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Red Tape Committee
Department of the Senate
PO Box 6100
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Submitted to: redtape.sen@aph.gov.au

Dear Select Committee,

Environmental assessments and approvals

EDOs of Australia (**EDOA**) is a network of community legal centres that specialise in public interest environmental law. We have written extensively on environmental assessments and approval processes at the national level and in each Australian jurisdiction. We welcome the opportunity to provide the Committee with our analysis and recommendations for reform.

We note that the Select Committee on Red Tape was established in October 2016 to "inquire into effect of restrictions and prohibitions on business (red tape) on the economy and community" in 7 areas, including environmental assessment and approvals.[i]

Thank you for granting an extension for our submission. We note that on the date that submissions closed (9 June 2017) only 11 submissions were received and published.[ii] We welcome the opportunity to provide expert legal input from a public interest perspective, drawing on our 30 years' experience assisting communities to protect the environment through law. Given that an inquiry on environmental assessments and approvals in 2014 received 83 submissions, we are concerned that this Committee may not have the benefit of input from a broader range of relevant experts.[iii]

We provide a number of resources relevant to the following terms of reference (**ToR**):

- **ToR (b):** Any specific areas of red tape that are particularly burdensome, complex, redundant or duplicated across jurisdictions
- **ToR (d):** The effectiveness of the Abbott, Turnbull and previous governments' efforts to reduce red tape
- **ToR (e):** Alternative institutional arrangements to reduce red tape, including providing subsidies or tax concessions to businesses to achieve outcomes currently achieved through regulation
- **ToR (g):** Any related matters.

ToR (b): ***Any specific areas of red tape that are particularly burdensome, complex, redundant or duplicated across jurisdictions***

Environmental law has been identified by the Committee as an area of law to be examined to assess whether it is burdensome, complex, redundant or duplicated. We note a 2012 Senate Inquiry that examined related issues, including whether the financial burden of environmental laws on private developers was unreasonable, found very little evidence to demonstrate this claim, and warned of a 'race to the bottom' on environmental standards.[iv]

EDOs of Australia submit that efficient, effective and well-designed environmental laws are essential, underpin a healthy economy, and are of benefit to all Australians.

The number of environmental Acts and regulations that currently exist are evidence of the importance and complexity of environmental management. We agree that the body of environmental law in Australia has grown, and that our legislation and regulations could be drafted more clearly and succinctly. The same could be said for many areas of law. However, assessing the role of environmental law is not about number of pages of legislation, it is about the *purpose* of the laws – that is to ensure decisions about activities and impacts are transparent and informed by objective evidence, community input and equality before the law; and to ensure outcomes that protect the environment and natural resources for present and future generations.

As our knowledge of the importance of environmental health for underpinning growing communities and economies has increased, it has been necessary to build a body of environmental regulations to ensure that development is ecologically sustainable. As the then Environment Minister, The Hon Robert Hill, explained 16 years ago:

> *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.*[v]

In this context, we draw the Committee's attention to the immense *public interest benefits* of environmental law. This is of relevance as this committee is charged with examining *community* impacts as well as effects on business.

The public benefit of environmental laws and the economic benefit of a healthy environment have been recognised in Australia and overseas. For example:

> *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.*[vi]

The *Sustainable Australia Report 2013* of the National Sustainability Council noted:

> *Running down our natural capital risks serious economic and social implications and would undercut the wellbeing of future generations of Australians. A healthy natural environment with functioning ecosystem processes is therefore an economic and social imperative.*[vii]

An international report commissioned by the Organisation for Economic Co-operation and Development (**OECD**) found that environmental regulation does not inhibit productivity. The report – *Do Environmental Policies Matter for Productivity Growth?* – found that more technologically advanced industries can benefit from more stringent environmental policies, and that environmental policies have no longer-term effects on productivity growth.[viii]

These issues are discussed in our previous *Submission to the House of Representatives Inquiry into streamlining environmental regulation, 'green tape' and 'one stop shops' for environmental assessments and approvals* in April 2014 at **Attachment A** and other submissions. [ix]

In relation to specific areas of law to be examined, it has been suggested that third party review rights impose as unjustified impediment to development.[x] This is incorrect for a number of reasons.

There is a strong public policy rationale for retaining broad standing provisions that allow conservation groups and individuals ('third parties') to seek judicial review. Reasons include:

- First, there is a general public interest in ensuring that decision-makers lawfully comply with legislative procedures – this is the role of judicial review.
- Second, the potential for additional scrutiny promotes better decision-making, accountability and public confidence that the law will be upheld.[xi]
- Third, where third party rights do exist, they are very rarely exercised. The argument that 'open standing' provisions opens the litigation floodgates has been described as 'wholly discredited.' [xii] For decades, NSW has had 'open standing' for *any person* to bring civil proceedings in court where legal procedures aren't followed, or planning and environmental laws are breached, with widespread acceptance of these rights.[xiii]
- Fourth, all Australians have an interest in seeing our unique natural heritage is protected. Broad standing means that 'directly affected' landholders don't bear the entire burden of protecting the nation's environmental icons – such as threatened species or World Heritage Areas like the Great Barrier Reef.
- Fifth, there are effective procedural court rules in place to prevent frivolous and vexatious litigation.[xiv]
- Sixth, various laws across Australia enable developers to appeal against a refusal of development consent, or conditions imposed (including 'merits review' in some cases). Focusing on third party appeal rights ignores the fact that an overwhelming majority of court appeals are brought by developers.[xv]
- Seventh, broad standing reflects Australia's commitment to international laws and principles including the International Covenant on Civil and Political Rights (**ICCPR**), the Rio Declaration on Environment and Development (1992) and related UNEP Guidelines (2010).[xvi]

These, and other benefits, have been recognised in a number of independent reviews that make recommendations supporting legal standing at least as broad as the current EPBC Act provisions. These include the:

- *Independent Review of the EPBC Act* (2009) (**Hawke Review**),
- NSW Independent Commission Against Corruption (2012) (**ICAC**), *Anti-Corruption Safeguards and the NSW Planning System*.
- Administrative Review Council, *Federal Judicial Review in Australia*, (2012)[xvii] and
- Productivity Commission: *Major Project Development Assessment Processes* (2013).[xviii]

Further detail on the benefits of third party standing is set out in our *Submission on EPBC Amendment (Standing) Bill 2015,* September 2015 at **Attachment B.**

ToR (d): ***The effectiveness of the Abbott, Turnbull and previous governments' efforts to reduce red tape***

We do not support the delegation of federal responsibilities for matters of national environmental significance (under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**) to states and territories. While most environmental decision-making happens at the state level, there are a number of crucial reasons why the Australian Government must retain a leadership and approval role in environmental assessments and approvals of matters of national environmental significance. These include:

- only the Australian Government can provide national leadership on national environmental issues, strategic priorities and increased consistency;
- the Australian Government is responsible for our international obligations, which the EPBC Act implements;
- State and Territory environmental laws and enforcement processes are not always up to standard, and do not consider cross-border, cumulative impacts of decisions;
- States and Territories are not mandated to act (and do not act) in the national interest; and
- State and Territory governments often have conflicting interests – as a proponent, sponsor or beneficiary of the projects they assess.

In addition to our 2014 submission at **Attachment A**, we attach our analysis of recent policies to hand federal environmental decisions to state planning agencies – as summarised in "Australia's environment: Breaking the One-stop-shop deadlock" *Impact – National Journal of Environmental Law*, Issue 97, 2016 at **Attachment C.**

ToR (e): ***Alternative institutional arrangements to reduce red tape, including providing subsidies or tax concessions to businesses to achieve outcomes currently achieved through regulation***

EDOs of Australia remain unconvinced that proposals to 'deregulate and delegate' project assessment and approval powers are an appropriate way to achieve sought-after improvements to planning regulation, productivity and environmental outcomes.

There are several alternative ways to improve the operation of environmental laws, the business-environment relationship, and federal-state interaction on major projects. These should focus on *effectiveness* rather than 'streamlining' (reducing) environmental protections. We give three examples below, followed by recommendations for a way forward.

First, EDOs of Australia published 10 best practice principles for environmental and planning laws (see **Attachment A**). These provide a basis to assess the effectiveness of the current regulatory framework at state and federal levels.

Second, we note that in response to former Australian Government proposals discussed above, the Wentworth Group of Concerned Scientists developed a *Statement on Changes to Commonwealth powers to protect Australia's environment.* This Statement, and a subsequent *Blueprint for a Healthy Environment and a Productive Economy*, provides a better balance between business and environmental outcomes while maintaining the Australian Government's important approval and oversight roles.[xix]

Third, there are a range of administrative efficiencies recommended in the 2009 independent Hawke Review of the EPBC Act, and other inquiries.[xx] The Hawke Review was a major, consultative, evidence-based inquiry to strengthen and improve the EPBC Act after 10 years of operation.[xxi] A range of important and beneficial recommendations are yet to be implemented, and were effectively derailed in 2012. These include:

- completion of a single, harmonised threatened species list based on robust scientific criteria (we note that similar work is underway);
- methods to assess and avoid cumulative impacts of multiple projects;[xxii]
- establishing a statutory National Environment Commission to provide strategic advice and oversight of environmental regulation and emerging issues;[xxiii]
- an interim 'greenhouse trigger' to require federal approval of major polluting projects, in the absence of a national carbon price;[xxiv]
- strategic assessment processes that can accredit other approval systems that genuinely 'maintain or improve' environmental outcomes, and that consider cost-effective climate change mitigation options;[xxv] and,
- a range of enforcement, accountability and transparency mechanisms to improve decision-making and community access to justice.[xxvi]

In developing a way forward, EDOs of Australia recommends a number of steps to improve the administration and effectiveness of Australia's environmental laws. There would be benefits for business from a system where clear national

environmental standards are consistently implemented across jurisdictions, thereby creating greater certainty. In summary:

- Instead of delegating environmental approval powers to the States and Territories (which is not necessary, justified or beneficial), the Australian Government should improve the efficiency and effectiveness of the EPBC Act, and work with States and Territories to improve their environmental assessment and approval processes and standards.
- This should include revisiting implementation of the Hawke Review package; and developing better administrative arrangements with the States and Territories under *assessment* bilateral agreements (once State processes are improved).
- Administrative arrangements should include a 'highest environmental denominator' approach to promoting consistent standards across jurisdictions; and strengthening state and federal regulatory skills and resourcing.[xxvii]
- Before pursuing updated accreditation or strategic assessment of State or Territory assessment systems, the Commonwealth should further consult on a uniform set of national environmental standards that state and Territory assessments must comply with to be accredited.[xxviii]
- Any reform process must be predicated on States and Territories having the necessary, comprehensive suite of legislated process and outcomes standards *in place and operative before* accreditation of assessment systems can occur.
- This should include requirements in State and Territory planning laws such as:
  - laws that aim to promote and achieve ecologically sustainable development (**ESD**);
  - improved assessment standards, including cumulative and climate impacts;
  - more accountable governance arrangements for assessors and decision-makers;
  - greater transparency and public participation before decisions are made;
  - increased access to justice for communities, including court appeal rights;[xxix]
  - leading practice monitoring, enforcement and reporting; and
  - renewed focus on implementing and strengthening threatened species laws.
- The Australian Government should also objectively review all current bilateral assessment agreements against national environmental standards and revoke any that do not comply. This could be done on the expert advice of a new National Environment Commissioner.

ToR (g): ***Any related matters.***

EDOs of Australia and each individual Environmental Defenders Office are experts in environmental law and have engaged with environmental assessment and approval processes at all levels. In addition to the **attached** submissions, we have made law reform submissions on a range of topics relevant to this inquiry, for example, on:

- Individual assessment bilateral agreements;
- Proposed approval bilateral agreements;
- Delegation of Commonwealth powers for assessing and approving offshore petroleum projects to the National Offshore Petroleum Safety and Emergency Management Authority (NOPSEMA);
- EPBC Act reform;
- Outcomes-based approval conditions;
- Reform of threatened species and planning laws;
- Regulation of agriculture;
- Environmental impact assessment improvement;
- Native vegetation management; and,
- The benefits of equitable rights to 'merits review' of development decisions.

These submissions are all available online,[xxx] and we would be happy to provide further detail to the Committee.

Yours sincerely,
EDOs of Australia

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Policy & Law Reform Director EDO NSW

Attachment A – EDOs of Australia *Submission to the House of Representatives Inquiry into streamlining environmental regulation, 'green tape' and 'one stop shops' for environmental assessments and approvals* in April 2014

Attachment B - EDOs of Australia *Submission on EPBC Amendment (Standing) Bill 2015* 15 September 2015

Attachment C - "Australia's environment: Breaking the One-stop-shop deadlock" *Impact – National Journal of Environmental Law*, Issue 97, 2016

References

[i] Other areas are: the sale, supply and taxation of alcohol; cabotage; tobacco retail; retail trading; small business compliance; and policy and process to limit and reduce red tape. See: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Red_Tape

[ii] Available at: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Red_Tape/Environment/Submissions. Of the 11 submissions received, 3 are from Government (Commonwealth, Tasmania and Act), 2 are mining related (Roy Hill Holdings Pty Ltd and Association of Mining and Exploration Companies Inc), one business (Australian Chamber of Commerce and Industry), one farming (National Farmers' Federation) and 2 interest groups (Institute of Public Affairs and Australian Taxpayers' Alliance).

[iii] See: http://www.aph.gov.au/Parliamentary_Business/Committees/House/Environment/Green_Tape/Submissions.

[iv] See: Senate Environment and Communications Committee, *Report on the EPBC Amendment (Retaining Federal Powers) Bill 2013*.

[v] 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.

[vi] 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), pp 15 and pp 186-187. See also the Wentworth Group of Concerned Scientists, *Blueprint for a healthy environment and a productive economy* (2014) at www.wentworthgroup.org.

[vii] Australian Government National Sustainability Council, *Sustainable Australia Report 2013*, p 81, at http://www.environment.gov.au/resource/sustainable-australia-report-2013-conversations-future.

[viii] Silvia Albrizio, Enrico Botta, Tomasz Koźluk, Vera Zipperer *Do Environmental Policies Matter for Productivity Growth? Insights from New Cross-Country Measures of Environmental Policies*, 1: OECD, France, No.: 1176.

[ix] The benefits of environmental law are also explained in our *Submissions to Freedoms Inquiry on Traditional Rights and Freedoms—Encroachments by Commonwealth Laws:*
First submission 6 March 2015, Second submission 21 September 2015, available at http://www.edo.org.au/justice1.

[x] Wild D, "Section 487 of the Environment protection & Biodiversity Conservation Act: How activists use red tape to stop development and jobs." Institute of Public Affairs, Research Essay, October 2016.

[xi] For example, NSW planning laws provide 'open standing' for judicial review and civil enforcement. This has widespread support including from an independent review panel (Moore and Dyer, *The way forward for planning in NSW*, 2012). Further, *'expanding third party merit appeals'* was one of six key safeguards in ICAC's report, *Anti-corruption safeguards in the NSW planning system* (2012). See also, Parliament of Australia, 'Citizens' engagement in policymaking and the design of public services', Research Paper No. 1, 2011-2012. http://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1112/12rp01;

[xii] Justice J. Cripps, "People v The Offenders", Dispute Resolution Seminar, Brisbane, 6 July 1990: *It was said when the legislation was passed in 1980 that the presence of section 123 [in the NSW planning law] would lead to a rash of harassing and vexatious litigation. That has not happened and, with the greatest respect to people who think otherwise, I think that that argument has been wholly discredited.* See also, Report by the Queensland Agriculture, Resources and Environment Parliamentary Committee on the *Mineral and Energy Resources (Common Provisions) Bill 2014,* September 2014. This report stated that "The Land Court further confirmed that, in its experience, there was no evidence to suggest that the courts processes were being used to delay project approvals"; The Queensland Parliamentary Committee on the Mineral and Other Legislation Amendment Bill 2016, "the majority of the committee notes that only a small number of appeals against mining leases are lodged in the Land Court each year by environmental groups, and the Minister is not bound by a recommendation of the Court. Despite mining stakeholders' claims that frivolous or vexatious cases are extensively used by landholders and other groups, the majority of the committee was unable to find evidence to support this view."

[xiii] See for example *Environmental Planning and Assessment Act 1979* (NSW) s. 123; Protection of the Environment Operations Act 1992 (NSW) s. 252. Other examples include local government and biodiversity laws.
[xiv] See for example, s. 37AO of the *Federal Court Act 1976* (Cth), Division 6.1 of the Federal Court Rules 2011, and ss. 8(8) and 12, *Vexatious Proceedings Act 2008* (NSW Land & Environment Court).
[xv] For example in NSW, of the merit appeals against local council development decisions, determined by Land and Environment Court from 2012-13 to 2014-15, between 96% and 99% of appeals were brought by developers. This reflects the fact that developers have much broader appeal rights, and much more resources, than third parties. Sources: NSW Department of Planning: *Local Development Performance Monitoring 2012-13*; *Local Development Performance Monitoring 2013-14* and *Local Development Performance Monitoring 2014-15*.
[xvi] *UNEP Guidelines for the Development of National Legislation on Access to Information, Public Participation and Access to Justice in Environmental Matters* (2010), available via www.unep.org. In Europe, environmental rights of transparency, participation and 'the right to review procedures to challenge public decisions' ('access to justice') are specifically protected under the Aarhus convention: http://ec.europa.eu/environment/aarhus/.
[xvii] Administrative Review Council, *Federal Judicial Review in Australia*, 2012, at https://www.arc.ag.gov.au/Publications/Reports/Documents/ARCReport50-FederalJudicialReviewinAustralia-2012.PDF, recommendation 10.
[xviii] "*The Commission considers there is a public interest in allowing third parties to bring judicial review applications, as it allows the legality of the process to be enforced, providing an important 'safety valve' in the system. This suggests the need for broad standing provisions, but completely open standing is not appropriate – having some restrictions on standing provides a means for managing unmeritorious review applications (ARC 2012). Courts also have the inherent ability to strike out vexatious claims" Productivity Commission (2013)* p 274.
[xix] Wentworth Group of Concerned Scientists, *Statement on Changes to Commonwealth powers to protect Australia's environment* (2012), p 1; and *Blueprint for a Healthy Environment and a Productive Economy* (2014) available at: www.wentworthgroup.org.
[xx] Including the Senate Environment and Communications Committee inquiry into the EPBC Amendment (Retaining Federal Powers) Bill 2013; Environment and Communications References Committee report on *Effectiveness of threatened species and ecological communities' protection in Australia*; House of Representatives Standing Committee report on *Managing Australia's Biodiversity in a Changing Climate* (2013).
[xxi] Unlike the 2012 COAG 'green tape' announcements, which came from one stakeholder group, the Hawke Review's public consultation process sought and analysed specific feedback on the operation of the Act. This included 220 submissions, 119 supplementary submissions, and face-to-face consultations in each state and territory with industry, NGOs, the community, individuals, research groups, academics, individual corporations, and agencies from every level of government. See Hawke, A., et al., *Report of the Independent Review of the EPBC Act* (2009) (**Hawke Review Report**), at http://www.environment.gov.au/legislation/environment-protection-and-biodiversity-conservation-act/epbc-review-2008, accessed March 2014.
[xxii] See Hawke Review Report at 3.3-3.6, 7.31, 7.60; see also Government Response (2011) to recommendations 6 and 8.
[xxiii] Hawke Review Report, recommendation 71. For further discussion of a national environmental body see the Australian Panel of Experts in Environmental Law (**APEEL**) technical discussion paper on environmental governance in Australia, available at: http://apeel.org.au/papers.
[xxiv] Hawke Review Report, recommendation 10(1).
[xxv] Hawke Review Report, recommendations 6(2)(b)(ii) and 10(2).
[xxvi] See for example, Hawke Review Report, recommendations 43-44 and 46; and 48-53.
[xxvii] See also Senate Environment and Communications Committee Report on the EPBC Amendment (Retaining Federal Powers) Bill, recommendation 5.
[xxviii] As per the Hawke Review Report, recommendation 4(4).
[xxix] See for example, ICAC, *Anti-corruption safeguards in the NSW Planning System* (2012), recommendation 16.
[xxx] Available at: www.edo.org.au.