



Protecting and enhancing environmental advocacy

House of Representatives Standing Committee on the
Environment inquiry into the Register of Environmental
Organisations

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Freedom. Respect. Equality. Dignity. **Action.**

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Human Rights Law Centre

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1. Summary

Thank you for the opportunity to make a submission to this inquiry. This submission will focus on environmental organisations' eligibility for tax deductible status insofar as they undertake advocacy work. In short, the Human Rights Law Centre (HRLC) submits:

- (a) Advocacy undertaken by not for profit organisations, including environmental organisations, is an important contribution to Australia's strong democratic system and is clearly legitimate under current Australian charity and tax law.
- (b) Australia is also bound to protect the international law right to freedom of association. This requires governments to provide an enabling environment for civil society organisations to operate free from hindrance and insecurity. International good practice suggests that this includes supporting civil society organisations' self-sufficiency with tax concessions and incentives for donors through tax deductions and credits.
- (c) There is a worrying trend of Australian governments using financial and other levers to stifle voices that are critical of government and business. This inquiry should not be used to silence important voices from the environmental movement.

The Committee should recommend an enabling tax environment for environmental groups to ensure that they can continue their valuable work, including advocacy, for the purpose of advancing the natural environment.

2. Advocacy is legitimate and valuable

The Terms of Reference for this inquiry include for the committee to have regard to "the activities undertaken by organisations currently listed on the Register and the extent to which these activities involve on-ground environmental works".

Although the reference to "on-ground environmental works" appears benign, public debate around the inquiry has revealed a concerning attitude towards the advocacy work of environmental organisations. In particular, it has been reported that some Government MPs would like the Register of Environmental Organisations to include only charities that do "practical environment work".¹

It is worrying that some Government MPs have sought to distinguish between "doing good work for the environment", characterised as legitimate, and "political activism", that is not. The distinction is illusory. Since *Aid/Watch* and the passing of the *Charities Act 2013* (Cth) it is clear that environmental charities

¹ See for example the comments by Liberal MP Alex Hawke and Nationals Senator Canavan on ABC 7.30, 10 April 2015, <http://www.abc.net.au/7.30/content/2015/s4214478.htm>.

can engage in advocacy including political advocacy. The High Court in *Aid/Watch* held that there is no doctrine in Australia that would exclude “political objects” from charitable purposes.²

The Charities Act provides that “advancing the natural environment” is a valid charitable purpose (section 12(1)). A charity can lawfully advance its purpose by engaging in public debate or supporting a political party or candidate to achieve the charity’s purposes (for example because the party or candidate promotes the charity’s aims).³

For the same reasons, the definition of “environmental organisation” in the *Income Tax Assessment Act 1997* (Cth) is also appropriate. The definition reflects that “protecting the environment” includes practical field work as well as education and advocacy. It also clearly supports those organisations that work in a number of ways, for example by complementing their field work with systemic advocacy.

Advocacy by environmental and charitable organisations should be seen as a vital part of the communications between voters, Members of Parliament and government, and between voters amongst themselves, which the High Court has recognised as “an indispensable incident” of Australia’s constitutional system.⁴ In *Aid/Watch*, the High Court recognised that these constitutional processes contribute to public welfare.⁵

On the international stage, Australia recognises and promotes the important role that advocacy plays in building and maintaining strong democratic societies. For example, in September 2013, Australia co-sponsored a United Nations Human Rights Council resolution that recognised the critical importance of civil society organisations to the promotion of human rights, democracy and the rule of law.⁶

3. Freedom of association: enabling civil society

Australia is bound in international law to protect, respect and promote the right to freedom of association.⁷ The right to freedom of association requires, among other things, organisations to be able to seek, receive and use resources; this is essential to their existence and effective operations.⁸

² *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539, [48].

³ See Australian Charities and Not-for-Profits Commission, <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>.

⁴ *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 at 559-560.

⁵ *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539, [45].

⁶ Human Rights Council resolution on the rights to freedom of peaceful assembly and of association, A/HRC/RES/24/5, 8 October 2013. The resolution stated “the importance of the freedoms of peaceful assembly and of association, as well as the importance of civil society, to good governance, including through transparency and accountability, which is indispensable for building peaceful, prosperous and democratic societies.”

⁷ Australia is a party to the *International Covenant on Civil and Political Rights*, article 22 of which protects freedom of association.

⁸ See Community of Democracies and UN Special Rapporteur on Freedoms of Peaceful Assembly and of Association, “Protecting civic space and the right to access resources”, 2014.

The ability of associations to access funding and other resources from domestic, foreign and international sources is an integral part of the right to freedom of association.⁹

Under international law, the right to freedom of association involves a duty on governments to create an enabling environment for civil society organisations to thrive.¹⁰ Australia has strongly supported this principle at the international level. The UN Human Rights Council resolution co-sponsored by Australia in 2013 urged nations “to create and maintain, in law and in practice, a safe and enabling environment in which civil society can operate free from hindrance and insecurity.”¹¹

Enabling the receipt of funds is only part of this picture. Charitable non-government organisations should also be assisted through support in terms of access to resources through tax concessions and deductible gift recipient status. The UN Special Rapporteur on Freedom of Assembly and Association and the Community of Democracies have recognised tax exemptions for civil society organisations as a positive example of government assistance to support freedom of association.¹² The Council of Europe has recommended that all non-government organisations be assisted to pursue their objectives through public funding, tax exemptions and incentives for donations through income tax deductions and credits.¹³ More recently, the Council of Europe and the Organisation for Security and Cooperation in Europe have suggested that states should provide tax and other incentives for business and individual donors to non-government associations, in order to support their important social work.¹⁴

4. Environmental voices shouldn't be stifled

Governments play a number of roles in terms of the health of the environment – they are funders, regulators, policy makers, custodians and legislators. Governments also control financial levers such as tax concessions that are vital to the survival of many charities and non-government organisations. Given the many roles played by government in terms of the environment, it is particularly critical that there be independent voices to monitor, test and hold governments to account. Environmental organisations provide some of those independent voices, and without a competitive funding platform (provided in the form of deductible gift recipient status through the Register of Environmental Organisations), these voices will be less effective or even silent.

⁹ Organization for Security and Cooperation in Europe Office for Democratic Institutions and Human Rights and Council of Europe, *Guidelines on Freedom of Association*, 2015, [223].

¹⁰ Organization for Security and Cooperation in Europe Office for Democratic Institutions and Human Rights and Council of Europe, *Guidelines on Freedom of Association*, 2015, [22].

¹¹ UN Human Rights Council Resolution A/HRC/RES/24/5, 8 October 2013, [3].

¹² Community of Democracies and Special Rapporteur on Freedoms of Peaceful Assembly and of Association, “Protecting civic space and the right to access resources”, May 2014, <<http://freeassembly.net/rapporteurpressnews/general-principles-right-to-funding/>>. The Community of Democracies is an intergovernmental coalition of states devoted to the idea of democracy: <<https://www.community-democracies.org/>>. Its members include Canada, USA and Sweden, but not Australia.

¹³ Council of Europe Recommendation on the legal status of NGOs in Europe, 10 October 2007, [57].

¹⁴ Organization for Security and Cooperation in Europe Office for Democratic Institutions and Human Rights and Council of Europe Commission for Democracy through Law, *Guidelines on Freedom of Association*, March 2015, [223].

For environmental organisations, the current inquiry is understood in the context of earlier government actions that sought to prevent environmental advocacy. This includes reviews by the Australian Taxation Office, prompted by Senate Estimates questioning, that led to 15 organisations ‘modifying their activities’, and one organisation, Aid/Watch, losing its status as a charity.¹⁵ Aid/Watch later had its status restored by the High Court of Australia.¹⁶

We do not want Australia to go down the same path as Canada. In recent years the Canadian Government has attacked advocacy by environmental and human rights charities. Since 2010, Canada has adopted a wide range of restrictive measures to effectively reduce the legal, financial and political space in which civil society organisations can operate.¹⁷ It has been reported that the Prime Minister’s Office blacklisted an environmental group an “enemy of the Government of Canada” for the organisation’s opposition to the Northern Gateway Pipeline.¹⁸ According to Lawyers Rights Watch Canada, the attacks on civil society have included threats to and removal of charitable status and the imposition onerous regulatory burdens, effectively limiting those organisations’ operations and capacity to raise funds.¹⁹

We have already witnessed a broader and deeply concerning trend of Federal and State Governments in Australia using financial levers to stifle critical voices. This trend includes:

- changes to Federal Government funding agreements with community legal centres that prohibit funding from being used on policy and law reform work;
- gag clauses in Queensland Government funding agreements with not-for-profits that restrict them from advocating for state and federal policy change;
- the removal of Federal Government funding from organisations that undertake advocacy like the National Congress of Australia’s First Peoples, the Refugee Council of Australia and the Environmental Defenders Offices; and
- significant cuts to the Australian Human Rights Commission’s funding.

This broader trend of intimidating dissenting voices is also evident in the:

- political attacks on the President of the Australian Human Rights Commission following the Commission’s report on the harm being done to children in immigration detention;
- excessive anti-protest laws particularly in Tasmania and Western Australia targeting environmental protest; and

¹⁵ Michael McKinnon and Matthew Franklin, ‘ATO warns Greens over politicking’ *The Australian* (17 February 2007) <<http://www.theaustralian.com.au/news/nation/ato-warns-greens-over-politicking/story-e6frg6nf-111113009920>>.

¹⁶ *Aid/Watch Inc v Commissioner of Taxation* (2010) 241 CLR 539.

¹⁷ See Lawyers’ Rights Watch Canada, *The Shrinking Space for Dissent in Canada*, May 2014, <<http://www.lrwc.org/canada-the-shrinking-space-for-dissent-in-canada-report/>>.

¹⁸ Alexis Stoymenoff, “‘Scary time’ for Canada,” *Vancouver Observer*, 26 January 2015, <<http://www.vancouverobserver.com/sustainability/2012/01/25/scary-time-canada>>.

¹⁹ See Lawyers’ Rights Watch Canada, *The Shrinking Space for Dissent in Canada*, May 2014, <<http://www.lrwc.org/canada-the-shrinking-space-for-dissent-in-canada-report/>>, supported by comments from Maina Kiai, Special Rapporteur on freedom of peaceful assembly and association, (McGill University, October 23, 2013), Online: YouTube: <<http://www.youtube.com/watch?v=FpoaQI5U9Gs>>.

- referral of whistleblowers and journalists seeking to expose abuses in immigration detention facilities to the Australian Federal Police for investigation.

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