



EDO-NQ

FACTSHEET SERIES

The PUBLIC INTEREST AND TEST CASE SCHEME

Commonwealth funding for environmental law related litigation

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The information provided in this document is designed to provide some initial information on, and to be an initial guide for, accessing the Commonwealth's Public Interest and Test Cases Scheme ("the PITCS").

Further information on the PITCS is available from documents referred to in this overview, or directly from the Attorney-General's Department.

1. Introduction

Environmental law is not considered a Legal Aid Priority under the Agreement for the provision of Legal Aid between the Commonwealth, State and Territories.¹ No Legal Aid is currently available from the Queensland government for environmental law cases involving state or commonwealth legislation.

However, financial assistance *may* be provided by the Commonwealth Attorney-General's Department ("AGD") under the Commonwealth Public Interest and Test Cases Scheme (the "PITCS")² for:

1. Public Interest cases

A public interest case for the PITCS is one which involves a question about a Commonwealth law the resolution of which by the courts is, in the opinion of the Attorney-General, of public importance.

2. Test cases

A test case is one which is commenced to resolve an important question arising under a law of the Commonwealth that, in the opinion of the Attorney-General, affects the rights of a section or group of the public who are, for the most part, socially or economically disadvantaged.

The Guidelines to the PITCS ("the Guidelines") provide information on what must be addressed in your application for financial assistance under the PITCS, and what the Attorney-General's Department ("AGD") will consider when considering applications and deciding whether to grant financial assistance. A copy of the Guidelines is available by following the link on the following page: http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalaid_FinancialAssistance

In this factsheet we give a brief introduction to the PITCS and the Guidelines, how they work, how to apply for funding under the PITCS and what matters are considered when deciding whether or not to grant funding. You will notice that throughout this factsheet we have included references (by footnotes) to different parts of the Guidelines; we have done this so that you can more easily find your way to the relevant part of the Guidelines and read further, if you would like.

Where the case that funding is being sought for involves public interest environmental law matters your Environmental Defenders Office ("EDO") may be able to help you complete an application to the PITCS, and advise and represent you in the matter if resources are available (otherwise, they may be able to refer you to a private solicitor who may be able to help). Contact details for EDOs in Queensland are toward the end of this factsheet.

¹ http://www.ag.gov.au/www/agd/agd.nsf/Page/Legalaid_CommonwealthLegalAidPrioritiesandGuidelines

² See Appendix II for details of all available Commonwealth schemes providing financial assistance.

2. The Public Interest and Test Case Scheme (“PITCS”) – in brief

What is PITCS funding available for?

Subject to certain eligibility criteria, PITCS funding is available for cases:

1. Public Interest cases

A public interest case for the PITCS is one which involves a question about a Commonwealth law the resolution of which by the courts is, in the opinion of the Attorney-General, of public importance.

2. Test cases

A test case is one which is commenced to resolve an important question arising under a law of the Commonwealth that, in the opinion of the Attorney-General, affects the rights of a section or group of the public who are, for the most part, socially or economically disadvantaged.

The PITCS may cover a range of expenses including professional legal costs, counsel’s fees, court fees, reasonable travelling expenses, reports and records required for case preparation, transcripts, interpreters’ fees and other disbursements.³

How much funding is available under the PITCS?

The AGD has indicated that there are no limits on the amount of financial assistance available under the PITCS. Irrespective of the amount requested, the PITCS will only provide approximately 80% of the legal costs. Successful applicants will be advised as to what the upper limit of their financial assistance will be (Guideline 6.8).

Where the AGD believes that an application has merit, but the amount requested is unreasonable, the AGD will approve a lesser amount.

Who assesses applications for funding under the PITCS?

Applications for financial assistance under the PITCS are assessed by delegates in the Legal Assistance Branch of the Attorney-General’s Department (“AGD”)⁴, who have considerable discretion to decide which applications will be successful.

How quickly are applications assessed?

The AGD aims to have applications assessed within 4 – 6 weeks of receiving all relevant information.

³ Guideline 4.4

⁴ Guideline 2.1

3. Relevant Considerations

When an application is made for financial assistance under the PITCS, the AGD conducts a ‘global assessment’ of the application and considers various factors according to the circumstances of the case.

The factors considered by the AGD when determining whether or not to give financial assistance under the PITCS include the following:⁵

- The financial means of the applicant and any “financially associated person”, and their ability to meet any of the ordinary professional legal costs associated with the litigation.
(Guidelines 5.2, and 5.3 to 5.11)
- Whether the applicant will suffer hardship if assistance is refused.
(Guidelines 5.2 and 5.22)
- Whether the applicant has reasonable prospects of success in the litigation (the applicant must at least have a reasonable case to argue, and the case can not be fanciful or raise only speculative arguments).
(Guidelines 5.18 to 5.21)
- The nature and extent of benefit the applicant may enjoy if assistance is given, or detriment the applicant will suffer if assistance is refused.
(Guideline 5.22)
- Whether the public (or a section of the public) will receive a benefit from the litigation, in that the litigation will resolve an important question of law that has been an area of uncertainty affecting a large section of the public.
(Guidelines 5.23 to 5.25)
- The public interest of the proceedings
(Guideline 5.2)

4. Merits Test

The merits of the case that funding is being sought for is the most important consideration under the PITCS. The merits test applied by the AGD is dealt with in Guidelines 5.18 to 5.21.

However, there is no section of the application form that directly addresses the merits test as detailed in the Guidelines. It is therefore important to incorporate elements of the merits test into the grant application wherever possible. We deal with completing the PITCS application form more in the next section.

When applying the merits test, the Guidelines indicate that the primary consideration is whether it is reasonable in all of the circumstances to grant the financial assistance requested⁶.

One of the circumstances which will be considered is whether the case has reasonable prospects of succeeding⁷. “Reasonable” implies that the case is not fanciful, and that the arguments raised

⁵ Guidelines 5.1 and 5.2

⁶ Guideline 5.18

⁷ Guideline 5.18

are not merely speculative⁸. The weight given to this factor will depend to some extent on the importance of the case and the questions of law which will be resolved⁹. Advice from the AGD indicates that an important factor to emphasise in PITCS applications is the broader legal precedent that it is hoped will be set by the case.

Cases will generally not be funded if:

1. the case will simply involve application of settled law to the facts of a matter, as it will not be considered a “test case”¹⁰;
2. a similar case that covers the same questions of law or fact is currently before a court and a decision which will address the issue is likely¹¹.

5. Completing the Application Form

The form can be found on the Attorney-General’s website at:

[http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/\(966BB47E522E848021A38A20280E2386\)~A/pp+form+-+all+schemes+other+than+native+title.pdf/\\$file/App+form+-+all+schemes+other+than+native+title.pdf](http://www.ag.gov.au/www/agd/rwpattach.nsf/VAP/(966BB47E522E848021A38A20280E2386)~A/pp+form+-+all+schemes+other+than+native+title.pdf/$file/App+form+-+all+schemes+other+than+native+title.pdf)

Notes:

- *Due to the nature of the questions in the PITCS application form we highly recommend that you get a qualified solicitor to assist you to complete it.*
- *Part D of the Application Form deals with details of the case for which funding is being sought. It is in this part that elements of the merits test and other relevant considerations referred to above must be addressed. The following (numbered in bold) are taken directly from the application form, and any notes on what to address when completing those particular areas follow in italics.*

- 1. Describe the legal action you intend to take**
- 2. What are the facts of the case?**
- 3. What are the legal questions to be decided?**
- 4. Does the case involve an issue of Commonwealth Law? (give details of the Commonwealth Law involved)**
- 5. Explain how the case is of general importance**

Public Interest

- *Why is the case legally important? Public policy arguments alone may not be sufficient.*
- *Address:*
 - *whether the outcome of proceedings will be of benefit to the public.*
 - *whether the outcome of the proceedings will resolve important questions of law that have been an area of uncertainty or that affect a large section of the public¹²*

⁸ Guideline 5.20

⁹ Guideline 5.19

¹⁰ Guideline 4.6

¹¹ Guideline 4.10

Test Cases

- *Test cases are those that:*
 - *are brought for the purpose of resolving an important question of Commonwealth Law; and*
 - *affect the rights of a section of the public or a group who are for the most part socially or economically disadvantaged.*¹³
- *The benefit that the community will gain by a decision in court is balanced against the expense of running a test case because they usually involve complex facts or complex legal arguments*¹⁴

Environmental law

- *It is important to emphasise the public nature of environmental law.*
- *Environmental law may be distinguished from other Commonwealth Legal Aid priorities, as it involves many areas of public law. Public funds are expended not on private interests as with other areas of Legal Aid, but on the protection of public resources.*
- *Cases are also carried out by individuals and community groups with no private interest in the matter and who will not gain any personal or financial advantage.*

6. **What are the legal arguments in favour of your case?**
7. **What evidence or witnesses do you have to support your case?**
8. **What do you stand to lose/gain by the case? (eg interest in land, loss of job, custody of children, compensation for injury etc.)**
9. **At what stage is the case? (State the court and court reference, if any)**

Assistance is usually provided in stages (Guideline 6.6)

- *At the end of each stage in the litigation process a decision is made on whether to continue funding¹⁵, so it cannot be assumed that funding will continue.*
- *Applications for extensions are assessed on:*
 - *Prospects of success*
 - *Public interest*
 - *Costs incurred*
 - *Amount required to conclude matter*¹⁶
- *Current government policy encourages parties to avail themselves of alternative methods of dispute resolution, mediation, conferencing and arbitration prior to having the matter determined in a court. It is therefore important to detail any previous stages of the proceedings that involved dispute resolution or why this was unavailable or impossible in the circumstances*¹⁷.

10. **What is the next stage?**
11. **How much do you think it will cost you to resolve the case?**
12. **Give details of how you calculated your costs for each stage of the case.**

¹² Guideline 5.23

¹³ Guideline 4.3

¹⁴ Guideline 5.24

¹⁵ Guideline 6.6

¹⁶ Guideline 6.7

¹⁷ Guideline 4.7

6. MEANS TEST

Hardship (Guidelines 5.3 to 5.11)

“Hardship” means financial hardship.

The broad ‘hardship test’ is whether the applicant has the means to meet the cost of the proceedings without incurring serious financial difficulty¹⁸.

Relevant matters which will be considered by the AGD when determining hardship include:

- The income, expenditure, assets and liabilities of the applicant and any financially associated person;
- The estimated cost of the proceedings;
- The conditions of eligibility for a grant of legal aid from the relevant legal aid commission.

If the applicant is a corporation or an association then these hardship guidelines are applied to:

1. the income and assets of the corporation or of the association; and
2. the income and assets of any person(s) whose interest it is considered will be directly and beneficially affected if assistance is granted to the applicant.¹⁹

Initial contributions (Guideline 5.12)

An applicant may be required to make some contribution toward the costs of the case they are seeking PITCS funding for. If the applicant is a club or association or common interest group then each member may also be required to make such a contribution.

If an applicant is required to make such a contribution then they will be told how much the required contribution is when they are advised of the decision on their PITCS application.

Verification of Means (Guidelines 5.13 to 5.17)

Applicants will generally have to verify their means (both income and assets), as will financially associated people. However, there is a discretion to waive the requirement to verify means where the application is urgent.

Guidelines 5.14 to 5.16 in particular deal with how income and assets are verified.

Although not all states provide Legal Aid to organisations and incorporated associations, this is possible under the PITCS providing a copy of the organisation's latest financial statement is included.²⁰

¹⁸ Guideline 5.3

¹⁹ Guideline 5.7

²⁰ Part G - Application for Assistance form

7. COSTS

If you receive financial assistance under the PITCS this does not mean that you will not have to pay any legal costs of other parties if a court orders (for example, if you lose the case)²¹.

Recovery of costs and repayment of PITCS funding (Guidelines 6.15 to 6.18)

If you receive PITCS funding and win the case, you will be expected to apply for costs against the other parties²².

The Commonwealth has the first right to be paid from any costs recovered by a legally assisted person, and a legally assisted person is required to repay any Commonwealth assistance under the PITCS from those costs.²³

8. CONCLUSION

If you require any assistance with the completion of an application to the Scheme please contact the Environmental Defenders Office in your State, and they may be able to assist you.

Otherwise contact the Attorney-General's Department on:

Financial Assistance Branch - (02) 6218 7132

Legal Assistance Branch, Assistant Secretary of Legal Services - (02) 6218 7020

9. FURTHER INFORMATION

If you have any further questions or concerns about any of these matters, then please contact us on the details below.

While we have limited resources, often we can give you quick advice over the phone or direct you to someone who may help on a free or reduced rate basis.

Stay in contact with your local Environmental Defenders Office. We try to run as many community workshops on as many useful legal issues as we can.

²¹ Guideline 6.19

²² Guideline 6.15

²³ Guideline 6.15

10. CONTACT DETAILS FOR EDOs in QUEENSLAND

EDO-NQ

Suite 1, Level 1

96-98 Lake Street

CAIRNS QLD 4870

Ph : 07 4031 4766; Fax: 07 4041 4535

Email: edong@edo.org.au

EDO (Qld)

30 Hardgrave Road,

WEST END QLD 4101

Ph: 07 3211-4466; Fax: 07 3211-4655

Email: edogld@edo.org.au

To become a member of the Environmental Defenders' Office of Northern Queensland, or for more information about factsheets and legal advice, please contact us at edong@edo.org.au or on 07 4031 4766. Our web address is www.edo.org.au/edong

APPENDIX I**Commonwealth Public Interest and Test Case Scheme (“PITCS”) Application figures**(Period: 1 January 2004 to 31 December 2008)²⁴

Area of Law	Applications Submitted	Applications Approved	Percentage
Family	26	10	38%
Discrimination/human rights	11	6	55%
Administrative (e.g. ADJR Act)	5	3	60%
Employment/OH&S/Workers' Compensation	5	3	60%
Constitutional	4	3	75%
Migration	4	-	0%
Commonwealth Criminal	3	-	0%
Land rights	3	-	0%
Intellectual property	2	-	0%
Consumer/fair trading/Trade Practices Act	2	-	0%
Bankruptcy	2	-	0%
Social security	2	-	0%
Extradition	1	-	0%
Medical negligence	1	-	0%
Probate	1	-	0%
<i><u>Environmental</u></i>	-	-	0%
Other (One of the above areas)	??	6	??
Unknown (files archived and not accessible or applications withdrawn)	8	-	0%
TOTAL	80	31	38.75%

²⁴ Provided by the Legal Assistance Branch Attorney-General's Department, April 2009.

APPENDIX II

Financial Assistance Provided by the Federal Government through the Attorney General

The money available for financial assistance through the Commonwealth Legal Aid PITCS is divided into 2 categories; Native Title and Non-Native Title. Of the Non-Native Title schemes, there is approximately \$12million available for 26 (statutory and non-statutory) schemes.

