this institution, the draft still misses some crucial aspects. In particular, it makes no mention of the liability of the ombudsman. As the Party concerned already pointed out in its response of 6 October 2010 and reiterated in its statement of 7 September 2011 on the first set of the draft findings and recommendations of the Compliance Committee,

"…*the ombudsman is under strict professional liability, as he would be liable under criminal or civil law if he or she neglects claims by NGOs or other members of the public, thus causing danger to the environment*."

This important legal fact should be added at the end of para 17 and is of further relevance for para 76 (see there).

Of great relevance in relation to the ombudsman for the environment is also para 73 (c). Like already stated in para 17 of the draft the environmental ombudsman has legal standing before the administrative courts. Therefore it is not correct to state that the environmental

ombudsman *"may or may not have the right to access the courts".*

Para 29:

In summarizing that "*(...) in its oral submissions during the discussion of the case, the Party concerned stated that some cases, such as those described by the communicant, may have been due to confusion within the authorities on how to address requests for environmental information*", the wording of the draft does not correctly reflect the reasoning given by the Party concerned.

In fact, the Party concerned actually emphasized *"that the difficulty of balancing the right of the public to request information against the obligation of the competent authority to maintain confidentiality in given cases may have led to initial delays".* The party concerned therefore proposes to use this wording in the draft by replacing the underlined wording (see above).

Para 48:

In para 48, the draft fails to mention the institution of the "Volksanwaltschaft", which deals with citizen's complaints in case of misconduct of an authority according to the Federal Constitutional Law (Art 148a B-VG); this has already been stated by the Party concerned in its Response of 6 October 2010 and should be included in the draft.

Para 58:

In stating towards the end of the paragraph that "*a devolution request has to be further submitted, but only after six months*", if a request for information has not been met, "*because the authorities may refuse to provide*" an official notification, the draft does not correctly reflect the Austrian instrument of devolution.

As the Party concerned has remarked in its statement of 7 September 2011 on the first set of the draft findings and recommendations of the Compliance Committee the authority, according to Art 5 para 7 of the Austrian Environmental Information Act, has to provide a justified response to the applicant including information on the possibility of remedies in case of not providing the information requested. Only in the case where a competent authority does not reply at all to the applicant within the given deadline according to the provisions of the Environmental Information Act, the instrument of the devolution request (where the competent authority has to act within up to six months) can be used by the applicant.

To reflect the position of the Party concerned correctly, sentences 5 and 6 of para 58 should be amended accordingly.

Para 61:

In light of the clarification regarding para 58, the first sentence of para 61 should also be amended in the following way:

"The national legislation of the Party concerned requires that if the authority does not provide any answer to the request for information within two months and it further fails to provide a written refusal within the next six months, (...)."

Para 68:

In summing up the Austrian legal system regarding the scope of reviewable claims sought by individuals, the second set of the draft findings and recommendations focuses on some aspects of case 2010/06/0262-10 of the Administrative Court (Automobile Testing Centre Voitsberg). Since this case is still pending before the Environmental Senate, after the Administrative Court has issued its decision, aspects as well as information on this case should not be incorporated into the draft recommendations and findings of the ACCC. A final decision is still to be taken by the Environmental Senate.

Thus, the Party concerned proposes to delete sentence 3 of para 68 ("*As an example, the communicant refers to the decision of the administrative court (...) that go beyond the impairment of rights doctrine*".") and to reword the remainder of para 68.

Para 73:

The Party concerned wishes to draw the Comittee's attention to the fact that Art 9 para 3 of the Aarhus Convention refers to "members of the public", whereas Art 9 para 2 refers to "members of the public concerned".

Art 2 of the Aarhus Convention also distinguishes between "the public" (para 4), which means *"one or more natural or legal persons, and, in accordance with national legislation or practice, their associations, organizations or groups"* and "the public concerned" (para 5), which means *"the public affected or likely to be affected by, or having an interest in, the environmental decision-making; for the purposes of this definition, non-governmental*

organizations promoting environmental protection and meeting any requirements under national law shall be deemed to have an interest".

In para 70 of the second set of the draft findings and recommendations the Compliance Committee explicitly recognizes the difference between Art. 9 para 3 in comparison to Art. 9 paras 1 and 2 in terms of the flexibility in implementing its provisions: " *Art 9 para 3 applies to a broad range of acts or omissions, while at the same time it allows for more flexibility - compared to article 9, paragraphs 1 and 2 - by the Parties in implementing it"*.

Consequently, in the view of the Party concerned, Art 9 para 3 of the Aarhus Convention does not require the implementation of "locus standi" especially or exclusively for NGOs but rather generally for "members of the public". Thus, this requirement can be considered to be fulfilled by granting "locus standi" to various "members of the public" in accordance with the definition of "the public" in Art 2 para 4 of the Convention like neighbours, ombudsmen, NGOs, citizen groups, special organs/bodies set up in a broad range of national laws.

In addition, the draft does not correctly reflect the Austrian legal system related to the requirements of Art 9 para 3 of the Aarhus Convention in stating that " *there seem to be very limited avenues available for NGOs to actually challenge acts and omissions by public authorities (...)*".

This **conclusion drawn in para 73 seems to be excessive and has to be seen as too restrictive and not adequately reflecting the Austrian legal system** (eg. its rule of procedural concentration), since *"these avenues"* further specified in the paragraph do offer a wide range of participation as it will be further elaborated on under para 75.

Please see above also our remark made in relation to the ombudsman for the environment in para 73 (c) in our remarks to para 17.

Para 74:

In stating that under Austrian law, there *"is no possibility for a member of the public to challenge an act or omission of a public authority, if (...) it cannot prove that it may be adversely affected by environmental damage so as to benefit from the laws transposing the EU Environmental Liability Directive (...)"*, the draft does not correctly reflect the legal possibility of submitting an environmental complaint ("Umweltbeschwerde") under the

Austrian Federal Environmental Liability Act. Concerning this matter, the Party concerned refers to pages 26 and 27 of its response of 6 October 2010 and points out that according to Art 11 para 1 of the cited law any natural or legal person who may see their rights infringed by environmental damage is given the right to raise an environmental complaint. In line with Art 11 para 3 of the cited law, the complaint has to show probable cause of the damage, which does not mean that the applicant has to prove it.

The Draft also lacks to point out the participation rights for neighbours being "*a member of the public*" (cf. introduction under para 73) not only under EIA and IPPC but also under all relevant sectoral laws and the legal possibility for NGOs to resort to legal representation via the ombudsman for the environment.

With regard to the assumption of the Compliance Committee, whereas a member of the public who cannot prove that it is affected by a project, has no recourse to civil remedies, the draft does not correctly reflect the provisions for remedies under Austrian private law. The Party concerned refers particularly to page 2 of the Austrian response of 6 October 2010 and summarizes that under environmental private law (Austrian Civil Code) anybody who is or fears to be endangered by pollution is entitled to file a lawsuit against the polluter and to seek an injunction.

In order to correctly reflect the position of the Party concerned and its legal system, sentences 2 and 3 of para 74 should read:

"(...) there is the possibility for a member of the public to challenge an act or omission of a public authority, if the procedure is consolidated under the EIA or IPPC procedures, if an environmental complaint under the environmental liability laws is raised as well as if the Environmental Ombudsman is invoked. In addition, a member of the public has recourse to civil remedies."

Para 75:

Further to our remarks on the corresponding paragraphs 73 and 74 above, **we strongly disagree with the conclusion in paragraph 75 that the conditions laid down by the Party concerned in its national law, are *"so strict that they effectively bar NGOs from challenging acts or omissions"*** that they contravene national environmental law.

This conclusion lacks factual evidence and legal basis. IPPC-procedures cover a wide

variety of projects causing the major emission load of pollutants in Europe. According to the European Commission (Communication from the Commission to the Council, the European Parliament, the Economic and Social Committee and the Committee of the Regions - Towards an improved policy on industrial emissions, 21.12.2007, COM[2007] 843 final), these installations

"*account for a considerable share of total emissions of key atmospheric pollutants (83% for sulphur dioxide (SO2), 34% for oxides of nitrogen (NOx), 43% for dust and 55% for volatile organic compounds (VOC)). They also have other important environmental impacts, including emissions to water and soil, generation of waste and the use of energy*".

In addition, the thresholds for EIA-procedures have been considerably reduced by the new legislation in 2004, now covering almost all relevant infrastructure projects. It is not correct that IPPC and EIA procedures only cover large projects: for instance, the incineration of one single ton of hazardous waste per year is subject to an EIA (see App I Nr 1 lit c of the Austrian EIA Act).

In the light of all this, the Compliance Committee's excessive conclusion that participation by NGOs - though legally guaranteed in all EIA, IPPC and ELD-procedures as well as under sectoral laws under the rule of concentration - is practically entirely excluded and thus the Austrian system would not sufficiently fulfill the requirements of Art 9 para 3 has to be rejected. **If procedures with NGO-participation in fact cover all major polluters, the notion that the Austrian national law "effectively bar" NGOs cannot be upheld since it contradicts its legal reality.**

Para 76:

In stating that the ombudsman for the environment does not have legal standing in procedures of several sectoral laws, the draft neglects that the ombudsman has standing under Art 42 para 1 number 8 of the Waste Management Act. This fact is also listed in the table submitted by the communicant on 15 February 2011.

The draft insofar neither correctly reflects the position of the Party concerned as it states that the ombudsman had *"discretion"* whether or not to bring a case to court. In this context, the Party concerned refers to its remarks under para 17 concerning the liability of the ombudsman.

Thus, sentence 2 of para 76 should read as follows:

"(...) as it does not have standing in procedures of several sectoral laws – -, other than the EIA, IPPC, ……...as well as the Austrian Waste Management Act (Art 42 para 1 no. 8)."

In the view of the Party concerned, sentence 3 of para 76 should be deleted since the ombudsman does not dispose of such a *"discretion"*.

Para 77:

Consequently, based on our remarks to paras 73-75, **we strongly disagree with the Committee's conclusion that the Party concerned, in *"failing to ensure standing of environmental NGOs"*, is not in compliance with Art 9 para 3, *"because it substantially limits access to justice".*** Such a conclusion goes far beyond the presented means of evidence and analysis, is of an excessive nature and neglects various existing standing rights for NGOs within the Austrian legal system.

Para 78:

For clarification: The information provided by the Party concerned in relation to the scope of reviewable claims under Art 9 para 2 (i.e. that members of the public once having locus standi can also raise issues of general environmental interest) is also valid for Art 9 para 3 of the Convention.

Para 82:

Please see our remarks on the corresponding paragraphs 73, 74 and 76. Accordingly it is not correct to state in paragraph 82 that the Party concerned *"is not ensuring standing of environmental NGOs (...) in its sectoral laws"* and is therefore in non-compliance with Art 9 para 3 of the Convention. This main finding is not properly reflecting the Austrian legislation (Federal Environmental Liability Act, IPPC installations under the Federal Waste Act and the Industrial Code). It is also not in line with the Compliance Committee´s recommendation under para 83 lit a (iii) of the draft where reference is made to EIA, IPPC and the environmental liability laws.

Para 83 lit a (iii):

In requiring to ensure that *"criteria for NGO standing* (….) be revised" and *"specifically laid down in sectoral environmental laws, in addition to any existing criteria for NGO standing in the EIA, IPPC or environmental liability laws"* this recommendation again **mixes matters of laying down, respectively of establishing "criteria for standing" with the question of conceding "access to administrative and judicial review"**, as the Party concerned has already pointed out on page 6 of its statement to the first set of draft findings and recommendations. Therefore, the present recommendation **needs to be reworded** especially in the light of our remarks on paragraphs 73, 74 and 76 above, so as to properly reflect the actual situation.

Final Remarks

In general terms we would like to emphasize again that in our view Art 9 para 3 leaves more flexibility to Parties than Art 9 para 2 of the Convention. Thus the possibilities for the Parties to introduce legal means for "members of the public" to challenge acts or omissions by public authorities or by private persons can encompass and combine various legal means and various "members" of the public, not only focusing on NGOs.

In the light of the various points that are still not resolved, the Party concerned would like the ACCC to duly reexamine these issues in its draft findings and recommendations.