Australian Network of Environmental Defender's Offices

Australian Network of Environmental Defender's Offices Inc

Supplementary Submission on Draft Productivity Commission report into Access to Justice Arrangements

11 July 2014

The Australian Network of Environmental Defender's Offices (**ANEDO**) consists of eight independently constituted and managed community environmental law centres located in each State and Territory of Australia.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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Further to our earlier submissions, representatives of ANEDO appeared before the Productivity Commission at public hearings in Canberra (2 June 2014) and Hobart (13 June 2014). This submission provides the following supplementary information in response to questions raised at those hearings.

Importance of advocacy, education and law reform

EDOs provide a wide range of high quality legal services within a specialist and expanding area of law. EDOs adopt a multidisciplinary and community capacity-building approach to service delivery, regularly reviewing their practices to ensure they are meeting the needs of communities in their catchment area, and effectively addressing environmental issues.

For example, EDO NSW, EDO NT and EDO WA have developed specific outreach programmes in consultation with indigenous communities. Various offices have delivered workshops and produced resources to assist rural communities to understand legal issues facing farmers. In response to growing concerns regarding unconventional gas projects, EDO Qld, EDO NSW and EDO Tasmania have produced publications explaining mining laws.

The diversity, flexibility and responsiveness of our services are fundamental to providing access to justice across the spectrum of environmental and planning issues.

Education

EDOs deliver services that are not provided by any other organisation. We play a critical role in ensuring that community members understand the laws and decisions that affect them, and that their involvement in decision-making is efficient and effective. All offices produce fact sheets on a range of topics and bulletins providing updates on changes to laws and policies. For example, the EDO NSW weekly e-bulletin has over 2300 subscribers across the community, government and business sectors.

Mining laws

- *Mining Law in NSW: A guide for the community*
- *Mining and Coal Seam Gas Law in Queensland*
- *Community Guide to Mining (Tasmania – in production)*

Unrepresented litigants

- *Community Litigants Handbook, Queensland*
- *Going It Alone: A Guide for Unrepresented Litigants in the Resource Management and Planning Appeal Tribunal, Tasmania*

Environmental law guides

- *Rural Landholder's Guide to Environmental Law in New South Wales (4th edn)*
- *A Guide to Private Conservation in NSW*
- *Caring for Country: A Guide to Environmental Law for Aboriginal Communities in NSW*
- *Caring for the Coast: A Guide to Environmental Law for Coastal Communities in NSW*
- *Getting the Drift: A community guide to pesticide use in the NSW Northern Rivers*
- *Environmental Law Handbook, ACT*
- *Environmental Law Handbook, Tasmania*

Funding EDOs to produce and update fact sheets, practical environmental law resources and procedural guides is a cost effective way to improve community awareness and enhance public participation in environmental decision making and enforcement.

Law Reform

EDOs have been actively involved in policy development, expert advice and advocacy for reform of planning and environmental laws. The practical experience of EDO lawyers in listening to community concerns, monitoring developments, analysing laws and finding solutions to land use planning disputes provides a unique perspective on the effectiveness of existing laws.

Policy work is complex and ongoing, even within a single issue. As Bridgman and Davis have argued, the general policy cycle involves, amongst other things, the identification of issues, policy analysis, development and critique of policy instruments, consultation, coordination, decision making, implementation, and evaluation.[1] Environmental and planning laws in particular involve a complex intersection of laws, policies, science and community relations across local, state and national levels of government. EDOs remain the go-to source for accurate information and constructive advice for interested and affected community members.

As Dovers has commented, "advances in environmental and sustainability policy are more likely to be initiated by non-government individuals and groups rather than governments".[2] With this in mind, EDOs contribute to thought leadership and law reform in both a reactive and proactive capacity. Our contribution to law reform proposals adds to the rigour of the decision making process, strengthens legislative protections and reflects our desire that litigation only be a last resort.

The policy work of EDOs is well-respected. EDOs are regularly invited to participate in legislative reform processes, consultation and government inquiries, both individually and through ANEDO. ANEDO has made over 20 submissions on national issues in the past 12 months alone. Further details are set out in **Attachment A**.

EDOs also contribute to law reform processes in each jurisdiction, depending on offices' capacity and reform activity within government. For example, in 2012-2013, EDO NSW prepared over 40 state and federal law reform submissions[3]. In the same period, EDO Tasmania prepared 5 detailed state-based submissions, EDO WA prepared 3 state-based submissions and was an active member of the EPA stakeholder reference group.

Within limited resources, EDO policy work often prioritises submissions in relation to government reform proposals and parliamentary inquiries. However, EDOs also prepare reports making the case for appropriate law reform. For example, EDO SA produced a paper entitled *Land Biodiversity and the Law: The Case for Reform* and EDO Tasmania collated proceedings from its conference on best practice marine farming into a paper entitled *Improving Tasmania's Marine Farming Framework*.

The ANEDO network has also conducted a range of comparative analyses that have identified areas for improvement and jurisdictions that are out of step with national standards on issues such as sustainability, access to justice or climate change. For

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[1] See, in particular Chapter 4 of Bridgman P and Davis G (2004) *The Australian Policy Handbook* 3rd edition, Allen & Unwin, Sydney. For a different perspective, but one which also highlights the complexities, see Howlett M and Ramesh M (2003) *Studying Public Policy: Policy Cycles and Policy Subsystems* Oxford University Press, Ontario. They argue that there are five related stages in the policy cycle: agenda-setting, policy formulation, decision making, policy implementation and policy evaluation.

[2] Dovers S (2005) *Environment and Sustainability Policy: Creation, Implementation, Evaluation* Federation Press, Sydney at p 11.

[3] Please note, this figure includes national submissions discussed in Attachment A.

example, in 2012 the network produced (and is currently updating) *An assessment of the adequacy of threatened species & planning laws in all jurisdictions of Australia.*[4]

Importance of public interest litigation

The protection of the environment is something that benefits the public.[5] 'Public interest environmental litigation' is litigation undertaken by a private individual or community group where the dominant purpose is not to protect or vindicate a private right or interest, but to protect the environment.[6]

Public interest environmental litigation has the capacity to make an important contribution in achieving the objects of environmental legislation.[7] Chris McGrath of the Australian Centre of Environmental Law suggests that it achieves this by 'increasing enforcement of environmental laws and enhancing transparency, integrity and rigour in government decision-making'.[8] Similarly, Peter Grabosky, Neil Gunningham and Darren Sinclair argue that public interest litigants play a legitimate role as 'surrogate regulators'.

For example, the Honourable Brian Preston says that 'the prospect of rigorous judicial review… will usually result in a developer ensuring that the principle document in support of the development application, the EIS, is adequate'.[9] Thus, the prospect of litigation can prompt developers to adequately address their legally enforceable environmental obligations and is ultimately a 'smart and potentially efficient form of regulation'.[10]

The view that third party appeal rights and effective public participation assist in preventing corruption and maintaining the integrity of planning and development processes was reiterated by the NSW ICAC Report, *Anti-corruption Safeguards and the NSW Planning System*:

> *Community participation and consultation requirements also act as a counter balance to corrupt influences. The erosion of these requirements in the planning system reduces scrutiny of planning decisions and makes it easier to facilitate a corrupt decision…*
>
> *The limited availability of third party appeal rights under the EP&A Act means that an important check on executive government is absent. Third party appeal rights have the potential to deter corrupt approaches by minimising the chance that any favouritism sought will succeed. The absence of third party appeals creates an opportunity for corrupt conduct to occur, as an important disincentive for corrupt decision-making is absent from the planning system*.

ANEDO urges the Productivity Commission to maintain its recommendation in the Draft report that funding to EDOs to provide access to justice in public interest environmental litigation matters is warranted.[11]

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[4] Available at: http://d3n8a8pro7vhmx.cloudfront.net/edonsw/pages/279/attachments/original/1380668130/121218Appendix1Reportontheadequacyofthreatenedspeciesandplanninglaws.pdf?1380668130.

[5] *Sinclair v Mining Warden at Maryborough* (1975) 132 CLR 473, 477-82 (Barwick CJ); *Castlemaine Tooheys Ltd v South Australia* (1986) 161 CLR 149, 155 (Mason ACJ).

[6] Chris McGrath, 'Flying Foxes, Dams and Whales: Using Federal Environmental Laws in the Public Interest' (2008) 25 *Environmental and Planning Law Journal* 324, 327.

[7] B J Preston, 'Third Party Appeals in Environmental Matters in New South Wales' (1986) 60 *The Australian Law Journal* 215, 222.

[8] Chris McGrath, 'Flying Foxes, Dams and Whales: Using Federal Environmental Laws in the Public Interest' (2008) 25 *Environmental and Planning Law Journal* 324, 331.

[9] B J Preston, 'Third Party Appeals in Environmental Matters in New South Wales' (1986) 60 *The Australian Law Journal* 215, 222.

[10] Neil Gunningham and Darren Sinclair, *Leaders and Laggards: Next-Generation Environmental Regulation* (Greenleaf, 2002); Chris McGrath, 'Flying Foxes, Dams and Whales: Using Federal Environmental Laws in the Public Interest' (2008) 25 *Environmental and Planning Law Journal* 331.

[11] Productivity Commission *Draft Report: Access to Justice Arrangements*, April 2014, pp22 and 625.

Work undertaken by EDOs

EDOs engage in the following areas of work:

- Provision of advice and information
- Community legal education
- Public interest environmental litigation
- Law reform and advocacy

The proportion of time devoted to each of these activities varies between offices, depending on factors including capacity, resources, funding agreements and the legislative framework. The proportion of time allocated by any one office also changes from year to year, based on environmental demands and work priorities (especially in those offices without staff dedicated to each of the work areas).

To illustrate this variety, the following activity breakdowns are provided for a selection of offices in 2012-2013:

	Advice	Litigation	Education	Law reform
EDO Qld	20%	50%	10%	20%
EDO SA	10%	50%	10%	30%
EDO ACT	30%	0%	30%	40%
EDO Tas	45%	15%	20%	20%
EDO NT	40%	5%	40%	15%

Specific work undertaken by EDOs is discussed in more detail below.

ANEDO would like to take the opportunity to strongly and unreservedly refute the suggestions recently made by Federal Member for Bass, Andrew Nikolic, that Environmental Defenders Offices fund, support or otherwise engage in illegal activities[12]. Our work uses the law to protect the environment, secure public participation in resource management decisions and enforce compliance with legislative requirements. Our lawyers are scrupulous, dedicated and well-respected within the community and the legal profession.

Public interest environmental litigation

The extent of an EDO's involvement in public interest environmental litigation varies depending on capacity and demand. Offices provide significantly higher volumes of advice (ranging in complexity) than the number of public interest cases run. For example, the following diagram illustrates work undertaken by EDO NSW in 2012-2013:

[12] ABC News. 29 June 2014. 'Eco-charities to lose charity status'. Available at http://www.abc.net.au/news/2014-06-29/andrew-nickolic-moves-to-strip-charity-status-from-some-environ/5557936?WT.ac=localnews_hobart

Smaller offices have been involved in fewer litigation activities, but the proportion of advice to court representation is broadly similar between all offices. EDO Qld has commenced proceedings in 10 matters covering planning, mining and challenging assessment processes in recent times (see Great Barrier Reef case study below). EDO Tasmania has advised approximately 200 clients, but represented clients in only 4 litigation matters in the past 12 months. In 2013-2014, EDO WA assisted 119 clients and finalised 22 complex matters, including involvement in three 'test cases' and providing representation in one court case (see below).

The nature of litigation undertaken again varies by state, and by year. On average, 70% of litigation work relates to State legislation while 30% of litigation work undertaken by EDOs relates to Federal legislation (primarily, the *Environment Protection and Biodiversity Conservation Act 1999* and / or *Administrative Decisions (Judicial Review) Act 1977*). The bulk of litigation work represents community members and groups challenging assessment or approval decisions, whether by merits review or judicial review, or seeks to clarify interpretation of significant statutory provisions.

The remainder of litigation activities are civil enforcement proceedings aimed at securing compliance (or penalising breaches) of environmental legislation or permit conditions. Notably, a significant amount of EDO advice work relates to compliance, and often leads to prosecution or other enforcement action being undertaken by government agencies.

CASE STUDY: EDO Northern Queensland

Enforcement action for Jamie Creek water contamination

The community of Walsh River raised concerns about the quality of drinking and stock water in Jamie Creek and sought assistance from EDONQ to address issues related to pollution from an existing mine, and potential impacts of a proposed new mine.

Approaches from the community led to the Environmental Authority raising an Environmental Protection Order requiring the operator to stop further releases of contaminants into Jamie Creek. EDO NQ's solicitor engaged a mediator to assist the client in mediations between the community group, mine operators (Kagara, later Monto Minerals) and the Department of Environment and Heritage Protection. The groups reached agreement on acceptable release volumes and community members have continued to monitor and record the contamination levels in Jamie Creek.

In February 2013, Baal Gammon Copper were charged with offences including contravening the environmental protection order and exceeding agreed contaminant levels. They were fined $80,000.

Importantly, any decision by an office to represent a client in public interest environmental litigation proceedings is subject to assessment against clear casework guidelines. Example of casework guidelines from EDO NSW and EDO Tasmania are included in **Attachment C**.

Assessment of prospects

A key consideration in any decision to get involved in a public interest environmental litigation is the prospect of the litigation succeeding. EDOs undertake a rigorous assessment of prospects (often in consultation with an experienced barrister), and ensure that clients are aware of both the potential risks and the evidentiary burden involved in the litigation.

In the past 5 years, no cases in which EDO offices were engaged have been dismissed on the basis that the case was frivolous or vexatious.

In fact, advice from EDO often plays a critical role in reducing the number of frivolous or tenuous litigation activities being pursued, and in improving the efficiency of matters which do proceed. In a recent article in the Hobart Mercury, Tasmanian Law Society President, Anthony Mihal, said of funding cuts to community legal services:

> *It's very short-sighted because more people appear in courts in person without representation as a result.*
>
> *In the case of the Environmental Defender's Office, for example, most people who sought advice were told they did not have a case. Without that advice, they went to court, costing the court system, developers and everyone involved.*
>
> *[The service] saves the system and everybody time and money. I predict many more people will be tying up the Resource Management and Planning Appeal Tribunal [as a result of the cuts].*[13]

Success rates

Most cases in which EDOs are involved achieve some change in outcome, whether a complete reversal of the decision being challenged, changes to permit conditions or orders requiring some remediation action. Recent examples of successful cases include:

- EDO NSW successfully represented a community group to oppose expansion of Rio Tinto's Warkworth Mine into an established buffer area between the mine and the town of Bulga: *Warkworth Mining Limited v Bulga Milbrodale Progress Association Inc* [2014] NSWCA 105 (see case study below)
- EDO WA succeeded in judicial review proceedings related to the proposed James Price Point LNG hub, overturning the approval of the facility: *The Wilderness Society v Minister for Environment*.
- EDO Tasmania successfully represented the Australian Institute of Architects (Tasmanian Chapter) to overturn a decision to remove an architecturally significant building from the Tasmanian Heritage Register: *Australian Institute of Architects v Tasmanian Heritage Council & Barnett* [2014] TASRMPAT 1

CASE STUDY: EDO NSW

Bulga Milbrodale Progress Association Inc v Warkworth Mining Limited & Ors

Rio Tinto was seeking to open cut mine a biodiversity offset area, containing an endangered ecological community, the Warkworth Sands Woodland, and threatened animal species including the squirrel glider and the speckled warbler. This woodland is unique to the area and only 13 per cent of the original forest remains. Rio Tinto had previously promised to permanently protect this area, under an agreement with the NSW government, as part of the existing approval from 2003.The protected area also includes Saddleback Ridge which provides a buffer between the mine and Bulga.

EDO NSW represented the Bulga Milbrodale Progress Association in the Land and Environment Court which found Rio Tinto's economic modelling deficient in many ways, including its methodology that over-estimated the benefits of the mine. The L & E Court refused the mine expansion.

[13] Paine, M. 'Women's Legal Service Cash Crisis'. *The Mercury*. 16 June 2014. Available at http://www.themercury.com.au/news/tasmania/womens-legal-service-cash-crisis/story-fnj4f7k1-1226955316168

The matter was appealed by Warkworth Mining Ltd (owned by Rio Tinto) to the NSW Court of Appeal where EDO NSW again appeared. The Court ruled in favour of the residents of the Hunter Valley village of Bulga and the protection of rare forests, by upholding the refusal of the open cut coal mine expansion. The appeal was dismissed with costs awarded to the Bulga residents.

The Court of Appeal found no fault with the Land and Environment Court decision that the economic benefits of the coal mine did not outweigh the significant impacts on Bulga residents and the destruction of rare forests containing endangered plant and animal species.

Often, even where cases are not wholly successful, the outcome clarifies interpretation of a significant legal provision or application of a legal principle or serves to illustrate a deficiency in the law. As discussed above, public interest litigation plays a significant role in testing the effectiveness of our regulatory frameworks.

CASE STUDY: EDO QLD

Testing the application of the World Heritage Convention: Dredging in the Great Barrier Reef

EDO Qld is currently acting for Mackay Conservation Group (***MCG***) in MCG's challenge to Federal approval of (as well as conditions placed on) the application by North Queensland Bulk Ports Corporation to undertake a program of dredging and dumping near Abbot Point to facilitate development of three new proposed port terminals: Terminal 0, Terminal 2 and Terminal 3.

Significantly, the case will examine provisions of the EPBC Act requiring that the Minister's decision not be inconsistent with the World Heritage Convention (Convention) or the Australian World Heritage Management Principles (***Principles***). MCG will argue that Minister's decision is unlawful because it is inconsistent with the Convention and the Principles, and it was premised on an erroneous construction of the requirements of Act. The case tests, for the first time since the EPBC Act came into force, how the Convention and the Principles affect the Minister's decision making powers in relation to Australia's World Heritage properties.

EDO clients

EDOs provide advice on public interest environmental and planning issues (Attachment B provides an example of the range of matters dealt with – EDOWA . Generally, any member of the public can obtain initial assistance, such as by way of a 15 minute phone consultation (subject to conflict of interest issues and satisfaction that the matter falls within the areas of work undertaken by the office). The principal criteria for further assistance will be whether the issues raised have a sufficient public interest element.

As a result, EDO clients represent a broad cross-section of individuals and groups concerned about environmental issues and planning outcomes. Clients include farmers, urban and rural residents, Coastcare and Landcare groups, indigenous communities[14], large and small environmental NGOs, representative bodies and consultants. EDO advice often serves to redress a significant imbalance between community members and comparatively well-resourced government authorities and private corporations.

[14] EDO South Australia represented Uncle Kevin Buzzacott, an indigenous elder, in an application for review of the Federal approval of an expansion of the Olympic Dam mine by BHP Billiton.

As outlined in the Casework Guidelines in **Attachment C**, capacity to pay will be a consideration in ongoing casework (including litigation).

CASE STUDY: EDO NT

Working with traditional owners in the remote NT near Borroloola

EDONT lawyers are currently working with traditional owners near the remote town of Borroloola. Traditional owners in the area have great concern about mining activities on and around their land. The traditional owners sought the assistance of EDONT to help understand the legal process that leads to mining approvals on their lands and to assist in engaging with relevant stake holders.

Currently traditional owners feel quite alienated from the process and sought assistance to ensure the protection of their country and culture. EDONT lawyers are working in collaboration with the traditional owners of the area to develop effective engagement pathways with statutory bodies and to educate the community about their rights with respect to mining on Aboriginal Land. EDONT is also engaging with the Aboriginal Areas Protection Authority on the behalf of the traditional owners to ascertain the registered sacred sites located on their lands.

Without the EDONT these particular traditional owners would have no access to free legal advice on environmental law matters. To put these traditional owners in that position places an enormous burden on them as custodians of their lands, EDONT is assisting to ensure that free, prior and informed consent is given before any development occurs on the traditional owners' lands.

Most EDOs do not routinely collate statistics regarding clients' financial position. However, a survey of clients undertaken by EDO Qld in 2013 indicated **60%** of individual clients and **88%** of organisational clients had no income, or an income less than $35,000 per annum. This supports the position that EDOs play an important role in providing access to justice to individuals and groups who would not otherwise be able to afford legal advice.

Community care groups also rely on advice from EDOs to support their on-ground environmental work. For example, EDO Tasmania recently received the following letter of support from the Southern Coastcare Association of Tasmania (***SCAT***):

> *In over 10 years of operating, SCAT has engaged the services of the Environmental Defenders Office (EDO) many times for advice including the development and review of our constitution. As a community run, not-for-profit, this legal support has been invaluable to our organisation. We have not had a budget to engage commercial legal professionals and it is extremely difficult to recruit in-kind legal services.*
>
> *SCAT was appalled to hear the recent announcement that Federal funding will be withdrawn from the network of EDOs across Australia. Slashing funds that sustain the network of EDOs will have a severe impact on grassroots, apolitical community organisations like SCAT and the network of Coastcare groups we support – organisations that provide an immense in-kind workforce which improves our coastal environment.*
>
> *The importance of practical, professional legal support is vital for community organisations to achieve good governance. In addition to providing vital and fundamental governance support for active and engaged Coastcare groups in southern Tasmania, the EDO has provided advice that helps individuals and environmental organisations understand risks when engaging in consultation, appeal processes and general business.*
>
> *The cost to sustain the network of EDOs, relative to the value they provide to care groups and communities, is a huge return on investment for the Australian taxpayer.*

Issues relating to costs

Our previous submission to the Productivity Commission made a number of recommendations in relation to reducing costs barriers to access to justice.[15] The following section provides a more specific response in relation to the use of protective costs orders and cost allocation arrangements.

Protective cost orders

Protective cost orders (***PCOs***) should be widely available in public interest cases, as the threat of being ordered to pay the other party's legal costs is one of the most significant deterrents to individuals and community groups initiating litigation.[16] As an example of existing PCOs, rule 42.4 of the Uniform Civil Procedure Rules 2005 (NSW) provides that courts may specify the maximum costs that one party may recover from another party (either of the court's own motion or at a party's request). EDO NSW has previously recommended that this rule be amended – to make it explicit that there is no limitation on circumstances when a 'protective costs order' can be made, and that such orders are available in public interest proceedings.

An example of the importance of PCOs, including where the defendant is a private company, is set out below. While the result in this case was positive, in other situations the denial of a PCO has meant that EDO clients have been unable to pursue a public interest litigation matter due to the cost risk involved.

CASE STUDY: EDO NSW

Blue Mountains Conservation Society v Delta Electricity[17]

On behalf of the Blue Mountains Conservation Society, EDO NSW ran civil enforcement proceedings in the NSW Land and Environment Court against Delta Electricity under the *Protection of the Environment Operations Act 1997* (POEO Act), for water pollution into the Coxs River which is part of Sydney's drinking water supply.

The litigation ran for over two and a half years, and was finally settled out of Court by the parties in October 2011. There were a number of judgments on various aspects of the case in that time, including:

- On 9 September 2009, EDO NSW successfully obtained a ***maximum costs order*** in the amount of $20,000, limiting the Society's liability to pay Delta's costs if unsuccessful. Justice Pain of the Land and Environment Court made the order on the basis that the case was brought in the public interest, was likely to raise novel questions of law and that the applicant could not continue unless an order capping costs was made. Justice Pain also ordered BMCS to provide security for Delta's costs in the amount of $20,000.

- On 18 October 2010, the Court of Appeal (Beazley JA, Basten JA and Macfarlan JA) dismissed Delta's appeal against the orders made by Justice Pain, confirming that the litigation may be characterised as being in the public interest.

[15] Submission to the Productivity Commission on Access to Justice Arrangements November 2013 Available at: http://www.edo.org.au/2013-2014-documents/131112-ANEDO-PC-Access-to-Justice-Submission-FINAL-PDF.pdf

[16] Allan Hawke, *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (2009) [15.105].

[17] Excerpt from EDONSW site; see www.edonsw.org.au/pollution_cases for details and links to judgments.

- On 26 August 2011, Justice Pepper of the Land and Environment Court dismissed Delta's application to have the Society's case struck out of Court, on the grounds that the Society had the right to bring civil enforcement proceedings for a breach of s.120 of the POEO Act, and that stopping the continuing pollution would be a practical remedy that could be imposed in respect of the past breaches. The Court awarded costs in favour of the Society.

Following the Court's rejection of Delta's strike-out motion, the parties agreed to try to resolve the issues through voluntary mediation. On 11 October 2011, the Society agreed to discontinue the proceedings on the following grounds:

1. Delta admits that it has discharged waste waters containing the pollutants between May 2007 and August 2011, and that it polluted waters within the meaning of s. 120 of the POEO Act, without authorisation under its licence, except in relation to salt; and
2. Delta submits an application to the EPA to vary its licence to specify maximum concentration levels for copper, zinc, aluminium, boron, fluoride, arsenic, salt and nickel; and
3. Delta submits an application to the EPA to include a condition in its licence requiring the implementation of a program of works for the full treatment of cooling tower blow down water from Wallerawang power station.

Delta agreed that it will do the works necessary to stop the pollution, and that in the interim, it will apply for limits to be set on those pollutants. What those limits will be is a matter to be determined by the EPA, and must include input from the community.

In Canada, intervenor funding has been used as a mechanism to achieve a similar outcome to protective costs orders. Allowing orders requiring a proponent to pay the costs of objectors to the project (the intervenors) participating in the administrative procedure in advance of the hearing was found to be a useful tool to facilitate citizen participation in public interest matters.[18]

ANEDO maintains that wider availability of protective costs order is the most effective mechanism to achieve access to justice in public interest matters.

International Costs Allocation Rules

Cost allocation rules in various international jurisdictions were considered in the Australian Law Reform Commission Report, *Costs Shifting – Who Pays for Litigation*, Report No 75 (1995). In short, US legislature has introduced laws that provide for a successful plaintiff to recover his or her costs but a successful defendant cannot. This is a form of 'one-way fee shifting' (discussed below). These laws are intended to promote social reform by encouraging litigation in public interest matters, such as civil rights and the environment.[19]

[18] The Ontario Parliament passed the *Intervenor Funding Project Act 1988*, which authorised certain tribunals, including the Environmental Assessment Board, to award funding to intervenors in advance of a hearing by the tribunal. Until its repeal in 1996, the Act made a significant contribution in the area of citizen participation as well as in the quality of environmental decision-making. Michael I Jeffery, "Intervenor Funding as the key to effective citizen participation in environmental decision-making: putting the people back into the picture" (2002) 19 *Arizona Journal of International and Comparative Law* 643, 656; cited in Brian Preston, Speech to International Symposium 'Towards an Effective Guarantee of the Green Access: Japan's Achievements and Critical Points from a Global Perspective' (30-1 March 2013) 12.

[19] See, eg, Civil Rights Attorney's Fees Awards Act 42 USCA 1988 (1982); Equal Access to Justice Act 28 USCA 2412 (1988).

The ALRC also looked at alternatives to the costs indemnity rule including 'one-way costs shifting' where one party (usually the plaintiff) is able to recover his or her costs if successful. If the other party is successful then each party bears his or her own costs. One-way costs shifting is intended to facilitate public interest litigation by removing the risk to a party of an adverse costs order, while still allowing him or her to claim costs if successful. It can be used to promote particular types of litigation such as environmental, consumer protection and other matters where there is a public interest in maximising private enforcement of the relevant laws[20] or to assist specific types of party in certain types of litigation, such as a party seeking the review of a government decision.[21]

General rule that costs follow the event

ANEDO reiterates that the threat of being ordered to pay the legal costs of a government agency, a large corporation, or both, where proceedings are unsuccessful is a major deterrent against public interest litigation. Costs rules vary within and between jurisdictions, but in many cases, the general rule is that "costs follow the event".[22] Courts may have discretion to depart from this rule, including in public interest matters, although that discretion is often broad, rarely exercised, and difficult to predict.

In its 1995 report, the ALRC concluded that the general rule that costs follow the event must be subject to certain safeguards. In particular, the rule must recognise the need for costs orders which reinforce the court or tribunal's control of the proceedings and the need to counter any deterrent effect it may have on public interest cases and cases involving people who have meritorious claims or defences but limited resources (4.33). They recommended exceptions to the general rule including public interest costs orders which recognises the potential benefit to government, industry and the community of public interest litigation and test cases that will clarify and develop the law or resolve important factual matters (4.34).

ANEDO notes that "costs follow the event" rules (including not allowing a PCO) do not create a "level playing field". In particular, the imbalance between third parties litigating in the public interest and the financial incentive (arising from commercial or residential development) for proponents to pursue development approval, as well as tax deductibility for many business related litigation expenses, make a proponent for development better placed to bear the costs of litigation.

Overall, ANEDO strongly recommends that court rules should not inhibit public interest litigation or reinforce imbalances of power and resources between potential parties. A preferable default rule would be that each party pays their own costs, with discretion (based on clear criteria) to make additional costs orders where appropriate. This would include orders to protect public interest litigants in recovering costs (for example, after successful civil enforcement proceedings), or to protect parties against frivolous or vexatious litigation.

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[20] eg one-way costs shifting has been widely used in the United States to promote particular types of litigation under legislation such as the Civil Rights Attorney's Fees Award Act 42 USCA 1988 (1982), Civil Rights Act 42 USCA 1973 (1976) and the Clean Air Act 42 USCA 7604 (1976).

[21] eg under the Judicial Review Act 1991 (Qld) a party seeking an order that a government decision-maker provide reasons may recover his or her costs if successful (in whole or in part) in obtaining the relief sought but may only be ordered to pay costs if wholly unsuccessful and the application did not disclose a reasonable basis, was frivolous or vexatious or was an abuse of process: s 50. In the United States the Equal Access to Justice Act 28 USCA 2412 (1988) allows individuals and small businesses to recover legal costs in cases against the government where the government's position is not 'substantially justified'.

[22] For example, for judicial review and civil enforcement proceedings in the NSW Land and Environment Court (class 4) the general rule is that costs follow the event. More favourably, in the small proportion of cases where merits review is available to third party objectors (class 1), the general rule is that each party pays their own costs.

Public interest litigation fund

In recognition of the significant barriers faced by public interest litigants (outlined in our original submission), ANEDO supports the establishment of a public litigation fund, as a complementary measure to the various recommendations made in our submission regarding reduced costs, e-filing, PCOs, fee waivers and clear public interest tests.

Such a fund should be available to cover costs associated with application / filing fees, engaging lawyers and experts (the cost of scientific experts can be prohibitive, yet their involvement in environmental litigation is often critical to the outcome). As Dr Chris McGrath has said:

> *Considering how the lack of resources and the threat of adverse costs orders inhibits public interest environmental litigation, the creation of such a fund would have significant benefits for public interest environmental litigation at a federal level in Australia.*[23]

ANEDO also notes that providing adequate funding to allow EDOs to represent public interest litigants is a proven, cost effective mechanism for improving access to the courts in public interest environmental law matters.

Funded by Government

In 1995 the ALRC recommended that the Commonwealth establish a public interest litigation fund.[24] The ALRC specifically recommended 'the assistance available to litigants under the Commonwealth test case fund should include an indemnity against the whole or part of an adverse costs order. The fund should also be subject to the power of a court to make a public interest costs order whereby the fund may be required to pay all or part of the costs of one or more of the parties to the proceedings'.[25]

A public interest litigation fund should be administered by an independent panel, subject to transparent guidelines. The Australian Tax Office test case litigation fund may be an appropriate model to investigate.[26]

In respect of successful civil enforcement actions commenced by third parties, there is a strong argument for the responsible government agency to cover the third party's costs where the action would not have been necessary had the agency taken enforcement action without resorting to a civil proceeding.

Funded by community

Litigation funds based on public donations, rather than government funding, have existed in Canada and the United States for many years[27] and have facilitated a large amount of public interest environmental litigation in those countries. However, Australia has a much smaller population and different cultural, governmental and philanthropic traditions.

The resources available through a public interest environmental litigation fund would need to be considerable to make a real contribution to more than a handful of cases. To be able to provide indemnity for costs in even one significant public interest environmental case, the fund would need capital of at least $100,000.

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[23] Ibid at 353.

[24] Australian Law Reform Commission, *Costs Shifting – Who Pays for Litigation*, Report No 75 (1995) Recommendation 60.

[25] Ibid.

[26] https://www.ato.gov.au/General/Tax-and-super-law/Test-case-litigation-program/

[27] Boer B, "Legal Aid in Environmental Disputes" (1986) 3 EPLJ 22, 35.

While making donations to the fund tax deductible would assist considerably, in the current economic environment, it would be extremely challenging to secure sufficient resources to allow the fund to operate effectively.[28]

Notwithstanding options for establishing government or community-funded public litigation funds, ANEDO submits that this could not, and should not, replace the important spectrum of functions provided by EDOs, including through a mixture of public and charitable funding.

Specialist Courts

As outlined in our previous submissions, ANEDO recommends that specialist environmental courts be constituted in each jurisdiction as a superior court of record, convened by judges or commissioners with expertise in planning and environmental matters.

It is our view that establishing specialist courts improves the level of understanding about environmental issues being considered, the rigour of the assessment and consistency of decision making. A seminal report by the Access Initiative, *Greening Justice: Creating and Improving Environmental Courts and Tribunals*,[29] examines the operation of specialist courts and tribunals around the world and recommends that such bodies be established in all jurisdictions. In a presentation to the Environmental Justice Seminar in 2013, Justice Brian Preston SC, Chief Judge of the Land and Environment Court of NSW, identified the characteristics of successful specialist environmental courts and tribunals. In summary, his Honour noted that such courts should be:

- **Quick** – swift resolution is particularly important in environmental matters, where delay in hearing a matter can result in the environment at risk being damaged before the case is finalised.
- **Supported by expertise** – environmental litigation frequently involves a complex mix of science, policy, law, economics and community values. It is critical that decision makers in these forums are "environmentally literate"[30] – particularly where unrepresented or public interest litigants are not able to afford to engage technical experts, it is important that decision makers are able to critically analyse the evidence presented to them, and inquire of experts to satisfy themselves about whether a proposal meets relevant statutory criteria.

  As Justice Preston notes, this specialist expertise greatly contributes to the development of environmental law jurisprudence and ultimately improves the quality of environmental laws. Judges and commissioners in specialist environment courts generally have a greater appreciation of the significance of environmental laws, and are more willing to impose appropriate penalties in respect of breaches.

  Such judicial expertise may be diluted if judges / members are required to sit on a range of matters in a generalist court and are not routinely presiding over environmental law matters.
- **Innovative and responsive** – specialist courts are experienced in environmental law and better placed to understand stakeholders and adopt practices and procedures that facilitate access to justice on environmental issues.

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[28] Chris McGrath, 'Flying Foxes, Dams and Whales: Using Federal Environmental Laws in the Public Interest' (2008) 25 *Environmental and Planning Law Journal* 324, 352.

[29] Pring & Pring. *Greening Justice: Creating and Improving Environmental Courts and Tribunals*. 2009. The Access Initiative.

[30] Preson, B. 2013. "Characteristics of successful environmental courts and tribunals". Presentation to the Eco Forum Global Annual Conference, Guiyang. Available at http://www.lec.lawlink.nsw.gov.au/

- **Consistent** – where a public interest litigant is weighing up the potentially significant cost risks associated with a proceeding, it is important that decisions are made consistently and allow for some level of predictability of the outcome (or, at least, the process). For this reason, ANEDO recommends that all specialist bodies be constituted as superior courts of record.
- **Comprehensive and centralised** – Justice Preston notes that the most successful specialist environmental courts are those that have a comprehensive jurisdiction, dedicated staff and a high level of recognition and respect amongst stakeholders.

  Specialist courts with experienced, "environmentally literate" judges enhance community confidence in the appeal process and elevate the importance of environmental and planning law.

Anecdotally, EDO lawyers practising in jurisdictions without a specialist court (but with a dedicated environmental list within an existing court or Tribunal, such as VCAT or the State Administrative Tribunal of Western Australia (Development and Resources Stream)) have found that a dedicated registry is important to successful case management. In the absence of a dedicated registry for the environmental list, procedures lack consistency and, particularly for unrepresented litigants, this can be overwhelming.

ANEDO notes that, as part of the review of South Australia's planning and development system, consideration is being given to rolling the functions of the Environmental Resource and Development (***ERD***) Court into a specialist list within the SA Civil and Administrative Tribunal. Such a move could reduce community confidence that planning matters were taken seriously and determined by specialist judges, and could potentially limit the comprehensive jurisdiction of the current ERD Court by removing criminal and civil enforcement functions.

Attachment A: ANEDO Submissions 2013-2014

- Submission on the Draft NSW-Commonwealth EPBC Bilateral Approval agreement
- Submission on the Draft Qld-Commonwealth EPBC Bilateral Approval agreement
- Submission on the Competition Policy Review Issues Paper
- Senate Inquiry into the Environment Protection and Biodiversity Conservation Amendment (Bilateral Agreement Implementation) Bill 2014 and the Environment Protection and Biodiversity Conservation Amendment (Cost Recovery) Bill 2014
- Submission on Draft Terms of Reference for a Threatened Species Commissioner
- Submission to the Inquiry into Environmental Offsets
- House of Representatives inquiry into streamlining environmental regulation, 'green tape' and 'one stop shops' for environmental assessments and approvals
- Submission to Senate Inquiry into Tasmanian Wilderness World Heritage Area
- Submission regarding the Agriculture and Veterinary Chemicals Legislation Amendment (Removing re-approval and re-registration) Bill 2013
- Submission to the Joint Select Committee on Northern Australia - Inquiry into the Development of Northern Australia
- Submission on Australian Government Energy White Paper
- Submission Responding to Draft EPBC Act Referral Guidelines for the Vulnerable Koala
- Submission on streamlining of environmental approvals for offshore petroleum
- Submission on Draft SA-Commonwealth EPBC Bilateral Assessment agreement
- Submission on Draft Qld-Commonwealth EPBC Bilateral Assessment agreement
- Submission on Draft EPBC NSW-Commonwealth Bilateral Assessment Agreement
- Letter to Minister Hunt on Environmental Standards
- Submission on revised ASX Corporate Governance Principles
- Submission to the Productivity Commission on Access to Justice Arrangements
- Submission to Productivity Commission Draft Report Major Projects Assessment
- Submission on Strategic assessment by NOPSEMA terms of reference
- Submission on EPBC water trigger Draft Significant Impact Guidelines

ANEDO submissions are available at www.edo.org.au/policy/policy.html

Attachment B: Advice Areas

Overview of advice categories – EDO WA 2013-2014

(please note: some clients seek advice regarding multiple issues)

Problem Type	# of records
Air pollution	2
Biodiversity management	10
Civil enforcement	1
Climate Change	3
Contaminated land	1
EPBC Issues	4
Environment	26
Environment Other	2
Environment administration	2
Environment industry issues eg mining, fishing etc	1
Environment planning	9
Environment pollution/chemicals etc	2
Environmental Impact Assessment	3
Fishing and aquaculture	4
Forestry	1
Fresh water pollution	1
Govt/admin FOI/privacy	4
Govt/admin complaints against other govt official	2
Judicial review	3
Mining	5
Natural resource management	7
Neighbourhood disputes complaints about neighbours	5
Noise pollution	7
Offences-justice procedure govt security/oprtns	1
Other civil company/commercial/corprtns/incorp law	1
Other civil defamation/libel	9
Other environment planning	5
Property damage and environmental offences	3
Protected areas	2
Public land management	7
Toxic chemicals	4
Urban and industrial development	9

Attachment C: Casework Guidelines

Guidelines for provision of legal representation by EDO NSW

EDO NSW will consider acting for you if it is of the opinion the matter involves a public interest environmental issue.

In determining this, EDO NSW needs to be satisfied that the issue has significance beyond the material or financial interests of a particular individual or group and will also have regard to relevant matters, such as whether:

- the issue involves a real threat to the environment; or
- engagement in the issue has the capacity to result in good environmental outcomes; or
- the issue concerns the manner in which the environment is regulated, now and into the future and across all areas of government; or
- the issue raises matters regarding the interpretation and future administration of statutory provisions.

Having determined the matter is a public interest environmental issue, EDO NSW may act for you provided EDO NSW has the human and financial resources to properly act in the matter.

If the matter involves litigation, EDO NSW will need to be satisfied that:

- the matter has reasonable prospects of success; and
- there is utility or value in commencing proceedings.

In considering any application, EDO NSW will also have regard to the financial means available to the applicant.

As of 1 July 2013, Legal Aid is no longer available for public interest environment matters.

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using the law to protect the natural and built environment

CASEWORK GUIDELINES

There are a number of factors EDO Tasmania considers when deciding whether to become involved in litigation. These guidelines outline the most important questions:

Is your case consistent with our objectives (set out in our Constitution)?

- To provide legal advice and assist with access to legal services on environmental law matters for disadvantaged persons and classes of persons for whose needs the services of lawyers in private practice are inadequate.
- To encourage the solution of environmental problems in a way which is compatible with the principles of ecologically sustainable development.
- To increase community awareness regarding legal remedies for environmental problems.
- To carry out and publish research on the administration of environmental law.

Can you afford private legal representation?

EDO Tasmania is not simply a low-cost legal service for private individuals. We need to make sure that our limited resources are available for people and community groups who cannot reasonably afford to get private legal assistance to help them to protect the environment.

However, the EDO recognises that it is not always reasonable to expect members of the community to contribute significant private resources to fight an issue that is in the public interest. Therefore, where a matter concerns the public interest and you will not gain personally from the outcome of litigation, your financial circumstances may be overlooked when assessing your application for assistance.

Is the litigation in the public interest?

In some situations, your case may involve both a private interest (e.g. impacts on your property) and a broader public interest. In these circumstances, we must be satisfied that the litigation will effectively serve the public interest.

Does the litigation involve important legal issues?

We will consider whether your case raises original or novel legal questions that could set an important precedent, any potential advantages for longer term protection of the environment or rights of public participation, and whether the case could highlight the need for law reform.

Does the litigation seek to protect important environmental values?

We will give preference to cases which seeks to protect areas with significant values, such as wilderness, threatened species habitat, heritage listed buildings or an important public recreational area.

Is the litigation likely to be successful?

We will assess the prospects of success, having regard to previous cases, the strength of the facts, the number of witnesses likely to be involved and the basis for any decision being challenged.

Available resources

We will assess the likely demands that your case will put on our resources (time, money, external expertise), and whether we have sufficient resources available to meet those demands. This may depend on timing, the availability of pro bono experts and any other commitments that we have.

Client commitment

We will also consider how committed you are, whether you have clear objectives or outcomes you are seeking and how willing you are to assist us with preparing your case.