Australian Network of Environmental Defender's Offices Inc

Submission to the Productivity Commission on Access to Justice Arrangements

November 2013

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

ANEDO welcomes the opportunity to assist the Productivity Commission in its inquiry into access to justice in Australia. In light of our mandate and experience, we are well placed to comment on barriers to justice in relation to public interest environmental law. Drawing on this experience, our submission will focus on seven core areas, with examples drawn from the Federal jurisdiction, New South Wales (**NSW**), Victoria, Tasmania, the Northern Territory (**NT)**, Western Australia (**WA**) and the Australian Capital Territory (**ACT**). These seven areas are:

1. **Role of environmental laws and ANEDO in ensuring access to justice**
2. **Standing – judicial review**
3. **Standing – merits review**
4. **Specialist courts**
5. **Costs**
6. **Photocopying costs – discovery and subpoenas**
7. **Freedom of information legislation.**

Our recommendations in relation to these seven areas are as follows:

Standing – judicial review

1. *Environmental and planning legislation in all Australian jurisdictions should provide for open standing for enforcement and judicial review proceedings where not already permitted.*

2. *All Federal environmental legislation should provide for third party enforcement. Enforcement provisions should be modelled on a slightly broadened version of s. 487 of the EPBC Act so that applicants need only demonstrate an ongoing interest in the issue at hand.*

3. *All Federal environmental legislation should provide for third party appeal rights with respect to environmental decision-making involving: development or activities capable of having a not insignificant impact on communities or the environment; management or zoning plans which will determine permissible activities within a given area; and environment plans for high impact activities such as offshore petroleum exploration and production.*

4. *Where necessary, amend Federal environmental legislation to include specific criteria which the relevant decision maker must 'act consistently with'.*

5. *Amend the NSW Water Management Act to provide for a Register of Approvals which provides users with a range of search options, including an option to search for all approvals issued in a particular valley between dates specified by the user.*

6. *Amend the NSW Water Management Act to provide for the creation of a central register of decisions to grant new licences and to approve licence transfers. The central register must provide users with a range of search options, including an option to search for all licences issued or transferred in a particular valley between dates specified by the user.*

Standing – merits

1. *ANEDO supports the inclusion of merits appeal rights in environmental legislation, particularly in respect of development likely to have a significant impact on the community and environment.*

2. *The EPBC Act should be amended to provide for third party merits review rights in respect of decisions to approve controlled actions.*

Costs

1. *To reduce costs barriers to access to justice, the preferred position would be that parties generally pay their 'own costs' in merits review, judicial review and third party enforcement proceedings. (Alternative options to promote access to justice follow.)*

2. *Relevant rules in each jurisdiction should be amended to provide for public interest litigants to be exempted from security for costs.*

3. *Relevant rules in each jurisdiction should be amended to provide that unsuccessful public interest litigants be exempted from paying costs.*

4. *Relevant rules in each jurisdiction should include criteria to determine whether a matter may be properly classified as one that is in the public interest.*

Specialist courts

1. *Specialist environmental courts should be constituted in those jurisdictions lacking such a court.*

2. *Existing and new specialist environmental courts should be modelled on the NSW Land and Environment Court (LEC). That is, they should be constituted as superior courts of record. They should also provide for the appointment of both judges and commissioners with particular expertise in environment and planning matters.*

Photocopying costs - discovery and subpoenas

1. *Rules in all jurisdictions should be amended to provide courts with discretion to either waive or cap photocopying fees for discovery and subpoenaed documents held by government departments where the applicant is a public interest litigant. Caps should be commensurate with the litigant's means.*

2. *Rules should be amended to provide for 'e-discovery', thereby significantly reducing the cost of discovery for all parties.*

Freedom of information legislation

1. *FOI legislation in every jurisdiction should be amended to require agencies to determine access applications in no more than 15 working days.*

2. *FOI legislation in every jurisdiction should be amended to include specific timeframes within which reviews must be completed. A reasonable period would be 10 working days for internal review, and 28 working days for a review conducted by the Information Commissioner (or equivalent).*

3. *FOI legislation in every jurisdiction should be amended to require agencies to provide a minimum discount of 50% to applicants acting in the public interest, or in the alternative to waive fees where the applicant is acting in the public interest.*

4. *The Copyright Act should be amended to exclude all documents submitted by a proponent to a government agency for the purposes of determining a development application (including, but not limited to, environmental impact statements).*

1. Role of environmental laws and ANEDO in ensuring access to justice

Environmental laws are important to access to justice, including because they can help to address social disadvantage and fairness in our legal system.[1] Environmental problems can have a profound effect on a local community, or the wider public, as well as individuals. In appropriate cases, EDOs may therefore represent community groups or individuals seeking access to justice.

Often, environmental issues disproportionately affect members of marginalised or lower socio-economic groups who are exposed to inappropriate developments which lower air quality, water quality or the amenity of an area. This may have flow-on effects leading to ill-health, reduced land values, disadvantage and disempowerment. For example, environmental laws can play a crucial role in assisting Aboriginal Australians to protect their cultural heritage.

Overall, environmental laws can ensure that all Australians have equal rights to a healthy environment, liveable communities and protected heritage; and ensure that businesses and government agencies have a legal responsibility to protect our environment and conserve natural resources.

As the only public interest environmental lawyers in Australia, access to environmental justice ultimately depends upon our continued capacity to deliver a range of specialist legal services to the community. This in turn requires long-term, secure funding for each of our nine offices.

Each EDO office provides the community with free advice and representation, educational materials and outreach services. Our offices are also committed to working with governments to improve environmental laws, writing submissions in response to public inquiries and providing advice on expert panels and stakeholder reference groups.

Our client base is diverse and includes residents' groups, farmers, Aboriginal elders, conservation groups and concerned individuals. Unlike proponent-developers (who are typically well resourced), many of our clients lack the means to hire a private solicitor, and lack an understanding of or experience with the legal system; depending entirely on our services for advice and where necessary, access to courts and tribunals.

Indeed, high demand for our services across urban and regional Australia highlights the importance and relevance of our work. For example, in 2012-13, EDO NSW provided 1200 free initial telephone advices and over 190 detailed written advices about environment and planning law matters. Similarly, EDO Victoria provided 249 advices (telephone and written) over the same period.

This demand is further reflected in our outreach work, with EDO offices delivering a significant number of workshops and seminars across Australia about specific areas of environmental law, including native vegetation, marine parks, contaminated land, water management, planning law, mining, agricultural land, and Aboriginal cultural heritage.

Our casework services also provide the community with an opportunity to enforce the law and to protect areas of environmental and agricultural significance. All of our cases are carefully chosen after seeking additional advice from counsel regarding prospects, and are recognised for their contribution to public interest environmental jurisprudence at a Federal, State and Territory level.

By way of extension, it is widely recognised that EDO offices contribute to the overall efficiency of the court system by only litigating in exceptional circumstances, and by managing what are often complex matters in a highly professional manner. An important part of this process is counselling the vast majority of our clients against litigation, thereby reducing court lists and the overall cost to the community of litigation.

In a 2010 paper entitled 'Unrepresented Litigants in the Land and Environment Court of New South Wales',[2] Neil Williams SC reinforced this point, stating:

> *I do not have the necessary information to undertake a costing, but on any view, if the New South Wales Government were to substantially increase the funding of the Environmental Defender's Office, while at the same time sponsoring an amendment to s 63 of the [Land and Environment Court] Act to remove the agent's right to appearance, compliance with environmental law would be improved (through identification of issues by practitioners with the necessary training and skills to pick a good point from a bad one), and the costs saving to the community would be enormous.*
>
> *No doubt some would characterise this as a lawyer's grab for more work, but such a characterisation is misconceived. The capacity of an agent to appear presently generates a very substantial amount of work in terms of numbers of days in Court, and volume of (otherwise unnecessary) preparation undertaken to deal with unmeritorious points that a skilled practitioner simply would not run. The EDO, conversely, conducts very lean, time-efficient cases which it prepares on a shoestring. It is reasonably obvious which is more effective.*

The following cases provide some insight into the scope and nature of our casework, in particular the manner in which we assist members of the community to preserve their local environment.

Case study: EDO Tasmania – preventing loss of agricultural land[3]

EDO Tasmania represented a local resident in rural northwest Tasmania who had objected to proposed amendments to the Devonport and Latrobe Planning Schemes to rezone approximately 134 hectares of agricultural land to create an industrial estate.

The resident was concerned that allowing an industrial estate on low-lying land ignored the risks of rising sea levels, and would lead to an unacceptable loss of viable agricultural land in the area.

Despite strong Council support for the proposal, the Tasmanian Planning Commission rejected the amendment on a range of planning grounds, including:

- The amendment was inconsistent with the regional plan, which demonstrated there was already sufficient industrial land in the area to accommodate reasonably foreseeable demands.
- The amendment failed to adequately address climate change hazards.
- Converting irrigable land to a non-agricultural use was contrary to the objectives of the *Protection of Agricultural Land Policy 2009*.

Case study: EDO Victoria – helping small rural communities protect their local environment[4]

In late 2010, the EDO represented western Victoria-based environment group Friends of the Surry Inc at a Tribunal hearing to oppose the granting of a works permit for a site in Narrawong. The site was next to the estuary of the Surry River, on a flood plain, and also on a primary dune system. Represented by the EDO and a barrister, Friends of the Surry Inc successfully argued that the Tribunal should not grant the permit.

Later, in mid-2011, the EDO again represented Friends of the Surry at a hearing about the future planning controls for the site, which was held by an Advisory Committee specially appointed by the Minister for Planning. The EDO, on behalf of the Friends of the Surry, argued that the planning controls for the site should protect its environmental features. The Friends of the Surry also brought expert evidence to suggest that the site was of aboriginal cultural heritage significance.

The Advisory Committee ultimately agreed with the need to protect the environment at the site, and recommended that the site be rezoned so as to largely prevent future developments at the site. The Minister for Planning then implemented the planning controls for the site recommended by the Committee.

2. Standing – judicial review

a) Background

ANEDO submits that open standing provisions are a fundamental component of any equitable legal system. This is particularly true in respect of environment and planning matters, which routinely include developments likely to have a significant impact on communities, the environment, and shared natural resources such as water and agricultural land. Accordingly, the public has a strong interest in ensuring – where necessary – that decision-makers have adhered to the relevant statutory framework, and proponents have properly implemented the conditions attached to their development approval. Indeed, as the State may lack the necessary resources to ensure compliance, open standing provisions provide genuine public interest litigants with the opportunity to enforce environmental laws and conditions of consent on behalf of the community.

There is no evidence to suggest that open standing provisions result in a multitude of litigants inundating the courts with frivolous or vexatious appeals. Indeed, in the 20 years that open standing (judicial review) provisions have existed under s. 123 of the *Environmental Planning and Assessment Act 1979* (NSW) (**EPA Act**), the 'floodgates' have remained firmly closed. The former Chief Justice of the NSW Land and Environment Court (**NSW LEC**), Justice Jerrold Cripps has noted that:

> *It was said that 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.*[5]

Notwithstanding Justice Cripps' observations, and the obvious benefits associated with open standing provisions, it has been noted that the current rules for standing in Australia have:

> *not developed a culture of public interest litigation. One reason for this is that the rules of standing in judicial review retain some restrictive elements that make it difficult for representative groups to challenge government decisions. The requirement that, to have standing, a complainant must be able to show a special interest or be aggrieved by a decision does not equate with even the strong views or commitments of a group.*[6]

When analysing relevant case law, it becomes apparent that such a test "has yielded uneven results in environmental cases – particularly for representative bodies that seek to challenge decision concerning their local areas."[7] One of the important cases that highlight the lack of opportunity for standing for public interest environmental litigants is *Australian Conservation Foundation Inc v Commonwealth* (1980).[8]

Case Study: Australian Conservation Foundation Inc v Commonwealth

The Australian Conservation Foundation (ACF) undertook proceedings against the Commonwealth for declarations, injunctions and other orders to challenge the validity of decisions concerning a proposal by a company to establish and operate a resort and tourist area in central Queensland. ACF believed they had the right to take action due to their well-known role in the protection of the environment.[9]

It was held that the ACF did not have standing and that the action should be dismissed. Gibbs CJ noted "a belief, however strongly felt, that the law generally or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor locus standi."[10]

This case demonstrated the fact that "[i]n cases which do not concern constitutional validity a person who has no special interest in the subject matter of an action over and above that enjoyed by the public generally, has no locus standi to sue for an injunction or declaration to prevent the violation of a public right or to enforce the performance of a public duty."[11]This reflects a narrow interpretation of the ambit of parties able to bring an action for judicial review.

The ACF case highlights the need for open standing provisions to be enshrined in environmental and planning legislation in all Australian jurisdictions. Accordingly, the following section will examine standing provisions in relevant legislation across a number of States and Territories with a view to exposing barriers to environmental justice.

b) States and Territories

Open standing provisions in environmental and planning legislation vary both within and between jurisdictions. The following table summarises standing provisions across a range of environmental and planning statutes. The table is to be read in conjunction with subsequent comments regarding additional factors that may undermine standing provisions under the *Water Management Act 2000* (NSW) and *Planning Bill 2013* (NSW). Similarly, our comments regarding costs (4. below) are to be taken into account when considering the true accessibility of standing provisions.

Table 1: Third party enforcement and appeal rights (judicial review)

	Planning	Water	Forestry	Mining
NSW (current)	• Restraining or remedying breaches of the Act.[12] ✓ • **See comments below re. Planning Bill 2013.**	• Restraining or remedying breaches of the Act.[13] ✓ • Appeal approval of allocation licence (including transfer). X [14] • Water use or water works approval.[15] ✓ • **See comments below re. barriers to accessing appeal rights.**	• Restraining or remedying a breach of an integrated forestry operations approval.[16] X • Appeal licences and approvals under relevant legislation. X	• Appeal exploration licence. (x) • Appeal production lease.[17] (x)
Vic	• Restraining or remedying breaches of the Act.[18] ✓ • Appeal rights in respect of major projects. • Appeal rights in respect of other projects. [19] ✓	• Restraining or remedying breaches of the Act. X • Appeal approval of allocation licence (including transfer). [20] X	• Restraining or remedying breaches of relevant legislation. X • Appeal licences and approvals under relevant legislation. X	• Appeal exploration licence. X • Appeal production lease. X
Tas	• Restraining or remedying breaches of the Act.[21] ✓	• Restraining or remedying breaches of the Act.[22] ✓ • Appeal rights in respect of approval of licence (including transfer).[23] ✓	• Appeal decision to certify a forest practices plan.[24] X • General right to object to a private timber reserve.[25] X	• Appeal exploration licence. X • Appeal production lease.[26] X
SA	• Restraining or remedying breaches of the Act. [27] ✓ • Appeal rights in respect of major projects. [28] X Appeal rights in respect of other projects. [29] ✓	• Restraining or remedying breaches of the Act. [30] ✓ • Appeal approval of allocation licence (including transfer).[31] X	• Appeal rights in respect of any decision made under the Act.[32] X	Information unavailable.
NT	• Restraining or remedying breaches of the Act. x	• Restraining or remedying breaches of the Act. x	N/A	• Appeal exploration licence. X • Appeal

	Planning	Water	Forestry	Mining
				production lease. X
QLD	• Restraining or remedying breaches of the Act.[33] ✓ • Statutory judicial review rights in respect of major projects.[34] X	• Restraining or remedying breaches of the Act.[35] ✓ • License approval and transfer.[36] ✓	• Restraining or remedying breaches of Act(s).✓ / X [37] • Appeal decisions.[38] ✓	• Appeal exploration licence. ✓ • Appeal production lease.[39] ✓

c) Additional comments - Planning Bill 2013 (NSW)

On 22 October 2013, the NSW Government introduced its revised Planning Bills into Parliament. In relation to **judicial review rights**, legal errors can continue to be challenged under open standing provisions, which allow any person to enforce a breach of the Planning Act.[40] This will include, for example, where new draft strategic plans have not been properly exhibited.

However, the Planning Bill retains a privative clause which attempts to limit 'provisions of this Act that are mandatory in connection with the validity of a strategic plan, an infrastructure plan or a planning approval' for State significant development and State infrastructure development (i.e. to limit mandatory requirements to the public exhibition requirements).[41] This clause also continues to curtail civil proceedings and enforcement against 'public priority infrastructure' projects. The NSW Planning Department has stated that the privative clause consolidates limitations in the existing system. EDO NSW is closely reviewing whether this intent has been achieved. However, privative clauses are a cause for concern from a public interest legal perspective, and are unlikely to engender public confidence that legal decision-making processes will be followed.

d) Additional comments - Water Management Act 2000 (NSW)

This section gives an example of how lack of transparency and accessibility of government information can affect access to justice and the exercise of public rights.

As previously indicated, the Water Management Act permits third parties who have objected to the granting of a water use or water works approval to appeal the decision within 28 days. Third parties may also seek an order restraining or remedying a breach of the Act, including breaches involving administrative decisions (to grant a licence or approval a licence transfer, for example). Recent changes to the Uniform Civil Procedure Rules 2005 (**UCPR**) now require such proceedings to be commenced within three months of the decision being made under the Act.[42]

These appeal rights must be considered in tandem with barriers to accessing information regarding decisions to approve water use applications, water works, a new licence or a licence transfer.

While the NSW Office of Water does maintain a Register of Water Approvals (for water use or water works),[43] the Register can only be used if an interested party can specify the exact kind of approval and the month and year that it was issued. Based on our experience, most members of the community do not have access to this sort of information, effectively barring them from accessing the Register.

Furthermore, while a 'water access licence register' is maintained by Land and Property Information (as per the requirements of the Water Management Act),[44] searches are only possible where an individual has access to a specific licence number.

In other words, there is no central, accessible register of decisions to grant new licences or to approve licence transfers. As such, it is difficult for third parties to know when the Minister has made such a decision under the Water Management Act.

We are aware that opponents of a more transparent system have raised concerns about privacy issues.[45] However, the *Privacy and Personal Information Protection Act 1998* (NSW) permits the disclosure of 'personal information' contained on public registers as long as the agency concerned is satisfied that the information will only be used for the purposes of the register or the Act under which the register is kept.[46] Being able to access and use the information contained on the aforementioned registers for the purposes of verifying whether a decision has been made in accordance with the Water Management Act is most certainly consistent with this requirement.

The Water Management Act, water sharing plans and dealing principles outline criteria that must be adhered to when determining an application for a new licence or for a licence transfer. Broadly speaking, these criteria seek to ensure that new licences or licence transfers will not have an unreasonable impact on other users and the environment. Accordingly, there is strong public interest argument in favour of third parties being able to verify that the decision-maker has complied with the Act and relevant instruments.

This lack of transparency has disadvantaged a number of our clients who were unable to access information regarding approvals granted under the Water Management Act within the relevant limitation period. While the UCPR do provide the courts with discretion to waive the three month limitation period, there is no guarantee that they would choose to exercise this discretion.

e) Federal jurisdiction

Standing provisions in Federal environmental legislation vary, however we note a general tendency to exclude third party enforcement and appeal rights. As a consequence, genuine public interest litigants to appeal a decision made under most environmental legislation must rely on common law standing in order to commence proceedings. As previously indicated, the case law in relation to common law standing is inconsistent, with the result that established conservation groups may not be granted leave to appeal. Furthermore, common law standing relates exclusively to administrative decisions made pursuant to a particular statute. That is, it cannot be relied on to generally enforce the provisions of environmental legislation.

A positive example of relatively broad standing can be found in the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (**EPBC Act**). Under section 475, the *EPBC Act* gives standing to an 'interested person' to apply for an injunction for contravention of the Act. An "interested person" is defined as:

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

ANEDO suggests a relaxation of the third limb of this test so that a person or group only need demonstrate ongoing concern in the issue at hand.[47] Adopting a broadened test such as this would promote broad and fair standing in the public interest, assisting the appropriate scrutiny of decisions affecting individuals and the wider community.

It has been noted that 'If environmental laws are as important as Australian legislatures proclaim them to be, surely any person should be entitled to enforce them.'[48] Building on this idea, ANEDO generally supports including the aforementioned 'broadened test' for standing in all Federal environmental legislation in relation to both enforcement *and* appeal rights.

Table 2: Third party enforcement and appeal rights (judicial review)

	Enforcement	**Appeal**
EPBC Act 1999	• An 'interested person' may apply for an injunction to remedy or restrain a breach of the Act.[49] ✓	• An 'aggrieved person' may appeal a decision made under the Act. [50] ✓
Fisheries Management Act 1991	• No third party enforcement rights. x	• No third party appeal rights. x
Water Act 2007	• No third party enforcement rights. x	• No third party appeal rights. x
Great Barrier Reef Marine Park Act 1975	• A person 'whose interests have been, or would be' affected by a breach may apply for an injunction to remedy or restrain that breach.[51] ✓	• No third party appeal rights. x
Offshore Petroleum And Greenhouse Gas Storage Act 2006 **and** **Offshore Petroleum And Greenhouse Gas Storage (Environment) Regulations 2009**	• No third party enforcement rights (with respect to environmental plans for offshore petroleum activities, for example). x	• No third party appeal rights (with respect to environmental plans for offshore petroleum activities, for example). x

f) Discretion

While ANEDO favours the application of third party appeal rights with respect to administrative decision-making made under environmental legislation, we note that appeal rights are only capable of being exercised if legislation includes criteria which must be considered during the decision-making process. That is, virtually unfettered discretion to approve or refuse an application cannot be meaningfully challenged by a third party.

With this is mind, ANEDO notes that certain environmental legislation confers a great deal of discretion on decision-makers. While this is ultimately the prerogative of Parliament, we are concerned that high-impact activities are not being assessed against reasonably specific criteria designed to guide decision-makers through complex material and issues.

For example, Part 9 of the EPBC Act does not include any specific criteria which the Minister must 'not act inconsistently with' when determining an activity declared to be a controlled action for the purposes of the 'water trigger.'[52] By way of contrast, the Minister must 'not act inconsistently with' specific criteria (such as environmental treaties) set out for six other matters of national environmental significance. While Part 9 does include general criteria against which all controlled actions are to be assessed,[53] the Minister need only 'consider' these matters, which is less onerous that a requirement to 'not act inconsistently with' specific treaties, for example. Ideally, however, the Minister would be required to 'act consistently with' relevant criteria as this arguable constitutes a stricter test.

Recommendations

1. *Environmental and planning legislation in all Australian jurisdictions should provide for open standing for enforcement and judicial review proceedings where not already permitted.*

2. *All Federal environmental legislation should provide for third party enforcement. Enforcement provisions should be modelled on a slightly broadened version of s. 487 of the EPBC Act so that applicants need only demonstrate an ongoing interest in the issue at hand.*

3. *All Federal environmental legislation should provide for third party appeal rights with respect to environmental decision-making involving: development or activities capable of having a not insignificant impact on communities or the environment; management or zoning plans which will determine permissible activities within a given area; and environment plans for high impact activities such as offshore petroleum exploration and production.*

4. *Where necessary, amend Federal environmental legislation to include specific criteria which the relevant decision maker must 'act consistently with'.*

5. *Amend the NSW Water Management Act to provide for a Register of Approvals which provides users with a range of search options, including an option to search for all approvals issued in a particular valley between dates specified by the user.*

6. *Amend the NSW Water Management Act to provide for the creation of a central register of decisions to grant new licences and to approve licence transfers. The central register must provide users with a range of search options, including an option to search for all licences issued or transferred in a particular valley between dates specified by the user.*

3. Standing – merits

a) Background

As previously noted, decision-making under environment and planning legislation often relates to high impact, controversial developments. Merits review provides an additional layer of scrutiny and to that extent improves community confidence in the decision-making process. In the words Preston CJ of the NSW LEC,

> *The rationale for merits review is founded in the notion of natural justice. The rights, liberties and obligations of citizens should not be unduly dependent upon administrative decisions which are not subject to review on the merits. Prima facie, an administrative decision should*

be reviewable on the merits if it is likely to affect the interests of a person. Interests can be commercial, property and legal interests as well as intellectual, and like interests (e.g. environmental interests or concerns within the objects of an organisation). Interests can also include legitimate expectations. The benefits of merits review include:

- *Enhancing the quality of the reasons for decisions;*
- *Providing a forum for full and open consideration of issues of major importance;*
- *Increasing the accountability of decision makers;*
- *Clarifying the meaning of legislation;*
- *Ensuring adherence to legislative principles and objects by administrative decision makers;*
- *Focusing attention on the accuracy and quality of policy documents, guidelines and planning instruments; and*
- *Highlighting problems that should be addressed by law reform.*[54]

With this in mind, ANEDO supports the inclusion of merits appeal rights in environmental legislation, particularly in respect of development likely to have a significant impact on the community and environment.

b) Third party merits appeal rights – States and Territories

As with judicial review, merits appeal rights vary both within the between jurisdictions. The following table outlines third party merits appeal rights with respect to key aspects of planning, water, forestry and mining legislation. However, it should also be noted that:

- merit appeal rights are available to *proponents* in a much wider range of circumstances than for third party community members;
- in most jurisdictions appeal rights are more limited for major projects; and
- the vast majority of development applications are *approved*,[55] which means that limiting appeal rights disproportionately affects third party community members.

These factors have led to considerable public concern about the equity of appeal rights.

Table 3 – Third party merits appeal rights – State and Territories

	Planning	**Water**	**Forestry**	**Mining**
NSW (current)	• Appeal approval of major projects ✓(where no PAC hearing, and not state significant infrastructure).[56] • Appeal approval of other projects. x • **See comments below re. Planning Bill 2013.**	• Appeal approval of allocation licence (including transfer).[57] x • Appeal water use or water works approval.[58] x	• Appeal licences and approvals under the relevant legislation.[59] x	• Appeal granting of exploration licence.[60] x • Appeal granting of production lease.[61] x
Vic	• Appeal approval of major projects called-in by the Minister.[62] x • Appeal approval of major projects *not* called-in by the Minister.[63]	• Appeal approval of allocation licence (including transfer).[64] x	• Appeal licences and approvals under relevant legislation.[65] x	• Appeal granting of exploration licence. x • Appeal granting of production lease.[66] x

	Planning	Water	Forestry	Mining
	• Appeal approval of other projects. ✓			
Tas	• Appeal rights in respect of major projects. [67] ✓/ x • Appeal rights in respect of other projects.[68] ✓	See info in Table 1.	See info in Table 1.	See info in Table 1.
SA	• Appeal Category 3 matters.[69] ✓ • Appeal approval of major projects.[70] x • Appeal approval of other projects. x	Information unavailable.	• Appeal licences and approvals under the relevant legislation.[71] x	Information unavailable.
WA	• Appeal decisions on environmental assessment of 'significant proposals'. (✓) • Appeal regarding planning matters generally.[72] x	• Appeal approval of water licence.[73] x	• Appeal approval of forest management plans or conditions.[74] x	• Any person aggrieved by Mining Warden's decision may appeal to Supreme Court, which may hear matters of fact[75] (✓)
NT	• Appeal rights in respect of major projects. x • Appeal rights in respect of other projects.[76] ✓	• Appeal rights in respect of approval of licence (including transfer).[77] x	N/A	• Appeal exploration licence. x • Appeal production lease. x • Objection to prescribed petroleum act (native title).[78] ✓
QLD	• Appeal rights in respect of major projects.[79] x • Appeal rights in respect of other projects. ✓/x [80]	• Appeal rights in respect of approval of licence[81] ✓ (including transfer). x	• Appeal rights in respect of native forestry ✓/ x [82]	• Appeal exploration licence for minerals. ✓/x[83] • Appeal production lease. ✓/x[84]

c) Additional comments - Planning Bill 2013 (NSW)

As noted above, on 22 October 2013, the NSW Government introduced its revised Planning Bills into Parliament. **In relation to merit appeal rights**, the new Bills retain the *status quo* for third party appeal rights against development approvals. These rights remain limited to community members who made submissions *objecting* to a major project that required a detailed environmental impact statement (called 'designated

development' or 'EIS assessed development').[85] By contrast, developers will continue to have court appeal rights and/or internal review rights against refusals or conditions for all but the smallest developments.[86] This is reflected in the fact that 98 out of every 100 appeals to the Land & Environment Court are lodged by developers, not objectors.[87]

Merit appeal rights will continue to be limited in some circumstances. As now, both developers' and objectors' court appeal rights will be removed where the NSW Planning Assessment Commission (**PAC**) holds a formal public hearing on a development application.[88] This has a disproportionate effect on objector appeal rights – because a large majority of major project decisions are *approvals*,[89] and because objectors' rights are more limited to begin with.

Furthermore, the NSW Planning Minister will continue to have open discretion to *direct* the PAC to conduct a public hearing,[90] without any requirement to seek expert advice or comply with public guidelines. In effect, this means a Planning Minister has open discretion to remove merit appeal rights for any particular major project.

Throughout the NSW planning review, the Independent Commission Against Corruption **(ICAC) has suggested that third party merits appeal rights should be expanded** to additional categories of private development, including projects that are significant and controversial (for example, large residential flat developments).[91] According to ICAC, 'The limited availability of third party appeal rights under the [current] EP&A Act means that an important check on executive government is absent.' Furthermore, 'The absence of third party appeals creates an opportunity for corrupt conduct to occur…'.[92] EDO NSW and other groups have also consistently supported more equitable appeal rights for community members. However, the NSW Government has rejected these recommendations.

d) Federal jurisdiction

ANEDO notes and is concerned about the overwhelming absence of merits review rights in Federal environmental legislation, as demonstrated by Table 4.

Table 4: Third party merits review rights

	Merits review rights
EPBC Act 1999	• No third party merits review rights. x
Fisheries Management Act 1991	• No third party merits review rights. x
Water Act 2007	• No third party merits review rights. x
Great Barrier Reef Marine Park Act 1975	• No third party merits review rights. x
Offshore Petroleum And Greenhouse Gas Storage Act 2006 and Offshore Petroleum And Greenhouse Gas Storage (Environment) Regulations 2009	• No third party merits review rights. x

Recommendations

1. *ANEDO supports the inclusion of merits appeal rights in environmental legislation, particularly in respect of development likely to have a significant impact on the community and environment.*

2. *The EPBC Act should be amended to provide for third party merits review rights in respect of decisions to approve controlled actions.*

4. Costs

Public interest environmental matters are by definition relevant to the broader Australian community. Indeed, some cases (for example those concerning climate change) have global implications. It is therefore concerning that legislation and rules in certain jurisdictions, as well as relevant case law, obstruct public interest litigants from accessing the courts. Specifically, security for costs and the threat of costs orders have deterred a number of our clients – all of whom are genuine public interest litigants – from either commencing or continuing with proceedings, or appealing an unfavourable decision.

While the leading High Court case, *Oshlack v Richmond River Council,*[93] confirmed that the public interest nature of proceedings could be taken into account when exercising a general statutory discretion concerning costs, it did not indicate that this was mandatory. That is, it was held that public interest factors are not necessarily sufficient to avoid a costs order being made against an unsuccessful litigant. Accordingly, *Oshlack* cannot necessarily be relied upon by public interest litigants to fill the aforementioned regulatory lacunae. That is, this case does not provide such litigants with sufficient clarity regarding the costs framework that is likely to apply in public interest matters.

Relevantly, most jurisdictions have failed to develop a clear set of guiding principles in respect of public interest costs matters. As noted by Justice McHugh in *Oshlack,*

> *If discretions concerning costs are to be exercised consistently and rationally, it is essential that courts formulate principles and guidelines that can be applied with precision in most cases.*[94]

To the best of our knowledge, the only court in Australia that has attempted to develop guiding principles of this nature is the NSW LEC. Thus public interest litigants have a *reasonable* idea of the costs framework that is likely to apply to their matter, particularly in Class 1-3 matters (where costs are only awarded in exceptional circumstances).[95] By contrast, the court has *discretion* to waive security for costs and costs orders in class 4 (judicial review) appeals determined to be brought in the public interest.[96] However, this rule is to be considered in conjunction with *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Or (No 3),*[97] in which Preston CJ outlined three-step criteria for determining whether a matter is in the public interest.

We also acknowledge that certain jurisdictions tend to exercise their discretion in favour of public interest litigants. For example, the Supreme Court of Tasmania is explicitly empowered to order security for costs,[98] but has declined to do so in a number of environmental and planning matters on the basis of public interest, and concern that such an order would put an end to proceedings.[99] Notwithstanding this trend, we do note that the Court ultimately has complete discretion regarding both security for costs *and* costs orders, with the Rules stating that 'the costs of the proceedings in the Court or before a judge are to be in the discretion of the Court or judge.'[100] There is therefore scope to introduce specific public interest provisions, thereby providing litigants with a greater degree of certainty regarding the likely financial consequences of commencing proceedings.

Similarly in Victoria, the Supreme Court ultimately has complete discretion with respect to security for costs and costs orders.[101] That is, the Act and Rules are silent as to costs in public interest matters. While the Court recently issued a protective costs order in a public interests matter (*Bare v Small*),[102] this was an exceptional ruling.

Finally, ANEDO submits that while 40.51 of the Federal Court Rules currently provides an opportunity for a party to apply for a maximum costs order, this is not sufficient and

does not give public interest litigants sufficient protection. We also note that these Rules do not provide for waiver of security for costs in public interest matters.

Case study: adverse costs order against public interest environmental litigant in Federal Court

EDO NSW, on behalf of Bat Advocacy NSW Inc, brought proceedings in the Federal Court challenging a decision of the Minister for Environment Protection, Heritage and the Arts under the EPBC Act to approve the dispersal of grey-headed flying-foxes from the Royal Botanic Gardens in Sydney.

In *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts* [2011] FCA 113, Justice Cowdroy dismissed the application, rejecting all four grounds of appeal. The Court was satisfied that the Minister had regard to the impact of the action on critical habitat, social matters, the term of the approval and matters raised in public submissions, taking into account the documents before the Minister and the conditions of consent imposed.

Bat Advocacy appealed Cowdroy's decision in relation to ground one only. The Full Court of the Federal Court dismissed the appeal *in Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts [2011] FCAFC 59.* Bat Advocacy made submissions that it should not be required to pay costs as the proceedings were brought in the public interest. In *Bat Advocacy NSW Inc v Minister for Environment Protection, Heritage and the Arts (No 2)* [2011] FCAFC 84 the Full Court rejected its application, finding that Bat Advocacy had not make out a basis for a special costs order.

Recommendations

1. *To reduce costs barriers to access to justice, the preferred position would be to allow merits review, judicial review and third party enforcement to be undertaken in 'own costs' jurisdictions. (Alternative options to promote access to justice follow.)*

2. *Relevant rules in each jurisdiction should be amended to provide for public interest litigants to be exempted from security for costs.*

3. *Relevant rules in each jurisdiction should be amended to provide that unsuccessful public interest litigants be exempted from paying costs.*

4. *Relevant rules in each jurisdiction should include criteria to determine whether a matter may be properly classified as one that is in the public interest.*[103]

5. Specialist courts

a) Background

ANEDO submits that specialist environmental courts have an important role to play in facilitating access to justice. As Chief Justice Preston has noted in relation to the NSW LEC,

> *A key feature of the Court and the legislation it administers is the ability of the public to participate and have access to justice. Many of the planning or environmental laws contain open standing provisions, which enable any person to bring proceedings to*

> *remedy or restrain breaches of the laws. Public interest litigation has been a feature throughout the Court's history. The Court's decisions have been instrumental in the development of public interest litigation, both procedurally and substantively*. [104]

In addition to Preston CJ's remarks, ANEDO has observed that specialist environmental courts are particularly well placed to manage the complexities of environmental litigation with maximum efficiency. For example, a high level of background knowledge about environment and planning matters, case management provisions in certain jurisdictions (in particular NSW) and on site hearings (also in NSW) ensure that matters are dealt with in an expeditious manner, improving the overall productivity of the court system.

b) NSW

The NSW LEC was established in 1980 under the *Land and Environment Court Act 1979.* The Act provides for the appointment of judges,[105] as well as commissioners with specialist knowledge of environmental protection and/or planning.[106]

The Court is constituted as a superior court of record,[107] which means it sits next to (rather than below) the Supreme Court in the judicial hierarchy. Furthermore, its judges have the same status and tenure as Supreme Court judges.[108] Both of these factors lend considerable weight to its decisions, which in turn has facilitated the development of a large body of well-respected environmental jurisprudence.

In addition to the comments provided above, Preston CJ has observed that the NSW LEC has improved access to justice by: ensuring just, quick and cheap resolution; making technical experts available to the court; reducing formality where possible; promoting and providing extensive publically available information on its functions and decisions; and improving geographical access through telephone conferencing, electronic call overs and holding appeal hearings near the location of a subject appeal.[109]

c) Tasmania, South Australia, Queensland

Tasmania and South Australia also have some form of separate body dealing with environmental matters.

The Resource Management and Planning Appeal Tribunal (Tasmania)[110] is a specialist tribunal, responsible for reviewing a wide range of decisions made under the suite of legislation comprising the Resource Management and Planning System (**RMPS**), which includes planning, environmental, water management, reserve management, heritage and threatened species legislation. The Tribunal is comprised of a chairperson, who must be a lawyer, and other members selected from a pool of panellists with expertise in a range of relevant fields.[111] The Tribunal is subject to the objectives of the RMPS, which include promoting sustainable development, providing for fair, orderly and sustainable use of resources, encouraging public participation and facilitating economic development consistent with those objectives.[112]

Similarly, the Environment, Resources and Development Court (South Australia) is empowered to review certain decisions under a number of environment and planning statutes.[113] Unlike Tasmania's Resources and Planning Appeal Tribunal, presiding judges do not necessarily have to have particular expertise in planning and environment law.[114] Nor is it subject to any overriding requirement to promote sustainable development (or other environmental objectives).

Finally, the Planning and Environment Court (QLD) was constituted in 1990 by the *Local Government (Planning and Environment Act) 1990* (QLD) (now the *Sustainable Planning*

Act 2009 (QLD).[115] The Sustainable Planning Act provides for the appointment of District Court judges to the Planning and Environment Court.[116]

Unlike the NSW LEC, the aforementioned bodies are not superior courts of record.

d) Victoria, Western Australia and Northern Territory

Victoria, Western Australia and Northern Territory do not have a specialist environmental or planning court.

Case study: Victoria

Victoria has no specialist environment or planning court. Dispute resolution in relation to planning and environment matters is dealt with by the Victorian Civil and Administrative Tribunal (**VCAT**)[117] through its specialist Planning and Environment List.

There are no internal appeal arrangements within VCAT. Appeal from VCAT decisions on a point of law only is to the Supreme Court of Victoria (or from a decision of the VCAT President to the Court of Appeal).

The setting of legal precedent from the Supreme Court or Court of Appeal on interpretation and application of environmental law is limited. In the absence of guidance from superior courts, decision making lacks consistency, resulting in considerable uncertainty for appellants.

Recommendations

1. *Specialist environmental courts should be constituted in those jurisdictions lacking such a court.*

2. *Existing and new specialist environmental courts should be modelled on the NSW LEC. That is, they should be constituted as superior courts of record. They should also provide for the appointment of both judges and commissioners with particular expertise in environment and planning matters.*

6. Photocopying costs - discovery and subpoenas

ANEDO is concerned by the absence of public interest provisions in court rules[118] with respect to photocopying for discovery and subpoenaed documents. As a consequence, a number of our clients have been invoiced for thousands of dollars (and in one instance $17,000)[119] by both private parties and government departments for the right to access documents during proceedings. This imposes an unreasonable burden on public interest litigants, who based on our experience, have limited means and to that extent cannot afford large photocopying fees.

ANEDO therefore submits that there is a strong argument in favour or waiving or capping photocopying fees where litigation is being brought in the public interest. In addition to reflecting the special status of public interest litigation, such rules would improve the overall efficiency of court proceedings by avoiding protracted negotiations over photocopying costs.

We also note that 'e-discovery' has been introduced in QLD,[120] improving efficiency and significantly lowering costs for all parties. ANEDO supports the use of this model in all Australian jurisdictions.

Recommendations:

1. *Rules in all jurisdictions should be amended to provide courts with discretion to either waive or cap photocopying fees for discovery and subpoenaed documents held by government departments where the applicant is a public interest litigant. Caps should be commensurate with the litigant's means.*

2. *Rules should be amended to provide for 'e-discovery', thereby significantly reducing the cost of discovery for all parties.*

7. Freedom of information legislation

a) Background

ANEDO submits that rigorous freedom of information (**FOI**) legislation is fundamental to achieving access to justice and to improving the overall efficiency of the legal system.

While we acknowledge the existence of FOI statutes in all Australian jurisdictions,[121] our experience indicates that there is significant scope for improvement in most States and Territories. Examination of the relevant legislation and case law reveals some common themes. The following sections will provide an overview of these themes. Further information is available in ANEDO's 2012 submission to the review of the *Freedom of Information Act 1982* (Cth),[122] and more specific information can be provided on request.

b) Exemptions

EDO offices are aware of instances where government agencies have relied on exemptions in freedom of information legislation to an unreasonable extent. We use the world 'unreasonable' to describe cases where review has eventually resulted in the documents being released – after considerable delay and sometimes cost to our clients. Unnecessarily withholding documents not only undermines the intent of FOI legislation, but is overwhelming inefficient. The following case study illustrates this point.

Case study: Western Australia

In *Re Pillsbury and Department of Mines and Petroleum and Cimeco Pty Ltd and Rey Resources Limited*,[123] Mr Pillsbury applied to the Department of Mines and Petroleum (**DMP**) for access to Rey Resources' Health, Safety & Environmental Management Interface Plan and Occupational Hygiene Management Plan.

The DMP refused to provide access to the documents. It argued that the documents were exempt from disclosure on the basis that disclosure would reveal commercially valuable information (other than trade secrets) and that disclosure could reasonably be expected to destroy or diminish that commercial value.[124]

EDO WA assisted Mr Pillsbury to apply for internal review of the DMP's decision. The DMP upheld its initial decision and relied on an additional ground for refusing access to the documents, namely that disclosure would reveal information (other than trade secrets or commercial valuable information) about the business, professional, commercial or financial affairs of a person and that disclosure could reasonably be expected to have an adverse effect on those affairs or to prejudice the future supply of information of that kind to the Government or to an agency.[125]

EDO WA then assisted Mr Pillsbury to apply for external review of the DMP's decision to the Information Commissioner. The Information Commissioner found that the two exemptions relied on by the DMP did not apply and ordered that Mr Pillsbury be given access to the documents in question.

c) Delays

Similarly, we are concerned by considerable delays associated with obtaining information, or reviewing applications for documents. These delays are not only inherently inefficient, but may seriously disadvantage our clients, all of whom are genuine public interest litigants.

For example, ANEDO often relies on FOI legislation to assess (and provide advice) regarding prospects of appeal. Several of our clients have been unable to access information within the statutory limitations period, giving rise to three possible scenarios. First, the client is unable to commence proceedings. Alternatively and where the rules provide,[126] the client may request that the court exercise its discretion to commence proceedings outside of the limitations period. Finally, the client relies on preliminary discovery to determine prospects, thereby lengthening court waiting lists.

Case study: NSW

The *Government Information (Public Access) Act 2009* (NSW) (**GIPA Act**) provides for the release of government documents that are not subject to statutory exemptions. It also includes review mechanisms where requests are denied by the relevant agency or agencies.

Relevant timeframes under the GIPA Act are as follows:

- Initial decision to be provided in 20 days. Agency may extend decision period by up to 15 days. Thus it may take up to 35 days to receive notice of the agency's decision.[127]
- The regulations may provide for further extension of the decision period.[128]
- Where an application is refused, the applicant may request internal review of the decision. **There is no timeframe within which such a review may be completed.**[129]
- Where an application is refused, the applicant may apply to the Information Commissioner to review the decision. **There is no timeframe within which such a review may be completed.** Furthermore, the Information Commissioner may only make recommendations regarding the application.[130]
- Where an application is refused, the applicant may apply to the Administrative Decisions Tribunal (NSW) for review. **There is no timeframe within which such a review may be completed.**[131]

In summary, it can take many months (and sometimes longer) to obtain documents to which our clients have a legal right. This has materially disadvantaged several of our clients, particularly where information is sought for the purposes of determining whether there are reasonable prospects for commencing proceedings – keeping in mind that judicial review proceedings must be commenced in three months.

d) Application of Copyright Act 1968 (Cth)

ANEDO is extremely concerned by the manner in which the *Copyright Act 1968* (Cth) (**Copyright Act**) is being interpreted in FOI matters. For example, in NSW, copyright has been claimed over environmental impact statements (**EIS**) in order to circumvent the

open access provisions contained in the GIPA Act.[132] This is manifestly unreasonable insofar as open access documents have been classified as such precisely because there is a strong public interest in ensuring that they are available for inspection.

This is particularly true in respect of an EIS, which outlines the likely impacts of large scale development (according to the proponent) on the environment and community. The information contained therein is used by government agencies to determine whether the development in question is likely to comply with the law, and to assist in the formulation of conditions of consent to mitigate and monitor impacts. There can be little dispute that the public has an overriding interest in ensuring that the development is likely to comply with the legislative framework. Denying access also has the unfortunate consequence of decreasing confidence in government processes, and potentially adding to court waiting lists by attempting to obtain the EIS through preliminary discovery.

Case study: Western Australia

In *Re Pillsbury and Department of Mines and Petroleum and Cimeco Pty Ltd and Rey Resources Limited,* the Information Commissioner determined that certain documents sought by Mr Pillsbury were *prima facie* subject to copyright and the client could only access the documents by way of inspection.

The DMP subsequently informed the client that he could not take handwritten notes when he inspected the relevant documents as this would infringe copyright.

However, there are numerous exemptions to copyright infringement under the Copyright Act. For example, the fair dealing exemption allows a person to reproduce up to 10% or one chapter of a written work where the reproduction is for the purpose of research or study.[133] This exemption was clearly applicable to Mr Pillsbury's matter, yet the DMP insisted that this exemption did not apply and insisted that taking handwritten notes would infringe copyright.

It was only after EDO WA escalated the matter within the DMP that the DMP agreed to allow Mr Pillsbury to take handwritten notes during the inspection. However, several weeks transpired before the DMP capitulated.

e) Fees

Briefly, we note that fees for producing public documents may unfairly prejudice public interest litigants. While certain FOI legislation provides agencies with discretion to reduce or waive fees, it does not necessarily include criteria to guide when the agency should exercise this discretion (for example, for applicant's acting in the public interest).[134]

In his review of the *Freedom of Information Act 1982* (Cth) and the *Australian Information Act 2010* (Cth), Dr Allan Hawke recommended:

> *that an agency should be able to waive or reduce charges in full, by 50% or not at all. However, it considers that it would be better for these options to be set out in guidelines rather than in the FOI Act itself and recommends the OAIC consider amending its guidelines accordingly.*[135]

While ANEDO broadly supports this recommendation, we would prefer that first, provisions regarding fee reduction or waiver be contained in legislation, and second, that legislation specifically provide for reduction or waiver where the applicant is acting in the public interest.

Recommendations

1. *FOI legislation in every jurisdiction should be amended to require agencies to determine access applications in no more than 15 working days.*

2. *FOI legislation in every jurisdiction should be amended to include specific timeframes within which reviews must be completed. A reasonable period would be 10 working days for internal review, and 28 working days for a review conducted by the Information Commissioner (or equivalent).*

3. *FOI legislation in every jurisdiction should be amended to require agencies to provide a minimum discount of 50% to applicants acting in the public interest, or in the alternative to waive fees where the applicant is acting in the public interest.*

4. *The Copyright Act should be amended to exclude all documents submitted by a proponent to a government agency for the purposes of determining a development application (including, but not limited to, environmental impact statements).*

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[1] For further information on the public benefits of environmental laws and protections, see ANEDO, 'In defence of environmental laws', May 2012 (available on request).
[2] Williams, Neil, 'Unrepresented litigants in the Land and Environment Court of New South Wales', a paper present by Neil Williams SC to the 2010 Environment and Planning Law Association (NSW) Conference at Kiama, 23 October 2010, at 36–39.
[3] Tasmanian Planning Commission, decision dated 2 February 2009.
[4] Friends of The Surry Inc v Minister for Planning & Ors [2013] VCAT 157 (23 January 2013).
[5] Cripps, J, "People v The Offenders", Dispute Resolution Seminar, Brisbane 6 July 1990.
[6] Groves, M. 2010, 'Standing and related matters', *Admin Review,* Issue 59, Pp. 86-88.
[7] Groves, M. 2010, 'Standing and related matters', *Admin Review,* Issue 59, Pp. 86-88.
[8] 146 CLR 493.
[9]Furthermore, ACF had lodged a submission pursuant to administrative procedures under the *Environment Protection (Impact of Proposals) Act* 1974 (Cth).
[10]*Australian Conservation Foundation v Commonwealth*(1980) 146 CLR 493 at 531.
[11]Available at: http://www.hrcr.org/safrica/access_courts/Austrailia/aus_cons_comm.html.
[12] EPA Act, s. 123.
[13] *Water Management Act 2000* (NSW), s. 336.
[14] *Water Management Act 2000* (NSW), s. 368. According to this section, only individuals who have objected to licence applications applying to areas lacking a water sharing plan or outside of a water management have appeal rights. As almost all of NSW is now covered by water sharing plans, this effectively excludes the vast majority of licences.
[15] *Water Management Act 2000* (NSW), s.
[16] *Forestry Act 2012*(NSW), s. 69ZA.
[17] The *Mining Act 1992* (NSW) (s 137) and *Petroleum (Onshore) Act 1991* (NSW) (s 25) contemplate that judicial review proceedings may be brought against the validity of decisions on mining titles, but there is no 'open standing' provision, so third parties would need to demonstrate standing under common law principles.
[18] Planning and Environment Act 1987 (Vic), s. 114.
[19] Planning and Environment Act 1987 (Vic)s 82 and 82B. This is a limited right as only an "objector" or an "affected person" may apply to the Victorian Civil and Administrative Tribunal for a review of the granting of a permit.
[20] Water Act 1989 (Vic), s.64 Only "a person whose interests are affected" may apply to the VCAT for a review of a licence approval.
[21] *Land Use Planning and Approvals Act 1993* (Tas), s 64
[22] *Water Management Act 1999* (Tas), s 264
[23] *Water Management Act 1999* (Tas), s 275
[24] *Forest Practices Act 1985* (Tas), s. 7.
[25] *Forest Practices Act 1987* (Tas), s. 8 (2) (f). Objector right limited to owners of adjoining land or within 100 metres of the proposed reserved who will be 'directly and materially disadvantaged' by the application.

[26] *Mineral Resources Development Act 1995*, ss. 15, 40, 67E, 76. Objector right limited to persons with an "estate or interest" in the land. The Mining Tribunal has held that this does not extend to conservation groups or adjacent downstream landowners: Frontier Resources Ltd v Tarkine National Coalition Inc [2011] TASMC.
[27] *Development Act 1993* (SA), s.85.
[28] *Development Act 1993*, (SA). s. 48E.
[29] *Development Act 1993* (SA), s. 38.
[30] *Natural Resources Management Act 2004* (SA), s. 201.
[31] *Natural Resource Management Act 2004* (SA).
[32] *Forestry Act 1950* (SA).
[33] *Sustainable Planning Act 2009* (Qld), s 601. For environmental approvals, a person can bring proceedings to remedy a breach of the *Environmental Protection Act 1994* (Qld). This includes (for example) a breach of the conditions of an Environmental Authority which all miners (minerals and CSG) must hold under that Act. However, the enforcement right is only available to someone whose 'interests are affected by the subject matter of the proceeding'; or with the leave of the Court. See *Environmental Protection Act 1994* (Qld), section 505.
[34] Judicial review specifically excluded in sections 27AD and 76W *State Development and Public Works Organisation Act 1971*(Qld). The JR Act has limited application to the *Sustainable Planning Act 2009* (Qld) (see s 757 SPA), however there are JR-like applications and declarations available under s 456 of the SPA.
[35] *Water Act 2000* (Qld), section 784.
[36] The application of the *Judicial Review Act 1991* (Qld) is not excluded from the *Water Act 2000* (Qld), save for a Minister's decision regarding the cost or price of bulk water supply (section 360Y *Water Act 2000* (Qld)).
[37] Clearing native vegetation by forestry on freehold land is 'development' under planning legislation. Plantation forestry also requires planning approval and can be similarly enforced. There are no rights regarding forestry on public land.
[38] The application of the JR Act (Qld) is not excluded from the *Forestry Act 1959* (Qld).
[39] The application of the JR Act (Qld) is not excluded from the *Petroleum and Gas (Production and Safety) Act 2004* (Qld), *Environmental Protection Act 1994* (Qld), or the *Mineral Resources Act 1989* (Qld) (save for section 231K concerning mineral development licences for an Aurukun project).
[40] Planning Bill 2013 (NSW), cl. 10.9.
[41] Planning Bill 2013 (NSW), cl. 10.12.
[42] UCRP, rule 59.10.
[43] Available at: http://registers.water.nsw.gov.au/wma/ApplicationSearch.jsp?selectedRegister=Application
[44] *Water Management Act 2000* (NSW), s. 71.
[45] It should be noted that Australian privacy protections are conferred on individuals only, not corporations. See, for example, definition of 'personal information' in the *Privacy Act 1988* (Cth), s 6; and *Privacy and Personal Information Act 1998* (NSW), s 4.
[46] *Privacy and Personal Information Protection Act 1998* (NSW) s 57(1).
[47] In considering ongoing concern, the entity's objectives could be a relevant (but not the only) consideration.
[48]Barker, M.L. 1996, 'Standing to Sue in Public Interest Environmental Litigation: From ACF v Commonwealth to Tasmanian Conservation Trust v Minister for Resources', *Environmental and Planning Law Journal*, Vol. 13, No. 3, Pgs. 186-208.
[49] EPBC Act, s. 475 (6).
[50] EPBC Act, s. 487.
[51] *Great Barrier Reef Marine Park Act 1975*, s. 61AGA.
[52] The 'water trigger' refers to the ninth matter of national environmental significance, namely large coal mining developments and large coal seam gas developments likely to have a significant impact on water resources. EPBC Act, ss. 24D, 24E.
[53] EPBC Act, s. 136.
[54] Preston, B and Smith J, "Legislation needed for an effective Court" in Promises, Perception, Problems and Remedies, The Land and Environment Court and Environmental Law 1979-1999. Conference Proceedings, Nature Conservation Council of NSW, 1999, at 107.
[55] For example, the NSW Department of Planning reported a 98% approval rate in the Major Development Monitor 2008-09 (119 of 121 DAs); and in 2009-10 (138 of 140).
[56] EPA Act, s. 98. PAC refers to the Planning and Assessment Commission.
[57] *Water Management Act 2000* (NSW).
[58] *Water Management Act 2000* (NSW).
[59] *Forestry Act 2012* (NSW); *National Park Estate (Land Transfers) Act 1998* (NSW); *Plantations and Reafforestation Act 1999* (NSW).
[60] *Mining Act 1992* (NSW), *Petroleum (Onshore) Act 1991* (NSW).
[61] *Mining Act 1992* (NSW), *Petroleum (Onshore) Act 1991* (NSW).
[62] *Planning and Environment Act 1987* (Vic), s. 97.

[63] Ibid.
[64] *Water Act 1989* (Vic). Note that this Act is currently under review.
[65] *Forests Act 1958* (Vic); *Sustainable Forests (Timber) Act 2004* (Vic).
[66] *Mineral Resources (Sustainable Development) Act 1990* (Vic); *Mines Act 1958* (Vic).
[67] Rights of appeal exist in respect of major infrastructure projects: *Major Infrastructure Development Approvals Act 1995* (Tas), s11. For Projects of State Significance and Projects of Regional Significance, there are broad rights to appear at panel hearings, but no right of appeal against panel decision: *State Policies and Projects Act 1993* (Tas), s 28; *Land Use Planning and Approvals Act 1993* (Tas), Division 2A
[68] *Land Use Planning and Approvals Act 1993* (Tas), s 61
[69] *Development Act 1993* (SA), ss. 38, 86.
[70] *Development Act 1993* (SA).
[71] *Natural Resources Management Act 2004* (SA).
[72] *Planning and Development Act 2005* (WA).
[73] *Rights in Water and Irrigation Act 1914* (WA).
[74] *Conservation and Land Management Act 1984* (WA).
[75] *Mining Act 1978* (WA), ss 147-148. Note: any person may object to a *mining tenement application* to Mining Warden's Court (Mining Regulations r 146).
[76] *Planning Act* (NT), s 117.
[77] *Water Act 1992* (NT).
[78] *Petroleum Act* (NT) s 57J A registered native title claimant or registered native title body corporate objecting to the prescribed petroleum act may apply to the Tribunal to have the objection to the prescribed petroleum act heard (after certain preconditions are met). Tribunal then provides a recommendation to the Minister, who must comply with the recommendation unless satisfied of a number of preconditions.
[79] *State Development and Public Works Organisation Act 1971*(Qld)
[80] Only for submitters on 'impact assessable' development (not 'self-assessable' or 'code assessable' development) *Sustainable Planning Act 2009* (Qld), section 462.
[81] *Water Act 2000* (Qld), sections 851 and 877.
[82] *Forestry Act 1959* (Qld) s 83A allows for internal review (not a merits review to court), but only for decisions for granting permits for land within State forests (under s 35), licences to get forest products (under s 55), a decision in relation to a permit, licence, lease, or other authority, or an agreement or contract (under s 56) or a decision in relation to a permit to traverse a part of a State forest, timber reserve or forest entitlement area with vehicles, teams, horses, or other animals (under s 73(2)).
[83] No third party appeal available against the granting of exploration permits for minerals (coal etc). Appeal rights are available against the approval of certain 'site-specific' (effectively meaning, higher risk) Coal Seam Gas exploration activities under the *Environmental Protection Act 1994* (Qld). However, they are only available if that person (it can be any person) made an earlier written submission on the application. See EP Act, s520(2).
[84] Any person can object to an application for a mining lease (and Environmental Authority) *before* it is granted, *Mineral Resources Act 1989* (Qld), s 260. Only affected landholders can object to an application for small scale mining for minerals other than coal *Mineral Resources Act 1989 (*Qld), sections 50 and 71. For coal seam gas production, like exploration, an appeal is only available for 'site-specific' (i.e. higher risk) coal seam gas activities under the *Environmental Protection Act 1994* (Qld), Again, they are only available if that person (it can be any person) made an earlier written submission during the application stage. See EP Act, s520(2).
[85] Planning Bill 2013 (NSW), cl. 9.8.
[86] Planning Bill (NSW), cll. 9.2-9.7.
[87] See NSW Department of Planning and Infrastructure, 'Local Development Monitors', available at: http://www.planning.nsw.gov.au/performance-monitoring. Statistics for major projects are more difficult to find, due to limited and inconsistent reporting and definitional issues across Australian jurisdictions.
[88] Planning Bill 2013 (NSW), cl. 9.6(3). For many major private projects, the NSW Planning Assessment Commission (**PAC**) will continue to determine development applications under an ongoing delegation from the current Planning Minister.
[89] For example, the NSW Department of Planning reported a 98% approval rate in the Major Development Monitor 2008-09 (119 of 121 DAs); and 2009-10 (138 of 140).
[90] Planning Administration Bill 2013 (NSW), cl. 4.3.
[91] Other suggested categories include development that represents a significant departure from existing development standards; and development that is the subject of voluntary planning agreements. See ICAC, *Anti-corruption safeguards and the NSW planning system* (February 2012), recommendation 15.
[92] ICAC (NSW), *Anti-corruption safeguards and the NSW planning system* (2012), p 22.
[93] (1998) 193 CLR 72.
[94] At 72.
[95] Land and Environment Court Rules 2007 (NSW), reg. 3.7.

[96] Land and Environment Court Rules 2007 (NSW), reg. 4.2
[97] [2010] NSWLEC 59.
[98] Supreme Court Rules 2000 (Tas), reg. 828.
[99] For example, *St Helens Area Landcare and Coastcare Group Inc v Break O'Day Council* [2005] TASSC 46.
[100] Supreme Court Rules 2000 (Tas), reg. 57.
[101] Supreme Court Act 1986 (Vic), s. 24; Supreme Court (General Civil Procedure
[102] [2013] VSCA 204.
[103] The three steps developed by Preston CJ in *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and Or (No 3)* could be further built on for this purpose.
[104] Preston, Brian (Chief Justice), *Benefits of Judicial Specialization in Environmental law: The Land and Environment Court of New South Wales as a Case Study*, 29 Pace Envtl. L. Rev. 396 (2012), p. 11.
[105] *Land and Environment Court Act 1979,* ss. 7, 8.
[106] *Land and Environment Court Act 1979*, s. 12.
[107] *Land and Environment Court Act 1979*, s. 5.
[108] *Land and Environment Court Act 1979*, s. 8.
[109] Ibid, pp. 36-40.
[110] Established under the *Resource Management and Planning Appeal Tribunal Act 1993* (Tas).
[111] *Resource Management and Planning Appeal Tribunal Act 1993*, Part 3.
[112] Ibid, Schedule 1.
[113] Including (but not limited to) the: *Environment, Resources and Development Court Act 1993* (SA)*; Development Act 1993* (SA)*; Environment Protection Act 1993* (SA)*; Natural Resources Management Act 2004* (SA)*; Marine Parks Act 2007* (SA).
[114] *Environment, Resources and Development Court Act 1993* (SA), s. 8.
[115] *Sustainable Planning Act 2009* (QLD), Part 7.
[116] *Sustainable Planning Act 2009* (QLD), s. 443.
[117] Established under the *Victorian Civil and Administrative Tribunal Act 1998* (Vic).
[118] For example the *Uniform Civil Procedure Rules 2005* (NSW) do not include provisions which provide the court with discretion to waive or cap photocopying fees for public interest litigants.
[119] Though this was negotiated down to $2,500, suggesting the initial fee was not commensurate with actual photocopying costs. In any case and based on our experience, $2,500 is a significant amount for a public interest litigant.
[120] Planning and Environment Court (QLD), Practice Note Direction No. 10 of 2013, 'Use of technology for the efficient management of documents in litigation.'
[121] *Freedom of Information Act 1989* (ACT); *Government Information (Public Access) Act 2009* (NSW); *Information Act 2003* (NT); *Right to Information Act 2009* (QLD); *Freedom of Information Act 1991* (SA); *Right to Information Act 2009* (Tas); *Freedom of Information Act 1982* (Vic)*; Freedom of Information Act 1992* (WA).
[122] Available at: http://edo.org.au/policy/121207-Cth-FOI-Act-review-ANEDO-submission-FINAL.docx.
[123][2013] WAICmr 1 (22 January 2013).
[124] *Freedom of Information Act 1992* (WA), Schedule 1, cl 4(2).
[125] *Freedom of Information Act 1992* (WA), Schedule 1, cl 4(3).
[126] See for example the *Uniform Civil Procedure Rules 2005* (NSW), reg. 59.10.
[127] *Government Information (Public Access) Act 2009* (NSW), ss. 57 (1), (2).
[128] *Government Information (Public Access) Act 2009* (NSW), s. 57 (3).
[129] *Government Information (Public Access) Act 2009* (NSW), Division 2 of Part 4.
[130] *Government Information (Public Access) Act 2009* (NSW), Division 3 of Part 4.
[131] *Government Information (Public Access) Act 2009* (NSW), Division 4 of Part 4.
[132] *Government Information (Public Access) Act 2009* (NSW), Part 3; *Government Information (Public Access) Regulations 2009* (NSW), Schedule 1, cl. 3 (1) (a). We further note that EISs are not included Schedule 1 of the Act, which outlines documents for which there is an overriding public interest against disclosure.
[133] *Copyright Act 1968* (Cth) s 40.
[134] See for example, *Government Information (Public Access) Act 2009* (NSW), s. 127.
[135] Australian Government (prepared by Dr. Allan Hawke), 'Review of Freedom of Information Act 1982 and Australian Information Commissioner Act 2010, 2013', Recommendation 25 (a).