Access to Justice Arrangements
Productivity Commission
LB2 Collins Street East
Melbourne Vic 8003

By email: access.justice@pc.gov.au

14 November 2013

Dear Sir/Madam,

Access to Justice Arrangements

The Conservation Councils of Australia represent nearly 500 local and regional environmental organisations from each state and territory in Australia.

We are democratic peak organisations, representing member organisations from rural, regional and metropolitan areas across Australia. We have a strong interest in public interest law as a mechanism for protecting the environment and achieving sustainable outcomes.

We welcome the opportunity to comment on the *Issues Paper on Access to Justice Arrangements* prepared by the Productivity Commission.

The legal system has an important role in conservation and environmental protection. Developments in public interest environmental law over the past decades have allowed third parties to take legal action in order to prevent, mitigate, remediate and compensate for harm done to the environment.

At times, the actions of third parties through the legal system can be the key factor in preventing and mitigating environmental harm. This is particularly true when compliance and enforcement agencies lack the adequate resources to prosecute breaches of environmental protection laws.

Public interest environmental law is an important component of a modern, democratic society.

There are a number of key obstacles to access to justice in public interest environmental law, including:

- Access to information and resources
- Legal standing
- Costs

While we recognise that access to information and resources has improved in recent times through increased transparency and open government, and advancements in technology, we have significant concerns with recent developments across Australia that have led to decreased legal standing and access to legal aid.[1]

Cuts to funding for community legal centres

A number of States, including Queensland and NSW, have cut government funding to community legal centres, including environmental legal centres. This is likely to see their services being significantly reduced or even ceasing entirely.

A recent report released by Community Law Australia noted the cost of legal services in Australia is unaffordable, severely inhibiting access to justice.[2]

The recent funding cuts will have a serious negative effect on the ability of the community to access important legal services and the legal system.

Cuts to legal aid for public interest environmental law

Given the high cost of legal action and the deep pockets of the developers and mining companies, community groups and individuals need financial support to exercise their rights and ensure environmental justice is done.

In NSW, as of 1 July 2013, Legal Aid support won't be available for environmental cases that are found to be in the public interest, including major forestry, mining or pollution breaches.

The NSW government's decision to end legal aid for major environmental cases undermines a pillar of environmental justice in NSW. Environmental laws in NSW contain important provisions that allow citizens to take legal action to enforce the law or remedy bad or illegal decisions. Removing legal aid for major environmental cases effectively denies communities and ordinary people access to the courts.

Restrictions to legal standing

There are important benefits from third party appeal rights and public interest litigation, including participative democracy, executive accountability, institutional integrity, improved decision making and rational development of the law.

In general, environment and planning laws across Australia include broad open standing provisions that allow third parties to bring proceedings to remedy breaches of those Acts. Open standing provisions provide public confidence that laws will be adhered to and are able to be enforced and that potential

[1] See, for example, Government 2.0 and the Declaration of Open Government, http://agict.gov.au/policy-guides-procurement/gov20 . Government 2.0 has been adopted by NSW states and territories.

[2] Community Law Australia, *Unaffordable and Out of Reach: The Problem of Access to the Australian Legal System*, July 2012

transgressors may have second thoughts, and ensures that limited resources are directed to the resolution of substantive issues.

In many cases, there is also legal standing for third parties to bring merit appeal cases for certain development consent decisions.

However, in more recent years, reforms to legislation have led to restrictions on legal standing through the expansion of 'privative clauses'. A 'privative clause' is a provision in legislation that purports to exclude or limit judicial review of decisions made under that legislation.

For example, in NSW, proposed reforms to planning system include a new 'exclusion to legal proceedings' provision that have the potential to significantly limit the scope of legal standing to enforce breaches of the Act. Additionally, new assessment procedures for State significant development and the introduction of a Planning Assessment Commission have led to restrictions on third part merit appeal rights.

We have found that these reforms have reduced the opportunity of third parties to access the court. We are concerned that this trend will continue across Australian and territories and has the potential to significantly curtail important legal standing and reduce access to justice.

Access to Justice at the Federal level

We note that these same obstacles exist under Federal environmental protection laws. In particular issues of standing and cost prohibit third parties from enforcing Federal environmental laws to prevent and mitigate environmental harm.

Recommendations

We have had the opportunity to review the submission and recommendations of the Australian Network of Environmental Defender's Offices.

We support the recommendations made by the Australian Network of Environmental Defender's Offices for improving access to justice, including, for example:

- All Federal environmental legislation should provide for third party enforcement.
- All Federal environmental legislation should provide for third party appeal rights with respect to environmental decision-making involving
- Where necessary, amend Federal environmental legislation to include specific criteria which the relevant decision maker must 'act consistently with'.
- 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.
- Relevant rules in each jurisdiction should be amended to provide for public interest litigants to be exempted from security for costs.
- Relevant rules in each jurisdiction should be amended to provide that unsuccessful public interest litigants be exempted from paying costs.

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

- Rules in all jurisdictions should be amended to provide courts with discretion to either waive or cap photocopying fees for discovery and subpoenaed documents and amended to provide for 'e-discovery', thereby significantly reducing the cost of discovery for all parties.

- FOI legislation should be amended to assist applicants seeking information in the public interest.

Yours sincerely,

Pepe Clarke
Chief Executive Officer
Nature Conservation Council of NSW

On behalf of the Conservation Councils of Australia:

Nature Conservation Council of NSW
Conservation Council SA
Environment Centre NT
Environment Victoria
Queensland Conservation Council
Conservation Council of Western Australia
Environment Tasmania
Conservation Council ACT Region