australian network of environmental defender's offices

Submission to the Inquiry into the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009

14 August 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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Introduction

The Australian Network of Environmental Defender's Offices (ANEDO) welcomes the opportunity to comment on the Access to Justice (Civil Litigation Reforms) Bill 2009. 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 on the Bill 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. ANEDO has commented extensively on public interest environmental litigation in the past.[1]

ANEDO strongly supports any measures that enhance access to justice for all members of the Australian community. An appropriate case management framework is an important component of this and we therefore support the Bill in this respect. However, ANEDO has two significant concerns with the Bill.

First, ANEDO is concerned that the Bill is too narrowly focussed on potential 'efficiency gains' within the Federal court system, at the expense of addressing substantive barriers to access to justice. For example, the proposed reforms may help reduce the cost and duration of a trial but for many applicants even a one day trial in Federal court would be beyond their resources. This situation is exacerbated by the existing 'loser pays' costs rule, which is a general rule of litigation whereby the unsuccessful party must pay the costs of the successful party. As such, much potential litigation is never brought, regardless of its merits, because litigants are unwilling to bear the significant costs risks involved if they are unsuccessful. Such substantive obstacles should therefore be the focus of the Bill.

Secondly, the Bill fails to address the specific issues surrounding 'public interest' litigation. There seems to be an implicit assumption in the Bill that all litigation is conducted for private purposes. As the name implies, 'public interest' litigation is litigation that benefits the broader community, rather than the litigant personally. It can do so in many ways, including clarifying a point of law of broad application, enforcing the rule of law or preserving the environment.

The impediments facing public interest litigants are apparent in the area of public interest environmental litigation. Typically, environmental litigation is commenced by a person or group with limited resources and no private interest in the subject matter of the litigation, the litigation is opposed by well-resourced defendants (such as government entities or developers) and, in the Federal context, it is conducted through the *Administrative Decisions (Judicial Review) Act* where the remedy will be a declaration or a prerogative writ, and the public interest applicants are subject to potential security for costs orders and a large bill if unsuccessful. These features make environmental litigation financially unrewarding at best and ruinously expensive at worst. Moreover, the lack of

[1] For example, ANEDO made a submission to the Senate Legal and Constitutional Affairs References Committee on 4 May 2009. In addition, our member offices have been involved in campaigning for access to justice in their respective jurisdictions. For example, in February 2008, EDO (NSW) published a discussion paper on access to justice in the NSW Land Environment Court. EDO (Vic) made submissions on access to justice to the Victorian Law Reform Commission's Civil Justice Review.

financial benefits also deters litigation funders such as Legal Aid from becoming involved in the sector. As such, access to environmental justice is particularly difficult to obtain.

At the same time, the need for environmental justice has never been greater with Australia facing increasing environmental pressures.[2] The community is becoming increasingly concerned about the cumulative impact of development on the Australian environment especially in an age of increasing climate change and declining biodiversity. EDO offices around Australia have to turn away many worthy requests for assistance each year, simply due to a lack of resources and the absence of strong public costs order provisions. ANEDO believes that a case management regime, such as that created by proposed Pt VB of the Bill, must therefore recognise and allow for the existence of public interest litigation.

In a broader sense, addressing the substantive problem of access to justice, both for public interest litigants and more generally, requires a whole of government response, including tackling not only formal barriers (such as narrow standing provisions), but also practical barriers, such as costs rules, legal aid assistance and funding to community legal centres. Thus, in terms of access to justice, this Bill is a step in the right direction, but it is only an incremental step.

Key Recommendations:
Our key recommendations are:

- Section 37M(2)(e) should be amended to make express reference to the financial position of the parties as a relevant factor for the court;

- Section 37M(2) should be amended to include an objective of ensuring that all parties before the Court are able to conduct their cases on an equal footing;

- Section 37P(4) and s53A(1) should be amended to require the Federal Court to consider the public interest nature of proceedings, including the impediments above, before making an order for arbitration or mediation;

- Section 43 should be amended to allow litigants to apply for a ruling as to whether the proceedings are public interest proceedings at any time during the case, and expressly require judges to make an appropriate public interest costs order in those cases.

- Section 56 of the *Federal Court of Australia Act 1976* should be amended to create a presumption against security for costs in public interest matters.

ANEDO would be happy to give evidence before the Committee, if that would assist the Committee in making its recommendations.

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[2] See, for example, 2006 Australian State of the Environment Committee, *Australia State of the Environment Report 2006* (2006), available at <http://www.environment.gov.au/soe/2006/index.html> on 10 August 2009 . See also various State and Territory State of the Environment Reports, available at <http://www.environment.gov.au/soe/index.html> on 10 August 2009.

We provide specific comment on the following aspects of the Bill:

Schedule 1 – Case Management

Schedule 2 – Jurisdiction and Appeals

Schedule 1 – Case Management

The bulk of Schedule 1 is taken up with establishing a case management framework for litigation in the Federal Court. In order to do so, it creates an 'overarching purpose' and various procedural mechanisms aimed at giving effect to that purpose. ANEDO is generally supportive of individual case management approaches, which have the potential to produce better outcomes through enhanced flexibility. Nonetheless, ANEDO has concerns about the implementation of the framework.

Two comparable case management regimes exist in NSW and the UK. The first is that created by the *Civil Procedure Act 2005* (NSW) (NSW *CPA*). The second is the *Civil Procedure Rules* (UK) (UK *CPR*). Like the Bill, both create a goal and then clarify what is meant by that goal. The phrasing varies, but the intent is essentially the same: to facilitate the just resolution of disputes in a timely fashion. We shall refer to these comparable regimes where relevant.

Section 37M - The Overarching Purpose

Section 37M, as currently drafted, is not responsive to the needs of less well resourced litigants, limiting the Bill's capacity to improve access to justice. Section 37M(2) sets out, non-exhaustively, a number of objectives which underlie the overarching purpose. These are:

> *(a) the just determination of all proceedings before the Court;*
> *(b) the efficient use of the judicial and administrative resources available for the purposes of the Court;*
> *(c) the efficient disposal of the Court's overall caseload;*
> *(d) the disposal of all proceedings in a timely manner;*
> *(e) the resolution of disputes at a cost that is proportionate to the importance and complexity of the matters in dispute.*

ANEDO is concerned that, in contrast to the regimes in NSW and the UK, these objectives do not require the court to have regard to the financial resources of the parties and/or any imbalance between them. For example, in the UK, rule 1.1(2)(c) of the CPR is equivalent to s 37M(2)(e). It provides that dealing with a case 'justly' includes:

> *(c) dealing with the case in ways which are proportionate –*
> *(i). to the amount of money involved;*
> *(ii). to the importance of the case;*
> *(iii). to the complexity of the issues; and*
> *(iv). to the financial position of each party;*

In contrast to 37M(2)(e), r 1.1(2)(c) requires the court to take into account the resources of the parties when making directions about case management. Similarly, s 57(1)(d) of the NSW CPA has as an objective 'the timely disposal of the proceedings, and all other

proceedings in the court, at a cost affordable by the respective parties.' This is eminently sensible. A direction that is appropriate in litigation between two well-resourced corporate parties may be entirely inappropriate where one of the parties is an individual, small business or a small NGO, even where the matters are of similar importance and complexity. The Bill should be amended to make clear that the financial positions of the parties to the litigation are a relevant consideration in deciding what case management directions should be made.

Hence, we recommend that section 37M(2)(e) should be amended to make express reference to the financial position of the parties as a relevant factor.

A related point is that the Bill does not deal with the principle of 'equality of arms', a well recognised aspect of the right to a fair trial.[3] A well resourced party has the capacity to conduct its case in a way that, whilst not formally abusive, takes advantage of its relative financial superiority to gain an advantage not open to its opponent. For example, a developer might call a large number of expert witnesses to testify about the environmental impact of its proposals, knowing that the plaintiff will be hard pressed to afford one. Much of this evidence will go uncontested, not because it is incontestable, but because the plaintiff is not able to afford the experts who could contest it. The Courts should be alive to this possibility and try to minimise its occurrence. Again, this is provided for in the UK CPR, where r 1.1(a) provides dealing with a case 'justly' includes 'ensuring that the parties are on an equal footing'. A similar provision should be inserted in s 37M(2) to make express reference to the objective of ensuring that the parties are placed on an equal footing. This might be done by including an objective of ensuring that the all parties before the Court are able to conduct their cases on an equal footing.

Section 37N

ANEDO understands the importance of these provisions of the case management framework created by the Bill. ANEDO is generally supportive of these provisions, provided that they are interpreted in a way that recognises the distinct character of public interest litigation as opposed to private litigation.

Section 37P - Mediation orders

ANEDO has some concerns about the ability of the Federal Court to order that mediation take place to resolve issues between parties under s37P(4). We submit that this power should be accompanied by specific considerations that the Court must take into account before making such an order.

Compulsory alternative dispute resolution (ADR) may be appropriate in private litigation, because the parties both have a financial interest in achieving their desired outcome at the lowest cost possible and this provides an incentive to negotiate. By contrast, ADR is likely to be less successful in public interest litigation, because the plaintiff will often have no private interest in the litigation and the defendant may be unwilling or unable to give

[3] See, e.g., Mark Janis, Richard Kay and Anthony Bradley, *European Human Rights Law* (2008), 792; Alex Conte, Scott Davidson and Richard Burchill, *Defining Civil and Political Rights: The Jurisprudence of the United Nations Human Rights Committee* (2004), 122; Joseph Jacob, *Civil Justice in the Age of Human Rights* (2007), 105.

the remedy that the plaintiff seeks. In such cases, compulsory ADR is likely to merely add to the time and expense of proceedings which would already be prohibitive for many public interest clients.

Also, as referred to above, there is often a significant power imbalance between public interest litigants and Ministers, government agencies and developers. Moreover, a negotiated outcome may rob the litigation of its public interest character, because it means that the litigation does not clarify the operation of a particular law or ensure that the rule of law is upheld.

Hence, Section 37P(4) and s53A(1) should be amended to require the Federal Court to consider the public interest nature of proceedings, including the impediments above, before making an order for arbitration or mediation under s37P(4).

Section 43 – Costs

As ANEDO has highlighted on numerous occasions,[4] costs are the major barrier to public interest environmental litigation in Australia and in other common law countries that apply the rule that 'costs follow the event' (i.e. the successful party's legal fees are paid by the unsuccessful party).

The problem with this rule is that it produces a significant amount of uncertainty about who will ultimately pay the costs of the legal action and in what amount. Given the high cost of litigating in the Federal Courts, especially against well resourced corporations like developers and government agencies, this uncertainty has a significant deterrent effect, because, whilst 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, even where the prospects of success are very strong.[5]

This point is well illustrated by the 'Bowen Basin' case (*Wildlife Preservation Society of Queensland Proserpine / Whitsunday Branch Inc. v Minister for the Environment and Heritage*)[6] which is instructive in terms of the risks faced by persons or groups engaging in public interest litigation. There, the plaintiff, Wildlife Whitsunday, a local environmental NGO, obtained a fee waiver from the Federal Court and received *pro bono* legal assistance from the Environmental Defender's Office of North Queensland and two barristers, Stephen Keim SC and Chris McGrath.

Whilst the plaintiff initially sued only the Minister for the Environment and Heritage, two coal mining companies, both represented by major commercial law firms, sought to be joined to the action. The plaintiff did not oppose joinder, but asked the judge to order that they would not have to pay the mining companies' costs. The judge refused to

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[4] See, e.g, ANEDO's submission to Senate Legal and Constitutional Affairs References Committee on 4 May 2009 which can be accessed at <www.edo.org.au/policy/090504access_justice.pdf> on 10 August 2009.

[5] See, among others, Australian Law Reform Commission, *Cost shifting – who pays for litigation*, Report 75 (1995)

[6] (2006) 232 ALR 510.

make the order. Ultimately, the plaintiff was unsuccessful and was ordered to pay in excess of $300,000 in costs.[7] Approximately $200,000 of those costs resulted from the involvement of the mining companies.[8] As such, the bulk of the costs actually came from the voluntary involvement of two defendants, neither of whom Wildlife Whitsunday sued in the first place.

As a result of the failed legal action, Wildlife Whitsunday had to be wound up and the Whitsunday region no longer has a local environmental NGO to defend it.[9] More recently, Senator Bob Brown faced potential eviction from the Senate on the basis of unpaid legal costs associated with his public interest challenge to the Tasmanian Regional Forestry agreement.[10]

In any event, a number of jurisdictions have now recognised the benefits that arise from public interest litigation and have adjusted their costs rules to facilitate such litigation. See the decision of the High Court in *Oshlack v Richmond River Council*,[11] Order 62A of the *Federal Court Rules*,[12] s 49 of the *Judicial Review Act 1991* (Qld).[13] Recently, the NSW Land and Environment Court has also changed its rules to recognise the special character of public interest litigation.[14] Canada[15] and the UK,[16] which also apply the 'costs follow the event' rule, have also taken innovative approaches.

However, as far as we are aware the Federal Court has only followed *Oshlack* in one environmental case, *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts*,[17] and therefore there is a pressing need for reform to ensure public interest environmental litigation is not stifled by costs orders.

The proposed s 43(3) is intended to codify the existing powers of trial judges as they are likely to already have the power to make such orders. However, this power has rarely been exercised[18] and, where it has been applied, does not seem to have been applied to make an order more favourable than a 'no costs' order (where neither side is required to

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[7] See Kirsty Ruddock, 'The Bowen Basin Coal Mine Case' in Tim Bonyhady and Peter Christoff, *Climate Law in Australia* (2007), 173, 185.
[8] Ibid, 184.
[9] Ibid, 185.
[10] See *Brown v Forestry Tasmania (No 4)* [2006] FCA 1729; *Forestry Tasmania v Brown* [2007] FCAFC 186; and *Brown v Forestry Tasmania* [2008] HCATrans 202.
[11] *Oshlack v Richmond River Council* (1998) 193 CLR 72.
[12] O62A has been applied in ten cases, including some public interest cases. See, e.g., *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864 (concerning disability discrimination). We are not aware of it being applied in environmental cases.
[13] See the decisions of the Queensland Court of Appeal in *Commissioner of Police Service v Cornack* [2004] 1 Qd R 627, 641 – 2 and *Cairns Port Authority v Albeitz* [1995] 2 Qd R 470, 476. An example of the application of s 49 in an environmental case is *Alliance to Save Hinchinbrook Inc v Cook & Ors* [2005] QSC 355, run by EDO North Queensland.
[14] See r 4.2 of the *Land and Environment Court Rules 2007* (NSW).
[15] See *British Columbia (Minister for Forests) v Okanagan Indian Band* [2003] SCC 71.
[16] See *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600. In the context of public interest environmental litigation and the importance of access to environmental justice, see *R (on the application of Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2009] C.P. Rep 8.
[17] (2008) 254 ALR 584
[18] See Chris McGrath, 'Flying Foxes, Dams and Whales: Using Federal Environment Law in the Public Interest' (2008) 25 *Environment and Planning Law Journal* 324, fn 60 and associated text.

pay the other's costs).[19] The infrequent application of such an order means that, in practice, public interest litigants simply have to assume that if they are unsuccessful they will get a costs order against them.

Hence, although the proposed subsection is a useful step which we support, there needs to be recognition that a general power to make such orders has been rarely exercised by the courts in favour of public interest applicants. Therefore, the Bill must go further, and expressly authorise the making of public interest costs orders, i.e. orders that recognise the public interest nature of a particular case, and, on that basis, make an order for costs other than 'costs follow the event'. As the English Working Group on Access to Environmental Justice has stated, a no costs order may be adequate where the NGO or individual involved is wealthy enough to bear the cost of litigation themselves, but will often be of limited assistance to poorly resourced plaintiffs.[20] Some sort of statutory authorisation for public interest costs orders is desirable, because, by providing clear authority for the making of such orders, it would encourage judges to make public interest costs orders in appropriate cases, rather than just in cases where there is a novel question of general importance.[21]

A new category of broad costs orders, 'Public Interest Costs Provisions', has been recommended by the ALRC which ANEDO supports.[22] This proposal for Public Interest Costs Orders offers a comprehensive approach to addressing the difficulties with costs in public interest litigation. The ALRC recommended courts having a wide discretion in issuing a public interest costs order, to be exercised with full regard to the circumstances of and surrounding proceedings.

Proposed reform

An useful option for mitigating the uncertainty associated with the current approach to costs would be to create a statutory mechanism allowing litigants to apply at the commencement of proceedings for a declaration that their proceedings are 'public interest proceedings' and to receive a corresponding public interests costs order. An 'upfront' costs order of this kind enables litigants to make an informed decision about whether to proceed with a particular piece of litigation. This kind of approach is taken in the UK, where a party seeking a 'protective costs order' can apply on the documents

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[19] In public interest cases where O62A is not used, the Federal Court has tended either to make a 'no costs' order (see e.g., *Ruddock v Vardalis* (2001) 115 FCR 229 and *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* (2008) 254 ALR 584) or an order that the unsuccessful public interest litigant is liable for only a proportion of the other party's costs. (see, e.g., *Margarula v Minister For Environment* [1999] FCA 730, where the Court ordered the Applicant to pay two thirds of the Minister's costs, and *Wilderness Society Inc v Malcolm Turnbull, Minister for Environment and Water Resources* [2008]FCAFC 19, where The Wilderness Society was ordered to pay 70% of the Minister's costs and 40% of Gunns' costs). Either order may be beyond the means of any public interest litigant.

[20] Working Group on Access to Environmental Justice, *Ensuring Access to Environmental Justice in England and Wales* (2008), 42.

[21] See, for example, *Your Water Your Say Inc v Minister for Environment, Heritage and the Arts (no.2)* [2008] FCA 900, *Save the Ridge Inc. v Commonwealth of Australia* [2005] FCA 157, *Lawyers for Forests Inc. v Minister for Environment, Heritage and the Arts (No 2)* [2009] FCA 466. In each case, the Court declined to make a public interest costs order.

[22] Australian Law Reform Commission, *Costs Shifting - who Pays for Litigation in Australia*, Report No 75 (1995).

commencing the judicial review application.[23] Order 62A of the Federal Court Rules does not require a party to apply at the commencement of proceedings, but does allow for applications to be made at any stage of proceedings, meaning that parties are able to obtain a ruling early on which clarifies their potential exposure.

Whilst the power to make costs orders prior to the resolution of the dispute already exists,[24] and will be reinforced by the Bill, judges appear reluctant to exercise it. As mentioned above, the trial judge in the Bowen Basin case refused to make an order shielding the plaintiff from the costs of the two mining companies who had themselves joined to the action. In his decision, his Honour ruled that 'the question of costs is best addressed after the case has been determined.'[25] As such, it would be desirable to expressly provide a statutory mechanism for the making of upfront costs orders.

Recommendation for costs provision

ANEDO therefore submits that additional sub-sections to section 43 should be inserted, defining what a 'public interest proceeding' is and expressly requiring judges to make public interest costs orders in public interest proceedings.

A two step process could be adopted consisting of the following:

- A mechanism permitting applicants to apply to the court for a decision on whether their proceedings are 'public interest proceedings' at any stage of those proceedings;
- If proceedings are declared to be public interest proceedings, then the court hearing the application cannot order that costs follow the event. Instead, it must make some form of public interest costs order (i.e. a 'no costs' order, a capped costs order, a one-way cost shifting order or an indemnity). This order must be made at the same time as the ruling on whether proceedings are public interest proceedings.

Instead of setting out the factors a Court must take into account in determining public interest costs (as is done in s 49(2) of the *Judicial Review Act 1991* (Qld)) the Bill could be amended to create the statutory concept of 'public interest proceedings' in section 43 which could be defined along these lines:

> *'public interest proceeding' means a proceeding concerning a matter within the jurisdiction of the Court that is instituted by a person or persons whose predominant purpose is to advance or protect a perceived interest, including a non-financial interest, of members of the public generally or a significant segment of the public. A proceeding does not fail to be a public interest proceeding simply because the applicant or applicants, or some of them, share the public interest benefit in greater or lesser degree.*

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[23] *R (Corner House Research) v Secretary of State for Trade and Industry* [2005] 1 WLR 2600; *R (on the application of Buglife: The Invertebrate Conservation Trust) v Thurrock Thames Gateway Development Corp* [2009] C.P. Rep 8.

[24] See Order 62, rule 3 of the *Federal Court Rules*.

[25] *Wildlife Preservation Society of Queensland v Minister for Environment and Heritage* [2005] FACE 1219, [2].

Allowing litigants to apply for a ruling as to whether their proceeding is a public interest proceeding would make it possible for litigants to know if they were at risk of exposure to the other party's costs and to make an informed decision about whether to proceed with the litigation. Given that an applicant can control their own costs, knowing the extent of their potential exposure should make it possible to make a rational decision about whether to proceed with the litigation. Similar considerations apply to respondents. An order specifying the applicant's potential liability will enable respondents to make a decision about what resources to devote to a particular matter. By requiring the making of a public interest costs order, a public interest litigant would, at a minimum, have the certainty of having their costs liability capped. This again makes it much easier for public interest litigants to make an informed decision about how they wish to proceed. By allowing for the making of any kind of public interest costs order, it also enables the court to tailor the order to the degree of public interest in the case, potentially expanding the class of cases in which public interest costs orders will be made.

Schedule 2 – Jurisdiction and Appeals

Schedule 2 attempts to streamline and rationalise the system of appeals from some interlocutory within the Federal Court. Whilst ANEDO is not opposed to most of the proposed amendments, we are concerned by the proposal to remove the right to appeal against decisions to require security for costs. As mentioned, many environmental litigants are poorly resourced and rely on ongoing fund raising to be able to continue their court cases. A successful application for security for costs may have the effect of forcing a party to discontinue their action, simply because they do not have access to the necessary funds at the time that the order is made. In the absence of a right of appeal, such decisions could act as a significant barrier to environmental litigation, and indeed any public interest litigation.

We suggest that there should be a presumption against granting an order for security for costs in public interest litigation. ANEDO therefore recommends that a new sub-section should be inserted in s 56 of the Federal Court of Australia Act creating a presumption against security for costs in public interest matters.