Australian Network of Environmental Defender's Offices Inc

Dear Mr Raine,

Thank you for your invitation to submit a broad outline of ANEDO's comments in relation to the Productivity Commission's Draft report into Access to Justice Arrangements (the ***Draft Report***). We would be pleased to appear at a hearing to discuss our comments in greater detail. Representatives from ANEDO will be presenting at hearings in Canberra, Adelaide and Hobart in the coming weeks.

At the outset, ANEDO welcomes the acknowledgment in the Draft Report that:

> *"there are grounds for the government to play a role in helping to meet legal costs in environmental disputes involving matters of substantial public interest".*[1]

And that funding to Environmental Defenders Offices (***EDOs***)

> *"is warranted where the expected returns to the community exceed the opportunity cost to the community of the funding."*[2]

We consider that EDOs deliver excellent returns to the community, both through direct representation and the less direct benefits of improving the efficiency and effectiveness of public participation, increasing compliance and advising against actions with little prospect of success (thereby reducing costs risks).

EDOs around Australia have played a critical role in addressing legal needs in public interest environmental law matters, and believe that funding our services is a cost effective mechanism for the government help meet the costs associated with such matters.

The principal access to justice issues that concern ANEDO relate to public interest environmental law, and were set out in detail in our earlier submission to the Productivity Commission in November 2013.[3] Our submission will reinforce or expand on the earlier document in relation to the following issues:

Standing and merits review

Transparency of public decision-making and the ability to challenge and overturn unlawful decisions and decision making processes are the best defences against inferior, partisan or arbitrary decision-making. The ability to challenge decisions is a critical component of a democratic society.

However, two significant access to justice barriers exist in respect of public interest challenges to environmental decisions: standing and the availability of merits review.[4] Despite this, these issues were not addressed in the Draft Report. We repeat our earlier recommendations that environmental and planning legislation in all Australian jurisdictions (including Federal) provide:

- Open standing for enforcement and judicial review proceedings
- Third party appeal rights in respect of actions likely to have a significant impact on the environment.
- Appeal rights subject to merits review

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[1] Productivity Commission Draft Report: Access to Justice Arrangements, April 2014, 22.
[2] Ibid, 625.
[3] Australian Network of Environmental Defenders Offices submission to Productivity Commission: Issues Paper on Access to Justice Arrangements. November 2013. Available at http://www.pc.gov.au/projects/inquiry/access-justice/submissions
[4] Stephen Keim. *Access to Justice and the Need for Public Interest Environmental Lawyers*, EDO National Conference: Public Interest in Australia, 28-29 May 2010

Costs

Prohibitive costs of litigation, including the risk of costs or security for costs,[5] also present a significant barrier to the equality of access to the judicial system for environmental matters. Irrespective of the merits of their case, potential litigants are often unable or unwilling to expend their own funds or to risk losing their own financial security in pursuit of a remedy on behalf of the public interest. Ensuring that adequate legal resources are available to allow each side to present well-reasoned and clearly articulated arguments is essential if justice is to be done, and to be seen to be done.

As Justice Toohey observed:[6]

> *Relaxing the traditional requirements for standing may be of little significance unless other procedural reforms are made. Particularly is this so in the area of funding of environmental litigation and the awarding of costs. There is little point in opening the doors to the courts if litigants cannot afford to come in.The general rule in litigation that "costs follow the event" is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action, must inhibit the taking of cases to court. In any event, it will be a factor that looms large in any consideration to initiate litigation.*

ANEDO recommends that each jurisdiction enact a statutory presumption that parties to public interest matters bear their own costs in merits review, judicial review and third party enforcement proceedings. Implementation of such a measure would be assisted by the introduction of consistent guidelines as to what constituted a "public interest" matter.

ANEDO also supports draft recommendations 13.6 and 13.7 regarding the availability of protective costs orders.[7]

It must also be noted that, even with a presumption that each party bears their own costs, the costs of engaging in court proceedings will be prohibitive in many instances. In environmental matters particularly, the cost of engaging lawyers and a range of experts put litigation out of the reach of most concerned individuals and community groups. ANEDO supports the idea of a well-resourced public interest litigation fund to assist parties to meet these costs, and go some way towards levelling the playing field in environmental litigation.

Currently, Legal Assistance Funds managed by Legal Aid are not generally available for environmental matters. Public interest environmental litigation often relies on generous pro bono assistance from the legal profession and other experts. However, as noted in the Draft Report, the number of practitioners with expertise in environmental law is limited. The success of public interest environmental litigation should not place an undue burden on a small group of practitioners to donate their time. ANEDO therefore supports both the establishment of a public interest litigation fund, and the presumption of "own costs" discussed above. A fund could be managed within the existing Legal Aid model, with applications assessed by an expert panel against criteria similar to those used to determine if a party is eligible for a protective costs order.

In the absence of a statutory presumption that parties to public interest environmental disputes bear their own costs, ANEDO would support the recommendation that parties represented on a pro bono basis be entitled to recover their costs. Costs should be limited to the normal court scale of fees and include recovery for both legal services provided by CLCs and pro bono private practitioners.

ANEDO reiterates its concerns regarding procedural costs involved in litigation, including costs associated with photocopying, discovery and accessing information under Freedom of Information legislation. We support the Draft Report recommendations regarding electronic filing and discovery to reduce the costs of these processes.

ANEDO recognises the desire for court fees to be increased to cover costs, however strongly supports the recommendation to allow such fees to be waived or reduced where there is a public interest in the matter proceeding, whether due to the significance of the potential impacts of a proposal or the public benefit in clarifying an uncertain area of law. We support Draft Recommendation 16.1, but further recommend that guidelines be developed to guide the exercise of any discretion to waive fees on public interest grounds.

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[5] Ibid.
[6] Address to international conference quoted in Oshlack (1994) 82 L.G.E.R.A. 236 and in Australian Law Reform Commission, Costs-shifting – Who Pays For Litigation? (A.L.R.C. 75, 1995) [13.9].
[7] Productivity Commission Draft Report: above n 1, 42.

Legal needs and eligibility tests

The Draft Report notes that socioeconomic indexes are not necessarily an appropriate measure of legal need in respect of public interest environmental law. While low socioeconomic areas may be disproportionately affected by industrial pollution, development with the potential to impact on significant environmental values is not delineated by socioeconomic area. Similarly, means testing is not an appropriate threshold for obtaining legal assistance on a public interest environmental matter, where the ultimate beneficiary of that assistance is the environment, and the community at large.

In respect of support for environmental law matters, ANEDO considers that 'legal need' can only be determined on a case-by-case basis, having regard to the level of public interest in the matter being considered.

Specialist courts

ANEDO maintains the view that specialist environmental courts should be constituted in each jurisdiction as a superior court of record, convened by judges / commissioners with expertise in planning and environmental matters. It is our view that establishing specialist courts improves the level of understanding about environmental issues being considered, the rigour of the assessment and consistency of decision making.

Judges and commissioners in specialist environment courts generally have a greater appreciation of the significance of environmental laws, and are more willing to impose appropriate penalties in respect of breaches.

Role of advocacy

The Draft Report acknowledges the key role played by community legal centres (***CLCs***) in law reform, policy and advocacy.[8] In particular, the Commission expressed the view that: 'advocacy can … be an efficient way to use limited taxpayer dollars', maximising the effectiveness of CLC work and should be a 'core activity' of Legal Aid Commissions and CLCs.[9]

In December 2013, each EDO office received notification from the Attorney-General's Department that Commonwealth funding for our service would be terminated on the basis that government resources would instead focus on "frontline legal services to disadvantaged members of the community." It has been made clear in subsequent conversations with government representatives that advocacy and law reform activities were not considered "frontline services".

We understand that funding agreements for CLCs still receiving Commonwealth funding are being amended to exclude advocacy and law reform activities from the definition of 'core legal services'.

ANEDO strongly agrees with the Draft Report's acknowledgement of the role of CLCs in law reform and advocacy work. Advice and casework undertaken by EDOs allows us to identify systemic problems which prevent the regulatory framework from effectively securing a healthy environment. Amending or clarifying laws to address these issues can reduce litigation, improve transparency (and therefore community confidence) and minimise future economic costs associated with addressing poor health and rehabilitating affected ecosystem values.

We urge the Productivity Commission to confirm in its Final Report the value of law reform and advocacy work undertaken by the legal assistance sector, and to recommend that the capacity of the sector to undertake this work not be restricted.

Community Legal Education

The Draft Report recognises that community legal education plays an important role in assisting people to make better decisions, anticipate problems and have the confidence to act quickly to exercise their legal rights.

EDOs undertake a significant amount of community legal education work and endorse the Draft Report's support for the importance of this work. ANEDO considers that funding should be directed to ensuring that clear, practical resources are available to assist the community to understand laws that affect them, and how best to exercise the opportunities afforded to them by those laws.

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[8] Ibid, 623.

[9] Ibid, 609, 623 and 625

Funding for EDOs

Commonwealth government funding for EDOs will cease on 30 June 2014, leaving many of the offices without a long-term secure source of income. Given the Draft Report's recognition of the value of the work undertaken by EDOs and the conclusion that funding for this work was warranted, it is clear that the funding cuts will create a barrier to access to environmental justice.

We urge the Commission to maintain its statement regarding EDO funding in the Final Report.

ANEDO also notes with some concern that representatives of the Attorney-General's Department have indicated that the decision to de-fund EDOs was, in part, due to the High Court's decision in *Williams v Commonwealth*.[10] Prior to the recent funding cuts, EDOs have received Commonwealth funding since 1996, and ANEDO does not agree that this decision restricts the Commonwealth government's powers to enter into funding arrangements for the provision of public interest environmental legal services.

Other issues

ANEDO supports Draft Recommendation 12.2 regarding the need for clear model litigant guidelines for government agencies, and for adherence to the guidelines to be monitored. Complaints regarding failure to adhere to the guidelines should be made to an independent body, such as the Ombudsman.

We thank you for the opportunity to provide these brief comments, and would welcome the opportunity to expand upon these points in a further submission to the Commission at public hearings.

If you require any further information, please do not hesitate to contact me .

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[10] *Ronald Williams V The Commonwealth Of Australia &Ors* [2012] HCA 23