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Ms. Jo Bragg
Principal Solicitor
Environmental Defenders' Office
30 Hardgrave Road
West End 4101

Dear Jo,

Your Submission to the Attorney-General

I have read your submission by the EDO and the EDO of Northern Queensland to the Attorney-General dated 12 June 2010 and write in support of that submission and also to raise other options to encourage and support public interest litigation to protect the environment. I am happy for this letter to be forwarded to the Attorney-General or any other person who may be interested to read it.

I should also try to establish my own qualifications in terms of commenting on this issue. I was admitted as counsel in 1985 after seven years of practice as a partner of a Brisbane firm. I took silk in 2004. I have been engaged in public interest conservation cases on and off since the late eighties. I was involved in the Noosa North Shore planning litigation which involved a six weeks hearing. I was engaged in litigation involving attempts to prevent the destruction of limestone caves at Mt Etna, near Rockhampton, in 1988-9. I have been involved in other planning cases involving public interest issues. I have been involved (with Dr. Chris McGrath as my junior) in a number of cases involving the construction and application of the Commonwealth environmental litigation (the EPBC Act). I conducted a successful appeal in the Court of Appeal (also with Dr. McGrath) involving a mining lease application by Xstrata Coal which addressed the hearing procedures in the Land and Resources Tribunal in Queensland. I have given CPD lectures on the EPBC Act.

In the early to mid-nineties, I was President of the Legal Aid Commission in Queensland. I was involved on the margins providing some advice (and moral support) in respect of the recent Paradise Dam case (the decision of which is currently reserved before the Federal Court).

It seems to me that the litigation in which Dr. McGrath and I have been involved, both separately and together, provides an excellent example of the impact that public interest litigation can have. The Nathan Dam case corrected the Commonwealth Minister's mistaken and very limited view of the legislation which he was attempting to administer. The *Booth v Bosworth* litigation, together with the Paradise Dam case, raised enforcement issues around which the Commonwealth Minister was content to tiptoe. In the case of *Booth v Bosworth*, the result has been a change in administration at State and Commonwealth level and farmers are no longer allowed to use electric grids to cause large numbers of flying foxes to die a painful death. Rather, use is made of the eminently practical and successful netting option which was available but not widely used because of an inherent tendency by many farmers to stick to old patterns.

I am also aware, however, how difficult it is to get even excellent cases on the merits up and running. Fear of adverse costs consequences present a real difficulty. Recently, my wife and I have been involved with a community group concerned about the failure to enforce conditions on a large scale construction project. The result was that the noisy construction work was allowed to operate 24 hours a day, seven days a week. Although I was convinced that the group would have been successful on a construction summons concerning the Coordinator-General's conditions or on an action for nuisance, I had real difficulty convincing either my wife or any other member of the group to litigate because of concerns about an adverse costs order.

Both EDO offices are catalysts for public interest litigation as they attract public interest clients and offers of *pro bono publicae* assistance. Providing proper resourcing to the two offices in Queensland goes part of the way to facilitating public interest litigation. Combined with the other suggestions in this letter, they provide a means of ensuring that high quality and well thought out public interest litigation can occur.

In 2001, Dr. McGrath and I wrote an article suggesting the formation of a fund for environmental litigation. Attempts have been made since then to get support for such a fund from philanthropic groups, so far, without success. Another of the problems that makes it difficult to conduct such litigation is the cost of expert witnesses. A group may be able to find barristers and solicitors and even a town planner who will act for reduced fees or on a speculative basis. However, an expert of a different discipline may not be available except for a full fee.

A flexible legal aid system for public interest litigation would allow community groups to contribute and raise what they can but also would provide for legal aid funding to provide the missing resources that cannot otherwise be found. I have also forwarded the 2001 paper by Dr. McGrath and myself.

The adverse costs order problem may be addressed in a number of ways. The New South Wales court system now has a provision similar to s.49 *Judicial Review Act 1991* (Queensland) allowing environmental litigants to obtain a protective costs order early in the proceedings. A general provision of that kind should be inserted into the *Uniform Civil Procedure Rules 1999*. There should also be a provision that the normal costs

assumption that the successful party should obtain its costs should not apply in environmental litigation, especially, where community groups are litigating against commercial or government entities. There may also be proper bases to extend the number of jurisdictions where the general order is that there be no order as to costs in litigation. For example, community groups do not generally fear adverse costs orders in the planning jurisdiction because of this prevailing costs regime.


There is also a need to insert in more Queensland environmental legislation provisions negating the need for an undertaking as to damages in the case of interlocutory orders under such legislation and orders providing special bases to qualify for standing to bring proceedings. The *Nature Conservation Act 1992* (Queensland) contains such provisions. In both areas, an excellent model for such legislation may be found in the *Environmental Protection and Biodiversity Conservation Act 1999* (Commonwealth).

Most importantly, I endorse your analysis of the important social benefits obtainable from increased access to the courts for public interest environmental litigation. Far sighted progressive governments realise that they cannot achieve everything through the legislative and administrative process. They realise that, as governments operating in a short electoral cycle, they are placed under enormous pressure by well-resourced groups whose pretensions to public interest comprise advancing their own profits. The pointy end of such pressure occurs where governments attempt to enforce good environmental laws. By empowering groups in the community to act in the public interest to enforce good laws and to bring cases to Court to show the full potential of such laws, progressive governments interested in protecting the environment can take pressure off themselves and extend the reach of the legislation they guide through Parliament.

I strongly believe that it is in the interests of progressive governments who want to protect the resources of clean water, healthy air and the many other resources provided by a sustainable environment to empower community groups to act in the ways suggested in your submission.

Please feel free to contact me if you have any questions.

Best regards,


Stephen Keim SC
Higgins Chambers
16 June 2010