



Environmental Defender's Office ACT Inc.



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8 May 2013

Mr Shane Rattenbury  
ACT Greens Member for Molonglo  
GPO Box 1020  
Canberra ACT 2601

Dear Mr Rattenbury,

***Exposure Draft Consultation Paper – Administrative Decisions (Judicial Review) Amendment Bill 2013***

The Environmental Defender's Office (ACT) Inc ('EDO') is a community legal centre specialising in public interest environmental law. We provide legal representation and advice, take an active role in environmental law reform and policy formation and offer educational publications and programs designed to facilitate public participation in environmental decision-making.

This submission comments on the exposure draft of the Administrative Decisions (Judicial Review) Amendment Bill 2013 ('the ADJR Bill'). It has been prepared by the principal solicitor for the EDO, assisted by volunteers. It does not constitute legal advice.

- *Do you think it is important that the availability of judicial review be extended to allow greater review of administrative decisions?*

As a public interest law centre the EDO strongly supports the introduction and implementation of legislation in the ACT that will benefit the ACT community and its ability to use the law to enhance and/or protect the environment. We are also supportive of any enactment that encourages meritorious public interest litigation. The EDO is of the view that the current restrictive standing provision in the *Administrative Decisions (Judicial Review) Act 1989* (ACT) operates to limit accountability to the community a propos government decision-making (affecting the environment). The ADJR Bill clearly has the capacity to bring about a positive change by means of the extension it gives to the use of judicial review as a statutory tool. The result will be a greater scrutiny of government decisions and consequently greater transparency and accountability.

As outlined in the Explanatory Statement, the ADJR Bill greatly simplifies a very complicated area of law. The EDO agrees that the effect of the proposed cl 5 and 6, namely removing the current test for standing and introducing an open standing amendment will allow future legal challenges to focus on the

substantive issues in question rather than the constructed issue of whether or not the case can be properly brought by the applicant seeking the judicial review. The EDO is of the opinion that one of the positive outcomes of the ADJR Bill will result in a better use of the resources that are currently spent arguing about procedural questions and therefore a better outcome in relation to the substance of the administrative decision should follow.

The EDO agrees with the point made in the Consultation Paper that ‘there should never be a situation where a decision that is unlawful is allowed to stand because there was no one able to seek judicial review of the decision’<sup>1</sup> and therefore strongly supports the statutory right the ADJR Bill provides by extending the availability of judicial review to ensure government decisions are made according to the law.

***PUBLIC INTEREST LITIGATION:***

Public interest litigation involves legal proceedings commenced by members of a community to determine a legal right which affects the community as a whole as opposed to private interests or rights. Public interest litigation is one of the most important methods available to test government decisions that might impact upon the environment. The ADJR Bill is an important advance (in the law) as it will facilitate this ‘testing’ of government decision making and will eventually improve government (accountability and) transparency. If enacted, the ADJR Bill will have a profound effect on public interest environmental law in the ACT.

The ADJR Bill affords members of the public a real improvement to access to justice via the courts. It goes beyond the ability offered by the current narrow test of ‘persons aggrieved’ for the community to seek review of government decisions. This change is particularly important where decisions affect members of a wider community and would otherwise go untested. For example, developments on public land or community facilities where people who access the land (beyond the direct neighbours) and may have a legitimate public interest in the proposal ought to have their voice heard in the debate. Opportunity for community or public input and the transparency that is likely to flow should be regarded as fundamental to decisions that are made in the name of the public interest and which directly affect the public.

- *Do you think that expanding the standing provisions to allow more people to make applications for review of decisions under the ADJR Act will lead to a significant increase in the number of matters (particularly unmeritorious matters and commercial disputes) before the Supreme Court?*

***FLOODGATES:***

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<sup>1</sup> Exposure Draft Consultation Paper, Administrative Decisions (Judicial Review) Amendment Bill 2013, 2.

The experience in NSW and other jurisdictions has shown that open standing does not open the 'floodgates' to litigation. Under s 123 of the *Environmental Planning and Assessment Act 1979* 'any person may bring proceedings in the Court for an order to remedy or restrain a breach of this Act, whether or not any right of that person has been or may be infringed by or as a consequence of that breach'. The Consultation Paper appropriately notes the comment from the former Chief Judge of the NSW Land and Environment Court, Justice Jerrold Cripps that the commentary surrounding s.123 and its potential to open the litigation floodgates has been 'wholly discredited'.<sup>2</sup>

The Honourable Justice Peter McClellan AM, Chief Judge at Common Law of the Supreme Court of NSW as he then was, in a speech to the Commonwealth Law Conference in 2005 on access to justice in environmental law also analysed the effect of open standing in the NSW planning legislation and dismissed the 'floodgates' argument. His Honour went further and stated that:

*The opportunity for a plaintiff to bring proceedings without having to establish standing has meant that it has been possible to use the plaintiffs, somewhat limited, resources to debate matters relating to the operation of the relevant planning laws rather than debating issues of standing. Many of these cases have significantly enhanced the quality of environmental decision-making within New South Wales.*

As your office is aware, the 'floodgates' argument was considered and found to have no merit by a number of agencies including the Australian Law Reform Commission, the NSW Law Reform Commission and the WA Law Reform Commission.

Further, the Senate Standing Committee on Environment, Communications and the Arts found the litigation initiated pursuant to the extended standing provided by the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (the *EPBC Act*) has been 'extremely low'.<sup>3</sup> Under the *EPBC Act*, s 487 provides an extended standing for judicial review by the expanding the meaning of the term 'person aggrieved' for the purposes of the application of the *Administrative Decisions (Judicial Review) Act 1977* (Cth) in relation to a decision made pursuant to the *EPBC Act* or Regulations.<sup>4</sup> Similarly s 475 of that Act allows any 'interested person'<sup>5</sup> to apply for an injunction to remedy or restrain a breach of the Act.

This expanded legal standing for third party applications goes beyond that which is provided under many other Acts. As noted in the independent review of the *EPBC Act* by Dr Allan Hawke AC, these

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<sup>2</sup> Ibid 3.

<sup>3</sup> Senate Standing Committee on Environment, Communications and the Arts, Parliament of Australia, *Inquiry into the operation of the Environment Protection and Biodiversity Conservation Act, 1999*(2009) 6.43.

<sup>4</sup> *EPBC Act 1999*, s487. A 'person aggrieved' if: (a) the individual is an Australian citizen; and (b) at any time in the 2 years immediately before the decision, failure or conduct, the individual has engaged in a series of activities in Australia or an external Territory for protection or conservation of, or research into, the environment.

<sup>5</sup> *EPBC Act 1999*, s475. An individual is an 'interested person' if the individual is an Australian citizen and the individual's interests have been affected by the conduct or the individual engaged in a series of activities for protection or conservation of, or research into, the environment at any time in the 2 years immediately before the conduct or proposed conduct.

provisions have created no difficulties and it was recommended that they should be maintained.<sup>6</sup> The Review also inquired into whether the provisions ought to be expanded. Suggestions by some commentators (of the review) was discussed, in particular whether standing should be further extended to all persons, or at the very least to those who made submissions during the decision-making process as was the argument for increased standing as providing a greater level of scrutiny by the public in decision-making affecting environmental matters.<sup>7</sup>

The Review noted legislation both at the Commonwealth and state/territory level that contains 'open standing' provisions and confer standing on all members of the public such as the *Trade Practices Act 1974* (Cth) and the *Environmental Planning and Assessment Act 1979* (NSW). It was observed that despite all the fears that these provisions would engender a 'flood' of litigation, they have been unproblematic and that there is no evidence of the provisions being abused and the number of cases to date has been modest.<sup>8</sup>

The EDO is also of the opinion that the idea that open standing could result in a plethora of unfounded environmental law actions is a misconception and is unfounded. The commitment of time and resources involved in bringing public interest proceedings is such that they are never ventured upon lightly, even in jurisdictions where each party bears their own costs. Environmental groups tend to prioritise only the most strategic cases for bringing public interest proceedings due to the costs of doing so.<sup>9</sup>

Further, in the ACT there are Rules allowing the court to stay or dismiss applications for judicial review in circumstances where the application is inappropriate, incompetent, unreasonable, vexatious or otherwise an abuse of the Court's process. Critics of the ADJR Bill can be reassured that these further safeguards are in place where the merits of a party's motivation to litigate might be 'meddlesome' or otherwise anti-competitive.<sup>10</sup>

Accordingly, the EDO is of the view that expanding the standing provisions to allow more people to make applications for review of decisions under the *ADJR Act* will not lead to the opening of the 'floodgates' and a significant increase in the number of matters (particularly unmeritorious matters and commercial disputes) before the Supreme Court.

### ***COST ORDERS AND PUBLIC INTEREST LITIGATION:***

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<sup>6</sup> Allan Hawke et al., *Independent Review of the Environment Protection and Biodiversity Conservation Act 1999* (2009) 15.81 <<http://www.environment.gov.au/epbc/review/publications/pubs/final-report.pdf>>.

<sup>7</sup> Ibid 15.82.

<sup>8</sup> Ibid 15.83-84.

<sup>9</sup> Australian Network of Environmental Defender's Officers (ANEDO), submission to the EPBC Review Committee, *10 Year Review of the Environment Protection and Biodiversity Conservation Act 1999*, 10 August 2009, 12 <[http://edo.org.au/policy/090810epbc\\_interim\\_report.pdf](http://edo.org.au/policy/090810epbc_interim_report.pdf)>.

<sup>10</sup> *Court Procedure Rules 2006*, r 3566.

Access to justice through the courts is more often determined by the likely costs of the proceedings. The following statement by Justice Toohey is frequently cited:

*there is little point in opening the door to the courts if litigants cannot afford to come in. The general rule in litigation that “costs follow the event” is in point. The fear, if unsuccessful, of having to pay the costs of the other side (often a government instrumentality or wealthy private corporation), with devastating consequences to the individual or environmental group bringing the action must inhibit the taking of cases to court. In any event, it will be a factor that looms large in any consideration to initiate litigation<sup>11</sup>.*

Proponents of the basic costs rule (where the successful party receives costs from the unsuccessful party) suggest that it discourages unmeritorious litigation. This proposition may have some merit, however the rule does not discriminate between claims that almost succeed and those that could never have succeeded. It is likely that the rule discourages claims wherever the applicant would not be able to cope with the impact of an adverse costs order, regardless of the merit of their interest or claim. This ‘deterrence’ effect is likely to be particularly pronounced where the potential applicant has no financial or personal interest in the proceedings, as is usually the case with public interest litigants.<sup>12</sup>

The Hawke Review also discusses the threat of a costs order as one of the most significant barriers to public interest litigation.<sup>13</sup> Preston CJ of the NSW Land and Environment Court has stated:

*The fear of exposure to significant legal costs to which an unsuccessful party may be subjected may deter a party from asserting, or continuing to assert, its rights in litigation. Access to the courts is thereby placed beyond the party’s reach and it is denied access to justice.<sup>14</sup>*

His Honour also observed:

*Typically, plaintiffs bringing public interest litigation stand to gain no or little financial benefit if the litigation is successful. The possibility of a potentially ruinous costs order may act as a deterrent to a litigant seeking to bring or continue litigation in the public interest.*

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<sup>11</sup> The Hon John Toohey, ‘Address to the NELA Conference’(1989) quoted in Paul Stein, “The Role of the New South Wales Land and Environment Court in the Emergence of Public Interest Environmental Law” (1996) *Environmental Planning Law Journal* 179 at 180-181.

<sup>12</sup> ANEDO, above n 9, 14, citing the Australian Law Reform Commission which commented that ‘[s]ubmissions to the Commission indicate that the [ordinary costs] rule is most likely to deter ... people or organisations involved in public interest litigation who have little or no personal interest in the matter.’ Australian Law Reform Commission, *Costs Shifting – Who pays for litigation?* Report 75 (1995) [4.14]. See also Chris Tollefson, Darlene Gilliland and Jerry DeMarco, ‘Towards a Costs Jurisprudence in Public Interest Litigation’ (2004) 83 *Canadian Bar Review* 474, 485, quoting the 1974 Report of the Ontario Task Force on Legal Aid, which notes the ordinary costs rule ‘operates unequally as a deterrent ... [particularly] against groups who seek to take public or litigious initiatives in the enforcement of statutory or common law rights when the members of the group have no particular or individual private interest at stake.’

<sup>13</sup> Hawke, above n 6, 15.105.

<sup>14</sup> *Caroona Coal Action Group Inc v Coal Mines Australia Pty Limited and the Minister for Mineral Resources* [2009] NSWLEC 165, per Preston CJ at 21.

*The object of making a maximum costs order is to ensure that access to justice is not impeded in these circumstances.*<sup>15</sup>

Access to justice (through the Courts) is often impeded by uncertainty. Costs incurred during any litigation, including those brought in the public interest, can be significant. Parties to any proceeding often do not know whether they will have to pay costs as cost orders are typically made after the substantive proceedings have concluded. Costs often follow the event by which time extensive costs have accumulated from both sides of the Bar table. The Hawke Review noted that because of the important role played by public interest litigation, this situation should be changed and a recommendation was made that the *EPBC Act* be amended to empower the Federal Court to decide, as a preliminary matter, whether a case is a 'public interest proceeding' and, if so, to determine the appropriate form of 'public interest costs order'.<sup>16</sup>

The Hawke Review also discussed the definition of a 'public interest proceeding', how the Court might determine the question of a costs order and the benefits of such a regime.<sup>17</sup> The Australian Network of Environmental Defender's Offices' (ANEDO) also conducted extensive research in determining the most effective form of public interest costs orders in the Federal jurisdiction and should be read if more information is required.<sup>18</sup>

In its review of the Interim Report, ANEDO proposed the Court ought to be allowed to make public interest costs orders in appropriate cases. The aim of such orders would be to reduce the cost barrier to meritorious public interest litigation and to provide certainty for parties. We would also suggest that these recommendations be taken into account when considering any amendments to (cost) provisions in the *Court Procedure Rules 2006* (ACT), namely:

- In proceedings for judicial review of a government decision applicants be permitted to apply to the court for a decision as to whether the substantive proceedings are 'public interest proceedings';
- If proceedings are declared to be 'public interest proceedings', then the court shall not order that costs follow the event and instead should determine what form of 'public interest costs order' ought to apply (i.e. a 'no costs' order, a capped costs order, a one-way cost shifting order or an indemnity). This order must be made at the same time as the ruling on whether proceedings are 'public interest proceedings';
- The legislation ought to clarify what 'public interest proceedings' are and whether a public interest costs order should apply.

In determining what public interest costs order ought to apply the court may consider:

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<sup>15</sup> Ibid at 55-58.

<sup>16</sup> Hawke, above n 6, recommendation 53.

<sup>17</sup> Ibid 15.110 – 15.115.

<sup>18</sup> ANEDO, above n 9, 13.

- The financial resources of the applicant;
- The existence of any personal interest on the part of the applicant in the outcome of proceedings;
- The timing of the application.<sup>19</sup>

The ANEDO Interim Report also discusses s 49 of the *Judicial Review Act 1991* (Qld) which allows a party to judicial review proceedings to make an upfront ‘costs application’. The court may either make a ‘no costs’ order or require another party to pay the costs of the applicant. Section 49 is, in effect, a costs control mechanism. In considering the costs application, the court has regard to matters including the financial resources of the applicant or any associated person, whether the proceeding involves an issue that affects the public interest in addition to any personal right or interest of the applicant and whether the proceedings are reasonable.<sup>20</sup> This section is useful both in guiding the Court’s discretion and in enabling litigants to estimate the likelihood of obtaining the order sought.<sup>21</sup>

The EDO believes that s 49 provides a good model of cost protection and should also be taken into consideration for any adaption of the *ACT Court Procedure Rules 2006* in relation to costs. It would allow the Court to adopt some protection according to the extent that a proceeding may be in the public interest. Such a mechanism, if available to the Courts, may lead to a greater range of proceedings receiving protection because, by its very nature, it may be categorised as ‘public interest litigation’. It therefore follows that it is in the public interest to protect such litigants from potentially devastating cost orders.

#### **SECURITY FOR COSTS:**

As discussed above, the risk of cost orders continues to be a real disincentive for potential litigants with genuine claims. Any party interested in commencing proceedings must consider the cost of litigation and a potential cost orders. The situation in the ACT is no different to many other jurisdictions and often the circumstances of potential cost orders are exacerbated by the possibility of a security for costs application.<sup>22</sup> A security for costs application can act as another major obstacle for would be litigants that is often not overcome and a failure to test the issue in question is a likely consequence. This situation is not relieved in practice by the discretion given to the Court to consider certain factors when deciding whether to make an order for security for costs and as noted in the Hawke Review, a major concern is the potential for applications for security for costs to be used as a part of a litigation strategy of attrition to wear down public interest litigants.<sup>23</sup>

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<sup>19</sup> Ibid 20-2.

<sup>20</sup> *Judicial Review Act 1991* (Qld), s 49(2).

<sup>21</sup> ANEDO, above n 9, 18.

<sup>22</sup> *Court Procedure Rules 2006*, r 1900 (1). On application by a defendant, the court may order the plaintiff to give the security it considers appropriate for the defendant's costs of the proceeding.

<sup>23</sup> Hawke, above n 6, 15.100.

In the ACT, the Court may have regard to certain factors including the means of the parties; the prospects of success or merits of the proceeding; the genuineness of the proceedings and whether the proceeding involves a matter of public importance.<sup>24</sup> And although there exists some protections against this form of abuse both in the ACT and in other jurisdictions, the Hawke Review noted the ANEDO submission that these protections are not effective in preventing the inappropriate use of security for costs applications.<sup>25</sup> In particular, ANEDO submitted that security for costs should not be made available against public interest applicants and that the limited financial resources (which is often a feature in public interest litigation) of an individual or group acting in the public interest should not provide a barrier to the litigation process. An application for the security of costs should not be an option against public interest parties as such an order is very likely to defeat the litigation before it can get off the ground. The ANEDO submission acknowledged rule 4.2 *Land and Environment Court Rules 2007* (NSW) as recognising the importance of public interest litigation as it allows a judge to refuse to order security for costs in public interest matters.<sup>26</sup>

Ultimately, the Hawke Review identified the existence of the possibility of having to resist a security for costs order is an added burden on public interest litigants and the Review recommended that the *EPBC Act* be amended to prohibit the ordering of security for costs in public interest proceedings.<sup>27</sup>

Again the EDO would recommend similar amendments to the *Court Procedure Rules 2006*.

- *Do you think that clause 6 strikes an appropriate balance between what may be competing private and public interests?*  
  
*Should there be a broader determination of the public interest of the matter being heard rather than solely the protection of the public interest in protecting the individual's right to deal with the matter as they best see fit?*

Public interest environmental law is embedded in the EDO's objectives. Accordingly, we are of the view that there be a broad determination of the public interest of the matter being heard rather than solely the protection of the public interest in protecting the individual's right to deal with the matter as they best see fit.

The ALRC accepts that public and private rights are not mutually exclusive. There will be proceedings containing a public element which also involve a private right and it is often that an overlap between public and private rights cannot be separated.<sup>28</sup> Public participation can provide checks and balances on government administration and improve the quality of decisions.<sup>29</sup> Public participation can also enable

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<sup>24</sup> *Court Procedure Rules, 2006* – r 1902(1)(a)(b)(c), (i).

<sup>25</sup> Hawke, above n 6, 15.101, citing ANEDO, above n 9, 13, citing Chris McGrath 'Flying Foxes, Dam and Whales: using Federal Environmental Laws in the Public Interest' (2008) 25 *Environmental and Planning Law Journal* 324, 352.

<sup>26</sup> ANEDO, above n 9, 13.

<sup>27</sup> Hawke, above n 6, 15.101-2 and recommendation 52.

<sup>28</sup> *Standing in Public Interest Litigation*, ALRC Report No 27 (1985) para 219–21.

<sup>29</sup> Mark Parnell, 'Public Participation in Environmental Decision-Making' (2006) <<http://www.edo.org.au/edosa/research/aialpaper.htm>>.

advocacy on behalf of interests not normally represented such as a conservation group advocating for the protection of biodiversity.<sup>30</sup> As most environmental decisions are concerned with establishing rights and responsibilities over the use of common natural resources (such as water, land, air and biodiversity), the EDO is of the view that a broad determination of 'public interest' would positively enable community members to advocate on behalf of such environmental decisions, so that such considerations are given appropriate weight in government decision-making. The ALRC recognises the desirability of allowing a wide range of people to commence and maintain public law proceedings and developed a new test for standing which weighs the desirability of allowing public law proceedings against the need to protect private interests.<sup>31</sup>

The EDO acknowledges that this recommendation was developed by the ALRC and that, importantly, it considers standing rules should not unduly interfere with the freedoms of holders of private rights to determine whether and how their rights should be made the subject of litigation.<sup>32</sup>

- *Do you think that the ability to join parties and intervenors in the Bill is appropriate?*

The EDO believes it that in some circumstances an interested party should be able to intervene in proceedings if it is to protect interests that may be affected and/or may be different from those of the original parties. If an intervenor is accepted as a party then all the privileges of a party should follow including the ability to seek or be subject to an order for costs. It is worth noting that pursuant to the *Administrative Decisions (Judicial Review) Act, 1977* (Cth) a person interested in a decision, conduct or failure which is the subject of an application under the Act may apply to the court to be made a party to that application. The court may grant such an application with or without conditions or refuse the application.<sup>33</sup>

The EDO also agrees with the ALRC's recommendation that a Court may, at any stage of proceedings, on its own motion or upon the application of a person, give leave to that person to participate in public law proceedings subject to such terms and conditions, and with such rights, privileges and liabilities (including liability for costs), as the court determines and that when deciding whether to grant leave the court should have regard to whether the intervener's contribution will be useful and different from those of the parties to the proceedings or whether the intervention will unreasonably interfere with the abilities of the parties having a private interest in the matter to deal with it differently.<sup>34</sup> Particularly in public interest litigation or proceedings affecting the public interest, a Court can benefit from hearing argument from more than two parties (or stakeholders). Admission of an intervener allows the court to expand its recognition of community interests and better equips it to deal appropriately and fairly with those community and public interests.

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<sup>30</sup> Ibid.

<sup>31</sup> *Beyond the Door-keeper - Standing to Sue for Public Remedies*, ALRC Report No 78 (1996) 5.25.

<sup>32</sup> Ibid 4.21. See also ALRC, above n 28, para 222, 257.

<sup>33</sup> *Administrative Decisions (Judicial Review) Act 1977*, s 12(1)-(2).

<sup>34</sup> ALRC, above n 31, Chapter 6, Recommendation 4.

In addition, the EDO would like to see legislative amendments enacted that enable the ACT Office of the Commissioner for Sustainability and the Environment (OCSE) to apply to a tribunal or court to be joined as a party to public interest environmental proceedings. In the *Human Rights Commission Act, 2005* (ACT), the ACT Human Rights Commission can be joined as follows:

53C Parties to ACAT proceeding on discrimination complaint

The parties to a complaint referred to the ACAT under this division are—

- (a) the complainant; and
- (b) the person complained about; and
- (c) if, on application by the commission, the ACAT joins the commission as a party to the complaint—the commission.

The EDO recommends that a similar provision be enacted in relation to the OCSE.

- *What if any court procedure rules or practice directions may need amendment as a result of the change?*

If the ADJR Bill is incorporated into the substantive Act then the EDO believes the cost provisions in the *Court Procedure Rules 2006* should be amended. This is discussed above. In our opinion the question of standing cannot be separated from the issue of costs. Indeed, they go hand in hand and it is therefore fundamental that these changes are made. Without a change to the costs provisions then ruinous costs orders loom large with the risk of transforming, in practice, these excellent amendments to a hollow reform.

- *Do you think that the Court has sufficient power to deal with unmeritorious claims and to fairly apportion the cost of litigation?*

The EDO agrees with the Consultation Paper that the *Court Procedures Rules 2006* give the Court sufficient means and discretion to deal with and control unmeritorious, frivolous or vexatious claims. Section 67A of the *Supreme Court Act 1933* (ACT) also deals with vexatious litigants, namely, on the application of the Attorney-General or an ‘aggrieved person’ the court may declare a person to be a vexatious litigant if it is satisfied that the person has frequently instituted ‘vexatious proceedings’. With this declaration comes a control over the type of proceedings that can be brought. Conditions may also attach and we note this includes an order for the security for costs.<sup>35</sup>

- *Do you have any other comments about the Bill or more generally about issues related to expanding standing for judicial review?*

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<sup>35</sup> *Supreme Court Act 1933* (ACT), s 67A(1)-(13).

In its submission on the Interim Report, ANEDO observed that all Australian states now have a court or tribunal that handles environmental matters.<sup>36</sup> These bodies generally perform merits review of administrative decisions, although some of them have the jurisdiction to perform judicial review as well.<sup>37</sup> Part of the impetus for these tribunals has been a need to enhance access to justice and access to environmental justice in particular. As part of this, the majority of the identified tribunals have abrogated the ordinary common law costs rule. In Victoria, New South Wales, Queensland, South Australia and Tasmania, the ordinary rule in the relevant specialist tribunal is that each party will bear its own costs, in the absence of some misconduct.<sup>38</sup> The existence of these tribunals suggests that the states are alive to the importance of public participation in environmental decision-making and have recognised the significance of adverse costs orders in deterring that participation.<sup>39</sup>

In the ACT there are no specialist environmental tribunals, and the argument could be had that access to justice, particularly in matters involving environmental public interest litigation, is restricted or otherwise unavailable. Expansion of this argument is outside the scope of this document, however we are of the opinion that the ADJR Bill as proposed would go some of the way to remedying this situation. However, risk of a costs order and/or a security for costs order as a barrier to public interest litigation in the ACT remains and again the EDO recommends that changes to the *Court Procedure Rules 2006* ought to be linked to the passage of the ADJR Bill. The changes we suggest are modeled on the recommendations by ANEDO in the Interim Report a part of which we note was recommended in the Hawke Review.<sup>40</sup>

Please contact the writer should you wish to discuss any matter arising.

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<sup>36</sup> In New South Wales, there is the Land and Environment Court; in Victoria the Victorian Civil and Administrative Tribunal (VCAT), which has a Planning and Environment List; in Queensland the Planning and Environment Court; in South Australia the Environment, Resources and Development Court; and, in Tasmania the Resource Management and Planning Appeal Tribunal. Western Australia has the State Administrative Tribunal, however, that Tribunal provides no third party appeal rights against development decisions and will not be considered further.

<sup>37</sup> The New South Wales Land and Environment Court is empowered to perform judicial review. The Queensland Planning and Environment Court does not formally perform judicial review, but can make declarations on the lawfulness of a process: see, for example, *Westfield Management Pty Ltd v Brisbane City Council* [2003] QPEC 10; *SOS Community Action Group and Anor v Reefco Resort Ltd and Cairns City Council* [2006] QPEC 69.

<sup>38</sup> See *Victorian Civil and Administrative Tribunal Act 1998* (Vic), s 109; *Integrated Planning Act 1997* (Qld), s 4.1.23; *Environment, Resources and Development Court 1993* (SA), s 29; and *Resource Management and Planning Appeals Tribunal 1993* (Tas), s 28.

Note that in NSW in the merits jurisdiction the court can award costs but the general rule is that costs are not awarded unless there are exceptional circumstances. In the NSW judicial review jurisdiction the general rule is that costs follow the event however public interest litigation is recognised and the court can decline to make any costs order – see *Land and Environment Court Rules 2007* (NSW), rule 3.7 & 4.2.

<sup>39</sup> ANEDO, above n 9, 19-20.

<sup>40</sup> Hawke, above n 6, Recommendations 52-53.

Yours sincerely  
**Environmental Defender's Office (ACT) Inc**

**Camilla Taylor**  
Principal Solicitor