EDOs of Australia

Submission to the House of Representatives Inquiry into the Register of Environmental Organisations

21 May 2015

EDOs of Australia (Australian Network of Environmental Defenders Offices Inc.) consists of eight independently constituted and managed community legal centres located across the States and Territories.

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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Submitted to: **House of Representatives Standing Committee on the Environment, Parliament of Australia**

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Executive Summary

The long-term conservation of Australia's natural and cultural heritage needs a strong and diverse environmental charity sector. Australia has enacted legislation, at both the Commonwealth and State/Territory levels, intended to preserve and protect the nation's natural and cultural heritage and to ensure that development is ecologically sustainable. In addition, Australia is a party to numerous international conventions that seek similar, if not identical, ends. A strong and diverse community of charitable environmental non-governmental organisations (eNGOs) is a vital element in ensuring that Australian governments comply with those obligations, and fulfil their inherent duty to govern for the long-term, best interests of Australian citizens. This is particularly important at a time when Australia's environment and native species are under increasing stress. This in turn increases the need for environmental charities to engage in service delivery, advocacy, policy development and public dialogue for the protection of the environment.

The Register of Environmental Organisations has existed for over 20 years to encourage Australians to give to charities with the principal purpose of protecting, researching, educating and informing people about the natural environment. The *Income Tax Assessment Act 1997* sets out rules and safeguards that provide for fair regulation of environmental charities on the Register. These include compliance requirements and audit powers for the Environment Department and the Australian Taxation Office. Environmental charities are also regulated by the Australian Charities and Not-for-Profits Commission, along with other charities.

Given the existing range of appropriate and effective compliance options and the significant environmental challenges facing Australians, it is important that Deductible Gift Recipient status or membership on the Register is maintained essentially under existing rules. As Robert Hill articulated as Environment Minister in 2001, integration of environmental considerations is an essential element of planning for economic growth and requires a significant rethink of priorities that are attuned to the concept of *ecologically sustainable development* (**ESD**).[1]

The National Sustainability Council reinforced this fact in 2013, noting that 'A healthy natural environment with functioning ecosystem processes is… an economic and social imperative'.[2] Put simply, 'Australians cannot afford to see themselves as separate from the environment.'[3]

[1] Statement by Senator the Honourable Robert Hill, Minister for the Environment and Heritage 22 May 2001, *Investing in Our Natural Heritage — Commonwealth Environment Expenditure 2001-02*; cited in Report of the Inquiry into the Definition of Charities and Related Organisations (2001). See also *EPBC Act 1999*, ss 3-3A. *Ecologically sustainable development* has been defined as:
'using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased'. See: www.environment.gov.au/resource/national-strategy-ecologically-sustainable-development.
[2] *Sustainable Australia Report 2013*, 'Reducing the environmental impact of economic growth', p 81.
[3] *State of the Environment 2011*, 'Headlines', independent report to Australian Government, 2012.

EDOs of Australia urge the House Environment Committee to:

- maintain existing conditions for environmental charities;
- support the continued role of the ACNC to assist and regulate all charities;
- recognise the range of activities that contribute to on-ground environmental outcomes, and
- support a strong environmental charity sector, as a crucial element for forging a more sustainable path for the wellbeing of present and future Australians.

Introduction

Thank you for the opportunity to comment on this inquiry, which is to:

> *inquire into and report on the administration and transparency of the Register of Environmental Organisations (the Register) and its effectiveness in supporting communities to take practical action to improve the environment.*[4]

EDOs of Australia is a network of independent community legal centres across Australia. Each EDO is dedicated to protecting the environment in the public interest. For the last 30 years, EDOs have provided legal representation and advice to communities seeking to protect the environment; taken an expert role in environmental law reform and policy formulation; and offered a public outreach program to help urban and rural communities understand and participate in environmental impact assessment and decision making.

Every day EDOs continue to help clients and local communities to protect the environment through law.

This submission addresses the following matters:

1) **Part One** addresses why the ability of charities to advocate for the environment is important for democracy and environmental protection, and why charitable activities should not be limited to a narrow conception of 'on-ground works'.

2) **Part Two** responds to the six of the seven terms of reference to the inquiry (with activities of EDOs addressed separately in Part Three below), in brief:

    a. Definition of 'environmental organisation' under tax law
    b. Requirements to be listed on the Register and maintain listing
    c. Reporting requirements for donations and activities
    d. Administration and efficiency of the Register
    e. Compliance arrangements (Environment Department, ATO, ACNC)
    f. Governance arrangements in international jurisdictions.

[4] *The inquiry will have particular regard to:*

- *the definition of 'environmental organisation' under the Income Tax Assessment Act 1997, including under Subdivision 30-E;*
- *the requirements to be met by an organisation to be listed on the Register and maintain its listing;*
- *activities undertaken by organisations currently listed on the Register and the extent to which these activities involve on-ground environmental works;*
- *reporting requirements for organisations to disclose donations and activities funded by donations;*
- *the administration of the Register and potential efficiency improvements;*
- *compliance arrangements and the measures available to the Department of the Environment and the Australian Taxation Office to investigate breaches of the Act and Ministerial Guidelines by listed organisations; and*
- *relevant governance arrangements in international jurisdictions, and exploring methods to adopt best practice in Australia.*

See: http://www.aph.gov.au/Parliamentary_Business/Committees/House/Environment/REO, accessed May 2015.

3) **Part Three** outlines why charitable status is important to EDOs in the context of the withdrawal of all federal government funding and potential for closure of EDOs in some states and territories; and provides information on the activities of EDOs in protecting the environment.

Part 1 – The vital role of charities in advocating for environmental outcomes

This is a time of growing environmental challenges and opportunities in Australia, as articulated by consecutive *State of the Environment* reports, *State of the Climate* reports and the *Sustainable Australia Report 2013*. It is important that the community continues to have a voice in support of environmental conservation and ecologically sustainable development.

In 2001, an independent inquiry into the definition of charities affirmed that 'the advancement of the natural environment' should be recognised as a charitable purpose, and was 'significant enough to warrant its own head of charity'.[5] The inquiry's expert panel took this view because:

> *The environment is a public good. The benefits that flow from protecting the environment cannot be appropriated by any person or persons for their own private benefit. For example, improving the air quality in Sydney or the water quality in Adelaide is for the benefit of all people who live in those cities, whether they contributed directly to that improvement or not.*

The 2001 inquiry cited the benefits of protecting and sustaining the environment for 'economic performance, human health and social well being', aesthetic value 'particularly among highly urbanised populations', and as 'an area of active community involvement'.[6] It also noted comments from the then Environment Minister, The Hon Robert Hill, that:

> *A new wave of thinking now acknowledges that to achieve ongoing economic growth we must respect and properly manage our natural resource base. We must move toward planning for and achieving sustainable economic growth. To achieve this we need to make the environment a key consideration in all our economic decision making processes. We must acknowledge that respecting and protecting the environment is not an add-on to economic growth.*[7]

The transformation envisaged by Minister Hill is still very much a work in progress. It is clear both from the Minister's statement, and the 2001 inquiry's reference to them, that protection of the natural environment necessarily encompasses more than 'on-ground works' (specified in the terms of reference for the current inquiry). As discussed further below, it is appropriate that the advancement of the natural environment continues to be recognised as a charitable purpose under Australian charity and tax laws including for the Register for DGR status.

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[5] The Hon Ian Sheppard AO QC, Robert Fitzgerald AM, and David Gonski, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001), recommendation 13, p 15. The 2001 inquiry took *advancement* to include 'protection, maintenance, support, research, improvement or enhancement.' (p 16)

[6] Sheppard, Fitzgerald and Gonski, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001), chapter 22, pp 186-187.

[7] Statement by Senator the Honourable Robert Hill, Minister for the Environment and Heritage 22 May 2001, *Investing in Our Natural Heritage — Commonwealth Environment Expenditure 2001-02; Report of the Inquiry into the Definition of Charities and Related Organisations* (2001), p 186.

It is essential that environmental charities have the ability and capacity to engage with the community, government and industry on environmental issues in order to advance their charitable purpose. Recent trends in environmental policy-making and reductions in departmental resourcing have actually *increased* the importance of charitable environmental organisations in areas such as service delivery, advocacy, public awareness, campaigning and environmental education.

Environmental charities provide an important public benefit by facilitating informed democratic engagement to advance environmental protection.

The amount of money that environmental charities receive from the public is small, but very important. They often have limited staff budgets (if any) and often rely on hard-working volunteers to further their charitable aims and get things done. We understand that charities on the Register of Environmental Organisations make up about 1 in 1000 not-for-profit organisations in Australia, and about 1% of charities.[8]

Yet NGOs can be more nimble and responsive than government agencies. NGO networks are often more in touch with 'on the ground' issues than centralised government agencies. For example, local community groups may rely on 'peak' environmental charities for a two-way flow of information or advocacy.

NGOs are also an essential source of independent information. Research (which focused on perceptions of mining) has found that the Australian public does not trust information from any one sector absolutely. Yet on average, non-government organisations (**NGOs**, which include charities) were more trusted than government or industry sources.[9]

Environmental charities can therefore assist and complement government activity (without always agreeing with it) by presenting a different perspective to the agency itself, facilitating dialogue with community members, and providing a voice for the environment in public policy debates, where that voice may be otherwise overlooked. For example, NGOs can advance 'good government' by:[10]

- *creating deliberative forums;*
- *representing marginalised and stigmatised groups that otherwise have no public voice;*
- *providing for those most affected by government decisions to be involved in policy formation and evaluation;*
- *providing a cost-effective channel for consultation;*
- *promoting a richer public debate by providing information and opinions that would otherwise not be heard;*

[8] On the basis that 'There are around 600,000 NFPs in Australia' and 'around 60,000… registered charities' (Australian Government tax white paper, *Re:think – Better tax, Better Australia*, March 2015, p 121). We have assumed around 600 environmental organisations on the Register.
[9] Moffat K, Zhang A and Boughen N, (2014), *Attitudes to Mining in Australia,* CSIRO, p11.
[10] The Australia Institute, "Silencing Dissent: Non-government organisations and Australian democracy" (2004).

- *helping keep government accountable to the wider community through their connection to NGOs' broad constituencies; and*
- *counterbalancing the influence of corporate organisations over government decision making.*

The Australian Charities and Not-for-Profits Commission's (**ACNC**) advice to charities on 'Advocacy' reflects this view.[11] For example:

> *The Charities Act makes clearer the existing law on advocacy and political activity by charities. A charity can advance its charitable purposes [by]:*
>
> - *involving itself in public debate on matters of public policy or public administration through, for example, research, hosting seminars, writing opinion pieces, interviews with the media*
>
> *…*

Many environmental charities do this, while remaining apolitical.[12]

Although not directed at environmental charities, in the *Aid/Watch* case the High Court in 2010 confirmed that an organisation with a charitable purpose will be considered 'charitable' even if it engages in political activities. As the High Court noted:

> *the generation by lawful means of public debate… concerning the efficiency of foreign aid directed to the relief of poverty, itself is a purpose beneficial to the community within the fourth head [of charity].*[13]

In summary, **EDOs support the existing clear position that it is appropriate and highly necessary in a democracy that charities may engage in advocacy and political activities to further their charitable purpose.**

[11] ACNC, 'Legal meaning of charity': https://www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/Char_def/ACNC/Edu/Edu_Char_def.aspx?hkey=df431454-2648-4090-8a5d-677ff26e46c1.

[12] We note that the ACNC notes that charities' activities may *also* involve: *supporting, opposing, endorsing and assisting a political party or candidate because this would advance the purposes of the charity (for example, a human rights charity could endorse a party on the basis that the charity considers that the party's policies best promote human rights), and giving money to a political party or candidate because this would further the charity's purposes.* The important distinction in the Charities Act is that support for (or opposition to) a political party or candidate must not be the *purpose* of a charitable organisation: *Charities Act 2013* (Cth), s 11(b). See further ACNC, 'Legal meaning of charity' webpage.

[13] French CJ, Gummow, Hayne, Crennan and Bell JJ *Aid/Watch Inc v Commissioner of Taxation* [2010] HCA 42 at 47. Cited in Arnold Bloch Leibler Bulletin, "Aid/Watch case: Important decision on tax exemptions and concessions relating to charitable institutions", 22/12/2010, at https://www.abl.com.au/ablattach/taxbul101222.pdf.

Part 2 – Response to the Terms of Reference (TORs)

This part responds to the following six of the seven the terms of reference to the inquiry:

a. Definition of 'environmental organisation' under tax law
b. Requirements to be listed on the Register and maintain listing
c. Reporting requirements for donations and activities
d. Administration and efficiency of the Register
e. Compliance arrangements (Environment Department, ATO, ACNC)
f. Governance arrangements in international jurisdictions.

Our response in relation to the specific activities of EDOs is addressed separately in Part Three below.

a. Definition of 'environmental organisation' under the *Income Tax Assessment Act 1997* (ITA Act)

The ITA Act requires a Register of Environmental Organisations (**the Register**) to be established. The aim of the Register is:

> *...to assist environmental organisations to obtain financial support from the community for use in the conservation and protection of the natural environment, by providing a tax incentive mechanism for the community to donate to those organisations.*[14]

Charitable donors can claim tax deductions for donations they make to environmental organisations listed on the Register.[15]

To be listed, the ***principal purpose*** of an environmental organisation must be:[16]

- the *protection and enhancement* of the natural environment (or a significant aspect of the environment); or
- providing *information* or *education* about the natural environment (or a significant aspect of it); or
- carrying on *research* about the natural environment (or a significant aspect of it).

The organisation must be registered as a charity with the ACNC before it can apply for DGR status on the Register (other steps are discussed further below).

Under the Charities Act, the 'purpose of advancing the natural environment' is also specified as a charitable purpose.[17] EDOs across Australia meet these principal purposes and provide a public benefit – as reflected in our

[14] Australian Government, *Guidelines to the Register of Environmental Organisations* (2003), p 3.
[15] Some environmental charities are listed in the *Income Tax Assessment Act 1997* (**ITA Act**) itself (s. 30-55). The Register saves the need to amend the Act each time a charity is added.
[16] ITA Act s. 30-265.
[17] Charities Act 2013, s 12(1)(j). As noted, the 2001 inquiry on the definition of charity (p 16) took *advancement* to include 'protection, maintenance, support, research, improvement or enhancement'.

organisational objects, activities and services we provide to the community (see Part Three for further detail).

Charitable environmental protection goes beyond 'on-ground works'

It is vital that protection of the environment continues to be recognised as a charitable purpose, and that this goes beyond 'on-ground environmental works'. On-ground works such as landscape restoration are a very important part of protecting and enhancing the natural environment. However, as this submission illustrates, there are many other important components to achieving positive environmental outcomes that the community expects, and that environmental charities fulfil.

This is demonstrated by the existing scope of 'principal purpose' in the ITA Act which includes the explicit references to *information*, *education* and *research*. Other examples of beneficial charitable activities to protect the environment include:

- advocacy for law reform to address systemic environmental issues;
- awareness-raising and community education;
- promoting access to justice, including by way of legal representation;
- third party (community) enforcement of environmental breaches;[18]
- encouraging public participation in decision-making; and
- advocating for enhanced protection of particular natural areas, such as a new national park or Aboriginal place.

Ministerial rules for the Register must not hinder advocacy for charitable purposes

Environmental organisations should be subject to the same rules regarding their legitimate role in public advocacy and political activity as any other charity. Environmental organisations should not be subject to any additional limitations on such activities (which will vary considerably between organisations). This is important in the context of 'ministerial rules' that may be established for the Register, and rules that organisations must comply with under the ITA Act (section 30-265(4)).

We agree that the principle of ensuring charitable funds are directed to the charity's primary purpose is sound. We also support the two current ministerial rules regarding annual returns and notification of organisational changes, and the way they are exercised. The current ministerial rules are fair, acceptable and sufficient.

It would be highly concerning if any attempt were made to use the ministerial rule-making process to limit public advocacy designed to pursue an organisation's charitable purpose to protect the natural environment.

[18] See examples of EDO client's cases in Part Three.

We note the established legal principles in legislation, at common law, and in guidance from the ACNC, that charities can advocate in support of their charitable cause (politically and otherwise). We submit that public advocacy in support of charitable causes is 'indispensible' to an informed community and a participatory democracy.[19]

The ministerial rules are made to ensure that charitable gifts 'are used only for [the charity's] principal purpose' (section 30-265(4)). They cannot be made *to restrict what that principal purpose is;* for example, by attempting to limit the use of charitable funds to 'on-ground environmental works'. While such an artificial restriction would not be in the public interest in any case, it would also be inconsistent with the broader *principal purpose* provisions in charity and tax law.

Meaning of 'natural environment' should reflect contemporary understanding

The Guidelines to the Register give examples of what the ***natural environment***, and concern for it, would include.[20] We submit that the 'natural environment' should be broadly interpreted in line with the evolving experience of the Australian landscape, its modification and gradual urbanisation. This is consistent with the 2001 inquiry on the definition of charities, which noted that 'the aesthetic value of the natural environment … contributes to wellbeing, particularly among highly urbanised populations.'[21]

Accordingly, in addition to non-urban natural areas like wilderness areas, protection of the 'natural environment' should include, for example, protection of urban parklands, given their benefits to wellbeing, recreation, ecosystem services and habitat for native species. Alternatively, specific reference could be made to the built environment and heritage (both Aboriginal and non-Aboriginal) to recognise the broader public benefit of the environment in these contexts.

b. Requirements to be listed and maintain listing

Environmental organisations are subject to various registration checks, transparency measures and other safeguards under charity and tax laws (reporting is discussed further below). These legal safeguards have increased since 2012 when the ACNC was established, and the ACNC continues to play an important role in assisting organisations to comply. EDOs of Australia support the continuation of a dedicated ACNC to ensure consistency, independence and efficiency in governance requirements across jurisdictions and charity sectors.

In addition to the ACNC (which regulates all charities), environmental organisations are regulated by the Environment Department (as keeper of the Register) and the Australian Tax Office (**ATO**) (for tax matters generally).

[19] See *Aid/Watch* case 2010 at para 44.
[20] Australian Government, Department of the Environment, *Guidelines to the Register of Environmental Organisations* (2003). For example (p 9) – significant natural areas, wildlife, habitat, waste, air, water, soil, biodiversity and promoting ecologically sustainable development (**ESD**) principles.
[21] Sheppard, Fitzgerald and Gonski, *Report of the Inquiry into the Definition of Charities and Related Organisations* (2001), p 187.

There are five main steps to be listed on the Register of Environmental Organisations:

1. The environmental charity registers with the ACNC.
2. The charity applies to the Department of Environment for DGR status.
3. The charity is assessed, and is certified by the Environment Minister.
4. The charity is then endorsed by the ATO and the Assistant Treasurer to have DGR status (i.e. tax-deductibility for donors).
5. The charity is then listed on the Register of Environmental Organisations.

Once registered, 'environmental organisations' have various ongoing obligations. As these obligations are quite detailed we have summarised them for the Committee at **Attachment A**.

The number and content of existing registration and maintenance requirements suggests that additional compliance regulations are not necessary. Nevertheless, consideration should be given to whether the ACNC should assume more responsibilities for environmental charities (and other DGR categories) rather than splitting these between three agencies.

This may be considered in the Government's broader tax review. As the Australian Government's recent tax white paper notes:

> *'While DGR status is highly valued, the process for applying for it can be time consuming. … There are also different requirements for DGR status across the different general categories which creates further complexity.*[22]

We submit that the costs of adding further administrative and regulatory requirements on environmental organisations would outweigh any benefits, particularly given the limited resources of environmental organisations, and the small proportion of charities they represent (perhaps 1%).

Tax laws should continue to recognise the importance of environmental protection as a public good to be encouraged through charitable status and tax exemptions (such as DGR status and income-tax exemptions for those charities).

c. Reporting requirements to disclose donations and activities funded

In addition to requirements noted in the TORs above, environmental organisations on the Register must submit an annual return to the Environment Department for each financial year, noting the number of donors, amount of donations received and types of activities funded.

Separately, environmental charities are also required to submit an annual return to the ACNC about their charitable and other income, activities and outcomes.

[22] Australian Government tax white paper, *Re:think – Better tax, Better Australia*, March 2015, p 127.

Existing requirements provide appropriate transparency and regulatory oversight, noting that experiences may differ with charities' capacity. Nevertheless, consideration should be given to whether these requirements could be harmonised where appropriate, in a way that reflects that many charities have limited administrative capacities and budgets. This could include for example, a single form that is shared between agencies, with relevant details published in accordance with existing ACNC practices.

d. Administration of the Register and potential efficiency improvements

As noted above, given the intersecting regulation of environmental charities by the Environment Department, ATO and the ACNC, the question arises whether certain obligations, such as registration, reporting and transparency, could be harmonised. It could also be examined whether the ACNC could assume responsibility for the Register of Environmental Organisations and other DGR registers. This is subject to any need for specialist expertise (for example, through consultation roles for agencies such as the Environment Department). Further assistance to charities is discussed below.

e. Compliance arrangements and investigation measures

When considering compliance and investigation measures, the limited staffing and administrative resources of environmental (and other) charities must be recognised.

As Australia's independent charity regulator, the benefit of the ACNC is that it can provide resources, forums and networks to build the capacity of environmental and other charities to comply with obligations and more effectively achieve their aims.

The Environment Department's *Guidelines to the Register of Environmental Organisations* (2003) explain a range of compliance mechanisms for the Environment Department and the ATO. The Guidelines set out a process for when environmental organisations are not meeting their obligations. This involves an administrative check (and if necessary, removal) process, with staged warning letters, responses and timeframes.

We support upfront and ongoing assistance from regulators such as the ACNC or the Environment Department to help charities meet their regulatory requirements.

The potential interaction with other regulatory schemes should also be considered. In this regard, regulators should collaborate to ensure that the relationships between these obligations are clear (for example, charity and electoral funding and disclosure laws and state fundraising laws etc).

f. Relevant governance arrangements overseas and methods to adopt best practice in Australia.

A review of other common law jurisdictions shows that the United Kingdom, New Zealand and Australia's laws are broadly consistent on what a charity is, and the scope of charitable purposes and/or activities. For example, in recent years all three jurisdictions have confirmed that charitable status is compatible with political activities that are directed to achieving charitable purposes. This recognises the evolving nature of democratic society and government, community expectations, and the necessary interplay between law and politics.

All three jurisdictions also have an independent charity regulator that provides guidance to charities on compliance, and is responsible for monitoring and enforcement. By contrast, Canada does not have an independent charity regulator; and the approaches of government and tax office regulation have been criticised as heavy-handed, discretionary and politicised.[23]

Overall, in our view the weight of evidence suggests that:

- Australia's current approach to independent charity regulation and tax-deductibility is sound (subject to issues of harmonisation noted earlier);
- Australian legislation and ACNC guidance reflects various aspects of UK and New Zealand approaches, and generally reflects leading practice; and
- The Canadian approach does not represent best practice and is not suited to the Australian charitable sector.

United Kingdom (UK)

Requirements for charitable status in England and Wales are similar to Australia.[24] For example, the *Charities Act 2011* (UK) requires that an organisation's charitable purpose 'is for the public benefit' and sets out a list of charitable purposes (sections 2-3). These purposes include 'the advancement of environmental protection or improvement' (and reasonably analogous purposes).[25] For example, the UK Environmental Law Foundation is a registered charity with similar aims and activities to EDOs of Australia. Its president is HRH the Prince of Wales.[26]

The UK Act mandates registration for charities with gross income over £5,000.[27] To be eligible for 'tax reliefs' (exemptions), charities must separately apply to Her Majesty's Revenue and Customs.[28]

As for governance, the UK Act sets up an independent Charities Commission as the arms-length regulator. The Commission's guidance makes clear that charitable activities may well include campaigning and 'political activities'

[23] Environmental Law Centre University of Victoria (Canada), *Tax Audits of Environment Groups* (2015), pp 30-31.
[24] We understand that similar but slightly broader rules apply in Scotland. See http://www.oscr.org.uk/.
[25] *Charities Act 2011* (UK), ss 3(1)(i) and 3(1)(m)(ii) respectively.
[26] See: www.elflaw.org
[27] *Charities Act 2011* (UK), s. 30 (some additional thresholds and exceptions apply).
[28] See: https://www.gov.uk/charities-and-tax/tax-reliefs.

(among other things) – provided that the activities further the charitable purpose.[29] UK guidance sets out a number of things the charity's trustees must consider in this regard, such as costs and benefits.[30] Charities can support specific policies of a political party; but cannot support a political party as a whole (or use its funds for this).[31] These principles apply to activities in the UK and overseas.[32]

Examples of campaigning methods that charities may use include media, advertising, social media campaigns, lawful demonstrations, direct mail and petitions.[33] Charities must adhere to other regulatory standards such as advertising, communication and defamation law.

The UK Commission states it has a 'fair and open procedure' to deal with complaints. In particular:

> *Where complainants simply disagree with the political or campaign stance taken by a charity, we will not generally become involved. As the charity regulator, our central concern is that charities should operate at all times within their own charitable purposes.*[34]

We agree that this is an appropriate compliance approach for a charity regulator.

New Zealand

The *Charities Act 2005* (NZ) also has various similarities to Australian charity law. Organisations may be registered if they are 'established and maintained exclusively for charitable purposes'.[35] Charitable purposes include 'the relief of poverty, the advancement of education or religion, or any other matter beneficial to the community' (section 5(1)). In addition, the NZ Act states that non-charitable purposes that are ancillary to the charity's objective will not prevent registration.[36] This provision was recently considered in the *Re Greenpeace* case.[37]
In *Re Greenpeace*, the majority of the NZ Supreme Court held that a 'political purposes exclusion should no longer apply in New Zealand' as 'political and charitable purposes were not mutually exclusive in all cases'.[38] This shifted New

[29] For example, 'A charity may choose to focus most, or all, of its resources on political activity for a period.' UK Charity Commission, *Speaking out: guidance on campaigning and political activity by charities* (2008), at 1.1 and 3.1. See: https://www.gov.uk/government/publications/speaking-out-guidance-on-campaigning-and-political-activity-by-charities-cc9/speaking-out-guidance-on-campaigning-and-political-activity-by-charities.
[30] UK Charities Commission, *Speaking out* (2008), at 5.1.
[31] UK Charities Commission, *Speaking out* (2008), at 1.1 and 4.1. The Australian position is slightly broader. See: https://www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/Char_def/ACNC/Edu/Edu_Char_def.aspx. Also, Australian law explicitly permits the *purpose* of a charity (not just its activities) to be 'promoting or opposing' laws and policies that would further (or hinder as the case may be) another listed charitable purpose (*Charities Act 2013* (Cth), s 12(l)).
[32] UK Charities Commission, *Speaking out* (2008), at 6.7.
[33] UK Charities Commission, *Speaking out* (2008), at 6.
[34] UK Charities Commission, *Speaking out* (2008), at 7.1.
[35] Charities Act 2005, s 13(1)(b)(i)
[36] Charities Act 2005 (NZ), s 5(3).
[37] [2014] NZSC 105 (*Re Greenpeace*). We note that this case was considering purposes relating to peace and disarmament.
[38] *Re Greenpeace*, Supreme Court of New Zealand, per Elias CJ, McGrath and Glazebrook JJ, [3]

Zealand's interpretation of charities, political purposes and public benefit towards (but not identical to) that of the Australian High Court in *Aid/Watch*.[39] The majority in *Re Greenpeace* held that 'a blanket exclusion [of political purposes] is unnecessary and distracts from the underlying inquiry whether a purpose is of public benefit' in the charitable sense.[40]

As for governance, the NZ Act sets up an independent Board to oversee charities (section 8). The Board is not subject to Ministerial direction and can delegate its independent functions to the CEO. The CEO's functions include to educate and assist charities, provide information and guidance, administer registration and annual returns, monitor charities, investigate and prosecute breaches, promote compliance and to promote research relevant to charities.[41]

Canada

Canadian tax law and policy significantly limit charities' spending on political activities (broadly defined).[42] The Canadian approach has raised significant in-country concerns from the perspectives of free speech and democratic governance. This cannot be held up as best practice. Canada's own Environmental Law Centre (University of Victoria) considers laws in Europe, UK, Australia and NZ as far more clear and balanced than in Canada.[43]

An important distinction between Canada and Australia is that Australia's *Charities Act 2013*, the ACNC and the common law (following the High Court in *Aid/Watch*) more readily recognise the public benefit of charities commenting on government laws and policies, and advocating for or against changes to laws and policies. As noted above, the ACNC provides useful guidance on the scope of legitimate advocacy by charities.[44] The point is not that anyone who exercises free speech can be a charity – but that charities should not be gagged from 'speaking out' in support of their charitable purpose. This is also emphasised in the UK Charity Commission's guidance.

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[39] See for example, Matthew Harding, 'An Antipodean view of political purposes and charity law' (2015) 131 *Law Quarterly Review*, 181; and Environmental Law Centre University of Victoria (Canada), *Tax Audits of Environment Groups* (2015), pp 38-39.

[40] *Re Greenpeace*, Supreme Court of New Zealand, per Elias CJ, McGrath and Glazebrook JJ, [3]

[41] Charities Act 2005 (NZ), s 10).

[42] Under the *Income Tax Act* (Canada) and Canadian Revenue Authority policy. See Environmental Law Centre University of Victoria (Canada), *Tax Audits of Environment Groups: The Pressing Need for Law Reform* (2015), pp 12-13.

[43] Environmental Law Centre University of Victoria (Canada), *Tax Audits of Environment Groups: The Pressing Need for Law Reform* (2015), Part II.

[44] ACNC, 'Legal meaning of charity': https://www.acnc.gov.au/ACNC/Register_my_charity/Who_can_register/Char_def/ACNC/Edu/Edu_Char_def.aspx?hkey=df431454-2648-4090-8a5d-677ff26e46c1.

Part 3 – The charitable status and activities of EDOs

Why charitable status is important to EDOs

The Australian Government's withdrawal of all federal funding from EDOs, announced by the Attorney-General in late December 2013, has placed significant strain on individual EDOs' capacity to assist the community (and State or Federal parliaments) on public interest environmental law matters.

While federal funding to EDOs was very limited, this funding enabled communities to access high quality legal advice, representation and technical expertise in situations where significant environmental and heritage values are under threat – and where legal processes have not been followed. This both provides access to justice, an important check on decision-making, and creates opportunities for positive and enduring environmental outcomes.

The first EDO opened its doors in NSW in 1985, and EDOs were first listed on the Register of Environmental Organisations from 1993. Subsequently, EDOs across Australia have obtained charitable or DGR status supporting individual donors seeking to protect the environment through the law. Historically though, EDOs have relied less on charitable funding and much more on other 'public' sources.[45] However, in the current climate of diminished government funding, EDOs are reorienting their funding sources in good faith to include more private charitable donations.

Until December 2013, many EDOs relied almost exclusively on federal funding to assist communities across Australia, with an 18-year track record of bipartisan support. The sudden withdrawal of almost $10 million in expanded funding over four years, as well as all annual Community Legal Service Program (**CLSP**) funding, raises the real prospect of closure for some offices and staff.

As EDOs provide unique services not covered by Legal Aid, this would leave several States and Territories without any independent community legal centres who can advise on planning and environmental issues that affect people's homes, communities, livelihoods and environments.

[45] This has included:

- annual funding from the Australian Government;
- annual funding from State and Territory governments;
- annual (sometimes three-yearly) funding from Law Societies, particularly in NSW;
- project-specific or grant-based funding from the Australian Government (such as Caring for our Country);
- project-specific or grant-based funding from State and Territory governments (such as environment departments and grant agencies);
- for some public interest case work, payment by clients (individuals or groups) who have the means to do so.

Productivity Commission's 2014 report confirms EDOs' public interest status

In November 2014, the Productivity Commission issued a report on *Access to Justice*, including the community legal sector.[46] This report was delivered prior to the Government's decision to restore community legal centre funding (other than to EDOs). The report noted the significant socio-economic contribution of CLCs and value for money their funding represented, including EDOs.

The Commission noted that 'Strategic advocacy, law reform and public interest litigation are areas where there are few incentives for private lawyers to act.'[47] Furthermore:

> *…the Commission considers that in many cases, strategic advocacy and law reform can reduce demand for legal assistance services and so be an efficient use of limited resources.*[48]

Specifically in relation to EDOs and environmental matters, the Productivity Commission noted:

> *The rationales for government support for environmental matters are well recognised. The impact of activities or actions that cause environmental harm typically extend beyond a single individual to the broader community. …*
>
> *… If the costs of litigation are high and/or there are substantial costs to coordinating community interests, this can lead to situations where there may be environmental matters that are justiciable by the courts but individuals or communities are unwilling or unable to raise them.*

After explicit analysis and discussion of EDOs' role, the Productivity Commission found that:

> *… there are strong grounds for the legal assistance sector to receive funding to undertake strategic advocacy, law reform and public interest litigation including in relation to environmental matters.*

The Commission recommended direct government funding for such community legal services be restored (including but not limited to 'environmental matters'):

> *RECOMMENDATION 21.1*
> *The Australian, State and Territory Governments should provide funding for strategic advocacy and law reform activities that seek to identify and remedy systemic issues and so reduce demand for frontline services.*

Restoration of federal community legal centre funding excluded EDOs

Following federal funding cuts to EDOs and many other community legal centres (**CLCs**) – including cuts to 'funding for strategic advocacy and law reform … by

[46] Productivity Commission, *Reforming Legal Assistance Services* (2014).
[47] Productivity Commission, *Reforming Legal Assistance Services* (2014), p 708.
[48] Productivity Commission, *Reforming Legal Assistance Services* (2014), p 709.

around $40 million over four years'[49] – the public and the community legal sector expressed their strong concerns to the Government.

In March 2015, the Attorney-General announced that CLC funding would be restored, with one significant exception.[50] Federal funding to EDOs, the only community legal centres that specialise in public interest environmental matters, would not be restored. No official communication was entered into with EDOs regarding this decision, although media reported comments that federal government funding to CLCs was for clients and cases not 'causes'.

EDOs have a proud history of representing clients in public interest cases. Every case that EDOs run, and every advice we write, involves an individual or client group seeking to protect the environment and Australian communities living in it.

The Productivity Commission noted the 'strong grounds' for public funding to the legal assistance sector including for environmental matters which cover the range of EDOs' work. We submit that the same 'strong grounds' apply to charitable status of EDOs. Just as individuals give to other types of charities, knowing that the public benefit of that money will not accrue directly to them, the same is true with environmental charities like the EDO. This is because, in the Productivity Commission's words:

> *As a result of negative environmental externalities, the social benefits for a community in raising environmental matters are more likely to exceed the private benefits for a single individual.*

For similar reasons, charitable recognition remains appropriate for other environmental organisations, including those that 'undertake strategic advocacy, law reform and public interest litigation', and including charitable groups that EDOs represent in public interest cases to protect the environment.

Activities of EDOs

People from all walks of life are aware and supportive of, and have benefitted from, the work of EDOs across Australia. These works includes, for example:

- helping people understand and use the law to protect the environment;
- encouraging community involvement in environmental and resource management decisions;
- developing more effective laws aimed at protecting the environment, in line with the principles of ecologically sustainable development (**ESD**); and
- enforcing compliance with environmental laws and regulations.

EDO lawyers are scrupulous, dedicated and well-respected within the community and the legal profession.

[49] Productivity Commission, *Reforming Legal Assistance Services* (2014), p 709.
[50] See Joint media release Senator the Hon George Brandis QC and Senator the Hon Michaelia Cash, 26th March 2015 "Legal Aid funding assured to support the most vulnerable in our community."

Each EDO is dedicated to achieving positive environmental outcomes in the public interest. As not-for-profit community legal centres, EDOs:

- offer community legal education programs to facilitate public participation in environmental decision-making;
- take an expert role in law reform and policy formulation;
- operate free community advice lines on environmental law as a public service; and
- provide legal advice and representation on public interest matters.

These services are fundamental to providing 'access to justice' across the spectrum of federal and state environmental and planning laws. We outline our education, policy, advice and casework roles below (for further information and testimonials, see **Attachment B**).

Community legal education

EDOs deliver services that are not provided by any other organisation. EDOs 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 and the EDO SA fortnightly e-bulletin has over 1900 subscribers across the community, government and business sectors. Several EDOs have developed specific outreach programmes in consultation with indigenous communities. EDO SA runs a Rural Outreach Programme visiting communities to provide community education and specific legal advice. Various offices have delivered workshops and produced resources to assist rural communities to understand legal issues facing farmers. In response to growing community concerns regarding unconventional gas projects, EDO Qld, EDO NSW and EDO Tasmania have produced publications explaining mining laws (with the EDO NSW publication being government funded).

Charitable donations and government funding enable EDOs to produce and update fact sheets, practical environmental law resources and procedural guides. This is a cost effective way to improve community awareness and enhance public participation in environmental decision making and enforcement. Examples include:

<u>Environmental law guides</u>

- *Rural Landholder's Guide to Environmental Law in NSW* (4th ed.)
- *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*

Mining laws

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

Unrepresented litigants

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

As noted above, many of these publications are commissioned (and indeed reviewed) by governments

Policy advice and law reform

EDOs have been actively involved in policy development 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 disputes provides a unique perspective on the effectiveness of existing laws. The overwhelming majority of policy and law reform work involves submission work at the request of government. EDOs are also often requested to present at government inquiries and undertake consultancy work for government agencies.

Environmental and planning laws involve a complex intersection of laws, policies, science and community relations across local, state and national levels of government. EDOs remain a go-to source for accurate information and constructive advice for interested and affected community members.

EDOs contribute to policy development and law reform in both responsive and proactive ways. Our contributions add to the rigour of decision-making process, strengthen legislative protections and reflect our desire that litigation only be a last resort. EDOs of Australia have also conducted a range of comparative analyses that have identified areas for improvement in areas such as biodiversity, sustainability, access to justice or climate change. For example, in 2012 and 2014 the network produced reports on *An assessment of the adequacy of threatened species & planning laws in all jurisdictions of Australia.*[51]

Our law reform work is geared to improving environmental laws to achieve better on-ground environmental outcomes, consistent with our charitable purpose.

[51] ANEDO, *Protect the laws that protect the places you love: An assessment of the adequacy of threatened species & planning laws in all jurisdictions of Australia* (2012) - Download PDF. The 2014 update of this report is available on request. Both reports prepared for the Places You Love Alliance.

Legal advice and casework

EDOs play a unique role in providing access to justice, as the Productivity Commission's 2014 *Access to Justice* report confirms. Through our public interest litigation, we empower community members to exercise legal rights enshrined by Parliaments of Australia, the States and Territories. As former High Court judge, Justice Toohey noted, 'there is little point in opening the doors to the Courts if litigants cannot afford to come in'.[52]

The protection of the environment is something that benefits the public.[53] '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.[54]

As many experts have noted, public interest environmental litigation can make important contributions to achieving the aims of environmental legislation. This includes by 'increasing enforcement of environmental laws and enhancing transparency, integrity and rigour in government decision-making';[55] and by empowering public interest litigants to play a legitimate role as 'surrogate regulators'.[56]

CASE STUDY: Blue Mountains Conservation Society v Delta Electricity[57] (EDO NSW)

On behalf of the Blue Mountains Conservation Society, EDO NSW ran civil enforcement proceedings in the NSW Land and Environment Court against state-owned power company, Delta Electricity, for water pollution into the Coxs River, which is part of Sydney's drinking water supply.[58]

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, which confirmed its public interest status.[59]

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[52] Justice Toohey, paper delivered to the National Environmental Law Conference, 1989.
[53] *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).
[54] Chris McGrath, 'Flying Foxes, Dams and Whales: Using Federal Environmental Laws in the Public Interest' (2008) 25 *Environmental and Planning Law Journal* 324, 327.
[55] Ibid.
[56] Grabosky et al. 2002
[57] Excerpt from EDONSW site; see www.edonsw.org.au/pollution_cases for details and links to judgments.
[58] Under s. 120 of the *Protection of the Environment Operations Act 1997* (POEO Act).
[59] Three relevant judgements were:

- In 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. The Court made the order on the basis that:
  - the case was brought in the public interest,
  - the case was likely to raise novel questions of law, and
  - the applicant could not continue unless an order capping costs was made.

  The Court also ordered the Society to provide security for Delta's costs in the amount of $20,000.
- In 2010, the NSW Court of Appeal dismissed Delta's appeal against the orders made by the Land and Environment Court, confirming that the litigation may be characterised as being in the public interest.
- In 2011, 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.

In particular, the Court reject Delta's attempt to strike-out the Society's case. Following this decision, the parties agreed to try to resolve the issues through voluntary mediation.

In October 2011, the Society agreed to discontinue the proceedings on the grounds that:

- Delta admits that it has discharged waste waters containing the pollutants between 2007 and 2011, and that it polluted waters within the meaning of the POEO Act without authorisation under its licence (except for salt);
- Delta would apply for limits to be set on various pollutants (copper, zinc, aluminium, boron, fluoride, arsenic, salt and nickel) under its licence; and
- Delta would apply for licence conditions to require full treatment of cooling tower blow down water from Wallerawang power station.

Finally Delta agreed that it would do the works necessary to stop the pollution, and limits in the pollution licence were determined by the EPA in consultation with the local community.

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 2013-14:

Similarly, EDO Tasmania advised 200 clients, but represented clients in only 4 litigation matters in 2012-13. Since 2012, EDO WA has provided over 275 advices to clients and been involved in significant litigation matters, including 4 cases in the WA Supreme Court (including the $45 billion James Price Point LNG hub and the controversial WA shark drum line program) and at least 4 contested proceedings in administrative tribunals. EDO Qld has commenced proceedings in 10 matters covering planning, mining and challenging assessment processes (see Great Barrier Reef case study below).

CASE STUDY: Testing the application of the World Heritage Convention: Dredging in the Great Barrier Reef (EDO QLD)

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 or the Australian World Heritage Management 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.

Both Queensland and the Commonwealth governments now have new policies against dumping in the Great Barrier Reef Marine Park. This makes it unlikely that this case will proceed to a hearing. However, the conduct of the case has highlighted the Minister's obligations according to law. In 2015, the new Queensland Government submitted a fresh application for development at Abbot Point which is undergoing assessment.

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. Other important 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. Finally, an important component of litigation work is mediating outcomes to the satisfaction of all parties.

CASE STUDY: Mediation and enforcement action for Jamie Creek water contamination (EDO Northern Queensland)

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. The company was fined $80,000.

EDO advice therefore redresses a significant imbalance between community members and comparatively well-resourced government authorities and private companies. Importantly, any decision by an office to represent a client in public interest environmental litigation proceedings is subject to assessment against clear casework guidelines.[60]

CASE STUDY: Bulga Milbrodale Progress Association Inc v Warkworth Mining Limited & Ors (EDO NSW)

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.

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.[61]

Our clients represent a broad cross-section of individuals and groups, including farmers, urban and rural residents, Coastcare and Landcare groups, indigenous communities, large and small environmental NGOs, representative bodies and consultants. Community care groups often rely on advice from EDOs to support their 'on-ground' environmental work as noted in the case studies below.

[60] See, for example, EDO NSW casework guidelines at http://www.edonsw.org.au/legal_advice; and EDO TAS casework guidelines at http://www.edotas.org.au/resources/legal-advice-and-representation/.

[61] Following the L&E Court's *Bulga* decision to refuse the Warkworth mine expansion, the then NSW Resources Minister, Chris Hartcher, initiated an amendment to the state mining policy ('Mining SEPP') to prioritise the economic benefits of a resource project over other considerations under the Mining SEPP. Rio Tinto has since made another application to expand the Warkworth mine. A fresh decision to approve or refuse the expansion is yet to be made by the Planning Minister. The amendments to the Mining SEPP may be revisited in 2015 as part of a wider review.

CASE STUDY: Letter of support from the Southern Coastcare Association of Tasmania (SCAT), 2013-14 (EDO Tasmania)

"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."

EDOs provide expert legal advice across the spectrum of environmental issues to a diverse range of clients (see further **Attachment B**).

CASE STUDY: Diversity of clients and issues (EDO WA)

EDO clients have, in recent years, included a wide range of individuals and organisations around Australia. Since 2012, just a few of EDOWA's clients have included:

▪ *Members of indigenous peoples* (Nykina Mangala, objection to coal mining near the Fitzroy River; Goolarabooloo, opposition to development of a large LNG hub at James Price Point near Broome; and other indigenous groups);

▪ *Farmers and rural landowners* (Avon Valley Residents' Association Inc. – proposed intervenors supporting local council refusal to approve proposed municipal landfill in rural York Shire; local resident threatened with fines for displaying placards on her residential property opposing the York Shire landfill; local residents of Bullsbrook opposed to expansion of sand mine near their rural home within the City of Swan; resident of Collie opposed to proposed coal mining in local area; Community Alliance for Positive Solutions Inc – local group concerned about pollution from alumina refinery operations near Wagerup);

▪ *Suburban residents and groups* (Wattle Grove resident opposed to subdivision of rural land for high density community for aged persons and sued for defamation by the developer; Serpentine-Jarrahdale Ratepayers Association – local association opposed to, among other things, expansion of controversial composting facility near Oakford);

▪ *Marine conservation groups and individuals* (Sea Shepherd Australia Ltd, No Shark Cull Inc, opponents of State government's controversial deployment of baited drum lines as part of its shark hazard mitigation program); and

▪ *Terrestrial conservation groups* (for example, the Wildflower Society WA Inc., Helena and Aurora Range Advocates, The Wilderness Society (WA) Inc. – groups opposing proposed iron mine in Helena and Aurora Range banded iron formations;
Rottnest Society – group concerned by proposed management plan's efforts to expand private development on historic and iconic island near Perth).

The matters on which EDOWA has provided advice, assistance and representation have been wide-ranging: environmental impact assessments and approvals; clearing of native vegetation; logging; mining and exploration (coal, iron, uranium); urban and rural development proposals including landfills and industrial facilities; pollution of surface and groundwater supplies; even defamation actions brought against community members who successfully opposed local development.

Attachment A – Key obligations for charities on the Register of Environmental Organisations

Note: **We summarise some key obligations below to assist the Committee and the public. However, this is general information only and is not a substitute for legal advice. Further sources of information are noted below. Organisations should seek professional advice on their particular needs.**

One of the terms of reference of this inquiry is to consider the existing requirements to be listed, and maintain listing, on the Register of Environmental Organisations (**the Register**).

Listing on the Register confers Deductible Gift Recipient (**DGR**) status on the environmental charity, to encourage tax-deductible donations from the public.

Charities on the Register need to satisfy various ongoing requirements under tax law (in addition to charity law).[62] Below is a summary of tax law obligations.

1. An environmental organisation (charity) can take different **legal forms**, such as an incorporated organisation, company or cooperative.[63]

2. Importantly, the charity's ***principal purpose*** must be either:[64]

   - the protection and enhancement of the natural environment (or a significant aspect of the environment); or
   - providing *information* or *education* about the natural environment (or a significant aspect); or
   - carrying on *research* about the natural environment (or a significant aspect).

The Guidelines to the Register (2003, p 9) give examples of what constitutes the ***natural environment***, and concern for it. The examples include significant natural areas, wildlife, habitat, waste, air, water, soil, biodiversity, and promoting ecologically sustainable development (**ESD**) principles.

3. The charity must have a **separate 'public fund'** for donations that meets oversight and tax law requirements.[65]

4. The charity must agree to comply with any **ministerial rules** made to ensure that donations are used for the organisation's principal purpose (e.g. protection of the natural environment). The rules are made by the (Assistant) Treasurer and the Environment Minister. There are two ministerial rules at present:

[62] Namely the *Income Tax Assessment Act 1997* (Cth), (**ITA Act**) Subdivision 30-E.
[63] This could be a body corporate, a cooperative society, a trust, or an unincorporated body that a government establishes for a public purpose. Income Tax Assessment Act 1997 (Cth) (**ITA Act**), section 30.260.
[64] ITA Act s. 30-265.
[65] For example, the public fund must meet the requirements under s 30-130 ITA Act.

a. The organisation must **answer all questions** listed on the statistical form that it must submit to the Environment Department each year.
b. The organisation must **inform the Environment Department** ASAP of certain administrative changes.[66]

5. There are a number of **other safeguards and limitations** around what 'environmental organisations' can do with charitable donations.[67]
   For example:

   a. Organisations and their public funds must be located in Australia.
   b. In most cases the charity must have at least 50 individual members.[68]
   c. A public fund needs its own bank account separate from other sources.
   d. A public fund must be overseen by at least 3 people, with a majority of 'responsible persons', whose names are lodged with the federal Environment Department.
   e. Organisations must submit an annual return to the Department for each financial year, noting the number of donors, amount of donations received and types of activities funded.
   f. Organisations must be not-for-profit (no profits to members, executive etc.)
   g. Organisations must not be directed by a donor to pass on charitable funds to another organisation (i.e. they must have a 'no conduit' policy). However, environmental charities may still pass on funds for environmental projects.
   h. The organisation's constitution must meet the Register's requirements.[69]
   i. The organisation's rules must require that if its public fund is wound up, the remaining assets will be transferred to another charitable fund on the Register.

Further information and sources

Department of Environment – Register of Environmental Organisations

Guidelines to the Register of Environmental Organisations (2003) and forms

Australian Charities and Not-for-Profits Commission (ACNC) legislation webpage.

[66] i.e. if the environmental organisation changes its name, or the name of its charitable fund, or the committee members who manage that fund, or if it departs from the model rules for that fund. See Guidelines to the Register (2003), p 10.
[67] See for example ITA Act ss 30-270 and 30-275.
[68] i.e. paid-up members who can vote at a general meeting (section 30-275 ITAA Act). This applies to charities that are cooperatives or body corporates, unless exemptions apply.
[69] Australian Government, *Guidelines to the Register of Environmental Organisations* (2003), p 4.

Attachment B – Case studies and testimonials from EDO clients

In 2013 the National Association of Community Legal Centres (NACLC) produced a brochure showcasing the public benefits and environmental outcomes of EDO offices across Australia. We include this brochure as an **attachment** to this submission, available at: **www.naclc.org.au/resources/NACLC_EDO_WEB.pdf**

We also highlight the following testimonials on the public benefits of EDOs:

"*If we hadn't found EDO, we couldn't have done it. The courts are a foreign place and speak a foreign language*."

Semi-retired grazier, John Greacen, who joined landholders near Pratten in successfully opposing a proposed feedlot on the Condamine floodplain, in central Queensland.

"As a community run, not-for-profit association... we have not had a budget to engage commercial legal professionals and it is extremely difficult to recruit in-kind legal services... The importance of practical, professional legal support is vital for community organisations to achieve good governance. "

Chris Johns, President, Southern Coastcare Association of Tasmania

"*The EDO knowledge and efficiency not only was instrumental in getting the right outcome but it was also a great saving to the public and private purses of all the individuals and organisations involved.*"

Craig Baulderstone, President, Woodcutters Road Environment Protection Association, S.A.

"*When community members were anxious about how to proceed, EDO Tasmania provided clear explanations about possible legal options and opportunities for community input into the assessment process. EDO Tasmania helped to guide us through the various submission processes, identified key issues and liaised with expert witnesses to address those issues."*

Jane MacDonald, former Communication Coordinator for Save Ralphs Bay Inc, Tasmania

"*Determined to save our village from a coal mine expansion, the Association secured the services of the EDO NSW to prepare an appeal. This started a relationship which achieved a landmark case in the Land and Environment Court by overturning the approval*."

John Krey, President, Bulga Milbrodale Progress Association, Hunter Valley, NSW

“Small communities such as ours do not have the knowledge or necessary resources to buy in the expertise to achieve an even playing field with well-funded, well connected and powerful developers. EDO NSW has provided access to justice for our community and has held decision makers to account.

Suzanne Whyte, Catherine Hill Bay Progress Association, NSW.

Mark helped the Elders understand the legal aspects of the proposed model. The workshop helped the Elders have confidence in the value of their experience and ideas, and highlighted how we could usefully contribute to the reform and consultation processes.”

Wendy Spencer, Project Manager – Dharriwaa Elders Group