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Environmental Defender's Office ACT Inc.

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Mr. Bill Stefaniak
Chair
Standing Committee on Legal Affairs (6th)
Legislative Assembly of the Australian Capital Territory

10 April 2006

Dear Mr Stefaniak

Re: Court Procedures (Protection of Public Participation) Amendment Bill 2005

The Environmental Defender's Office ACT Inc. wishes to make the following submission to the Committee regarding the Court Procedures (Protection of Public Participation) Amendment Bill 2005.

The EDO (ACT) is a community legal centre servicing the Canberra region for the past ten years. We have three main functions, namely, providing legal advice about environmental law to members of the community and groups interested in preserving the environment; undertaking community education about legal issues related to the environment and planning; and researching and making submissions to government about reform of laws and policies affecting the environment. We are one of nine independent Environmental Defender's Offices (EDO's) in Australia that specialise in environmental law.

The EDO supports the enactment of legislation by the ACT Assembly to discourage Strategic Litigation Against Public Participation ('SLAPPs'). At present the legal system can be inappropriately used by corporations and individuals to intimidate and hinder members of the public who are participating in public life and debate on matters of public importance, such as environmental protection. This point has been made most recently by nearly 150 senior lawyers and law educators in the "Public Interest Lawyer's Statement in Support of Public Participation Law Reform". This is attached for your perusal (Appendix A).

Over the past twenty years it has been the experience of the EDO's, particularly in South Australia and New South Wales, that public participation is an important public policy issue integral to the effectiveness in practice of environmental protection laws. In other words, the issue of protecting public participation requires the attention of Australian legislators in order to ensure that our environmental laws achieve their objectives. Indeed the South Australian EDO has researched this issue in depth and proposed legislation to prevent and discourage SLAPP suits. We recommend that the

Assembly consider seriously the Bover & Parnell model for anti-SLAPP legislation (Appendix B).

SLAPP suits are certainly by no means a novelty, and many of the issues remain relatively the same as they were ten years ago. This is evident from the article by Dr Prest from 1994 entitled "The Muzzling of the Dingo Forest Mob" (Appendix C). That article argues that the inherent powers of the Courts whilst integral to the functioning of the legal system and the dismissal of unmeritorious claims, can be inadequate to protect public debate and discussion about issues of public interest. *It can take some time before the courts reject unmeritorious SLAPP actions, and during that time legitimate public comment and debate may be suppressed.* Dr Prest's article refers to a host of domestic and international examples particularly from Canada and the USA. In particular, it cites research published in the *Law and Society Review* by Penelope Canan and George Pring of University of Denver, Colorado which found that 80% of SLAPPs were eventually resolved in favour of the defendants (Appendix D).

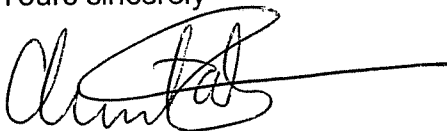
The time has come in the ACT to put into place legislation to discourage Strategic Litigation Against Public Participation (SLAPPs). That legislative step has been taken in many jurisdictions overseas and indeed Prest (1994) refers to laws enacted in California and New York State. For the benefit of the Committee we attach an article from the *Loyola of Los Angeles Law Review* (1999) summarizing the Californian legislation (Appendix E) and another summarizing the features of Washington State's anti-SLAPP provisions (Appendix F).

We would also add in our submission that perhaps the most problematic aspect of this type of litigation is the naming of "unnamed persons" as additional defendants. Proposed legislation should address this aspect of SLAPP suits which has been a feature of litigation both in NSW and overseas.

We note that the Courts have available to them certain internal procedural mechanisms and powers for the disposal of unmeritorious litigation which has been commenced for ulterior or collateral purposes, such as the tort of abuse of process. However *due to the reactive nature of those mechanisms*, as outlined in this submission and appendices, the EDO (ACT) advocates the need for legislation in this area and in principle supports the Court Procedures (Protection of Public Participation) Amendment Bill 2005.

Thank you for your time.

Yours sincerely

A handwritten signature in black ink, appearing to read 'Christal', followed by a long horizontal flourish.

Ms. Christal George
Chairperson
Environmental Defender's Office ACT Inc.

Appendix A

“Public Interest Lawyers’ Statement in Support of Public Participation Law Reform”,
4 April 2005

Appendix B

Bover, T. & Parnell, M. (2001) “A Protection of Public Participation Act for South Australia”, A Law Reform Proposal prepared for the Environmental Defenders Office (SA) Inc.

Appendix C

Prest, J. (1994) "The Muzzling of the Dingo Forest Mob" 70 *Chain Reaction* 20-22.
(National Journal of Friends of the Earth Australia)

Appendix D

Canan, P. & Pring G., (1988) “Studying Strategic Lawsuits Against Public Participation: Mixing Quantitative And Qualitative Approaches”, 22:2 *Law and Society Review* 385

Appendix E

Tate, K. W. (1999-2000) “California's Anti-Slapp Legislation: A Summary of and Commentary on Its Operation and Scope” 33 *Loyola of Los Angeles Law Review* 801

Appendix F

Johnston, M. (2002-2003) “Better SLAPP Trap: Washington State's Enhanced Statutory Protection for Targets of Strategic Lawsuits against Public Participation, 38 *Gonzaga Law Review* 263

Note:

Please contact Committee Office for details of Appendix A to F