

# EDOs of Australia



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## **Submission to the Productivity Commission on *Regulation of Agriculture: Issues Paper***

**February 2015**

EDOs of Australia (Australian Network of Environmental Defenders Offices Inc.) is a network of 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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## Introduction

Thank you for the opportunity to comment on the *Regulation of Agriculture: Issues Paper (Issues Paper)*.

EDOs of Australia (**EDOA**) is a network of independent community legal centres across Australia. We have extensive experience advising on a local, State and national laws regulating impacts on the environment, including many that are relevant to agricultural practices. EDOs around Australia regularly provide legal advice and information to rural communities, particularly in relation to impacts of off-site development and mining activities on water resources and access to farm land.

EDOA appreciates the agricultural sector's desire to minimise "unnecessary regulatory burdens", but maintains that environmental laws are neither unnecessary nor excessive. It is our view that the long term competitiveness and productivity of Australian agriculture relies on the maintenance of a healthy environment and building resilience against a changing climate.

EDOA, and our constituent State and Territory offices, have made numerous detailed submissions addressing specific environmental and planning laws in recent years. Rather than replicating previous commentary, this submission will highlight key conclusions from those documents and refer the Commission to the original submission for more detailed analysis (see Attachment 1 for a list of relevant submissions).

In particular, the extent to which environmental laws encroach upon property rights (including those of rural landowners) is currently being examined by the Australian Law Reform Commission as part of its "Freedoms Inquiry". Many of the views EDOA expressed in our submissions to that inquiry are relevant to the Productivity Commission's current inquiry.

### **SUMMARY OF KEY POINTS:**

- Implementation of rigorous environmental regulation is a key mechanism to secure long-term competitiveness and productivity of Australian agriculture.
- Environmental regulations not only protect agricultural productivity, they can provide alternative income streams for farming businesses, such as carbon storage and biobanking opportunities.
- Clear, prescriptive regulation of water use, storage and management is absolutely essential to ensure healthy, resilient and productive agricultural landscapes.
- Regulation of land clearing is necessary, proportionate and critical to the long-term viability of agricultural productivity in Australia.
- Government investment in mapping tools to improve spatial data is critical to ensuring regulatory effectiveness. Where mapping is unavailable, a precautionary approach should be adopted.

- Regulation requiring regular re-approval of agricultural chemicals should be reinstated, allowing review of the impacts of chemicals (and required management practices) on the basis of up to date science.
- Regulations preventing the spread of weeds are a cost-effective approach to managing the damage caused by invasive plant species.
- Clear planning regulations are necessary to protect important agricultural areas from land uses that would compromise productivity. Rezoning of good quality agricultural land to reduce these protections should be avoided unless essential.
- Good planning (including strategic and regional planning) to manage land use conflicts is preferable to specific “right to farm” legislation.
- While cooperative approaches are appropriate, regulators must enforce legal obligations where cooperation and collaboration has failed to protect land.
- Laws providing opportunities for farmers’ views to be heard in relation to planning and development decisions are critical to minimise land use conflicts and protect agricultural resources.

These issues are discussed in greater detail throughout the submission.

We hope this submission assists the Productivity Commission in developing a Discussion Paper. We would be happy to meet with the Commission to discuss this submission, and to provide further evidence to support our view that existing regulations are necessary to protect the environment on which a competitive, productive agricultural sector depends.

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## 1. Role of environmental regulation

Part 1 of our submission briefly addresses the importance of environmental regulation, and the benefits that this regulation delivers for the agricultural sector.

The most recent State of the Environment Report outlines the ongoing environmental challenges confronting Australia, ranging from large scale land clearing, to over-allocation of certain water resources, to declining biodiversity.<sup>1</sup>

A recent Climate Council report, *Feeding a Hungry Nation: Climate Change, Food and Farming in Australia*<sup>2</sup>, also highlights the vulnerability of Australia's agricultural sector to the impacts of climate change – increased extreme weather, water scarcity, salinity and erosion.

Environmental laws exist to protect the environment and conserve natural resources in the public interest, for the benefit of all Australians, including farmers. The vulnerability identified by the State of the Environment and Climate Council reports further confirms the importance of regulations to protect agricultural land from conflicting land uses, maintain water quality and availability, strengthen biosecurity and build resilience to climate variability. As outlined in Part 4, regulations can also provide opportunities for alternative income streams such as carbon storage and biodiversity offsets.

EDOA therefore welcomes the acknowledgement in the Issues Paper of the public interest role played by environmental regulation, and the need for any reforms to ensure that environmental standards are maintained. EDOA urges the Commission, when developing the Discussion Paper, to strengthen these statements and emphasise that regulatory “effectiveness” should be assessed against the principles of ecologically sustainable development.<sup>3</sup>

Adopting that approach, EDOA has published best practice standards for planning and environmental regulation<sup>4</sup> and evaluated relevant laws in each State and Territory against these standards. Based on our analysis, no State or Territory currently has a regulatory regime that reflects EDOA's ‘best practice metric’. Rather than identifying regulations that impose “unnecessary burdens”, EDOA would welcome critical analysis of inadequate regulations and activities which warrant higher levels of scrutiny than they are currently subject to. In our view, improving standards for environmental protection in many regional areas would have significant positive impacts on long-term agricultural productivity.

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<sup>1</sup> State of the Environment 2011 Committee. *Australia state of the environment 2011. Independent report to the Australian Government Minister for Sustainability, Environment, Water, Population and Communities*. Canberra: DSEWPaC, 2011, pp. 7-10

<sup>2</sup> Climate Council of Australia. 2016. *Feeding a Hungry Nation: Climate change, Food and Farming in Australia*. Available at [www.climatecouncil.org.au](http://www.climatecouncil.org.au)

<sup>3</sup> See s.3A, *Environment Protection and Biodiversity Conservation Act 1999*

<sup>4</sup> See attachment A of EDOA's *Draft Framework for Standards for Accreditation of Environmental Approvals under the EPBC Act 1999* submission.

## ***Protection of agricultural land***

A key example of the role of environmental laws in protecting agricultural productivity is efforts across Australia to restrict mining and unconventional gas activities that threaten farm land and water supplies. EDO offices in Qld, NSW, South Australia, Tasmania and Western Australia have provided extensive support to farming communities seeking to protect water quality and good quality agriculture land in their regions, in the face of laws that prioritise mineral and gas exploration over agricultural production.

Significantly, the “water trigger” requiring coal seam gas and coal mining developments likely to impact on aquifers and surface water to be referred to the Commonwealth Minister under the *Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*, was introduced following concerns expressed by farmers.<sup>5</sup> Similarly, the extension of the moratorium on fracking in Tasmania to 2020 was achieved largely through the advocacy of the Tasmanian Farmers and Graziers Association and rural landowners.

These legislative and policy reforms reflect the desire for formal protection of natural resources and the recognition that such resources are interconnected and their protection is in the broad public interest.

As outlined in Part 4 of this submission, EDOA will continue to advocate for legislative amendments to ensure that farmers have opportunities to participate in development decisions that threaten the long term health and productivity of their land.

### ***One stop shop***

The Issues Paper refers to current efforts to establish a “one stop shop” to reduce overlap and duplication of assessment under State and Commonwealth legislation. EDOA has advocated strongly for the Commonwealth government to retain its role in assessing and approving the limited range of issues deemed to be ‘matters of national environmental significance’. In summary, this is because:

- Only the Commonwealth has the mandate and willingness to protect matters of national (and international) importance. A State government has no motivation to put the national interest before its own State interest when approving development within its own State.
- EDOA’s audit of State and Territory laws clearly shows that no state or territory biodiversity or planning laws currently meet the Commonwealth environmental standards necessary to effectively and efficiently protect the environment.

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<sup>5</sup> See Carmody, Emma and Ruddock, Kirsty, Coal seam gas and water resources: a case for Commonwealth oversight? *Australian Environment Review*, 2013. Vol 28 No 3, p. 501.

In his independent review of *Environment Protection and Biodiversity Conservation Act 1999* (the **Hawke Review**)<sup>6</sup>, Dr Allan Hawke made a series of recommendations to improve the efficiency of regulation. These recommendations included “greater reliance on, and accreditation of, State and Territory processes, subject to meeting appropriate standards.”<sup>7</sup>

However, as outlined above, EDOA’s evaluation indicates that no State or Territory legislation currently meets the “appropriate standards” required to justify the Commonwealth Minister accrediting approval processes under those Acts. Our analysis shows that assessment and approval under the EPBC Act is neither duplicative nor redundant and must be retained to ensure that Australia continues to meet its international obligations in relation to biodiversity conservation.

Rather than focussing on one-stop shop approvals, EDOA believes that regulatory efficiency can be more effectively achieved through efforts to act on the full package of reforms recommended by Dr Hawke. In particular, better use of strategic and regional planning (see discussion of planning below), standardisation of impact assessment criteria and investing in national environmental accounts and acquisition of critical spatial information will minimise duplication without compromising environmental standards.

For more detail regarding our position, read [Objections to the proposal for an environmental ‘one stop shop’ \(2014\)](#) and our submission to the [EPBC \(Bilateral Agreement Implementation\) Bill 2014](#).<sup>8</sup>

Furthermore, in practice the EPBC Act is more likely to regulate large-scale developments that threaten agricultural productivity than to regulate agricultural activities themselves. The application of the EPBC Act is limited to actions likely to have a significant impact on a listed matter of national environmental significance. This high threshold – both in the limited list of matters and the need for impact to be “significant” – means that the vast majority of farming operations, including land clearing and application of chemicals, will not be affected by the EPBC Act. In general, such activities will require assessment under local or State laws only. Where the EPBC Act does apply, it will very rarely prevent agricultural activities from being undertaken, instead imposing practical restrictions to address the limited matters protected by the Act.

In contrast, mining operations or large infrastructure projects that may impact on water quality or clear vast areas of viable agricultural lands will require assessment under the EPBC Act to ensure that matters of national environmental significance are adequately protected.<sup>9</sup>

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<sup>6</sup> Hawke, A. 2009. *The Australian Environment Act: Independent Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999*. Available at [www.environment.gov.au](http://www.environment.gov.au)

<sup>7</sup> Recommendation 4, Hawke Review (above n5). (emphasis added)

<sup>8</sup> Available at [http://www.edonsw.org.au/planning\\_development\\_heritage\\_policy](http://www.edonsw.org.au/planning_development_heritage_policy) See also [http://www.edonsw.org.au/federal\\_handover\\_of\\_environmental\\_approval\\_powers\\_to\\_the\\_states](http://www.edonsw.org.au/federal_handover_of_environmental_approval_powers_to_the_states)

<sup>9</sup> See for example Gloucester Coal Seam Methane Gas Project, Gloucester Region, NSW (EPBC Act approval 2008/4432). Available online: <http://www.environment.gov.au/epbc/notices/assessments/2008/4432/2008-4432-approval-decision.pdf> (accessed 20 February 2016).

## 2. Environmental regulation affecting agriculture

As identified in the Issues Paper, a myriad of laws and policies that may broadly be defined as “environmental regulations” affect farming businesses, whether directly or indirectly. Part 2 of our submission specifically addresses laws relating to the following issues:

- Regulation of water use
- Vegetation clearing
- Application of agricultural chemicals
- Control of feral animals.

### 1. Regulation of water use

The Issues Paper notes that this inquiry will not examine the implementation of the National Water Initiative, the *Water Act 2007*, the Murray Darling Basin Plan or water resource plans in any detail.

EDO has prepared a number of comprehensive submissions in relation to water regulations, and would be pleased to discuss these issues with the Commission in more detail. Relevant recent submissions include:

- Briefing note on the [Water Amendment \(Review Implementation and Other Measures Bill\) 2015](#) (January 2016)<sup>10</sup>
- [Inquiry into the social, economic and environmental impacts of the Murray-Darling Basin Plan](#) (September 2015)
- [Submission to the Murray-Darling Basin Authority on the draft Basin-wide Environmental Watering Strategy](#) (September 2014)
- [Environmental Water Recovery Strategy for the Murray-Darling Basin \(Recovery Strategy\)](#) (February 2013)
- [Submission on the proposed Murray-Darling Basin Plan](#) (April 2012)

### ***Allocations and monitoring***

Legislation regulating the allocation of water rights generally provides some limited exemptions for domestic uses and stock watering but requires higher yield uses to be authorised by licence. Licences generally set annual and daily take limits, identify periods when taking is permitted, specify the authorised off-take location and nominate a surety level to guide how allocations may be restricted in times of water shortage.

EDO supports the regulation of water use as a necessary mechanism to ensure environmental flows are maintained and scarce water resources are directed to

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<sup>10</sup> A copy of our submission to the Senate Inquiry into the Bill can be provided once authorised for publication by the Senate Committee.

best uses. The experience in relation to the Murray Darling Basin is indicative of the need for regulation to implement sustainable management. The Murray-Darling Basin Authority summarises the history of mismanagement of the Murray Darling system as follows:

*Since European settlement of the Basin, our use of its resources has focused on securing water for our domestic and agricultural needs. We had little understanding of the water needs of the natural environment, and as a result, water has been over-allocated for human use.*

Poor cross-jurisdictional management, over-allocation of water resources and declining ecosystem health underpins the National Water Initiative, State and Territory water laws and the Commonwealth's decision to introduce the *Water Act 2007*.

To ensure that water legislation achieves the core aim of sustainable management, it is critical that restrictions on water use are understood, enforced, and reviewed in light of changing climatic conditions. This requires:

- Allocations must be made on the basis of ecologically sustainable development principles.
- Investing in education programmes, such as those conducted by Landcare organisations, to raise awareness amongst farmers of legal responsibilities;
- Water management plans identifying environmental flow requirements must be regularly reviewed, and allocations amended where necessary to reflect changes in scientific knowledge and water availability;
- Ensuring surety levels in licences accurately reflect the hierarchy of water needs;
- Enforcement of record keeping obligations, as well as random audits to ensure records are accurate.

With installation of water meters, recording data and reporting on water use should not impose an excessive burden on farming businesses. EDOA supports offences for interfering with meters.<sup>11</sup>

- Strong, consistent enforcement action against licence holders not complying with water licence conditions.

A study undertaken by the Tasmanian Department of Primary Industries, Parks, Water and the Environment in 2013 revealed that, while licence holders generally comply with conditions, licence holders had little motivation to comply with allocation limits or to record volumes taken in catchments seen to have an abundant water supply.<sup>12</sup> Given increasing vulnerability of water supplies to climate change, it is critical that regulators obtain accurate, timely data to manage

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<sup>11</sup> See, for example, s.228 of the *Water Management Act 1999* (Tas)

<sup>12</sup> DPIPWE. 2013. *Water Compliance Stakeholder Analysis April 2013*. Available at [www.dpipwe.tas.gov.au/water/water-licences/our-water-our-future](http://www.dpipwe.tas.gov.au/water/water-licences/our-water-our-future) (accessed 20 February 2016).

water resources in all catchments (even those that are not currently experiencing scarcity).

In Queensland, the *Water Reform and Other Legislation Amendment Act 2014* introduced an exemption allowing mining and coal resource projects to take unlimited groundwater needed to access their resource without obtaining a licence. Without licence requirements, there are also no opportunities for community objections challenging the veracity of groundwater modelling.

This concerning amendment, though not yet commenced, has yet to be repealed by the current government.

If the amendment proceeds, large scale mines proposed for the Galilee Basin, such as the Carmichael mine,<sup>13</sup> Kevin's Corner mine<sup>14</sup> and Alpha mine,<sup>15</sup> will not be required to obtain water licences, despite numerous concerns raised regarding the groundwater impacts of these operations.<sup>16</sup> Without the water licence framework to act as a check and balance prior to associated water being taken by the mine, the government cannot adequately manage a State's water resources.

### ***Dam construction***

All States and Territories have legislation regulating the construction and operation of water storages.

Regulation of dam construction is essential not only to ensure safety and avoid incidents of dam collapse, but to make sure that the environmental impacts of the dam are rigorously assessed – including changes to aquatic ecosystems as a result of interruption or diversion of flow and disturbance of habitat.

Most legislation provides exemptions for small off-stream dams where no threatened species will be affected, so regulatory requirements are imposed only where the impacts of the proposed dam are likely to be considerable.

For example, recent amendments to the *Water Management Act 1999* (Tas) have created a category of low-risk dams that can be constructed without formal assessment, provided evidence is submitted demonstrating compliance with minimum standards. The relevant authority is able to “call in” a dam for further assessment if the material submitted is inadequate or raises concerns. These changes have both streamlined the assessment process, and improved the level of information held by the Department – this is an example of regulatory amendments that have improved efficiency while maintaining (potentially, improving) environmental outcomes in respect of small farm dams.

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<sup>13</sup> <http://www.statedevelopment.qld.gov.au/assessments-and-approvals/carmichael-coal-mine-and-rail-project.html>, involving 60 million tonnes per annum of coal production .

<sup>14</sup> <http://www.statedevelopment.qld.gov.au/assessments-and-approvals/kevin-s-corner-project.html>, involving 30 million tonnes per annum of coal production.

<sup>15</sup> <http://www.statedevelopment.qld.gov.au/assessments-and-approvals/alpha-coal-project.html>, involving 30 million tonnes per annum of coal production.

<sup>16</sup> [http://www.courts.qld.gov.au/\\_data/assets/pdf\\_file/0009/272349/MRA082-13-etc-4-12.pdf](http://www.courts.qld.gov.au/_data/assets/pdf_file/0009/272349/MRA082-13-etc-4-12.pdf)

However, two key criticisms of the *Water Management Act 1999* (Tas) remain.

Firstly, while environmental, socio-economic and engineering factors must all be considered in determining whether to authorise a dam, no hierarchy exists to ensure that environmental impacts are not overridden by socio-economic arguments.

Secondly, though the Act provides for an “interested person” to appeal against a decision to approve a dam, s.276 of the Act prevents any appeal that seeks to challenge any economic, engineering or scientific information relied on by the regulator. This imposes an unnecessary restriction that compromises the opportunities for any person, including other downstream water users, to question the environmental impacts that the dam will have.

Given the significance to farming communities of maintaining water supplies and water quality, EDOA recommends that all allocation and dam construction decisions be required to demonstrate that adequate environmental flows will be retained, and that these decisions be open to challenge by interested third parties.

In summary, clear and often prescriptive regulation of water use, storage and management is absolutely essential to ensure healthy, resilient and productive agricultural landscapes.

## **2. Vegetation clearance**

EDOA is strongly of the view that rigorous land clearing laws are necessary to ensure that Australia meets its international obligations both to protect biodiversity and to minimise carbon emissions. Land clearing also has long-term consequences for a productive agricultural sector. As Maron et al point out:

*Land clearing is the main cause of biodiversity loss. It also exacerbates erosion and salinity, reduces water quality, worsens the impacts of drought, and contributes significantly to carbon emissions. Indeed, vegetation protection laws enabled Australia to meet its Kyoto Protocol target for emissions reductions.*<sup>17</sup>

NSW and Queensland have experienced significant changes in land clearing laws in recent years. Their experiences provide clear examples of relaxed regulatory regimes accelerating clearing of native vegetation.

In Queensland, changes to the *Vegetation Management Act 1999* in 2013 removed restrictions on broadscale land clearing for agriculture, as well as protections for high-value regrowth on freehold and indigenous land.

For more analysis of the changes to the Queensland legislation, see the EDO Qld [submission to the \*Vegetation Management Framework Amendment Bill 2013\*](#).<sup>18</sup>

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<sup>17</sup> Maron, M et al. 2015. “Land clearing in Queensland Triples after Policy Ping Pong”. *The Conversation*. Available at <https://theconversation.com/land-clearing-in-queensland-triples-after-policy-ping-pong-38279> (accessed 20 February 2016)

<sup>18</sup> Available at <http://www.parliament.qld.gov.au/documents/committees/SDIIC/2013/10-VegetationMgmtFramewk/submissions/075.pdf>

The *Statewide Landcover and Trees Study*<sup>19</sup>, conducted by the Queensland government, confirm that 296,000 hectares of bushland was subsequently cleared in 2013-14, triple the volume of clearing recorded in 2008-09. The majority of the clearing was undertaken for conversion to pasture, with 35% occurring in catchments draining into the Great Barrier Reef. Clearing is also estimated to have removed over 40,000 hectares of koala habitat.<sup>20</sup>

In NSW, land clearing laws have long been controversial. Proposed repeal of the *Native Vegetation Act* in favour of self-assessment for land clearing on rural properties has re-enlivened debate about the “balance” needed natural values and agricultural production.<sup>21</sup> As the immediate past president of the NSW Young Farmers Federation, Josh Gilbert, recently stated:

*Without full appreciation of the value of native vegetation, this policy risks not only the repetition of past errors, but also of trading long-term profitability for short-sighted practices.*<sup>22</sup>

For more detail regarding the NSW vegetation clearing proposals, see legal analysis of environmental regulation undertaken for the NSW Biodiversity Legislation Review.<sup>23</sup>

In Tasmania, measures to restrict broadscale land clearing on private property, a commitment made under the *Regional Forest Agreement 1997*, were to take effect on 1 January 2015. The proposed amendment to the *Policy for Maintaining a Permanent Native Forest Estate* would have limited landowners to clearing 20 hectares every five years. In December 2014, these restrictions were deferred for 12 months and in December 2015 were deferred for a further 6 months. During this time, landowners are restricted to clearing 40 hectare per year. There has been no analysis to date of the volume or location of land cleared since the initial decision to defer tighter restrictions.

Government and agricultural proponents often point to rehabilitation work undertaken in rural areas to secure habitat, establish regrowth areas and stabilise farmlands. Maron et al highlight the unsustainability of this approach:

*Australia spends hundreds of millions of dollars each year trying to redress past environmental damage from land clearing. Tens of thousands of volunteers dedicate their time, money and land to the effort.*

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<sup>19</sup> Queensland Government. 2015. *Statewide Landcover and Trees Study* (SLATS). Available at <https://www.qld.gov.au/environment/land/vegetation/mapping/slats-reports/index.html#slats-most-recent-reports> (accessed 21 February 2016).

<sup>20</sup> See WWF. 2016. “More than 40,000 hectares of koala habitat cleared after Qld land clearing controls weakened”. Available at <http://www.wwf.org.au/?15660/More-than-40000-hectares-of-koala-habitat-cleared> (accessed 22 February 2016)

<sup>21</sup> NSW biodiversity laws have been reviewed and it is proposed to repeal key legislation including the Native vegetation Act and Threatened Species Act and replace these with a new Biodiversity Conservation Act. See: <http://www.environment.nsw.gov.au/biodiversitylegislation/review.htm>

<sup>22</sup> Gilbert, J. 2 February 2016. “Why I Quit Over Native Veg Laws’: Outgoing Chair of NSW Young Farmers Speaks Out”. *New Matilda*. Available at <https://newmatilda.com/2016/02/02/47884/> (accessed 19 February 2016)

<sup>23</sup> Available at [http://www.edonsw.org.au/farming\\_private\\_land\\_management\\_policy](http://www.edonsw.org.au/farming_private_land_management_policy)

*But despite undeniable local benefits of such programs, their contribution to national environmental goals is undone, sometimes many times over, by the damage being done in Queensland.*

*Take the federal government's 20 million trees program. At a cost of A\$50 million, it aims to replace 20 million trees by 2020 to redress some of the damage from past land clearing. Yet just one year of increased land clearing in Queensland has already removed many more trees than will be painstakingly planted during the entire program.<sup>24</sup>*

The CSIRO estimates that stabilising river-banks following deforestation can range from \$16,000 to \$5 million per kilometre<sup>25</sup>, and numerous other ecosystem services are often unquantified.

These examples demonstrate the environmental benefits, as well as the economic efficiency, of implementing laws to restrict land clearing rather than attempting to address the consequences of excessive vegetation loss at a later date. Furthermore, some losses resulting from land clearing will be irreversible and should be completely avoided.

### **Mapping**

A recent study by Robyn Bartel<sup>26</sup>, based on interviews with farmers in central northern New South Wales, indicated that, while most farmers appreciated the need to maintain vegetation, they were concerned about the accuracy of mapping and the universal application of the laws.<sup>27</sup>

These views are somewhat supported by a report validating vegetation mapping in the Greater Hunter Valley.<sup>28</sup> The report, by ecologist John Hunter, concluded that vegetation mapping used by the government was correct "less than 30% of the time."<sup>29</sup>

EDO strongly supports government investment in mapping tools to improve spatial data and enhance the accuracy of desktop analyses. Such mapping will be critical to ensure habitats are correctly identified and adequately protected. However, until such mapping is developed, and in the absence of clear contrary evidence as to the classification of particular vegetation, it is appropriate for regulators to adopt a precautionary approach to restrictions on land clearing.

In summary, regulation of land clearing is necessary, proportionate and critical to the long-term viability of agricultural productivity in Australia. Native vegetation

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<sup>24</sup> Maron M et al. 2016. "Queensland land clearing is undermining Australia's environmental progress". *The Conversation* Available at <https://theconversation.com/queensland-land-clearing-is-undermining-australias-environmental-progress-54882><https://theconversation.com/queensland-land-clearing-is-undermining-australias-environmental-progress-54882>

<sup>25</sup> Bartley, R. Henderson, A et al. 2015. *Stream bank management in the Great Barrier Reef catchments: A Handbook*. Available at <https://publications.csiro.au/rpr/download?pid=csiro:EP15849&dsid=DS1>

<sup>26</sup> Robyn Bartel, 'Vernacular knowledge and environmental law: cause and cure for regulatory failure' (2014) 19 *Local Environment* 8, 891 – 914.

<sup>27</sup> Bartel, 906.

<sup>28</sup> John T Hunter, 'Validation of the Greater Hunter Native Vegetation Mapping as it pertains to the Upper Hunter region of New South Wales' (2016) 17 *Ecological Management & Restoration* 1, 40-46.

<sup>29</sup> Hunter, 40.

laws have a demonstrated public benefit – not only for carbon sequestration, but also for ensuring soil and water quality, reducing salinity etc. While it is important for cooperative approaches to be adopted wherever possible, the government must enforce the necessary protections where cooperation and collaboration has failed to achieve an appropriate outcome.

As stated at the outset, we hope that the Productivity Commission's Discussion Paper will include a strong statement supporting the implementation of rigorous environmental regulation as a mechanism to secure long-term competitiveness and productivity of Australian agriculture.

### **3. Agricultural chemicals**

In July 2014, the *Agricultural and Veterinary Chemicals Legislation (Removing Re-approval and Re-registration) Amendment Act 2014* gave effect to the government's commitment to remove the requirement for agricultural chemicals to be periodically re-approved and re-registered.

At the time, EDOA (then ANEDO) raised a number of concerns regarding the change. The re-approval and re-registration conditions were introduced in 2013 in response to community concern regarding the proper regulation of chemical constituents and chemical products. The reversal of those conditions after less than 12 months was not supported by any evidence that the conditions imposed an unreasonable burden on the agricultural sector.

EDOA recommended not only the retention of the new conditions, but strengthening them to require the best available, peer-reviewed data on environmental impacts to be assessed as part of any re-approval determination.

EDOA maintains this position. For more details, read our [Submission regarding the Agriculture and Veterinary Chemicals Legislation Amendment \(Removing reapproval and re-registration\) Bill 2013](#).<sup>30</sup>

### **4. Feral animal and invasive species control**

EDOA recognises that the costs of controlling invasive species, weeds and feral animals can present difficulties for farmers. Environmental regulation of such species is an essential and cost effective measure to maintain and improve agricultural productivity. The Commonwealth Government has estimated that weeds cost Australian farmers around \$1.5 billion a year in weed control activities and a further \$2.5 billion a year in lost agricultural production, with similar costs to the environment.<sup>31</sup>

Fallow deer control in Tasmania presents another example of poor regulatory responses to the impacts of feral animals. The population of fallow deer, originally introduced to Tasmania for hunting, has expanded to an estimated 25,000 and is

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<sup>30</sup> Available at [http://www.edonsw.org.au/farming\\_private\\_land\\_management\\_policy](http://www.edonsw.org.au/farming_private_land_management_policy)

<sup>31</sup> Australian Government. Weeds in Australia. <http://www.environment.gov.au/biodiversity/invasive/weeds/weeds/why/impact.html>. See also the [CRC for Australian Weed Management Technical Series](#)

predicted to increase by up to 40% in the next decade. The impacts of the species on agricultural land, in wilderness areas and on other native species warrant strategic management.

However, the species is currently protected under the *Nature Conservation Act 2002* (Tas) and can only be taken in limited numbers under a permit. The current permitting system does not allow land managers to respond efficiently to the problems posed by deer. EDO Tasmania is regularly contacted by farmers and Landcare organisations troubled by the limited options available to deal with the species.

EDO Tasmania would support reclassification of the species under the *Wildlife (General) Regulations 2010* and extension of the crop protection permit bag limits. We would also support a strategic review of other options, including introducing a management plan allowing permit-free control by accredited landowners in designed areas of the State.

### **3. Planning and development**

The Issues Paper raises concerns regarding regulatory burdens imposed by planning schemes and development application requirements.

In general, planning plays a critical role in protecting good quality agricultural land from encroachment by incompatible uses. The planning regulations in most jurisdictions include agricultural zones which discourage (or explicitly prevent) non-agricultural uses and minimise opportunities to subdivide properties into lots that would not support viable agricultural units.

As outlined above, the benefits of these zoning protections can be overridden laws which allow mining and unconventional gas activities to be approved, often without the need for landowner consent and without opportunities for affected communities to challenge the decision.

A full analysis of the application of various planning regimes on agricultural land across Australia is beyond the scope of this submission. However, EDO offices have extensive experience in advising on planning issues<sup>32</sup> and would be happy to address any specific questions that the Commission has regarding this issue.

#### ***Changing land uses***

The Issues Paper also seeks comments on the “burden” presented by zoning restrictions that may “prevent diversification of on-farm activities into areas such as processing, tourism and retail”. Again, an analysis of the impacts of specific zoning restrictions is beyond the scope of this submission.

Rural residential zones in most planning schemes allow for some flexibility in relation to land uses that are complementary to agricultural uses (or, at least, not inconsistent with such uses). Scope exists to amend zoning of Rural / Significant Agricultural land to zones allowing greater flexibility.

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<sup>32</sup> See Attachment 1 for examples of submissions regarding relevant planning issues.

However, EDOA submits that:

- Any removal of land from an agricultural zone should only be authorised where there is clear evidence that the land is not viable as an agricultural unit or that the proposed use will not compromise the long-term agricultural potential of the land. In assessing whether land is “viable”, a broad range of uses must be considered, including small-scale / boutique produce.
- It is important to consider whether enabling a broader range of land uses may lead to land use conflict that ultimately reduces the productivity of agricultural land. This is discussed more below.

### ***Right to farm vs good planning***

Anecdotally, there can be financial and other impacts on farmers in dealing with complaints from neighbours regarding noise, dust and spray from farming businesses. In some jurisdictions, “right to farm” legislation, such as the *Primary Industries Activities Protection Act 1995* (Tas), has been introduced to restrict the legal options available to neighbours alleging nuisance from a farming operation. The Tasmanian government has recently announced that it intends to further strengthen that Act, however the details of any proposed amendments are yet to be released.

EDOA believes that land use conflicts are more effectively addressed through improvements to the planning system than in specific legislation restricting nuisance actions.

EDOA appreciates that farmers may consider land subdivision and development as a way to supplement farming income. However, such actions can effectively contribute to land use conflict problems – by protecting a farmer who invites residential development against the land use conflicts such development may create (such as complaints regarding farming practices), “right to farm” legislation does little to encourage sound strategic planning to manage such conflicts.

It is also important that any immunity from nuisance action is confined to activities that pre-date the introduction of conflicting land uses. That is, a farmer cannot significantly increase the intensity or duration of farming operations and expect a neighbouring owner not to complain.

Perversely, ‘right to farm’ legislation has been used by a farmer in support of an application to subdivide rural land<sup>33</sup>, on the basis that existing farming activities would not be impacted as the legislation would prevent new residents from taking nuisance action. In that case, the Tribunal considered it inappropriate to introduce a conflicting land use into the area:

*The Tribunal finds... that use of the existing 60 hectare lot for farming purposes is already inhibited to an appreciable degree by the existence of the residences to the west.*

*Activities such as spraying can occur without troubling persons in those residences while the wind is blowing to the general east. Placing a further residence at the north-eastern corner of*

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<sup>33</sup> *Williams Davies v Devonport City Council* [2002] TASRMPAT 145

*and immediately adjacent to the part of the parent site which is presently used for agriculture and where there is no reason to suppose it will not be used for that purpose in the future, will further limit the conditions in which activities such as spraying can occur. In that way it will tend to inhibit the use of the agricultural land on the remainder of the lot, and in the same way potentially inhibit the use of the agricultural land to the east, for agricultural purposes.*

*To allow a subdivision having a significant potential for such an effect would lessen the utility of the rural land for the purposes for which the Tribunal considers the Scheme is likely to have zoned it Rural. For that reason alone the Tribunal considers that the discretion provided by the Planning Scheme should be exercised so as to refuse the application.*

This decision highlights the role of the planning system, including Tribunal review, in protecting agricultural land uses and enhancing the long-term competitiveness of farming operations.

### **Strategic and regional planning**

Good regional strategic planning can effectively reduce land-use conflicts, as well as streamlining assessment and approval processes. The Hawke Review noted that strategic and bioregional planning provisions in the EPBC Act were under-utilised and recommended that their role be expanded.<sup>34</sup>

EDO strongly recommends that strategic and regional planning be explored as a mechanism to reduce duplication of assessment requirements. Regional planning could consider land use competition at a regional scale, identify areas where key activities, such as agriculture, are to be encouraged (and other, conflicting uses, discouraged or prohibited) and allow those activities to proceed with minimal further assessment requirements provided standards set out in the plan are met.

However, reliance on strategic planning must be in the context of supporting recommendations made by the Hawke Review, including:

- strengthening the process for creating plans, so they are more substantial and robust;
- allowing the Commonwealth to unilaterally develop regional plans;
- specifying mandatory required information for strategic assessments;
- requiring any class of actions endorsed in accordance a strategic plan to demonstrate that they will “improve or maintain” the natural values of the land;
- enhance provision for public engagement;
- allow activities likely to have a significant impact on a matter of national environmental significance to be “called in” by the Commonwealth Minister where the strategic plan is inadequate to assess those impacts;

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<sup>34</sup> Recommendation 6, Hawke Review, n5

- for creation of a broad performance audit power to assess the performance of accredited systems

In relation to public engagement, it is important that regional planning processes (and decisions about resulting development) are participatory, transparent, open and accountable. For example, engagement opportunities provided under the NSW planning system are not always equitable<sup>35</sup> and efforts need to be made to ensure all those potentially affected by a decision are able to have their say. This is discussed below in Part 4.

#### **4. Other matters**

This Part briefly discusses regulatory and policy issues relevant to agricultural productivity and competitiveness. We would be happy to elaborate on any of these issues at the Commission's request.

##### ***Diversifying income***

Rather than imposing a financial burden, a number of environmental and planning regulations have presented a range of opportunities for farmers to diversify their incomes, often in ways which have direct or indirect benefits for the environment. These include:

- Creating and regulating markets for carbon storage and vegetation offsets
- Biobanking and other biodiversity offset programmes
- Conservation covenants and land management agreements that provide financial incentives for conservation efforts
- Emissions reduction programmes, including the Carbon Farming Initiative and Emission Reduction Fund projects
- Co-generation and biofuel opportunities for crop waste

##### ***Landcare***

As outlined in Part 2, efforts to rehabilitate land are generally less cost effective than implementing management practices to avoid adverse impacts. However, Landcare and Caring for Our Country programmes have provided high-quality, cost effective assistance to farming businesses across the country.

EDOA strongly recommends government action to restore funding to Landcare organisations in recognition of their role in educating farmers and implementing cost-effective measures to improve farm productivity and minimise environmental impacts.

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<sup>35</sup> EDO NSW [Submission on the Draft Exploration Code of Practice: Community Consultation](#), Nov. 2015; see also EDO NSW, 'Community engagement and landholder rights' in [A review of NSW Coal Seam Gas Regulation and Best Practice](#), pp 4-6, Dec. 2014.

### ***Cooperation vs regulation***

As outlined in Part 2, there are benefits to flexible and cooperative approaches in dealing with agricultural land. However, faced with a changing climate, harsh economic conditions and the desire for short-term gains, cooperative approaches will not always be sufficient to encourage actions to secure long-term environmental outcomes.

EDOs of Australia do not believe that a consensual framework is workable or appropriate for regulating actions that will have a significant impact on the environment. We have consistently argued that high-impact development must be regulated by rigorous environmental laws underpinned by the principles of ecologically sustainable development and subject to judicial review.

By way of contrast, consensual arrangements are likely to lack rigour, to be arbitrary in nature and unenforceable.

### ***Public participation***

EDO offices across Australia represent many farming clients in their efforts to prevent land use conflict and minimise incursion onto, and pollution of, agricultural resources. Laws which provide opportunities for farmers' views to be heard in relation to planning and development decisions are critical to achieving these aims.

EDOA is a strong proponent of merits appeal rights for third parties. These rights can deliver better environmental outcomes while increasing the transparency and accountability of decision-making (legislative checks and balances exist to avoid vexatious litigation). For this reason, ICAC recommended third party merit appeal rights be expanded in its submissions to the NSW Planning Review.<sup>36</sup>

EDOA is also an advocate for 'open standing' to enforce the law and seek judicial review. Restrictions on standing in the mining legislation in many States and Territories has had adverse implications for regional communities, often limiting those able to object to unconventional gas proposals to owners of land on which wells are proposed to be located, rather than downstream owners concerned about impacts on groundwater.

For example, EDO Qld was pleased that the *Mineral and Other Legislation Amendment Bill 2016*, introduced on 22 February 2016, seeks to restore community objection rights to mining proposals. Further improvements to the objection process will be needed to ensure that landholders can raise concerns and challenge decisions that could compromise the long-term sustainability of their agricultural land uses, particularly with respect to water resources.<sup>37</sup>

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<sup>36</sup> See ICAC, *Anti-corruption safeguards in the NSW planning system* (2012) recommendation 16.

<sup>37</sup> [Submission to Mineral and Energy Resources \(Common Provisions\) Bill 2014](#); [Submission to Water Legislation Amendment Bill 2016](#)

## **Attachment 1: EDO submissions**

The following submissions may be relevant to the Productivity Commission's Inquiry:

### **EPBC Act and the One Stop Shop**

[Objections to the proposal for an environmental 'one stop shop' \(2014\)](#)

[Submission to Senate Committee Inquiry regarding EPBC \(Bilateral Agreement Implementation\) Bill 2014](#)

Other submissions and briefing notes concerning the EPBC Act are available online at: [http://www.edonsw.org.au/native\\_plants\\_animals\\_policy](http://www.edonsw.org.au/native_plants_animals_policy)

### **Water Management**

Briefing note on the [Water Amendment \(Review Implementation and Other Measures Bill\) 2015](#)

[Inquiry into the social, economic and environmental impacts of the Murray-Darling Basin Plan](#)

[Submission to the Murray-Darling Basin Authority on the draft Basin-wide Environmental Watering Strategy](#)

[Environmental Water Recovery Strategy for the Murray-Darling Basin \(Recovery Strategy\)](#)

[Submission on the proposed Murray-Darling Basin Plan](#)

[Submission to Water Legislation Amendment Bill 2016](#): EDO Qld

Other submissions and briefing notes concerning water law and policy are available online at: <http://www.edo.org.au/water1>

### **Land Clearing**

[Draft 10/50 Vegetation Clearance Code of Practice](#)

[Draft Landholder Guides and Draft Orders to implement self-assessable codes under the Native Vegetation Regulation 2013](#)

Other briefing notes and submissions are available at [http://www.edonsw.org.au/farming\\_private\\_land\\_management\\_policy](http://www.edonsw.org.au/farming_private_land_management_policy)

### **Agricultural Chemicals**

[Submission regarding the Agriculture and Veterinary Chemicals Legislation Amendment \(Removing reapproval and re-registration\) Bill 2014](#)

## **Planning**

[Submission to Productivity Commission Inquiry into Major Development Assessment Processes](#): EDOA

[Scorecard for Queensland Planning reform](#): EDO Qld

[Submission to \*Regional Planning Interests Bill 2013\*](#): EDO Qld

[Comments on Tasmanian Planning Reform Position Paper](#): EDO Tasmania

[Comments on proposed changes to SA's Planning Laws](#): EDO SA

EDO NSW submissions regarding land use conflict between mining and farming are available at [http://www.edonsw.org.au/mining\\_coal\\_seam\\_gas\\_policy](http://www.edonsw.org.au/mining_coal_seam_gas_policy)