



**EDOs of Australia**

## **Inquiry into shark mitigation and deterrent measures**

**3 March 2017**

EDOs of Australia (formerly ANEDO, the Australian Network of Environmental Defender's Offices) consists of eight independently constituted and managed community legal centres located across the States and Territories.

Each EDO is dedicated to protecting the environment in the public interest. EDOs:

- provide legal representation and advice,
- take an active role in environmental law reform and policy formulation, and
- offer a significant education program designed to facilitate public participation in environmental decision making.

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## Introduction

Environmental Defenders Offices of Australia (**EDOA**) welcomes the opportunity to provide input to the Inquiry into shark mitigation and deterrent measures.

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- provide legal representation and advice,
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Given our specific expertise, our comments to this Inquiry focus on the following Term of Reference:

*(b) the regulation of mitigation and deterrent measures under the Environment Protection and Biodiversity Conservation Act 1999, including exemptions from a controlled action under section 158;*

## Context

Despite the wide variety of non-lethal shark mitigation and deterrent measures available to manage interactions between sharks and humans, a number of Australian jurisdictions continue to focus on shark culls as a key mitigation measure. This approach continues despite a lack of evidence of a causal link between the implementation of shark cull programs and a reduction in shark fatalities.

In contrast, there is clear evidence that shark cull measures impact on species that are protected under the *Environment Protection and Biodiversity Conservation Act 1999* (**EPBC Act**). The vulnerable Great White Shark (*Carcharodon carcharias*) is targeted by shark cull programs. Many other threatened, protected and migratory species are also impacted, including the critically endangered east coast population of Grey Nurse Shark (*Carcharias taurus*), turtles and cetaceans. For example, in the 2015-16 summer period the NSW shark netting program operating off beaches between Newcastle and Wollongong captured 748 animals and killed 21 Great White Sharks, five Grey Nurse Sharks, 14 dolphins, and 19 turtles. In the two months of operation from 8 December 2016 to 7 February 2017, the *NSW North Coast Shark Meshing Trial* has killed two bottlenose dolphins, three turtles and one Great White Shark with an additional five turtles and one Great White Shark released alive although their fate remains unknown.

These impacts continue despite the lack of any environmental assessment under either federal or state legislation.

## Historical shark cull measures

Shark meshing in NSW and shark meshing and drum lines in Queensland were operating prior to the introduction of the EPBC Act. In previous correspondence with EDO NSW, both the Commonwealth and NSW State Governments have asserted that the NSW shark meshing activities operating prior to 2016 and currently are not subject to assessment under the EPBC Act due to section 43B of the EPBC Act, namely:

### **43B Actions which are lawful continuations of use of land etc.**

*(1) A person may take an action described in a provision of Part 3 without an approval under Part 9 for the purposes of the provision if the action is a lawful continuation of a use of **land, sea or seabed** that was occurring immediately before the commencement of this Act.*

*(2) However, subsection (1) does not apply to an action if:*

*(a) before the commencement of this Act, the action was authorised by a specific environmental authorisation; and*

*(b) at the time the action is taken, the specific environmental authorisation continues to be in force.*

*Note: In that case, [section 43A](#) applies instead.*

*(3) For the purposes of this section, neither of the following is a **continuation** of a use of **land, sea or seabed**:*

*(a) an enlargement, expansion or intensification of use;*

*(b) either:*

*(i) any change in the location of where the use of the land, sea or seabed is occurring; or*

*(ii) any change in the nature of the activities comprising the use;*

*that results in a substantial increase in the impact of the use on the land, sea or seabed.*

As such these programs have not been subject to assessment under modern environmental standards. Our current state of knowledge in relation to the importance of sharks in the marine environment and the environmental harm caused by these activities, makes it inappropriate to continuing to rely on these exemptions. **We therefore recommend that full environmental assessment that considers both the environmental impact and alternative beach safety measures should be undertaken for historical shark cull measures.**

## Recently introduced shark cull measures

Since 2014, both WA and NSW have introduced new shark cull measures. None of these measures have been subject to full environmental assessment prior to implementation under either federal or state legislation.

### *Federal Environmental Assessment*

For the shark cull measures introduced since 2014, both WA and NSW have applied for, and been granted, exemptions to federal environmental assessment requirements under section 158 of the EPBC Act. The relevant provision states:

#### **158 Exemptions from Part 3 and this Chapter**

- (1) A person proposing to take a controlled action, or the designated proponent of an action, may apply in writing to the Minister for an exemption from a specified provision of Part 3 or of this Chapter...*
- (3) The Minister may, by written notice, exempt a specified person from the application of a specified provision of Part 3 or of this Chapter in relation to a specified action.*
- (4) The Minister may do so only if he or she is satisfied that it is in the national interest that the provision not apply in relation to the person or the action.*
- (5) In determining the national interest, the Minister may consider Australia's defence or security or a national emergency. This does not limit the matters the Minister may consider...*

**Appendix 1** shows that up until 2014, use of these exemptions were extremely rare and were most often used to protect threatened species at immediate risk of harm or for emergency responses in disaster situations. However, over the last three years, the Federal Environment Minister has granted an exemption from federal laws to allow a State Government to target protected sharks on three occasions - to authorise the WA Government's shark cull off Perth and South West WA beaches and more recently to approve the NSW shark cull. We note that all exemptions programs have been approved for fixed periods.

Consequently, none of these programs have been subject to assessment under present environmental standards. It is important that these exceptional circumstances do not continue without the usual legal checks and balances enshrined in our environmental laws. **We therefore recommend that any proposal for the ongoing use of shark cull measures or for further short term shark culls, should undergo a thorough environmental assessment, and not be permitted to continue under an exemption to federal laws.**

## *NSW Environmental Assessment*

It is equally concerning that NSW introduced legislative changes to specifically over-ride existing legislative environmental assessment requirements to allow their current shark cull trial to proceed.

On 15 November 2016 the NSW Parliament passed the *Fisheries Management Amendment (Shark Management Trials) Bill 2016*. The Bill inserted a new Schedule 6D into the *Fisheries Management Act 1994* (NSW) (**Fisheries Act**) to facilitate shark management trials in NSW by way of plan of management to be approved by the Minister for Primary Industries. This effectively bypasses environmental assessment of the trials that would otherwise have been required under NSW planning and fisheries legislation.

Clause 9 of Schedule 6D to the Fisheries Act provides that a shark trial authorised by the Management Plan requires no other consent, approval, licence, permit or authorisation under any other law. Further, clause 14 provides that the open standing provision of the Fisheries Act does not apply to a breach or apprehended breach of Schedule 6D of the Fisheries Act. This means that there are no statutory third party civil enforcement rights in relation to the activities authorised under Schedule 6D of the Fisheries Act or the Management Plan.

We also note that Schedule 6D of the Fisheries Act is subject to a five year sunset clause, after which the Schedule is repealed. The Minister may authorise multiple shark management trials within the 5 year period (see clause 3-4 of Schedule 6D to the Fisheries Act).

The *NSW North Coast Shark Meshing Trial*<sup>1</sup> allows for the use of up to 10 shark nets in the trial area over a twelve month period at coastal beaches and other tidal waters in the Ballina Shire and Richmond Valley Councils Local Government Areas. All 10 nets may be used at any one time in the trial area and nets cannot be used for a total period of more than six months under the Trial.

## *WA Environmental Assessment*

The shark cull program implemented by WA in 2014, known as the *Shark Drum Line Deployment, Management and Associated Services*<sup>2</sup>, involved the deployment of up to 72 baited drum lines and rapid response within marine monitoring areas in the metropolitan and the South West regions from 25 January 2014 until 30 April 2014. Relevant personnel were granted exemptions to harm protected species under the *Fish Resources Management Act 1994* and, where necessary, licences under *Wildlife Conservation Act 1950* and *Wildlife Conservation Regulations 1970*.<sup>3</sup> The program was also referred to the WA Environmental Protection Authority (**EPA**) in line with the legislative requirements.

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<sup>1</sup> <http://www.dpi.nsw.gov.au/fishing/sharks/management/shark-net-trial>.

<sup>2</sup> <http://www.epa.wa.gov.au/proposals/shark-drum-line-deployment-management-and-associated-services>.

<sup>3</sup> <https://www.dpc.wa.gov.au/Publications/Documents/Review%20-%20Western%20Australia%20Shark%20Hazard%20Mitigation%20Drum%20Line%20Program%202013-14.pdf>

The EPA concluded it would not formally assess the program, based largely on the limited timeframe and small scale of the program, and that the program could proceed.

In contrast, when the WA Government referred the subsequent *Western Australian Shark Hazard Mitigation Drum Line Program 2014-2017*<sup>4</sup> to the EPA, the EPA concluded that the proposal should not be implemented due to the risk of harm to marine fauna. It is notable that when the WA shark cull program was properly assessed it was not found to be allowable. The WA Government subsequently chose not to implement the program.

Since withdrawing the drum line proposal, the WA Government has implemented *Guidelines for Taking Sharks Posing a Serious Threat to Public Safety*.<sup>5</sup> These Guidelines “describe the circumstances in which consideration is to be given to the setting of capture gear to take a shark posing a serious threat to public safety”. The WA Government has applied for, and be granted, one exemption under section 158 of the EPBC Act to date.

## **Conclusion**

It is inappropriate for programs with questionable efficacy that are known to impact on threatened and protected species, to be able to continue to operate and expand without comprehensive environmental assessment, including full consideration of alternative measures. Given the lack of knowledge about the extent to which many of these species can withstand the loss arising from shark culls the ongoing use of s158 exemptions to allow shark culls is inappropriate. **We therefore recommend that all existing shark cull measures and any new proposals should be subject to full and rigorous environmental assessment.**

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<sup>4</sup> <http://www.epa.wa.gov.au/proposals/western-australian-shark-hazard-mitigation-drum-line-program-2014-2017>.

<sup>5</sup> [http://www.fish.wa.gov.au/Documents/shark\\_hazard/guidelines\\_for\\_taking\\_sharks\\_posing\\_a\\_serious\\_threat\\_to\\_public\\_safety.pdf](http://www.fish.wa.gov.au/Documents/shark_hazard/guidelines_for_taking_sharks_posing_a_serious_threat_to_public_safety.pdf).

## Appendix 1 – List of exemptions granted under section 158 of the EPBC Act<sup>6</sup>

Date exemption granted	Project title	Description of Activity exempted	Length of exemption
16/11/16	North Coast Shark Meshing Trial, New South Wales	The New South Wales North Coast Shark Meshing Trial undertaken in accordance with the <i>Management Plan for the NSW North Coast Shark Meshing Trial</i> (14 November 2016).	12 months from the date of commencement
17/05/2016	Dispersal of the Grey-headed Flying Fox camps, Batemans Bay, NSW	The exemption permits the dispersal, by non-lethal methods, of the Grey-headed Flying Fox (GHFF) camps at Batemans Bay and associated vegetation management plan to reduce the number of GHFF (approximately 120,000) from residing in areas where noise, smell and droppings are significantly impacting on the health of people in the local area. Exemption applies only to dispersal activities that occur outside the vulnerable period (being the period where pregnant females and dependant young are most vulnerable).	Until 31 December 2016
2/10/2014	The deployment of fishing gear in WA state waters to catch a shark posing an imminent threat to public safety	The proposed action comprised the deployment of fishing gear by Western Australian Department of Fisheries staff, for a period of not more than three days, to attempt to capture and destroy the shark responsible for attack in Esperance, Wylie Bay 2 October 2014.	5/10/2014 (3 days)
3/09/2014	The exemption to capture, remove and establish a captive colony of Bramble Cay melomys ( <i>Melomys rubicola</i> ) from Bramble Cay, Queensland	Bramble Cay melomys, <i>Melomys rubicola</i> , is listed as endangered under the EPBC Act. The action proposed is to capture, remove and establish a captive colony of Bramble Cay melomys from Bramble Cay at the University of Queensland under a Captive Breeding Agreement between the Queensland Government and the University. It is proposed that the captive colony will be the source for a long term translocation programme to re-establish the Bramble Cay melomys back into the wild following threats of extinction and the need for emergency conservation.	

<sup>6</sup> Full information available at: <http://epbcnotices.environment.gov.au/exemptionnotices/>.

Date exemption granted	Project title	Description of Activity exempted	Length of exemption
26/06/2014	Establishment and operation of a captive management program for the Christmas Island Flying-fox.	Christmas Island Flying-fox is listed as critically endangered under the EPBC Act and is endemic to Christmas Island. Establishment and operation of a captive management program for the Christmas Island Flying-fox which attempts to prevent the population of the Flying-fox from further declining and allow investigation of threats and reproductive biology of the specie to inform future development of a captive management program.	
6/03/2014	Exemption for maritime environmental emergencies in accordance with the National Plan for Maritime Environmental Emergencies	<p>Exempt action or actions undertaken by any persons managing or responding to maritime environmental emergencies in accordance with the National Plan for Maritime Environmental Emergencies.</p> <p>National Plan defines a 'maritime environmental emergency' as the potential or actual pollution of the sea or harm to the marine environment by oil or other hazardous and noxious substances.</p> <p>This was made in response to a revoking of the previous exemption of action or actions undertaken by persons acting in accordance with the National Plan to Combat Pollution of the Sea by Oil and Other Noxious and Hazardous Substances (<b>Old Plan</b>) from the application of all of the provisions of Part 3 of the EPBC Act. The Old Plan was replaced on 5 March 2014 by the National Plan.</p>	
6/03/2014	Revocation of exemption dated 28 August 2000 relating to <b>Old Plan</b> .	See above.	6/03/2014
10/01/2014	The setting of up to seventy two (72) baited drum lines each with a single approximately size 25/0 hook, in Western Australian state waters, and management of those lines	The setting of 72 baited drum lines and management of those lines in accordance with Schedule 2 and Addendum 1 Request for Tender DPC 1596 (Shark Drum Line Deployment, Management and Associated Services). Drum lines based 1km off 8 heavily utilised WA beaches. Monitoring of drum lines 12 hours per day and any shark under 3m and still alive would be released.	
17/04/2011	Remediation of Flood Damage to the Warrego Highway near Marburg Range, QLD	Permits the repair of culverts and earth embankments damaged during the heavy QLD floods.	
06/09/2009	The drilling of a relief well (and all	Drilling of relief well permitted.	



Date exemption granted	Project title	Description of Activity exempted	Length of exemption
	associated activities) in production licence AC/L7 or AC/L8 to stop the current uncontrolled flow of oil, gas and condensate from the Montara H1 well		
07/07/2009	Captive breeding program for Christmas Island Pipistrelle	Establishment and operation of captive breeding program for Christmas Island Pipistrelle including: <ul style="list-style-type: none"> <li>- capture of animals to create breeding colony;</li> <li>- captive husbandry within colonies; and</li> <li>- release back into natural habitat.</li> </ul> Pipistrelle is endangered and numbers declined rapidly.	
07/07/2009	Establishment and operation of captive breeding program for Christmas Island Blue Tailed Skink and Christmas Island Forest Skink	Establishment and operation of captive breeding program which includes: <ul style="list-style-type: none"> <li>- capture of animals to create breeding colony;</li> <li>- captive husbandry within colonies; and</li> <li>- release back into natural habitat on Christmas Island.</li> </ul>	
11/02/2009	All actions taken in response to current severe bushfires in VIC including but not limited to clearance of vegetation, building of fire breaks and back burning.	All actions taken in response to current severe bushfires in Victoria including but not limited to clearance of vegetation, building of fire breaks and back burning in response to unprecedented fires constituting national emergency.	
7/11/2007	Release of water from Lake Crescent TAS for essential human needs and stock	Release of up to 2000ML of water from Lake Crescent Tasmania for purpose of critical human need including town supply, domestic supply for riparian land holders, for stock and possible firefighting.	31 May 2008
10/08/2004	Consolidation in 2004 of science and technology activities supporting Australian Defence	Consolidation in 2004 of science and technology activities supporting Australian Defence Force.	

Date exemption granted	Project title	Description of Activity exempted	Length of exemption
	Force.		
03/04/2002	Commonwealth urban and commercial new development/ Christmas Island/ Immigration Reception and Processing Centre and associated Infrastructure	Establishment and operation of an Immigration Reception and Processing Centre together with associated services and infrastructure to account for the expect influx of asylum seekers to the centre over the coming months. Infrastructure was not adequate.	
03/04/2002	To develop an immigration reception and processing centre and associated infrastructure	Construction and design of necessary infrastructure, construction of additional housing, works associated with laying and operation of cables, pipes and other infrastructure and constriction of temporary camp.	
21/10/2000	South Australian Minister for Primary Industries and Resources/ Agriculture/South Australia/Spring-Summer 2000-2001 Australian plague locust control program	Plague locust control program to protect the State's cereal and grape crops from the threat of destruction by the Australian plague locust. The threat of losses to the State's agricultural and pastoral industry from the plague locust during this spring/summer period is significant in both economic and social terms. Actions taken under the Program contain measures to protect the environment through the use of appropriate non-sprayed buffer zones around areas of environmental sensitivity, including endangered species locations and areas of national environmental significance known to occur within the planned areas of operation.	