australian network of environmental defender's offices

Submission on Senate Legal and Constitutional Affairs Committee Inquiry into Access to Justice

4 May 2009

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.

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Executive Summary

The Australian Network of Environmental Defender's Offices Inc (ANEDO) welcomes the opportunity to comment on the *Senate Legal and Constitutional Affairs Committee Inquiry into Access to Justice*.

ANEDO is a network of 9 community legal centres in each state and territory, specialising in public interest environmental law and policy. We therefore provide comment from the perspective of community legal centres (CLCs) and public interest litigants who are undertaking legal proceedings to protect the environment or to enforce breaches of environment protection legislation. It is important to note that the EDO's were created to fill an unmet community need for good quality legal advice on environmental law. This is because other community legal centres (CLC's) traditionally did not have expertise in this area. Moreover, assistance from pro bono services offered by private law firms is limited because providing pro bono advice to members of the community on environmental law matters often involves conflicts with commercial firms' traditional client base. Therefore, EDO's occupy a unique position in providing access to justice to the community on public interest environmental law issues.

Our key recommendations are:

- ANEDO submits that standing under the *Environment Protection and Biodiversity Conservation Act 1999* should be open to all parties by amending s475 to provide that any person can commence proceedings to enforce a breach of the Act. There is no evidence that liberal standing provisions lead to a flood of court actions from community members;
- There is a clear need to provide more federal funding to Community Legal Centres and other pro bono services to ensure that public interest litigants are provided with avenues to access good quality legal representation at a reduced price;
- ANEDO calls for the provision of legal aid for public interest environmental law matters on a national scale;
- the Commonwealth Test Case Fund should be extended to allow for use in public interest litigation concerning State laws;
- The risk of adverse costs orders against public interest litigants should be alleviated through the use of own costs orders, upfront costs orders and limited costs orders;
- ANEDO recommends that own costs provisions be extended throughout Australia to enable greater access to the courts for public interest litigants both on the merits and legality of decisions;
- ANEDO submits that all jurisdictions should introduce upfront costs order mechanisms to allow public interest litigants to apply to the court to determine at the outset of proceedings how the costs will fall. This will give applicants some certainty about the financial consequences of taking legal action;
- ANEDO recommends that limited costs orders should be introduced in all jurisdictions to enable courts to make limited costs orders in public interest proceedings;
- ANEDO calls for public interest costs orders as recommended by the Australian Law Reform Commission to be implemented on a national level;
- ANEDO submits that there should be a clearly defined exemption from security for costs for litigants who can demonstrate that they are taking action in the public interest;

- ANEDO calls for s478 to be re-inserted into the *EPBC Act* to provide that applicants do not need to give undertakings as to damage. On a broader level, requirements to provide undertakings as to damages should be removed from all jurisdictions;
- ANEDO recommend that the Commonwealth and State/Territory Governments should ensure adequate baseline funding for Community Legal Centres to enable them to attract and retain suitable staff, and have appropriate facilities and resources to adequately perform their function;
- ANEDO submits that greater core funding should be provided to EDO offices around Australia to enable these offices to better meet the unmet need for environmental law assistance to the community; and
- ANEDO submits that there is a clear need for law reform to ensure that public interest litigants are able to bring cases across all jurisdictions without the threat of costs orders. This will also improve the ability of Indigenous people to access the justice system in order to protect their rights.

We make comment on the following Terms of Reference.

(a) The ability of people to access legal representation
(b) The adequacy of legal aid
(c) The cost of delivering justice
(f) The adequacy of funding and resource arrangements for community legal centres; and
(g) The ability of Indigenous people to access justice.

a) The ability of people to access legal representation

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.

Standing

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 twenty years of the open standing provisions under s 123 of the *Environmental Planning and Assessment Act* 1979 (NSW), it shows that there has not been such a barrage of vexatious litigation. The former Chief Judge of the Land and Environmental Court, 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.*[1]

In similar commentary on the reality of the motivations of those that commence legal proceedings in the public interest, it was noted by Justice Murray Wilcox that:

> *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 – 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.*[2]

Moreover, the Senate Standing Committee on Environment, Communication and the Arts noted in their first report on the operation of the *Environment Protection and Biodiversity Conservation Act 1999* (*EPBC Act*), that the statistics of the Department of Environment, Water, Heritage and the Arts suggested that:

> *"there is little litigation initiated under the 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."*[3]

Thus, there is no credence to the floodgates argument and standing should not be restricted on this basis and opening standing should be given as a matter of course.

Many pieces of legislation around Australia have good open standing provisions which enable any person to bring proceedings to enforce legislation such as the *Environmental Planning and Assessment Act 1979* in NSW. However other acts do not contain such rights which 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.[4]

The *Environment Protection and Biodiversity Conservation Act 1999* provides that an "interested person" can take enforcement action under the Act. Under s 475, an interested person is defined as a person or organisation who either

(a) will be affected by the conduct of or proposed conduct, or

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[1] Cripps J "People v The Offenders", Dispute Resolution Seminar, Brisbane 6 July 1990.
[2] *Ogle v Strickland* (1987) (1987) 71 ALR 41; 13 FCR 306 at 322 per Wilcox J.
[3] "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.
[4] *Australian Conservation Foundation Incorporated v the Commonwealth of Australia* (1981) 146 CLR 247

(b) is engaged in a series of activities related to the protection or conservation of, or research into, the environment within two years to the application.

A similar standard is applied to the "aggrieved person" under s 487 for judicial review of decisions made under the *EPBC Act*. Although the provisions above extends the ability of individuals or organisations to seek justice in relation to environmental matters compared to other challenges under the *Administrative Decisions (Judicial Review) Act*, we submit that there is scope to broaden these provisions. Indeed, as above, there is no compelling policy basis for restricting standing, especially under the primary federal environment protection legislation.

The current *EPBC* 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 to provided that any person may apply for the relief provided in the legislation.

Ability to access good quality legal representation

There are very few avenues for impecunious public interest litigants to access legal representation in relation to public interest environmental matters. The EDOs around Australia are among the few public interest environmental law firms that currently exist. However, as will be discussed below, many state EDOs are under-staffed and under-resourced. Moreover, EDO's have casework guidelines in place which restrict the matters that the offices will take on. For example, EDO NSW has guidelines in place which require certain factors to be taken into consideration prior to taking on a matter on behalf of community members or groups. These include whether:

- the issue involves a real threat to the environment; or
- engagement in the issue has the capacity to result in good environmental outcomes; or
- the issue concerns the manner in which the environment is regulated, now and into the future and across all areas of government; or
- the issue raises matters regarding the interpretation and future administration of statutory provisions.

If potential clients do not fit into the above criteria, there is little chance that they will be able to acquire representation from other CLCs as they too have limited resources and little expertise in environmental law. Furthermore, most of their funding is committed to social justice issues (such as domestic violence and discrimination) that are broader than the environment. The lack of assistance available forces public interest litigants into private legal representation which is highly expensive and therefore prohibitive for many individuals and community groups. This will lead them to reconsider their position in commencing litigation if they cannot acquire pro bono assistance or lawyers who will act for reduced fees.

This identifies a clear need to provide more federal funding to CLCs to ensure that public interest litigants are provided with avenues to access good quality legal representation. One

means of addressing this is increasing legal aid funding which we address below. We discuss CLCs in detail in Term of Reference (f).

b) The adequacy of legal aid

An important component of the provision of legal aid is the accompanying indemnity that, should litigation fail, the conservation group does not have to pay the costs of the opposing parties.[5] The only jurisdiction in which State legal aid is provided for environmental litigation is NSW. In applications for legal aid to pursue environmental public interest litigation, an Environmental Law Committee recommends to the Legal Aid Commission that whether to grant legal aid based on a merits test. A means test also applies and it is strictly applied. Clients with any sources of funding or income are often excluded by the means test.

However, in NSW Legal Aid will not be available in every case, even where strong public interest grounds can be shown. In EDO NSW's 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 NSW 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.[6] Moreover, there are further limits on legal aid. It will only be provided in relation to proceedings in the Land and Environment Court, not the Supreme Court of NSW. However, despite these problems, legal aid does remain available for such matters in NSW.

No other jurisdiction provides legal aid for public interest environmental law matters which effectively prevents many groups from accessing justice and enforcing breaches to environmental protection legislation. ANEDO therefore calls for the provision of legal aid for public interest environmental law matters on a national scale.

The only other avenue for legal aid at present is a Commonwealth Test Case Fund. However, this fund has historically been difficult to access for conservation groups. Other limitations on using the fund include:

- It is limited to Commonwealth law, whereas most environmental law is State based;
- The decision as to whether a case is in the public interest rests with the Attorney-General. This poses a conflict as most forms of environmental public interest litigation under Commonwealth law would usually involve another Federal Minister or agency as the respondent.

[5] Section 47, *Legal Aid Commission Act 1979* (NSW).
[6] See EDO NSW, Discussion Paper on Access to Justice in the Land and Environment Court, 18 February 2008. Available from www.edo.org.au/edonsw. …

- There is no indemnity from adverse costs orders (although the Federal Court has granted limited costs orders in some public interest litigation and also possesses the power to make maximum costs orders[7])

ANEDO recommends that the Commonwealth Test Case Fund be extended to allow for use in public interest litigation concerning State laws and that a decision maker (similar to the role of the Legal Aid Commission of NSW) be established to oversee the grant of such funds.

(c) The cost of delivering justice

A significant barrier to access to justice in environmental law issues is the cost of justice. Indeed, ANEDO has previously observed that there are considerable costs barriers making it difficult for public interest litigants to initiate court proceedings, which limits their access to justice.[8]

There are three key costs barriers across Australia:

- adverse costs orders
- security for costs
- undertakings as to damages

We address these in turn.

Adverse costs orders

Despite the number of positive factors in favour of community access to courts such an open standing granted by many acts, the threat of an adverse costs order is one of the greatest deterrents to litigants seeking to bring public interest proceedings.[9] Indeed, whilst any litigant's own costs can be estimated in advance (in the public interest litigant's case these may involve capped fee arrangements), the costs of the other parties will be largely unknown which leaves public interest litigants in a position of uncertainty and open to a potentially large costs order which they may be unable to pay.

As Justice Toohey has observed:

There is little point in opening the door to the courts if litigants cannot afford to come in. The General rule in litigation that "costs follow the event" is in point. The fear, that if unsuccessful, of having to pay the costs of the

[7] A case in which granted limited costs is *Maunchest Pty Ltd v Bickford; Noosa Hub Pty Ltd (In liquidation) and Jefferson* [1993] FCA 318 where Drummond J order that the costs be limited to $5000; Order 62 A r 1 of the *Federal Court Rules* enables the Court to order a maximum amount of costs that can be recovered on a party-party basis.
[8] See ANEDO submission to 10 year review of the *Environment Protection and Biodiversity Conservation Act 1999* found at http://www.edo.org.au/policy/090219epbc.pdf
[9] Ogle L, "The Court Process and the Public Interest Litigant", *Promises, Perception, Problems and Remedies, Land and Environment Court and Environmental Law* 1979-1999, Conference presented by Nature Conservation Council of NSW, pg. 26. Ruddock K, "The Bowen Basin case" in *Climate Law in Australia*, Bonyhady T & Christoff P (eds), pg 184, Federation Press.

other side (often a government instrumentality or wealth private corporation), with devastating consequences to the individual or the environmental group bringing the action must inhibit the taking of cases to court. In any event, it will be factor that looms large in any consideration to initiate litigation.[10]

The ALRC has also noted that:

> *Cost is a critical element in access to justice. It is a fundamental barrier to those wishing to pursue litigation.*[11] *The significant benefits of public interest litigation mean it should not be impeded by the costs allocation rules*[12].

Some courts have indicated a willingness to depart from the usual order that costs 'follow the event'. For example, the High Court has affirmed decisions of lower courts that costs will not necessarily be awarded to the victor in public interest cases where it can be shown there are 'special circumstances' justifying a departure from the general rule.[13] However, to date, such discretion has been seldom applied and has done little to placate concerns by public interest litigants that they will have to pay for the costs of other party if they are unsuccessful.[14]

Several mechanisms have been utilised in some jurisdictions to alleviate the concerns of public interest litigants of an adverse costs order. We discuss these below.

Own Party Costs

Own party costs provisions involve each party bearing its own costs of proceedings regardless of the outcome. Most jurisdictions across Australia implement such a rule in certain circumstances either through legislation or through allowing courts the discretion to make such an order.[15] In Queensland litigants in the Planning and Environment Court bear their own costs unless they are found to have caused unreasonable delay or been frivolous or vexatious.[16] Similarly, in NSW, the Land and Environmental Court in its merits review jurisdiction applies the rule that each party is to pay their own costs except in situations where a costs order would be "fair and reasonable" in the circumstances.[17]

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[10] Toohey J, "Address to the NELA Conference" (1989) quoted in Stein P, "The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest Environmental Law" (1996) 13 Environmental Planning Law Journal 179 at 181.
[11] (ALRC 75 at [2.2]).
[12] (ALRC 75 at [13.11]).
[13] *Oshlack v Richmond River Shire Council* (1994) 82 LGERA 236, upheld in High Court in (1998) 193 CLR 72.
[14] See *Anderson on behalf of Numbahjing Clan within the Bundjalung Nation v Director-General of the Department of Environment and Climate Change* [2008] NSWLEC 299, *Donnelly v Delta Gold Pty Ltd* [2002] NSWLEC 44 at [56] per Bignold J; *Engadine Area Traffic Action Group Inc v Sutherland Shire Council (No 2)* (2004) 136 LGERA 365; *Roy Kennedy v Director-General of the Department of Environment and Conservation (No 2)* [2007] NSWLEC 271, *Blue Wedges Inc v Minister for the Environment, Heritage & the Arts* [2008] FCA 8 (15 January 2008,
[15] See *Minister for Planning v Walker* (No 2) [2008] NSWCA 334 (3 December 2008)
[16] *Integrated Planning Act* 1997 (Qld) s.4.1.23.
[17] *Land and Environment Court Rules* 2007 reg.3.7.

In Victoria, the equivalent jurisdiction is the Victorian Civil and Administrative Tribunal, which hears both merits matters and judicial review matters relating to environmental and planning law issues. Section 109 of the *Victorian Civil and Administrative Tribunal Act 1998* (Vic) says each party will bear its own costs. Costs can only be awarded against a party in exceptional circumstances, such as where the proceedings are vexatious, or there has been a failure to comply with an order of the tribunal. Similarly, the Tasmanian Resource Management and Planning Tribunal requires each party to pay its own costs, except in exceptional circumstances.[18] South Australia's Environment, Resources and Development Court is also an own costs jurisdiction, and the court only has the power to award costs in limited circumstances.[19]

None of these jurisdictions have had a significant number of public interest appeals even with the presence of these own costs provisions. Indeed, whether a litigant takes an action depends not only on costs, but on whether applicants have significant resources, time, access to experts and prospects of success.

ANEDO recommends that own costs provisions be extended throughout Australia to enable greater access to the courts for public interest litigants both on the merits and legality of decisions. This will avoid situations where public interest litigants have to face bankruptcy in order to achieve a public good for the benefit of the wider community.[20]

Upfront Costs Orders

Upfront costs orders (or similar name) involve the court determining at the outset how the costs will fall once proceedings are completed. Such orders are currently only available in Queensland under s49 of the *Judicial Review Act 1991*. Section 49 allows the court to determine (on application) that once the proceedings are complete the parties will either have to bear their own costs or pay the costs of the other side if they are unsuccessful. In considering the costs application, the court is to have regard to amongst other things, the financial resources of the applicant and:

> *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*[21]

An example of the use of this provision is the case of *Alliance to Save Hinchinbrook Inc v Cook & Ors*,[22] where an environmental group successfully sought an upfront costs order on the basis that they would not otherwise be able to afford to conduct the litigation. The court in that case made an upfront order under s49 that each party would bear their own costs after taking into account the public interest nature of the proceedings. Similarly, in the case of *Save Bell Park Group v*

[18] *Resource Management and Planning Appeal Tribunal Act 1993* (Tas), s 28.
[19] *Environment, Resources and Development Court Act 1993* (SA), s 29.
[20] See Ruddock K, "Bankruptcy – the price for seeking to protect Indigenous rights? (Editorial Commentary)" (2009) 26 Environmental Planning Law Journal 81.
[21] Section 49(2)(b), *Judicial Review Act 1991*.
[22] *Alliance to Save Hinchinbrook Inc v Cook & Ors* [2005] QSC 355.

Kennedy[23] the Court made an own costs order under s49 after finding that the public interest arguments were 'the most compelling' taking into account the fact that the applicant was an unincorporated association, had few financial resources and its members were not motivated by private interests.

ANEDO submits that all jurisdictions should introduce upfront costs order mechanisms to allow public interest litigants to apply to the court to determine how the costs will fall at the outset and seek an own costs order. This will give applicants some certainty about the financial consequences of taking legal action. Without such a mechanism, the financial uncertainties facing potential litigants will continue to restrain the potential of Australian courts to serve the public interest.

Limited Costs Orders

Limited costs orders (or maximum costs orders) involve a court determining at the outset what the quantum of costs of proceedings will be to give some certainty to both parties and to indicate to public interest litigants the extent of their likely costs liability if they are unsuccessful.

In the Federal Court, limited costs orders enable the Federal Court to order that a maximum amount of costs can be recovered on a party-party basis.[24] Several Federal Court decisions have confirmed that the court will exercise its discretion to issue a limited costs order in certain circumstances including whether the action is a 'public interest' proceeding.

In the case of *Corcoran v Virgin Blue Airlines Pty Ltd* a maximum costs order was made limiting the costs order in the case brought in relation to disability discrimination. In that case, the judge stated the following in relation to the factors that influenced his decision to make a maximum costs order:

> "*The applicants have brought the applications reasonably early in the litigation. They do not claim any personal financial reward. The claims advanced are arguable and not frivolous. There is a public interest in the subject matter of the proceedings. If an order is not made, the applicants may discontinue the litigation or, at the least, be inhibited from continuing. That position on their part has been explained in evidence and is reasonable. Mr Ferguson cannot afford to continue the litigation and Mr Corcoran is not prepared to risk his assets for a case in which he has no personal financial interest and from which he seeks no personal financial gain."*[25]

Bennett J made orders that Virgin if successful would be limited in costs recovery to $15,000 from Mr Ferguson and $35,000 for Mr Corcoran.

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[23] (2002) QSC 174.

[24] *Federal Court Rules* Order 62A r1.

[25] *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 (17 June 2008) per Bennett J at [54]

In *Bessie Mavis Woodland & Ors v Permanent Trustee Company Ltd* [1995] FCA 1388, the Federal Court made an order that a maximum costs order be made in the amount of $12,500. Factors considered in the decision were as follows:

- The proceedings were brought in the public interest and were representative proceedings. The Court found it would not be in the public interest if the applicants were forced to abandon the proceedings
- The applicants' case was reasonably arguable
- Because the proceedings were brought in the Federal Court, legal aid was not available. The Court found that the applicant's could have brought proceedings in the Supreme Court, with legal aid and that the respondents should not be put in a worse position than if the proceedings were brought in the Supreme Court. On this basis a maximum costs order was made which was the same amount as the Legal Aid indemnity.

In light of the above, ANEDO recommends that limited costs orders should be introduced in all jurisdictions to enable courts to make limited costs orders in public interest proceedings.

'Public interest' costs orders

A new category of broad costs orders, 'Public Interest Costs Provisions' has been recommended by the ALRC.[26] This proposal for Public Interest Costs Orders offers a comprehensive approach to 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*".

ANEDO supports the ALRC's recommendations and calls for public interest costs orders to be implemented on a national level.

Security for Costs

Security for costs involves litigants demonstrating at the beginning of proceedings that they will be able to pay the other sides costs in the event that they are unsuccessful. In NSW, the Land

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

and Environment Court has applied security for costs orders in a number of cases.[27] Such orders can be prohibitive in that public interest litigants are deterred from proceeding with their case or they cannot demonstrate they will be able to pay the other sides costs if unsuccessful.

Accordingly, the court is mindful of this when examining security for costs orders.[28] One of the factors considered by the Court 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 organisation the right to litigate.[29] Potential public interest litigants, such as community and residents' groups, have reported that opposing parties seem to be using the threat of a security for costs order to intimidate them from pursuing judicial review in the Land and Environment Court.

ANEDO submits that there should be a clearly defined exemption from security for costs for litigants who can demonstrate that they are taking action in the public interest across all Australia's legal systems. Currently, litigants are entirely reliant upon the discretion of the court which is uncertain and essentially prohibitive to some litigants.

Undertakings as to damages

A final barrier to public interest litigation to many of ANEDO's clients is the necessity of entering an undertaking as to damages when seeking an injunction on an interlocutory basis. Environmental public interest litigation is usually pursued in order to protect the environment from the potential harm of a development. When the failure to give such an undertaking is often fatal to seeking an interim or interlocutory injunction, further litigation can become futile.

One way to address the issue of undertakings as to damages is to contain specific provisions that prevent the Court from requiring such undertakings in granting an interlocutory injunction. Such a provision, section 478, existed in the *Environmental Protection and Biodiversity Conservation Act* prior to its amendment.

As in previous submissions, ANEDO calls for s478 to be re-inserted into the Act. On a broader level, requirements to provide undertakings as to damages should be removed from all jurisdictions. Such provisions would not diminish the Court's power to strike out vexatious or frivolous proceedings, but would allow public interest litigants to commence meaningful proceedings without the fear of financial repercussions.

(f) The adequacy of funding and resource arrangements for community legal centres

[27] *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.
[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 J, in matter 40106 of 1996).

Community Legal Centres generally

Community Legal Centres (CLCs) in general are experiencing difficulties as a direct result of inadequate levels of funding and increased demand on CLCs caused by restricted Legal Aid funding. Indeed, the Legal and Constitutional References Committee inquiry into *Legal Aid and Access to Justice* found that it was important that CLCs are properly funded to enable them to provide services that can be responsive to the community need.[30] Moreover, research conducted by the Legal Aid Commission of NSW has found that there is a significant disparity between the average salaries paid to lawyers working in the community sector (mostly paid under the Social and Community Services Awards) and lawyers working in government and private sectors.[31] There is therefore a strong argument for ensuring that wages in CLCs at least achieve some parity with the Legal Aid or Government legal sector to ensure that offices can retain qualified and experienced staff.

In light of this, the Legal and Constitutional References Committee inquiry recommended that the Commonwealth and State/Territory Governments act to ensure adequate baseline funding for CLCs to enable them to attract and retain suitable staff, and have appropriate facilities and resources to adequately perform their function.[32] ANEDO strongly support these recommendations.

EDO funding

Environmental law is of increasing importance in our community and public policy debates. The EDOs around Australia are involved in important public interest environmental law work including advice to the public, law reform, community education work and casework. This work has an important role in ensuring that the community is able to understand and access environmental laws across NSW and Australia.

While the EDOs have to date achieved a significant amount on limited resources, they need to ensure that there is a continuing basis to fund each office in order to maintain and enhance these services. Indeed, most EDOs within the Australian Network of Environmental Defender's Office (ANEDO) are seriously under-resourced. Such a situation renders it impossible to run a legal office that meets the expectations of clients and community groups. As part of a letter on behalf of the ANEDO as Chair of the EDO NSW, Murray Wilcox QC pointed out that seven of the nine EDOs are only able to employ less than three full-time lawyers.[33]

As a result, there is a high unmet legal need for environmental law assistance throughout the EDOs. For example, EDO Qld estimates that 60% of callers require more legal assistance than

[30] June 2004, pg 217.
[31] Legal Aid Commission of NSW, *Review of the NSW Community Legal Centres Funding Program Final Report*, June 2006. Mercer Human Resource Consulting report on *Remuneration Recommendations -National Association of Community Legal Centres*, October 2006.
[32] *Ibid.*
[33] Wilcox M, "Submission to the Commonwealth Attorney-General for Increased funding for Environmental Defender's Offices and ANEDO"

the basic services they can provide. Most other EDO offices similarly have often been unable to provide more than basic initial advice to many callers. They indicate a similar level of unmet need. More staff will enable each office to provide greater assistance to callers and communities.

The unmet need is best illustrated by the example of the work undertaken by the office with the most resources, the EDO NSW. For example, in community education, EDO NSW has been able to undertake 40 workshops (34 out of 40 outside metropolitan areas) in the past 2 years, EDO NSW staff have given 60 presentations, published 12 papers, and EDO NSW has organised 11 seminars in the community education area alone. In comparison, EDO Tasmania which has extremely limited resources, have been able to undertake a handful of community education workshops and presentations in the past two years. However the level of demand for EDO Tasmania's services and the environmental issues faced, suggest that there is a similar demand for such community education services as in NSW, and greater resources would go some way to meeting that demand.

In his letter, Murray Wilcox QC requested a commitment from the Commonwealth Government to ensure ongoing financial assistance sufficient to allow each EDO to employ three solicitors and 1.5 support staff. Such a commitment to financial assistance would ensure the expansion of each EDO within each State and Territory in order to meet unmet demand for legal advice and education programs concerning environmental issues. In particular, this would benefit regional areas where many of the environmental disputes originate.

(g) the ability of Indigenous people to access justice

The NSW Department of Aboriginal Affairs has emphasised the key role of Indigenous people in environmental management, and the special rights and interests of Indigenous people in relation to land and natural resources:

> *Aboriginal people have a cultural, spiritual, social and economic connection to the land and its natural resources, and have an important role in environmental management. Aboriginal people possess special knowledge, rights and interests in relation to the way that natural resources are managed and used.*[34]

Moreover, the Human Rights Committee has also observed that 'Indigenous people have a unique and profound relationship to their land which extends beyond economic interests to cultural and spiritual identity.[35] Since its establishment, ANEDO has recognised this critical role. For example, EDO NSW has as one of its goals to "empower the community to protect the environment through law" recognising among other things "the importance of indigenous involvement in protection of the environment"

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[34] www.daa.nsw.gov.au (30 April 2009).

[35] Ruddock K, "Bankruptcy – the price for seeking to protect Indigenous rights? (Editorial Commentary)" (2009) 26 Environmental Planning Law Journal 81 at 87.

The recently released Native Title Report by the Australian Human Rights Commission has identified that key environmental and legal challenges facing Indigenous people include native title, water and climate change.[36] In particular, the Report analysed the threat posed by climate change to Aboriginal and Torres Strait Islander peoples, their lands, waters and resources in Australia, as well as the maintenance of their traditional life, languages and cultures. As the Aboriginal and Torres Strait Islander Social Justice Commissioner and Race Discrimination Commissioner observed:

> *Our communities require specific support to put in place measures to adapt to climate change but we also have new opportunities, mainly through our traditional knowledge, to participate in emerging carbon markets and further mitigation efforts.*[37]

Thus, Indigenous groups are likely to require legal advice in relation to such issues as they become more pronounced.

Another key issue that clients often raise with EDO's is the protection of Indigenous heritage. In this context, ANEDO has identified that Indigenous clients generally require legal assistance in relation to:

- preventing the destruction or desecration of Indigenous cultural heritage;
- participating in land-use planning and development assessment processes;
- participating in decisions about conservation and use of natural resources;
- responding to pollution and environmental health issues; and
- obtaining access to incentives for, and information about, conservation on Indigenous land.

However, a key hindrance for Indigenous people in protecting their heritage is that they have no direct ownership over their heritage and cannot prevent its destruction. For example in NSW the Department of Environment and Climate Change has all ownership rights over Indigenous sites of cultural significance and heritage, including the right to consent to their destruction. Thus, Indigenous people who seek to prevent destruction of their cultural heritage are often left with no option but to legally challenge government consents in court or to seek injunctions preventing the destruction of important objects and place.

Given the above threats to Indigenous rights, the role of public interest litigation to protect Indigenous rights is extremely important, especially having regard to international principles that take into account "Indigenous people's… relationship to their land which extends beyond economic interests to cultural and spiritual identity".[38]

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[36] http://www.humanrights.gov.au/social_justice/nt_report/ntreport08/

[37] *Ibid.*

[38] Human Rights Committee, "Promoting Economic and Social Development through Native Title" (2004) 2 (28) *Land Rights, Laws: Issues of Native Title* 1 at 4; International Covenant on Civil and Political Rights, opened for signature 16 December 1966, 999 UNTS 171 (entered into force generally 23 March 1976, for Australia 13 August 1980).

ANEDO submits that in light of the above, there is a clear need for Aboriginal people to have access to good quality legal representation to ensure that their rights are protected, especially as there are emerging threats to these rights such as climate change and amendments to native title laws. However, Indigenous people face a lot of the same barriers facing public interest litigants which has been discussed throughout this submission.

Indeed, fundamental to the ability of Indigenous people to access justice is the issue of costs, in particular the threat of an adverse costs order with Indigenous people forced to risk potential bankruptcy in taking cases to protect their heritage. Further law reform is needed to ensure that Indigenous people have access to the courts in relation to environmental disputes and issues relating to the protection of Indigenous cultural heritage. [39] As pointed out earlier in this submission, various mechanisms can be utilised to encourage public interest litigants – including Indigenous litigants – to commence proceedings when they would otherwise be prohibited from doing so by the prospects of an adverse costs order being made against them if unsuccessful.

Thus, we submit that there is a clear need for law reform to ensure that public interest litigants are able to bring cases across all jurisdictions. This will also improve the ability of Indigenous people to access the justice system in order to protect their heritage.

** For more information on this submission please contact Robert.ghanem@edo.org.au*

[39] Ruddock K, "Bankruptcy – the price for seeking to protect Indigenous rights? (Editorial Commentary)" (2009) 26 Environmental Planning Law Journal 81 at 87.