



# australian network of environmental defender's offices

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Access to Justice Division  
Attorney-General's Department  
3-5 National Circuit  
BARTON ACT 2600

## **Strategic Framework for Access to Justice in the Federal Civil System**

To whom it may concern,

The Australian Network of Environmental Defender's Offices (ANEDO) welcomes the opportunity to provide comment on the Report of the Access to Justice Taskforce, *Strategic Framework for Access to Justice in the Federal Civil System* (the Report). ANEDO is a network of 9 community legal centres in each state and territory, specialising in public interest environmental law and policy. Our submission focuses on two issues:

1. Public interest costs orders; and
2. Funding to enhance access to justice in the area of public interest environmental law.

### 1. Public interest costs orders

ANEDO has commented extensively on access to justice and costs issues for public interest litigants in a number of fora. We refer the Attorney-General's Department to our recent submissions which provide a detailed analysis of the issues and make

broad and specific recommendations on how to make the legal system more accessible for public interest litigants.<sup>1</sup>

ANEDO welcomes the Report's recognition of the importance of public interest proceedings and the significant impediments faced by public interest litigants in bringing matters to court, particularly in relation to environmental matters. However, we submit that the recommendations made do not go far enough, and will do little to remove the significant obstacles faced by public interest litigants. We note that Recommendation 8.10 of the Report stipulates that:

*The Government should consider amending federal court legislation to provide a discretion for the court to make a public interest costs order, at any stage of the proceeding, where the court is satisfied the proceedings concerned will be of benefit to the public because the proceedings will determine, enforce or clarify an important right or obligation affecting the community or a significant section of the community, or affect the development of the law generally and reduce the need for further litigation.<sup>2</sup>*

The Government has pre-empted this recommendation by introducing the *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009* in June 2009, which passed through the Senate on 27 October 2009. Whilst the bill does not specifically mention 'public interest proceedings' it does elaborate on the types of costs orders that a Federal Court judge may make under the existing general discretion to make costs orders in s43 of the *Federal Court of Australia Act 1976*. The amendments to s43, whilst not limiting the general discretion, explicitly recognise the ability of the Court to make a variety of costs orders at *any time* in the proceedings. These include capped costs orders and no costs orders. In our recent submission to the Senate Legal and Constitutional Affairs Committee's inquiry into the Bill, ANEDO submitted that the proposed expansion of s43 does little to alleviate the impediments faced by public interest litigants. The amendment merely provides a list of some of the potential orders that judges may make in exercising their *existing* discretion to make a costs order under s43.

Several other jurisdictions have introduced similar provisions to the amended s43, such as s 49 of the *Judicial Review Act 1991* (Qld),<sup>3</sup> and rule 4.2 of the *Land and*

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<sup>1</sup> ANEDO has made recent submissions to the Senate Legal and Constitutional Affairs References Committee Inquiry into the *Access to Justice (Civil Litigation Reforms) Amendment Bill 2009* in August 2009 and to its general inquiry on Access to Justice in May 2009. Moreover, we have discussed public interest litigation and costs issues in our submissions to the Independent Review of the *Environment Protection and Biodiversity Conservation Act 1999*. In addition, our member offices have been involved in campaigning for access to justice in their respective jurisdictions. For example, in February 2008, EDO (NSW) published a discussion paper on access to justice in the NSW Land Environment Court. EDO (Vic) made submissions on access to justice to the Victorian Law Reform Commission's Civil Justice Review.

<sup>2</sup> *Strategic Framework for Access to Justice in the Federal Civil System*, Access to Justice Taskforce (2009), p114.

<sup>3</sup> See the decisions of the Queensland Court of Appeal in *Commissioner of Police Service v Cornack* [2004] 1 Qd R 627, 641 – 2 and *Cairns Port Authority v Albeitz* [1995] 2 Qd R 470, 476. An example

*Environment Court Rules 2007* (NSW). However, while some of these state provisions explicitly recognise public interest costs orders as a specific category, and require courts to consider a variety of factors in determining whether a proceeding is a public interest matter, they also still rely heavily on judicial discretion.

As ANEDO has demonstrated in previous submissions, judicial discretion to make a public interest costs order has rarely been exercised in the federal and state judicial systems, despite courts having the power to do so.<sup>4</sup> As a result, public interest litigants have to assume that if they are unsuccessful in proceedings that they will have to pay the other side's costs and face potential bankruptcy if they proceed. This has a significant deterrence factor and prevents valuable public interest issues from being resolved by the courts. As ANEDO submitted to the Senate Legal and Constitutional Affairs Committee:

*the spectre of potentially hundreds of thousands of dollars in costs incurred by respondents will deter most public interest litigants from bringing a case, even where the prospects of success are very strong.*<sup>5</sup>

In consideration of the above, ANEDO strongly recommends that a statutory mechanism be included in the *Federal Court of Australia Act 1976* (and indeed across Australia) that makes it mandatory for the Court to make a public interest costs order if an applicant can demonstrate at the commencement of the matter (or at any time during proceedings) that their matter is a genuine 'public interest proceeding' with reasonable prospects of success. We therefore recommend a two-step process as follows:

- A mechanism permitting applicants to apply to the Court for a decision on whether their proceedings are 'public interest proceedings' at any stage of those proceedings; and
- If proceedings are declared to be public interest proceedings, then the court hearing the application cannot order that costs follow the event. Instead, it must make some form of public interest costs order (defined to include 'no costs' orders, capped costs orders, one-way cost shifting orders and indemnities, etc). This order must be made at the same time as the ruling on whether proceedings are public interest proceedings.

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of the application of s 49 in an environmental case is *Alliance to Save Hinchinbrook Inc v Cook & Ors* [2005] QSC 355, run by EDO North Queensland.

<sup>4</sup> As far as ANEDO is aware, public interest costs orders have only been made on 2 occasions in the Federal system - *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 254 ALR 584 and *Oshlack v Richmond River Council* (1998) 193 CLR 72. See also Chris McGrath, 'Flying Foxes, Dams and Whales: Using Federal Environment Law in the Public Interest' (2008) 25 *Environment and Planning Law Journal* 324, fn 60 and associated text.

<sup>5</sup> ANEDO submission to the inquiry into the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009, p6. Found at:

[http://www.aph.gov.au/SENATE/committee/legcon\\_ctte/civil\\_litigation/submissions.htm](http://www.aph.gov.au/SENATE/committee/legcon_ctte/civil_litigation/submissions.htm) (5 November 2009).

We submit that ‘public interest proceedings’ should be defined along these lines:

*‘public interest proceeding’ means a proceeding concerning a matter within the jurisdiction of the Court that is instituted by a person or persons whose predominant purpose is to advance or protect a perceived interest, including a non-financial interest, of members of the public generally or a significant segment of the public. A proceeding does not fail to be a public interest proceeding simply because the applicant or applicants, or some of them, share the public interest benefit in greater or lesser degree.*<sup>6</sup>

Such a process, where a public interest declaration is sought at the start of proceedings, will enable public interest litigants to know at the outset if they are at risk of exposure to the other party’s costs and make an informed decision about whether to proceed with court action. Indeed, the making of a mandatory public interest costs order would provide a public interest litigant with the certainty of knowing that, at a minimum, they will have their costs liability capped. This will help ensure that important public interest issues will be brought to court by applicants without the fear of financial ruin. On the other hand, the Court will retain discretion as to what *type* of public interest costs order to make as the Court can tailor the order to the degree of public interest in the case, potentially expanding the class of cases in which public interest costs orders will be made.

Hence, ANEDO recommends that the Access to Justice Taskforce amend Recommendation 8:10 in the Report to propose the implementation of a statutory mechanism in the *Federal Court of Australia Act 1976* that obliges the Court to make a public interest costs order where an applicant demonstrates that its proceedings are ‘public interest proceedings’.

## 2. Funding to enhance access to justice in the area of public interest environmental law

Environmental considerations are playing an increasingly prominent role in Australian public policy, with both governments and the broader community now recognising the importance of such matters as water conservation and allocation, dealing with climate change, protecting biodiversity, retention of our natural and cultural heritage, and the sustainability of indigenous and rural communities.<sup>7</sup> Indeed, the need for environmental justice has never been greater with Australia facing increasing environmental pressures.<sup>8</sup> The importance of environmental law

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<sup>6</sup> Murray Wilcox, pers. comm.

<sup>7</sup> See Australian Bureau of Statistics (2007), *Australia’s Environment- Issues and Trends*, Canberra and S.Cousins (2007), “Contemporary Australia, Environmental issues”, National Centre for Australian Studies, Monash University found at <http://www.radioaustralia.net.au/australia/pdf/environmental.pdf> (viewed 29/9/08).

<sup>8</sup> See, for example, 2006 Australian State of the Environment Committee, *Australia State of the Environment Report 2006* (2006), available at <http://www.environment.gov.au/soe/2006/index.html> > on 10 August 2009 . See also various

was recently highlighted by the retiring Chief Justice of the High Court, the Honourable Murray Gleeson QC, in nominating water and climate change as matters that will dominate court disputes in the next decade.<sup>9</sup> Earlier this year, Professor Ross Garnaut described climate change as “harder than any other issue of high importance that has come before our polity in living memory”.<sup>10</sup>

The increased urgency and increased community concern about environmental issues has led to an increased need for assistance and information in relation to public interest environmental law matters. The EDOs were created to fulfil this role, which is to assist the community in achieving positive environmental outcomes through the law. EDOs around Australia are involved in public interest environmental law work including advice to the public, law reform, community education work and casework. This work has an important role in ensuring that the community is able to understand and access environmental laws across Australia, and to promote positive changes to the law. However, while the EDOs have to date achieved a significant amount on limited resources, there is a need to ensure that EDO offices are adequately funded in order to maintain and enhance these services. Unfortunately, EDO offices have to turn away many worthy requests for assistance each year, simply due to a lack of resources. Most offices are under-resourced and, as a result, there is a high unmet legal need for public interest environmental law assistance.

Murray Wilcox, former Federal Court judge, sent a letter to the Attorney-General on behalf of ANEDO in late 2008 calling for increased funding for Environmental Defender’s Offices around Australia.<sup>11</sup> We refer the Access to Justice Division to this letter and rely on its recommendations.

We note that Australian Government’s focus when allocating resources for Community Legal Centres, and legal aid generally, is on providing legal services to those who are socially, geographically and economically disadvantaged. On the other hand, while this focus is important and valid, there is very little discourse about the need to allocate resources that serve the public interest generally. For example, as Gleeson CJ highlighted above, there is an increased urgency in dealing

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State and Territory State of the Environment Reports, available at <<http://www.environment.gov.au/soe/index.html>> on 10 August 2009.

<sup>9</sup> “If someone asked me to predict - and said it was income tax 30 years ago, and it is immigration cases now - I would say in 30 years from now it will be water ... When there is an important topic of public policy and the likelihood of government regulation, then lawyers are likely to get involved, too.” Justice Gleeson said courts would have an increasing role in settling environmental issues, especially as businesses and governments dealt with concerns about climate change”. See “Water the next big battleground”, *Sydney Morning Herald*, 11 February 2008 found at <http://www.smh.com.au/news/environment/water-issues/water-next-big-battleground/2008/02/10/1202578600925.html> (viewed 29/9/08).

<sup>10</sup> See “Climate crisis diabolical” *Sydney Morning Herald* at <http://www.smh.com.au/news/environment/climate-crisis-diabolical/2008/07/04/1214951014040.html> (viewed 29/9/08).

<sup>11</sup> Wilcox M, “Submission to the Commonwealth Attorney-General for Increased funding for Environmental Defender’s Offices and ANEDO.”

with environmental issues that are matters of public interest, and that these are likely to have significant impacts on the community in future. Therefore, ANEDO submits that to improve access to justice, the strategic framework for access to justice must include appropriate funding for general public interest legal services, such as the EDOs, in addition to funding CLCs that assist disadvantaged individuals.

For further details on this submission and the correspondence we have referred to please contact Rachel Walmsley on (02) 9262 6989 or [rachel.walmsley@edo.org.au](mailto:rachel.walmsley@edo.org.au)

Yours sincerely

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