



Australian Network of Environmental
Defender's Offices Inc

ABN: 85 763 839 004

C/- Environment Defender's Office (Vic) Inc.
PO Box 12123
A'Beckett Street PO
Melbourne VIC 8006

Ph: (03) 8341 3100
Fax: (03) 8341 3111

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Financial Assistance Consultation
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

By email: fnass@ag.gov.au

Consultation paper – A new scheme for assistance with disbursements

ANEDO welcomes the opportunity to make a submission to the Attorney-General's Department in relation to the proposed new scheme of financial assistance (**new scheme**).

The Australian Network of Environmental Defenders Offices (**ANEDO**) is a network of nine community legal centres in each state and territory specialising in public interest environmental law and policy. Our interest in this matter is the development of a scheme that supports the protection of a safe and healthy environment.

The only scheme under which environmental groups are currently eligible for financial assistance is the Public Interest and Test Cases Scheme (**public interest scheme**). However in practice the public interest scheme has not served environmental organisations well. ANEDO proposes that the new scheme better support public interest environmental litigation.

The underlying purpose of financial assistance under the Commonwealth scheme is to provide access to justice for individuals and groups in Commonwealth matters. Inadequate assistance not only leads to social injustice and inequality – in cases of potential harm to the environment, there are often health, wellbeing and amenity implications for individuals and groups, as well as the potential exacerbation of financial and social disparities within certain sectors of the community.

ACT, GPO Box 574, Canberra ACT 2601. T: 02 6247 9420 F: 02 6247 9582 E: edoact@edo.org.au
NSW, L5, 263 Clarence St, Sydney NSW 2000. T: 02 9262 6989 F: 02 9262 6998 E: edonsw@edo.org.au
NSW - NORTHERN RIVERS, PO Box 868, Lismore NSW 2480. T: 1300 369 791 F: 02 6621 3355 E: edonr@edo.org.au
NT, GPO Box 3180, Darwin NT 0801. T: 08 8982 1182 F: 08 8982 1183, E: edont@edo.org.au
NORTH QLD, 1/96-98 Lake St, Cairns QLD 4870. T: 07 4031 4766 F: 07 4041 4535 E: edonq@edo.org.au
QLD, 9/193 North Quay Brisbane, QLD 4000. T: 07 3211 4466 F: 07 3211 4655 E: edoqld@edo.org.au
SA, GPO Box 170, Adelaide SA 5001. T: 08 8410 3833 F: 08 8410 3855 E: edosa@edo.org.au
TAS, 131 Macquarie St, Hobart TAS 7000. T: 03 6223 2770, F: 02 6223 2074 E: edotas@edo.org.au
VIC, PO Box 12123, A'Beckett St PO VIC 8006. T: 03 8341 3100 F: 03 8341 3111 E: edovic@edo.org.au
WA, Suite 4, 544 Hay Street, Perth WA 6000. T: 08 9221 3030 F: 08 9221 3070 E: edowa@edowa.org.au

This submission proposes new parameters for the proposed new scheme in the context of public interest environmental litigation. In summary:

- At a minimum, the new scheme should continue to support ‘common purpose groups’ including environmental groups and other unincorporated associations in applying for financial assistance, in accordance with the current public interest scheme.
- To better recognise and protect environmental interests in practice, public interest environmental litigation should be explicitly recognised under the new scheme, as is done under the NSW legal aid scheme.
- Funding for public interest environmental litigation should not be excludable on the basis of Commonwealth or State involvement.
- Disbursements should explicitly cover expert witnesses.
- Means testing is largely irrelevant in public interest environmental cases, which are not about enforcing a private right or interest. The focus for these cases should instead be on the merits of the case.
- Merits testing for public interest environmental litigation should include a further criteria, namely, whether the matter impacts on an environment of special significance.
- The ‘streamlining’ of financial assistance schemes by the Commonwealth should not result in reduced overall funding, or come at the cost of ‘enhanced access to justice’.
- Where financial assistance has been granted to parties in public interest environmental litigation, they should be eligible for legal indemnity.

Meaningful public participation in environmental litigation provides numerous, direct public benefits, by assisting in the achievement of legislative objectives, protecting the environment, improving enforcement of environmental laws, ensuring government accountability in decision making and private accountability for environmental harms resulting from breach of environmental or planning laws, ensuring the continuation of a participatory democracy, and stimulating innovative and socially responsible answers to environmental problems.

The value of these contributions must be recognised in the new financial assistance scheme, by better supporting public interest environmental litigation.

Who can apply?

ANEDO supports the fact that under current arrangements, ‘common purpose groups’ including environmental groups and other unincorporated associations (such as local community groups) can apply for financial assistance.¹ At a minimum, this arrangement should be retained under the new scheme.

¹ Public interest scheme, 4.1.

However the fact that environmental groups very rarely obtain financial assistance under the current public interest scheme suggests that the program is not adequately recognising or protecting environmental interests. ANEDO proposes a new scheme which explicitly recognises the value and legitimacy of public interest environmental litigation. The following sections explore how this might be achieved.

Eligible case types

Public interest environmental litigation should be explicitly recognised in the new scheme

As noted above, the current public interest scheme has gone some way to accommodating public interest environmental litigation in theory, for example, by recognising ‘common purpose groups’, including environmental groups, as eligible for financial assistance; and by affording broad in-principle support for public interest litigation. However the picture is different in practice.

Since the public interest scheme was introduced in 1996, only a very limited number of groups seeking funding for public interest/test case environmental cases have received assistance. This is a reflection both of the very limited number of applications made by groups for assistance under the public interest scheme (which suggests that there is insufficient awareness about its existence and utility), as well as a failure on the part of the Department to qualify such groups under the scheme.²

This reflects a major ‘gap’ in the Commonwealth financial assistance scheme, which needs to be addressed. In fact, given the failure of environmental litigants to seek and/or qualify for assistance, in spite of a framework purportedly established for the purpose, ANEDO recommends that public interest environmental litigation be explicitly, and separately, recognised as part of the new scheme.

For example, the new scheme could make cases eligible for assistance which:

- will have a significant impact on the values of an environment of special significance;
- as a result of (potential) impacts on the environment, will have a significant impact on the public in general or a section of the public; and/or
- is of broad public importance for some other reason that is deemed appropriate.

Alternatively, following the legal aid scheme in NSW, grants could be made available for environmental matters ‘where the activity or proposed activity raises a matter of substantial public concern about the environment’.³

This approach not only assists the environment but goes a long way to addressing public disadvantage and other broader objectives of the public interest scheme. For example, it is not uncommon that individuals in lower socio-economic demographics are more often exposed to inappropriate developments which lower air quality, water quality or the amenity of an area, with

² By way of illustration, the first major grant of aid for an environmental case from the Commonwealth came in 2009, some 13 years the public interest scheme was introduced. *Wide Bay Burnett Conservation Council v Burnett Water Pty Ltd* (‘Paradise Dam Case’) QUD 319 of 2009.

³ Legal Aid NSW, ‘Civil law matters – when legal aid is available’, Chapter 6.13.

flow-on effects to ill-health, lower land values, social disadvantage and disempowerment within a community more generally.⁴ This raises issues of ‘environmental justice’.

At the other end of the spectrum, proponents of major developments, such as coal mines or major residential developments, are generally extremely well resourced and prepared to spend large sums of money to defend their case. In this respect public interest environmental litigants are at a massive financial disadvantage.

ANEDO considers that it should be a priority of the Commonwealth to do what it can to correct this imbalance and ensure some equality of representation between the parties in a case.

Funding for public interest environmental litigation should not be excludable on the basis of Commonwealth or State involvement

Even without a separate model, as proposed above, ANEDO is concerned about the fact that the current scheme precludes funding for ‘cases where the Commonwealth or State/Territory Government is a party and is to present public policy arguments on behalf of the Australian community’.

First, it is submitted that the intended meaning of ‘public policy arguments on behalf of the Australian community’ is unclear in this context and requires clarification if it is to be transposed into the new scheme.

Second, ANEDO submits that there should not be such a wide discretion to prevent funding in public interest environmental cases involving the Commonwealth or States. This is because the majority of environmental cases, by their very nature, involve Commonwealth or State Governments as a party. In particular, cases that challenge Commonwealth decisions made under the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (**EPBC Act**) can raise significant issues of public importance.

ANEDO believes that a refusal to provide financial assistance based on a government’s discretionary ability to ‘present public policy arguments’ undermines government accountability and presents an unfair barrier to environmental groups seeking funding to challenge environmental cases in the public interest. As such, this exclusion should be removed under the new scheme.

What is a disbursement?

ANEDO welcomes the fact that financial assistance for legal representation costs will be retained in Commonwealth public interest and test cases.

However, improvements to the current scheme could be made in the context of disbursements for expert witnesses. At present, disbursements for expert witnesses may be covered if it is considered that they fit into the very specific category of ‘medico-legal reports from relevant specialists’ or the very broad category of ‘other disbursements’.

⁴ This is particularly the case in situations involving Aboriginal cultural heritage. See for example the environmental litigation pursued at James Price Point (WA), Olympic Dam (SA) and Muckatj Station (NT).

ANEDO considers expert witnesses to be an integral element of environmental litigation, as these cases are typically technically complex. Our experience is that experts are less willing and able to cap their fees or act pro bono than legal counsel. As a result, inability to obtain expert evidence because of financial constraints is one of the most significant barriers to public interest environmental litigation and where the imbalance in resources between proponents and public interest litigants is most pronounced.

As such, the new scheme would benefit from an explicit recognition of the eligibility of financial assistance for expert witnesses, across a range of disciplines, but particularly for environmental cases.

Eligibility for assistance – means test

The current public interest scheme requires applicants for financial assistance to verify their means – either as individuals or as members of a corporation/unincorporated association. The rationale for this ‘hardship test’ is presumably to ascertain the ability of the individual or association to pay for the litigation themselves; and to determine what financial benefits applicants may derive from the outcome of the proceeding.

However, these concerns are largely irrelevant in public interest environmental cases, which are not about enforcing a private right or interest. In fact, many individuals engage in environmental litigation without any personal interest in order to protect public rights. They perform a public service in seeking to obtain clarity and consistency in the application of environmental laws; promote meaningful community involvement in environmental decision-making; and ensure compliance with Australia’s domestic and international environmental obligations.

It should not be the task of unassisted members of the public to perform this task on behalf of parliament, for the benefit of the public at large. Rather, where there is a clear public interest dimension to the process, means testing of individuals or organisations should be irrelevant, and the focus should instead be on the merits of the case.

Eligibility for assistance – merits test

ANEDO supports the current criteria for assistance eligibility, including the likelihood of a successful court or negotiated outcome in the matter; whether the matter impacts on a large section of the public; and whether instituting court proceedings is the best way to resolve the issues.

In addition, however, ANEDO supports the inclusion of a further criteria in a merits test for environmental cases, namely, whether the matter impacts on an environment of special significance. Further, it might be appropriate, as is the case in NSW, to consider the environmental, economic, cultural and social impact of the matter on the local community and public generally.⁵

⁵ Legal Aid NSW, ‘Civil law matters – when legal aid is available’, Chapter 8.2.

Amount of assistance – prescribed amounts and capping

As noted above, expert witnesses are an integral element to environmental litigation and ANEDO values the opportunity to obtain financial assistance for this work. If, as is being mooted, the new scheme sets prescribed limits on each item of disbursements, ANEDO requests that expert reports be eligible for at least \$5,000. This would go some way to facilitating a site survey, preparing a report and responding to reports made by the respondent. While ANEDO recognises that the Attorney-General's Department may not be able to meet the full commercial costs of all reports, this is the minimum amount to allow public interest litigants with limited means to obtain comparable expert assistance to the (generally far better resourced) respondents.

Similarly, in imposing any cap on total assistance for public interest/test case litigation, due regard should be given to the type of case in question. For environmental cases, which generally give rise to larger fees, ANEDO considers that an appropriate maximum should range from \$10,000 (for simpler cases, such as those seeking judicial review) to \$20,000 (where experts are involved).

Administration of assistance

In relation to payment arrangements, it is vital that the Department ensures it has systems in place to process grants quickly. For example, in EPBC Act matters, where there are only 28 days available for third parties to review a decision, it would be necessary that a decision in relation to funding be processed within this timeframe (3-4 weeks, maximum).

Other matters

Reduced funding

While not dealt with explicitly, it would appear that the purpose of this 'streamlining' exercise is to increase efficiency, and concurrently reduce funding, for financial assistance in legal matters across the board. Simultaneously, it is proposed that the central purpose of the new scheme is to 'enhance access to justice'.

Yet increased access to justice is hardly likely to be achieved with reduced funding. The already substantial disadvantage faced by groups and members of the public seeking to bring actions in the public interest, who come up against vastly better resourced corporations and vested interests, should not be further exacerbated by reductions in Commonwealth assistance.

Legal indemnity

A substantial barrier to public participation in public interest environmental litigation is the threat of adverse costs orders. ANEDO supports legal indemnity for parties to such litigation, where financial assistance has been granted, based on the merits of the case.⁶

Such a system would significantly improve access to justice, encouraging greater public participation in the legal system; providing greater clarity at the outset about what legal costs are

⁶ See, for example, s 47(1)(b) of the *Legal Aid Commission Act 1979* (NSW).

likely to be; and requiring opposing parties to make a more considered choice about whether to pursue the claim.

Concluding comments

As Justice Toohey emphasised in his well quoted passage made at an International Conference on Environmental Law: "There is little point in opening the doors to the courts if litigants cannot afford to come in."⁷

It is vital, having created a framework for third parties to bring public interest environmental litigation in relation to Commonwealth matters (most notably through the EPBC Act), and having established a means for them to finance this process through the public interest scheme, that these opportunities be realised in practice.

Currently, lack of funding is still a major impediment to public participation in environmental litigation – with substantial implications for the environment, future prosperity, not to mention public health, wellbeing and amenity.

ANEDO urges the Attorney-General's Department to seriously consider developing as part of its new scheme a framework which recognises and values the role of public interest environmental litigation.

Thank you for considering this submission. Please contact me if you would like further information on 03 83413100 or nicola.rivers@edo.org.au.

Yours sincerely,



Nicola Rivers
Director, Law Reform, Environment Defenders Office (Vic)
On behalf of
The Australian Network of Environment Defenders Offices

⁷ Justice Toohey and Anthony D'Arcy, Environmental Law – Its Place in the System, National Environmental Law Association, International Conference on Environmental Law Sydney, Australia (June 1989) 69.