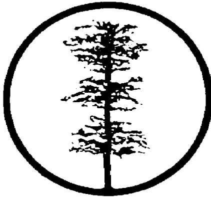
ENVIRONMENTAL DEFENDER'S OFFICE OF NORTHERN QUEENSLAND INC. and ENVIRONMENTAL DEFENDERS OFFICE (QLD) INC.



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12 June 2010

By email (attorney@ministerial.qld.gov.au) and hand:

The Honourable Cameron Dick MP
Attorney –General and Minister for Industrial Relations
GPO Box 149
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REQUEST FOR MEETING TO DISCUSS PROPOSAL AND NEED FOR STATE LEGAL AID FOR PUBLIC INTEREST ENVIRONMENTAL LITIGATION

The Environmental Defenders Office (Qld) Inc. ("EDO (Qld)") and Environmental Defender's Office of Northern Queensland Inc. ("EDO-NQ") (collectively, "Queensland EDOs") are small community legal centres which specialise in public interest environmental law in Queensland. Poorly resourced but determined community groups and public spirited litigants come to us for environmental and planning legal advice, often hoping to run litigation to stop breaches of the law and to protect Queensland's precious environment.

Queensland's environment laws contain specific provisions to encourage public participation. If illegal harm is occurring to the environment, community groups need to overcome certain barriers in order to take Court action if government fails to act. The community groups need firstly, legal standing to take court action, secondly favourable costs rules and finally and most relevantly to this submission, at least some financial assistance or legal aid. Since 1992 there has been, effectively, no legal aid available from Legal Aid Queensland for even the most important Queensland public interest environmental cases.

Without financial assistance to enforce environmental legislation and pursue environmental law matters in court, the community is denied access to justice and its ability to protect and conserve public resources and the Earth's life support systems. We estimate that over the State there are over 20 excellent cases per year with a willing and able client which fail due to lack of resources (and many more worthy cases with no clients). The failure to run those cases leads to irreparable social and environmental degradation. However, where legal aid or other assistance is available, as is the case in New South Wales and under the Commonwealth's "Public Interest and Test Case" formula, important public interest environmental cases have been successfully run in court. **See attachment** (examples of cases not run for lack of aid and cases run where assistance was available). Given the vast financial and human resources available to commercial interests who are causing environmental damage in Queensland, it is urgent to correct this imbalance.

We are keen to meet with you to further discuss our submission and wish to thank you for organising a meeting for us with Mr Brad Raguse and Mr Phil Clarke. While we know funds are tight, a relatively small amount of funding for public interest environmental cases will have a huge impact on environmental protection and conservation efforts. We know that you have a special appreciation of the need to address environmental issues such as climate change.

Just to make it clear, this application is not about funding for the Queensland EDOs, but rather about funding for public interest cases, where the client may use which ever lawyer the client chooses.

Yours faithfully,

Patrick W. Pearlman
Principal Solicitor
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Jo-Anne Bragg
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cc: Jasmine Love (by email: Jasmine.Love@justice.qld.gov.au)
Phil Clarke, Acting Director-General, Justice and Attorney General (by hand)

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1. Overview

1.1 Access to justice and legal services is an important, fundamental right for all Australians. The purpose of legal aid in Queensland is to provide legal information, advice and representation to financially and socially disadvantaged Queenslanders. The availability of legal aid therefore ensures improved access to justice, for all Queenslanders.

1.2 The public will wish to engage with the areas of law which have the greatest influence over or impact on their lives or interests. These areas of law will change over time. In order to maintain access to high quality legal services for financially and socially disadvantaged Queenslanders as new concerns and interests emerge, the areas of law which attract legal aid funding must also adapt.

1.3 The desire by the public to play a more meaningful role in environmental decision-making in order to minimise human impacts on the environment has increased. The increased concern has been triggered, at least in part, by increasing alarm over the number of environmental disasters occurring around the globe and a greater awareness of human impacts on the environment.[1] This has been acknowledged at a governmental level, by the introduction of more comprehensive environmental legislation.

1.4 A publicly accessible legal framework does little to allow meaningful participation by the public if the single most inhibiting factor is not overcome – cost. Providing the public with the financial assistance necessary to actually participate in environmental decision-making, and the enforcement of environmental law, will demonstrate government commitment to environmental protection. This is not possible for all matters but it is crucial that there is some funding for important public interest matters.

1.5 Where issues involving potential harm to the environment arise, limited access to justice has broader implications for the public than with other areas of law. Unlike the areas of private law for which legal aid is currently available, environmental harm affects a wide section of the population. The inability of individuals and groups to access legal services for environmental litigation compromises public rights, which includes present and future access to the natural features and resources upon which Queensland's economy and wellbeing is dependant.

1.6 EDO-NQ and EDO (Qld) therefore wish to propose that the following recommendations be adopted:

Acknowledgement A: Acknowledgement of the public interest inherent in environmental law
That there is an inherent public interest and benefit in environmental law which aims to protect the environment from material environmental harm[2], serious environmental harm[3], or significant impact[4] by protecting public rights to the environment over private interests in the environment.

Acknowledgement B: Clarification of the term "public interest environmental litigation"
That the term "public interest environmental litigation" should refer to litigation by an individual or group of individuals for the dominant purpose of conserving or protecting, or advancing the conservation or protection, of the environment.

Recommendation 1: Expand Legal Aid Priorities to include public interest environmental litigation
Legal Aid Priorities for Queensland be expanded to include the provision of financial assistance for public interest environmental law matters. A set amount per annum, eg $180,000, to be provided for such cases in total.

Recommendation 2: A separate merits test
There be adopted a separate merits test which is suited to the nature of public interest environmental litigation matters.

Recommendation 3: Proposed merits test
The merits test proposed in this submission for assessing the eligibility of public interest environmental litigation matters under Legal Aid in Queensland would require that all of the following factors be satisfied:

1) The matter:
- **a)** directly or indirectly affects a significant number of people
  OR
- **b)** raises a matter of broad public concern
  OR
- **c)** requires legal intervention to avoid a significant and avoidable environmental harm serious environmental harm, material environmental harm or significant impact to federally protected matters of NES
  OR
- **d)** particularly impacts on disadvantaged or marginalised groups

2) The matter benefits the Queensland environment and:
- **a)** seeks to achieve the purpose of, or to enforce environmental legislation
  AND
- **b)** will prevent, mitigate harm to or otherwise protect the Queensland environment,
  AND
- **c)** involves "material environmental harm"[5] or "serious environmental harm" or the potential for serious or material environmental harm

3) Whether:
- **a)** the applicant has reasonable chance of success on the merits,
  OR
- **b)** the case involves an untested or undecided area of law

Recommendation 4: No Means test, instead focus on the public interest elements of the case
The traditional approach to granting legal aid only in cases of financial hardship is not appropriate when the case is all about the public interest.

Recommendation 4: Separate Assessment Committee
A separate, independent committee (as in New South Wales) be established to assess applications for aid against relevant criteria outlined in this submission and to make recommendations to the decision officer at Legal Aid Queensland..

Recommendation 6: Legal Aid Indemnity for public interest environmental litigation

When legal aid is granted for a case, that it includes an indemnity for Legal Aid applicants, similar to that provided in section 47 of the *Legal Aid Commission Act 1979* (NSW), for public interest environmental litigation.

2. Introduction

2.1 Environmental law has emerged over the last three decades with a focus on public law, as distinct from the private law upon which much of Australia's legal system is based.[6] It is also substantially focused on public interests and public rights to an unpolluted and healthy natural environment for all Australians. There is therefore an inherent public interest element to environmental law not present in other areas of law, as environmental law aims to protect the shared public right to utilise and enjoy the environment. Access to environmental law is, therefore, inescapably a social justice priority.

2.2 In Queensland, a considerable body of environmental legislation has been enacted over the last two decades. Much of the legislation has removed the traditional barriers to public participation by including more relaxed standing provisions[7] and modified costs orders. This demonstrates governmental and political acknowledgement of the public's desire to participate in the environmental decision-making process, and indeed the public interest in providing for such participation.

2.3 However, meaningful public participation requires more than the legal rights of standing and reduced cost barriers. Accessing the legal system is expensive. Environmental litigation invariably involves substantial cost as it necessarily relies upon expert evidence in determining environmental issues and the litigation is often lengthy and complex. Without the without the provision of legal aid in appropriate cases, financially and socially disadvantaged individuals are not able to participate in environmental decision-making or challenge inappropriate development applications.

3. Public Interest Environmental Litigation

3.1 The attributes of a democratic society and our system of representative democracy are exemplified by a citizen's ability to initiate litigation in the public interest. The importance of public interest litigation is well recognised both within Australia and abroad. Justice Stein observed that other countries including England[8], New Zealand[9], Canada[10] and elsewhere[11] have also accepted the importance of proceedings brought to advance a legitimate public interest.[12]

3.2 Public interest is undefined in both case law and legislation as it is a dynamic concept that changes with individual circumstances and with time[13]. However, at its core is the notion that the public interest is something that benefits the wider community, not merely an individual. In this way public interest litigation describes legal proceedings that are instituted by an individual, or group of

individuals, with the dominant purpose of benefiting the public. It is not about vindicating or protecting individual rights. In the environmental context, the dominant purpose of public interest litigation must, then, be the conservation or protection, or the advancement of the conservation or protection, of the environment[14].

3.3 Environmental protection itself a public benefit can conflict with private rights, or, in fact, other public interests such as the development of a resource, employment, or another social or economic interest[15].

3.4 In order to maintain access to high quality legal services for financially and socially disadvantaged Queenslanders as new concerns and interests emerge, the areas of law which attract legal aid funding must also adapt.

3.5 Australia is committed to a number of important international agreements relating to World Heritage Areas, biodiversity conservation, marine pollution and climate.[16] These international obligations have gradually been incorporated into domestic legislation after the 1992 Intergovernmental Agreement on the Environment nationally recognised principles of ecologically sustainable development ("ESD"). Much of Queensland's current environmental legislation reflects the principles of ESD.[17]

3.6 Environmental law has emerged over the last three decades as a separate area of law which focuses on public law.[18] Where sustainable use of public resources is not effectively regulated and enforced, limited access to justice for environmental law matters has broader implications than with other areas of law. Environmental harm has the potential to affect a wider section of the population than private law matters currently eligible for legal aid funding. Public rights of future generations to access these resources are also included in ESD. The inability of individuals and groups to access legal services for environmental litigation compromises public rights, which include access to the natural features and resources upon which Queensland's present and future economy and wellbeing is dependant.

Acknowledgement A: Of the public interest inherent in environmental law

That there is an inherent public interest and benefit in environmental law which aims to protect the environment from material environmental harm, serious environmental harm, or significant impact by protecting public rights to the environment over private interests in the environment.

Acknowledgement B: Clarification of the term "public interest environmental litigation"

That the use of the term "public interest environmental litigation" should refer to litigation by an individual or group of individuals for the dominant purpose of conserving or protecting, or advancing the conservation or protection of, the environment.

4. Environmental Law

4.1 Of the 16 World Heritage Areas declared in Australia 5 are in Queensland. Protection and management of Queensland's environment involves both State and Federal legislation.

4.2 State Government commitment to protect Queensland's natural environment over the last two decades is evident from the comprehensive system of environmental legislation in force. There are 34 pieces of legislation that govern the protection or management of Queensland's important natural and cultural environment – of these 26 were created since 1989.[19] The legal system covers an extremely wide subject area including:

- Planning and development
- Vegetation management
- Nature conservation
- Water
- Fisheries
- Environmental harm and Pollution
- Cultural heritage; and
- Taking action to protect the environment

4.3 Much of Queensland's environmental legislation specifically encourages community consultation and participation, for example the *Sustainable Planning Act 2009 (Qld)* ("SPA") like the legislation it replaced, includes relaxed standing provisions, modified costs orders and notice provisions.

4.4 The importance of Queensland's natural features on an international scale is evident from the proportion of World Heritage Areas declared across the State. They cover a considerable area including: 900,000 ha in the Wet Tropics World heritage Area; 59,223 ha of the Gondwana Rainforests of Australia; 10,000 ha in the Riversleigh World Heritage Area; 166,038 ha of Fraser Island; and 348,000 sq km associated with the Great Barrier Reef, which extends 2,300 km from Cape York to near Bundaberg. World Heritage Properties and other matters of national environmental significance (NES) are protected and managed under the *Commonwealth Environment Protection and Biodiversity Conservation Act 1999* ("EPBC Act").[20] Any efforts by the public to engage with the EPBC Act, however, involve the very high costs associated with attending the Federal Court.

Filing Gaps in the Legal System

4.5 Public interest litigation enables the public to protect neglected or disadvantaged interests. This is often important for "filling gaps" in the legal system.

4.6 Environmental law has emerged over the last three decades with a focus on public law, and distinct from the private law upon which Australia's legal system is based.[21] This differs significantly

from the principles of private law upon which the present legal system has spent over 600 years developing.

4.7 As a result, environmental legislation contains a body of new terms, concepts and means of enforcement that are largely untested. Exact interpretations and legal understanding through much of the body of environmental law in Australia has not yet been fully developed and interpreted.[22]

4.8 Increasing certainty and consistency in the legal system however, should not be the task of an unassisted member of the public to perform on behalf of parliament, for the benefit of the public at large. Financial assistance *must* be provided for environment related litigation that is in the public interest in order:

- To obtain clarity and consistency in the application of environmental laws;
- To promote meaningful community involvement in environmental decision–making; and
- To ensure that Australia's international obligations to protect biodiversity and reduce greenhouse gas emissions are not compromised.

Enforcing Environmental Laws

4.9 The term "environment" is so broad in its definition that laws designed to protect the environment are almost impossible to enforce. 'The environment' incorporates everything in our immediate surroundings which means that it is not always possible for enforcement agencies to remain aware of all breaches of existing environmental laws.[23] Public engagement with environmental laws is important as the public plays the role of watchdog for the enforcement of environmental law. Where they are unable to perform this role effectively, many breaches go unnoticed.

4.10 Under most of Queensland's environmental legislation, the public is able to take enforcement action, despite the absence of a private interest. Sheller J referred to the open standing provisions available under section 123 of the *Environmental Planning and Assessment Act 1979* (NSW) as:

> "an acknowledgement in part at least, that those directly responsible for the administration of the Act and those seeking dispensations pursuant to its provisions might not always be relied upon to ensure that breaches of the Act were remedied or restrained".[24]

Without financial assistance, it is unreasonable to expect individuals or not-for-profit groups to self-finance, either through existing funds or through fund-raising efforts, in order to carry out public interest environmental litigation from which they will obtain no personal benefit or compensation. This is especially the case where the legislature intended that the public would be responsible in part for enforcement of environmental legislation and participation in the decision-making process through litigation.

Broadening Information Available to Decision-Makers

4.11 Environmental law in Australia generally prescribes that protection of the environment be balanced against economic, social and developmental considerations.[25] This system is problematic as the considerations are placed in competition with each other with no legislative guidance as to the weight that must be given to each. Therefore, environmental legislation provides weak protection to the environment in regions heavily influenced by economic and developmental interests.

4.12 Under the current system of environmental protection in Queensland, any decision is open to challenge on different, but equally valid balancing of environmental, developmental, social and economic considerations. Courts provide the public with an impartial adjudicator through which to challenge the activities and decisions of government and better-resourced parties. This ensures the public has direct access to government decision-making, and the opportunity to bring important matters to the attention of the legislature.[26]

4.13 Where the environment has not been adequately considered in a decision to approve an activity, and significant harm to the environment is likely to result, individuals or not-for-profit groups should be able to receive financial assistance to challenge the decision in order to protect the public resources upon which Queensland's economy and well-being are dependant.

Minimising Harm to the Natural Environment

4.14 All humans are dependent on the natural environment for survival. Yet the right to uncontaminated air, drinking water, or ocean are not preserved in either Australia's constitution or legislation.

4.15 Individuals and groups who seek to participate in environmental decision-making or pursue environmental litigation do so solely for protection of the natural environment used by all Queenslanders, not for personal financial or other gain. As Kirby J discussed in relation to the Land and Environment Court in New South Wales:

> "Inherent in the foregoing legislative innovation is a parliamentary conclusion that it is in the public interest that such individuals and groups should be able to engage the jurisdiction of the Land and Environment Court, although they have no personal, financial or like interest to do so."[27]

4.16 Where they are successful, public interest environmental litigants will significantly reduce environmental impacts of development on the Queensland environment.[28] Where public participation is possible, inappropriate development applications likely to harm the environment can be stopped, or conditions attached to mitigate or reduce the likely impacts.

4.17 It is not uncommon that individuals in lower socio-economic demographics are more often exposed to more inappropriate developments which lower air quality, water quality or the amenity

of an area, such as industrial activities or large-scale development projects. Where these projects, either directly or indirectly, increase the likelihood of ill-health affects or lower land values, the financial and social disadvantage within a community is compounded, as community members are unable to access funding to stop those developments, or ensure that more restrictive conditions are placed on them.

Improving Financial Equality Among Parties In Environmental Cases

4.18 The opportunity to present an alternative perspective and evidence maintains equality in the decision-making process. Unfortunately, legal costs are expensive, often prohibitively so. For a well-prepared and run matter legal costs include such things as solicitor's fees, barrister's fees and, in the case of environmental cases, usually require the additional cost of expert's fees.

4.19 Where legal advisors and experts who are willing to appear at reduced rates are engaged, the cost range for a 2 day trial is around $25,000. This is in comparison to the $40,000 to $60,000 that a developer or government department would spend with a full legal team and team of experts.

4.20 When major developments with potential for environmental harm are proposed, such as coal mines or major residential developments, proponents are prepared to spend millions of dollars in Court, and public interest environmental litigants are at a massive financial disadvantage.

4.21 The non profit groups who might be most able and willing to run public interest environmental litigation may be able to raise funds but experience massive demands on their limited financial and administrative resources. For example, see the attached outline of examples of litigants and their finances at the end of this submission!!

4.22 Former Chief Justice of the Land and Environment Court, Justice Cripps, strongly supported amendments to NSW Legal Aid's system of public interest environmental law assistance. His Honour emphasised:

> "how important it is that there be some equality of representation between the protagonists on each side."[29]

4.23 There can be no notion of equal access to justice where the public is unable to protect its right to access natural resources over private commercial interests because the public is unable to afford to advocate for these rights in court.

5. Legal Aid for Environmental Law

5.1 In 1986 Ben Boer proposed that there were five main reasons why there had, to that time, been relatively few public interest legal actions taken to protect environmental values[30]:

- Lack of appropriate environmental legislation;
- Lack of sufficiently broad standing provisions;
- Lack of public knowledge about environmental legislation;
- Lack of a history of public interest litigation; and
- Lack of funds for public interest litigation.

5.2 Whilst major advances have been made to overcome the first four hurdles identified by Boer and listed above, there has been insufficient advance in relation to the final hurdle indentified; lack of funds for public interest litigation.

5.3 A publicly accessible legal framework does little to allow meaningful participation by the public if the single most inhibiting factor is not overcome – cost. Providing the public with the financial assistance necessary to actually litigate in connection with environmental decision-making, and the enforcement of environmental law, will demonstrate the government's commitment to environmental protection.

5.4 Legal Aid Queensland provides no financial assistance for individuals or groups to pursue public interest environmental litigation. Whilest ervices exist in Queensland for individuals to obtain legal advice and assistance with regard to public interest litigation and administrative law,[31] no financial assistance is available. For example, Dr Carol Booth's application for Legal Aid for an important wildlife case was rejected before the public interest elements were considered, even though her assets were extremely modest. See attachments at the end of this submission.

5.5 There are two Environmental Defenders Offices ("EDOs") in Queensland.[32] These offices provide legal advice specifically in relation to public interest environment and planning law. However, with limited resources, Queensland's EDOs are severely limited in their ability to provide legal representation and advice in response to many of the requests for litigation assistance they receive. In short, demand for public interest environmental and planning law assistance far outweighs the level or degree of service that can be provided, particularly where litigation is run. Moreover, running a public interest environmental litigation case in the Planning and Environment or any other Queensland state court involves not just solicitors time but may also involve barristers, expert witnesses, travel, court fees and other administrative costs - none of which the EDOs' service is able to cover.

5.6 Despite the legal framework and assistance that has been created, lack of funding is still the single most limiting factor in ensuring the public's access to environmental justice. As Justice Toohey emphasised in his well quoted passage made at an International Conference on Environmental Law:

> "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."[33]

5.7 Without the inclusion of public interest environmental litigation as a Legal Aid priority, access to justice for financially and socially disadvantaged Queenslanders is limited. The public is often forced to accept the approval of commercial activities despite being aware of their potential to cause harm to the environment, and without having had any meaningful opportunity to challenge the decision to approve the activity. Where the public is unable to obtain sufficient funding to challenge a development application, or breach of an environmental law in a lower court, they are usually also unable to raise the funds required to prove the existence of any failures once the activity is completed or operational. In particular, in residential situations this can result in loss of health, wellbeing and amenity in an area, which exacerbates financial and social disparities within the sections of the community. *(See examples in the attachment of cases not run due to lack of resources.)*

5.8 Where members of the public are willing to spend the time and personal resources required to challenge administrative decisions or other well-resourced parties in the courts then, in the absence of any financial interest or personal benefit, they need legal aid.

5.9 For these reasons, the Queensland EDOs are requesting *as a minimum*, that financial assistance be made available to public interest environmental litigants who wish to take claims involving environmental law matters to an appropriate Queensland state court.

Recommendation 1: Expand Legal Aid Priorities to include public interest environmental litigation

Legal Aid Priorities for Queensland be expanded to include the provision of financial assistance for public interest environmental litigation matters. A set amount per annum eg $180,000 to be provided for such cases in total.

6. Proposed System of Assessment for Legal Aid Environmental Law

6.1 Meaningful public participation in environmental litigation provides numerous, direct public benefits to Queensland and its citizens, by: (1) assisting in the achievement of legislative objectives, (2) protecting the environment, (3) improving enforcement of environmental laws, (4) ensuring government accountability in decision making and private accountability for environmental harms resulting from breach of environmental or planning laws, (5) ensuring the continuation of a participatory democracy, and (6) stimulating innovative and socially responsible answers to environmental problems.[34] Unfortunately, New South Wales is the only state in Australia at present where Legal Aid priorities include environmental law matters.

6.2 The Queensland EDOs support a system of assessment for Legal Aid with respect to environmental law matters that can be easily adapted to the current system of assessment for legal aid applications in Queensland. However, certain adaptations will be required to accommodate the public nature of environmental litigation, and the fact that incorporated not-for-profit associations are often involved in environmental matters, as well as individuals.

Merits Test - Public Interest Environmental Litigation

6.3 Public interest law is characterised by the merits of each circumstance. The public importance of ensuring that the public is able to access the legal system in order to pursue cases in the public interest is an important right of all Australians.

6.4 Private interests are not relevant to public interest environmental litigation. Many individuals engage in environmental litigation without any personal interest in order to protect public rights. Despite this, however, the merits test under both Queensland Legal Aid and NSW Legal Aid (including that for public interest environmental law matters) does not acknowledge the public nature of environmental litigation. This makes such merits tests inefficient as they are both inappropriate and complicated to apply.

6.5 As individuals and non-profit groups engaging in environmental litigation rarely have remunerative interests in the outcome of the litigation, the Queensland EDOs support a separate test for providing financial assistance for public interest environmental litigation specifically adapted to the nature of environmental law.

Recommendation 2: A separate merits test

There be adopted a separate merits test which is suited to the nature of public interest environmental litigation matters

6.6 A clear merits test specifically adopted to suit the nature of public interest environmental litigation matters will be advantageous for both potential applicants for legal aid and administrators assessing applications because the merits test will:

- Be more easily understood by applicants;
- Be more easily understood by administrators assessing legal aid applications;
- Save time in assessing applications and therefore save cost in administration; and
- Avoid the need for a separate assessment panel to assess applications.

6.7 Legal Aid NSW provides two separate merits tests for State and Commonwealth environmental law matters. The merits test for Commonwealth cases adds additional public interest emphasis to the test. In addition to the merits test, Legal Aid NSW broadly considers, where appropriate, the environmental, economic, cultural and social impact of the matter on the local community and public generally,[35] and whether the matter is "of substantial public concern".[36]

6.8 The Queensland EDOs consider the merits test set out under the NSW Legal Aid Scheme for environmental law matters needs improvement. We believe that the NSW merits test is too broad, the terms defining "substantial public concern" and the additional considerations are unclear, and that this results in a test that is unnecessarily complicated and difficult to apply. "Public interest", "public benefit", "public concern" and "public importance" remain undefined in both legislation and case law. The courts prefer to determine whether a case is in the public interest based on the circumstances of each case,[37] rather than define criteria that could potentially limit future instances.[38] Some clear indicators of what will qualify as public interest environmental law should be implemented before legal aid environmental law matters can be efficiently and consistently assessed.

6.9 Therefore the Queensland EDOs recommend a separate merits test for public interest environmental litigation cases that incorporates the relevant parts of the current Queensland Legal Aid merits test, and additional factors that are specific to environmental law matters. These additional factors acknowledge that environmental law matters have an inherent public interest value but that public interest environmental law matters that will qualify for legal aid will depend on the degree of environmental harm that may result if a case is not pursued in court.

Recommendation 3: Proposed merits test

The merits test proposed in this submission for assessing the eligibility of public interest environmental litigation matters under Legal Aid in Queensland would require that all of the following factors be satisfied:

1) The matter:

- **a)** directly or indirectly affects a significant number of people
  OR
- **b)** raises a matter of broad public concern
  OR
- **c)** requires legal intervention to avoid a significant and avoidable environmental harm, serious environmental harm, material environmental harm or significant impact to federally protected matters of NES.
  OR
- **d)** particularly impacts on disadvantaged or marginalised groups

2) The matter benefits the Queensland environment and:

- **a)** seeks to achieve the purpose of, or to enforce environmental legislation
  AND
- **b)** will prevent, mitigate harm to or otherwise protect the Queensland environment,
  AND
- **c)** involves "material environmental harm"[39] or "serious environmental harm" or the potential for material or serious environmental harm
  OR

3) Whether:

- **a)** the applicant has reasonable chance of success on the merits,
  OR
- **b)** the case involves an untested or undecided area of law

Means Test

6.10 The current Legal Aid Means test effectively excludes most public interest environmental cases as the individuals or incorporated bodies simply do not qualify under the strict criteria currently in place. Knowing that it is futile, generally groups do not bother to even apply for aid.

6.11 For example, Dr Carol Booth applied for legal aid in an important public interest case about wildlife protection- see attachment of examples. The merits and public interest aspects of the case were never examined as despite Dr Booth having very modest assets (no house and modest savings) she did not pass the means test. While Dr Booth did manage to run the case using pro bono help, she is a rare exception.

6.12 The current means test for Legal Aid in Queensland does not provide assistance for community groups and associations. The current system provides a separate means test for only:

- Individuals
- Individuals over 60 years
- Farmers or small businesses

Current legal structures provide considerable benefits for community groups who are incorporated. Incorporation provides the benefits of:

- Financial protection provided to individuals within a separate legal entity
- Some limited liability for members
- The ability to continue regardless of change in membership
- The ability to enter enforceable contracts
- The ability to sue and be sued
- The ability to attract funding more easily
- The ability to apply for status as a charity

6.13 These legal structures encourage members of the public engaged in advocacy and activism for charitable or public purposes to do so as incorporated bodies. The ability to function as an organisation without personal liability is an important feature that allows individuals to take environmental law and other public interest matters before the courts. It is therefore important that legitimate organisations acting in the public interest, are considered eligible for legal aid assistance.

6.14 Environmental cases simply are not about enforcing a private right or interest. While public spirited litigants might each contribute hundreds of hours of volunteer time, they cannot be expected to raise all the funds needed to run a litigated public interest case. And many non profit associations, as can be seen from the attached examples, typically have their funds fully committed to provide services, education, etc, so that even if it appears they have some funds, those funds are not available without dismantling other non profit services.

6.15 The benefits of adopting a formal structure are essential to the effective functioning of community organisations in Australia. The Queensland EDOs strongly disagree with the application of a means test that 'looks behind the veil' and considers the personal assets of individuals in an incorporated not-for-profit organisation. However, where an individual in an organisation stands to directly benefit financially from the proceedings, then Legal Aid should be given discretion to determine whether they will be treated as a separate party to the proceeding and means tested as an individual. In order to assist Legal Aid in the exercise of such discretion, the Queensland EDOs suggest that applicants for aid include statutory declarations averring either that the applicant (or any member where the applicant is an organisation) will not directly benefit financially from the proceedings or explaining in detail the nature and extent of any such benefit.

Recommendation 4: No means test, instead focus on the public interest elements of the case

The traditional approach to granting legal aid only in cases of financial hardship is not appropriate when the case is all about the public interest.

6.16 In the alternative, if a means test is determined to be necessary or appropriate, the Queensland EDOs recommend that in the case of an organisation, such a test should be modified from the current means test applied by Legal Aid in Queensland to: (1) not consider the personal assets of principals or board members of incorporated non-profit organizations, and (2) consider only the organisation's "net" assets, meaning available financial resources in the applicant's current budget (ie, only unencumbered/uncommitted funds should be considered).

Assessment of Applications

6.17 Applications for public interest environment litigation matters under the NSW system are referred to the Public Interest Environmental Committee. The Committee makes recommendations based on an assessment of the facts and circumstances raised in the application, to the Director of the Grants Division.

6.18 The Queensland EDOs support a system of assessment that involves an independent assessment committee comprised of individuals experienced in environmental law. While this might take funds that could be otherwise directed to grants, it will help in applying the specific criteria for public interest environmental law.

Recommendation 5: Separate Assessment Committee

A separate, independent committee (as in New South Wales) be established to assess applications for aid against relevant criteria outlined in this submission and to make recommendations regarding whether to grant the application and, where granted, the level of aid granted, to the decision officer at Legal Aid Queensland.

6.19 In view of the particularly public interest nature of environmental litigation matters and the highly specialised nature of environmental law matters generally, the Queensland EDOs recommend the creation of a separate assessment committee to consider applications for legal aid under the scheme proposed herein. Such a committee has been utilised in New South Wales to act upon legal aid requests associated with public interest environmental litigation.

6.20 In order to allow appropriate determinations upon applications for legal aid against relevant criteria outlined in this submission, the Queensland EDOs suggest that the size of the assessment committee be kept to a minimum (ie, 3-5 members) and that the membership of the assessment committee should, subject to any conflict of interest considerations, include one or more

representatives from the following: legal practitioners experienced in environmental and planning law matters, environmental scientists or academics, and organizations representing the public interest. In order to ensure that any assessment committee has sufficient expertise and experience to promptly determine applications for aid, the Queensland EDOs further recommend that the assessment committee be constituted as a permanent standing body whose members serve for terms of at least one year and who are eligible for reappointment for successive terms, rather than on an *ad hoc* basis.

6.21 In addition, recognising that the continued pursuit of public interest environmental litigation matters will often depend upon prompt resolution of applications for legal aid, the Queensland EDOs recommend that the assessment committee's determination whether to provide legal aid in response to a properly submitted request for aid should be issued within 30 days after receipt of such request.

Legal Aid Indemnity

6.22 The no-costs jurisdiction of the Queensland Planning and Environment Court,[40] to cite one example, is an effective means of encouraging public participation by ensuring that members of the public, engaging in environmental litigation are not vulnerable to adverse costs orders.

6.23 The Queensland EDOs support the adoption of section 47 from the *Legal Aid Commission Act 1979* (NSW) system to provide some indemnity for applicants for legal aid related to public interest environmental litigation. This system is an effective means for achieving access to justice because, in addition to a financial contribution towards an applicant's legal costs, the system also provides assistance with adverse cost orders made against an applicant. A cap on the total amount of money that will be paid to a successful party[41] is also included to protect limited legal aid funds. This is an effective system because:

- It protects impecunious legal aid applicants from adverse costs orders that they are unable to afford – encouraging greater public participation in the legal system
- Applicants are better able to predict how much their legal costs will be and therefore may be more likely to pursue cases as they are better able to assess the affordability and raise the required funds.
- A cap on the funds available for an adverse costs order against a legal aid applicant, this ensures that limited public funds are used appropriately and efficiently.
- Opposing parties will also make a more considered choice about whether to pursue a claim against an environmental law litigant, as they are liable for their own costs, regardless of whether they are successful or not.

Recommendation 6: Legal Aid Indemnity for public interest environmental litigation

When legal aid is granted for a case, that it includes an indemnity for Legal Aid applicants, similar to that provided in section 47 of the *Legal Aid Commission Act 1979* (NSW), for public interest environmental litigation.

7. Conclusion

7.17 The purpose of Legal Aid in Queensland is to provide legal information, advice and representation to financially and socially disadvantaged Queenslanders. The availability of Legal Aid therefore ensures improved access to justice for all Queenslanders. Without the provision of Legal Aid for the public to participate in environmental decision-making, financially and socially disadvantaged individuals are not able to participate in environmental decision-making or challenge inappropriate development applications.

7.18 Where issues involving potential harm to the environment arise, limited access to justice has broader implications for the public than with other areas of law. Unlike the areas of private law for which Legal Aid is currently available, environmental harm has the potential to affect a wide section of the population. The inability of individuals and groups to access legal services for public interest environmental litigation compromises public rights, which include access to the natural features and resources upon which Queensland's economy and wellbeing is dependant.

7.19 To address the limited access to justice experienced by litigants seeking to protect public interests in matters relating to the environmental, where no personal benefit to themselves exists, legal aid for public interest environmental law cases must be introduced in Queensland.

7.20 A clear merits test will ensure that legal aid for public interest environmental litigation can be introduced simply and efficiently, without excessive administrative costs.

REFERENCES

[1] Rachael Carson has been attributed to raising public awareness and concern to the impacts of humans on the environment in her book The Silent Spring (1962, Penguin Books), Paul Erlich's Population Bomb (1968, Buccaneer Books) the Club of Rome's Limits to Growth (1972, Pan Books) were also important. Environmental disasters including the cooling malfunction in the nuclear power plant at Three Mile Island in USA in 1979 which caused part of the core to melt in the second reactor; the Union Carbide India Limited disaster in the crowded area of Bhopal, India 2-3 December 1984; The Chernobyl nuclear power plant accident in Ukraine, 1986, which released at least five percent of the radioactive reactor core into the atmosphere and downwind – also had a significant impact on public opinion.

[2] *Environmental Protection Act 1994* (Qld) s 16.

[3] *Environmental Protection Act 1994* (Qld) s 17.

[4] Under Part 3 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth).

[5] *Environmental Protection Act 1994* (Qld) s 16.

[6] Justice Paul Stein 'The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest Law' (1996) June *Environmental and Planning Law Journal* 179, 179.

[7] For example: *Environmental Protection Act 1994* (Qld) s.507, *Integrated Planning Act 1997* (Qld), *Nature Conservation Act 1992* (Qld) ss.173D, 173E and 173O; *Coastal Protection and Management Act 1995* (Qld); The *Vegetation Management Act* 1999 relies on IPA for enforcement.

[8] *Donald Campbell & Co v Pollak* [1927] AC 732, 811-812.

[9] *Ratepayers and Residents Action Association Inc v Auckland City Council* [1986] 1 NZLR 746; *Auckland Bulk Gas Users Group v Commerce Commission* [1990] 1 NZLR 448, 472-473.

[10] *Mahar v Rogers Cablesystems Ltd* (1995) 25 OR (3d) 690, 703-704; *Reese v Alberta* [1993] 1 WWR 450.

[11] *Southeast Alaska Conservation Council, Inc v State of Alaska* (1983) 665 P 2d 544, 553-554

[12] *Oshlack v. Richmond River Council* [1994] NSWLEC 20, Judgement on Costs per Stein J.

[13] McGrath C "Flying foxes, dams and whales: Using federal environmental laws in the public interest" (2008) 25 EPLJ 324 at 325 and 326

[14] McGrath, above n15, p327

[15] McGrath, above n15, p327

[16] *World Heritage Convention* (1972) (entered into force 1975); *Convention of Biodiversity* (CBD) (1992) (entered into force 29 December 1993); *Convention on International Trade in Endangered Wildlife* (1973) (entered into force 1 July 1975); *United Nations Convention on the Law of the Sea* (1982) (entered into force 16 November 1994); *United Nations Framework Convention on Climate Change* (1992) (entered into force 21 March 1994)

[17] Three main principles upon which ecologically sustainable development is based include; intergenerational equity, the precautionary approach and biodiversity conservation agreed to under *The Rio Declaration* Principle 3 A/CONF.151/26 (Vol. I) (1992) http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm at 10 May 2009.

[18] Justice Paul Stein 'The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest Law' (1996) June *Environmental and Planning Law Journal* 179, 179.

[19] *Aboriginal Cultural Heritage Act 2003* (Qld), *Biodiscovery Act 2004* (Qld), *Biological Control Act 1987* (Qld), *Coastal Protection and Management Act 1995* (Qld), *Electricity Act 1994* (Qld), *Environmental Protection Act 1994* (Qld), *Fisheries Act 1994* (Qld), *Forestry Act 1959* (Qld), *Gene Technology Act 2001* (Qld), *Geothermal Exploration Act 2004* (Qld), *Health Act 1937* (Qld), *Integrated Planning Act 1997* (Qld), *Integrated Resort Development Act 1987* (Qld), *Land Act 1994* (Qld), *Land Protection (Pest and Stock Route Management) Act 2002* (Qld), *Local Government Act 1993* (Qld), *Marine Parks Act 2004* (Qld), *Mineral Resources Act 1989* (Qld), *Native Title (Queensland) Act 1993* (Qld), *Nature Conservation Act 1992* (Qld), *Offshore Minerals Act 1998* (Qld), *Petroleum and Gas (Production and Safety) Act 2004* (Qld), *Petroleum (Submerged Lands) Act 1982* (Qld), *Plant Protection Act 1989* (Qld), *Queensland Heritage Act 1992* (Qld), *Recreation Areas Management Act 2006* (Qld), *Soil Conservation Act 1986* (Qld), *State Development and Public Works Organisation Act 1971* (Qld), *Transport Infrastructure Act 1994* (Qld), *Transport Operations (Marine Pollution) Act 1995* (Qld), *Vegetation Management Act 1999* (Qld), *Water Act 2000* (Qld), *Wet Tropics World Heritage Protection and Management Act 1993* (Qld), *Wild Rivers Act 2005* (Qld).

[20] ss 12 and 15A World Heritage Property; ss 15B and 15C National Heritage Places; ss 16 and 17B Ramsar Wetland; ss 18 and 18A Threatened Species of Threatened Ecological Communities, ss 20 and 20A Migratory

Species, ss 23, 24 & 24A Commonwealth Marine Area; ss 21 and ss 22A Nuclear Action; ss 26 and ss 27A Commonwealth Land; ss 28 Action by Commonwealth

[21] Justice Paul Stein 'The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest Law' (1996) June *Environmental and Planning Law Journal* 179, 179.

[22] There have been 5 cases dealing with the interpretation of "serious environmental harm." The term is still not clear, and cases often arise where application of the word is unclear see for example *Thiess Services Pty Ltd Anor v. Mareeba Shire Council Ors* [2008] QPEC 95

[23] The definition of "environment" in section 8 of the *Environmental Protection Act 1994* (Qld) (which definition is mirrored in section 528 of the *Environment Protection and Biodiversity Conservation Act 1999* (Cth)) includes—

(a) ecosystems and their constituent parts, including people and communities; and
(b) all natural and physical resources; and
(c) the qualities and characteristics of locations, places and areas, however large or small, that contribute to their biological diversity and integrity, intrinsic or attributed scientific value or interest, amenity, harmony and sense of community; and
(d) the social, economic, aesthetic and cultural conditions that affect, or are affected by, things mentioned in paragraphs (a) to (c).

[24] *Richmond River Council v Oshlack* (1996) 39 NSWLR 622

[25] As it incorporates the principles of ecologically sustainable development ("ESD") agreed to under *The Rio Declaration* Principle 3 A/CONF.151/26 (Vol. I) (1992) http://www.un.org/documents/ga/conf151/aconf15126-1annex1.htm at 10 May 2009.

[26] Justice Brian Preston 'The Role of Public Interest Environmental Litigation' (2006) 23 *Environmental and Planning Law Journal* 337.

[27] Kirby J (in the majority) in *Oshlack v Richmond River Council* [1998] HCA 11 at para 114

[28] *Friends of Hinchinbrook Society Inc v Minister for Environment & Ors* [1997] FCA 55, if the Society had been successful in stopping the tourist resort and marina at Port Hinchinbrook at Oyster Point on the World Heritage listed Hinchinbrook Channel the acid sulphate dredge spoil that now covers a large area adjacent to the development and the continued dredging required to maintain the marina would not have occurred; The Cairns Skyrail project modified the construction phase of the project and adopted low impact methods of construction in response to the public demands.

[29] David Robinson 'The Environmental Defender's Office NSW 1985-1995' (1996) *Environmental Planning and Law Journal* 13(3) 155, 166

[30] Boer B "Legal Aid in Environment Cases" (1986) 3 EPLJ 22

[31] QPILCH (the Queensland Public Interest Law Clearing House) is a legal referral and service organisation for public interest civil law cases. Cases that meet particular guidelines can be referred to member firms and barristers for free legal assistance. They also provide direct services through legal staff and volunteers in particular areas, which currently include: credit and debt, homelessness, administrative law (problems with government decision making), civil law for refugees, self-representation civil law service. The QPILCH Administrative Law Clinic provides advice in relation to complaints about government (mainly state) department decisions and matters before the Administrative Appeals Tribunal.

[32] One in Brisbane ("EDO(Qld)"), and the other in Cairns ("EDO-NQ").

[33] Justice Toohey and Anthony D'Arcy, Environmental Law – Its Place in the System, National Environmental Law Association, International Conference on Environmental Law Sydney, Australia (June 1989) 69 at

[34] Jeffrey M (QC) 'Intervenor Funding as the Key to Effective Citizen Participation in Environmental Decision-Making: Putting the people back into the picture' (2002) 19 Arizona Journal of International and Comparative Law 643., at 648.

[35] Legal Aid NSW, Merits Test A for State matters in public interest environmental law matters, NSW Legal Aid Policies http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=758&cid=993&policyid=1&chapterid=26§ionid=5973

[36] Legal Aid NSW Policy Online, Merits test for public interest environmental law matters. 3. Civil law matters 3.3 Public interest environment matters http://www.legalaid.nsw.gov.au/asp/index.asp?pgid=755&cid=993&link=guideline|civil_law|3 at June 2009.

[37] ALRC 75 Costs Shifting – who pays for litigation at [13.2]

[38] "It is plain that the categories of public interest are not closed and that different minds will differ as to what is, or what is not, in the public interest..." per Jacobsen J in *McKinnon (No 2)* ALR 653–5 cited with approval by

Callinan and Heydon JJ (in the majority) in *McKinnon v Secretary, Department Of Treasury* (2006) HCA 229 ALR 187 at 211-212.

[39] *Environmental Protection Act 1994* (Qld) s 16.

[40] *Integrated Planning Act 1997* (Qld), ss.4.1.23 (1), 4.2.26, 4.3.21 and 4.3.28

[41]*Legal Aid Commission Act* 1979 (NSW), s.47(2)

ATTACHMENT

1. Examples of Environmental Groups' lack of resources

Example One: Small community association (fairly typical)

Development Watch is a small, respected non-profit community group on the Sunshine Coast and is an incorporated association under the *Associations Incorporation Act* 1981 (Qld). Like dozens of other community groups in Queensland, it scrutinises development at every stage of the development assessment process for unacceptable impacts on the environment. It operates exclusively with volunteer labour. The Sunshine Coast is a high growth area, so the workload for this group is immense. With an annual association budget of $2,000, it has struggled in the past to run appeals or to be an effective co-respondent as it cannot afford to engage experts in the absence of any legal aid.

Note: The Queensland EDOs estimate that there are similar organisations throughout Queensland; with approximately 6 in coastal local government areas but a lesser number in inland local government areas.

Example Two: Individual (rare)

Dr Carol Booth is a well known conservationist who ran the first enforcement actions under the *Nature Conservation Act* 1992 in the Planning and Environment Court to successfully stop illegal mass electrocution of flying foxes. In order to run the cases, Dr Booth contributed many hundreds of hours of volunteer time and relied on pro bono help from a barrister and EDO Queensland and fund raising by conservationists and wildlife carers seeking to protect flying foxes.

Dr Booth said,

> It was very hard work over several years raising the funds from the community of conservationists and wildlife carers as they have limited funds and competing causes (carers spend most of funds raised on vets bills and food for injured wildlife).
>
> *We really need public interest environmental legal aid in Queensland. There are more important cases to be run on protection of the environment, but we have run out of resources.*
>
> Even though when I ran the cases I was working part time and on a low income with extremely modest assets (no house and modest savings) my application for Legal Aid in October 2005 was rejected as I did not pass the means test without the public interest merits of the case even being considered.

Note: The Queensland EDOs estimate that across Queensland there are dozens of individuals annually who, like Dr Booth, seek to use state courts in the public interest but who would not meet traditional tests of financial hardship. Unlike Dr Booth, who is the exception, they cannot raise the funds and need legal aid.

Example Three: Large Incorporated Association (rarer still)

Wildlife Preservation Society Bayside Branch Inc. is a well-respected a non-profit body incorporated under the *Associations Incorporation Act* 1981 (Qld).

Due to the pace of development in koala habitat and impacts of development on Moreton Bay, the Association and its President Simon Baltais have run a number of appeals in the Planning and Environment Court as appellants and also as co-respondents.

The cases are run on a budgetary shoe string. Usually Simon takes time off work to represent the group as an agent free of charge, and the association engages one or two experts who act pro-bono or for vastly reduced fees. The Community Litigants Handbook published by the Queensland EDOs is the organisation's "how to" manual and EDO Qld often provides more specific advice to the organisation.

The annual budget of this organisation, around $100,000 is one of the largest of all Queensland community based non-profit environmental groups however it is trivial compared to all the financial demands on the organisation.

The majority of the association's annual budget, however, is allocated to projects for which equipment is purchased and staff are engaged and paid for example "Sea Grass Watch" and "Mangrove Watch where staff are needed to supervise 100's of volunteers involved in community and scientific monitoring in and around Moreton Bay. The Association holds educational events and is the focus of huge volunteer efforts by the community writing submissions on government proposals, proposed planning schemes and publicising adverse environmental impacts of proposals.

Mr. Simon Baltais said,

> *It is a constant struggle to find money for experts so we can go to Court, we certainly can't afford legal representation. Queensland desperately needs legal aid for public interest environmental matters.*

Note: The Queensland EDOs estimate that there are fewer than 10 similar larger non-profit associations throughout Queensland with a budget around or over this size who might wish to run public interest environmental litigation matters through state courts, such as the Planning and Environment Court.

2. Examples of cases that were not run due to lack of legal aid

With great effort, the EDO offices in Queensland might run 2-3 main cases each per year for clients with assistance from barristers operating pro bono or at reduced rates. While the Queensland EDOs have noted above that the "no costs" jurisdiction of the state's Planning and Environment Court removes some of the impediments to individuals and non-profit organisations running public interest environmental litigation, there are negative consequences of that jurisdiction as well. For example, barristers cannot specialize in cases before the Planning and Environment Court as it is "no

costs" jurisdiction. However the Queensland EDOs estimate that there are over 20 excellent cases per year over the State with a willing and able client but which fail due to lack of resources (and many more worthy cases with no clients). The failure to run those cases leads to irreparable social and environmental degradation.

The following important public interest environment matters were not run, but similar cases might be run in the future if our recommendation is accepted:

Example One: Sand Mining Case in Barron River Catchment

Planning cases can involve significant public interest issues. Recently, the EDO-NQ was assisting a group of residents who were concerned about the impacts of nearby sand mining on their health and their local environment. Air pollution caused by sand mining contains silica, the health impacts of which are not yet fully known. Residents in particular, raised concerns about residents who had become ill after sand mining operations in the area in the past. The case also involved significant environmental concerns about the viability of the Barron River, and its role in replenishing sand through natural flows along the river. In recent years in Cairns there has been significant erosion on the Northern Beaches as a result of declining natural sand flows that has resulted in erosion and loss of property and the requirement to build seawalls in stretches along the coast to stem the erosion. In such a case there would have been significant public interests in taking a case, but the residents concerned were unable to run the case and obtain the scientific evidence required with the resources at their disposal.

Example Two: Weippin Street Land Clearing (Redland)

In this case a proposed development in the Redland area resulted in land clearing with no buffer zone immediately adjacent to a significant bora ring. The bora ring site will be degraded and will not survive. No Green space study had been done as was required by the planning scheme. However the local environmental group had no resources to run a case for a declaration to stop the illegal development approval in time, as they were relying on finding a barrister and expert who could act for close to pro bono fees and could not locate one. The local Wildlife Group has exhausted all its resources fighting other bad developments in key Koala habitat in the Redlands area. The Koala is now listed as "vulnerable to extinction" in the SEQ Area.

Example Three: Gecko v GCCC and Stocklands 2003 (Gold Coast region)

The Gold Coast Environment Council reluctantly could not appeal a bad residential development by Stocklands which cut across an important regional nature conservation corridor. The group had used up all its resources fighting a tourist development in World Heritage Quality Forest on the Springbrook Plateau. In the absence of legal aid of some kind, the group had used up every "pro bono" favour it had with barristers etc and there was no way they could come up with the $30,000-$50,000 to fund a merit appeal, even though it meant the permanent loss of this wildlife corridor.

Example Four: **Brisbane North South Bypass Tunnel Air Pollution (Brisbane)**

This tunnel will cause massive air pollution problems and health problems for those living within 700 metres of the emission stacks. The best practice air emission filters are not part of the design hence the anticipated problems. We know this because studies have been carried out of similar tunnels in Sydney which similarly lack any form of air filtrations. The health impacts for those within 700 metres of the emission stacks in the comparable Sydney Tunnel are moderate to severe respiratory problems causing them variously to move house, spend excessive amounts on medicines, install expensive air filters and change the houses to keep them air tight so the filters will operate effectively.

Citizens against the tunnel have approached EDO (Qld). However the group has no money to spend on the expert witnesses to attempt to mount a case to challenge the adequacy of the Environmental Impact Assessment Statement or the decision not to install air filters in the Proposed Tunnel. As it would be a "test case" with fierce opposition from a major consortium this case would cost at least $40,000-90,000 to run and the group cannot run the case in the absence of public funding.

Example Four: **Illegal broadscale landclearing case (statewide)**

A major problem in Queensland is illegal land clearing often of many tens of thousands of hectares. The official SLATS 2001-3 data based on satellite imagery shows 227,219 hectares - or 22% of the total clearing - may have been done illegally. Land clearing contributes to species extinction, erosion, salinity and loss of biodiversity. However to gain evidence of the illegal clearing often requires access to expensive satellite images, use of a plane, careful title checks of vast properties. This environmental degradation is often "out of sight out of mind" for the vast majority of Queenslanders but we will all suffer the impacts over the next ten to thirty years when our land becomes unusable due salinity and declining water quality.

The Wilderness Society considered running a test case to challenge illegal land clearing but was unable to afford it due to the expense (estimated $30-70,000) and lack of any public funds.

3. Examples of cases run where legal aid exists

As noted above, conservation groups and interested individuals have been able to secure legal representation and run public interest environmental litigation where – as in New South Wales or under the Commonwealth's "Public Interest and Test Case" scheme (PITCS) – legal aid or financial assistance is available for such efforts. It bears noting that such financial assistance rarely covers the actual costs of running such litigation and other funding options are typically needed, such as either private contributions or fundraising efforts or legal counsel foregoing recovery of much of their costs.

Example One: **Munro and Nean v Minister for Lands (NSW Sup. Ct. No. 30041/2009) (NSW legal aid)**

Lyall Munro and Wayne Nean, two Aboriginal pensioners with extremely limited means, were able to bring proceedings against the Minister for Lands for revoking the dedication to public recreation of Taylor Oval, Moree under the Crown Lands Act. Messrs Munro and Nean were concerned about proposals to develop a culturally significant site to the Gomeroi people and also an important recreational facility in Moree. Their challenge was based on the Minister's failure to consider the Department of Lands assessment that found the highest and best use of Taylor Oval to be recreation and the Minister's failure to follow other procedures required by the Crown Lands Act. The Crown Land Act Assessment Report concluded that Taylor Oval is "currently best suited to urban and non-urban recreation and community or public purposes". The ancillary Preferred Uses Report similarly concluded that Taylor Oval should be retained as Crown Land reserved and dedicated for public recreation purposes. The Minister's sought to revoke this dedication in order to facilitate the rezoning of Taylor Oval to permit construction of a Big W retail store and the Crown's lease or sale of the land to Big W for that purpose. The Environmental Defenders Office of New South Wales (EDO-NSW) took on the case to ensure that proper processes are followed before Crown Land that is of significance to the local community is leased or sold for private purposes. Messrs Munro and Nean were ultimately successful, with the Minister conceding failure to consider the relevant assessments and agreeing to consent orders restraining him from further revoking the public purpose dedication of Taylor Oval.

Example Two: **Nambucca Valley Conservation Association Inc v Nambucca Shire Council & Anor [2010] NSWLEC 38 (NSW legal aid)**

The Nambucca Valley Conservation Association Inc (NVCA) commenced proceedings in the NSW Land and Environment Court challenging Nambucca Shire Council's decision to allow a rural residential development to proceed in core koala habitat. In the NVCA's 26 years' history as a community association, this was the first time it had initiated legal proceedings. The NVCA challenged the Council's decision on a number of grounds, including: (1) the significant impact on threatened species (including the koala) and an endangered ecological community; (2) Council's failure to consider provisions of the Nambucca Local Environmental Plan; (3) Council's failure to properly exhibit the proposal after it was amended; and (4) Council's improper deferral of environmental considerations by the Council. In a decision issued 18 March 2010, the Court upheld the NVCA's challenge and declared invalid the Council's development consent, holding that Council failed to take into account public submissions made in relation to an earlier version of the development. In addition, the Court held that Council failed to advertise the final version of the development, which had changed significantly from the first application in 2003 to the final version in 2008 and that, in determining the development application, the Council had failed to consider the provisions of its own local environmental plan dealing with the objectives of the relevant land use zones, as well as general considerations applying to the development.

Example Three: **Sweetwater Action Group Incorporated v Minister for Planning & Huntlee Holdings Pty Ltd (NSW legal aid)**

On 9 February 2009, the Minister for Planning approved a Concept Plan for the new Huntlee Town Centre in the Lower Hunter Valley to facilitate a residential development that would house over 20,000 people at North Rothbury, despite the site being ranked last under the Department of Planning's assessment of 91 possible development sites in the Lower Hunter Valley. Among other things, North Rothbury is the only place where the critically endangered plant, *Persoonia pauciflora* is found. In 2006 a Memorandum of Understanding (MOU) and a Deed of Agreement were signed by Hardie Holdings Pty Ltd and the Minister for Planning in relation to the Huntlee site, under which the Minister agreed to facilitate development for residential and commercial purposes and, in exchange, Hardie Holdings Pty Ltd agreed to dedicate 876 hectares of land for a conservation reserve. The EDO-NSW represented the Sweetwater Action Group Incorporated (SWAG), a group of concerned residents who challenged the Concept Plan approval and related rezoning of the site on grounds the Minister failed to consider the precautionary principle and biodiversity principle in assessing the development and raised questions regarding the appropriateness of locating a large new population in an area that is not well serviced by public transport or other facilities. In a decision issued 19 October 2009, the Court declared the Concept Plan approval and related rezoning of the site invalid and ordered the decisions quashed. The Court also entered a costs order requiring the Minister pay SWAG's legal costs.

Example Four: **Wide Bay Burnett Conservation Council v Burnett Water Pty Ltd ("Paradise Dam Case") QUD 319 of 2009 (Cth "PITCS" funding)**

On 7 October 2008, acting on behalf of the Wide Bay Burnett Conservation Council (the "Council"), EDO (Qld) launched enforcement proceedings in Federal Court against Burnett Water, a government-owned corporation operating the Paradise Dam on the Burnett River. The Council sought a declaration that Burnett Water was breaching condition 3 of its environmental approval requiring it to install and operate a fishway suitable for the Queensland lungfish, an ancient and evolutionally-important species of fish listed under the Environmental Protection and Biodiversity Conservation Act 1999 (Cth) ("EPBC Act"). In addition, the Council sought mandatory injunctions to address problems with the fishway design and lengthy periods of non-operation. The Council's suit invited the Federal Court, for the first time, to consider and interpret compliance with environmental conditions imposed under the EPBC Act.

In pursuing its action, the Council relied on community donations, EDO (Qld)'s solicitors and pro bono help from students and barrister Dr Chris McGrath. However such a major case in the Federal Court could not have proceeded effectively without gaining funding from the Commonwealth Government's Public Interest Test Case Scheme ("PITCS"), which EDO (Qld) successfully sought in order to enlarge the legal team and to pay for items such as court transcripts. The Commonwealth grant recognised the important public interest elements in this case. This was the first major grant of aid for an environmental case from the Commonwealth in the 15 years that funding assistance has been available under the PITCS.