



EDOs of Australia

Submission to the Independent review of interactions between the EPBC Act and the agriculture sector

20 June 2018

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

EDOs of Australia (**EDOA**) is a network of community legal centres specialising in public interest environmental law. Our offices service clients – including rural and regional community groups and farmers – located across Australia. We therefore support evidence-based laws and policies that guarantee the long-term, sustainable management of our natural resources such as native vegetation *and* promote sustainable regional development.

Proposals to clear native vegetation for agricultural expansion often intersect with environmental laws and permits (but not always federal laws). This is because habitat loss and modification from land-clearing is recognised as a key threatening process to biodiversity, including flora and fauna that is threatened with extinction. EDOA and individual offices have made extensive submissions on the regulation of native vegetation clearing at both state/territory and at the national level under the *Environment Protection & Biodiversity Conservation Act 1999* (**EPBC Act**). Our submissions are available online.¹

This submission draws on our body of work and addresses the following issues:

- 1. Impacts of native vegetation clearing and the need for regulation**
- 2. Evidence base for the inquiry - current application of the EPBC Act**
- 3. A national role in native vegetation management**
- 4. Benefits and protections for landholders**
- 5. Statutory review of the EPBC Act**
- 6. Recommendations**
- 7. Further references**

In summary, there is no evidence that the EPBC Act places an undue regulatory burden on landholders. The data in fact suggests that significant land clearing is actually an *under-regulated* area of national laws, due to a low number of referrals, an even lower number of federal assessments, and the lack of a national coordinated picture of cumulative impacts.

Given this fact, we do not recommend any legislative amendment as part of this review, but rather that increased resources be provided to assist landholders to understand the legislation and understand the rare situations when the Act may apply, and when it will not. Instead of shrinking from the field of environmental regulation, the Commonwealth should aim to better explain and coordinate assessment requirements with its state agency counterparts, for easier on-farm understanding. All jurisdictions should also address the systemic under-investment in natural resource management, so that environmental information is comprehensive, accurate and accessible to landholders; good stewardship is rewarded; and the multiple private and public values of native vegetation are recognised.

The upcoming statutory review of the EPBC Act will provide a more comprehensive opportunity to consider amendments to strengthen the Act, to better address critical challenges like inappropriate clearing of nationally significant native vegetation.

Thank you for the opportunity to speak to consultants assisting the review.

¹ See: www.edonsw.org.au and www.edo.org.au.

1. Impacts of native vegetation clearing and the need for regulation

The 2016 State of the Environment Report (SOE) states “vegetation is fundamental to ecosystem health and human survival.”² It notes “land clearing represents a fundamental pressure on the land environment, causing loss and fragmentation of native vegetation. Depending on subsequent management, land clearing can also lead to a variety of impacts on soils, including erosion and loss of nutrients... and causes major changes to the hydrological cycle, including dryland salinity.”³ It concludes “land clearing, although declining, is still a significant cause of environmental disturbance across Australia, particularly in Queensland”,⁴ and classifies the continued decline of native vegetation extent and connectivity as an “almost certain, major” risk.⁵

To put this technical assessment in context, Australia’s rates of deforestation are amongst the worst in the world.⁶ As a wealthy nation with a clean, green image, this is at odds with how we present ourselves to the world, and with how many farmers see themselves, as stewards of the land. WWF estimates that some 964 of the 1,250 threatened Australian terrestrial animal species are particularly susceptible to habitat fragmentation or degradation, while the same is true for 286 of the 390 threatened plant species.⁷

Given the scale of the threat and the challenge to ensure healthy biodiversity, soil, water and landscapes across Australia, it is entirely appropriate for the Commonwealth to enact legislation to regulate certain classes of development – particularly those that contribute to key threatening processes.

Indeed, the SOE process has long-recognised that “[o]ur environment is a national issue requiring national leadership and action at all levels.”⁸ Focussed, results-driven national leadership is impossible without an appropriate legislative framework. The cornerstone of this framework is the EPBC Act.

2. Evidence base for the inquiry - current application of the EPBC Act

As EDO NSW stated at the consultation discussion for this inquiry, there is no hard evidence to suggest the agriculture sector is unduly burdened by EPBC Act requirements. Publicly accessible information is difficult to search and navigate on the Department of Environment and Energy’s website. However, analysis of all referrals based on the available information suggests that only around 99 out of over 6,000 referrals have been for agriculture (around 1.65 percent of all referrals). Analysis of forestry, mining and agriculture approvals reveals a comparatively low level of referrals. It is clear from the publically available referral and approval statistics, that the EPBC Act is constrained in its application, and where it does apply, it very rarely prevents development from being undertaken.

² Metcalfe DJ and Bui EN (2017). Australia state of the environment 2016: land, Independent report to the Australian Government Minister for the Environment & Energy, Australian Government Department of Environment & Energy, Canberra, doi:10.4226/94/58b6585f94911, p3.

³ Ibid, p16, and 24.

⁴ Ibid 35.

⁵ Ibid, p132.

⁶ WWF International *Living Forests Report Chapter 5: Saving Forests at Risk*, April 27, 2015; available at: <https://www.worldwildlife.org/publications/living-forests-report-chapter-5-saving-forests-at-risk>

⁷ <http://www.wwf.org.au/what-we-do/species/tree-clearing#gs.2OZKTuw>

⁸ Ibid, p. 66.

The very low rate of referrals for land clearing has been noted by the Australian National Audit Office and the 2009 *Independent Review of the EPBC Act*.⁹ Indeed the briefing paper for this inquiry notes:

Since 2000, the number of referrals under the EPBC Act from the agriculture sector has remained consistently low, compared with referrals from other sectors. Most referred actions in the agriculture sector have been determined not to require further assessment under the EPBC Act. Almost all controlled actions in the agriculture sector assessed over the past 18 years have ultimately been approved.

and,

*In many cases, a farmer may only have a need to consider their obligations under the EPBC Act once or twice in the course of their working life, if at all.*¹⁰

There are a number of reasons why the application of the EPBC Act is limited. Four of these are set out below.

First, the core function of the EPBC Act is to protect matters of national environmental significance (**MNES**). Accordingly, any 'action' that is likely to have a significant impact on one of the 10 MNES must be assessed and approved under the EPBC Act. The requirement to have a 'significant impact' on a specified list of matters sets a high threshold for consideration under the Act. As a consequence, the vast majority of development proposals will only require assessment at a local or State level, which lies outside the scope of this Inquiry.

Second, the EPBC Act generally only regulates high-impact developments (such as mining operations or large infrastructure projects). It does not – contrary to what this inquiry may suggest – constantly and unduly regulate land clearing by farmers. To clarify, land clearing is regulated by State and Territory Governments – except in very rare instances where this clearing is likely to have a significant impact on a MNES.

Third, the majority of the clearing actions that do attract EPBC Act application are undertaken by large companies on land that has been purchased for the purposes of commercial exploitation. Private landholders wishing to undertake development on their residential lot (or farm) remain largely unaffected by the Act.

Fourth, the Minister is not required to refuse a development proposal because it is likely to have a significant impact on a MNES. Rather, the Minister may – and in almost all cases does – issue a conditional approval. Only a handful of the matters that have required Ministerial assessment and approval under the Act have ever actually been refused.¹¹ In other words, the Act is not prohibitive or particularly restrictive in the way it is applied. Rather – and like most environmental legislation in Australia – it is based on a system of permits and approvals which authorise and mitigate activities with adverse environmental impacts.

⁹ Hawke, A. (2009), *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999, Final Report*, October 2009 at 7.24 (p, 128).

¹⁰ An independent review of interactions between the EPBC Act and the agriculture sector – Briefing paper to inform public consultations, Friday 4 May 2018 (Aither Pty Ltd). Available at: <http://www.environment.gov.au/system/files/consultations/9a283b7c-ef31-47e6-9de8-3675c294f990/files/aither-briefing-paper.pdf>

¹¹ See: Australian Government, *Department of the Environment Annual Report s*.

3. A national role in native vegetation management

Native vegetation is primarily regulated by states and territory legislation. This does not mean that there is no role for the Commonwealth Government. It is essential to retain a Commonwealth regulatory role for nationally significant clearing, particularly where state laws are inadequate. For example, the 2016 SOE notes significant impacts of increased clearing in Queensland following the weakening of the state law. The Commonwealth Government cannot abdicate responsibility to the states and territories on major environmental issues where it has international obligations. Reluctance to regulate is not a sign of regulatory maturity where there are matters of national significance at stake.

It is well established that the Commonwealth is principally responsible for ensuring that 'international obligations relating to the environment are met by Australia'¹² and therefore it cannot simply delegate all responsibility to state and territory legislation.

The EPBC Act derives the majority of its constitutional validity from a series of bilateral and multilateral treaties to which Australia is signatory. In other words, it is the principal legislative vehicle chosen by the Commonwealth to implement Australia's international environmental obligations.

Proper implementation of these obligations necessarily requires a *minimum* level of regulation.¹³ As noted above, the Act does not prohibit development. Rather, certain actions must be assessed and approved under the Act before development can lawfully commence. Therefore, an activity that will have a significant impact on a site protected under the World Heritage Convention,¹⁴ or on listed threatened species or communities (for example)¹⁵ may be approved under the Act.

To that end, it is inappropriate to argue that the requirement to obtain a permit for an action that is likely to have a significant impact on a matter protected under international law constitutes an undue burden on private property holders. This is particularly true when one considers that the Act principally regulates activities undertaken by large companies on land purchased specifically for the purpose of commercial development.

By way of contrast, it has been persuasively argued that Australia could and should be doing more to protect species and areas listed under international conventions; that the EPBC Act may fall short of properly implementing Australia's international environmental obligations.¹⁶ The forthcoming statutory review of the EPBC Act will provide an opportunity to consider how the Act should be strengthened to better implement Australia's international obligations.

Strengthening the EPBC Act is of crucial importance, given the inadequacies of state and territory legislation. A series of audits undertaken by EDOs of Australia confirms that

¹² *Intergovernmental Agreement on the Environment* (1992). See cl. 2.2.1 (1).

¹³ The High Court has held that a statute or instrument purporting to give effect to a treaty must be 'appropriate and adapted' to this task. See: *State of Victoria v Commonwealth* (1996) 187 CLR 416.

¹⁴ See for example EPBC Act approval 2011/6213 for Abbot Point Terminal 0, Terminal 2, Terminal 3 - Capital Dredging, Queensland. This approval authorised dredging works that are likely to have a significant impact on the Great Barrier Reef Marine Park. Further information is available online:

http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=current_referral_detail&proposal_id=6213

¹⁵ See for example EPBC Act approval 2014/7202 for the Esso Pipeline Replacement Project, Victoria.

Further information is available online: http://www.environment.gov.au/cgi-bin/epbc/epbc_ap.pl?name=referral_detail&proposal_id=7202

¹⁶ See for example Haigh, David, *Australian World Heritage, the Constitution and International Law* (2005) 22 *EPLJ* 385.

state and territory laws do not meet national standards for biodiversity protection.¹⁷ In certain states such as NSW, new biodiversity and land clearing laws have been furthered weakened through the introduction of new state laws.¹⁸ This increases the need for national legislation to apply to significant clearing.

Strengthening the EPBC Act in relation to significant land clearing would assist in achieving the nationally identified and endorsed goals set out in *Australia's Native Vegetation Framework*. These goals are:

- Goal 1** Increase the national extent and connectivity of native vegetation
- Goal 2** Maintain and improve the condition and function of native vegetation
- Goal 3** Maximise the native vegetation benefits of ecosystem service markets
- Goal 4** Build capacity to understand, value and manage native vegetation
- Goal 5** Advance the engagement and inclusion of Indigenous peoples in management of native vegetation.

4. Benefits and protections for landholders

EDOs of Australia is of the view that the EPBC Act confers significant benefits on private landholders. For example, the Act enables the Minister to impose additional conditions on mining developments that have already been approved under State or Territory laws. These conditions may reduce impacts on neighbouring properties or the environment in general, particularly in relation to water resources.¹⁹

Further to this point, it is worth noting that the “water trigger” MNES, was introduced following concern expressed by farmers about the impacts associated with coal seam gas and coal mining developments on aquifers and surface water.²⁰ In other words, the Act was amended for the express purpose of protecting a resource used by private landholders, in the knowledge that natural resources are interconnected and their value is shared.

Similarly, many of our clients have expressed concern about impacts on local biodiversity caused by mining operations which are regulated under the EPBC Act. While land owned by these individuals and groups may not be impacted by these developments, they nonetheless benefit from, and support the protection of, local flora and fauna.²¹

Other potential opportunities are available for farmers to gain benefit for stewardship of their native vegetation. These opportunities include carbon sequestration (as noted in the

¹⁷ EDOs of Australia (2012) Assessment of the adequacy of threatened species & planning laws; and Assessment of the adequacy of threatened species & planning laws (2014); available at: https://www.edonsw.org.au/native_plants_animals_policy. These audits were commissioned by the Paces You Love Alliance.

¹⁸ For legal analysis of the NSW biodiversity and land clearing laws see: https://www.edonsw.org.au/biodiversity_legislation_review

¹⁹ 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 16 September 2015).

²⁰ 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.

²¹ See for example *Northern Inland Council for the Environment Inc. v Minister for the Environment* [2013] FCA 1418; *Northern Inland Council for the Environment Inc. v Minister for the Environment* [2013] FCA 1419. Case notes and full judgement available online: http://www.edonsw.org.au/northern_inland_council_for_the_environment_v_minister_for_environment_maul_es_creek_and_boggabri_mine_cases

SOE 2016), and biodiversity offsetting.²² We strongly support incentives for private land conservation and stewardship payments for land managers, particularly where there can be co-benefits achieved (for example, where there can be carbon *and* biodiversity benefits).

5. Statutory review of the EPBC Act

As noted, the next 10 year statutory review of the Act is due to commence later this year.²³ We submit that the statutory review presents the appropriate opportunity to identify areas of the Act to be strengthened. In contrast, we do not recommend that this review into agricultural interactions should result in any legislative or regulatory changes that would pre-empt the more comprehensive review. Industry specific changes divorced from that comprehensive review risk further fragmentation of the Act's operation, greater confusion and inefficiency in the application of the Act and weakened environmental outcomes.

The previous review was undertaken in 2009 by an expert panel chaired by Dr Allan Hawke. This was an exhaustive and widely consultative report which resulted in 71 recommendations for reform to build on the Act and improve its efficiency and effectiveness.²⁴ The Panel did not find evidence that the Act constituted an undue burden on agriculture or interference with property rights. In fact, that review identified that a stronger role for the EPBC Act in regulation of land clearing – including the addition of a land clearing trigger – warranted further consideration.²⁵

EDOs of Australia has consistently recommended a land clearing trigger be included to regulate nationally significant clearing.²⁶

Further recommendations to strengthen the EPBC Act in relation to biodiversity are set out in our report '*Next Generation - Biodiversity Laws. Best practice elements for a new Commonwealth Environment Act*' that was prepared for Humane Society International and published in June 2018.²⁷

We will elaborate on these recommendations in our response to the statutory review.

²² We note any offset scheme must include rigorous like for like rules to ensure genuine offsetting of impacts on MNES.

²³ EPBC Act, s. 522A.

²⁴ Hawke, A. (2009), *Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999, Final Report*, October 2009.

²⁵ Hawke *ibid*, Chapter 7.

²⁶ See our Hawke submission... & HSI Biodiversity report 2018.

²⁷ Available at: https://www.edonsw.org.au/next_gen_biodiversity_laws

6. Recommendations for this inquiry

As stated above, given the *under*-regulation of the agriculture sector and the impending statutory review, we do **not** support this inquiry recommending any pre-emptive legislative or regulatory amendments. There are however, a number of recommendations that could assist landholders to better understand the EPBC Act.

- Provide **resources for increased outreach and education for landholders to better understand their obligations under the EPBC Act**. This could include workshops, publications, information on line, and dedicated staff for a landholder referrals information line; or regional on ground staff members in certain areas such as the Monaro grasslands. This is consistent with recommendations made by the Productivity Commission in its *Inquiry into the Regulation of Australian Agriculture* (2016)
- **Clarify significant impact guidelines**. These could be made more user-friendly by including more case studies on when the Act will and will not apply to a clearing action.
- Develop a **compliance pro-forma whereby a farmer can record clearing actions**. This would not be onerous paperwork (eg: date, type of vegetation, extent of clearing, purpose of clearing) but would assist the landholder in responding to any compliance inquiries and to demonstrate due diligence.
- **Invest in mapping and environmental accounts** so that there is an evidence base for identifying clearing that would be nationally significant (eg: due to the scarcity or fragmentation of the vegetation type). This data is essential to identify trends and cumulative impacts of clearing, and to provide the baseline data required to support risk-based regulatory approaches
- **Improve publicly available data on referrals and approvals** to address the inaccurate perception that agriculture is heavily regulated by the EPBC Act.

We also note, with some concern, that a significant number of Ministerial decisions in relation to the listing, or up-listing, of threatened species and ecological communities have been deferred pending the outcome of this review, despite unambiguous listing recommendations from the Threatened Species Scientific Committee. Particularly in relation to communities assessed as being critically endangered (such as the *Eucalyptus ovata* / *E brookeriana* woodlands in Tasmania), the review does not appear to provide a sound justification for delaying listing decisions. We urge the Minister to progress those listing decisions as soon as practicable.

7. Further references

The following EDO submissions may further assist this inquiry.

- **Regulation of Agriculture: Productivity Commission Issues Paper** - EDOs of Australia submission, February 2015 – [Download PDF](#)
- **Submission to the Productivity Commission on its Regulation of Agriculture: Draft Report**
August 2016 - [Download PDF](#)

These submissions outline our analysis of: risk-based regulation; landscape scale approaches; the use of exemptions and inconsistent on-ground implementation; balancing social, economic and environmental considerations; market based mechanisms; improving engagement with stakeholders regarding regulation; the need for environmental data, ecosystem services and environmental accounts; and the imperative for regulation of agriculture to address the future challenges of climate change.

- **ANEDO submission to the Freedoms Inquiry on Traditional Rights and Freedoms—Encroachments by Commonwealth Laws**
Submission 1: 27 February 2015 - [Download PDF](#)

Our first submission explains why strong environmental laws are necessary, and argues that existing laws do not unduly encroach on private interests.

Submission 2: 21 September 2015 - [Download PDF](#)

Our second submission sets out how the EPBC Act and the Water Act respond to modern environmental challenges, and why they are needed if Australia is to meet its international legal obligations. It also provides clear evidence that these Acts do not unduly infringe private property rights, and in certain instances actually protect private property from the impacts associated with development.