

Submission

to the

Access to Justice Review

prepared by

**The Community Environmental Legal Service program,
Environmental Justice Australia**

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Environmental Justice Australia (formerly the Environment Defenders Office, Victoria) is a not-for-profit public interest legal practice. Funded by donations and independent of government and corporate funding, our legal team combines a passion for justice with technical expertise and a practical understanding of the legal system to protect our environment.

We act as advisers and legal representatives to the environment movement, pursuing court cases to protect our shared environment. We work with community-based environment groups, regional and state environmental organisations, and larger environmental NGOs. We also provide strategic and legal support to their campaigns to address climate change, protect nature and defend the rights of communities to a healthy environment.

While we seek to give the community a powerful voice in court, we also recognise that court cases alone will not be enough. That's why we campaign to improve our legal system. We defend existing, hard-won environmental protections from attack. At the same time, we pursue new and innovative solutions to fill the gaps and fix the failures in our legal system to clear a path for a more just and sustainable world.

Community Environmental Legal Service (CELS) is a program of Environmental Justice Australia and provides legal help for Victorians through the publication of kits, fact sheets and videos which provide accessible and practical environmental law information to the Victorian community. Through the CELS program we also deliver legal workshops in Victoria, run by one of our expert environmental lawyers to suit the needs of community groups or groups of individuals concerned about or impacted by environmental issues. Empowering the Victorian community via our CELS program is an important part of the work of Environmental Justice Australia in pursuing access to justice.

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Term of Reference 1: the availability of easily accessible information on legal assistance services and the Victorian justice system, including advice on resolving common legal problems

There are 3 main sources of information about the relevant environmental and planning laws and processes in Victoria. These sources are:

- 'A Guide to the Planning System', available on the website of the Department of Environment, Land, water and Planning, at <http://www.dtpli.vic.gov.au/planning/about-planning/a-guide-to-the-planning-system>
- 'Taking it to VCAT', which is a guide on participating in appeals, and is prepared by VCAT and available on the VCAT website at https://www.vcat.vic.gov.au/system/files/taking_it_to_vcat_planning_and_environment.pdf
- VCAT videos and the Objections, Appeals and Enforcement Kit prepared by the Community Environmental Legal Service (a program of Environmental Justice Australia), available at <https://envirojustice.org.au/cels>

The combination of these resources provide a reasonable overview of the system, and would be of assistance to people who have time to read and consider the information in detail, ready access to the internet, who are skilled at reading and interpreting information and whose first language is English. The CELS VCAT video presents some information visually and in spoken, plain English. However, the VCAT video does not contain the level of detail of the written material.

Beyond information, there is very little assistance available for people with legal problems that relate to planning and environmental law in Victoria. The Community Environmental Legal Service of Environmental Justice Australia is the only legal centre in the state with this expertise. CELS receives limited funding through the Community Legal Service Provision funding provided by Victorian Legal Aid (VLA), which provides funding for approximately one lawyer, plus some support personnel and on costs. With this funding we provided limited services, including legal assistance targeted to a small number of specific communities identified as being disadvantaged and facing environmental justice issues and workshops for communities affected by environmental law issues. VLA does not assist people with concerns relating to planning and environmental law. There is no organised system to leverage or connect people in need with planning and environment lawyers in private practice.

As a result, significant numbers of people with legal problems in the planning and environment space go unassisted. People without access to the internet or whose ability to read and comprehend reasonably technical English, do not have access to appropriate information or assistance. Further, as discussed in more detail below, it is often disadvantaged communities, whose members are more likely to face challenges such as a lack of education, or not having English as their first language, who face the most serious environmental issues.

Lack of accessible information is a bad outcome for environment and planning law. Environmental and planning legal regimes contain several provisions designed to facilitate public input into decision making and creates broad rights of merits review of planning decisions. However, these provisions and rights are of little use to disadvantaged communities who are unable to access assistance to navigate the system and voice their concerns or views about particular developments or environmental impacts that affect them.

On this point, we further note that it is disadvantaged communities that bear the brunt of environmental risk, because undesirable, polluting and risky operations and facilities typically being concentrated in areas of socioeconomic disadvantage. Examples of such communities in Victoria include the Latrobe Valley, Corio, Tullamarine and Broadmeadows and Altona and Brooklyn.¹ This phenomenon is known as environmental injustice.² Provision of access to justice is one way in which people can obtain environmental justice. Access to justice for communities suffering environmental injustice is not currently adequately provided for in Victoria.

Term of Reference 2: diverting people from civil litigation and triage

Our experience has been that early intervention can often resolve a dispute without the need for litigation. In the case of environmental and planning law, many disputes are against the regulator, as a result of a regulator choosing not to use their powers to investigate and take compliance action when someone has identified another person who has breached planning and/or environmental laws. Often, having access to legal assistance means that the person's concerns and evidence supporting those concerns, can be more clearly and persuasively presented to the relevant local council or government agency, resulting in that agency taking compliance action or a more active role in the dispute, and addressing a client's concerns without the need for litigation. However, as discussed in question 1, having lost the majority of our public funding, Environmental Justice Australia and CELS are not in a position to meet demand for this sort of assistance.

Further, there are limited options for referring people with environment and planning law problems. VLA and most CLCs do not assist people with planning and environment legal issues. Environmental Justice Australia has limited capacity to assist members of the public. Often, we make referrals to private practitioners if the client has the ability to pay. In matters where a client has no capacity to pay and their matter does not meet our guidelines, we have limited referral options: currently, we refer people to our CELS website, or to the Law Institute of Victoria (LIV) referral service. The LIV referral service is suboptimal for a referral, as its purpose is not to provide free legal assistance for people with no capacity to pay. However, we are not aware of any other options.

¹ Greenham, Billy, 'Mapping Environmental Justice in Victoria', https://envirojustice.org.au/sites/default/files/files/Submissions%20and%20reports/environmental_justice_mapping_project.pdf

² Environmental Justice Australia has done considerable work and advocacy on environmental justice and what it means in an Australian context. See, for example, the [Environmental Justice Report](#)

In the absence of somewhere to refer people, a more developed point of entry and/or referral system would be of limited utility.

In our experience, Alternative Dispute Resolution (ADR) in VCAT and in the Court system, can be and has been useful in our clients' matters, in either resolving or narrowing issues in dispute. Several matters have been resolved either prior or during litigation through ADR including court facilitated mediation. However, ADR has limitations. In the context of planning and environment disputes, if someone objects to a development going ahead in a certain location, because of that location's environmental values, it is unlikely that ADR will assist in resolving that dispute. Likewise, in relation to cases enforcing breaches of environmental laws, offers to make good damage are often an inappropriate remedy. Offers to make good could be inappropriate because 'making good' damage may not be physically possible, or may take decades, if for example, the damage was to threatened vegetation, or was a serious pollution event that cannot fully be remediated. Further, taking a case to Court may result in the Court clarifying the law and creating precedent.³ Public judgments also facilitate the law to play a role in preventing unlawful behaviour, by demonstrating there are consequences for breaching the law – this outcome would not be achieved through a confidential settlement.

Further, ADR is only just and effective if the person conducting it is skilled and can ensure the process is fair, and that the parties are all able to effectively participate.⁴ Understandings of one's legal rights is a necessary prerequisite to effective participation in an ADR process. A party cannot truly be in a position to decide whether a compromise is fair and reasonable if they are unaware of what rights they might be trading away.

Not all matters are appropriate to divert. Public interest litigation has an important role in defining rights, interpreting and improving the law, and also can have an important role in social change.⁵ Public hearings and judgments are necessary for the law to be able to perform these roles. One commentator notes that using private, non-legal values to resolve issues relating to public rights and duties undermines one of the central roles of the Courts.⁶ Whilst triage and diversion may *in some instances* provide access to justice, sometimes justice requires access to the Courts. Adequate support for those using the formal court system should be provided.

Term of reference 3: whether and how alternative dispute resolution mechanisms should be expanded

We refer to our comments above on the limitations of ADR.

³ Baron et al, 'Throwing Babies Out with the Bathwater; Adversarialism, ADR and the Way Forward', *Monash University Law Review* (Vol 40, No 2)

⁴ Baron et al, 'Throwing Babies Out with the Bathwater; Adversarialism, ADR and the Way Forward', *Monash University Law Review* (Vol 40, No 2)

⁵ Durbach at al, 'Public interest litigation: making the case in Australia', *Alternative Law Journal*, 38 (4), 219-223

⁶ Edwards, Harry T. 'Alternative Dispute Resolution: Panacea or Anathema?', *Harvard Law Review*, Vol. 99, No. 3 (Jan., 1986), pp. 668-684

Expansion of ADR mechanisms will only lead to improved access to justice if parties are in a position to make informed decisions about whether ADR is suitable in their matter, and when participating in the ADR process itself, are not disadvantaged and unable to effectively negotiate, due to knowledge and power imbalances. More often than not, this will mean for ADR to be fair and effective, and to deliver justice, parties will need access to legal advice and assistance before, and in many instances during, ADR proceedings. Therefore, any expansion of ADR process should also include resourcing of appropriate legal assistance services.

Terms of reference 5: the provision and distribution of pro bono legal services by the private legal profession in Victoria.

Pro bono and volunteer assistance provided by law students, lawyers and barristers are essential to the work of Environmental Justice Australia.

We have 2 programs through which law students volunteer. These are our intern program and our 'day volunteer' program. Interns come in for 2-3 weeks over University holidays. Day volunteers come in one day a week during semester. We have 1 or 2 law student volunteers in the office every day, and they assist with legal research, logistics and administration.

We also have been lucky enough to have skilled and experienced lawyers working part time or taking a career break coming in one day a week to assist. This assistance greatly adds to our capacity, and sometimes gives us access to relevant legal expertise different to that of our employed lawyers.

Finally, the bar makes an enormous contribution to our practice. Barristers provide us with free or reduced rate legal services ranging from urgent advices to representation in Court and other forums. Some barristers make an incredible contribution, representing clients for weeks-long hearings, free of charge.

This generous support greatly enhances the quantity and quality of the work we do, and the outcomes we are able to achieve, and in doing so, enhances access to justice for many people.

We have less pro bono support from legal firms. This is not to say we do not receive any. Some of the most useful support we have received in the past from firms has been logistical. For example, a firm used to allow us to use their photocopying service. This was of huge practical assistance, as we as an office have a slow, black and white photocopier, which makes preparing documents for litigation very challenging, and diverts lawyer time away from legal work. Firms have also allowed us to use their offices to host meetings and functions. Finally, lawyers and firms have provided us with specific pieces of advice not related to environmental law, and not within our expertise, such as on defamation or costs issues facing clients.

We have identified several barriers to accessing more support from law firms. These include, firstly, that most of our matters are against government agencies, corporations, developers and local Councils. Law firms often act for, or seek to act for, these entities. Therefore, the existence of an actual or perceived conflict of interest, or an unwillingness to be associated in a matter that may be seen as being contrary to the interests of potential clients, means many firms choose not to provide us with assistance.

In addition, firms often have their own identified pro bono priorities. Firms that do not practice in environmental law may not appreciate the need for pro bono assistance in this space, and/or do not have the expertise. Firms that do understand the need and have expertise are often unable or unwilling to assist, due to actual or potential conflicts of interest as described above.

It is possible that there are lawyers and firms that would be willing to assist us in a more detailed fashion. Identifying those firms and what assistance they would be willing to provide would be resource intensive, and given the issues raised above, possibly not worth diverting lawyer resources away from their legal work.

This last point could be addressed by people in need of legal assistance and community legal centres being provided with detailed information about what firms are willing to provide what assistance, in what areas of law. That way, approaches to law firms could be targeted. An online tool, such as a centralised register of firms offering pro bono services detailing what services they are willing to provide is one method through which this could occur. The register could also allow those with a legal need to specify that need, so lawyers are aware of what potential pro bono work is available. This may make doing pro bono work easier for small firms and sole practitioners, as they will not need to develop a devoted pro bono program in order to connect with those with unmet legal needs.

Recognition for, and encouragement of, firms providing logistical support and resources in panel contracts would also be a way of encouraging firms to provide the practical support that we have found to be helpful. We note that this type of assistance is less likely to raise conflict of interest or commercial interest concerns.

Awarding CPD points for pro bono assistance is of some merit. However, we have concerns that this be managed in a way as to ensure value. Hundreds of lawyers providing small, one-off amounts (eg 1-2 hours) of legal assistance in an uncoordinated fashion is unlikely to provide real benefits in terms of achieving access to justice. Further, the system of coordination warrants attention, so that it does not create an administrative and organisational burden that is greater than the benefit.

In any consideration by government of the need for pro bono services, we submit that the government should take into account the value of strategic advocacy law reform and strategic public interest litigation advancing justice and access to justice, and not look purely at statistics around unmet need. Law reform and strategic litigation both have the potential to address systemic injustices affecting many individuals and communities, something that ADR, access to non-ongoing legal advice and provision of information is

unable to achieve. On this point we reiterate the Productivity Commission findings on the value of community legal centres, undertaking strategic advocacy, law reform and public interest litigation.⁷

Term of reference 6: the availability and distribution of funding amongst legal assistance providers by the Victorian and Commonwealth governments to best meet legal need

We note the Productivity Commissions findings that Australia's legal assistance sector required a \$200 million injection of funds. This indicates there is a significant shortfall in government funding to provide access to justice.

In Victoria, there is very limited funding to provide legal assistance to those with environmental and planning law problems. As stated above, Environmental Justice Australia received funding for approximately one lawyer plus some support, and uses this funding to run CELS. Legal Aid does not provide legal assistance or grants to people with environment or planning law issues. Other CLCs typically do not assist people with planning and environment law issues. Before significant funding cuts to the Environment Defenders Office/Environmental Justice Australia we received significant numbers of referrals from VLA, VCAT and other CLCs. Since the funding cuts, we no longer provide legal assistance to people who seek our services following a referral. This indicates there is significant unmet legal need for people with planning and environmental legal problems.

This can be a justice issue. The concept of environmental justice was discussed above. The concept arose out of a movement in the US, sparked by dirty, polluting and risky facilities being concentrated in African-American and other disadvantaged communities. There is some evidence of environmental justice issues in Victoria, with the concentration of risky, polluting facilities in disadvantaged communities.

With our now limited funding, CELS targets communities facing environmental justice issues. We have provided significant legal assistance to the Latrobe Valley community following the Hazelwood Mine Fire. We also provide ongoing assistance to communities around Tullamarine affected by a series of industrial and transport developments that potentially affect these communities' health and well-being. Further, with some success, we have advocated for the concept of environmental justice to be reflected in Victoria's environmental laws. Outside the targeted assistance we can provide to a selected few communities, communities and individuals around Victoria, including many facing serious environmental issues, do not have access to any legal assistance.

In addition, environmental law problems are typically different to other legal problems and disputes. They are often diffuse, affecting lots of people but no one person seriously enough to warrant them incurring the significant costs and financial risks of taking legal action. In this context there is a need for publicly

⁷ Productivity Commission, 'Access to Justice Arrangements: Productivity Commission Inquiry Report', No 72, 5 September 2014, pages 711 and 713

funded legal assistance, and for organisations that are able to undertake systemic advocacy.⁸ There also needs to be an approach to assessing unmet legal need that does not just look at statistics indicating numbers of individuals unable to access legal assistance.

Term of reference 9: options for providing better support to self-represented litigants throughout the Victorian justice system

VCAT should be open and accessible, and a forum that not be overwhelming to unrepresented litigants.

In many instances, clients and people we have spoken to are able to successfully represent themselves in VCAT and have good experiences and sometimes good outcomes. This is particularly the case in merits review applications. In these instances, we find that educational resources, such as our VCAT video, and fact sheets, workshops and access to an advice line are all resources that can provide information and support to self-represented litigants, in the event that those litigants are able to understand and absorb the information contained in the written material.

On this point we note that since the Environment Defenders Office (now Environmental Justice Australia) was substantially defunded in 2013, our ability to provide advice services to assist self-represented litigants has been constrained, and as a result, there exists a significant gap in Victoria in providing assistance to self-represented litigants with public interest concerns who appear in VCAT.

Use of lawyers by other parties can and does make VCAT's planning and environment list less accessible to self-represented litigants. Many clients and community members who have represented themselves in proceedings where lawyers are representing other parties have related their experience of not understanding what is going on, for example, when a lawyer uses technical language or raises a legal point. No one takes the time to explain these matters simply to unrepresented litigants, often meaning that, even if a discussion might be relevant to their interests, they are not able to participate in the discussion because they cannot understand what is being said.

Use of lawyers and counsel in VCAT also makes appearing at VCAT more intimidating for unrepresented litigants, which may deter people from participating, or limits the extent of people's participation. For example, it may make parties less inclined to fully explain their case, or ask questions of a witness. In addition, the presence of lawyers in enforcement cases can mean there is an increased chance of unrepresented parties receiving adverse outcomes, including costs orders.

In this environment, we have reservations about encouraging people to represent themselves in VCAT unless they are confident and have experience appearing at VCAT. As such, we have concerns that providing information and education about going to VCAT may give some applicants "enough rope to hang themselves", by making people think that self-representation is easy and putting them situations that become very stressful and expose them to adverse costs orders. This is particularly the case in matters other than merits review of planning decisions.

⁸ Productivity Commission, 'Access to Justice Arrangements: Productivity Commission Inquiry Report', No 72, 5 September 2014, pages 712-3

For example, recently, applicants 'A' and 'B', unable to afford lawyers, decided to represent themselves in relation to proceedings they commenced against a neighbour who they alleged had unlawfully damaged a large native tree. We gave them some preparatory advice. When the hearing commenced, the other party's lawyer launched into an application to strike out A and B's application, without notice. A and B did not know what this meant, or how to respond to a strike out application and were thrown off from making the case they had prepared. Their confidence shattered and they withdrew their application. We note that A and B's case had merit, and that the other party conceded one of their arguments, as reflected in an undertaking they gave to VCAT.

Subsequently, the other party made an application for costs. We represented A and B in this application, as it would have set a terrible precedent for other individuals trying to uphold environmental and planning laws. The costs application was unsuccessful.

A and B were reasonably confident and articulate people, who could explain the history of their matter clearly and had been in VCAT before. Nevertheless, the whole experience became very stressful and unpleasant, such as to discourage them from using VCAT again.

Therefore, any support for unrepresented litigants must include ongoing support. We note that since funding was cut to Environment Defenders Office/Environmental Justice Australia in 2013, we are unable to assist the vast majority of people who have public interest claims in the planning and environment list at VCAT, and that there is no other body that offers this service.

We always advise self-represented litigants who have Supreme Court matters, and who we are unable to assist, from pursuing their matter unless they can get a lawyer. This is because the Court forms and rules are complex, the information services available are not that easy to understand and the risk of adverse costs is high. Given there is such limited legal assistance for environmental law matters, this normally means that people choose not to pursue their matters in Court. We note that our decision not to assist such people does not mean that there is no merit to their claims: the decision is usually made on the basis that CELS does not have the resources to provide representation.

People not using enforcement mechanisms for planning and environment law has consequences for justice - people who breach the law are more likely to be able to do so without consequence, which increases incentives for non-compliance. Further, the law is not developed through case law and decisions. Sometimes, public interest litigation is necessary for justice, and access to the courts and services to assist in this is essential.

Some options to improve justice for self-represented litigants include:

- Changing the VCAT rules and practices, to empower and encourage VCAT members to explain and assist unrepresented litigants.
- Amending section 96 of the VCAT Act to require VCAT members to consider whether the applicant is a self represented litigant, and whether, in those circumstances, the award of costs is in the interests of justice.
- Additional resourcing of legal advice and assistance services in the areas of environmental and planning law.

- Provision of a duty lawyer, employed by VCAT, to provide procedural assistance and advice to self represented litigants.

Other access to justice issues not covered by the terms of reference

There is a strong public interest in ensuring compliance with laws designed for the protection of public goods such as clean water and air, healthy rivers, and biodiversity. Enabling third party litigants to bring proceedings to enforce environmental laws is an important and effective means of ensuring compliance. Third party public interest litigation in environmental law is significantly underutilised in Victoria, due to:

- Restrictive standing laws;
- Costs laws and rules; and
- Lack of public funding support for provision of legal service to public interest litigants.

Most environmental laws in Victoria do not provide statutory rights for third party standing. Therefore, to enforce a breach of an environmental law, third parties must establish common law standing. This greatly reduces the number of important, public interest cases that can be brought. Cases that should run often don't, not due to lack of merit, but due to the lack of an applicant who has standing, and who is willing to accept the costs risks of litigation.

In addition to the lack of clear standing rights, the costs and financial risks of litigation present a significant obstacle to pursuing public interest environmental litigation. Environmental litigation of any significance is likely to be complicated and expensive. Where broad standing rules are present in environmental litigation, the public purpose and objective of such rules can be undermined if exercise of these rights is subject to a threat of an adverse costs order.

The threat of an adverse costs order is a significant obstacle to pursuing public interest environmental litigation. It is rare for an individual litigant to be prepared to risk financial ruin to pursue public interest litigation. Smaller community groups may not have sufficient financial resources and the officers of such groups will be unwilling to put the assets and savings of the group at risk. Larger environmental NGOs may be better resourced but dissuaded from pursuing legal remedies by the uncertain nature of the potential liability that might arise.

Australian Courts have recognised that the public interest nature of litigation in environmental and other cases can be a sufficient basis for departing from the usual rule that the unsuccessful party must pay the successful parties legal costs. However these principles are interpreted narrowly. In any event, as consideration of the issue is deferred until the conclusion of the proceedings, there is no certainty that an individual or organisation pursuing public interest litigation will not be financially penalised if the litigation is unsuccessful.

The Victorian Law Reform Commission Report recognised the value of public interest litigation and made a series of recommendations to overcome several barriers to public interest litigation. Proposed reforms included:

- Creation of a justice fund, designed to eventually become self-funding, that could provide financial assistance and indemnities for costs orders and security for costs, to protect litigants from costs risks in meritorious public interest cases;⁹ and

⁹ 'Victorian Law Reform Commission - Civil Justice Review: Report', 2008, page 13

- Amending the costs rules so that there are express provisions to protect public interest litigants from adverse costs.¹⁰

Neither of these recommendations have been implemented. We submit that access to justice would be significantly enhanced if these recommendations were implemented.

Thankyou for the opportunity of making a submission to the Access to Justice Review. We would be very happy to expand upon the points raised in this submission or to respond to any other matters that would be of assistance in the conduct of the Review.

¹⁰ ‘Victorian Law Reform Commission - Civil Justice Review: Report’, 2008, page 676