



Australian Government

Department of Climate Change, Energy,
the Environment and Water

Review of the Environmental Defenders Office's conduct under the Commonwealth Simple Grant Agreement (EDOEJA000002)



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Acknowledgement of Country

We acknowledge the Traditional Owners of Country throughout Australia and recognise their continuing connection to land, waters and culture. We pay our respects to their Elders past and present.

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Attachment B: Port Fairy Community Group Query – EDO response

Attachment C: BGH report of EDO Grant – Outcome of Initial Assessment of Potential Fraud

Attachment D: Letter from EDO to Minister re EDO process review 13 Mar 2024

Summary

Following the judgment in *Munkara v Santos NA Barossa Pty Ltd (No 3)* [2024] FCA 9 (**judgment**), the Minister for the Environment and Water, the Hon Tanya Plibersek MP requested the Secretary of the Department of Climate Change, Energy, the Environment and Water (**DCCEEW**), Mr David Fredericks PSM (**the Secretary**) to advise her whether in the Department's view the conduct of the Environmental Defenders Office (**EDO**) described in comments made by Justice Natalie Charlesworth in the judgment was in accordance with the terms of the Simple Grant Agreement (**the grant agreement**) between the Commonwealth Government and the EDO or whether they may possibly be in breach. The Minister also asked for advice on any proposed steps the Secretary would recommend be taken in response.

To this end, DCCEEW obtained independent legal advice from external legal provider Norton Rose Fulbright (**NRF**).

The legal advice was that the comments in the judgment do not provide a reasonable basis to conclude that the EDO had breached the terms of the grant agreement.

In addition, given that the Business Grant Hub (**BGH**) in the Department of Industry, Science and Resources (**DISR**) administers the grant agreement, BGH was also commissioned to assess whether any possible fraud had occurred regarding the grant agreement.

The BGH concluded that there was no evidence indicating possible fraud. The BGH also advised it would appear the EDO has been compliant with the grant conditions to date.

Following DCCEEW's consideration of the matter, it is satisfied that the EDO's conduct described in the judgment, and the EDO's conduct referenced in further material tabled in Senate Estimates on 12 February 2024, were not in breach of the grant agreement.

The Secretary does however consider that further steps need to be taken.

To ensure the integrity of the grant agreement, DCCEEW is working with BGH to:

- implement additional assurances in relation to the EDO grant agreement, including in respect of milestone reporting; and
- negotiate variations to the grant agreement to expressly clarify the standards expected by the Commonwealth of the EDO.

The Secretary has brought the judgment to the attention of the Law Society Northern Territory.

1. Context

1.1 Scope of the Review

- 1) On Friday 2 February 2024, the Hon Tanya Plibersek MP requested the Secretary to consider the EDO's conduct described in comments made in the Federal Court by Justice Natalie Charlesworth in her recent decision judgment in *Munkara v Santos NA Barossa Pty Ltd (No 3)*.
- 2) The Minister asked whether, in the Department's view, the conduct was in accordance with the terms of the grant agreement or whether they may possibly be in breach. If there was a breach the Minister asked for advice on the seriousness of the breach. She also asked the Secretary for advice on any potential steps he would recommend be taken in response.
- 3) The Secretary also agreed to take into account as part of the review the material tabled in the Senate by Senator Susan McDonald (Facebook post – **Attachment A** refers) on 12 February 2024.

1.2 The Judgment

- 4) On 15 January 2024, Federal Court Justice Natalie Charlesworth, in the matter of *Munkara v Santos NA Barossa Pty Ltd (No 3) [2024] FCA 9*, included in her judgment criticism of the EDO lawyers and the expert witness engaged by EDO, Mr Lewis.
- 5) Her Honour found that the material 'supports an inference that Indigenous instructions have been distorted and manipulated [by the EDO's lawyers] before being presented to this Court via an expert report' [1169] and that EDO lawyers had engaged in 'a form of subtle witness coaching' [1135].
- 6) Justice Charlesworth further observed that a 'synthesized narrative' prepared by EDO lawyers purporting to be a record of meeting with Tiwi informants was unreliable and Mr Lewis' reliance on this synthesis narrative undermined the foundation of his evidence [1137].

1.3 The Facebook Post

- 7) In relation to the Facebook post of 12 February 2024, the event identified was hosted and organised by the Great Australian Bight Alliance. The EDO was invited to speak at the event about the ConocoPhillips drilling and CGG seismic blasting projects and how to effectively engage with these projects through the NOPSEMA framework.
- 8) On 9 May 2024, the EDO confirmed in writing to the BGH that they were not invited to attend in a client capacity and have no formal ongoing relationship with this community group (**Attachment B** refers).
- 9) They also reconfirmed attendance at this outreach seminar did not fall within the funded projects under the grant agreement.

2. The Grant Agreement

2.1 What is the Grant for and what are its terms?

- 10) The October 2022-23 Budget included a measure to provide \$9.8 million over four years from 2022-23 (and \$2.6m per year ongoing) to restore funding to the EDO and Environmental Justice Australia (EJA). This measure delivered on the Government’s election commitment as published in the Plan for a Better Future to improve access to justice and legal assistance for Australians wanting to uphold environmental laws and protect Australia’s environment and heritage.
- 11) On 28 March 2023, the EDO, and Environmental Justice Australia Program grant opportunity (the program) was advertised on GrantConnect (Grant Connect ID GO6081).
- 12) EJA subsequently decided not to take up the grant opportunity.
- 13) The EDO entered into a grant agreement with DISR on behalf of the Australian Government on 15 June 2023. The grant agreement’s objectives are to:
- a) improve access to and delivery of quality justice and legal assistance services to members of the community to uphold the law and protect Australia’s natural assets and environmental outcomes;
 - b) effectively advocate for public interest environmental law; and
 - c) provide core legal services and encourage early intervention in legal issues relating to the environment.
- 14) The grant agreement is for the period 2022-23 to 2025-26 and the planned funding schedule is:

Funding (GST exclusive)					
	2022–23	2023–24	2024–25	2025-26	TOTAL
Environmental Defenders Office	2,000,000	2,000,000	2,123,000	2,124,000	8,247,000

- 15) The grant opportunity guidelines limit what eligible activities and expenditure can be included in the grant agreement.
- 16) Eligible activities listed under 5.1 of the grant opportunity guidelines may include:
- a) the provision of legal information and legal assistance services to members of the community, farmers, Aboriginal and/or Torres Strait Islander people, communities and their community representatives, and environmental groups;
 - b) the provision of legal information and legal assistance services (including legal advice and legal representation) relating to public interest planning, environmental law and criminal law matters relating to environmental protest which may include issues such as:

- i) major development and infrastructure (e.g. dams, roads, tunnels, large-scale developments)
- ii) mining, fracking, and energy (e.g. coal, coal seam gas and power stations)
- iii) land clearing and logging (e.g. native vegetation clearing and forestry)
- iv) corporate and government conduct (e.g. decision making, access to information)
- v) irrigation and water use (e.g. rivers, wetlands, drinking water);
- vi) contamination of land and water (e.g. PFAS (per- and polyfluoroalkyl substances), lead).

We may also approve other activities.

17) Eligible expenditure items listed under 5.4 of the grant opportunity guidelines includes:

- a) Salaries and directly related expenses including recruitment
- b) Domestic travel and accommodation
- c) Consultation with relevant organisations
- d) Web design and development
- e) Helpline services
- f) The costs of an independent audit of project expenditure (where requested) up to a maximum of 1 per cent of total eligible project expenditure.

2.2 How is the Grant administered?

18) In line with the Streamlining Government Grants Administration (SGGA) program announced in the 2015-16 Budget to deliver simpler, more consistent, and efficient grants administration across government, a grant hub is to be used to administer a grants program. This policy approach has been used to administer grants by successive governments.

19) DCCEEW is responsible for the grant program policy and BGH administers the grant agreement.

20) As the policy owners of the Program, DCCEEW is responsible for:

- a) developing the grant opportunity guidelines that specify eligible activities, which were prepared in consultation with the Attorney-General's Department and BGH.
- b) undertaking an evaluation at the conclusion of the Program to assess the appropriateness of the Guidelines and the effectiveness of the policy.
- c) transferring funding and providing the relevant administrative and financial delegations to BGH to manage the administrative requirements of the grant.

21) BGH's responsibilities include:

- a) publishing the agreed Guidelines
- b) application assessment and selection process

- c) establishing, negotiating, and signing the grant agreement with the grant recipient
- d) assessing milestone reports from the EDO and making associated milestone payments
- e) administering and managing the requirements under the grant agreement.

3. Independent Advice

3.1 External legal advice

22) DCCEEW obtained independent legal advice from NRF. In NRF's view, the judicial comments in the judgment do not provide a reasonable basis to conclude that the EDO has breached the terms of the grant agreement.

3.2 Business Grants Hub review

23) At the request of DCCEEW, the BGH undertook an assessment of possible fraud regarding the grant agreement, with the formal outcome of the BGH review communicated to DCCEEW on 6 May 2024. A copy of BGH's formal advice is at **Attachment C**.

24) BGH found that there is no evidence indicating potential fraud. For a matter to be assessed as indicating potential fraud there needs to be information which shows an intent to be dishonest or to deceive. Fraud is more than carelessness, accident, or error. When intent cannot be shown, the matter may reveal non-compliance rather than fraud. BGH advised it would appear that EDO has been compliant with the grant conditions.

25) As an additional level of assurance, the BGH requested and received with the EDO's 30 April 2024 milestone report, proof of expenditure and an independently audited financial report for the period 30 June 2023 to 31 March 2024.

26) BGH will assess the EDO's milestone report before the grant instalment is paid. The payment of \$1 million to the EDO is due by the end of May 2024 subject to BGH being satisfied with progress against the agreed milestones.

4. Findings and next steps

4.1 Compliance with the grant agreement

27) Having considered the judgment, the information tabled in Senate Estimates on 12 February 2024 and the response from the EDO, the independent legal advice from NRF, and the review by the BGH, DCCEEW is satisfied that the EDO's conduct is not in breach of the grant agreement.

28) Subject to the EDO continuing to provide progress reports and independent audit reports that satisfy the BGH that EDO remains compliant with the grant agreement and meets the milestone requirements, instalment payments to the EDO can be paid as scheduled.

4.2 Additional Assurances

29) Despite DCCEEW having concluded that the EDO is not in breach of the grant agreement, the Secretary has determined that the following additional assurances should be implemented in consultation with BGH:

- a) Undertake an assurance review of the grant activity by utilising section G6.1 of the agreement to inspect and take copies of any material relevant to the grant, and review that against information supplied by EDO in their 16 November 2023 milestone report.
- b) Apply additional due diligence to the next milestone report that was due, and received, on 30 April 2024, by requesting proof of expenditure with the milestone report.
- c) The independent audited financial acquittal report for the period 30 June 2023 to 31 March 2024 is to be completed by one of the following entities to ensure an additional layer of due diligence and ensure independence:
 - i) a Registered Company Auditor under the *Corporations Act 2001* (Cth); or
 - ii) a Certified Practising Accountant; or
 - iii) a member of the Institute of Public Accountants; or
 - iv) a member of Chartered Accountants Australia and New Zealand; and
 - v) who is not a principal member, shareholder, officer or employee of the EDO or a related body corporate.

30) These additional assurances are to be applied in relation to all future milestone reports.

31) BGH has also met with the EDO to ensure they understand their additional assurance requirements and what is required by them to be compliant with the terms of the grant agreement.

4.3 Vary the Grant Agreement

32) DCCEEW has also requested that BGH negotiate variations to the grant agreement to strengthen the grant agreement by expressly requiring EDO to comply with their relevant professional legal standards and to notify BGH if they become aware of any disciplinary proceedings being brought against them or adverse comments or findings made by relevant legal bodies regarding their conduct or performance.

33) BGH has commenced negotiations to vary the grant agreement and EDO has indicated it is amendable to the inclusion of the additional clauses.

4.4 The Law Society

- 34) As noted previously, Justice Natalie Charlesworth in her judgment included negative judicial comments in relation to conduct by legal representatives in the proceedings.
- 35) While Her Honour declined to refer any person to the relevant law society, it would be open to DCCEEW to do so.
- 36) As the accountable authority, a Secretary has broad obligations to consider the conduct of publicly funded entities. In particular, a Secretary should act consistently with the public interest, noting the public's expectation of integrity in the delivery of services.
- 37) To ensure the judicial commentary is considered and addressed by the relevant law society, the Secretary has brought the judgment to the attention of the Law Society Northern Territory.

4.5 Engagement with the EDO

- 38) The CEO of the EDO, Mr David Morris advised the Minister on 13 March 2024 that the Board of the EDO had appointed a team of external legal experts to recommend process reforms to enhance the provision of EDO's legal services (**Attachment D** refers). Senior Counsel, Dr Tony McAvoy SC, has been engaged to conduct the review and will be supported by law firms Chalk & Behrendt and Gilbert + Tobin.
- 39) The Secretary has responded to the EDO on the Minister's behalf welcoming the EDO's decision to conduct its own independent review and requesting that the EDO report to him the outcome of that review and any actions taken in response.
- 40) Since the closing of applications for the grant funding on 19 April 2023, DCCEEW has not corresponded with EDO on any matters including the independent review that has been undertaken. Now that the review is finalised, DCCEEW will meet with the EDO to confirm the additional assurance activities being undertaken by BGH on behalf of DCCEEW, discuss the outcome of the review findings and discuss professional standards.