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Dear Chief Judge

Discussion paper on Access to Justice in the Land and Environment Court

NSW is fortunate to have a specialist court, the Land and Environment Court, to deal with land, planning and environmental law matters. The Court has since its establishment strived to enable all of those with an interest in planning and environmental law to readily access the Court.

The Environmental Defender's Office (EDO) has over 20 years experience in assisting individuals and community groups access the Court. In order to continue to strengthen access to justice in the Land and Environment Court, the EDO has drafted this discussion paper to encourage debate about access issues. The issues discussed have arisen from the work undertaken by the EDO in advising members of the community. Through our advice line we provide legal advice to a range of persons who use the Land and Environment Court, from individuals who are lodging small development applications to those concerned with the lack of Council and Government enforcement of breaches of the law, to residents and environment groups who wish to challenge Council and Government decisions.

We encourage all of those interested in the issues discussed to provide the EDO with feedback on the issues raised and reforms we have suggested.

Importance of the Land and Environment Court

The NSW Land and Environment Court has been an innovative model for environmental protection. The Court has been a matter of interest internationally, with Judges of the Land and Environment Court routinely invited to speak at International conferences.¹ The Court has also been a model for other similar Courts in Queensland and South Australia.²

Importantly, the Court has been a catalyst for emerging environmental jurisprudence. The Court has developed Australian jurisprudence on the precautionary principle and ecologically sustainable

¹ See papers of Chief Justice Preston, "Ecologically Sustainable Development in the Courts in Australia and Asia" (Wellington, New Zealand, 29 August 2006); "Role of Judiciary in promoting Sustainable Development: the Experience of Asia and the Pacific" (Kenya, 17 April 2006); Chief Justice Stein, "A Specialist Environmental Court: An Australian Experience" in Robinson and Dunkley (ed), *Public Interest Perspectives in Environmental Law*, 1995.

² Chief Justice Pearlman, "The Role and Operation of the Land and Environment Court of NSW", pg. 18 and Stein, "A Specialist Environmental Court: An Australian Experience" in Robinson and Dunkley (ed), *Public Interest Perspectives in Environmental Law*, 1995, pg. 268



development.³ Decisions of the Land and Environment Court continue to inform debate and discussion in other Courts. For example, key cases under the Commonwealth *Environmental Protection and Biodiversity Conservation Act 1999* have examined and followed Land and Environment Court cases.⁴

A key theme to the reforms that created the Court was the right of the general public to participate in the process of environmental planning.⁵ One of the great strengths of the Land and Environment Court is its powers to grant civil remedies such as injunctions and declarations in response to breaches of environmental laws. This has enabled public interest litigants to protect the environment by bringing such matters before the Court.⁶

Notwithstanding these advances noted above there remains some scope to continue to improve the quality of citizen participation in environmental decision-making.⁷

Access to Justice

As Justice Toohey (former Judge of the High Court) noted “There is little point in opening the doors to the Courts if litigants cannot afford to come in”.⁸

The Court has always efficiently dealt with cases that come before it to ensure the Court is accessible to the community. The Court has endeavoured to keep fees low in order to facilitate access to justice.⁹ It has also regularly adopted measures to allow for hearings in rural and regional areas.¹⁰ The Court also makes special efforts to assist unrepresented litigants particularly through the Court website and information sheets.

Another important factor in promoting access to justice is the availability of legal aid in public interest environmental law matters.¹¹ Although the grants are limited, without such grants many public interest environmental law matters would not proceed.

³ Chief Justice Preston, “Ecologically Sustainable Development in the Courts in Australia and Asia” (Wellington, New Zealand, 29 August 2006); Chief Justice Preston, “Judicial Implementation of the Principles of Ecologically Sustainable Development in Australia and Asia” (Sydney, NSW 21 July 2006); Chief Justice Preston, “The Role of the Judiciary in Promoting Sustainable Development: The Experience of Asia and the Pacific” (Paper presented to the second Kenya National Judicial Colloquium on Environmental Law, Mombasa, Kenya, 17-22 April 2006); Justice Biscoe “Ecologically Sustainable Development in New South Wales” (Paper delivered on 2 June 2007 at the 5th Worldwide Colloquium of the IUCN Academy of Environmental Law, Paraty, Brazil)

⁴ *Booth v Bosworth* (2001) 117 LGERA 168 cited *Drummoyne Municipality Council v Roads & Traffic Authority of NSW* [1989] NSWLEC 19; *Minister for the Environment and Heritage v Queensland Conservation Council* [2004] FCAFC 190 discussed *Kivi v Forestry Commission of New South Wales*

⁵ See Chief Justice Stein, “A Specialist Environmental Court: An Australian Experience” in Robinson and Dunkley (ed), *Public Interest Perspectives in Environmental Law*, 1995, pg. 258 who reproduced part of the Second Reading Speech.

⁶ See for example- *Corkhill v Forestry Commission of NSW (No. 2)* (1991) 73 LGERA 126, and *Brown v Environmental Protection Authority* (1992-1993) 78 LGERA 119, and *Leatch v National Parks and Wildlife Service & Shoalhaven City Council* (1993) 81 LGERA 270, and *Timbarra Protection Coalition Inc v Ross Mining NL* [1998] NSWLEC 19, and *Coalcliff Community Association v Minister for Urban Affairs and Planning No. 40047 of 1996* [1997] NSWLEC 94, and *Gray v Minister for Planning & Ors* (2006) 152 LGERA 258.

⁷ Michael Jeffery, ‘Intervenor Funding as the Key to Effective Citizen Participation in Environmental Decision-Making: Putting the People Back into the Picture’, (2002) 19 (2) *Arizona Journal of International and Comparative Law* 643, 643.

⁸ Paper of Justice Toohey delivered to National Environmental Law Conference in 1989.

⁹ Land and Environment Court of NSW, Annual Report 2006, pg. 20.

¹⁰ Land and Environment Court Annual Report 2006, Pg. 21-22.

¹¹ David Robinson, “Public Interest Environmental Law- Commentary and Analysis”, in Robinson and Dunkley (ed), *Public Interest Perspectives in Environmental Law*, 1995, pg. 310.



There is still room for improvement to access to justice in the Land and Environment Court. The main way that access could be improved is through reforms to the costs system. Similarly further improvement could be made in relation to the use of expert witnesses. These areas are discussed below.

Costs issues

Despite the number of positive factors in favour of community access to the Court, the threat of an adverse costs order is one of the greatest deterrent to litigants seeking to bring public interest proceedings.¹² Whereas the public interest litigant's own costs can usually be estimated in advance with a reasonable degree of accuracy and kept low through capped fee arrangements, the costs which will be incurred by other parties are an unknown quantity. The spectre of potentially hundreds of thousands of dollars in costs incurred by respondents will deter most public interest litigants from bringing a case in an individual capacity, even where the prospects of success are very strong.

As noted by the ALRC:

“Cost is a critical element in access to justice. It is a fundamental barrier to those wishing to pursue litigation.”¹³

The significant benefits of public interest litigation mean it should not be impeded by the costs allocation rules”.¹⁴

The risk of an adverse costs orders means that without a grant of legal aid (where an indemnity is provided by the Legal Aid Commission) few litigants will take the risk of bringing proceedings.

In NSW, we are fortunate to have a Legal Aid system which does make grants for public interest environmental law proceedings, however Legal Aid will not be available in every case, even where strong public interest grounds can be shown. In our experience, one major impediment to obtaining Legal Aid in public interest matters is that the Legal Aid Commission insists on looking behind the corporate veil and requires incorporated groups to provide details of the assets and income of their individual members in order to obtain a grant for a group. Many groups simply do not wish to subject their members to such intensive scrutiny when they have no personal benefit to gain from the litigation. Where individual litigants are concerned, many individuals on an average wage are ineligible due to the very strict means test applied by the Legal Aid Commission, and yet are understandably not willing to put all of their own income and assets on the line to fund public interest proceedings.

Public interest litigants primarily use class 1 and class 4 proceedings.

In Class 1 proceedings, the usual order is for each party to pay their own costs. However costs orders may still be made if “fair and reasonable” in the circumstances.¹⁵ Therefore, when advising

¹² Lisa Ogle, “Community Experience of the Court”, Promises, Perception, Problems and Remedies, Land and Environment Court and Environmental Law 1979-1999, Conference proceedings, pg. 26 Kirsty Ruddock, “The Bowen Basin case” in Bonyhady T & Christoff P (eds), Climate Law in Australia, MUP (forthcoming).

¹³ (ALRC 75 at [2.2]).

¹⁴ (ALRC 75 at [13.11])

¹⁵ *Land and Environment Court Rules 1979*, Part 16 Rule 4



clients on the risks of commencing proceedings, the possibility of an adverse costs orders cannot be ruled out.

Public Interest litigants also use Class 4 proceedings either to seek judicial review or undertake civil enforcement proceedings. The general rule in Class 4 proceedings is that costs follow the event. The Court has recognised in some of its judgments that public interest litigation justifies a departure from the ordinary rule as to costs.¹⁶ The application of these decisions is however limited. As far as we are aware, there has only been one case in the Land and Environment which has followed the *Oshlack* decision and made no order as to costs since the High Court upheld this decision.¹⁷ The infrequent application of the *Oshlack* decision means that, in practice, public interest litigants simply have to assume that if they are unsuccessful they will get a costs order against them. Furthermore, in a number of cases, the Court has made orders for litigants to pay security for costs.¹⁸ In most cases, this makes it difficult for public interest litigants to continue the case.

Upfront costs orders

The difficulty of the current situation is that it is impossible to estimate in advance the costs liability which may be incurred when commencing public interest proceedings. An upfront costs ruling would greatly assist public interest litigants to determine whether they were taking an acceptable risk in commencing or continuing with proceedings.

One way to address costs issues is to introduce a provision whereby each party pays its own costs in public interest proceedings. Such a system already operates in the Queensland Supreme Court. Section 49 of the *Judicial Review Act 1991* allows an applicant to make an application that each party pays its own costs.¹⁹ Usually these orders are made at the start of proceedings. Similarly, the

¹⁶ *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236, upheld in High Court in (1998) 152 ALR 83.

¹⁷ *Donnelly v Delta Gold Pty Ltd* [2002] NSWLEC 44 Bignold J at [56].

¹⁸ *Diamond and Anor v Birdon Contracting Pty Limited and Anor* [2007] NSWLEC 92, and *Gunning Sustainable Development Association Incorporated v Upper Lachlan Council and Anor* [2004] NSWLEC 603, and *Donnelly and Anor v Capricornia Prospecting Pty Ltd and Ors* [1999] NSWLEC 39

¹⁹ **Section 49 Costs--review application**

- (1) If an application (the costs application) is made to the court by a person (the relevant applicant) who--
- (a) has made a review application; or
 - (b) has been made a party to a review application under section 28; or
 - (c) is otherwise a party to a review application and is not the person whose decision, conduct, or failure to make a decision or perform a duty according to law, is the subject of the application;
- the court may make an order--
- (d) that another party to the review application indemnify the relevant applicant in relation to the costs properly incurred in the review application by the relevant applicant, on a party and party basis, from the time the costs application was made; or
 - (e) 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.
- (2) In considering the costs application, the court is to have regard to--
- (a) the financial resources of--
 - (i) the relevant applicant; or
 - (ii) any person associated with the relevant applicant who has an interest in the outcome of the proceeding; and
 - (b) 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; and
 - (c) if the relevant applicant is a person mentioned in subsection (1)(a)--whether the proceeding discloses a reasonable basis for the review application; and



Queensland Planning and Environment Court has a system whereby each party bears its own costs in the equivalent of class 1 and class 4 proceedings, unless they are found to have caused unreasonable delay or been frivolous or vexatious.²⁰

Section 49 orders have only been used in a handful of cases in Queensland because the courts have taken a strict view in interpreting what meets the public interest criteria.²¹ 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.²² 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.

Inclusion of a section 49 style provision in NSW would make significant inroads toward removing prohibitive monetary obstacles to justice through the Court. Without such a mechanism, the financial uncertainties facing potential litigants will continue to restrain the potential of the court to serve the public interest.

Limited costs orders

Order 62A r 1 of the *Federal Court Rules* enables the Federal Court to order a maximum amount of costs that can be recovered on a party party basis. It is a pre-emptive order in contrast to standard cost orders. The idea behind the order was to ensure that the costs of litigation do not deter persons of ordinary means from accessing the Court.²³ Two cases where such orders were made include:

- In *Maunchest Pty Ltd v Bickford; Noosa Hub Pty Ltd (In liquidation) and Jefferson, Drummond J* ordered that the costs be limited to a maximum of \$5,000²⁴;
- In *Woodlands v Permanent Trustee Co Ltd* a case that involved claims by persons who had obtained “Homefund” loans, Wilcox J made orders under 62A specifying \$12,500 as maximum recoverable costs against the applicants by any one respondent.²⁵

Such a provision in the Land and Environment Court could enable a broad range of people to bring legal proceedings.

Broader costs orders

A broader provision has been recommended by the ALRC in Chapter 13 of its report *Costs Shifting*²⁶. This proposal for Public Interest Costs Orders offers a comprehensive approach to

(d) if the relevant applicant is a person mentioned in subsection (1)(b) or (c)—whether the case in the review application of the relevant applicant can be supported on a reasonable basis.

(3) The court may, at any time, of its own motion or on the application of a party, having regard to—

(a) any conduct of the relevant applicant (including, if the relevant applicant is the applicant in the review application, any failure to prosecute the proceeding with due diligence); or

(b) any significant change affecting the matters mentioned in subsection (2);

revoke or vary, or suspend the operation of, an order made by it under this section.

²⁰ *Integrated Planning Act 1997 (Qld)* s.4.1.23

²¹ *South East Queensland Progress Association v Greta Dorethea Anghel & Ors* [1995] 2 Qd R 454, *Save Bell Park Group v Kennedy* [2002] QSC 174

²² *Alliance to Save Hinchinbrook Inc v Cook & Ors* [2005] QSC 355.

²³ Shulman, “Order 62A of the Federal Court Rules” *Alternative Law Journal*, vol 32:2 June 2007, pg. 75.

²⁴ [1992] FCA No NG808 of 1992

²⁵ (1995) 58 FCR 139

²⁶ Australian Law Reform Commission, *Costs Shifting: Who Pays for Litigation in Australia*, Report No 75, 1995.



addressing the difficulties with costs in public interest litigation. The ALRC recommended court's having a wide discretion in issuing a public interest costs order, to be exercised with full regard to the circumstances of and surrounding proceedings. Such orders could take the forms:

- "each party bear his or her own costs the party applying for the public interest costs order, regardless of the outcome of the proceedings, shall
 - not be liable for the other party's costs
 - only be liable to pay a specified proportion of the other party's costs
 - be able to recover all or part of his or her costs from the other party
- another person, group, body or fund, in relation to which the court or tribunal has power to make a costs order, is to pay all or part of the costs of one or more of the parties"²⁷.

Security for costs

A security for costs order usually prevents a public interest case from proceeding.²⁸ The EDO is aware that the Court has been mindful of this in examining security for costs orders.²⁹ One of the factors that the Court may take into account when determining whether to make an order for security for costs is whether the application for security is oppressive in the sense of denying an impecunious citizen or organization the right to litigate.³⁰ Community members have reported to the EDO that some Councils or developers seem to be using the threat of a security for costs order to intimidate community groups and impecunious litigants from pursuing judicial review proceedings. Obviously, up front costs order or if the applicant in the proceedings is legally assisted would assist in ensuring that security for costs becomes less of an issue.

Not requiring undertaking for damages

Many of our clients are seeking to prevent environmental damage that is occurring or about to occur. To do so it is necessary to seek an injunction often on an interlocutory basis. To obtain an interlocutory injunction it is necessary to provide an undertaking for damages. An undertaking to damages is financially prohibitive to many parties who might otherwise seek an injunction against a potential environmental damaging action in the public interest in the Land and Environment Court.³¹ Large development projects may give rise to damages in the hundreds of thousands of dollars. A failure to give such an undertaking is often fatal to seeking an interim or interlocutory injunction. Without an interlocutory injunction, litigation protecting the environment can become futile.

One way to address the issue of undertaking to damages is to contain a specific provision that prevents the Court from requiring undertakings for damages in granting an interlocutory injunction. Section 478 of the *Environment Protection and Biodiversity Act 1999* (Cth) until its recent amendment contained such a provision.³² Provisions such as section 478, do not diminish the Court's power to strike out proceedings if they are vexatious, frivolous or constitute an abuse of process. However their presence enables third parties to commence their own enforcement proceedings where Government agencies choose not to do so.

Expert costs

²⁷ (ALRC 75 at [13.22])

²⁸ *Razorback Environment Protection Society Inc v Wollondilly Council* [1999] NSWLEC 8

²⁹ *Ross v State Rail Authority of NSW* (1990) 70 LGRA 91, *Residents of Blacktown and Seven Hills Against Further Traffic Inc v RTA* (unreported Stein, 40106 of 1996).

³⁰ Beazley J in Federal Court case of *KP Cable Investments Pty Ltd v Meltglow Pty Ltd* (1995) 56 FCT 189 at 197-198).

³¹ "Flying Foxes, dams and whales: Using federal environmental laws in the public interest" September 2006, unpublished.

³² Section 478 was repealed by the *Environment and Heritage Legislation Amendment Act 2006* No.165 Sch.1 at 763.



An important aspect of balancing proceedings in the Land and Environment Court is in access to information and evidence. Ironically, the need to engage experts means the costs of bringing class 1 proceedings are sometimes more difficult for public interest litigants.³³ Community groups often attempt to engage experts at reduced or pro bono rates in order to reduce these costs. In some areas of expertise (such as planning) it is simply not possible to find experts with sufficient expertise and court experience without paying significant amounts of money for experts. Joint experts can often be costly for community groups working on a limited budget. Even for groups who obtain legal aid, the legal aid rate is usually capped quite low, which means that groups have to raise funds in order to pay experts. In contrast, developers often have extensive resources to bring to litigation and often have already engaged experts to assist with the EIS process.

In order to improve access to justice it is necessary to balance the costs and accessibility of key experts for Land and Environment Court matters. One suggestion is that expert funding could be derived through a court- or intervenor-funded system.³⁴ The 'intervenor funding model' involves the proponent funding its own opposition, with the necessary financial resources provided in advance of the hearing. The Canadian Province of Ontario adopted this innovative model during the 1990's with its *Intervenor Funding Project Act 1988* (R. S. O. 1990 c. I.13, § 16 (repealed 1996)). The Act was carefully designed to avoid any potential for abuse. Moreover, during the period for which it was operative, the amount of funding provided on a case by case basis under this regulation was estimated to be a mere 1 to 2% of the development project cost. However the step was controversial, and when a new government came into power it was repealed. The EDO considers that this is a worthy model which could be successfully implemented in the Australian context.

Expert costs could also be contained by guarding against unnecessary duplication of experts. Well-resourced developers and public authorities sometimes engage a number of experts to address one or more related issues which are capable of being addressed by a single expert. This can greatly increase the length of the hearing and the joint conferencing process, putting an unfair costs burden on public interest litigants. It is suggested that the Court should adopt a practice of only receiving evidence from one expert in each area of expertise raised by the Statement of Issues unless the parties can demonstrate why additional experts are required.

Other procedural issues

There are a number of minor procedural reforms which the EDO suggests could improve access to justice in the Land and Environment Court.

Adjournments pending Legal Aid decision

The Land and Environment Court jurisdiction is subject to strict time frames. This means that often litigants who are applying for legal aid have not received a response about their application prior to lodging the proceedings. Grants of legal aid are dependent on meetings of an independent committee and often it is not possible for a decision to be made prior to filing or even the first callover.

In some circumstances it may therefore be necessary for a party to adjourn a proceeding in order to await a decision about legal aid. Often applicants will not proceed with a hearing if they are not

³³ Lisa Ogle, "Community Experience of the Court", Promises, Perception, Problems and Remedies, Land and Environment Court and Environmental Law 1979-1999, Conference proceedings, pg. 26

³⁴ See Michael Jeffery, 'Environmental Governance: A Comparative Analysis of Public Participation and Access to Justice', (2005) 9 (2) *Journal of South Pacific Law*. URL: <<http://www.paclii.org/journals/fJSPL/vol09no2/2.shtml>>



granted legal aid. If they are able to adjourn the proceedings this will avoid the need for other parties to incur legal costs in situations where the matter may not proceed. The EDO therefore proposes that the Court adopt a procedure of allowing for an adjournment of a matter at the outset of the proceedings to await a decision on the granting of legal aid. There is a similar provision currently at section 57 of the *Legal Aid Commission Act 1979* which establishes such a right in respect of parties who have or intend to appeal a legal aid decision. EDO proposes a right to adjourn be available when awaiting a decision and also if appealing a decision.

Joinder of parties to appeal in Part 3A matters:

Recent reforms to the *Environmental Planning and Assessment Act 1979*, namely the introduction of the new Part 3A, have resulted in a winding back of the public's long-held rights to engage in and review planning decisions.³⁵

In relation to major projects, the EDO recommends that the *Land and Environment Court Act* joinder provisions be amended to allow any person to join developer merit appeals and/or objector appeals in relation to Part 3A, where it is in the public interest or interest of justice.

Section 39A of the *Land and Environment Court Act 1979* – Joinder of parties in certain appeals - should be amended to state:

On an appeal under section 75K(3), 75L, 75Q, 75W, 96 (6), 96AA (3), 96A (5), 97 or 98 of the *Environmental Planning and Assessment Act 1979*, the Court may, at any time, on the application of a person or of its own motion, order the joinder of a person as a party to the appeal if the Court is of the opinion:

- (a) that the person is able to raise an issue that should be considered in relation to the appeal but would not be likely to be sufficiently addressed if the person were not joined as a party, or
- (b) that:
 - (i) it is in the interests of justice, or
 - (ii) it is in the public interest,that the person be joined as a party to the appeal.

Electronic copies of EIS and other court documents:

The EDO has also noted administrative areas which could be reformed to assist and simplify litigation before the Court and may involve reforms to the Practice Directions and Court Rules.

One example is to ensure that less copying is required for filing applications. It would be helpful for the Court and other parties to accept electronic copies of lengthy documents. For example, in most class 1 appeals, the Environmental Impact Statement is to be filed with the application. Often this can be a lengthy document that is expensive to copy. In some cases not much of the EIS will actually be referred to in the course of the hearing. In those circumstances, it would be useful to allow the applicant to provide this document in electronic version on CD-Rom. If pages of the EIS are needed later on, the Court may simply be provided with hard copies of those pages without requiring several volumes of hard copy.

If you have any comments or feedbacks on this discussion paper please contact me on 9262 6989 or by email at kirsty.ruddock@edo.org.au. The EDO will seek to provide some suggestions for further reforms to the Government once we have received feedback on these ideas.

³⁵ For example, in relation to critical infrastructure projects, the new provisions (Part 3A) take away opportunities for community involvement with regard to the ability: to be involved pre-approval; to challenge an approval on legal grounds, to enforce the approval (such as breaches of pollution licences), to seek stop work orders, interim protection orders and notices regarding cultural heritage, threatened species and pollution, and to appeal on the merits.



Yours sincerely
Environmental Defender's Office (NSW) Ltd

Kirsty Ruddock
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Cc: Members of the Court Users Group



An independent public interest legal centre specialising in environmental law