1

TOOLKIT 1:

JUDICIAL REVIEW IN ENVIRONMENTAL MATTERS

ENVIRONMENTAL DEFENDERS OFFICE NT

ABOUT THE ENVIRONMENTAL DEFENDERS OFFICE (NT) INC

The Environmental Defenders Office NT (EDO) is an independent non-for-profit, community legal centre that specialises in environmental law. The EDO provides legal advice, representation and education through the Northern Territory. The EDO also advocates for stronger environmental protection laws by making submissions on law reform.

The EDO is the only community legal centre in the Northern Territory that provides legal advice on environmental matters in the public interest. The EDO is an incorporated association established under the *Associations Act* (NT).

In addition to NT based activities, the EDO is a member of a national network of EDO's working collectively to protect Australia's environment through public interest planning and environmental law.

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LEGAL ADVICE SHOULD BE SOUGHT IN SPECIFIC CASES

While all care has been taken in the preparation of this publication, it is not a substitute for legal advice in individual cases. For any specify questions you should seek legal advice.

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Contents

What is judicial review?

A decision made by a government minister, government department or statutory authority is regarded as being an administrative decision. Some administrative decisions can be challenged in a court or tribunal. For example, decisions to grant or refuse to grant an approval for an action that may affect the environment may be open to a legal challenge. Other decisions, such as decisions to fund projects or works that may affect the environment might be regarded as being political decisions and can therefore not be reviewed.

When can a Judicial Review be made?

When an administrative decision is made, the decision-maker must follow the correct legal process. If the legal process is not followed, the decision may be open to a legal challenge. The law requires that before making a decision, the decision-maker 'must have taken into account all relevant information, excluded irrelevant matters, and reached a conclusion that, on the weight of the evidence, is reasonable in the circumstances' [1].

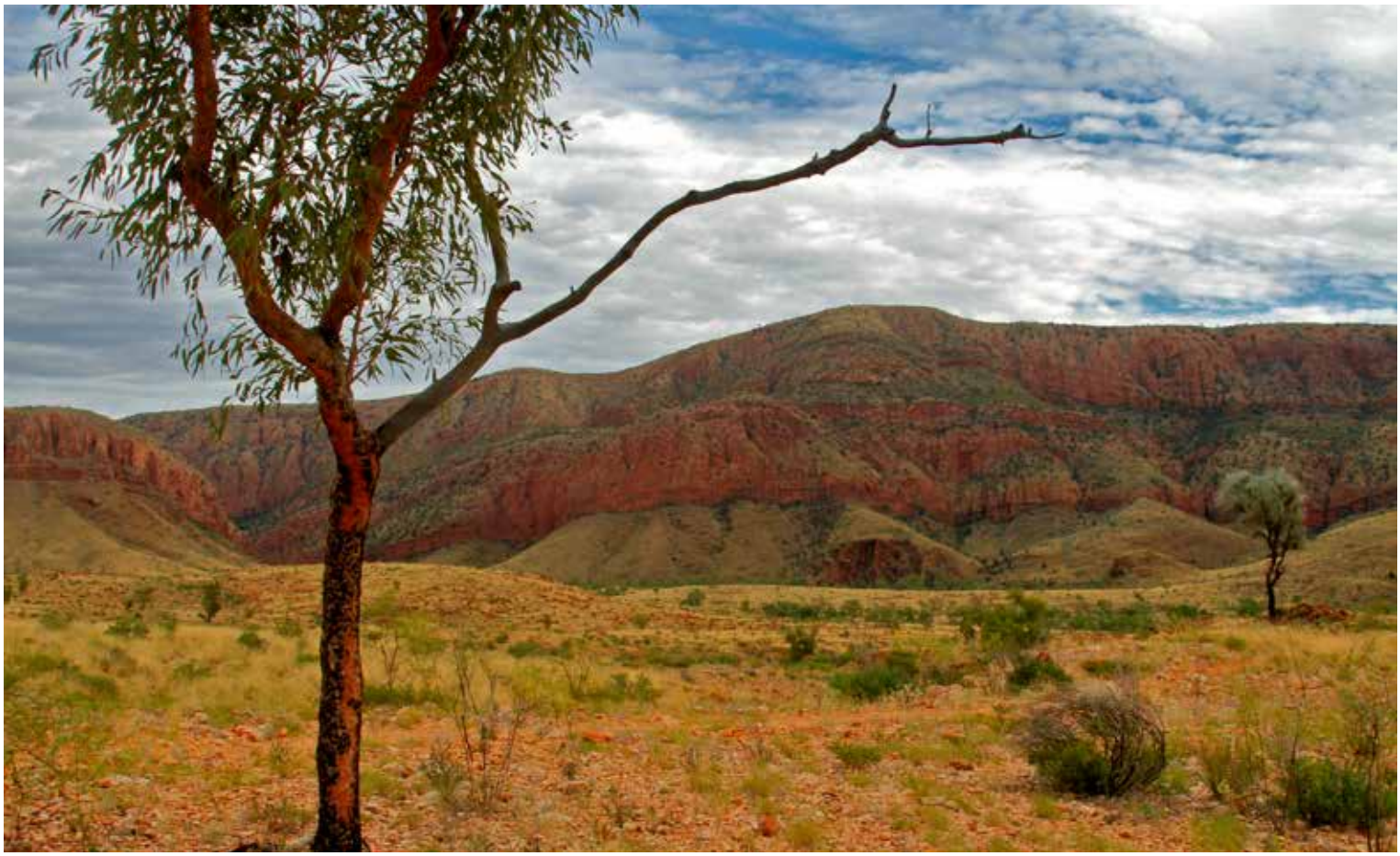
1 Bates, G, *Environmental Law in Australia* 2010 (7th ed).

What are the remedies for a Judicial Review?

If a court is satisfied that a decision has been wrongly made, it has several powers to rectify the matter with remedies. Common remedies that are sought in environmental matters are:

- Certiorari - an order of the court to set aside or quash the decision;
- Mandamus - an order for the court to force a tribunal, public body or official to perform an action that it has failed to; in the case of a decision, it means the decision-maker has to go back and remake the decision, applying the correct law;
- Declaration - an order in which the court declared the legal position in relation to a particular issue - for example, that a decision was legally incorrect; and
- Injunction - an order that prevents someone from doing something or requires certain action.

Caption: Afternoon light, Ormiston Pound, West MacDonnell Ranges National Park.



Common law rules for challenging a decision of the executive arm of the NT Government

There are a number of grounds that make up the Common Law in relation to judicial review:

1. Error of law

There was an error of law in that the decision-maker misunderstood or misapplied a statute[2]. For example, by applying the wrong criteria or asking the wrong question that has been prescribed by the relevant legislation.

2. Relevant factors were not taken into account

A relevant consideration is one that the court would say **must** be taken into account[3].

- In the case of *Director of Public Prosecutions v Smith* the Court looked at relevant considerations when a Judicial Review is made in the public interest. The court determined that 'the public interest is a term embracing matters, among others, of standards of human conduct and the functioning of government and government instrumentalities tacitly accepted and acknowledged to be for the good order of society and for the well being of its members. The interest is therefore the interest of the public as distinct from the interest of an individual or individuals'[4].
- For example, if a Minister relies on a report from the Department of Lands, Planning and the Environment that does not consider the relevant Environmental Impact Statement as required by the Planning Act the Minister would have failed to take a relevant consideration into account.

An action concerning the failure of a relevant consideration can be undertaken in two ways:

(1) By a failure to consider a relevant matter of which the decision-maker had active or constructive knowledge.

   a. A person challenging the decision will have to establish an express or implied statutory obligation on the decision-maker to consider the particular matter and a failure to discharge that obligation.

   b. For example, s51 of the *Planning Act (2009)* (NT) states that a consent authority must, in considering a development application, take into account the following:

      (g) if a public environmental report, or an environmental impact statement, has been prepared or is required under the *Environmental Assessment Act* in relation to the proposed development - the report or statement and the results of any assessment of the report or statement under the Act;

      (n) the potential impact on the existing and future amenity of the area in which the land is situated.

(2) By a failure of the decision-maker to obtain potentially relevant information, i.e. information that should have been considered – this can also be described as the 'duty of inquiry'.

3. Irrelevant factors were taken into account

An irrelevant consideration is one the decision maker **must not** take into account[5].

- This was explored in the High Court in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* and the Court held that 'if the Minister (or decision maker) relies entirely on a departmental summary which fails to bring to his attention a material fact which was insignificant or insubstantial, the consequence will be that he will have failed to take that material fact into account and will not have formed satisfaction in accordance with the law'[6].

An action for irrelevant considerations that give rise to a judicial review must satisfy two components:

(1) What matters were taken into account by a decision-maker? This is primarily an issue of fact, to be answered by analysis of evidence.

(2) Were any of the matters that were taken into account irrelevant considerations? This is commonly an issue of law, resolved by construction of the statute that confers a power.

   a. A criteria of relevance may also be found outside a statute, by reference to other aspects of the legal framework within which decision-making occurs.

Environment law example case

MacFarlane v Minister for Natural Resources, Environment & Heritage[7]

The MacFarlanes wanted to use ground water for horticulture on their property so applied for an extraction licence. The Controller of Water Resources rejected the application and upon application for review the Minister upheld the Controller's decision. The three issues as to whether the Minister took into account irrelevant considerations or failed to take into account relevant considerations were:

1) The Controller and later the Minister took into account the fact that a water allocation plan for the area was being developed. This was held to be relevant because of the construction of the legislation and the plan impacted the granting of long term water licences;

2) It was relevant that the Controller and later the minister took into account the existence of a number of 12 month licenses granted by the Controller after the application because there were other users of the water; and

3) The delay in dealing with the application was irrelevant because there was no guarantee that the licence would have been granted even without the delay and there was no obligation to consider the time of the application.

4. The decision was made for an improper purpose, or in bad faith

This occurs when an action may be designed to achieve a purpose that is beyond the responsibilities of the government body[8].

- For example, an act may permit the council to close off a street for road repairs and a council could decide to do this with the real objective of creating a permanent traffic-free area in the city; or
- Alternatively, if you can show that the decision was affected by corruption, bribery, dishonesty or similar malpractice (this remains very difficult to prove).

2 *R v Toohey; Ex parte Northern Land Council 1981 HCA.*
3 *Minister for Immigration and Multicultural Affairs v Yusuf 2001 HCA.*
4 *Director of Public Prosecutions v Smith* [1991] VR 63.
5 *Minister for Immigration and Multicutural Affairs v Yusuf* 2001 *HCA.*
6 *Minister for Aboriginal Affairs v Peko-Wallsend Ltd* 1986 *HCA.*
7 [2012] NTSC 98
8 *Minister for Immigration and Multicultural Affairs v SBAN* 2002 FCAFC.

5. The decision was inherently unreasonable

This occurs when the decision was so unreasonable that no reasonable decision maker could have made it[9]. This can be difficult, given that an application made under the grounds of unreasonableness admits that the decision was permissible under the law.

- This can occur in a situation where the decision maker may have acted unreasonably because highly significant factors were not given proper weight or because their opinion could not have been reasonably formed on the information available[10].
- For example, an open cut mine might be proposed in the Northern Territory and the NT EPA holds that this will not have an environmental impact that would require an *Environmental Impact Statement* for the purposes of the *Environmental Assessment Act*.

6. The decision was made in breach of natural justice

This occurs in two situations, either the requirements of a fair hearing have not been met, or, in the alternative, the decision was reached by someone who was not free from bias[11].

- The fair hearing rule provides there is a presumption that a person with an interest in the decision will be given an opportunity to be heard before an adverse decision is made, regardless of what statutory hearing procedures might also exist.
- For example, the failure to provide adequate notice of a hearing, give someone sufficient opportunity to present a case or give a person notice of something that is unknown or not obvious to them would be examples of a breach of natural justice.
- The no bias rule provides that proceedings should be free from bias or the appearance of bias. This is determined by asking whether a reasonable person would have held that the decision made by the government was not free from bias.
- For example, if a decision maker was a major shareholder of a company that will be affected by the decision, and the decision was likely to affect to the share price[12].
- Other examples include where people had a professional association with one of the parties, been a relative or expressed hostility towards one of the parties. However, the question of bias is often determined by degree.

7. The decision was made without the power or authority to make it

The person or entity making a decision did not have the power or jurisdiction to make it[13].

- This would occur in circumstances where a government body divests or delegates its' authority in a matter to someone or some organisation over which it had no control.

9 *Associated Provincial Picture Houses Ltd v. Wednesbury Corporation1948 KB; Australia Broadcasting Tribunal v Bond 1990 HCA; Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002 2003 HCA.*
10 *Minister for Immigration; Ex Parte Eshetu 1999* ALR.
11 *R v Watson; Ex parte Armstrong.*
12 *Clenae Pty Ltd v Australia & New Zealand Banking Group Ltd 1999* VR.
13 *Craig v South Australia 1995 HCA.*

The legislative rules for challenging a decision of the executive arm of the Commonwealth Government

The Administrative Decisions (Judicial Review) Act (ADJR Act)

When challenging a decision made by the executive arm of the Commonwealth Government, an application must be made in accordance with the *ADJR Act*.

These rules are similar to the rules provided by the common law and state that an application for judicial review can be made in the following circumstances:

- Decision made in breach of the rules of natural justice[14]
- Procedure required by law were not observed[15]
- The person who purported to make the decision did not have jurisdiction[16]
- Decision was not authorised by the act in pursuance of which it was purported to be made[17]
- Decision was made by an improper exercise of the power conferred by the Act.[18] This includes situations where an irrelevant consideration was taken into account, a relevant consideration was ignored, the use of power was in bad faith, for a purpose other than intended, made at the direction of another person, an exercise of discretionary power without regard to the merits of a case, an exercise of power that was inherently unreasonable, power used in such a way that makes the result uncertain or any exercise of a power that constitutes an abuse of power[19]
- The decision involved an error of law, regardless of if it appeared on the record of the decision[20]
- Decision was induced or affected by fraud[21]
- There was no evidence to justify the making of the decision[22]
- The decision was otherwise contrary to law[23]

14 *Administrative Decisions (Judicial Review) Act 1977* S5(1) (a).
15 *Ibid* at (1) (b).
16 *Ibid* at (1) (c).
17 *Ibid* at (1) (d).
18 *Ibid* at (1) (e).
19 *Ibid* at (2).
20 *Ibid* at (1) (f).
21 *Ibid* at (1) (g).
22 *Ibid* at (1) (h).
23 *Ibid* at (1) (j).

The rules of standing in public interest environment cases

What is standing?

Standing is the ability of a party to show the court they have a sufficient connection to a legal proceeding to justify their participation in it. Therefore, standing is the right to commence or participate in legal proceedings.

What is the threshold test for standing?

Sections 5, 6 and 7 of the *Administrative Decisions (Judicial Review) Act 1977* ("**ADJR Act**") say that a person who is aggrieved by a decision or conduct can apply to have that decision or conduct reviewed. A 'person aggrieved' means a person whose interests are adversely affected by the relevant decision or conduct[24].

Under section 12 'a person interested in a decision' may join an application for review once an application is made.

The courts have established the following test to determine whether or not a party is 'a person interested' or 'a person aggrieved':

1. Does the party have a special interest in the matter?
2. Is that interest too distant? A mere intellectual or emotional concern about an issue will not be enough for a person or organisation to have standing[25].

Public interest environment cases

In proceedings involving environmental organisations, the courts have identified some relevant considerations in deciding whether or not an organisation passes the required test[26].

These may include, but are not limited to, the following:

- The size of the organisation and the extent to which its activities relate to the area in question;
- The extent to which the organisation has received Commonwealth recognition (e.g.: through regular financial grants received, etc.);
- The extent to which the organisation has received State Government recognition (e.g.: through appointment to advisory committees, etc.); or
- Whether the organisation has received Commonwealth funding to conduct or co-ordinate conferences and projects relating to matters of environmental concern.

Key cases involving environmental organisations

***Australian Conservation Foundation* ("ACF") *v Commonwealth*[27]**

This case concerned the validity of a Commonwealth proposal to establish and operate a resort and tourist area in Queensland. The ACF argued it had a right to sue as it had a long-standing interest in the preservation and conservation of the environment and had made submissions to the government about the project.

It was held that the ACF did not have standing as the development in question did not affect ACF directly and while it had a general interest (i.e. an intellectual or emotional concern) in protecting the environment, it had no greater interest than any other member of the public would have in the matter.

The two main principles established in this case were as follows:

- A party must have a special interest in a matter to have standing; and
- An emotional or intellectual concern in a matter will not mean a party will have standing.

The Court concluded that the organisation was seeking to prevent an alleged public wrong rather than assert a private right.

***North Coast Environment Council Inc.* ("NCEC") *v Minister of Resources*[28]**

In this case a somewhat broader approach was taken to standing. Importantly, the Court set out a number of factors that may be relevant in determining whether an organisation has a special interest and should be granted standing.

The courts have subsequently embraced this approach in cases involving environmental organisations[29].

The Court decided the NCEC did have standing for the following reasons:

1. NCEC had a closeness of relationship to the subject matter as the peak environmental organisation in the north coast region of NSW with 44 environmental groups as members.
2. Since 1977 NCEC had been recognised by the Commonwealth as a significant and responsible environmental organisation.
3. NCEC had been recognised by the NSW state government as a body that should represent environmental concerns on advisory committees.
4. NCEC had received significant Commonwealth funding for coordinating projects and conferences on environmental matters.
5. NCEC had made submissions on forestry management issues and funded a study of old growth forests.

It was held that these considerations showed the NCEC had a special interest in the decision.

***Environment East Gippsland Inc.* ("EEG") *v Vic Forests*[30]**

The approach taken in regard to environmental organisations in the NCEC case was also followed in this recent case that concerned logging activities on Brown Mountain in Victoria.

Unlike the NCEC, EEG was not the peak body for environmental issues and did not have a close relationship with government in terms of funding or advice.

However, the Court nevertheless held that EEG did have standing due to the following factors:

- Its level of membership;
- Its constant activities on the mountain in question;
- Its regular communication with government concerning the area; and
- The fact it was the only body directly interested in the preservation of the area's natural habitat.

It was concluded that these factors indicated that EEG did have a special interest in logging activities on Brown Mountain.

24 *Administrative Decisions (Judicial Review) Act,* s 3(4).
25 See *Australian Conservation Foundation v Commonwealth [1980]* HCA 53; (1980) 146 CLR 493.
26 See for example *North Coast Environment Council Inc v Minister of Resources* [1994] FCA 1556; (1994) 36 ALD 533 (1994) 55 FCR 492, [84] and *Environment East Gippsland Inc v VicForests* [2010] VSC 335, [80].
27 Ibid, above at 25.
28 [1994] FCA 1556; (1994) 36 ALD 533 (1994) 55 FCR 492.
29 See *Tasmanian Conservation Trust v Minister* (1995) 127 ALR 580 and *Environment East Gippsland Inc v VicForests* [2009] VSC 386.
30 ibid, above at 26.

Key cases involving Indigenous communities

Onus v Alcoa[31]

In this case the High Court held that an interest of a spiritual or emotional nature may ground standing to seek an injunction and that you do not have to have a financial concern in a matter to have standing.

Members of the Gournditch-jmara Aboriginal people sought an injunction restraining Alcoa from excavating land in which aboriginal relics were scattered. The Court held the group had standing for three reasons:

1. The cultural and spiritual significance of the site to the group.
2. The group were custodians of relics.
3. The group used the relics regularly.

Therefore, the Court concluded the group had more than an intellectual or emotional concern in the matter and had been affected to a substantially greater degree than the public at large.

Batemans Bay Local Aboriginal Land Council ("BBLALAC") *v Aboriginal Community Benefit Fund Pty Ltd*[32]

BBLALAC proposed to conduct a funeral benefits fund catering for all Aboriginal persons, with its activities financed under the *Aboriginal Land Rights Act* (NSW). The issue was whether BBLALAC had power to do so under the legislation.

It was held that the Aboriginal Community Benefit Fund did have standing as the alleged activities affected it financially and more so than any other party.

Therefore, to have standing at common law, a party must show it has a greater interest in a matter than that which any ordinary group or member of the public would have. In determining whether or not a party has more than an intellectual or emotional concern in a matter, the court will consider a number of factors and look at the overall circumstances of each case.

Standing and the *Environment Protection and Biodiversity Conservation Act*

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("**EPBC Act**") has broadened the requirements for standing for cases brought under its provisions.

Under section 475, the EPBC Act provides an 'interested person' standing to apply for an injunction for a breach of the EPBC Act where an 'interested person' is defined as:

- An individual who is an Australian citizen or ordinarily resident in Australia or an external Territory; or
- An organisation that is incorporated (or was otherwise established) in Australia or an external Territory which aims to protect, conserve or research into the environment; and
- Has engaged in a series of activities related to the protection or conservation of, or research into, the environment during the two years prior to the offence.[33]

However, other important environmental laws, such as the National Greenhouse and Energy Reporting Act 2007 ("NGER Act") include no such provisions.

Therefore, there is some inconsistency in the legislation and the requirements for standing may vary from case to case, depending upon the relevant statutory provisions.

Summary on standing

- To have standing in a proceeding a party must have a special interest in the matter that is more than just an intellectual or emotional concern about it.
- In cases involving environmental organisations, in deciding whether a party has a sufficient interest in a matter, the Courts will look at factors such as the level of membership of the organisation, its connection to the area in question, its level of communication with government and its role in preserving that area's natural habitat.
- In matters involving Indigenous communities, the Court may look at factors such as whether the case concerns an area which has special cultural or spiritual significance to the community and any custodianship the community may have of the area in accordance with the laws and customs of their people.
- Requirements as to standing will also depend upon the relevant legislation in each individual case. For example, the *EPBC Act* has broader provisions in regard to standing than other environmental laws.

What are the benefits of public interest litigation?

There are a number of benefits to public interest litigation including:

- Development of the law which leads to greater certainty and increased public confidence in the administration of the law (which in turn should lead to less disputes and less money spent on litigation);
- The reduction of other social costs by stopping or preventing costly market or government failures; and
- The significant contribution public interest litigation has made to the development of environmental law.[34]

Legal Costs associated with running litigation

Justice not always equally accessible

Litigation is costly and can be a formidable barrier to those who may be considering commencing court proceedings.

Unfortunately, this means that while justice should be equally accessible to all, there can be limitations upon the extent to which members of the public can access the legal system.

How do lawyers normally charge for their services?

Lawyers normally charge for their work on an hourly basis. This means legal fees can often be extremely high, particularly for complex, time-consuming matters.

Clients will also need to cover the cost of disbursements, which are costs additional to lawyers' fees, such as court fees and the cost of printing and photocopying documents.

31 [1982] VicSC 49
32 [1998] HCA 49; 194 CLR 247; 155 ALR 684; 72 ALJR 1270.
33 *Environment Protection and Biodiversity Conservation Act* (Cth), s 487.
34 Australian Law Reform Commission, *Costs Shifting - who pays for litigation?* Report 75 (1995), 13.6 - 13.7

Awarding costs in public interest litigation

In a court proceeding, although the judge or magistrate ultimately has a broad discretion in regard to costs orders,[35] the common law rule is that an unsuccessful party will usually be ordered to pay some of the successful party's legal costs at the end of a case.[36]

Therefore, an unsuccessful party will often have to pay a portion of a successful party's costs, in addition to their own legal costs.

This approach to costs will normally also apply in cases that are in the public interest, unless there are special circumstances justifying some other order.[37]

Exceptions to the norm on costs: *Oshlack v Richmond River Council*[38] ("Oshlack")

The ordinary rule in relation to costs may not be followed where litigation is brought in the public interest and there is some other element that justifies departure from the common law rule.

This principal was established in the case of *Oshlack*.

In this case, the High Court upheld a decision of the NSW Land and Environment Court not to award costs against an unsuccessful litigant in an environmental matter.

In making its decision, the Court took into account the following factors:

- The proceedings were brought under the *Environmental Planning and Assessment Act* (NSW) ('the Act') that has a broad standing rule. The Act states that 'any person' can bring proceedings for a breach of the Act, whether or not a right of that person has been directly infringed or breached;[39]
- The proceedings were brought in the public interest with the worthy motive of seeking to protect the local environment and its koala population; and
- The type of litigation that occurs in the Land and Environment Court is different to ordinary civil litigation.

The Court ultimately concluded that there were sufficient special circumstances to justify departure from the normal rules relating to costs, particularly given the broad standing provision in the Act.

However, the Court emphasised that the mere fact proceedings are brought in the public interest will not be enough alone to justify departure from the usual costs rule.[40] Something more is required for the court to take that step.

Limitations of Oshlack

There is uncertainty associated with the approach taken in Oshlack and the extent to which it will be applied in public interest cases.

Subsequent cases have not reflected any broad change in the common law rules,[41] emphasising that the circumstances in Oshlack were exceptional.

Australian courts are generally reluctant to depart from the usual approach as to costs and therefore public interest litigation remains a risky step to take.

Order 62A Federal Court Rules

Order 62A of the Federal Court Rules permits costs to be capped in certain circumstances, providing another alternative to the ordinary costs rule. However, very few decisions on its application have been made.

The case law on order 62A has identified six factors that will be relevant in a decision to make an order:

- The existence of an arguable case;
- The timing of the application for an order;
- The applicant's personal interest in proceedings;
- The fact that, in the absence of an order, the litigation may be discontinued;
- The complexity of the dispute and the amount in dispute; and
- Public interest factors.[42]

Although one relevant factor is whether the application is in the public interest, something more than a public interest factor alone is needed.[43] In *Woodland v Permanent Trustee Company Ltd*[44] the existence of a public interest factor was identified as a being of 'some significance' without being 'necessarily decisive'.

Although Order 62A provides a means through which costs may potentially be capped in certain circumstances, the order has only been applied occasionally in Federal Court cases.

Therefore, the normal rules on costs will generally apply.

Other relevant legislative provisions regarding costs

In some matters, as demonstrated in Oshlack, other statutory provisions may limit the extent to which the Court will follow the usual rules relating to costs.

For example, the *Native Title Act 1993* (Cth) says that unless the Federal Court orders otherwise, each party to a proceeding must bear their own costs.[45]

Therefore, the approach the court takes to costs will occasionally vary, depending upon the circumstances of each individual case and the relevant legislative provisions.

Summary on costs

- In the vast majority of public interest cases, the normal rules in regard to costs will apply.
- This means that in public interest cases, there is a real risk that the unsuccessful party will be ordered to pay the successful party's costs in addition to their own legal costs.
- While there are some exceptions to this rule, these have generally only been applied in exceptional circumstances.

35 See for example *Federal Court of Australia Act 1976* (Cth), s 43(2); *Local Court Act* (NT), s 31, *Supreme Court Rules* (NT), 37A.08(1) and 37B.07(1).
36 See for example *Latoudis v Casey* (1990) 170 CLR 534.
37 See for example *Oshlack v Richmond River Council* [1998] HCA 11; 193 CLR 72; 152 ALR 83; 72 ALJR 578.
38 [1998] HCA 11; 193 CLR 72; 152 ALR 83; 72 ALJR 578.
39 *Environmental Planning and Assessment Act 1979* (NSW), s 123.
40 Ibid, above n 3, [54]
41 See, for example *Friends of Hinchinbrook v Minister for the Environment & ORS* [1998] FCA 432; (1998) 99 LGERA 140; and *Save the Ridge Inc v Commonwealth* (2006) 230 ALR 411.
42 *Woodland v Permanent Trustee Company Ltd* (1995) 58 FCR 139.
43 *Corcoran v Virgin Blue Airlines Pty Ltd* [2008] FCA 864,[10].
44 (1995) 58 FCR 139.
45 *Native Title Act* (1993) (Cth), s 85A (1).

Pro-bono legal services

What is pro-bono support and why is it important?

Pro-bono support from the legal profession refers to a legal practitioner offering their services on a voluntary basis without any entitlement to or expectation of remuneration.[46]

Given the cost of litigation, pro-bono legal services play an extremely important role in increasing access to justice. Pro-bono work helps ensure everyone has access to legal representation and advice, regardless of whether or not they can afford a lawyer.

Pro-bono support can also play a crucial role in public interest cases, where members of the community and organisations otherwise may not have the funds needed to commence legal proceedings.

However, demand for pro-bono support will often outstrip supply.

Forms of pro-bono support

Pro-bono legal services include community legal centres, environment defenders offices, legal aid and pro-bono clearing houses.

Pro-bono support can take a number of forms including:[47]

In-firm pro-bono

- Individual client advice and/or representation with the client paying nothing.

Outreach services

- Lawyers providing legal assistance at outreach locations, usually in the premises of a community organisation. The assistance may be for a limited period or long term.

Specialist services

- Legal firms may create or contribute to a specialist legal service individually, or in partnership with other firms.

Volunteering

- Lawyers may volunteer at CLCs or other legal organisations.

What are some restrictions on the availability of pro-bono support?

There are limitations on the extent to which pro-bono support may be available in litigation matters.

Lawyers may be unwilling to consider providing pro-bono assistance for a number of reasons, including:

- The potential scope of the case, and requirements on a lawyer's time, may be difficult to estimate;
- Requests for assistance are often made at short notice, providing limited time to properly prepare for the matter;
- The cost of disbursements, such as the cost of the lawyer travelling to provide advice, may also discourage lawyers from providing pro-bono support, particularly given the funding constraints many pro-bono legal services face; and
- By providing pro-bono support in litigation matters lawyers may also risk having a costs order made against them personally. The fact a lawyer may be acting for free and in the public interest will not prevent the court imposing the usual costs order of the loser paying the winner.

46 Trkulja v Efron [2014] VSCA 76, footnote 49.
47 National Pro Bono Resource Centre, Signposts in the Pro Bono Landscape: Aspects of Pro Bono Legal Services in Australia, pg 8.

Going to Court for judicial review

Which Court do I go to?

In the Northern Territory, judicial review proceedings are brought under the common law and heard by the Supreme Court of the Northern Territory. Judicial review of decisions taken by Commonwealth decision-makers are heard in the High Court of Australia in Canberra or the Federal Court in Darwin.

Do I need a lawyer?

Most litigation is complicated and not all persons are capable of conducting proceedings without professional assistance. For specific matters pertaining to the environment, the Environmental Defenders' Office (NT) may be able to assist:

Environmental Defenders' Office (NT)

T (08) 8981 5883 **M** 0402 778 997
FREECALL 1800 073 916

E edont@edont.org.au W www.edont.org.au

There also are a number of resources that can be utilised to assist litigants in the conduct of proceedings.

The Supreme Court website (www.supremecourt.nt.gov.au) contains useful material such as various practice directions and past judgments handed down by the Court.

Various websites provide a wealth of resources. Examples include:

- **Australasian Legal Information Institute (Austli)** www.austlii.edu.au;
- **Foundation Law** www.lawfoundation.net.au;
- **Comlaw** www.comlaw.gov.au;
- **Findlaw** www.findlaw.com.au;
- **The Law Society** lawsocietynt.asn.au.

All Northern Territory legislation, including repealed legislation, is available from the Parliamentary Counsel website by following the links from www.dcm.nt.gov.au

There are a number of easy to follow legal publications that can be referred to. The Northern Territory Legal Aid Commission publishes a handbook titled "The Law Handbook". Legal Aid agencies in most other jurisdictions also publish a similar guide and some have an online version, for example the Law Handbook Online of the Legal Services Commission of South Australia (www.lawhandbook.sa.gov.au). Care needs to be taken when using interstate references due to the likely differences in procedure.

Although laws and procedures are not generally interchangeable between the various States and Territories, many of the procedures in the Northern Territory Supreme Court are based on those in Victoria so publications in Victoria may be a particularly relevant alternative source.

There are many legal texts that can be referred to. They may be available through reference libraries. There are texts covering evidence, procedure and specifically pleadings.

Judgments of various courts, but specifically those of the Supreme Court of the Northern Territory, are relevant due to the principle that like cases are to be decided alike.

More generally a case may specifically decide an issue dealing with either a point of law or procedure or the interpretation of the section of an act.

Judgments from all Australian jurisdictions are available on the websites referred to above, particularly Austlii. Judgments of the Supreme Court are also available on the Court's website.

The Supreme Court of the Northern Territory

The Court comprises the Judges and the Master. The Judges have unlimited original jurisdiction. The Master's jurisdiction is limited as set out in the Supreme Court Act and the Supreme Court Rules ("SCR").

The Supreme Court Rules regulate the procedures and practices of the Court and they are the primary reference source for procedural matters.

The SCR follow a format of numbering as Orders with sub-rules, for example the rules dealing with costs are all within Order 63. There are 75 sub-rules in that Order and, for example, the rule dealing with costs sanctions for issuing proceedings in the Supreme Court in lieu of the Local Court is Order 63 Rule 22. In this Handbook the formatting will be abbreviated to the commonly used parlance so that Order 63 Rule 22 will be referred to as Rule 63.22.

Forms used in proceedings will have a corresponding Rule. For example, Rule 5.02(2) details the use of an originating motion in the proceedings. A sample originating motion is set out below.

Commonly used forms can be downloaded from the Northern Territory Supreme Court website at: http://www.supremecourt.nt.gov.au/lawyers/Forms.htm

Registry staff at the Court

Of the staff in the Supreme Court Civil Registry, only the Registrar has legal qualifications. The remainder of the staff are administrative staff. Therefore they can only provide limited administrative assistance. Registry staff cannot provide legal advice about your matter.

They can sometimes provide you with information regarding the Court's administrative processes such as listing enquiries and the like. They are able to provide you with some court forms. However they cannot help you to complete your court documents.

Registry staff cannot tell you what to say in court and they cannot speak to a Judge or the Master on your behalf.

The role of Registry staff in checking documents is mostly limited to formal matters such as the correctness of the manner of completion of the document. For these reasons you cannot rely in Court on any information given to you by Registry staff.

Communications with the Court

It is not appropriate to communicate with a Judge or the Master other than in Court proceedings. It is inappropriate for there to be any private audience or private correspondence with a Judge or the Master.

All correspondence should be addressed to the Registry.

The Court is situated in State Square next to Parliament House and the postal address of the Court is GPO Box 3946, Darwin, NT 0801.

Pre-Action Procedures

The Court has a set of Practice Directions that set out various steps to be taken before an action is commenced. These can be found at www.federalcircuitcourt.gov.au/practice/index.html

Preparing your application

An application for Judicial Review requires the following documents:

1. Originating application for judicial review;
2. Affidavit supporting the Application; and
3. All documents referred to in your affidavit should be exhibited to your Affidavit.

Examples of these documents can be found below.

Application:

An originating application for Judicial Review must be set out as shown in the attached sample, or the court may not accept it.

Furthermore, the Application must include the following:

(a) The name of the applicant /plaintiff (yourself);

(b) The details of the respondent/defendant (the person/agency who made the decision);

(c) The details of the decision you wish to review and the date the decision was made;

(d) The ground/s on which you wish the decision to be reviewed (refer to list above)

(e) The orders (relief) you are seeking from the court.

Affidavit:

An affidavit is simply a document that sets out, in paragraph form, the facts which you are relying on as evidence that the decision was unlawful. These are the events that are relevant to your application. You do not refer to the law in your affidavit. Nor do you list cases or part of any Acts you want to draw to the courts attention. Rather, it must only contain factual information that you want the court to look at.

You affidavit must be sworn under oath, or affirmed in the presence of a Justice of the Peace, Commissioner for Declarations, a solicitor or a barrister.

If you refer to a document in your affidavit, a copy of that document must be placed with your affidavit, so that the court can see the evidence that you have sworn on oath. This becomes an exhibit to your affidavit.

Service on the defendant

Once the application has been filled, it is then necessary for you as the Plaintiff to arrange service on each defendant.

In general, service must be affected personally, see *Rules 6 and 7* of the SCR that deal generally with matters relevant to service.

Service on a company is affected at its registered office and in the case of a company can be affected by posting the document to the registered office. The registered office is that set out in the company's official documents and can be ascertained by a search at the offices of the Australian Securities and Investments Commission ("**ASIC**") or on the ASIC website: www.asic.gov.au/.

There are additional requirements where service has to be affected in another State or Territory. Service outside of the Northern Territory requires a document known as a Form 1 Notice under the Commonwealth *Service and Execution of Process Act* to be attached to the Writ.

The requirement is a mandatory one and failure to comply renders the service totally ineffective.

In certain circumstances the court may permit service to be affected other than personally *[Rule 6.09]*. This is known as substituted service. In appropriate cases the court can also deem service that has not been strictly affected according to the rules as valid service *[Rule 6.10]*.

Substituted service is generally ordered only after a party has exhausted all reasonably available means to effect personal service.

The methods of substituted service vary according to the circumstances. It may take the form of service by post, service on another person or service by advertisement in a newspaper.

Generally service of a Writ must be effected within 12 months of its filing. Service cannot be effected after this time without first obtaining the permission of the Court *[Rule 5.12]*.

After service has been affected it is necessary to prove that service. That is done by an affidavit of service *[Rule 6.16]*. That step will be unnecessary if the Defendant files an Appearance (see below).

It is necessary for the affidavit of service to specify the time, date and place when service was affected, by whom service was affected, the documents served (including the Form 1 Notice referred to above where appropriate) and the method by which it was established that the person required to be served was in fact the person served.

The latter requirement is usually proved by the server asking of the person served whether they are the person named in the Writ and the person served responding in the affirmative.

Address for service

The Writ is required to stipulate an address, which must be within 15 kilometres of the Registry where the Writ was issued, at which documents can be served on the Defendant either by post and or personal delivery *[Rule 6.05]*.

As it must accommodate personal delivery, a post office box or similar postal address does not suffice.

Likewise the Writ is required to contain an address for service of the Plaintiff, which must also be within 15 kilometres of the Registry where the Writ was issued *[Rule 6.05]*.

Effectively therefore all process to be served on a Plaintiff after commencement, and on a Defendant after an Appearance, can be effected by post or delivery to the address for service. Personal service, although permitted, is not required.

Appearance

The next step after service has occurred is for each of the defendant(s)/respondent(s) to enter an Appearance by filing the appropriate notice at the Registry. The form for an Appearance is available on the Supreme Court website. A sample Notice of Appearance is included in the scenario below.

The SCR provide that, unless the Court otherwise permits, a defendant cannot take any step in a case without filing an appearance *[Rule 8.02]*.

Where a party is a company, it cannot take any step in the proceeding (which includes the filing of an appearance) without representation by lawyers unless the Court first otherwise approves *[Rule 1.13]*.

How long a defendant has to file an Appearance will depend on where the defendant is served.

The different time limits are set out in the originating process. For example, in a proceeding commenced by writ, or by originating motion, the time allowed for filing a notice of appearance is seven days when served within 200 kilometres of the Registry and it is 21 days if it is served outside of the Northern Territory *[Rule 8.04]*.

Service outside of Australia is more complicated and generally requires compliance with various international conventions *[Rule 7]*.

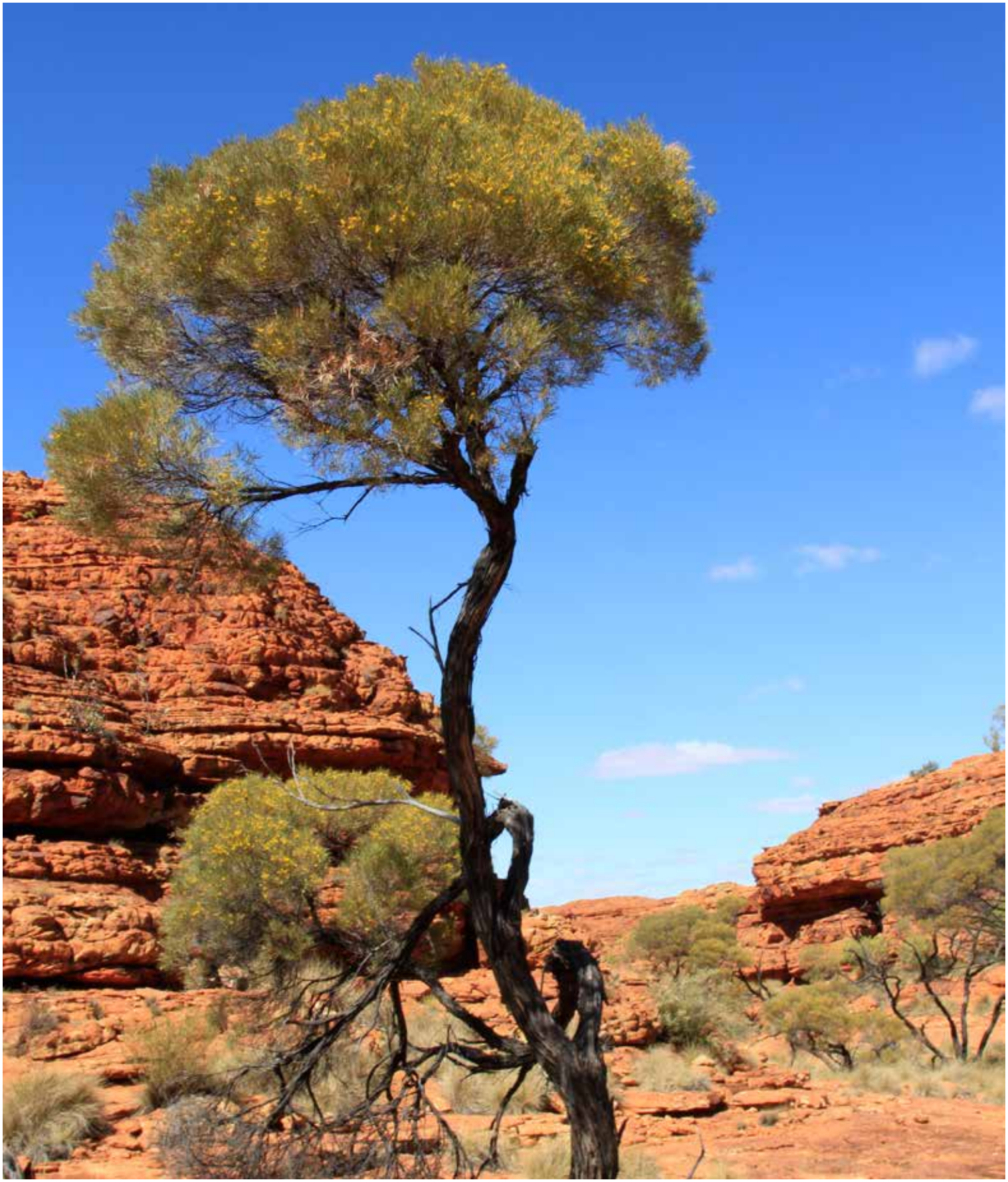
Private bailiffs or process servers can be engaged to effect service in Australia.

They will charge a fee for their service that usually includes the preparation and provision of the affidavit of service. The successful party can recover bailiff's fees as part of the costs of the claim.

The effect of an Appearance is that it is notice of the Defendant's intention to contest the action. The steps thereafter depend on whether each Defendant files an Appearance or fails to do so within the allowed time.

The SCR specify a timetable for subsequent court documents to be filed and served after the filing of an Appearance *[Rules 14.02, 14.04, 14.05 and 14.07]*.

Caption: Tree and rock formations, Watarrka National Park.



Appendix: Common Legal Terms

Adjourned, Adjournment	When a case is adjourned the hearing of the case is put off to another time or day.
Affidavit	A written statement that is sworn or affirmed. It can sometimes be used in place of oral evidence.
Balance of Probabilities	This is the 'standard of proof' in civil trials and in simple terms means more likely than not.
Barrister	Barristers are lawyers who represent clients in court, usually when engaged by a solicitor on behalf of a client. They also provide opinions and advice.
Burden of Proof	This refers to the obligation on the party who has the onus of proving a case at Trial.
Callover	A time set aside when all cases to be heard in a civil sitting are allocated final Trial dates.
Date to be fixed	When a date for a hearing on a matter is required but the Court is unsure when it should be held the Court will leave the date open to be fixed at a later time.
Default Judgment	A judgment that is obtained without the Court hearing any evidence as to the merits of the claim, e.g., when a party fails to answer a claim, judgment can be entered against them.
Defendant	The party against whom a claim is made in the civil jurisdiction.
Defence	The Defendant's pleading in answer to the Plaintiff's Statement of Claim.
Discovery	The process by which documents are disclosed and made available for inspection.
Directions Hearing	A relatively informal court appearance that takes place as part of the Case Management process and where directions are given for the future conduct of the case.
Evidence	The means by which facts in a case are proved. It can be spoken or written, and can consist of physical objects such as photos and documents.
Ex tempore	A legal term, usually referring to a decision which is given immediately following the conclusion of a Trial. It means literally 'at the time'.
Exhibits	Evidence in physical form brought before the Court (e.g. documents, objects or electronic evidence such as CCTV, video footage, recording).
Hearing or Trial	A term referring to the time when the evidence and legal argument is presented in Court.
Interlocutory	A legal term which can refer to an order on a temporary or provisional decision on an issue at an intermediate stage of a case.
Interlocutory Application or Summons	Any application for an Interlocutory order made within a proceeding.
Interrogatories	A series of questions delivered by one party to another and which require sworn answers.
Judge	A Judge is an independent judicial officer who presides over and decides cases in the Supreme Court. Judges are members of the Supreme Court and have unlimited authority to hear cases.
Judgment	A decision of the Court. It may be given verbally at the conclusion of the hearing, in which case it is known as ex tempore. It may be given at a later time in writing where it will be described as 'Reasons for Decision' or 'Reasons for Judgment'.
Jurisdiction	Generally refers to the extent of powers of a Court including as to the authority to hear a particular type of case.

Master	The Master is, like a Judge, an independent judicial officer who also presides over and decides cases in the Supreme Court but whose authority is limited to the specific authority given in the Supreme Court Act or the SCR.
Party, Plaintiff, Defendant	A party is one of the people or entities involved in the legal matter. A party who brings a claim is known as a Plaintiff and a party against whom a claim is brought is known as a Defendant.
Pleadings	Pleadings are written statements which alternate between the parties and which contain allegations of facts and otherwise define the issues to be decided in a case.
Practice Direction	A Practice Direction is a supplement to the SCR made by the Judges in respect of specific matters of procedure.
Reserved Decision	Following the hearing of a case the Court may reserve the decision by deferring the decision to a later date or time. In urgent cases an immediate decision may be given, but reserving the provision of reasons to a later time.
Senior Counsel (SC)	Senior Counsel are practitioners who have attained professional eminence at the Bar, and they apply to be appointed 'Senior Counsel' (SC). In the past, this appointment was known as 'Queen's Counsel' (QC).
Solicitor	A solicitor is the term used to describe a lawyer who, although able to and qualified to appear in court, does not routinely do so and instead undertakes the preparation of a case for court and gives legal advice to parties.
Standard of Proof	The applicable standard or measure for determining whether a disputed fact or issue has been proved.
Subpoena	A document issued by the Court which summonses a person or entity to attend court to give evidence or to produce documents. It is also sometimes referred to as a summons to witness or summons to produce documents.
Summons	A process issued by a court at the instigation of a party for the purpose of notifying another party of the nature of an application and to attend the hearing of the application.
Without Prejudice	Discussions or communications between opposing parties are sometimes made "without prejudice" to enable a freer interchange of view. The effect of this is that if negotiations fail the parties have signalled that they do not want one another to make use in evidence of what has passed between them.

JUDICIAL REVIEW IN ACTION: A SCENARIO*

**The idea of this scenario is not to provide concrete legal advice but to familiarize people with the look of court documents and the kind of details that are put into those documents. The scenario is also not meant to exhaust all the possible options available in this scenario. For example, injunctions are not discussed in this scenario, nor are matters relating to land status.*

The scenario uses some fictional names of people, organisations and places. Any resemblance to real life names and places is merely coincidence.

Summary of case facts:

All That Glitters Pty Ltd is a small gold mining company that holds a minerals title Minerals Title in the Aarrkk Sands Desert. All that Glitters wants to begin full scale gold mining and has submitted a Notice of Intention (NOI) to the Minister for Resources and Mines, Craig Blindeye, to that effect.

Mr Blindeye refers the matter to the Northern Territory EPA. The NT EPA assess the NOI and decides that the matter requires assessment at the level of an Environmental Impact Statement. Following the conclusion of the NT EPA assessment process, the NTEPA recommends that the mine not go ahead. The NTEPA's report to the Minister stated that:

> "The mining systems proposed to be used on site fall far short of what is required to adequately protect groundwater sources from Acid Mine Drainage. Additionally the information provided by the proponent fail to explain how they will protect sensitive ecological areas on the site which provide habitat for two endangered species, the Aarrkk and the Bowam python.

Despite this, Minister Blindeye decides to go ahead and approve the mining management plan and grant an authorisation for full scale mining under the *Mining Management Act*. All the Glitters is granted its authorisation on 24 May 2014. The Minister's reasons for decision stated that while the systems used were not best or good industry practice, they were adequate to protect groundwater from acid mine drainage and the importance of the economic benefits of the mine were the overriding consideration. The reasons also stated that the project would not impact on endangered species. The reasons made no reference of the submission made by the *Aarrkk Landcare Group* (Aarrkk).

A local conservation group, *Aarrkk Landcare Group,* approach the EDO on 26 May 2014 and ask if they can assist in challenging the Minister's decision to issue the mining.

Grounds of review:

For the purposes of this scenario, after reviewing the case the EDO thinks there are potentially grounds to challenge Minister Blindeye's decision. The EDO has identified that the Minister's decision may be able to be challenged on the grounds that:

- The Minister failed to take into account a relevant consideration;
- That the Minister acted so unreasonably that no Minister could have made the decision he did.

Procedure to commence case:

The EDO discusses all the risks of taking proceedings with Aarrkk and ultimately they decide the want to challenge the Minister's decision. To do that, the EDO needs to commence proceedings in the Supreme Court of the Northern Territory. This tool kit provides some very basic sample documents to illustrate the way a proceeding is begun. The documents include:

- Originating motion
- Summons on originating motion
- Sample affidavit in support
- Notice of appearance

All Supreme Court documents must have a back sheet, like the ones shown below, and have corners, the Registry can assist.

FORM 5B

Rule 5.02(2)

ORIGINATING MOTION BETWEEN PARTIES

IN THE SUPREME COURT OF NORTHERN TERRITORY OF AUSTRALIA AT DARWIN BETWEEN

No. XY of 2014

Aarrkk Landcare Group Incorporated Plaintiff

and

The Minister for Resources and Mining

Defendant

TO THE DEFENDANT

This proceeding by originating motion has been brought against you by the plaintiff for the relief or remedy set out below.

IF YOU INTEND TO DEFEND the proceeding, YOU MUST GIVE NOTICE of your intention by filing an appearance within the proper time for appearance stated below.

YOU OR YOUR SOLICITOR may file the appearance. An appearance is filed by:

(a) filing a "Notice of Appearance" in the Registry of the Supreme Court in the Supreme Court Building, State Square, Darwin, or, where the originating motion has been filed in the Alice Springs Registry, in the Alice Springs Registry of the Supreme Court, Law Courts Building, Parsons Street, Alice Springs; and

(b) on the day you file the Notice or on the next working day, serving, at the plaintiff's address for service which is set out at the end of this originating motion, a copy, sealed by the Court.

IF YOU DO NOT file an appearance within the proper time, the plaintiff MAY OBTAIN JUDGMENT AGAINST YOU without giving you any further notice.

IF YOU FILE an appearance within the proper time, the plaintiff cannot obtain judgment against you except by application to the Court after notice to you by summons.

*THE PROPER TIME TO FILE AN APPEARANCE is as follows:

(a) Within 7 days after service –

(i) where you have been served with the originating motion filed in the Darwin Registry and that service was within the Northern Territory and within 200 kilometres of Darwin; or

(ii) where you have been served with the originating motion filed in the Alice Springs Registry and that service was within the Northern Territory and within 200 kilometres of Alice Springs;

(b) Within 14 days after service, where you are served within the Northern Territory with the originating motion filed in either Darwin or Alice Springs Registry but you are served at a place not within 200 kilometres of the Registry in which it was filed;

(c) Within 21 days after service where you are served with the originating motion out of the Northern Territory but within the Commonwealth;

(d) Within 28 days after service, where you are served with the originating motion in New Zealand or in Papua New Guinea;

(e) Within 42 days after service, where you are served with the originating motion in any other place.

FILED (18 June 2014).

REGISTRAR

THIS ORIGINATING MOTION is to be served within one year from the date it is filed or within such further period as the Court orders.

Part 2

1. A declaration that the decision of the defendant of 24 May 2014 pursuant to s36(4) of the *Mining Management Act* to grant authorisation PL656 to All that Glitters Pty Ltd was contrary to law.

2. An order in the nature of certiorari setting aside the defendant's purported decision of 24 May 2014 to grant authorisation PL656 to All that Glitters Pty Ltd.

3. An order in the nature of mandamus directing the defendant to consider and determine All that Glitters Pty Ltd's application for an authorisation according to law.

4. Costs.

5. Such further or other order as the Court thinks fit.

Part 3*

1. Place of trial – DARWIN

2. This originating motion was filed –

(a) by the plaintiff in person;

(b) for the plaintiff by, [*name of firm or solicitor*], solicitor, of [*business address of solicitor*];

(c) for the plaintiff by [*name or firm of solicitor*], solicitor, of [*business address of solicitor*] as agent for [*name or firm of principal solicitor*], solicitor, of [*business address of principal*].

3. The address of the plaintiff is –

4. The address for service of the plaintiff is – [Where documents can be served on the plaintiff].

[*Where the plaintiff sues by a solicitor, the address for service is the business address of the solicitor or, where the solicitor acts by an agent, the business address of the agent. Where the plaintiff sues without a solicitor, the address for service is stated in 3, but, where that address is not within 15 kilometres of the Registry in which the originating motion is filed the plaintiff must state an address for service which is within 50 kilometres of that Registry*.]

5. The address of the defendant is –

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* *Complete or strike out as appropriate.*

[BACKSHEET]

IN THE SUPREME COURT
OF NORTHERN TERRITORY OF
AUSTRALIA AT DARWIN
BETWEEN

Aarrkk Landcare Group Inc.

Plaintiff

AND

Minister for Resources and Mining

Defendant

ORIGINATING MOTION

Carl Cinnotta
Looking out for you lawyers
Unit 4, Logan St
DARWIN NT 0800
[Phone No.]
[Fax.]
[Email]

FORM 45A

Rule 45.04(2)

SUMMONS ON ORIGINATING MOTION

IN THE SUPREME COURT
OF NORTHERN TERRITORY OF
AUSTRALIA AT DARWIN BETWEEN

No. XY of 2014

Aarrkk Landcare Group Incorporated

Plaintiff

and

The Minister for Resources and Mining

Defendant

TO THE DEFENDANT

You are summoned to attend before the Court on the hearing of an application by the plaintiff for judgment or an order in respect of the relief or remedy sought in the originating motion as follows:–

1. A declaration that the decision of the defendant made on 24 May 2014, pursuant to section 36(4) of the *Mining Management Act* (NT) to grant authorisation PL656 to All that Glitters Pty Ltd was contrary to law.

2. An order in the nature of certiorari setting aside the defendant's purported decision of 24 May 2014 to grant authorisation PL656 to All that Glitters Pty Ltd.

3. An order in the nature of mandamus directing the defendant to consider and determine All that Glitters Pty Ltd's application for an authorisation according to law.

4. Costs.

5. Such further or other order as the Court thinks fit.

The above relief is sought on the grounds that, in making the decision of 24 May 2014, the defendant:

a. failed to take into account a relevant consideration, namely that the proposal did have the potential to impact on endangered species; and

b. made a decision that no decision maker, acting reasonably, could have made.

The application will be heard before the Master in the Court, Supreme Court Building, State Square, on [4 July 2014] at 9 a.m. ~~[*or p.m.*]~~ or so soon afterwards as the business of the Court allows.

The Master may, as appropriate –

(a) where he has authority to give the judgment or make the order sought by the plaintiff, hear and determine the application;

(b) by consent of the defendant, give the judgment or make the order;

(c) refer the application to a Judge for hearing and determination;

(d) place the proceeding in the list of cases for trial and give directions for the filing and service of affidavits or otherwise.

FILED _23 June 2014.

_____

[BACKSHEET]

IN THE SUPREME COURT
OF NORTHERN TERRITORY OF
AUSTRALIA AT DARWIN
BETWEEN

Aarrkk Landcare Group Inc.

Plaintiff

AND

Minister for Resources and Mining

Defendant

SUMMONS ON ORIGINATING MOTION

Carl Cinnotta
Looking out for you lawyers
Unit 4, Logan St
DARWIN NT 0800
[Phone No.]
[Fax.]
[Email]

IN THE SUPREME COURT OF THE NORTHERN TERRITORY
AT DARWIN

No. XY of 2014

BETWEEN

AARRKK LANDCARE GROUP INCORPORATED

Plaintiff

– and –

THE MINISTER FOR RESOURCES AND MINES

Defendant

AFFIDAVIT OF JAMIE CHRISTOPHER LEITHY IN SUPPORT OF ORIGINATING MOTION

Date of document:	23 June 2014
Filed on behalf of:	the Plaintiff
Prepared by:	Looking out for you solicitors Pty Ltd
Tel:	[#######]
Email:	[#######]
Fax:	[#######]

I, Jamie Christopher Leithy, of 46 Macnix Street, Darwin solemnly and sincerely affirm as follows:

1. I am the Public Officer of the Aarrkk Landcare Group Incorporated, the Plaintiff in this matter. I am authorised to make this affidavit on the Plaintiff's behalf.

2. I make this affidavit from my own knowledge unless otherwise stated. Where I make statements based on information provided to me by others, I believe such information to be true.

3. The Plaintiff is an incorporated association, which has been issued a certificate of incorporation under the *Associations Act*. Annexed and marked "**JCL-1**" is a copy of the Plaintiff's certificate of incorporation.

4. Pursuant to section 2 of the Plaintiff's Constitution, the objects of the Plaintiff are:

    a. To protect the unique environment of the Aarrkk Sands Desert;
    b. To initiate and carry out specific campaigns aimed at securing the protection of the Aarrkk Sands Desert;
    c. To educate and inform the public on issues facing the Aarrkk Sands Desert and it's unique flora and fauna;
    d. To encourage and support, financially or otherwise, initiatives taken to protect the Aarrkk Sands Desert by individuals and groups;
    e. To cooperate with and assist where possible other environmental organizations; and
    f. To encourage the community, industry and government to assist in the achievement of the above objectives;
    g. To do all such things that are conducive to the achievement of the above objectives;
    h. To maintain independence from all political parties.

    Annexed and marked "**JCL-2**" is a copy of the Plaintiff's Constitution.

5. The Plaintiff has been involved in numerous campaigns relating to the protection of the Aarrkk Sands Desert from inappropriate mining operations for a long period of time. Annexed and marked "**JCL-3**" is a copy of the Plaintiff's website which provides details of its campaigns.

6. On 24 January 2012 the Plaintiff secured a major grant from the Northern Territory Government to undertake wildlife surveys in the Aarrkk Sands Desert. These surveys were particularly focused on the species of Aarrkk which inhabit the Aarrkk Sands Desert. Annexed and marked **"JCL-4"** is a copy of the grant agreement.

7. On 13 June 2013, the Plaintiff hosted a community meeting to discuss the findings of its wildlife surveys and the reduced numbers of Aarrkk's identified. Annexed and marked "**JCL-5**" is a copy of the flyer adverstising the public meeting hosted by the Plaintiff 13 June 2013.

8. On 27 June 2013, the Plaintiff made a submission to the Minister under the *Minerals Titles Act* NT objecting to the grant of an Extractive Minerals Lease for All that Glitters Pty Ltd. Among other things that submission noted the Plaintiff's serious concerns for populations of the Aarrkk and the Bowam Python if the EML was approved. Annexed and marked "**JCL-6"** is a copy of the Plaintiff's submission.

9. On 7 August 2013, Minister Blindeye published a notice confirming that he had granted EML675 to All that Glitters Pty Ltd. Annexed and marked "**JCL-7**" is a copy of the notice of decision to grant EML675.

10. I am informed and verily believe (because I have read Minister Blindeye's Media Release dated 25 May 2014) that the Minister approved All that Glitters application for an authorisation PL637 to conduct full scale gold mining in the Aarrkk Sands Desert. Annexed and marked **"JCL-8"** is a copy of the Minister's Media Release dated 25 May 2014.

11. The Originating Motion in these proceedings was filed with the Northern Territory Supreme Court on 18 June 2014. Annexed and marked "**JCL-9**" is a copy of the Originating Motion.

12. The relief stated in the Originating Motion is sought on the grounds that, in making the decisions of 24 May 2014, the Defendant:

    a. failed to take into account a relevant consideration, namely that the proposal did have the potential to impact on endangered species; and
    b. made a decision that no decision maker, acting reasonably, could have made.

AFFIRMED at Darwin)
in the Northern Territory)
by **JAMIE CHRISTOPHER LEITHY**)
this 23rd day of June 2014) .....

BEFORE ME:

.....
Carl Cinotta
Looking Out for You Lawyers
Unit 4, Logan St,
Darwin 0800
An Australian legal practitioner within the
meaning of the *Legal Profession Act* 2004.

IN THE SUPREME COURT OF THE NORTHERN TERRITORY
AT DARWIN

No. XY of 2014

BETWEEN

AARRKK LANDCARE GROUP INCORPORATED

Plaintiff

– and –

THE MINISTER FOR RESOURCES AND MINES

Defendant

ANNEXURE "JCL-1"

This is the annexure marked with the letter "JCL-1" referred to in the affidavit of JAMIE CHRISTOPHER LIETHY

Sworn before me on 23 June 2014 at Darwin

……
Carl Cinotta
Looking Out for You Lawyers
Unit 4, Logan St,
Darwin 0800
An Australian legal practitioner within the
meaning of the *Legal Profession Act* 2004.

[ANNEXURES CONTINUE WITH MARKING AS ABOVE FOR EACH ANNEXURE JCL-2, JCL-3 ETC].

FORM 8A

Rule 8.05(2)

NOTICE OF APPEARANCE

IN THE SUPREME COURT OF NORTHERN TERRITORY OF AUSTRALIA AT DARWIN

No XY of 2014 ( )

BETWEEN:

AARRKK LANDCARE GROUP INCORPORATED

Plaintiff

AND:

THE MINISTER FOR RESOURCES AND MINES

Defendant

The defendant ~~(or one of the defendants)~~, of [*address*] appears in this proceeding.

Dated: 25 June 2014

Signed *Simone Lawyer*

Lawyer

Solicitor for the Northern Territory

The address for service of the defendant is Solicitor for the Northern Territory, 44 Legal Avenue, Darwin 0800

[*Where the defendant appears in person and the address of the defendant is outside the Northern Territory*: The address of the defendant within the Northern Territory for service is .]

[*Where the defendant appears by a solicitor* The name or firm and the business address within the Northern Territory of the solicitor for the defendant is .]

[*Where the solicitor is an agent of another:* as agent for [*name of firm and business address of principal*].]

[BACKSHEET]

IN THE SUPREME COURT
OF NORTHERN TERRITORY OF
AUSTRALIA
AT DARWIN

No XY of 2014
( )

BETWEEN:

Aarrkk Landcare Group Inc.

Plaintiff

AND:

The Minister for Resources and Mines

Defendant

APPEARANCE

Simone Lawyer
Solicitor for the Northern Territory
44 Legal Avenue
Darwin 0800
Telephone:
Fax:
Email:

Caption: White Bellied Sea Eagle, Maningrida, Arnhem Land.

ENVIRONMENTAL
DEFENDERS OFFICE NT

A 5/84 Smith Street
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