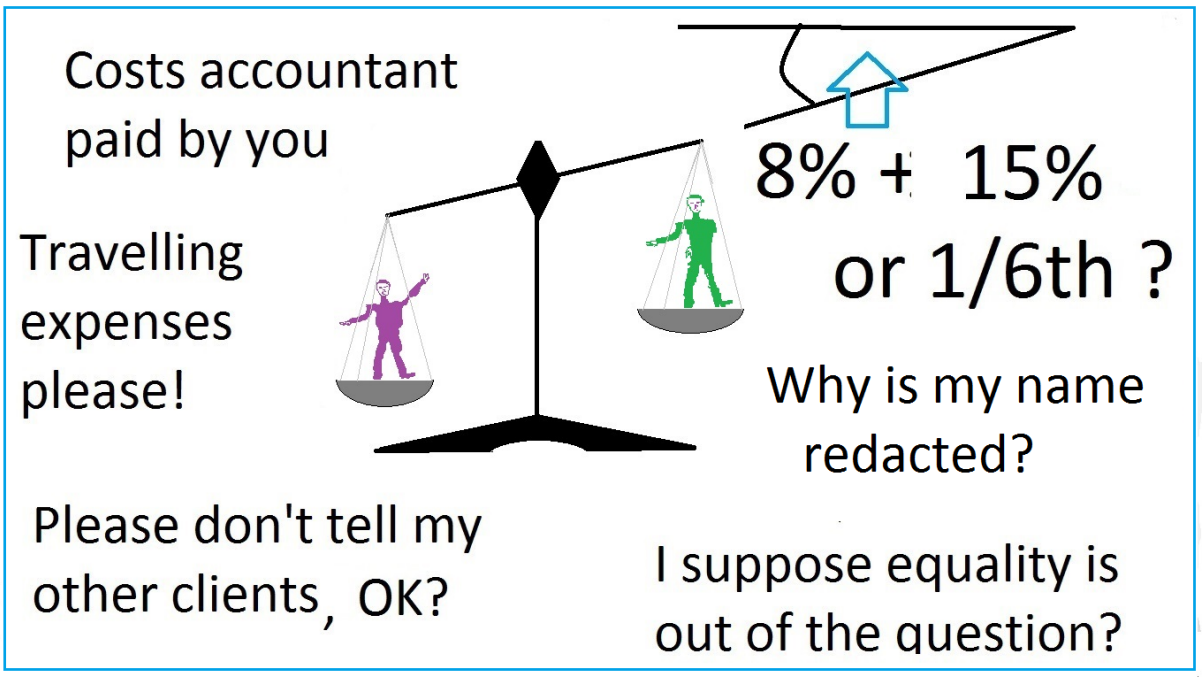
Re: ACCC/C/2014/113

Opening Comments of Communicant to ACCC on 18th December 2015

Note: *The statements below are a "re-construction" of my comments expressed in the opening and closing statements. I have added a few details to the actual statements to encompass aspects which were conveyed by the context of the statements.-*

I pointed out that there were three sections to my communication -- the Special Costs Procedure problems, the unfair rules regarding legal costs adjudications and the failures of transparency/open justice.

I then referred to **slide number one**: [Lawyer v Own-Client Adjudications]



I indicated that all persons who challenge legal costs need to be provided with fair procedures and equal protection of the law. I referred to the imbalance in the rules, particularly the one sixth rule and the imposition of stamp duty.

I said that litigants cannot be treated as second class citizens, before any court or tribunal in Ireland. - Equality before the law was required - Anything less should not have been acceptable in a 20th century democracy, and is certainly not acceptable in a 21st century democracy.

The one sixth rule came from a UK legislature in 1849, and had no legitimate democratic credentials. It has remained unchallenged since, very likely, because the outcomes largely remain unpublished, so most people are unaware of the rule. I said the government was seeking to reduce this penalty from an 18.6% margin to a 15% margin, thus reducing the unfairness by 3.6% (in the new LSRB).

On the issue of stamp duty, I said that it should not be hugely significant whether the tax was 80% or 8% - the only acceptable rate was zero, as any other rate was unfair [When applied to the overcharged party]. This was a penalization or harassment of litigants seeking to challenge lawyers' fees. Litigants who are overcharged by either their own lawyers or the opposite party's lawyers should not have to pay any such tax.

The state's refusal to allow challengers to their own lawyers' fees, to have access to a an adjudicative process, which applied fair rules, amounted to a penalization or harassment of environmental litigants, in the exercise of their rights to obtain legal representation, at their own expense, and was a violation of Article 3.8 of Aarhus.

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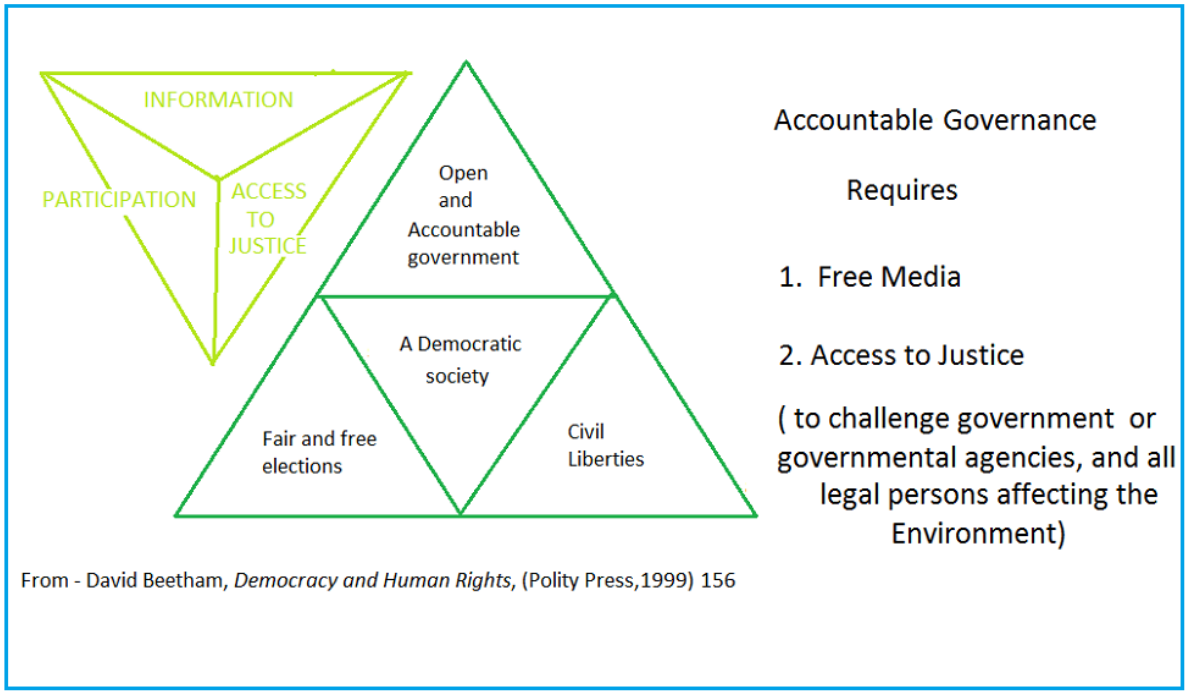
Moving on to **slide number two**:



I referred to the interconnectedness between the three pillars of the Aarhus Convention and the three aspects of a democratic society as outlined by David Beetham, and expressed the view that democratic input was important in relation to all the rules relating to legal costs (and access to courts).

As an example, I suggested that the Superior Rules Committee which recommends important changes to the Rules of Court lacked any real democratic input due to the historical secrecy surrounding the process and the absence of public consultation. I referred to a 2004 report produced by the three rules committees which sought that there should be greater transparency. The report called for an annual report to be allowed to be issued by the rules committees, as this was the norm in all other

common law countries. I pointed out that the Courts' rules committees are not allowed to publish any annual report. The government refused the request for this minimum level of transparency.[1]

In the UK, reports are published and there are about two meetings per year open to the public. In the US, all rule changes are subjected to public consultation. Even if the Superior Rules Committee sought to bring in fairer rules for environmental litigants, to assist compliance with the Aarhus convention, the government could veto such proposals, in secret; the public would not likely ever know. The committee [SRC] members would appear to be subject to the 1963 Official Secrets Act, which requires that most state officials do not disclose any confidential information.[2]

I stated that I understood that the Committee [ACCC] could not make findings in relation to how laws are made, and could only address the actual laws, but that it was still important to observe the rather undemocratic framework from which some of the Rules of Court had emerged.

End of opening statement.

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[1] Actually, the report is dated September 2003 and titled - "28th Interim report of the Committee on Court Practice and Procedure to Mr. Michael McDowell SC, TD, Minister for Justice, Equality and Law Reform. <http://www.courts.ie/Courts.ie/library3.nsf/(WebFiles)/6678B377C3C80E4480256F430062E5CC/$FILE/Committee%20on%20Court%20Practice%20and%20Procedure%2028th%20Report.doc > - The report called for, among other things, public consultation, annual reports to be published (on a website) and a change of law to allow appointment of a lay-member to each committee.

[2] See - Official Secrets Act, 1963 – "Section **4.**—(1) A person shall not communicate any official information to any other person unless he is duly authorised to do so or does so in the course of and in accordance with his duties as the holder of a public office or when it is his duty in the interest of the State to communicate it." <http://www.irishstatutebook.ie/eli/1963/act/1/section/4/enacted/en/html#sec4 >.

Closing Comments of Communicant (after lunch session):

I submitted that it was essential to declare that A.9 of Aarhus required publication of all outcomes of legal costs disputes connected to environmental actions and that this was equally important for lawyer-own-client disputes as well as adverse costs disputes. The right to legal representation (at one's own expense) is an inherent right in environmental law disputes, and the hiring of a lawyer (at one's own expense) was an integral part of the "process" of exercising the right to litigate. Any fee dispute which arises subject to the hiring of a lawyer, engaged the "fair procedures" requirement in A.9.4, and any decisions related to such procedures were encompassed by the term "decisions under this article". Publication of outcomes of such fee disputes was thus required by A.9.4.

I indicated that taxation hearings were historically secret courts in the UK (incl. appeals, at least up to 1936[3] in the UK). The use of "In Chambers" hearings appeared to extend back as far as the Judicature Acts in the UK (1875), (or perhaps earlier), and this clearly removed excessive fee demands of lawyers from public scrutiny, in an undemocratic fashion. Today, taxation hearings lack transparency in Ireland, as 97% of outcomes go unpublished, and there is no access to documents either before, during or after the hearings, undermining public scrutiny. The public are entitled to attend hearings in Ireland, but rarely do as the process of removal of taxation hearings, away from the substantive court action effectively removes the adjudication from the normal "Judicial Theatre" to a disconnected satellite hearing.[4]

I said that journalists could not criticise the legal fees obtained by any particular lawyer, as this might suggest that she "wasn't worth it", and this could easily be deemed to be defamatory in Irish law. Ireland not only had the highest legal costs in the Western world, it also had the most oppressive defamation laws, with strict liability, no *de minimus* exceptions and huge damages-awards. It was therefore essential to ensure that all data related to legal costs outcomes be published, so that average fees could be referenced and cross-compared internationally. Detailed publication was necessary to facilitate journalistic or academic scrutiny of the legal costs system.

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[3] *White v Altringham UDC*, Kings Bench (Court of Appeal), 2 (1936) 138 --- "It is sufficient therefore to compare Order 65 of the Rules of the Supreme Court with the relevant provisions as to county U. D. C. courts under and pursuant to the Act of 1888. This comparison must begin with a consideration of the High Court position. Order 65, r. 27, reg. 41, is the dominant provision ; the relevant parts are as follows : ' Any party who may be dissatisfied with the certificate or allocatur of the taxing officer, as to any item or part of an item which may have been objected to as aforesaid, may . . . . **apply to a judge at chambers** for an order to review the taxation as to the same item or part of an item, and the judge may thereupon make such order as the judge may think just; but the certificate or allocatur of the taxing officer shall be final and conclusive as to all matters which shall not have been objected to in manner aforesaid.' "

[4] The term "Judicial Theatre" was referenced by Prof. Judith Resnik in an article – 'The Democracy in Courts: Jeremy Bentham, 'Publicity', and the Privatization of Process in the Twenty-First Century', (The Democracy in Courts, 2013) 105 <http://www.helsinki.fi/nofo/NoFo10RESNIK.pdf >.

The proposal to redact a client's name in the LSRB Bill [2011], was particularly problematic. While the hearings were not *in camera* (as such), they would likely be encompassed by the expansive secrecy order[5], which is outlined in the LSRB [2011]. This was an unprecedented and unjustified interference in any person's free speech rights, and thus violated human rights law. This would also significantly interfere in collating the legal-fees (regarding lawyer-own-client costs) that any particular environmental case may generate for a litigant, and would obstruct the monitoring of the level of such fees, and violate the publication requirement of A.9.4, as the name of the litigants was an integral part of the publication of any decision of a court or tribunal. A challenger would appear to not be allowed to refer to the substantive legal case, which gave rise to the hiring of a lawyer, by the challenger, as by doing so, others would be able to establish the names of the parties to that case; this would appear likely to be deemed to be a violation of the secrecy order and may invoke penalties. Regardless of whether the secrecy order prevents the client from referring to the substantive case, journalists and academics would be obstructed in linking the costs outcome to the substantive environmental legal action.

I thank the ACCC for inviting me to present my communication.

End of closing statement.

Kieran Fitzpatrick - 18 December 2015.

Correction: For the record, a reference to Article 3(3) in the *summary* of my original submission (Annex 1), was an error, and was intended to refer to Article 3(1) of the Aarhus convention.

[5] See Section 135 of LSRB [2011], as supplied in Ireland's reply; "**135.** Proceedings and documents created or furnished to the parties to a legal costs adjudication are absolutely privileged except— (a) to the extent required for an appeal…" . See also Section 17(2) (d) of The 2009 Defamation Act. As the 2009 Defamation Act already provides for (absolute) defamation privilege, it appears that the term "privilege" as used in Section 135 refers only to "legal professional privilege". [The reference to – "except— (a) to the extent required for an appeal"- is consistent only with this interpretation.] As there are two parties to a legal costs dispute, it would appear that this privilege attaches to the interests of the lawyer (whose bill is being challenged) as well as the client. Hence, it appears that the consent of both [lawyer and client] may be required to disclose documents or other details of the proceedings. [Note- Also that in *Lord* (Case file was supplied in Ireland's reply), the legal costs accountant was required to obtain the consent of both parties to a dispute, in order to access the file. A request for a declaration seeking to reverse a practice direction demanding consent was refused by the court. The applicant in *Lord* had sought "*A declaration that the practice direction of the Respondents of 3rd April 1998 to the effect that any person not being a party to a taxation of costs must obtain the consent from a party to such a taxation before being permitted to inspect the taxed bills of costs is ultra vires, void and of no force and effect:*". The declaration was not granted.] This therefore appears to amount to a "secrecy order" upon the client against disclosing any details in relation to the proceedings. This would therefore appear to prevent the client from even referring to the substantive environmental case, in which she was involved, which gave rise to the costs which are the subject of the costs dispute.