australian network of environmental defender's offices

Submission to the Administrative Review Council on Judicial Review in Australia – Consultation Paper (April 2011)

1 July 2011

The Australian Network of Environmental Defender's Offices (ANEDO) consists of nine independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

Contact Us

EDO ACT (tel. 02 6247 9420)
edoact@edo.org.au

EDO NSW (tel. 02 9262 6989)
edonsw@edo.org.au

EDO NQ (tel. 07 4031 4766)
edonq@edo.org.au

EDO NT (tel. 08 8981 5883)
edont@edo.org.au

EDO QLD (tel. 07 3211 4466)
edoqld@edo.org.au

EDO SA (tel. 08 8410 3833)
edosa@edo.org.au

EDO TAS (tel. 03 6223 2770)
edotas@edo.org.au

EDOVIC (tel. 03 9328 4811)
edovic@edo.org.au

EDO WA (tel. 08 9221 3030)
edowa@edo.org.au

Submitted to:
ARC Secretariat
Access to Justice Division
Attorney-General's Department
3-5 National Circuit
Barton ACT 2600

Emailed to: arc.can@ag.gov.au

Executive Summary

The Australian Network of Environmental Defender's Offices (ANEDO) is pleased to provide the following targeted comments on the April 2011 Administrative Review Council Consultation Paper[1] on Judicial Review in Australia (the Consultation Paper). ANEDO is a network of nine community legal centres specialising in public interest environmental law and policy.

The consultation paper contains thirty questions on the following aspects of judicial review focussing on the application of the *Administrative Decisions (Judicial Review) Act 1977* (*ADJR Act*):

1. The current system of judicial review;
2. The ambit or scope of review;
3. Grounds of review;
4. Right to seek judicial review;
5. Judicial review and reasons for decisions;
6. Availability of remedies in judicial review proceedings;
7. Court procedures;
8. Additional statutory review mechanisms; and
9. Options for Australia.

This submission focuses on those topics that are particularly relevant to ANEDO's area of expertise. That is, our submission concentrates primarily on improving judicial review from the perspective of:

- encouraging greater recognition of public interest litigation in judicial review proceedings; and
- improving access to justice particularly in relation to environmental and related issues.

Accordingly ANEDO's key recommendations are as follows:

- Broaden the decisions to which the *ADJR Act* applies, beyond decisions made under enactment, to non-statutory decisions;
- Codifying the grounds of judicial review and including a "catch all" provision so as not to limit the grounds of judicial review;
- Broadening the rules for standing in relation to public interest litigants in judicial review and making them more consistent;
- Providing courts with the power to make "no costs", or at the very least "own costs", orders for public interest litigants in judicial review;
- Ensure statements of reasons follow a clearer format that identifies the applicable legislation, findings of fact, the decision and reasoning behind the decision;
- Ensure accompanying documents that have contributed to the formulation of the decision are attached to the statement of reasons;
- Minimising the exemptions that exist from any obligation to provide a statement of reasons;
- Ensure that the streamlining measures that exist in migration decisions do not expand to a broader scope of judicial review decisions; and
- Consider extending the 'prescribed period' for applications for an order of review in public interest litigation.

[1]Available at: http://www.ema.gov.au/agd/WWW/arcHome.nsf/Page/Latest_News_Current_Projects_Consultation_paper_-_Judicial_Review_in_Australia.

This submission generally follows the structure of the Consultation Paper, focussing on our key areas of interest, namely:

A) The Ambit or Scope of Review (Q. 4);
B) Grounds of Review (Q. 12);
C) Right to Seek Judicial Review (Q. 14)
D) Judicial Review and Reasons for Decisions (Q.15 & 17); and
E) Availability of Remedies in Judicial Review Proceedings (Q. 21).

A) The Ambit or Scope of Review

Question 4.
Should judicial review extend to reports and recommendations by bodies other than the final decision maker, as previously recommended by the Council, or should review extend more broadly? If so, by what means should review be extended?

ANEDO agrees that there should be an extension of the decisions that are subject to judicial review. ANEDO would support the recommendations made by theAdministrative Review Council in its 1989 report, *Review of the Administrative Decisions (Judicial Review) Act: The Ambit of the Act*, to make reports and recommendations by bodies other than the final decision maker judicially reviewable prior to the final decision being made.

Furthermore, ANEDO would also like to see a broadening of the decisions to which the *ADJR Act* applies. Currently this act narrowly restricts judicial review to decisions made under an enactment. In line with subsequent developments in other Australian States and Territories ANEDO proposes that a broadening of the decisions should extend to:

- decisions given full force by (even if not authorised by) an enactment;
- decisions made by government officers and agencies exercising non-statutory prerogative or executive powers; and
- non-statutory decisions under formally published policy documents, such as guidelines or codes of conduct.

Such a broadening would increase the range of decisions and bodies[2] open to review and therefore increase transparency and accountability in the decision-making process. In the longer term it would lead to better decision making in the public interest. It would also enhance consistency of judicial review, because in some cases there is no clear reason why a particular decision that affects the environment and the public interest is, or is not, made under an enactment.

[2]Such as the Threatened Species Scientific Committee provided for under the *Environment Protection and Biodiversity Conservation Act 1999*.

B) Grounds of Review

Question 12
What are the advantages and disadvantages of different approaches to the grounds of judicial review – common law or codification of grounds and/or general principles? Which approach is to be preferred and why? What grounds should be included in a codified list?

The general question here is whether or not it is preferable to have a list of grounds of judicial review in statute or to leave the development of grounds to the common law. Currently the *ADJR Act* provides that "a person who is aggrieved by a decision to which this Act applies … may apply to the Federal Court or the Federal Magistrates Court for an order or review in respect of the decision"[3] on a number of grounds set out in the legislation. To obtain review of a decision, a person must be able to demonstrate that s/he is a "person who is aggrieved" by the decision, and that this decision is "a decision to which this Act applies."[4]

ANEDO recognises this debate surrounding the codification of grounds of review is not a new debate, with the Kerr Committee[5] in 1971 and the Ellicott Committee[6] in 1973 both recommending the need to ensure that each of the common law grounds of review should be 'codified' in legislation. Qualifying statements were included in the Ellicott Committee Report that stated "if an attempt was to be made to codify the grounds in legislation then … these should include an open-ended ground such as 'contrary to law."[7]

ANEDO is in favour of codifying grounds of judicial review so as to add certainty to the grounds for review. This is also in step with judicial review in other Australian jurisdictions.[8] It is however fundamental that a catch all open-ended ground (similar to the"otherwise contrary to law" and "an exercise of power in a way that constitutes an abuse of the power"[9]) be incorporated into any codification of the grounds. As noted in the discussion paper, these two current catch-all grounds may need to be further broadened, as to date there has been an "almost total lack of applications which have sought to use these provisions."[10] Therefore the catch-all ground should be expanded to enable review under the *ADJR Act* on any ground of review that may be available at common law. Without such a catch-all provision, codifying all grounds may potentially impede development of the law and prevent incorporation of arguments from other jurisdictions that may not fit within the codified grounds.

---

[3] Sections 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
[4] Sections 5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).
[5]Commonwealth, *Commonwealth Administrative Review Committee Report,* Parl Paper No. 144 (1971) (*'Kerr Committee Report'*).
[6]Commonwealth, *Prerogative Writ Procedures: Report of Committee of Review,* Parl Paper No. 56 (1973) (*'Ellicott Committee Report'*).
[7]Cassimatis, A.E. 2010, 'Judicial attitudes to judicial review: a comparative examination of justifications offered for restricting the scope of judicial review in Australia, Canada and England' *Melbourne University Law Review*; 34 (1): 1-33.
[8]Such as the *Judicial Review Act 1991* (Qld) and the *Judicial review Act 1991* (Tas). The NSW Government has also explored the prospect of codification in that state, which was supported by EDO NSW. Full EDO NSW submission available at: http://www.edo.org.au/edonsw/site/policy.php.
[9] Sections of the 5(1)(j) and 6(1)(j).*Administrative Decisions (Judicial Review) Act 1977* (Cth).
[10]Consultation Paper at pg. 76.

C) Right to Seek Judicial Review

Question 14
What is the appropriate test for standing in judicial review proceedings, particularly in relation to representative organisations? What are the arguments for making standing in judicial review consistent with standing under s 27(2) of the *AAT Act*, which gives organisations standing if a decision relates to a matter included in the objects or purposes of the organisation? What are other ways to achieve greater recognition of the public interest in judicial review proceedings?

i) Standing

ANEDO submits that broad standing provisions for judicial review should exist to enable appropriate scrutiny of decisions affecting individuals and the wider community. Unfortunately, it has been noted that the current rules for standing in Australia have:

> "not developed a culture of public interest litigation. One reason for this is that the rules of standing in judicial review retain some restrictive elements that make it difficult for representative groups to challenge government decisions. The requirement that, to have standing, a complainant must be able to show a special interest or be aggrieved by a decision does not equate with even the strong views or commitments of a group."[11]

As the consultation paper notes:

> "[G]enerally a person has standing to apply for judicial review if the court considers that the person has a sufficient connection to the proceedings."[12]

When analysing the case law, it becomes apparent that such a test "has yielded uneven results in environmental cases – particularly for representative bodies that seek to challenge decision concerning their local areas."[13] One of the important cases that highlight the lack of opportunity for standing is *Australian Conservation Foundation Inc v Commonwealth*(1980):[14]

Case Study: Australian Conservation Foundation Inc v Commonwealth
The Australian Conservation Foundation (ACF) undertook proceedings against the Commonwealth for declarations, injunctions and other orders to challenge the validity of decisions concerning a proposal by a company to establish and operate a resort and tourist area in central Queensland. ACF believed they had the right to take action due to their well-known role in the protection of the environment.[15]

It was held that the ACF did not have standing and that the action should be dismissed. Gibbs CJ noted "a belief, however strongly felt, that the law generally or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi."[16]

[11]Groves, M. 2010, 'Standing and related matters', *Admin Review,* Issue 59, Pgs 86-88.
[12]Consultation Paper at para 3.36.
[13]Groves, M. 2010, 'Standing and related matters', *Admin Review,* Issue 59, Pgs 86-88.
[14]146 CLR 493.
[15]Furthermore, ACF had lodged a submission pursuant to administrative procedures under the *Environment Protection (Impact of Proposals) Act* 1974 (Cth).
[16]*Australian Conservation Foundation v Commonwealth*(1980) 146 CLR 493 at 531.

This case demonstrated the fact that "[i]n cases which do not concern constitutional validity a person who has no special interest in the subject matter of an action over and above that enjoyed by the public generally, has no locus standi to sue for an injunction or declaration to prevent the violation of a public right or to enforce the performance of a public duty."[17]This reflects a narrow interpretation of the ambit of parties able to bring an action for judicial review.

In comparison, in the case of *North Coast Environmental Council v Minister for Resources*, it was held that a conservation organisation amounted to a "person aggrieved" and therefore had a "special interest to apply for judicial review of a decision."[18]

This lack of consistency in the breadth of standing in case law can also be seen when comparing Commonwealth legislation. A positive example of broad standing can be found in the *Environment Protection and Biodiversity Conservation Act 1999* (*EPBC Act*). Under section 475, the *EPBC Act* provides an "interested person" standing to apply for an injunction for contravention of the act, where an"interested person" is defined as:

- An individual who is an Australian citizen or ordinarily resident in Australia or an external Territory; or
- An organisation that is incorporated (or was otherwise established) in Australia or external Territory which aims to protect, conserve or research into the environment; and
- Has engaged in a series of activities related to the protection or conservation of, or research into, the environment during the two years prior to the offence.

In contrast there is no such provision for broad standing under the *National Greenhouse and Energy Reporting Act 2007* (NGER Act), another important source of Federal environmental law.

To reduce such inconsistencies within the case law and legislation, a standard statutory benchmark could be enacted that sets out the opportunities for those parties entitled to initiate judicial review proceeding. The Consultation Paper sets out the possibility for making standing in judicial review consistent with standing under section 27(2) of the *Administrative Appeals Tribunal Act1975*(Cth). That actprovides:

> "An organisation or association of persons, whether incorporated or not, shall be taken to have interests that are affected by a decision if the decision relates to a matter included in the objects or purposes of the organisation or association."

ANEDO would be open to such an approach, however the obvious limitation with this proposal is that uncertainty still remains around how such a provision would apply to individuals.

The case of *North Queensland Conservation Council Inc v Executive Director, Queensland Parks and Wildlife Service*[19] (the NQCC Case) demonstrated another approach to standing. In that case, Chesterman J (at [12]) proposed and applied the following test:

> "The rationale for limiting standing as explained by Gibbs CJ in *Onus* suggests a solution to the problem. The plaintiff should have standing if it can be seen that his connection with the subject matter of the suit is such that it is not an abuse of process. If the

[17]Available at: http://www.hrcr.org/safrica/access_courts/Austrailia/aus_cons_comm.html.
[18](1994) 127 ALR 617.
[19][2000] QSC 172.

> plaintiff is not motivated by malice, is not a busy body or crank and the action will not put another citizen to great cost or inconvenience his standing should be sufficient."

This test has since been applied in a number of cases.[20] While the NQCC case could be seen as conferring relatively broad standing in judicial review proceedings, ANEDO believes the constraint of the second limb of the test –which requires that the action "will not put another citizen to great cost or inconvenience should the standing be sufficient" – could act as an inappropriate obstruction to public interest litigants seeking access to justice.

It has been noted that "If environmental laws are as important as Australian legislatures proclaim them to be, surely any person should be entitled to enforce them."[21]Accordingly, ANEDO generally supports the introduction of a test for standing similar to the *EPBC Act*, as described earlier. Building on the current test under the *EPBC Act*, ANEDO suggests a relaxation of the third limb of that test.[22] This could include the requirement that a person or group only need demonstrate ongoing concern in the issue at hand.[23] Adopting a broadened test such as this would promote broad and fair standing in the public interest, assisting the appropriate scrutiny of decisions affecting individuals and the wider community.

ii) Costs

In addition to broad standing provisions, equally important is ensuring that impediments such as the prospect of adverse costs orders do not prevent the initiation or continuation of judicial review litigation that raises public interest issues. ANEDO therefore submits that federal courts should be empowered and encouraged to grant "no costs" orders to all public interest litigants. Although section 62A of the Federal Court Rules currently provides an opportunity for the court by order made at a directions hearing to "specify the maximum costs that may be recovered on a party and party basis", ANEDO believes this is not sufficient and does not give public interest litigants sufficient protection.

Alternatively, ANEDO would at least propose the introduction of "own costs" orders. Section 49 of the *Judicial Review Act 1991* (QLD) provides an example of a provision of "own costs" orders that already exists in state legislation that could be transposed to a federal context. That is:

> "that a party to the review application is to bear only that party's own costs of the proceedings, regardless of the outcome of the proceedings."

In Queensland, section 49 orders have only been used in a handful of cases because the courts have taken a strict view in interpreting what meets the public interest criteria.[24] The creation of such a provision therefore would not open the floodgates to litigation. One environmental group who has used the provision is the Alliance to Save Hinchinbrook. They successfully sought an upfront costs order under s 49 of the *Judicial Review Act* on the basis that they would not otherwise be able to afford to conduct the litigation.[25] The Supreme Court also found that the

---

[20]*Save Bell Park Group v Kennedy* [2002], *Save the Ridge Inc v Australian Capital Territory* [2004] ACTSC 13, and *BHP Coal Pty Ltd &Ors v Minister for Natural Resources and Mines &Anor*[2005] QSC 121.

[21]Barker, M.L. 1996, 'Standing to Sue in Public Interest Environmental Litigation: From ACF v Commonwealth to Tasmanian Conservation Trust v Minister for Resources', *Environmental and Planning Law Journal*, Vol. 13, No. 3, Pgs. 186-208.

[22]See section 487 of the *EPBC Act* (Extended standing for judicial review).

[23] In considering ongoing concern, the entity's objectives could be a relevant (but not the only) consideration.

[24]*South East Queensland Progress Association v Greta DortheaAnghel&Ors* [1995] 2 Qd R 454, *Save Bell Park Group v Kennedy* [2002] QSC 174.

[25]*Alliance to Save Hinchinbrook Inc v Cook &Ors*[2005] QSC 355.

group has a significant interest and reasonable case to review a decision of the Environmental Protection Agency to allow the building of a breakwater in the Hinchinbrook channel, opposite the Great Barrier Reef World Heritage area in North Queensland.

Former High Court judge, Justice Toohey has famously commented that "there is little point in opening the doors to the Courts if litigants cannot afford to come in."[26] The threat of adverse costs orders is one of the greatest deterrents to litigants seeking to bring public interest proceedings. ANEDO believes that the introduction of a "no costs order" in the federal jurisdiction, or at the very least a provision analogous to Queensland's s 49, would bring greater access to the courts for public interest litigants. It would also give parties greater certainty about the financial consequences of taking legal action. For further information, ANEDO members have published various reports and submissions about costs in public interest environmental cases.[27]

D) Judicial Review and Reasons for Decisions

Question 15.
Should we have a generalised right to reasons, or is it more appropriate for the right to be included only in specific pieces of legislation? Where should the right be located? At what stage of the decision-making process should a right to reasons for administrative decisions be available and in relation to what range of decisions?

ANEDO is of the opinion that the *ADJR Act* works well to provide applicants with the right to reasons. Section 13 of this Act entitles applicants to be provided a statement of reasons "as soon as practicable, and in any event within 28 days" from when the request is received by the court. This process allows parties to receive a statement of reasons in an efficient manner without the need to commence proceedings.

ANEDO does have some recommendations that may improve this current system which relate to the format of the statement of reasons and the introduction of a requirement to provide accompanying documents. ANEDO believes that there should be a more stringent format in the presentation of reasons, with a standard setting that identifies the applicable legislation, the findings of fact, the decision, and the reasoning behind the decision. Within the reasoning section, ANEDO submits that decision makers should be required to provide not only the reasons, but also the accompanying documents that have contributed to the formulation of the decision. The mandatory provision of such accompanying documents would greatly increase transparency in the decision making process. It would also assist to set the decision in its broader context, in situations where public interest litigants are seeking 'the full picture' that led to an important decision.

Question 17.
What, if any, exemptions should there be from any obligation to provide reasons?

ANEDO believes that in the interests of accountability, transparency and robust decision making, no exemptions should exist from any obligation to provide a statement of reasons.

---

[26] Justice Toohey, paper delivered to the national Environmental Law Conference (1989).
[27] See, eg, Environmental Defenders Office (Victoria) Ltd,*Costing the Earth? The case for public interest costs protection in environmental litigation* (Sept 2010), available at: http://www.edo.org.au/edovic/policy.html; and Environmental Defenders Office (NSW) Ltd, "Submission to the NSW Law Reform Commission on Security for costs and associated costs orders" (Feb 2010),at: http://www.edo.org.au/edonsw/site/pdf/subs/100215costs_orders.pdf.

E) Availability of Remedies in Judicial Review Proceedings

Question 21
What would be the benefits, if any, from extending the various streamlining measures relating to courts – such as time limits and discouraging unmeritorious litigation – that apply to judicial review of migration decisions to all avenues for judicial review?

Although ANEDO does not intend to make comments in regard to aspects of this review relating to migration, we submit that there is no need or justification for courts to implement streamlining measures (such as time limits and discouraging unmeritorious litigation).

Indeed, ANEDO members have raised concerns about existing time periods for filing proceedings under section 11 of the *ADJR Act*. Given factors such as the complexity of environmental approvals; the often vast quantity of supporting material; the subsequent length of reasons; and the resource limitations on public interest clients, the 28-day time limit may not be sufficient to advise clients and seek instructions to apply for judicial review. ANEDO would therefore support an extension of the 'prescribed period' for applications for an order of review in cases of public interest litigation.[28] We note the court has a broad discretion for granting extensions of time.[29] However, the general reliance on the prescribed period and discretion can create additional risks for public interest litigants. (For example, even in circumstances where a request for an extension is granted, an applicant would ordinarily be ordered to pay the costs of the other parties in respect of the application to extend time.[30]) Far from opening the gates to a 'flood' of additional litigation, a longer period to apply for federal judicial review would also ensure sufficient consideration of the merits of the case.

To date there have been very few incidences of litigation under the Commonwealth's central environmental legislation; the *Environment Protection and Biodiversity Conservation Act 1999*. As the Senate Committee on the Environment, Communications and the Arts noted in 2009:

> "there is little litigation initiated under the [*EPBC*] Act – either by third parties, proponents of actions, or permit applications. In approximately eight years since the Act commenced, there have been just eight application to courts for injunctions, 21 applications for judicial review of decisions, and 12 applications for merits review of decisions. When it is considered that this Australia's main national environmental legislation … this appears to be an extremely low level of litigation."[31]

Given the limited amount of federal environmental litigation; the recognition of the value of access to justice; and the importance of public interest environmental litigation to Australians present and future wellbeing; ANEDO does not support the extension of streamlining measures from other specific areas of judicial review.

For more information in relation to this submission please contact Mr Nari Sahukar, Acting Policy and Law Reform Director (EDO NSW) on nari.sahukar@edo.org.au *or (02) 9262 6989.*

[28] See section 11(3), *ADJR Act*.
[29] See, eg, Wilcox J in Hunter Valley Developments Pty Ltd (1984) 3 FCR 344, 348-350.
[30] By comparison, section 39B of the *Judiciary Act 1903* (Cth) does not have a time limit; however, delay, amongst other things, is taken into account as a factor in deciding whether or not to grant relief.
[31] "The operation of the *Environment Protection and Biodiversity Conservation Act 1999*", First Report by The Senate Standing Committee on Environment, Communications and the Arts, 18 March 2009, para 6.43.