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5th November 2010

Mr Laurie Glanfield
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Dear Mr Glanfield,

Class action reforms - Draft Civil Procedure Amendment (Supreme Court Representative Proceedings) Bill

We refer to the discussion paper and draft *Civil Procedure Amendment (Supreme Court Representative Proceedings) Bill 2010*.

The EDO is a community legal centre with over 20 years experience specialising in public interest environmental and planning law. The EDO has been extensively involved in law reform and litigation relating to the impact of environmental issues on communities in NSW. In particular, we are involved in working with a number of communities who are increasingly dealing with complex environmental pollution or nuisance issues. For those people, class actions provide a useful means of addressing these environmental concerns. As a result class actions are increasingly used in other jurisdictions to address pollution issues.¹

The current class action provisions in the *Uniform Civil Procedure Rules* are difficult to use and therefore do not encourage firms to conduct class actions in public interest environmental matters. In fact to our knowledge no such cases have been brought in NSW. This is an impediment to the cheap and efficient resolution through litigation of health and environmental impacts of pollution or other environmental issues.

In our experience, the costs of litigation are a significant impediment to persons bringing legal proceedings.² As ANEDO submitted to the Senate Legal and Constitutional Affairs Committee:

*the spectre of potentially hundreds of thousands of dollars in costs incurred by respondents will deter most public interest litigants from bringing a case, even where the prospects of success are very strong.*³

Class actions can significantly address this issue by allowing persons to bring claims on behalf of a community of affected persons, and make it viable to pursue such claims.⁴ We support the adoption of

¹ Current class actions include: an action in relation to lead poisoning in Mt Isa in Queensland, an action in relation to Alcoa refinery in Yarloop in WA, and an action into a methane gas leak from landfill near Brooklands green estate in City of Casey in Victoria. Customary landowners in PNG also brought a class action in Victoria against BHP in relation to pollution in PNG from the Ok Tedi mine.

² Ogle L, "Community Experience of the Court" in *Promises, Perception, Problems and Remedies, Land and Environment Court and Environmental Law, 1979-1999: Conference Proceedings* (Nature Conservation Council of NSW, 1999) p 26; Ruddock K, "The Bowen Basin Case" in Bonyhady T and Christoff P (eds), *Climate Law in Australia* (Melbourne University Press, 2007) p 184.

³ ANEDO submission to the inquiry into the Access to Justice (Civil Litigation Reforms) Amendment Bill 2009, p6. Found at: http://www.aph.gov.au/SENATE/committee/legcon_ctte/civil_litigation/submissions.htm (5 November 2009).



the Victorian and Federal Court class action models that have enabled persons to bring class actions in those jurisdictions. Both of these jurisdictions already have established case law which will assist NSW Courts in interpreting this Bill.

The EDO also welcomes changes to the Bill that have sought to redress areas where reforms are required in both the Victorian and Federal Court class action models. In particular, we welcome the changes that are proposed to those jurisdictions in particular the cy-pres remedy for left over funds from any damages (s178(5)). In environmental cases, left over funds could be provided to remedy any environmental damage or assist local community groups such as bushcare groups or wildlife carers who can assist with remediation works.

We would also support the flexibility of the Bill in s158(2) in allowing for class actions even when not all members of the group have claims against all the defendants. In many environmental claims there may be common but related issues involving technical or scientific evidence, and it would be efficient to allow claims to be heard in the one proceedings in related matters.

We have also read the submission lodged by Maurice Blackburn dated 27th October 2010 and would support the changes they have suggested to the Bill.

If you have any questions or queries please do not hesitate to contact me on 9262 6989.

Yours sincerely

Environmental Defender's Office (NSW) Ltd

Rachel Walmsley

Policy Director

⁴ See Second Reading Speech for *Federal Court of Australia Bill* and comments of Courts in *Wong v Silkfield Pty Ltd* (1999) 199 CLR 255 and *Carnie v Esanda Finance Corp Ltd* (1995) 182 CLR 398.

