Environmental Defender's Office

Submission on NSW Government Discussion Paper: Reform of Judicial Review in NSW

19 April 2011

The EDO Mission Statement:

To empower the community to protect the environment through law, recognising:

- the importance of public participation in environmental decision making in achieving environmental protection
- the importance of fostering close links with the community
- the fundamental role of early engagement in achieving good environmental outcomes
- the importance of indigenous involvement in protection of the environment
- the importance of providing equitable access to EDO services around NSW

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Executive summary

The Environmental Defender's Office of NSW (EDO) welcomes the opportunity to comment on the NSW Department of Justice & Attorney General's Discussion Paper on *Reform of Judicial Review in NSW* (Discussion Paper).[1]

The EDO is a community legal centre with over 20 years experience specialising in public interest environmental and planning law. We provide comment from the perspective of a community legal centre and public interest litigants who are undertaking legal proceedings to protect the environment, or to enforce breaches of environment protection legislation.

The EDO was created following the establishment of the Land & Environment Court and the NSW *Environmental Planning & Assessment Act 1979* (*EP&A Act*), to fill a community need for specialised, high quality legal advice on environmental law. The EDO therefore occupies a unique position in providing access to justice to the community on public interest environmental law issues, including judicial review matters.

In considering options for judicial review reform in NSW, the key issue for the EDO is: **'What forms and characteristics of judicial review will best empower the community to ensure that the actions and decisions of public authorities (ministers, departments, councils and others) are made legally, and on the basis of appropriate considerations?'** The EDO's particular area of interest is in those decisions that affect the local, regional or state environment.

With this in mind, this submission responds to each of the options for judicial review reform in NSW presented in the Discussion Paper – focusing on those options we support in order to improve judicial review, from the perspective of public interest litigation and access to justice.

The submission concludes that judicial review in NSW could be improved by embracing a statutory model to supplement existing common law rights. In the EDO's view, noting the question we pose above to guide our consideration, a new statutory jurisdiction for judicial review should:

- include a statutory right to a 'statement of reasons' for relevant decisions (statutory and non-statutory);
- be based on a modified ADJR Act model;
- retain best practice features of the NSW system (like statutory open standing provisions) and incorporate developments or modifications from other jurisdictions, such as the ability for courts to review decisions beyond those made under an 'enactment';
- address the problem of prohibitive costs in initiating or continuing judicial review litigation that raises public interest issues (such as by allowing 'no costs' orders);
- avoid jurisdictional tests for judicial review that may limit accessibility or availability of judicial review on public interest grounds.

[1] Available at: http://www.lawlink.nsw.gov.au/lawlink/legislation_policy/ll_lpd.nsf/pages/lp_dp, accessed 4/4/2011.

The submission generally follows the Discussion Paper's structure, and raises additional issues where relevant, under the following headings:

First Principles: Is there a need for reform of judicial review in NSW?

Option 1: Creating a statutory right to reasons
Timeframes
Exclusions by class of decision
Safeguards
Location of statutory rights to reasons

Option 2: Reform of common law judicial review, including standing
Discretionary powers of the Courts as to the conduct of proceedings
Other discretionary powers in judicial review proceedings – upfront costs orders
Standing

Creating a statutory judicial review jurisdiction

Option 3: Creating a NSW statutory judicial review jurisdiction – a modified ADJR Act test?

Option 4: An alternative model for statutory judicial review – introducing a 'natural justice' test

Option 5: Introducing a 'public function' test

Option 6: Applying a public function test to common law judicial review?

First Principles: Is there a need for reform of judicial review in NSW?[2]

The issues discussed in this submission arise from the EDO's work in advising members of the community on environmental and planning law issues, including residents and environmental groups who wish to challenge council and government decisions. The EDO's litigation work spans both NSW and Commonwealth jurisdictions, and includes a broad range of primary Acts, subordinate legislation and government policies. Most of the EDO's litigation work involves judicial review matters.

Focusing on environmental and planning law cases at the state level, the EDO notes that the NSW Land and Environment Court (LEC) has been an innovative model for environmental protection. The LEC has been of interest both internationally and as a model for similar courts in other Australian jurisdictions including Queensland and South Australia.[3] Decisions of the LEC continue to inform debate and discussion in other courts, including at the Commonwealth level, such as cases concerning the *Environment Protection and Biodiversity Conservation Act 1999* (*EPBC Act*). Judicial review of environmental and planning decisions specifically is also assisted in NSW by the inclusion of open standing provisions in relevant legislation.

Acknowledging these innovative foundations, in considering the development of judicial review in NSW, the EDO believes a new statutory model would improve certainty and clarity.

The EDO believes that any new statutory code for judicial review should include:

- statutory rights to request a 'statement of reasons' for relevant government and administrative decisions (see 'Option 1' discussion)
- the power for courts to make 'no costs' orders in public interest litigation involving judicial review (see 'Option 2' – 'Other discretionary powers…')
- broad standing provisions, to enable appropriate scrutiny of decisions affecting individuals and the wider community (see 'Option 2' – 'Standing')
- the ability to review a range of decisions beyond those made under an 'enactment' only (see 'Option 3')

Recognising the recent evolution of judicial review in other jurisdictions like Queensland and Tasmania, the EDO submits that a statutory code for judicial review in NSW should have broader jurisdiction than the *Administrative Decisions (Judicial Review) Act 1977* (*ADJR Act*). Options for inclusion in a NSW statutory code are considered under the questions below.

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[2] Question 1 of the Discussion Paper asked:
(a) Are there problems with the substance of, or procedures for, common law judicial review in NSW?
(b) If there is a need for reform, what are the key issues that should be addressed in any reform measures?
(c) If there is a need for reform, should NSW introduce a statutory code for judicial review, based on the ADJR Act model, another statutory model (which would in either case co-exist with the existing common law judicial review), or would it be preferable to reform some aspects of common law judicial review only?

[3] See EDO NSW, Discussion paper on Access to Justice in the Land and Environment Court (Feb. 2008), pp 1-2, available at: www.edo.org.au/edonsw/site/pdf/subs/080218access_justice_lec.pdf.

Option 1: Creating a statutory right to reasons[4]

The EDO supports the creation of a statutory right to obtain reasons for judicially reviewable decisions in NSW. This could form part of a new statutory model for judicial review. In the EDO's view, a statutory right to a statement of reasons would:

- improve access to information about decisions that affect individuals, communities and the public interest; and
- improve access to justice for members of the community who wish to ensure that decisions by public authorities have been made legally and appropriately – including by ministers, departments, local councils and other authorities.
- improve on common law rights to statements of reasons, which in the EDO's experience can be uncertain due to their conditionality (those rights only arise after an interested party has applied for review of a decision, and the right to request a statement of reasons may require a special application to the court[5]);
- reduce delays in receiving information through other channels (such as relying on freedom of information requests or discovery) that may be materially important to a case on foot, or to determining whether a case should be pursued.

The EDO has considerable experience in proceedings involving statements of reasons in the Federal Court, and is currently requesting statements of reasons in two cases in the NSW LEC.

The EDO agrees that the right to obtain a statement of reasons, prior to lodging any court application for review, would assist individuals 'to assess if a decision could or should be challenged…'. Furthermore, 'it also enhances transparency and accountability of government decision-making and so enhances the legitimacy of decisions.' (Discussion Paper, para 7.3.)

The EDO agrees that a statutory right to a statement of reasons in NSW could generally be modelled on provisions of the ADJR Act, the *Judicial Review Act 1991* (Qld) (Queensland Act) and the *Judicial Review Act 2000* (Tas) (Tasmanian Act).

Timeframes

In considering the required timeframes to make a request ('…within 28 days from when the document recording the decision was given… or otherwise within a reasonable time' – Discussion Paper, para 7.4), the EDO submits the requirements need to take adequate account of the decision-maker's notification procedures relevant to that decision.

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[4] Question 2 of the Discussion Paper asked:
(a) Should a statutory right to obtain reasons for judicially reviewable decisions be created in NSW?
(b) Should any decisions or classes of decision be excluded from the requirement to provide reasons? On what basis?
(c) If a statutory right to obtain reasons is created, but no statutory judicial review jurisdiction is created, how should the class of decisions to which the right to obtain reasons be defined? In particular, would any of the tests discussed in relation to Options 3, 4 and 5 below be an appropriate means of determining when the right to reasons would apply?
(d) Would possible reforms expanding the rules of standing require any further limitation on the scope of the right to obtain reasons?

[5] See for example, *Land and Environment Court Rules 2007 ,* Rule 4.3, available at: http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_practice_procedure. See also LEC *Practice Note – Class 4 Proceedings*, 'Provision of information in judicial review proceedings'. Available at: http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_practicedirections. This practice note applies to all proceedings in Class 4 referred to in s 20 of the *Land and Environment Court Act 1979* (NSW).

For example, interested individuals or groups should not be disadvantaged where they did not know a decision has been made, or when, due to a delay in notification (or lack of notification) by the decision-maker.

Exclusions by class of decision

In considering classes of decisions that should be excluded from the requirement to provide reasons, the Discussion Paper's reference to 'decisions to make subordinate legislation' (at 7.8.2) is unclear. Does this literally refer only to decisions *to make* subordinate legislation, or more broadly, to decisions on the *content* of such legislation?

The EDO considers that there is a range of subordinate legislation in environmental and planning law where a right to seek a statement of reasons for a decision on the *content* of that subordinate legislation would be important to public transparency and accountability. This includes, for example, the making of Local Environmental Plans (LEPs), State Environmental Planning Policies (SEPPs) and regulations.

In a recent case where an SEPP was at issue, the EDO's application for a statement of reasons was refused, with a key reason being that the decision in question was technically made by the Governor. However, the EDO submits that in practice, the discretion involved in making an SEPP is exercised by the Minister for Planning rather than the Governor – and therefore such decisions should be judicially reviewable.

Safeguards

It is important that the reforms include checks and balances to ensure that statements of reasons are properly made, including:

- enabling applicants to access documents that were before the decision-maker at the time of the decision; and
- ensuring that reasons are documented and available within a reasonable (ie short) period, including before any appeal rights expire.

The EDO also supports the inclusion of protections for applicants in relation to costs arising from a request for a statement of reasons, as in the Queensland Act (s 50). Under that Act, the court may order that the respondent pay a successful applicant's costs in obtaining relief, with additional safeguards before an applicant can be ordered to pay the respondent's costs.[6]

Location of statutory rights to reasons

Although there is no legislative basis, there are specific provisions on statements of reasons in the *Land and Environment Court Rules 2007* (Rule 4.3),[7] as well as in the Practice

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[6] Judicial Review Act 1991 (Qld), s 50 (Costs – application for reasons for decision) available at: http://www.legislation.qld.gov.au/LEGISLTN/CURRENT/J/JudicialRevA91.pdf.

[7] Available at: http://www.lawlink.nsw.gov.au/lawlink/lec/ll_lec.nsf/pages/LEC_practice_procedure. Under Rule 4.3 the Court may make:

> *(b) an order directing the public authority to furnish to any other party a written statement setting out the public authority's reasons for the decision, being a statement that includes:*
> *(i) the public authority's findings on any material questions of fact, and*
> *(ii) the evidence on which any such findings were based, and*

Notes of the LEC and the Supreme Court.[8] The EDO submits that although the right to request a statement of reasons for decisions could be improved in NSW by amending the existing rules, our preference is for a statutory right to reasons to be explicitly included in a new statutory code for judicial review. This would ensure that rights to reasons are available without having to commence proceedings, improving certainty, transparency, accessibility and efficiency.

Option 2 – Reform of common law judicial review, including standing

Discretionary powers of the Courts as to the conduct of proceedings[9]

The EDO supports the empowerment of courts hearing judicial review proceedings with certain discretionary powers in order to enhance the effectiveness of judicial review in NSW. This should include certain powers outlined in the Discussion Paper (para 8.6), namely:

(a) to make supplementary findings of fact; and
(b) to suspend the operation of the original decision and stay related proceedings.

Option (a) could improve the ability of courts to deal with proceedings more efficiently, particularly noting that the LEC has specialised expertise to consider relevant facts in environmental and planning law cases.

With respect to (b), at present it is necessary to apply for an interlocutory injunction to prevent action occurring in accordance with development consents or approvals that

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(iii) the public authority's understanding of the applicable law, and
(iv) the reasoning process that led to the decision,

Similarly, under the LEC *Practice Note – Class 4 Proceedings*:

- a respondent public body or official is to make available to the other party(ies) 'the document it says record matters relevant to the decision, within 14 days of that respondent's appearance.'
- the Court may, at a directions hearing, direct the respondent public body or public official to give the other parties (in a specified timeframe) 'a statement in writing setting out the reasons for the decision including':
    - 'findings on material questions of fact referring to the evidence or other material on which those findings were based,
    - 'the body's or person's understanding of the applicable law and
    - 'the reasoning processes leading to the decision;'
- 'otherwise in appropriate cases, the Court may, at a directions hearing, make orders for the matters [in the point above] to be ascertained by way of particulars, discovery or interrogatories.'

[8] These alternatives to the LEC Rules are important in light of the 'anomaly', identified in the findings in the *Shellharbour* case, that 'the definition of "public authority" in the LEC [Rules] is not wide enough to include a Minister.' See *Shellharbour City Council v Minister for Planning [2011] NSWLEC 59*, at para 7, available at: http://www.caselaw.nsw.gov.au/action/PJUDG?jgmtid=151224.

[9] Question 4 of the Discussion Paper asked:
(a) Should courts hearing judicial review proceedings in NSW be empowered to make supplementary findings of fact, provided there is no inconsistency with those facts already found by the administrative decision-maker?
(b) Should courts hearing judicial review proceedings in NSW be empowered to suspend the operation of the original decision or stay any or all of the 'proceedings under the decision'?
(c) Should courts hearing judicial review proceedings in NSW be empowered to make orders regarding costs incurred in a tribunal or any other forum whose decision is under challenge in the judicial review proceedings, where that tribunal or other forum itself had a power to order costs?
(d) Should courts hearing judicial review proceedings in NSW be empowered to dismiss an application or refuse relief for an application that is brought prematurely?
(e) Are there other discretionary powers that could usefully be given to judicial review courts?

have been granted. This can be a significant obstacle for public interest groups or individuals in deciding to seek judicial review of planning and environment decisions because of the potential requirement for an undertaking as to damages (among other things). Giving NSW courts the discretion to 'stay' the operation of a decision, and clearing the procedural obstacles imposed in seeking an interlocutory injunction, would encourage accountable decision-making. That is, if decisions are improperly made, interested persons and groups are more likely to see the utility in bringing proceedings that will have a practical effect (for example, where the clearing of vegetation might otherwise have occurred by the time the proceedings are completed). The Administrative Appeals Tribunal has this power in the Commonwealth arena (AAT Act, s 41;[10] see also ADJR Act, s 15[11]). A similar provision could usefully be introduced into NSW.

The Discussion Paper also noted the following options as potential discretionary powers:

(c) to award costs incurred in proceedings before a tribunal or other forum;
(d) to dismiss an application or refuse relief for an application that is brought prematurely.

From a public interest perspective, the EDO is less inclined to support these additional discretionary powers for the courts. It would be of concern if option (c) were adopted in a way that discouraged public interest litigation, by increasing plaintiffs' exposure to additional costs from other forums. Option (d) appears unnecessary, as the courts already have powers to deal with matters that are unlikely to succeed, which can be struck out or challenged, for example, on the basis of having no jurisdiction (such as where an action is premature because a decision-maker is yet to make a relevant decision).

Other discretionary powers in judicial review proceedings – upfront costs orders

To facilitate public scrutiny of relevant decisions, the EDO submits that the courts should be empowered to make orders that 'no costs' be payable where there is a public interest in bringing judicial review litigation. The leading case to enunciate this principle is *Oshlack v Richmond River Council*.[12] The LEC rules confer discretion not to order costs (or security for costs, or undertakings as to damages) against an applicant who brings Class 4 *EP&A Act* proceedings in the public interest.[13] However, in practice, this discretion has been exercised only sparingly.[14]

A new statutory power could be modelled on s 49 of the Queensland Act. That provision allows the court to make an order 'that a party to the review application is to bear only that party's own costs of the proceeding, regardless of the outcome of the proceeding.'[15] In considering the costs application, the court is to have regard to (among other things):

- the applicant's financial resources, and

[10] This power was recently used in *No Ship Action Group Incorporated and Minister for Environment Protection, Heritage and the Arts and the State of New South Wales (Joined Party)* [2010] AATA 212 (24 March 2010).
[11] ADJR Act, s 15 (Stay of proceedings—Federal Court).
[12] (1998) 193 CLR 72.
[13] Land and Environment Court Rules 2007, rule 4.2.
[14] See, for example *Minister for Planning v Walker (2008)* 161 LGERA 423. See also: http://www.edo.org.au/edonsw/site/casework_key_past.php#sandon.
[15] *Judicial Review Act 1991* (Qld), s 49(1)(e).

- 'whether the proceeding involves an issue that affects, or may affect, the public interest, in addition to any personal right or interest of the relevant applicant'.[16]

The basis of the EDO's recommendation is that, despite the number of positive factors in favour of community access to the LEC for example, the threat of an adverse costs order is one of the greatest deterrents to litigants seeking to bring public interest proceedings.[17] As noted by former High Court judge, Justice Toohey, 'there is little point in opening the doors to the Courts if litigants cannot afford to come in'.[18]

In Queensland, s 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.[19] 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.[20] The Supreme Court also found that the group has a significant interest and reasonable case to review a decision of the EPA to allow the building of a breakwater in the Hinchinbrook channel opposite the Great Barrier Reef World Heritage area in North Queensland.

In NSW, providing relevant powers for 'no costs' orders would reinforce a key aim of judicial review – to enhance accountability – by:

- enabling greater access to the courts for public interest litigants regarding the legality of decisions; and
- giving parties greater certainty about the financial consequences of taking legal action.

Without such powers, uncertainties about the costs of litigation will continue to restrain the courts' potential to serve the public interest.

Further detail on costs and access to justice issues specific to the LEC can be found in the EDO's 2008 *Discussion paper on access to justice in the Land and Environment Court.*[21] That submission considers the benefits of limited costs orders, broader public interest costs orders (as recommended by the Australian Law Reform Commission[22]), and the barrier of 'security for costs' orders. These issues are further explored at a national level in the ANEDO submission to the Senate inquiry on access to justice (2009).[23] Finally, in

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[16] *Judicial Review Act 1991* (Qld), s 49(2)(a) and (b).
[17] Lisa Ogle, "Community Experience of the Court", Promises, Perception, Problems and Remedies, Land and Environment Court and Environmental Law 1979-1999, Conference proceedings, p 26. Kirsty Ruddock, "The Bowen Basin case" in Bonyhady T & Christoff P (eds), *Climate Law in Australia* (2007), Federation Press, pp 184-185.
[18] Justice Toohey, paper delivered to the National Environmental Law Conference (1989).
[19] *South East Queensland Progress Association v Greta Dorethea Anghel & Ors* [1995] 2 Qd R 454, *Save Bell Park Group v Kennedy* [2002] QSC 174.
[20] *Alliance to Save Hinchinbrook Inc v Cook & Ors* [2005] QSC 355.
[21] EDO NSW (February 2008), pp 4-6, available at http://www.edo.org.au/edonsw/site/pdf/subs/080218access_justice_lec.pdf.
[22] Australian Law Reform Commission, *Costs Shifting: Who Pays for Litigation in Australia*, Report 75 (1995).
[23] ANEDO submission to Australian Senate Legal & Constitutional Affairs Inquiry into access to justice (May 2009), pp 7-13, available at: http://www.edo.org.au/policy/090504access_justice.pdf.

September 2010, the EDO Victoria released a discussion paper, *Costing the Earth*? The case for public interest costs protection in environmental litigation.[24]

Standing[25]

The EDO supports open standing provisions in NSW, or at least an expanded version of the ADJR Act provisions. This accords with a view noted in the Discussion Paper (para 8.11), that unlawful action in public administration should, in its own right, be open to challenge.

In its 2009 submission to a Senate Committee inquiry on access to justice,[26] the Australian Network of Environmental Defender's Offices (ANEDO) suggested:

> *There are two key barriers affecting the ability of public interest litigants to access legal representation in relation to public interest proceedings. First, the ability for public interest litigants to initiate court proceedings in the first place. This is known as 'standing'. Second, the ability to access lawyers to act on their behalf given limited funds.*

As noted in that submission, the inability to satisfy standing requirements has often served to deny potential public interest litigants access to the court system.

Traditionally, an argument has been put that standing and appeal rights should be restricted to prevent a situation where the 'floodgates' are opened and courts are faced with a multitude of actions being filed by 'meddlesome' third parties. Further concerns usually revolve about the ability to abuse the process or the ability to cause mischief. However, using the experience of nearly 20 years of the open standing provisions under s 123 of the *Environmental Planning and Assessment Act* 1979 (NSW)[27], this shows that there has been no such barrage of vexatious litigation. The former Chief Judge of the LEC, Justice Jerrold Cripps has noted that:

> *It was said when the legislation was passed in 1980 that the presence of section 123 would lead to a rash of harassing and vexatious litigation. That has not happened and, with the greatest respect to people who think otherwise, I think that that argument has been wholly discredited.*[28]

Justice Murray Wilcox has made similar comments on the reality of the motivations of people that commence public interest legal proceedings:

> *Litigation – in the public interest and for no personal advantage, especially against a wealthy opponent and under a cost regime requiring the losing party to pay costs incurred by the victor –*

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[24] Available at http://www.edo.org.au/vic.

[25] Question 5 of the Discussion Paper asked:
(a) Is there a need to reform the common law rules of standing for judicial review in NSW?
(b) If so, should the same standing rules apply to all forms of relief?
(c) Should the current rules of standing be reformed to make clear that persons or organisations representing a special or public interest may seek judicial review of decisions which affect issues related to those they represent?
(d) Do the legislative provisions cited provide a sufficiently objective model as to how standing rules could be expanded to recognise standing for persons or organisations representing a special or public interest?

[26] ANEDO submission to Australian Senate Legal & Constitutional Affairs Inquiry into access to justice (May 2009), p 3, available at: http://www.edo.org.au/policy/090504access_justice.pdf.

[27] which provides that '(1) Any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act…'

[28] Cripps J, "People v The Offenders", Dispute Resolution Seminar, Brisbane 6 July 1990

> *has some similarity to marriage as described in the Book of Common Prayers: it is not by any to be enterprised nor taken in hand, inadvisedly, lightly or wantonly.*[29]

In 2009, the Senate Standing Committee on Environment, Communication and the Arts noted that, according to the federal Environment Department's statistics:

> *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 applications 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 is Australia's main national environmental legislation… this appears to be an extremely low level of litigation.*[30]

Thus, there is no credence to the floodgates argument, and standing should not be restricted on this basis. In the EDO's view, open standing should be given as a matter of course in order to facilitate important proceedings in the public interest.

Many pieces of legislation around Australia have good open standing provisions which enable any person to bring proceedings to enforce legislation, such as the *EP&A Act* in NSW. However, other Acts do not contain such rights. This prevents concerned community members from commencing legal action unless they can demonstrate they have a 'special interest' in the proceedings or matter that goes beyond an 'intellectual or emotional interest', which can be a difficult threshold to satisfy.[31] Even if standing is ultimately granted, it can be an additional hurdle for plaintiffs, often requiring legal advice and argument before the court.[32]

The discussion paper cites the *EPBC Act*, among others, as a possible model for standing in the NSW context. The *EPBC Act* explicitly extends individuals' and organisations' ability to seek justice on environmental matters compared to other challenges under the *ADJR Act*. The *EPBC Act* provides that a 'person aggrieved' can apply for judicial review of decisions made under that Act or regulations. In brief, this means a person, organisation or association who:

- is an Australian citizen (or ordinarily resident in Australia), or an organisation/association established in Australia; and
- has engaged in a series of activities in Australia for protection or conservation of, or research into, the environment – within two years prior to the decision, failure or conduct in question; and
- for an organisation/association, its objects or purposes at the time of the decision (etc) included protection or conservation of, or research into, the environment.[33]

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[29] *Ogle v Strickland* (1987) (1987) 71 ALR 41; 13 FCR 306 at 322 per Wilcox J.
[30] "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.
[31] *Australian Conservation Foundation Incorporated v The Commonwealth of Australia* (1981) 146 CLR 247.
[32] For example, *Lyall Munro and Wayne Nean v Moree Shire Plains Council and Minister for Planning* (2009). Prior to this case being settled, the defendant (the Minister of Lands) mounted arguments against the plaintiffs' standing under the *Crown Lands Act 1989* (NSW). The plaintiffs were elders of the local Aboriginal community opposing development of a public recreational facility of some significance to that community, as well as being a site of local sporting history and reconciliation. See: http://www.edo.org.au/edonsw/site/casework_key_past.php#munro.
[33] *EPBC Act*, s 487. Similar tests apply to an "interested person" pursuing enforcement action under s 475.

We have consistently submitted that there is scope to broaden these provisions to protect the public interest. Indeed, as noted above, there is no compelling policy basis for restricting standing, either under federal or state environment protection legislation, applicable to judicial review litigation conducted in the public interest.

The EPBC Act's limitations were highlighted in ANEDO's 2009 submission to the Senate on access to justice:

> *The current EPBC Act standing provisions could feasibly lead to situations where genuine public interest proceedings are thwarted which is counter-productive given the objects of the Act. In light of this, ANEDO submits that standing under the EPBC Act should be open to all parties. This can be done by amending the above provisions [on standing for an 'interested person' (for enforcement action, s 475) or an 'aggrieved person' (for judicial review, s 487)] to provide that any person may apply for the relief provided in the legislation.*

As noted, many NSW statutes dealing with environment and planning issues include open standing provisions that address some of the limitations of the current federal standing provisions. In the context of this proposed reform process, the EDO supports open standing provisions; or at least, an expanded version of the ADJR Act provisions as recommended by a number of law reform commissions and inquiries across Australia.[34] To avoid doubt, any new legislation should in no way limit the existing circumstances in which open standing is currently available.

Overall, in the EDO's view, promoting open standing would reflect the reputation of NSW, and in particular the LEC, as a catalyst for environmental jurisprudence that is forward-looking and fair, and that promotes public participation in environmental planning.[35]

Creating a statutory judicial review jurisdiction[36]

As noted, the EDO believes there would be significant benefits to establishing a statutory judicial review jurisdiction in NSW, covering the Supreme Court and the LEC. For example:

- statutory rights to request a 'statement of reasons' would improve access to justice, transparency and access to information, reduce delay, and lead to more rigorous and fair decision making in the longer term;

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[34] For example, Australian LRC (Reports 27 [1985] and 78 [1996]); WA LRC (Project 95, 2002); Report to the Victorian Attorney-General's Law Reform Advisory Council (1994). See Discussion Paper, paras 8.13-8.16.

[35] See also, EDO NSW, Discussion paper on Access to Justice in the Land and Environment Court (Feb. 2008), pp 1-2, available at: www.edo.org.au/edonsw/site/pdf/subs/080218access_justice_lec.pdf.

[36] Question 6 of the Discussion Paper asked:
(a) Are there significant benefits to be gained from establishing a statutory judicial review jurisdiction in NSW?
(b) Leaving aside the question as to defining its jurisdiction, should NSW introduce a statutory code for judicial review, otherwise based on the ADJR Act model?
(c) If so, should the statutory code for judicial review adopt any of the reforms canvassed above in Part 8 (there discussed in relation to possible reforms of common law judicial review)? [see for example Q 3-4-5]
(d) Can the jurisdiction of statutory judicial review in NSW be defined so as to avoid some of the problems associated with the ADJR Act?

- enacting broader, consistent standing provisions for judicial review would not 'open the floodgates', but would remove barriers to accessibility and enable appropriate scrutiny of decisions;
- enacting a new jurisdiction for judicial review would supplement common law rights by clarifying the scope of decisions that are subject to review;
- in turn this would most usefully go beyond decisions made under an 'enactment' (the ADJR test) to include more recent developments in other jurisdictions;
- basing the NSW jurisdiction on this 'modified' ADJR model would reflect the role of judicial review to enable scrutiny of decisions that affect individuals and the wider community, whether made under legislation, subordinate law or formal published policy documents;
- the ability for courts to make 'no costs' orders in public interest litigation involving judicial review, would enable greater access to the courts for public interest litigants and give parties greater certainty about the costs of taking legal action.

Defining the scope of decisions subject to judicial review – Options 3, 4 and 5

As the Discussion Paper notes, Options 3, 4 and 5 are alternative means to define the scope of, and give effect to, a statutory model for judicial review in NSW. These options propose to define when a decision is reviewable with reference to (respectively):

- a modified ADJR Act test, that is, decisions under an enactment, and other decisions reflected in other jurisdictions' developments, such as in Queensland, Tasmania and the UK (Option 3);
- whether the rules of natural justice apply to the making of the decision (Option 4); or
- decisions made in the exercise of a public function – ostensibly to include 'the decisions of a greater range of government and non-government entities and the exercise of appropriate executive and prerogative powers' (Option 5).

Each of these options is considered below.

Option 3: Creating a NSW statutory judicial review jurisdiction – a modified ADJR Act test?[37]

As noted above, a central question for the EDO is: what forms and characteristics of judicial review will best empower the community to ensure that the actions and decisions of public authorities (ministers, departments, councils and others) are made legally, and on the basis of appropriate considerations?

The EDO believes that a new statutory framework, based on a modified ADJR Act model (Option 3), represents the best opportunity for a clear and simplified form of judicial review.

[37] Question 7 of the Discussion Paper asked:
(a) Should the jurisdiction of a NSW judicial review act be based on the ADJR Act model?
(b) Which if any of the suggested modifications to the ADJR Act jurisdiction should be adopted in the NSW legislation?

We support the view that NSW should adopt a range of the developments in judicial review across other jurisdictions, including Queensland and Tasmania that have occurred since the ADJR Act was enacted federally. A modified ADJR model would supplement the basic characteristics of judicial review under both the ADJR Act and the NSW common law.

The EDO supports a 'modified' ADJR Act test that permits judicial review of the following (with reference to para 10.22 of the Discussion Paper):

- decisions made under an enactment (the ADJR Act test), which should be defined to include decisions *given force by* (even if not *authorised* by) an enactment
- decisions by government officers and agencies exercising non-statutory prerogative or executive powers (for example, decisions related to powers exercised under a program that uses Parliament-appropriated funds – as in the Queensland Act, s 4(b), and as the Administrative Review Council recommended for ADJR Act reform)
- non-statutory decisions under formally published policy documents, such as guidelines or codes of conduct (including Department of Planning or Planning Advisory Committee policies)
- the making of subordinate legislation, such as LEPs and SEPPs (see comment under 'Exclusions by class of decision' above)
- certain decisions of the Governor (as in Queensland and Tasmania), particularly a range of justiciable decisions made under NSW planning and environment legislation (examples below[38])

Adopting an expanded list in a statutory model would bring NSW judicial review up to date with other states, further the evolution of NSW case law and jurisprudence, and allow NSW to draw on the case law and jurisprudence of other Australian jurisdictions.

Option 4: An alternative model for statutory judicial review – introducing a 'natural justice' test[39]

The EDO agrees that there may be significant disadvantages to a jurisdictional test for judicial review based solely on whether 'natural justice' applies to the decision concerned. In particular, with reference to the Discussion Paper's comments on Option 4:

- this test would set NSW on a divergent path from not only the Commonwealth, but also Queensland, ACT and Tasmania – leading to fragmentation of the law and reducing the availability of case law and other jurisprudence to draw on in judicial review matters in NSW;
- in relation to certain public interest cases – including environmental law matters taken up by representative groups – the EDO would be concerned if a 'natural

[38] For example, the making of SEPPs under the *EP&A Act 1979*; the making of Protection of Environment Policies under the *Protection of the Environment Operations Act 1997*; and orders to exempt threatened species protection under s 118B of the *National Parks and Wildlife Act 1974*.

[39] Question 8 of the Discussion Paper asked:
(a) If NSW were to create a statutory avenue for judicial review, should the test for a reviewable decision be that the rules of natural justice apply to the making of the decision?
(b) If the test for a reviewable decision is that one of the rules of natural justice applies, is this broad enough to allow (i) public interest organisations to seek review and (ii) review of actions / decisions or exercise of 'public functions' by the private sector?

justice' test operated to exclude decisions from review because they were perceived to have no individual impact.

These disadvantages seem to detract from broader goals of consistency, accountability and rigour in public decision making that underpin judicial review. Accordingly, the EDO does not favour Option 4.

Option 5: Introducing a statutory 'public function' test[40]

The EDO notes that the UK has adopted this test as part of common law rules, developing a range of criteria for what constitutes a 'public function' (see for example, Discussion Paper, para 12.14).

The Discussion Paper proposes this could be a 'third limb' to a statutory test for whether a decision is reviewable. That is, such a test could be summarised briefly as:

- a decision made under an enactment;
- a non-statutory, appropriation-related decision; or
- (the third limb) a decision in exercise of a public function, directly affecting a person's legal rights, legitimate expectations or interests.

At this stage of considerations the EDO does not, in principle, oppose a 'public function' test to supplement other aspects of a statutory judicial review model in NSW. However, this proposal may require further consideration as the model is developed – including as to whether such a test is necessary in NSW, and whether divergence from other Australian jurisdictions would be justified.

Option 6: Applying a public function test to common law judicial review?[41]

This option would follow the UK model by adding a 'public function' test to existing common law jurisdiction for judicial review in NSW. The Discussion Paper notes that this may:

- clarify that common law judicial review should apply to the exercise of 'public' functions, powers or duties, while

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[40] Question 9 of the Discussion Paper asked:
(a) Would the expansion of statutory judicial review to decisions made in the exercise of a public function appropriately clarify the range of decisions that should be subject to judicial review, including the decisions of a greater range of government and non-government entities and the exercise of appropriate executive and prerogative powers?
(b) If adopted, should a public function test be additional to the existing jurisdictional tests under the ADJR Act and the Queensland Act?
(c) If adopted, would a public function test be limited by principles of justiciability? Should the drafting of a public function test be expressly limited to decisions directly affecting legal rights, legitimate expectations or interests?

[41] Question 10 of the Discussion Paper asked:
(a) Would the application of a 'public function' test expand the scope of common law judicial review?
(b) Would the availability of judicial review for decisions made in the exercise of a public function appropriately clarify the range of decisions that should be subject to judicial review, including to a greater range of government and non-government entities?
(c) Could a statutory amendment (to the Supreme Court Act 1970 and the Land and Environment Court Act 1979) extend the provision of judicial review at common law to exercises of a public function?
(d) How else could a public function test be applied to common law judicial review?

- avoiding possible difficulties of a new statutory jurisdiction (for example, artificially limiting scope of review; inconsistency between a statutory and CL grounds for review).

As noted for Option 5, this test may require further consideration, including of how it has operated in the UK. It would also be important to avoid the other potential drawback of the 'natural justice' test at Option 4 above. That is, to ensure that any such test would not hinder the accessibility of judicial review in public interest cases, on the basis that an environmental or planning law decision did not 'directly affect a person's legal rights, legitimate expectations or interests' and therefore the test was not satisfied.

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