PRODUCTIVITY COMMISSION

NATIVE VEGETATION INQUIRY

SUBMISSION OF SENATOR ANDREW BARTLETT

AUGUST 2003

1. INTRODUCTION

The terms of reference for this inquiry require the Productivity Commission to inquire into, and report on, numerous issues including:

(a) the impact of native vegetation and biodiversity conservation laws on landholders and regional communities (paragraph 3(a));

(b) the efficiency and effectiveness of native vegetation and biodiversity laws in reducing the costs of resource degradation (paragraph 3(b));

(c) the appropriateness of the current distribution of costs for preventing environmental degradation across industry, government and the community (paragraph 3(b));

(d) whether there is any overlap or inconsistency between Commonwealth, State and Territory native vegetation and biodiversity laws (paragraph 3(c));

(e) the evidence of possible perverse environmental outcomes resulting from the operation of native vegetation and biodiversity conservation laws (paragraph 3(d));

(f) the adequacy of assessments of economic and social impacts of decisions made under native vegetation and biodiversity conservation laws (paragraph 3(e));

(g) the degree of transparency and extent of community consultation when developing and implementing native vegetation and biodiversity conservation laws (paragraph 3(f)); and

(h) recommendations governments could consider to minimise the adverse impacts of native vegetation and biodiversity conservation laws, while achieving the desired environmental outcomes, including measures to clarify the responsibilities and rights of resource users (paragraph 3(g)).

The Australian Democrats and I are committed to the protection and conservation of Australia's biodiversity for four main reasons.

1. Landscape health.

   Our economy and society is dependent upon the environment, which in turn, is dependent upon biodiversity. As biodiversity declines, so do such things as water and air quality, soil health, and our natural resource base. In modern parlance, as our biodiversity is diminished, the environment loses the capacity to provide vital ecosystem services.

2. Cushion for climatic variation

   Diversity within and between species and ecosystems provides the environment with the capacity to adapt to climatic changes. If the climate changes, biodiversity ensures there are species and ecosystems that are able to fill voids left by species and ecosystems that are unable to cope with the new conditions. Hence, biodiversity ensures the maintenance of life and a degree of stability in the biosphere. As biodiversity is reduced, so to is the capacity of the environment to adopt to change. This increases the risk that climate changes will lead to catastrophic changes in the environment.

3. Anthropocentric values

Biodiversity is of enormous value to humanity. In this regard, biodiversity provides the basis for natural resource dependent industries, such as agriculture, forestry, and fisheries. It can also be a source of medicines, new agricultural products and industrial substances. Biodiversity is also an invaluable resource for the tourism industry for its recreational and aesthetic values. Further, biodiversity also has tremendous heritage values and provides us with the ability to trace the origins of life and humanity.

4. Intrinsic value

Although biodiversity is essential for human existence, prosperity and happiness, species and ecosystems also have an intrinsic worth beyond that placed on them by humanity.

However, as has been emphasised by the Commission, this inquiry is not empowered to inquire into the utility of protecting and conserving native vegetation and biodiversity[1]. It is assumed that the protection and conservation of biodiversity is an essential social objective. Therefore, I will not provide any additional information on the utility of protecting and conserving biodiversity (including native vegetation).

In part 2 of this submission, I evaluate the impacts of the Commonwealth's *Environment Protection and Biodiversity Conservation Act 1999* (Cwlth) ("**EPBC Act**") on landholders and regional communities. Owing to the nature of the terms of reference and focus of the inquiry, I have ignored other Commonwealth legislation that relates to the protection and conservation of biodiversity, such as the *Fisheries Management Act 1991* and the *Regional Forestry Agreement Act 2002*.

Part 3 evaluates the impacts of relevant State native vegetation and biodiversity laws, particularly the relevant laws in Queensland and New South Wales.

Part 4 provides a brief conclusion.

[1] Productivity Commission, *Impacts of Native Vegetation and Biodiversity Regulations: Issues Paper*, May 2003, p.5.

2. SUMMARY

The major points raised in this submission are as follows.

(a) The rates of land clearing and biodiversity decline in Australia are well beyond the levels that are sustainable. Urgent action is required to prevent further degradation of our natural resource base and natural heritage.

(b) The regulation of activities that result in the loss of native vegetation and biodiversity is essential. Incentive schemes and voluntary programs are extremely important. However, they do not provide the statutory protection that is necessary for the ongoing protection of the environment. Regulatory regimes provide an essential safety net to catch the "recalcitrant few", ensure key aspects of the environment are protected, and provide an impetus for change.

(c) The native vegetation and biodiversity laws that are currently in place have been relatively ineffectual. The majority of these laws have failed to curtail excessive rates of land clearing and the decline in biodiversity. The failure of these laws can be attributed to flaws in the structure of the regimes and a lack of political will on behalf of regulators to administer and enforce these laws appropriately. Non-compliance has also been a problem, which has been exacerbated by regulators unwillingness to enforce the laws.

(d) The available statistics on the operation of relevant regimes and agricultural performance demonstrate that the impact of Australia's native vegetation and biodiversity laws on the economic interests of rural landholders has been negligible.

(e) In certain instances, rural landholders may experience acute financial impacts as a result of the operation of native vegetation and biodiversity laws. Where this occurs, the appropriate government should provide financial assistance to the affected landholders to help them to adjust to the regulatory changes and impacts of the operation of the regime. However, all financial assistance must be applied in those areas of greatest need and be strategically directed to assist rural communities to move to sustainable enterprises.

(f) Changes need to be made to Commonwealth, State and Territory laws to ensure greater protection is provided for native vegetation and Australia's biodiversity. The changes should be made in a way that minimises unnecessary duplication between Commonwealth, State and Territory laws. In some instances, duplication in regulatory regimes will be necessary to ensure the Commonwealth has powers to regulate activities that affect matters that are of international or national importance or that have trans-border implications.

(g) The Commonwealth and State and Territory Governments must address their neglect of native vegetation and biodiversity conservation issues. Governments must be more willing to administer and enforce native vegetation and biodiversity laws in a manner that is conducive to the achievement of their statutory objectives.

2. COMMONWEALTH BIODIVERSITY LAWS

2.1 Background on the EPBC Act

The EPBC Act contains a number of regulatory processes for the protection and conservation of biodiversity. The centrepiece of the legislation is the referral, assessment and approval process contained in Chapters 2, 3 and 4. Broadly, it prohibits any person from taking out an action that is likely to have a significant impact on the matters protected under the provisions of Part 3 without the approval of the Minister. The matters protected under the provisions of Part 3 can be divided into two categories:

(a) the matters of national environmental significance (Part 3, Division 1), which are:

  (i) the world heritage values of Australia's World Heritage properties;

  (ii) the ecological character of Australia's Ramsar wetlands;

  (iii) listed threatened species (other than "conservation dependent" species) and ecological communities (other than "vulnerable" ecological communities);

  (iv) listed migratory species;

  (v) nuclear actions; and

  (vi) Commonwealth marine areas and Commonwealth-managed fisheries; and

(b) matters involving the Commonwealth, Commonwealth agencies and/or Commonwealth land (Part 3, Division 2), which are:

  (i) the environment generally where the action is taken by the Commonwealth or a Commonwealth agency or is carried out on Commonwealth land; and

  (ii) the environment on Commonwealth land where the action is carried out outside Commonwealth land.

There are several exemptions from the prohibitions contained in Part 3. These include:

(a) the exemption provided for RFA forestry operations undertaken in accordance with a regional forestry agreement[2];

(b) the exemption provided for actions taken in the Great Barrier Reef Marine Park in accordance with an instrument made under the *Great Barrier Reef Marine Park Act 1975* (Cwlth)[3];

(c) the exemption provided for existing uses (ie a use that is a lawful continuation of a use of land, sea or seabed that was occurring immediately before the commencement of this Act)[4];

(d) the exemption provided for actions that were authorised prior to the commencement of the Act[5];

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[2] Part 4, Division 4.
[3] Part 4, Division 5.
[4] s.43B.
[5] s.43A.

(e) the Minister can grant exemptions from the provisions in Part 3 if he/she is satisfied it is in the "national interest" that the relevant provisions do not apply to the action[6]; and

(f) the exemption provided for the activities authorised under a facility installation permit granted under the *Telecommunications Act 1997* (Cwlth)[7].

The EPBC Act contains a number of other provisions that have the capacity to make an important contribution to the efforts being made to address biodiversity decline in Australia. These include the permit provisions in Part 13 that relate to actions taken in Commonwealth areas, the provisions in Part 15 concerning the management of World Heritage Areas, Ramsar wetlands and Commonwealth reserves, and the provisions of Part 13A concerning the regulation of the trade in live specimens. However, on the most part, these provisions are unlikely to affect the majority of rural landholders.

2.2 Impacts on rural landholders

2.2.1 Has the EPBC Act adversely affected the activities and interests of rural landholders?

If the EPBC Act was having a serious adverse impact on the profitability of rural enterprises, or was adversely affecting their operations, it would be expected that these impacts would be reflected in the statistics concerning the operation of the Act and the financial statistics for the agricultural industry.

Farm performance since July 2000

The available statistics provide no evidence that the EPBC Act (or any other native vegetation or biodiversity laws) is having a significant adverse impact on the profitability of the agricultural industry as a whole.

Between July 2000 and 30 June 2002, the Australian Bureau of Agricultural and Resource Economics ("**ABARE**") reported that the average farm cash income for all broadacre industries increased from $71,900 to $100,000, which is among the highest recorded in 26 years[8]. ABARE also found the average farm rate of return for all broadacre industries over this period increased from 2.0% to 4.2%[9]. The increases in farm cash income and profitability were experienced across all States and Territories.

Interestingly, research conducted by ABARE has revealed that there was a significant increase in average cash costs per farm for broadacre farmers between July 2000 and 30 June 2002 ($182,570 to $196,600)[10]. However, it did not attribute any of the cost increase to increases in the cost of compliance with regulatory requirements. The majority of the increase was attributed to increases in the price of fuel and fertiliser and an expansion in maintenance and repair work.

The fact that there is little evidence of the EPBC Act (or any other native vegetation or biodiversity conservation laws) having a significant impact on the financial performance of

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[6] ss.158 and 28.
[7] *Telecommunications Act 1997* (Cth), Schedule 3, section 28.
[8] ABARE 2002, *Australian Farm Surveys Report 2002*, Canberra.
[9] ABARE 2002, *Australian Farm Surveys Report 2002*, Canberra.
[10] ABARE 2002, *Australian Farm Surveys Report 2002*, Canberra.

the agriculture sector as a whole is consistent with the nature of the regulatory regime and the structure of the agricultural industry. Agricultural establishments cover approximately 460 million hectares (about 60% of Australia). Approximately 200 million hectares of this area is used for agricultural purposes[11]. However, approximately 80% of the profits from the agricultural sector come from less than 1% of the total area used[12]. The 2 million hectares of land used for irrigated agriculture produces approximately 26% of the gross value of production and approximately 50% of the profits of Australian agriculture[13]. The vast majority of the most productive areas are likely to have been cleared and being used for agricultural purposes prior to the commencement of the Act. Owing to the operation of the existing use (s.42B) and prior authorisation (s.43A) exemptions, these areas are unlikely to be affected by the operation of the EPBC Act. The EPBC Act will only affect these areas where landholders seek to expand their operations into patches of remnant vegetation or change the use to which the land is being applied in a way that is likely to have a significant impact on a matter protected under Part 3.

In addition, the limited number of threatened species and ecological communities that have been listed, and the distribution of these species and communities, has greatly reduced the capacity of the EPBC Act to affect the operations of landholders in the most productive agricultural areas. For example, at 31July 2003, a mere 27 ecological communities were listed as endangered and 2 were listed as critically endangered. This is despite the fact that the National Land and Water Resource Audit found that Australia has 2891 threatened ecosystems and ecological communities[14]. The only listed threatened ecological communities that could potentially have a noticeable impact on the activities of landholders in the most productive agricultural areas are: Bluegrass (*Dichanthium* spp.) dominant grasslands of the Brigalow Belt Bioregions (North and South); Brigalow (*Acacia harpophylla* dominant and co-dominant); Buloke Woodlands of the Riverina and Murray-Darling Depression Bioregions; Grassy White Box Woodlands; Natural Temperate Grassland of the Southern Tablelands of NSW and the Australian Capital Territory; Semi-evergreen vine thickets of the Brigalow Belt (North and South) and Nandewar Bioregions. However, the statistics concerning the operation of the Act (which are discussed below), demonstrate that the Act has had very little (if any) impact on the activities of rural landholders in these areas.

Although the EPBC Act has had little or no impact on the financial performance of the agricultural sector as a whole, and it is unlikely to do so, it is acknowledged that it may have acute impacts on certain landholders in particular areas. This is most likely to occur when landholders seek to expand their operations into areas containing listed threatened ecological communities or habitat of listed threatened or migratory species. It could also occur when landholders seek to cull a species that is protected under the Act. However, to date, there is little or no evidence of these potentially acute financial impacts having been suffered by any rural landholders (with the possible exception of one fruit farmer in northern Queensland). The statistics on the operation of the EPBC Act clearly illustrate this point.

Statistics on the operation of the EPBC Act

Environment Australia maintains a public register on the Internet that contains information on all public notices issued in relation to the EPBC Act's referral, assessment and approval

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[11] National Land and Water Resources Audit, *Australian Agriculture Assessment 2001*, Commonwealth of Australia, Canberra, 2001.
[12] National Land and Water Resources Audit, *Australians and Natural Resource Management 2002*, National Land and Water Resources Audit, Canberra, March 2002.
[13] National Land and Water Resources Audit, *Australians and Natural Resource Management 2002*, National Land and Water Resources Audit, Canberra, March 2002.
[14] National Land Water Resource Audit, *Australian Terrestrial Biodiversity Assessment 2002*, National Land and Water Resources Audit, Canberra, December 2002.

process. It also publishes monthly statistical summaries concerning the operation of this process. To assist in the analysis and comprehension of data concerning the operation of the EPBC Act's referral, assessment and approval process, Environment Australia places referrals into one of 18 categories. These categories include agriculture and forestry; water management and use; mining; land transport; energy generation and supply; and communications.

Table 1 below provides details of the referrals received between 16 July 2000 and 16 July 2003 that have been placed in the "agriculture and forestry" category and the decisions that have been made under the EPBC Act in relation to these referrals.

Table 1: Agriculture and forestry referrals between 16/7/2000 and 16/7/2003

No	Referral No.	Nature of proposed action	Location	State/ Territory	Approval required/not required	Assessment Approach	Approval granted/ refused
1.	2003/1090	Clearing of Brigalow	Cracow	QLD	Not required	N/A	N/A
2.	2003/1081	Clearing of native vegetation for forestry operations	Edenhope	VIC	Required	Undecided	Undecided
3.	2003/1014	Clearing and works for irrigated intensive crop production	Macintyre River Valley	NSW	Required	AAP*	Undecided
4.	2003/988	Clearing of Brigalow	Argoon	QLD	Not required	N/A	N/A
5.	2003/975	Land clearing for centre-pivot irrigation system	Minimay	VIC	Not required – manner specified	N/A	N/A
6.	2003/962	Clearing of Brigalow	Rolleston	QLD	Not required – manner specified	N/A	N/A
7.	2003/924	Clearing of bluegrass for Leucaena	Springsure	QLD	Not required – manner specified	N/A	N/A
8.	2002/849	Land clearing for centre-pivot irrigation system	Minimay	VIC	Not required – manner specified	N/A	N/A
9.	2002/844	Red-footed booby bird harvest	Cocos (Keeling) Islands	Cocos (Keeling) Islands	Required	Undecided	Undecided
10.	2002/813	Collection of cast bull kelp	Bluff Hill Point	TAS	Not required – manner specified	N/A	N/A
11.	2002/766	Land clearing for centre pivot irrigation system	Bringalbert	VIC	Required	PD*	Undecided
12.	2002/743	Viticulture development	Cornella	VIC	Not required – manner specified	N/A	N/A
13.	2002/725	Land clearing for pineapple plantation	Childers	QLD	Not required	N/A	N/A
14.	2002/571	Electrocution of Spectacled Flying-foxes	Kennedy	QLD	Required	PD*	Refused
15.	2002/655	Cattle feedlot development	Condobolin	NSW	Not required	N/A	N/A
16.	2002/564	Mill and	Smithton	TAS	Not required	N/A	N/A

		timberyard					
17.	2001/480	Electrocution of Spectacled Flying-foxes	Kennedy	QLD	Required (subsequently withdrawn)	N/A	N/A
18.	2001/452	Cattle feedlot development	Rangers Valley	NSW	Not required	N/A	N/A
19.	2001/381	Cattle feedlot development	Milang	SA	Required	Undecided	Undecided
20.	2001/200	Dairy facility	Gannawarra	VIC	Required	PD*	Approved
21.	2000/91	Irrigated cotton development	Macquarie Marshes	NSW	Required	PER*	Undecided

*AAP = Accredited assessment process, PD = Preliminary documentation, PER = Public environment report

Table 2 below provides details of the referrals received between 16 July 2000 and 10 July 2003 that have been placed in the "water management" and "water management and use" categories and the decisions that have been made under the EPBC Act in relation to these referrals.

Table 2: Water management and use referrals between 16/7/2000 and 16/7/2003

No	Referral No.	Nature of proposed action	Location	State/ Territory	Approval required/not required	Assessment Approach	Approval granted/ refused
1.	2003/1118	Dam redevelopment	Wivenhoe	QLD	Undecided	N/A	N/A
2.	2003/1087	Sewerage scheme development	Cradle Valley	TAS	Undecided	N/A	N/A
3.	2003/1069	Land clearing and installation and operation of centre-pivot irrigation system	Apsley	VIC	Not required – manner specified	N/A	N/A
4.	2003/1059	Water infrastructure development	Rouse Hill	NSW	Not required – manner specified	N/A	N/A
5.	2003/1053	Levee track maintenance	Sale	VIC	Not required	N/A	N/A
6.	2003/1016	Installation of fishways on barrages	Goolwa	SA	Not required	N/A	N/A
7.	2003/1010	Floodgate redevelopment	Vasse and Wonnerup Estuaries	WA	Not required	N/A	N/A
8.	2003/999	Waste water and sewage treatment development	Sydney	NSW	Undecided	N/A	N/A
9.	2003/998	Stormwater pollution traps	Fyshwick	ACT	Not required	N/A	N/A
10.	2003/996	Pipeline development	Clare Valley	SA	Not required – manner specified	N/A	N/A
11.	2003/958	Waste water recycling development	Edinburgh Park	SA	Not required	N/A	N/A
12.	2002/899	Stormwater drain development	Berriquin	NSW	Not required	N/A	N/A
13.	2002/898	Water recycling scheme	Coal River Valley	TAS	Not required – manner specified	N/A	N/A
14.	2002/885	Additional release of water	Obi Obi Creek	QLD	Not required – manner	N/A	N/A

		from dam for irrigation			specified		
15.	2002/828	Development of infrastructure attaching to bores	Litchfield Shire	NT	Undecided	N/A	N/A
16.	2002/815	Redevelopment of dam	Lake Buffalo	VIC	Not required	N/A	N/A
17.	2002/798	Dredging of Murray mouth	Coorong	SA	Not required	N/A	N/A
18.	2002/780	Water infrastructure development	Ash Island	NSW	Not required	N/A	N/A
19.	2002/770	Construction and operation of Nathan Dam	Dawson River	QLD	Required	PER	Undecided
20.	2002/716	Stormwater drainage development	Berrigan and Jerilderie Shires	NSW	Not required	N/A	N/A
21.	2002/682	Construction and operation of weir	Swan Hill	VIC	Not required	N/A	N/A
22.	2002/627	Redevelopment of weirs	Wentworth Shire	NSW	Not required	N/A	N/A
23.	2002/604	Stormwater drainage redevelopment	Bribie Island	QLD	Not required	N/A	N/A
24.	2002/565	Construction and operation of dam	Meander	TAS	Required	Undecided	Undecided
25.	2002/561	Redevelopment of water infrastructure	Heathcote	VIC	Not required	N/A	N/A
26.	2002/560	Redevelopment of water infrastructure	North Harcourt	VIC	Not required	N/A	N/A
27.	2002/559	Redevelopment of water infrastructure	Spring Gully	VIC	Not required	N/A	N/A
28.	2002/558	Redevelopment of water infrastructure	Trentham	VIC	Not required	N/A	N/A
29.	2002/557	Redevelopment of water infrastructure	Bendigo	VIC	Not required	N/A	N/A
30.	2002/553	Stormwater escape channel	Wakool	NSW	Not required	N/A	N/A
31.	2001/496	Pipeline project	North-west Vic	VIC	Not required	N/A	N/A
32.	2001/432	Redevelopment of dam	Dartmouth Dam	VIC	Not required	N/A	N/A
33.	2001/422	Construction and operation of dam	Paradise	QLD	Required	AAP	Approved
34.	2001/420	Redevelopment of dam	Bundaberg	QLD	Required	AAP	Undecided
35.	2001/389	Redevelopment of weir	Mundubbera	QLD	Required	PD	Approved
36.	2001/388	Construction and operation of weir	Barlil	QLD	Required	PD	Approved
37.	2001/385	Construction and operation of weir	Eidsvold	QLD	Required	AAP	Approved
38.	2001/373	Upgrade of water filtration plant	Orchard Hills	NSW	Not required	N/A	N/A

39.	2001/355	Dredging of watercourse	Cape Upstart Bay	QLD	Not required	N/A	N/A
40.	2001/331	Construction and operation of desalinisation plant	Green Island	QLD	Not required	N/A	N/A
41.	2001/282	Upgrade waste water treatment plant and supply of treated waste water	Gold Coast	QLD	Not required	N/A	N/A
42.	2001/190	Redevelopment of weir and construction of weirs	Bundaberg	QLD	Required (later withdrawn)	N/A	N/A
43.	2001/189	Construction and operation of Paradise Dam	Bundaberg	QLD	Required (later withdrawn)	N/A	N/A
44.	2001/188	Construction of weir	Bundaberg	QLD	Required (later withdrawn)	N/A	N/A
45.	2001/187	Weir maintenance works	Yarrawonga	VIC	Not required	N/A	N/A
46.	2001/184	Construction and operation of drainage system	Numurkah	VIC	Required	PD	Undecided
47.	2001/159	Flood mitigation project	Pumicestone Passage	QLD	Not required	N/A	N/A
48.	2001/141	Redevelopment of Awoonga dam	Calliope Shire	QLD	Not required	N/A	N/A
49.	2000/112	Pressure tunnel maintenance works	Kosciuszko National Park	NSW	Not required	N/A	N/A
50.	2000/111	Pipeline construction	Townsville	QLD	Not required	N/A	N/A
51.	2000/93	Stormwater pollution traps and other infrastructure	Lanyon	ACT	Not required	N/A	N/A
52.	2000/72	Pipeline construction	Woorinen	VIC	Not required – manner specified	N/A	N/A
53.	2000/65	Stormwater escape channel	Finley	NSW	Not required	N/A	N/A
54.	2000/14	Constructed wetland	Gippsland Lakes	VIC	Required	PD	Approved

The available statistics on the operation of the EPBC Act, including those outlined in tables 1 and 2 above, suggest strongly that it has had little or no impact on the activities of any industry group, particularly the agricultural sector.

There is considerable evidence that a large number of activities undertaken in rural and regional areas after 16 July 2000 that have had, or may have, a significant impact on a matter protected under the provisions of Part 3 of the EPBC Act have not been referred to the Minister. In this regard, the most recent statistics on land clearing in Queensland suggest that approximately 400,000 hectares of woody vegetation was cleared in Queensland between 1 July 2000 and 30 June 2001. The Queensland Department of Natural Resources and Mines estimates that approximately 58% of this involved clearing remnant woody vegetation. A significant proportion of this clearing occurred in areas that are known to contain a number of listed threatened species, listed threatened ecological communities and listed migratory species, including the Brigalow Belt and Nandewar Bioregions. There is also evidence of high rates of clearing in catchments in NSW and Victoria (particularly in West Wimmera

Shire) that contain numerous matters that are protected under Part 3 of the EPBC Act. It is likely that a significant proportion of the land clearing activities that have occurred in these regions should have been referred to the Minister under the EPBC Act. It is also likely that there are a significant number of other developments (eg. water development and use) in rural and regional areas should be, or should have been, referred under the EPBC Act. Yet, between 16 July 2000 and 16 July 2003, only twenty-one (21) referrals were received that were classified by Environment Australia as being in the "agriculture and forestry" category. Similarly, between 16 July 2000 and 16 July 2003, a mere fifty-four (54) referrals were received that were classified by Environment Australia as being in the "water management" or "water management and use" categories.

The fact that many actions taken in rural areas over the past 3 years that may adversely affect the matters protected under Part 3 have not been referred to the Minister may be partly be explained by the operation of relevant exemptions. The most important of the available exemptions for rural landholders are likely to be those contained in sections 43A and 43B, which relate to actions that were approved prior to the commencement of the Act and existing use rights respectively. While these exemptions are important, it is highly unlikely that the majority of actions taken in rural areas over the past 3 years that may have a significant impact on the matters protected under the provisions of Part 3 fall within the terms of these exemptions.

Therefore, on the basis of the evidence, it is difficult to avoid the conclusion that there is a considerable amount of non-compliance with the EPCB Act's requirements in rural and regional areas and that the Act has had very little impact on the activities of rural landholders.

Moreover, of the twenty-one (21) "agriculture and forestry" referrals received over this period, only one (1) has been prevented from being undertaken as a result of the operation of the EPBC Act. This action was the proposal by Mr R. Bosworth to kill approximately 5,500 spectacled flying-foxes using an electric grid in the period November to December 2002 (Reference No. 2002/571)[15]. None of the fifty-four (54) "water management and use" referrals received between 16 July 2000 and 16 July 2003 have been prevented from proceeding as a result of the operation of the EPBC Act. Further, only two (2) of these "water management and use" actions have had enforceable conditions imposed on them as a result of the operation of the EPBC Act.

At a broader level, at 31 May 2003, 916 referrals had been received by Environment Australia. Mr Bosworth's proposed action to kill spectacled flying-foxes (Reference Number 2002/571) is the only action that has been referred to the Minister that has been prevented from being undertaken as a result of the operation of the EPBC Act. Of the eight hundred and seventy-two (872) decisions that were made under section 75 in relation to referrals (ie whether the relevant action requires approval under Part 9 – "**controlled action decisions**") between 16 July 2000 and 31 May 2003, six hundred and thirty-five (635 - 73%) were declared not to require approval.

The above facts illustrate clearly that the EPBC Act has had little or no impact on the activities of rural landholders. It would appear that:

(a) the overwhelming majority of actions in rural and regional areas that could potentially require approval under the EPBC Act are not being referred;

(b) when actions are referred, the majority are declared to not require approval (ie they are not controlled actions); and

[15] Note, the decision to refuse this action was made on 21 March 2003, despite the fact that the period for taking the action was between November and December 2002.

(c) the very small minority that do require approval are approved with minimal conditions.

These facts discredit any claim that the EPBC Act has adversely affected farm productivity or the activities of rural landholders.

The only possible exception is Mr Bosworth. However, the action the Minister refused to approve involved killing an extraordinarily large number of a listed threatened species that contributes to the world heritage values of the Wet Tropics World Heritage Area. Under the Government's current policy towards killing spectacled and grey-headed flying-foxes, it would appear he can kill a smaller number of spectacled flying-foxes under a State permit without having to comply with the requirements in Part 3 of the EPBC Act. Further, there are a number of alternative management options that Mr Bosworth could adopt. Therefore, even in the case of Mr Bosworth, it would appear the financial impacts have been relatively limited and entirely justified given the significance of the species in question.

Administrative efforts to lessen the impacts of the EPBC Act on rural landholders

The Commonwealth has gone to extraordinary lengths to minimise the impacts of the EPBC Act on the activities of rural and regional landholders and to ensure they understand their legal obligations. These efforts have included the following.

(a) Flying-fox guidelines

In 2002, Environment Australia released the "Administrative Guidelines on Significance – Supplement for Spectacled Flying-foxes" and "Administrative Guidelines on Significance – Supplement for Grey-headed Flying-foxes". These guidelines state that people killing spectacled and grey-headed flying-foxes under a valid State authorisation are not likely to have a significant impact on these species. The intention of these guidelines (an intention that was previously explicitly stated in the guidelines) is to ensure that people killing these threatened species are not required to comply with both State laws and the EPBC Act.

While I vehemently oppose these guidelines, it is a clear example of the lengths the Commonwealth has gone to so as to minimise the impacts of the EPBC Act on rural landholders.

(b) Bluegrass guidelines

Soon after Bluegrass (*Dichanthium* spp.) dominant grasslands of the Brigalow Belt Bioregions (North and South) was listed as an endangered ecological community in April 2001, Environment Australia published the "Administrative Guidelines on Significance - Supplement for the Nationally Endangered Bluegrass Ecological Community". The guidelines state:

"*In general, activities resulting in the permanent loss of small areas of the listed Bluegrass ecological community, for example less than 20 hectares or less than 5% of the patch (whichever is the smaller), will not be significant.*

Activities that result in a temporary and reversible impact on the condition of the listed Bluegrass ecological community also will generally not be significant. Similarly, activities over a large area that would result in only a minor, recoverable change to the listed ecological community will generally not be significant.

Most routine rural management purposes that are prescribed by the Queensland Land Regulation 1995 would be considered as activities not likely to have a significant impact. Note that some of these activities might also be a continuation of a use occurring before 16 July 2000 and therefore not subject to the referral requirement in the EPBC Act in any case. Examples of the type of activities not likely to have a significant impact include:

- *Controlled burns or prescribed fires*
- *Slashing (eg. for firebreaks)*
- *Fencing having a width no more than the permitted distance under the Queensland Land Regulation 1995*
- *Construction of sheds, farm buildings and yards*
- *Maintenance of internal roads, equipment and dams etc*
- *Maintenance of fence lines and firebreaks*
- *Weed control (hand and ground machinery)*
- *Movements of farm vehicles and machinery*
- *Minor dam construction and access tracks for stock*
- *Maintaining farm gardens and orchards*
- *Grazing within sustainable land management regimes*"

Again, the intention of these guidelines is to lessen the impact of the EPBC Act on rural landholders in areas containing Bluegrass ecological communities. The fact that only one referral was received that involved clearing of a bluegrass ecological community for agricultural purposes between July 2000 and July 2003 is a testament to the "success" of these guidelines in lessening the regulatory affect of the Act.

(c) Rural liaison officer

The Commonwealth has provided a seconde from Environment Australia to the National Farmers Federation in order to provide rural landholders with information about the EPBC Act.

(d) Rural information tours

Environment Australia has conducted visits to numerous rural and regional areas to disseminate information about the EPBC Act.

In conclusion, it appears to be beyond doubt that the EPBC Act has not had a significant affect on rural productivity or the activities of rural landholders. Further, the Commonwealth has gone to considerable lengths to minimise the impacts of the EPBC Act on rural landholders and to ensure there is information available on the obligations of landholders under the Act.

2.2.2 Has the EPBC Act had a positive impact on rural landholders?

As discussed above, the EPBC Act has had very little impact on the activities of rural landholders. This is a result of flaws in the structure of the Act, widespread non-compliance and the manner in which the EPBC Act is being administered. There is the possibility the EPBC Act has assisted in raising awareness of biodiversity conservation, natural resource management and natural heritage conservation issues amongst rural and regional communities. However, no empirical research has been conducted that could be used to support this claim.

It is unfortunate that the EPBC Act has had little measurable impact on the activities of rural landholders. Past and present natural resource management practices have had an enormous

impact on the Australian environment and its biodiversity. Drastic changes are urgently required if we are to maintain agricultural productivity and preserve our natural heritage.

Reports published by the National Land and Water Resources Audit over the past 3 years have illustrated this point clearly. Important findings in these reports include the following.

- Approximately 5.7 million hectares of Australia's agricultural and pastoral zone currently has a high risk of developing dryland salinity problems and this could increase to 17 million hectares by 2050 unless effective solutions are implemented[16].
- Salinity is a major surface water quality problem in 24 of 74 basins that have been assessed[17].
- Excess nutrient levels is a major surface water quality problem in 43 of 70 basins that have been assessed[18].
- Turbitity is a major surface water quality problem in 41 of 67 basins that have been assessed[19].
- Acidity is a major surface water quality problem in 7 of 43 basins that have been assessed[20].
- 57 subregions in Australia have less than 30% of the original extent of native vegetation remaining[21].
- Connectivity between native vegetation remnants has broken down in 88 subregions in Australia[22].
- 39 subregions in Australia have more than 70% of their component ecosystems threatened[23].
- 37 subregions in the more intensively used areas in Australia have very high or high continental landscape stress rates[24].
- Soil acidity is affecting approximately 50 million hectares of Australia's agricultural zone[25].

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[16] National Land and Water Resources Audit, *Australian Dryland Salinity Assessment 2000: Extent, Impacts, Processes, Monitoring and Management Options*, Commonwealth of Australia, Canberra, 2000.
[17] National Land and Water Resources Audit, *Australian Water Resources Assessment 2000: Surface Water and Groundwater – Availability and Quality*, Commonwealth of Australia, Canberra, 2000.
[18] National Land and Water Resources Audit, *Australian Water Resources Assessment 2000: Surface Water and Groundwater – Availability and Quality*, Commonwealth of Australia, Canberra, 2000.
[19] National Land and Water Resources Audit, *Australian Water Resources Assessment 2000: Surface Water and Groundwater – Availability and Quality*, Commonwealth of Australia, Canberra, 2000.
[20] National Land and Water Resources Audit, *Australian Water Resources Assessment 2000: Surface Water and Groundwater – Availability and Quality*, Commonwealth of Australia, Canberra, 2000.
[21] National Land and Water Resources Audit, *Landscape health in Australia: A Rapid Assessment of the Relative Condition of Australia's Bioregions and Subregions*, Commonwealth of Australia, Canberra, 2001.
[22] National Land and Water Resources Audit, *Landscape health in Australia: A Rapid Assessment of the Relative Condition of Australia's Bioregions and Subregions*, Commonwealth of Australia, Canberra, 2001.
[23] National Land and Water Resources Audit, *Landscape health in Australia: A Rapid Assessment of the Relative Condition of Australia's Bioregions and Subregions*, Commonwealth of Australia, Canberra, 2001.
[24] National Land and Water Resources Audit, *Landscape health in Australia: A Rapid Assessment of the Relative Condition of Australia's Bioregions and Subregions*, Commonwealth of Australia, Canberra, 2001.

- Approximately 120,000 kilometres of riparian vegetation along eastern Australia's rivers and streams are degraded and require rehabilitation[26].
- 19,000 tonnes of total phosphorus and 141,000 tonnes of total nitrogen are exported to Australia's coast each year from areas of intensive agriculture[27].
- Australia has 2891 threatened ecosystems and other ecological communities[28].
- Vegetation clearing is the most significant threat to species and ecosystems in eastern Australia[29].
- The condition of riparian zones is degraded (meaning recovery is unlikely in the medium term) across much of southern and eastern Australia (31% of subregions assessed) and an additional number require significant management intervention to achieve recovery (38% of subregions assessed)[30].

The EPBC Act has the potential to assist in bringing about the changes that are necessary to address these environmental issues and conserve our natural heritage. Regulatory systems alone cannot resolve the current problems associated with natural resource management. It will require an alteration in the mindset of the broader community and collaborative programs involving all stakeholders. However, the severity of the environmental problems we face and the existence of environmental externalities makes regulation essential.

Agricultural lobby groups have argued that the regulation of land clearing and other activities that adversely affect biodiversity constitutes a violation of their property rights. This claim has no legal, policy or moral basis. Landholders (whether they hold a freehold or leasehold interest in the land) do not have, and never have had, an unfettered right to use their property for any purpose without restriction.

It has long been recognised, both at common law and in statutory law, that the right to use land is constrained by the need to protect the rights of others and the broader public interest. The justification for restrictions being placed on the use of property is that there are some activities that have impacts that extend beyond the boundaries of the relevant land (ie there are externalities). Where the externalities are judged as having too greater impact on the welfare of the broader community and/or the rights of other landholders to the quiet enjoyment of their property, the state will intervene to restore balance between the competing interests. These principles are embodied in the torts of public and private nuisance. As our society has become more complex, it has become necessary to impose additional restrictions on the use and enjoyment of property beyond those provided under the common law. This was initially seen in public health and planning laws, which seek to minimise the risk of disease, protect the health of the community and ensure the orderly development of land. In modern times, we have seen these principles lead to the development of an extensive array of environmental laws that are designed to protect and conserve our natural resources and natural heritage.

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[25] National Land and Water Resources Audit, *Australian Agriculture Assessment 2001*, Commonwealth of Australia, Canberra, 2001.
[26] National Land and Water Resources Audit, *Australian Agriculture Assessment 2001*, Commonwealth of Australia, Canberra, 2001.
[27] National Land and Water Resources Audit, *Australian Agriculture Assessment 2001*, Commonwealth of Australia, Canberra, 2001.
[28] National Land and Water Resources Audit, *Australian Terrestrial Biodiversity Assessment 2002*, Commonwealth of Australia, Canberra, 2002.
[29] National Land and Water Resources Audit, *Australian Terrestrial Biodiversity Assessment 2002*, Commonwealth of Australia, Canberra, 2002.
[30] National Land and Water Resources Audit, *Australian Terrestrial Biodiversity Assessment 2002*, Commonwealth of Australia, Canberra, 2002.

If we are to prevent the collapse of our natural resource base and demise of our natural heritage, regulation is essential. Many landholders have, and will, alter their practices voluntarily. However, the government cannot rely on the goodwill of landholders alone. Unfortunately, there are a significant number of landholders who have, and will, refuse to accept the need for change. Regulatory systems prevent the "recalcitrant few" from undermining the positive actions of those landholders who embrace the need for reform. They also provide an essential safety net to protect and conserve key aspects of the environment. This is particularly important where the impacts of relevant actions are irreversible. The moral force of law is also able to assist in altering community values and behaviour.

History has demonstrated the need for the Commonwealth to coordinate national responses to many environmental issues. The States and Territories are ill suited to protecting the national interest and fulfilling Australia's international environmental obligations. Further, Commonwealth intervention is also often necessary in order to resolve issues that have interstate implications and to provide the impetus for change.

The EPBC Act, while not the ideal piece of legislation, has the potential to make a significant contribution to addressing the environmental problems currently facing Australia. It provides the Commonwealth with a clear sphere of responsibility for the regulation of activities concerning the environment. These include the so-called "matters of national environmental significance", actions involving Commonwealth land and the actions of the Commonwealth and Commonwealth agencies.

Unfortunately, the Commonwealth has failed to fulfil its environmental responsibilities in relation to the administration and enforcement of the EPBC Act. As discussed above, only one action that has been referred to the Minister has been prevented from being undertaken as a result of the operation of the EPBC Act. The Commonwealth has also failed to fulfil the statutory duty to ensure the lists of threatened species and ecological communities are kept up-to-date[31]. In this regard, only 49 species and 7 ecological communities were listed between 16 July 2000 and 16 July 2003. Similarly, a mere three entries have been made on the Register of Critical Habitat, all of which relate to habitat located on islands in the Southern Ocean[32]. Further, despite evidence of widespread non-compliance, only two enforcement proceedings have been commenced in relation to breaches of the EPBC Act. None of these have concerned Australian citizens or residents and none have related to land management issues. The preferred method of dealing with offenders is to educate them as to the appropriate behaviour and to encourage compliance in a colloberative manner. However, where collaberative approaches have failed, as they have in this case, regulators must impose stringent penalties in order to protect the public interest and provide the necessary incentive for compliance[33]. Failure to impose penalties in the face of evidence of wide-spread and deliberate breaches encourages a culture of non-compliance and diminishes the moral force of the law.

The manner in which the EPBC Act is being administered and the Commonwealth's reluctance to take enforcement action have ensured the Act has had little or no impact on our environmental problems. It has also diminished the incentive for landholders to comply with

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[31] See s.185.

[32] The three entries are *Diomedea exulans* (Wandering Albatross) - Macquarie Island; *Thalassarche cauta* (Shy Albatross) - Albatross Island, The Mewstone, Pedra Branca; and *Thalassarche chrysostoma* (Grey-headed Albatross) - Macquarie Island.

[33] See Australian Law Reform Commission, *Civil and Administrative Penalties in Australian Federal Regulation*, ALRC 95, 2002, Chapter 3.

the Act's obligations. This must be rectified if the objectives of the EPCB Act and the potential benefits to landholders and the broader community are to be realised.

An issue of particular concern is the current Government's willingness to engage in "trade-offs" in relation to biodiversity loss. This has been witnessed in numerous controlled action and approval decisions[34]. By "trade-offs" I refer to the situation where the Government is willing to allow a proposal that will have an adverse impact on a matter protected under Part 3 (eg. a listed threatened species or ecological community) to proceed if the person taking the action carries out remediation works to offset the negative impact. This policy is most commonly applied in proposals concerning the clearing of native vegetation, where the Minister allows the vegetation to be cleared if the proponent undertakes to revegetate another area. I have two concerns with this policy.

Firstly, reliance on trade-offs when deciding a proposed action is not a controlled action is illegal. Section 75(2)(b) explicitly prohibits the Minister from having regard to the beneficial impacts of an action on the matters protected under Part 3 when making a controlled action decision. This practice undermines the effective operation of the EPBC Act's referral, assessment and approval process.

Secondly, trade-off approaches are not always appropriate when seeking to protect and conserve biodiversity. For example, where a species is at, or is approaching, a critical population level, a trade-off policy can jeopardise the species chances of survival by denying the species habitat for a period of time. Similarly, the absence of information on the habitat requirements of a species can make a trade-off policy inappropriate. I am concerned the Commonwealth is applying trade-offs in instances where it is inappropriate and despite a lack of information on the nature of the species and ecological communities concerned.

If the EPBC Act was improved and the Commonwealth made a concerted effort to realise the objects of the Act to provide protection for the environment and promote the conservation of biodiversity are realised, rural landholders would experience numerous benefits. These include the following.

(a) Loss of biodiversity will result in a reduction in ecosystem services that are provided to agriculture. These include: pollination; pest control; genetic resources; shade and shelter for livestock; soil fertility and stability; absorption and break down of wastes; regulation of hydrological cycle; raw materials; and aesthetic values. By providing protection for the matters of national environmental significance, the EPBC Act could assist in the retention of the value of these services.

(b) Reduction in native vegetation cover is the primary cause of the salinity problem that now plagues approximately 5.7 million hectares of land in Australia's agricultural and pastoral zone[35]. Continued clearance of native vegetation is likely to exacerbate this problem and lead to around 17 million hectares being affected by dryland salinity problems by 2050[36]. Of the area that is likely to suffer salinity problems by 2050, it

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[34] See for example the controlled action decisions made in relation to EPBC Reference Numbers 2002/849, 2002/842, 2002/733, 2003/975 and 2003/1069; and the approval decisions made in relation to EPBC Reference Numbers 2001/434, 2001/497 and 2001/164.

[35] National Land and Water Resources Audit, *Australian Dryland Salinity Assessment 2000: Extent, Impacts, Processes, Monitoring and Management Options*, Commonwealth of Australia, Canberra, 2000.

[36] National Land and Water Resources Audit, *Australian Dryland Salinity Assessment 2000: Extent, Impacts, Processes, Monitoring and Management Options*, Commonwealth of Australia, Canberra, 2000.

is estimated that in excess of 11 million hectares is likely to be agricultural land[37]. By assisting in the protection and conservation of native vegetation, the EPBC Act could contribute to the efforts being made to address dryland salinity issues in agricultural areas.

(c) Clearance of native vegetation and poor natural resource management practices has resulted in considerable increases in the rates of soil erosion. Current rates of soil loss through erosion are estimated to be approximately 3 times the natural rate[38]. The highest rates of soil erosion are found in intensely cropped lands, particularly those in northern Australia. Soil loss reduces agricultural productivity by decreasing soil fertility and adversely affecting freshwater resources. The EPBC Act could assist in addressing erosion issues in certain catchments (eg. those with acute erosion problems, Ramsar wetlands or habitat of threatened species or ecological communities).

(d) Loss of native vegetation results in the release of greenhouse gases into the atmosphere, which is contributing to global warming. Climate change has the potential to have a significant adverse affect on the Australian agricultural sector. In this regard, it is predicted that global warming is likely to result in decreases in rainfall in agricultural areas and increases in extreme climatic events, such as the drought that is currently being experienced in eastern States[39]. With appropriate amendments, the EPBC Act could make an important contribution to reducing Australia's emissions that are caused by land clearing.

(e) The protection and conservation of areas having important natural heritage values can assist in the development and growth of rural and regional tourism. Tourism can have both direct and indirect economic benefits for rural landholders.

The structural and administrative changes that are required to the EPBC Act bring about these benefits are considerable. These changes would have a profound impact on the activities of many rural landholders and the adverse impacts of these changes would not be evenly distributed amongst landholders or the broader community. Those landholders that are most acutely affected and who do not have the means to make appropriate adjustments should be given financial assistance. The issue of financial assistance is discussed in greater detail below.

2.3 Efficiency and effectiveness of the EPBC Act

2.3.1 Efficiency of the EPBC Act in reducing the costs of resource degradation

As discussed in section 2.1 above, the EPBC Act has had very little impact on the activities of rural landholders and those responsible for the management of Australia's watercourses. This is a product of structural deficiencies in the Act, flaws in the way in which it is being administered and non-compliance.

The failure of the EPBC Act to alter land management practices has ensured the Act has been ineffective in reducing the costs of resource degradation. However, a regulatory system has

[37] National Land and Water Resources Audit, *Australian Dryland Salinity Assessment 2000: Extent, Impacts, Processes, Monitoring and Management Options*, Commonwealth of Australia, Canberra, 2000.
[38] National Land and Water Resources Audit, *Australian Agriculture Assessment 2001*, Commonwealth of Australia, Canberra, 2001.
[39]

no chance of effectively achieving its objectives if the government lacks the political will to administer it appropriately.

2.3.2 Appropriateness of the distribution of the costs for preventing environmental degradation

There are several points that I wish to make in relation to the current distribution of the costs of preventing environmental degradation.

Firstly, a significant proportion of the responsibility for the environmental degradation caused by inappropriate land management practices must lie with rural landholders, both past and present. In many instances, the Commonwealth, States and Territories have actively encouraged inappropriate land management practices. However, as a group, landholders must acknowledge their responsibility for these issues.

Secondly, rural landholders stand to gain the greatest proportion of the financial benefits associated with the prevention of environmental degradation and improved land management practices. As a result, it is fair that rural landholders as a group bear a significant proportion of the costs associated with addressing these issues.

Thirdly, the Commonwealth, the State and Territory governments, and the broader community, have an obligation to assist in preventing the degradation of the environment that is caused by poor land management practices. The broader community has been a beneficiary of past practices that have degraded the environment. It also has an enormous stake in ensuring that the degradation of our natural resources and natural heritage is addressed. Therefore, our governments and the broader community should assist in shouldering the financial burden associated with the protection and conservation of our natural assets.

Fourthly, the Commonwealth and State and Territory Governments currently contribute a significant proportion of resources that are being devoted to the prevention and remediation of natural resource degradation. In the 1999-2000 financial year, the total expenditure on environment protection in the agricultural sector has been estimated at $221.3 million (not including Government subsidies)[40]. Government spending on natural resource management issues exceeds this expenditure by a considerable amount. For example, in the 1999-2000 financial year, the Commonwealth alone spent approximately $246.7 million on Natural Heritage Trust programs that are related to natural resource management issues[41]. Table 3 below contains details of this expenditure.

Table 3: Commonwealth expenditure on NHT natural resource management programs in 1999-2000

NHT Program	Actual Expenditure ($m)
Bushcare	81.6
Endangered Species Program	5.8
Farm Business Improvement Program	5.6
Farm Forestry Program	11.9
Murray-Darling 2001 Program	43.0
National Feral Animal Control Program	2.0

[40] Australian Bureau of Statistics, *Australia's Environment Issues and Trends 2003*, Commonwealth of Australia, Canberra, 2003.
[41] Environment Australia, *Natural Heritage Trust Annual Report 2000-01: Helping Communities Helping Australia*, Commonwealth of Australia, 2002.

National Land and Water Resources Audit	9.8
National Landcare Program	49.2
National Reserve System Program	11.4
National River Health Program	2.6
National Rivercare Program	19.1
National Weeds Program	0.9
National Wetlands Program	3.8
Total	**246.7**

The Commonwealth's expenditure on natural resource management programs under the NHT is only a part of the total government spending on natural resource management issues. The Commonwealth has a number of other programs associated with natural resource management (including tax relief) and the States and Territories also expend a considerable amount of money on these issues.

Given the nature of our current environmental problems, there is an urgent need for government expenditure on natural resource management issues to be increased considerably. There is also an urgent need for appropriate regulatory regimes to be put in place that prevent further degradation of the Australian environment. Where particular landholders suffer acute hardship due to the operation of regulatory regimes, the state should provide financial assistance to help them to adjust to the changes. However, the fact remains that the Commonwealth and the States and Territories currently contribute a significant proportion of the resources that are being devoted to the prevention of environmental degradation caused by inappropriate land management practices. The agricultural sector needs to acknowledge the extent of the environmental problems and take drastic action to prevent further degradation of Australia's natural resources and natural heritage.

2.4 Adequacy of assessments of economic and social impacts of decisions

There are several types of decisions under the EPBC Act that could have important implications for rural landholders. These include the following.

(a) A decision under Part 7 about whether an action that is the subject of a proposal referred to the Minister is a controlled action ("controlled action decision").

(b) A decision under Part 8 about which type of assessment approach must be used to assess the relevant impacts of the action ("assessment approach decision").

(c) A decision under Part 9 about whether or not to approve an action and, if it is approved, whether to attach conditions to the approval ("approval decision").

(d) A decision under Part 13 about whether or not to include a species or ecological community on the lists of threatened species or ecological communities.

(e) A decision under Part 15 about whether to nominate a place for inclusion on the World Heritage List.

(f) A decision under Part 15 about whether to designate a wetland for inclusion on the List of Wetlands of International Importance.

2.4.1 Controlled action decision

Subsection 75(1) states:

"*The Minister must decide:*

(a) whether the action that is the subject of a proposal referred to the Minister is a controlled action; and

(b) which provisions of Part 3 (if any) are controlling provisions for the action."

Section 67 defines a "controlled action" in the following terms.

"*An action that a person proposes to take is a controlled action if the taking of the action by the person without approval under Part 9 for the purposes of a provision of Part 3 would be prohibited by the provision.*"

Subsections 75(1A) and (2) impose restrictions on the matters the Minister may consider when making a controlled action decision. Subsection 75(1A) requires the Minister to have regard to public comments received in response to an invitation published on the Internet. Subsection 75(2) states:

"*If, when the Minister makes a decision under subsection (1), it is relevant for the Minister to consider the impacts of an action:*

(a) the Minister must consider all adverse impacts (if any) the action:

(i) has or will have; or

(ii) is likely to have;

on the matter protection by each provision of Part 3; and

(b) must not consider any beneficial impacts the action:

(i) has or will have; or

(ii) is likely to have;

on the matter protection by each provision of Part 3."

Although the requirements in subsections 75(1A) and (2) are the only explicit limitations on the matters the Minister may consider when making a controlled action decision, the nature and purpose of section 75 implicitly restricts the Minister to the following issues:

(a) will the action have, or is it likely to have, a significant impact on a matter protected by a provision of Part 3?; and

(b) is the action subject to an exemption from the provisions of Part 3?

Therefore, social and economic considerations are irrelevant for the purposes of controlled action decisions. The relevant matters are confined to those associated with the impacts of the action and whether an exemption applies to the action.

The prohibition on the consideration of social and economic matters when making controlled action decisions is consistent with the structure of the referral, assessment and approval process. The referral process is only intended to ensure that actions that are likely to have a

significant impact on the matters protected under Part 3 are appropriately assessed and regulated. Social and economic issues are considered at the approval phase (see below). If these issues were considered in making controlled action decisions it would undermine the ability of the assessment and approval process to achieve its objectives.

Unfortunately, the Minister and the Minister's delegates have had regard to irrelevant considerations on a number of occasions in making controlled action decisions. This typically involves the decision-maker having regard to the impacts of actions that do not form part of the action in question (eg. see the controlled action decisions made in relation to Reference Numbers 2003/975, 2003/1069 and 2002/733) or beneficial impacts of the action (see the controlled action decision made in relation to Reference Number 2002/842). It is arguable that economic and social issues motivated the consideration of irrelevant matters in these instances.

It is worth noting that the referral process was designed to minimise inconvenience for people proposing to take an action that could potentially require approval under the Act. Firstly, the referral process provides a means of eliminating uncertainty regarding the status of a proposed action under the action. If a person is proposing to take an action and they are unsure whether it requires approval, they can make a referral. If the Minister decides the action does not require approval and the action subsequently has a significant impact on a matter protected under Part 3, the person will not be in breach of the Act. Secondly, the Minister is usually required to determine whether an action is a controlled action within 20 business days of receiving a referral. If the person proposing to take the action states in the referral form that they consider the action is a controlled action, the Minister must make the controlled action decision within 10 business days of receiving the referral. These short timeframes ensure people who are proposing to take an action receive a response in a timely manner.

2.4.2 Assessment approach decision

Subsections 87(3), (4) and (5) impose restrictions on the Minister's powers to make assessment approach decisions.

Subsection 87(3) specifies matters the Minister must consider when making an assessment approach decision. These include preliminary information given to the Minister under section 86, information concerning the relevant impacts of the action, information received from a relevant State or Territory and any guidelines published by the Minister under subsection 87(6).

Subsection 87(4) restricts the ability of the Minister to select an accredited assessment process and subsection 87(5) restricts the ability of the Minister to select an assessment on preliminary documentation.

In addition, subsection 87(2) requires the Minister to seek comments from a relevant Minister of the State or Territory in which an action will be undertaken.

There is no explicit prohibition on the Minister having regard to social and economic issues when making an assessment approach decision. However, it would be contrary to the nature and purpose of the assessment process. The choice of assessment process should be determined solely on the nature of the action and the seriousness of the potential impacts on the matters protected under Part 3.

The statistics on the assessment approach decisions made between 16 July 2000 and 31 May 2003 suggest the Minister has had a preference for using assessments by preliminary

documentation and accredited assessment processes. In this regard, assessment by preliminary documentation was chosen on 49% of occasions and accredited assessment processes were chosen on 31% of occasions over this period[42]. The apparent predilection toward assessment by preliminary documentation and accredited assessment processes may be attributable (at least partly) to the Minister's desire to minimise costs to people whose actions require approval under the Act.

Although I am supportive of using the available processes to minimise duplication, the Minister must ensure assessments adequately address all potential risks to the matters protected under Part 3. I am concerned that the assessment by preliminary documentation may have been overused in the first three years of the Act's operation.

2.4.3 Approval decision

The appropriate stage in the referral, assessment and approval process for economic and social issues to be considered is when the Minister is deciding whether or not to approve the project. This is reflected in the Act, which requires the Minister to have regard to social and economic matters when deciding whether to approve an action[43]. At this point, the Minister will have detailed information at his or her disposal on the "relevant impacts" of the proposal (ie the impacts of the action on the matters protected by the controlling provisions). The Minister will also have a range of information on the economic and social impacts of the action. In this regard, people are entitled to submit information on the social and economic impacts of a proposed action during the assessment process. Assessment reports prepared by Environment Australia in relation to a proposed action also contain information on the social and economic impacts of an action. Further, the Minister is required to inform any other Minister who may have administrative responsibilities relating to the action of the decision he or she intends to make and to provide them with an opportunity to provide comments on the proposed decision[44]. Subsection 131(2) explicitly states that comments from the Ministers may relate to economic and social matters relating to the action. These provisions ensure the Minister is able to make an informed decision on whether the economic and social benefits of the proposal outweigh the potential adverse environmental, social and economic impacts. Further, the Minister has the ability to impose enforceable conditions that can be used to minimise the impacts of the action on matters protected under Part 3.

The Commonwealth Auditor-General recently considered the adequacy of the Minister's consideration of economic and social issues when making approval decisions under Part 9[45]. The Auditor-General concluded that:

"*Environment Australia has adequately met the requirements of the Act in this regard.*"

The notion that the Minister has placed considerable weight on economic and social impacts is also supported by the fact that the Minister has only refused one action in three years. In my opinion, the Minister has given too much weight to social and economic considerations (to the extent they are separate from environmental issues) in a number of instances. This has resulted in inappropriate actions being undertaken that have had important impacts on matters protected under Part 3. However, the available evidence suggests strongly that the social and economic impacts of the actions have been adequately assessed and that the Minister has given considerable weight to these issues in making approval decisions under Part 9.

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[42] See Environment Australia's monthly statistic reports available at: http://www.ea.gov.au/epbc/statistics/statistics.html.
[43] s.136.
[44] See s.131.
[45] Australian National Audit Office, *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999*, Audit Report No.38 2002-2003, Chapter 3.

2.4.4 Threatened species and ecological community listing decision

Part 13 of the EPBC Act requires the Minister to establish a list of threatened species and a list of threatened ecological communities. The list of threatened species contains six categories: extinct, extinct in the wild, critically endangered, endangered, vulnerable, and conservation dependent. The list of threatened ecological communities contains three categories: critically endangered, endangered and vulnerable.

In order to be eligible for inclusion on these lists, a species or ecological community must satisfy a number of specified requirements that relate to its conservation status. For example, in order for a species to be listed as critically endangered it must be facing an extremely high risk of extinction in the wild in the intermediate future as determined in accordance with the criteria prescribed in the regulations.

Members of the public can nominate species and ecological communities for inclusion on these lists[46]. After receiving a nomination, the Minister must request the advice of the Threatened Species Scientific Committee ("**TSSC**") on whether the species or community is eligible for inclusion on the relevant list[47]. The TSSC usually has 12 months to provide its advice to the Minister[48]. After receiving the advice, the Minister has 90 days to decide whether or not to include the species or community on the relevant list[49].

Section 185 imposes an obligation on the Minister to "take all reasonably practical steps" to ensure the lists of threatened species and ecological communities contain all species and communities that satisfy the listing criteria.

Importantly, in deciding whether or not to include a species or community on the list of threatened species or list of threatened ecological communities, the Minister can only have regard to matters that "relate to the survival" of the species or community[50]. Although the wording of the relevant sections could be improved, it is clear the intention of Parliament was to confine the relevant considerations for the purpose of this decision to the question of whether the species or ecological community concerned satisfies the listing criteria. Therefore, it should be "science-based" and economic and social considerations should be irrelevant.

If the Minister could have regard to economic and social considerations in making listing decisions, it would undermine the integrity of the lists and jeopardise the ability of the approval and permit processes to provide effective protection for all threatened species and ecological communities. As noted above, economic and social considerations are properly considered when the Minister is deciding whether to approve an action or grant a permit in relation to an action.

The listing process is designed to ensure that:

(a) all species and ecological communities that satisfy the listing criteria are protected under the Act;

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[46] s.191.
[47] ss.189 and 191.
[48] s.189(4).
[49] s.189(5).
[50] See ss 186(2) and 187(2).

(b) the impacts of actions that may have a significant impact on a species or ecological community that satisfies the listing criteria are required to be assessed before the action can be taken;

(c) the Minister can block and impose enforceable conditions on an action that is likely to have a significant impact on a species or ecological community that satisfies the listing criteria;

(d) recovery plans can be prepared in relation to all species and ecological communities that satisfy the listing criteria; and

(e) Australia is able to meet its obligations under the Biodiversity Convention[51].

In response to adverse reactions to the listing of certain species and ecological communities (most notably the inclusion of the Brigalow (*Acacia harpophylla* dominant and co-dominant) and Bluegrass (*Dichanthium* spp.) dominant grasslands of the Brigalow Belt Bioregions (North and South) on the list of threatened ecological communities), the Minister introduced a public consultation process. This allows members of the public to submit comments on whether a nominated species or community satisfies the listing criteria and the economic and social impacts of the inclusion of the species or community on the relevant list. Minister Kemp has indicated the information on the economic and social impacts of listing will not be considered when he is making the listing decision. Rather, he will retain this information for use when deciding whether to approve proposed actions. The public consultation process also involves the distribution of information to affected stakeholders on the implications of listing.

I am extremely supportive of the policy of informing affected stakeholders of the legal impacts of the inclusion of a species or ecological community on the lists of threatened species and ecological communities. This should assist stakeholders to make necessary adjustments to their plans and practices and to obtain a greater understanding of the relevant legislative processes. It is also likely to result in higher levels of compliance and greater public support for the protection and conservation of biodiversity.

However, I do not believe the Minister should encourage members of the public to submit comments on the economic and social impacts of listing. This information is irrelevant for the purposes of the listing decision. Further, requesting this information may mislead members of the public into believing social and economic considerations are relevant for the purposes of the listing decision. It also has the potential to influence the Minister's treatment of nominations. In this regard, the slow rate of listing of species and communities could be used to support an argument that the Minister is delaying making decisions in relation to nominations that could have adverse political impacts.

2.4.5 World Heritage listing decision

The Commonwealth is required to use its "best endeavours" to reach agreement with the owners and occupiers of a place, and the relevant State or Territory, on the nomination and management of the place prior to nominating the place for inclusion on the World Heritage List. The decision on whether to include a nominated place on the World Heritage List is made by the World Heritage Committee.

As with the listing process for threatened species and ecological communities, social and economic considerations should be irrelevant when deciding whether to nominate a place for inclusion on the World Heritage List. This decision should be made solely on basis of

[51] Convention on Biological Diversity done at Rio de Janeiro on 5 June 1992.

whether the Minister believes the place has World Heritage values. Economic and social issues should be considered on a case-by-case basis when the Minister is deciding whether to approve an action. However, the statutory consultation process ensures that the impacts of nomination and listing are explained to relevant stakeholders and that the Commonwealth makes appropriate arrangements for the ongoing management of the place.

The inclusion of this process for consultation in the EPBC Act may have prompted by the public outcry that was associated with the nomination of the Wet Tropics of Queensland in the 1980s. This process should minimise the risk of this reaction occurring in the future.

None of the listings that have occurred since the commencement of the EPBC Act have had any significant public opposition.

2.4.6 Ramsar wetland listing decision

The nomination process for the designation of wetlands on the List of Wetlands of International Importance requires the Commonwealth to use its "best endeavours" to reach agreement with the owners and occupiers of the wetland, and relevant State and Territory Governments, on the designation and the management of the wetland.

As discussed above in relation to the nomination of World Heritage Areas, social and economic issues should not be considered when deciding whether to designate a wetland for inclusion on the List of Wetlands of International Importance. These issues are more appropriately considered on a case-by-case basis during the approval process. However, the consultation process should assist in reducing misunderstandings about the impacts of the inclusion of a wetland on the List of Wetlands of International Importance.

2.4.7 Conclusion

In conclusion, the EPBC Act contains sufficient processes for the consideration of economic and social issues. It also contains several consultation processes that provide affected stakeholders with an opportunity to comment on proposed decisions and to be given information about the impacts of proposed decisions. However, I believe the administrative arrangements that have been established in relation to the listing of threatened species and ecological communities should be changed to ensure stakeholders are not encouraged to submit comments on social and economic impacts. These comments are irrelevant in the listing process.

2.5 Transparency and community consultation

2.5.1 Consultation during development

The EPBC Act was passed after several years of deliberation and consultation. In 1996, the Commonwealth undertook a review of its involvement in environmental regulation and management. This led to the Council of Australian Governments ("**COAG**") undertaking an investigation into the division of responsibility for environmental regulation and management between the three tiers of government. A consultation paper was released in relation to this review[52]. After the review had been completed, COAG signed the Coalition of Australian Governments Heads of Agreement on the Environment ("**Heads of Agreement**").

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[52] Intergovernmental Committee for Ecologically Sustainable Development, *Review of Commonwealth/State Roles and Responsibilities for the Environment Consultation Paper*, December 1996.

The Heads of Agreement identified the matters of national environmental significance and indicated that the Commonwealth's environmental assessment process would apply to actions that are likely to have a significant impact on these matters. This agreement provided the basis for the EPBC Bill 1998, which was subsequently passed as the EPBC Act in 1999.

The Commonwealth could have made greater efforts to consult rural communities about the potential impacts of the EPBC Act. This may have reduced the confusion that has been associated with the Act over the past 3 years. However, during the 4 years over which the EPBC Act was prepared, agricultural lobby groups had numerous opportunities to make submissions to Parliament about the Commonwealth's involvement in the regulation of environmental issues. The signing of the Heads of Agreement in 1997 constituted a declaration of the Commonwealth's intention to prepare the EPBC Act. The Heads of Agreement was made publicly available soon after it was signed and was the subject of considerable public comment. Therefore, agricultural lobby groups and other rural interest groups must bear a considerable amount of the blame for the lack of consultation with the Commonwealth about the development of the EPBC Act.

2.5.2 Consultation during implementation

Although the EPBC Act contains many flaws, a lack of opportunities for public participation is not amongst them. The table below contains a summary of some of the more important opportunities for public participation that are provided for in relation to decisions and processes under the EPBC Act.

Table 4: Opportunities for public participation

No	Section	Nature of decision/process	Comments
1	74	Controlled action decision	Members of the public are provided with an opportunity to comment on all referrals in which the person proposing to take the action states that it does not believe the action is a controlled action.
2	Part 8	Assessment process	Members of the public are provided with an opportunity to comment on draft assessment documentation in relation to controlled actions. Members of the public may not be provided with an opportunity to comment on assessment documentation where an action is assessed under an accredited assessment approach. Similarly, if an action is assessed by way of a commission of inquiry, members of the public are not guaranteed an opportunity to participate in the process. However, in most cases (if not all), members of the public will be provided with an opportunity to participate in all assessments concerning controlled actions.
3	49A	Preparation of assessment and approval bilateral agreements	Members of the public are required to be provided with an opportunity to comment on all draft bilateral agreements.
4	N/A	Listing of threatened species and ecological communities	The Minister has established an administrated arrangement whereby members of the public are provided with an opportunity to comment on nominations for the inclusion of a species or ecological community on the lists of threatened species and ecological communities.
5	266A	Consultation on permits issued under Part 13	The Minister is required to establish a register for public comments about permit applications made

			under Part 13. When the Minister receives an application for a permit under Part 13, he/she must cause a notice to be sent to the people on the register inviting their comments on the application.
6	275	Recovery plans and threat abatement plans	The Minister must invite public comments on all proposed recovery and threat abatement plans.
7	290	Wildlife conservation plans	The Minister must invite public comments on all proposed wildlife conservation plans.
8	314	Nomination of places for inclusion on the World Heritage List	The Commonwealth is required to use its "best endeavours" to reach agreement with the owners/occupiers of a place on the nomination and management of the place prior to nominating the place for inclusion on the World Heritage List.
9	326	Designation of wetland for inclusion on the List of Wetlands of International Importance	The Commonwealth is required to use its "best endeavours" to reach agreement with the owners/occupiers of a place on the designation and management of the place prior to designating the place for inclusion on the List of Wetlands of International Importance.
10	351	Commonwealth reserves	Before the Governor-General makes a proclamation concerning a new Commonwealth reserve, the Director of National Parks must prepare a report on the proposed reserve. The Director must invite public comments when preparing the report on the proposed reserve.
11	368	Management plans for Commonwealth reserves	The Direct of National Parks must invite public comments on all proposals to prepare management plans for Commonwealth reserves. The Director must also invite public comments on draft management plans for Commonwealth reserves.

There are several other processes that allow for public participation under the EPBC Act, including the wildlife trade provisions in Part 13A. However, space prevents me from considering them all.

The key issue is that there are ample opportunities for public participation in most decision-making processes under the EPBC Act. There are issues about the extent to which the Minister and Environment Australia have regard to public comments when making decisions. However, these issues are unrelated to the question of whether the Act contains sufficient opportunities for public participation.

2.6 Overlap and consistency with State/Territory laws

The EPBC Act was designed to minimise unnecessary duplication between Commonwealth and State environmental laws. This intention is reflected in numerous aspects of the Act, including the following provisions.

(a) Matters protected under Part 3 - The EPBC Act's environmental assessment and approval process only applies to "matters of national environmental significance", Commonwealth land and actions involving the Commonwealth and Commonwealth agencies.

(b) Bilateral agreements - The bilateral agreement provisions enable the Commonwealth to accredit State and Territory assessment and approval processes for the purposes of the EPBC Act.

(c) Accredited assessment process - The Minister can accredit State assessment processes for the purposes of assessing a controlled action under Part 8. This eliminates the need for separate Commonwealth and State assessments to be carried out in relation to a single action. As highlighted above, accredited assessment processes have chosen in over 30% of assessment approach decisions.

(d) Biodiversity conservation provisions in Part 13 – Part 13 contains a series of provisions that are designed to provide protection for members of listed threatened species, listed threatened ecological communities, listed migratory species, listed marine species and cetaceans. It also contains provisions for the protection of habitat included on the Register of Critical Habitat. However, these biodiversity protection provisions only apply to actions taken in Commonwealth areas.

These provisions ensure there is minimal unnecessary overlap between the EPBC Act and other laws of the Commonwealth, States and Territories. Further, where overlap is unavoidable, the Act contains provisions for the duplication and compliance costs to be reduced.

While minimising duplication is an important objective, in many instances the Commonwealth must retain the power to conduct an independent assessment and approval process. The Commonwealth has an important role in ensuring the matters of national environmental significance are appropriately managed, protected and conserved. In this regard, the regulation of the matters of national environmental significance under the EPBC Act provides the Commonwealth with powers to ensure Australia is able to meet its international legal obligations. It also ensures the Commonwealth is able to regulate activities that are likely to affect matters that are agreed to be of national concern.

For these reasons, I vehemently oppose the creation of approval bilateral agreements, as they would result in the Commonwealth abrogating its responsibility for the regulation of activities that may have a significant adverse impact on the matters of national environmental significance. However, provided there is an appropriate level of oversight, I support the use of accredited assessment processes and the creation of assessment bilateral agreements. These processes allow State and Territory assessment processes to be used, however, the Commonwealth retains the approval power. The use of these processes can minimise compliance and administrative costs without compromising the effectiveness of the assessment and approval process.

2.7 Options to reduce adverse impacts of environmental regimes

The EPBC Act's referral, assessment and approval process has three (4) main structural flaws:

(a) the inability of the Act to effectively deal with cumulative impacts;

(b) uncertainty associated with key elements of the Act;

(c) the exemptions provided for activities that are having adverse impacts on matters of national environmental significance; and

(d) the limited coverage of the "matters of national environmental significance".

These flaws are discusses in greater detail below.

2.7.1 Cumulative impacts

The greatest threats to Australia's biodiversity and the matters of national environmental significance are caused by the cumulative impacts of many actions. Clearing of native vegetation is a relevant example. Although an exceedingly large amount of native vegetation is being cleared in Australia each year, individual clearing incidents are often small and, when considered alone, appear to be relatively insignificant. However, the cumulative impact of these clearing incidents on Australia's biodiversity is disastrous.

The EPBC Act's referral, assessment and approval process is incapable of addressing the issues associated with cumulative impacts. This is a result of the nature of the prohibitions in Part 3 and the provisions concerning controlled action decisions. In this regard, in order for the referral, assessment and approval process to apply, an action must be likely to have a "significant impact" on a matter protected under Part 3. The creation of a threshold level of impact ensures the assessment process is unable to capture the myriad of smaller incidents that cumulatively have a significant impact. Similarly, when making a controlled action decision, the Minister is only permitted to consider the impacts of the relevant action, not the impacts of other similar actions. Consequently, cumulative impacts are largely irrelevant in relation to determining whether approval is required. They are only relevant once the Minister has determined an action requires approval under the EPBC Act (ie during the assessment and approval phases).

These flaws in the referral, assessment and approval process greatly diminish its utility as a means of providing protection for the matters protected under Part 3.

2.7.2 Uncertainty

There are a number of areas of uncertainty associated with key aspects of the referral, assessment and approval process that greatly diminish its effectiveness and may be creating complications for rural landholders and other stakeholders. Uncertainty creates two main problems. Firstly, it creates complications for stakeholders who are required to comply with the Act. These complications can diminish the willingness of stakeholders to observe the relevant statutory requirements[53]. Secondly, legal uncertainty makes it extremely difficult for the EPBC Act to be effectively administered and enforced. If the regulators are unlikely to enforce the Act, stakeholders are less likely to comply.

Important areas of uncertainty include the following.

(a) The "significant impact" threshold

There is considerable uncertainty associated with the concept of an action having a "significant impact". Firstly, it requires subjective value judgements to be made about the potential or actual impacts of an action. Secondly, a considerable amount of scientific data is often required for this assessment to be made accurately. Unfortunately, in many instances, this scientific data and knowledge is unavailable or non-existent[54].

(b) The "likely" test

[53] See Bardach, E. and Kagan, R.A, *Going by the Book: The Problem of Regulatory Unreasonableness*, Temple University Press, Philadelphia, 1982.

[54] For further discussion on the issues associated with scientific uncertainty, see Farrier D, Whelan R and Brown C, "Addressing Scientific Uncertainty in Local Government Decision-Making Processes" (2002) 19 *Environmental and Planning Law Journal* 6 at 429.

As stated above, an action will require approval under the EPBC Act if it is "likely" to have a significant impact on a matter protected under Part 3. At what point does an impact become "likely"?

The Federal Court has suggested that the meaning of "likely" in this context is "*prone, with a propensity or liable*", or "*real or not remote chance or possibility regardless of whether it is less or more than fifty per cent*"[55].

When combined with the problems associated with the "significant impact" threshold, this area of uncertainty can create considerable difficulties for both regulators and proponents.

(c) What are the "impacts" of an action?

In many instances, it can be extremely difficult to delineate between the impacts of an action and the impacts of a related action, particularly when the related action has been facilitated by the first mentioned action. For example, if a person proposes to construct a road, do the impacts of the act of constructing the road include the impacts of people who subsequently use the road? Similarly, if a person proposes to construct a dam, do the impacts of constructing the dam include the impacts of landholders who use the water to irrigate their crops? This issue is the subject of an application that is currently before the Federal Court. However, irrespective of the outcome of the proceedings, it is an issue that will continue to create problems for all stakeholders.

(d) Protecting species and ecological communities

The EPBC Act's referral, assessment and approval process provides protection for listed threatened species, migratory species and ecological communities. While I am extremely supportive of providing statutory protection for threatened and other important elements of Australia's biodiversity, in many instances it can be very difficult to determine the impacts of an action on an entire species or ecological community. Indeed, in many instances, it can be difficult to even identify a species or ecological community. This can be a particular problem with ecological communities, where the opinions of expert ecologists can differ considerably. This issue can create complications when seeking to comply with, or enforce, the EPBC Act.

(e) Protecting world heritage values of World Heritage properties and the ecological character of Ramsar wetlands

Sections 12 and 15A provide protection for the world heritage values of declared World Heritage properties. However, there can be difficulties with determining what the world heritage values of a World Heritage property are and what the extent of the impacts of an action on these values are likely to be.

Similarly, sections 16 and 17B provide protection for the ecological character of declared Ramsar wetlands. Again, it can often be difficult to accurately determine what the ecological character of a wetlands is and what the impacts of an action on these characteristics is likely to be. It would be more appropriate if these provisions provided protection for the relevant places and/or prohibited all development within a specified area without approval.

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[55] *Booth v Bosworth* (2001) 114 FCR 39, per Branson J at 64. The term "likely" has been interpreted in a similar manner in the context of the *Environmental, Planning and Assessment Act 1979* (NSW), see *Jarasius v Forestry Commission of NSW* (1988) 71 LGRA 79; *Drummoyne Municipal Council v Roads and Traffic Authority of NSW* (1989) 67 LGRA 155; and *Drummoyne Municipal Council v Maritime Services Board* (1991) 72 LGRA 186.

If the EPBC Act is going to achieve its objectives, efforts must be taken to lessen the degree of uncertainty associated with the operation of the provisions of Part 3.

2.7.3 Exemptions

There are a large number of exemptions from the requirements in Part 3 that undermine the ability of the Act to achieve its objects. These include the following.

(a) The exemption provided for RFA forestry operations undertaken in accordance with a regional forestry agreement[56].

(b) The exemptions for actions that were authorised prior to the commencement of the Act[57].

(c) The exemption provided for existing uses (ie a use that is a lawful continuation of a use of land, sea or seabed that was occurring immediately before the commencement of this Act)[58].

(d) The ability of the Minister to grant exemptions from the provisions in Part 3 if he/she is satisfied it is in the national interest that the relevant provisions do not apply to the action[59].

(e) The exemption provided for the activities authorised under a facility installation permit granted under the *Telecommunications Act 1997* (Cwlth)[60].

The scope of the existing exemptions must be reduced considerably if the Act is going to be able to achieve its environmental objectives.

2.7.4 Matters of National Environmental Significance

The matters of national environmental significance contained in Part 3, Division 1 of the EPBC Act are inadequate and do not represent the full range of issues that are truly matters of national environmental importance.

Of greatest relevance to this inquiry are the proposals to include a land clearing "trigger" in Part 3 and to expand the existing matters of national environmental significance so as to include conservation dependent species and vulnerable ecological communities.

I am highly supportive of the proposal to expand the existing matters of national environmental significance so as to include conservation dependent species and vulnerable ecological communities. This would ensure better protection for our biodiversity by providing protection for species and ecological communities before their conservation status reaches crisis point.

With regard to the proposal for a land-clearing trigger, I acknowledge there may be complications associated with this proposal. However, these complications could be resolved through the use of a zoning system that provides protection for areas of importance. The areas of importance could be identified on the basis of biodiversity values, heritage values, erosion and salinity risk, and the nature and extent of protection provided under relevant State

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[56] Part 4, Division 4.
[57] s.43A.
[58] s.43B.
[59] ss.158 and 28.
[60] *Telecommunications Act 1997* (Cth), Schedule 3, section 28.

or Territory laws. This system could provide all stakeholders with legal certainty and ensure appropriate statutory regimes are in place to address important environmental issues.

3. STATE BIODIVERSITY AND NATIVE VEGETATION LAWS

The regimes for the regulation of land clearing and the conservation of biodiversity differ markedly between the States and Territories. In this section, I will only discuss those that apply in New South Wales and Queensland.

3.1 New South Wales

3.1.1 Background on NSW laws

NSW has a number of pieces of legislation that relate to native vegetation and biodiversity. The main pieces of legislation and a brief outline of the legislative regimes are discussed below.

(a) *Environmental Planning and Assessment Act 1979* (NSW) ("**EPA Act**")

The EPA Act is the principal piece of environmental and planning legislation in New South Wales. It regulates development primarily through what are known as Environmental Planning Instruments ("**EPIs**"). These include Local Environmental Plans ("**LEPs**"), Regional Environmental Plans ("**REPs**"), State Environmental Planning Policies ("**SEPPs**"), and deemed EPIs. Broadly, EPIs set out what types of development can be carried out in certain areas. This is achieved through the placement of development into three categories: development for which development consent is not required; development for which development consent is required; and development that is prohibited.

When development consent is required under an EPI, the provisions of Part 4 of the EPA Act will apply. Part 4 outlines the processes that apply in relation to applications for, and the granting of, development consents. It also contains provisions relating to the assessment of the environmental impacts of proposals.

Many EPIs regulate activities concerning native vegetation and biodiversity conservation. These range from LEPs that regulate land clearing in local government areas to SEPPs, such as *SEPP 14 – Coastal Wetlands* and *SEPP 26 – Littoral Rainforests*.

Where a person proposes to undertake a "development" that involves clearing native vegetation or that may affect biodiversity, they will generally require development consent and may be required to prepare a species impact statement or environmental impact statement. The consent authority for these activities will differ depending on the location of the proposed development and the extent of the proposed clearing. In many instances, by virtue of the operation of the *Native Vegetation Conservation Act 1997* (NSW), the consent authority will be the Minister for Land and Water Conservation.

(b) *Threatened Species Conservation Act 1995* (NSW) ("**TSC Act**")

The TSC Act:

(i) contains lists of extinct species, endangered species, vulnerable species, endangered populations, endangered ecological communities, and key threatened processes;

(ii) allows the Minister to declare land to be critical habitat of an endangered species, population or ecological community if it is critical to the survival of the species, population or ecological community;

(iii) provides for the preparation of recovery plans for endangered species, vulnerable species, endangered populations and endangered ecological communities;

(iv) provides for the preparation of threat abatement plans for key threatening processes;

(v) allows the Director-General of the National Parks and Wildlife Service ("**NPWS**") to issue licences to harm or pick a member of a threatened species, population or ecological community, or to damage habitat of a threatened species, population or ecological community (including critical habitat); and

(vi) allows the Director-General of the NPWS to issue stop work orders to prevent adverse impacts on threatened species, populations and ecological communities (and their habitats).

The mechanisms for the statutory protection of species, populations and ecological communities that are listed under the TSC Act are contained in the EPA Act and the *National Parks and Wildlife Act 1974* ("**NPW Act**"). In this regard, it is an offence under the NPW Act to:

(i) harm or pick a member of a species, population or ecological community that is listed as threatened under the TSC Act;

(ii) damage any critical habitat; and

(iii) damage habitat (other than critical habitat) of a threatened species, population or ecological community.

The EPA Act provides that where an application for development consent is made under Part 4 in respect of land that is critical habitat, or the development is likely to significantly affect a threatened species, population or ecological community, or their habitat, the applicant must submit a "species impact statement" and it must be taken into account by the consent authority[61].

If an environmental impact statement is required under Part 5 of the EPA Act, and the development or activity is likely to significantly affect the environment (including critical habitat) or a threatened species, population or ecological community, a species impact statement must be prepared and taken into account by the relevant determining authority. There are also additional requirements concerning proposals dealt with under Part 5 of the EPA Act concerning the concurrence of, or consultation with, the Director-General of the NPWS and the Minister for the Environment[62].

(c) *Native Vegetation Conservation Act 1997* (NSW) ("**NVC Act**")

The NVC Act replaced State Environmental Planning Policy 46 ("**SEPP 46**"), which was adopted in 1996. Broadly, it prohibits clearing of land in certain areas unless the clearing is authorised under a development consent issued under the EPA Act or an applicable native

[61] The requirements for the preparation of species impact statements are set out in the TSC Act.
[62] See ss.112B and 112C.

vegetation code of practice[63]. The Minister for Land and Water Conservation is the consent authority for any clearing that requires development consent because of the operation of the NVC Act[64].

The Act provides for the preparation and implementation of regional vegetation management plans ("**RVMPs**"). RVMPs can identify land on which development consent is required to clear native vegetation, specify how native vegetation must be cleared with or without development consent, can identify regional protected land, and include measures for the protection and conservation of native vegetation[65].

The NVC Act divides the land to which the Act applies into two categories: land subject to a RVMP; and land not subject to a RVMP. It also regulates two types of clearing: clearing native vegetation (ie removing or killing any "native vegetation" – which is defined as indigenous trees, understorey plants, groundcover (but only in areas where not less than 50% of the herbaceous vegetation covering the area comprises indigenous species), and wetland plants); and clearing protected land (ie removing or killing any vegetation on "regional protected land" or "State protected land").

If a person proposes to clear native vegetation on land to which a RVMP applies, he/she must comply with the requirements of the RVMP. As noted above, this can include a requirement to obtain development consent under Part 4 of the EPA Act. Similarly, if a person proposes to clear any vegetation on land to which a RVMP applies, and the land is designated as regional protected land RVMP, he/she must comply with the requirements of the RVMP.

Section 21 prohibits the clearing of native vegetation on any land to which the Act applies and State protected land except in accordance with a development consent issued under the EPA Act or a native vegetation code of practice. Section 22 prohibits clearing on State protected land except in accordance with a valid development consent issued under the EPA Act. There are a number of exemptions from the general prohibitions on land clearing on land to which a RVMP applies. These include the following.

(i) Sustainable grazing, being a level of grazing that, in the opinion of the Director-General, the vegetation concerned is capable of supporting without resulting in a substantial long-term modification of the structure and composition of the vegetation[66].

(ii) The cutting of 7 trees per hectare in any 12-month period for on-farm uses[67].

(iii) The clearing of native vegetation planted for forestry, agriculture, agroforestry, woodlots, gardens and horticultural purposes[68].

(iv) The clearing of native vegetation in a native forest in the course of its being selectively logged on a sustainable basis or managed for forestry purposes[69].

(v) Clearing of up to 2 hectares over any 12 month period for any contiguous land holding in the same ownership[70].

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[63] Note, the requirements contained in the NVC Act apply to land subject to a lease issued under the *Western Lands Act 1901* (NSW) (see s.18DB of the *Western Lands Act 1901*).
[64] See s.14.
[65] See s.25.
[66] See s.5 of the NVC Act.
[67] See Schedule 4, item 3 of the NVC Act and SEPP 46.
[68] See Schedule 4, item 3 of the NVC Act and SEPP 46.
[69] See Schedule 4, item 3 of the NVC Act and SEPP 46.

(vi) The removal of native vegetation, whether seedlings or regrowth, of less than 10 years of age if the land has been previously cleared for cultivation, pastures or forestry plantation purposes[71].

(vii) The clearing to a minimum extent of native vegetation if it is necessary for the construction, operation and maintenance of farm structures (such as farm dams, tracks, bores, windmills, fences, fence lines, stockyards, loading ramps, sheds and the like)[72].

(viii) Clearing land not more than 100 metres wide for a firebreak where mallee species predominate in the Western Division[73].

(ix) Clearing land in the Western Division, not more than 5 hectares in area for the construction of a house, shearing shed, machinery shed, ground tank, dam, stock yard or similar utility, subject to the construction being permitted under the Western Lands Act or any relevant Western Lands lease or any licence[74].

(x) Clearing land in the Western Division of seedlings and regrowth where the land was cleared or cultivated during the preceding 20 years under the provisions of the Western Lands Act or the Forestry Act 1916, except where the tree cover predominantly comprises one or more of the following species: *Eucalyptus camaldulensis* (river red gum); *Casuarina cristata* (belah); *Casuarina pauper* (belah); or *Callitris glaucophylla* (white cypress pine)[75].

(xi) Clearing land in the Western Division of trees which are less than 3 metres high where one or more of the following species predominates: *Eucalyptus largiflorens* (black box); *Eucalyptus camaldulensis* (river red gum); *Eucalyptus populnea* (bimble box); *Eucalyptus coolabah* (coolibah); *Callitris glaucophylla* (white cypress pine); *Casuarina cristata* (belah); or *Casuarina pauper* (belah)[76].

(xii) Clear land where the predominant species are "woody weeds" which, for the purpose of this paragraph, are: *Eremophila sturtii* (turpentine); *Eremophila mitchellii* (budda, false sandalwood); *Dodonaea viscosa subsp. spatulata* (broadleaf hopbush); *Dodonaea viscosa subsp. angustissima* (narrowleaf hopbush); *Senna artemisioides subsp. filifolia* (punty bush); or *Senna artemisioides nothosubsp. artemisioides* (silver cassia)[77].

(xiii) Clear land (by the use of fire) where mallee trees are the predominant species for the purpose of promoting the growth of pasture species or reducing hazardous or potentially hazardous fuel build-up, but not so as to result in the significant killing of the below-ground parts of the predominant species or the significant destruction of other trees[78].

3.1.2 Impacts on landholders and regional communities

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[70] See Schedule 4, item 3 of the NVC Act and SEPP 46.
[71] See Schedule 4, item 3 of the NVC Act and SEPP 46.
[72] See Schedule 4, item 3 of the NVC Act and SEPP 46.
[73] See Schedule 4, item 5 of the NVC Act and Schedule 4 of the *Western Lands Regulation 1997*.
[74] See Schedule 4, item 5 of the NVC Act and Schedule 4 of the *Western Lands Regulation 1997*.
[75] See Schedule 4, item 5 of the NVC Act and Schedule 4 of the *Western Lands Regulation 1997*.
[76] See Schedule 4, item 5 of the NVC Act and Schedule 4 of the *Western Lands Regulation 1997*.
[77] See Schedule 4, item 5 of the NVC Act and Schedule 4 of the *Western Lands Regulation 1997*.
[78] See Schedule 4, item 5 of the NVC Act and Schedule 4 of the *Western Lands Regulation 1997*.

Has the NSW Native Vegetation and Biodiversity Conservation Laws Unduly Restricted the Activities of Rural Landholders?

The situation with respect to NSW native vegetation and biodiversity conservation legislation is similar to that encountered with the EPBC Act. Although less extreme than has been the case with the EPBC Act, the NSW native vegetation and biodiversity conservation legislation has had limited impact on the activities of rural landholders due to:

(a) the manner in which the relevant legislation is currently being administered;

(b) the nature of the regimes; and

(c) non-compliance.

The available evidence suggests that the failure of the NSW native vegetation legislation to have a profound impact on the rate of the decline in native vegetation in NSW can primarily be attributed to the willingness of relevant consent authorities to approve clearing applications. The table below sets out the figures on the areas applied to be cleared and the areas approved to be cleared for each region in NSW between 1 January 2000 and 31 December 2002.

Table 5: Area Applied for and Approved for Clearing under the NVC Act Between January 2000 and December 2002

	Period: 1/1/00 – 31/12/00		**Period: 1/1/01 – 31/12/01**		**Period: 1/1/02 – 31/12/02**	
	Area applied to clear (ha)	**Area approved to clear (ha) (and as a % of area applied)**	**Area applied to clear (ha) (and as a % of area applied)**	**Area approved to clear (ha) (and as a % of area applied)**	**Area applied to clear (ha) (and as a % of area applied)**	**Area approved to clear (ha) (and as a % of area applied)**
Barwon	8965	7003 (78%)	11945	9133 (76%)	1217	1169 (96%)
Central West	14797	8965 (61%)	8581	5344 (62%)	12453	10097 (81%)
Far West	36570	34545 (94%)	63222	42393 (67%)	20058	16440 (82%)
Hunter	8322	5527 (66%)	14597	10387 (71%)	5927	4845 (82%)
Murray	3029	2783 (92%)	14548	9152 (63%)	30665	16434 (54%)
Murrumbidgee	10797	4273 (40%)	8342	4367 (52%)	10261	5850 (57%)
North Coast	15963	13385 (84%)	10274	9499 (92%)	3472	3054 (88%)
Sydney/South Coast	2072	1350 (65%)	2367	1819 (77%)	826	365 (44%)
Total	**100515**	**77831**	**133876**	**92094**	**84878**	**58255**

		(77%)		**(69%)**		**(69%)**

Source: NSW Department of Land and Water Conservation, Native Vegetation Clearing Reports, available online at: http://www.dlwc.nsw.gov.au/care/veg/clearing.html (1 August 2003).

As the above figures indicate, between January 2000 and December 2003, around 70% of the area applied to be cleared was approved. The total area of land that was approved to be cleared over this period was 228,186 ha. This is a staggering figure, particularly when you account for the clearing that has previously occurred and the fact that a significant proportion of clearing that occurs in rural areas is exempt from the requirement to obtain development consent. The majority of this clearing was for the purposes of cropping and grazing[79]. Given the large areas of native vegetation that are authorised to be cleared each year, it is difficult to accept that NSW's native vegetation and biodiversity laws are having a significant adverse impact on the economic interests of rural landholders.

The unwillingness of the NSW Government to take enforcement proceedings against people who carry out illegal clearing has also diminished the effectiveness of its native vegetation and biodiversity conservation laws. The NSW Auditor-General has reported that between the introduction of the NVC Act and 30 April 2002, there were 705 reported breaches of the Act[80]. In 499 cases, no enforcement action was taken against the alleged offender. In most cases where an enforcement action was taken, the action consisted only of a warning letter[81]. Very few formal enforcement proceedings have been commenced in relation to breaches of the requirements of SEPP 46 and/or the NVC Act and, where they have been taken and the defendant has been found guilty, the penalties that have been imposed have been low[82]. This is despite the existence of evidence of substantial non-compliance with the native vegetation laws in certain areas[83]. Again, these facts undermine arguments that these laws are having an adverse impact on the economic interests of rural landholders.

There are a two main points that should be noted about the structure of NSW's native vegetation and biodiversity conservation laws. Firstly, these laws do not apply to in all rural areas[84]. Secondly, they do not apply to all rural activities that may adversely affect native vegetation or biodiversity. As noted above, there is a range of exemptions from the requirement to obtain development consent to clear native vegetation. These exemptions have significantly decreased the ability of these laws to regulate the clearance of native vegetation by rural landholders. They also reduce the impact of these laws on the activities of rural landholders and, by doing so, have left the door open to further unregulated degradation of the natural environment.

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[79] See NSW Department of Land and Water Conservation, *Native Vegetation Clearing Reports: Proposed Land Use for the Area Approved for Clearing 2000*, *Proposed Land Use for the Area Approved for Clearing 2001* and *Proposed Land Use for the Area Approved for Clearing 2002*, available online at: http://www.dlwc.nsw.gov.au/care/veg/clearing.html (viewed 1 August 2003)

[80] Audit Office of NSW, *Performance Audit Report: Department of Land and Water Conservation: Regulating the Clearing of Native Vegetation*, 2002 (available online at: www.audit.nsw.gov.au (viewed 1 August 2003).

[81] 147 warning letters were sent out between commencement and 30 April 2002. See Audit Office of NSW, *Performance Audit Report: Department of Land and Water Conservation: Regulating the Clearing of Native Vegetation*, 2002 (available online at: www.audit.nsw.gov.au (viewed 1 August 2003).

[82] See Bartel, R (2003) "Compliance and complicity: An Assessment of the Success of Land Clearance Legislation in New South Wales", *Environmental and Planning Law Journal*, Vol 20, pp.116 - 141.

[83] See Audit Office of NSW, *Performance Audit Report: Department of Land and Water Conservation: Regulating the Clearing of Native Vegetation*, 2002 (available online at: www.audit.nsw.gov.au (viewed 1 August 2003) and Bartel, R (2003) "Compliance and complicity: An Assessment of the Success of Land Clearance Legislation in New South Wales", *Environmental and Planning Law Journal*, Vol 20, p.116.

[84] See ss. 9 and 10 and Schedules 1 and 2.

The conclusion that the introduction of native vegetation laws has had little impact on the economic interests of rural landholders is supported by the available statistics on agricultural productivity in NSW over the period 1997 – 2002. The table below outlines the figures on gross farm product, gross State product and gross farm product as a proportion of gross State product in NSW and ACT between 1 July 1997 and 30 June 2002.

Table 6: Gross Farm Product in NSW and ACT Between 1997 and 2002

	1997-98 ($m)	**1998-99 ($m)**	**1999-00 ($m)**	**2000-01 ($m)**	**2001-02 ($m)**
Gross Farm Product	3,725	3,787	4,041	5,153	6,048
Gross State Product	200,682	211,309	225,282	237,573	249,411
GFP as % of GSP	1.9	1.8	1.8	2.2	2.4

Source: Australian Bureau of Statistics, *NSW Agricultural State Profile*, 2003.

As the above table indicates, the introduction of the NVC Act does not appear to have had a noticeable adverse impact on the profitability of the NSW agricultural sector. As explained in the context of the EPBC Act, there is a possibility NSW native legislation and biodiversity conservation laws have had adverse impacts on the financial performance of certain agricultural enterprises in particular areas. However, this is unlikely to affect the financial performance of the NSW agricultural sector as a whole and any unjust outcomes could be resolved through the provision of adjustment assistance.

Have the NSW Native Vegetation and Biodiversity Conservation Laws Had Any Positive Impacts on Rural Landholders?

The ability of the native vegetation and biodiversity conservation laws to have beneficial impacts on the interests of rural landholders has been greatly undermined by the willingness of the Government to grant approvals and its unwillingness to enforce the laws. If the environmental and broader community benefits of these laws are to be realised, further efforts must be made to ensure these laws restrict the loss of native vegetation and biodiversity. This will require the activities of rural landholders to be curtailed. However, as explained in relation to the EPBC Act, this is no different from any other area in the economy or society where regulation is needed to protect communal interests and overcome market failures. The failure to address this issue now will merely postpone the inevitable and result in serious longer-term consequences for the environment and the Australian economy.

3.1.3 Efficiency and effectiveness

The NSW native vegetation and biodiversity conservation laws have been relatively ineffective in reducing the costs of resource degradation. However, as discussed above, this is primarily a result of the NSW Government's unwillingness to administer the laws in a manner that is conducive to the achievement of the objects of the relevant legislation. If the laws were administered and enforced more appropriately, there is little doubt they could have a profound impact on the decline in biodiversity and the degradation of Australia's natural resources.

The remarks made above in relation to the distribution of costs for preventing environmental degradation have equal application here. There is a need for landholders to receive financial assistance to adjust to changes that are brought about by the implementation of appropriate regulatory regimes concerning native vegetation and biodiversity. However, assistance should be concentrated in the areas of greatest need and be strategically applied to help rural communities to move to sustainable industries.

3.1.4 Adequacy of assessments of economic and social impacts of decisions

The statistics presented above in relation to the rate of approvals for the clearing of native vegetation indicate that the NSW Government is giving considerable weight to short-tem social and economic concerns in making decisions in relation to clearing applications at the expense of the long-term interests of the broader community and the environment. The rates of approved clearing far exceed levels that are sustainable. Given the extent of clearing of native vegetation that has occurred in the past, there is an urgent need for the remaining pockets of remnant vegetation to be conserved. The retention of remnant vegetation will assist in addressing the decline in biodiversity. It will also help stop the degradation of soil and water resources.

3.1.5 Transparency and community consultation

SEPP 46 was introduced with little notice and no public consultation[85]. The lack of notice and consultation may have contributed to the adverse reaction that was experienced amongst rural lobby groups to SEPP 46. However, SEPP 46 was intended to be an interim measure that would ultimately be replaced by the NVC Act. Therefore, the failure of the NSW Government to provide an adequate notice period or to engage in public consultation may have been a deliberate attempt to avoid panic clearing before the regulatory regime commenced. The experience in Queensland prior to the commencement of the *Vegetation Management Act 1999* (Qld) suggests that this concern was well founded, although commentators have suggested that SEPP 46 had little impact on the rates of clearing and had little deterrence value[86].

Although there was no public consultation prior to the commencement of SEPP 46, it did contain many concessions to rural landholders in the form of "rural" exemptions. Further, evidence concerning the rate of clearing of woody vegetation over the period 1995-1997 and the number of enforcement proceedings taken in relation to illegal clearing suggests that an extremely lenient approach was taken to the implementation of SEPP 46.

Most importantly, SEPP 46 provided rural landholders with an extended period over which to adapt to the new regulatory environment. It also provided agricultural lobby groups and others with an opportunity to participate in the preparation of the NVC Act.

With regard to implementation, the NVC Act contains a number of opportunities for public participation. These include opportunities for participation in planning processes, to comment on proposed activities and to appeal against decisions. The opportunities for participation in the preparation of RVMPs are instructive in this regard.

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[85] See Lee E, Baird M and Lloyd I (1998) "State Environmental Planning Policy No 46 – Protection and Management of Native Vegetation", Environmental and Planning Law Journal, Vol 15, p127; and Bartel, R (2003) "Compliance and complicity: An Assessment of the Success of Land Clearance Legislation in New South Wales", *Environmental and Planning Law Journal*, Vol 20, p.116.

[86] Lee E, Baird M and Lloyd I (1998) "State Environmental Planning Policy No 46 – Protection and Management of Native Vegetation", Environmental and Planning Law Journal, Vol 15, p127.

The NVC Act contains the following provisions concerning public participation in the preparation of RVMPs.

(a) Regional Vegetation Committees are responsible for the preparation of draft RVMPs. Regional Vegetation Committees are required to contain: 4 representatives of rural interests; 2 representatives of conservation interests; a person who is a non-government member of a Catchment Management Committee, or who is a trustee of a Catchment Management Trust; a person who is a member of a LandCare Group; 2 representatives of Aboriginal interests; and various other people from government agencies and other groups[87].

(b) In preparing draft RVMPs, information on the objectives of the plan and the plan area must be provided to relevant local councils, Local Government Liaison Committees, the Native Vegetation Advisory Council, and relevant Catchment Management Committees and Catchment Management Trusts[88].

(c) Prior to the finalisation of a RVMP, a draft of the plan must be made available for public comment[89].

The opportunities for public participation in the decision-making processes under the NVC Act and EPA Act are adequate. Whether decision-makers have sufficient regard to the opinions of members of the public is an issue that cannot be addressed here. However, it would appear the relevant legislative structures are in place to ensure there are opportunities for this to occur.

3.1.6 Consistency with State/Territory laws

There is no inconsistency between the NSW native vegetation and biodiversity conservation laws and the EPBC Act. As discussed above, the EPBC Act was designed so as to prevent inconsistencies and minimise unnecessary duplication with State laws. The level of duplication between the EPBC Act and relevant NSW laws could be improved if the Commonwealth and the NSW Government could finalise an assessment bilateral agreement. This would reduce compliance and assessment costs associated with project applications.

3.1.7 Options to reduce adverse impacts of environmental regimes

There is a need to ensure there is minimal unnecessary duplication between the assessment processes that apply under EPBC Act and relevant NSW native vegetation and biodiversity laws. This is currently achievable with the use of assessment bilateral agreements and accredited assessment approaches. The Commonwealth and NSW should finalise the assessment bilateral agreement under the EPBC Act as soon as possible, although I note that there are flaws in the draft that was circulated for public comment.

As discussed above, I believe the Commonwealth should take an active role in providing statutory protection for native vegetation in areas that have important biodiversity and heritage values, have a high risk of erosion or salinity or that are not adequately protected under State laws. This should be implemented through a zoning system that provides legal certainty for all stakeholders. If appropriately designed, the zoning system could be integrated into NSW planning processes so as to minimise compliance and administrative costs.

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[87] See s.51 of NVC Act.
[88] See s.28 of the NVC Act.
[89] See s.29 of the NVC Act.

3.2 Queensland

3.2.1 Queensland native vegetation and biodiversity laws

The regulation and control of land clearing in Queensland is divided into two regimes: that applying to freehold land; and that applying to leasehold land.

Land clearing on freehold land in Queensland is regulated under the *Vegetation Management Act 1999* ("**VM Act**") and the *Integrated Planning Act 1997* ("**IP Act**"). The *Land Act 1994* governs clearing on leasehold land.

The IP Act is the principal piece of planning and environmental legislation in Queensland. Like most planning processes, it contains provisions for the preparation and implementation of planning schemes and a development approval process known as the Integrated Development Approval System ("**IDAS**"). The Act divides development into three categories: exempt development, assessable development; and self-assessable development. Applications for development approval are usually determined by local councils, the Minister for Local Government and Planning, or the Minister for Natural Resources and Mines.

The VM Act amended the IP Act to make land clearing on freehold land assessable development. However, there are a number of exemptions to this general rule. These include the following.

(a) Clearing vegetation for activities constituting "essential management".

(b) Clearing vegetation for activities constituting "routine management" in areas that are not mapped as endangered regional ecosystems or have not been declared by the Minister as being of high nature conservation value or vulnerable to land degradation. Routine management includes clearing regrowth vegetation.

(c) Clearing for ongoing farm forestry practices.

Applications for development approval that involve clearing native vegetation are generally assessed against the code contained in the *State Policy for Vegetation Management on Freehold Land*. Where a Regional Vegetation Management Plan has been prepared, development applications involving clearing vegetation will be assessed against the criteria outlined in the plan. Note also that local governments can make clearing vegetation in certain areas assessable development under a planning scheme.

Clearing on leasehold land is governed under the Land Act. Under the Act, a tree clearing permit is generally required to remove or destroy vegetation on leasehold land. Again, there are a number of exemptions to this general rule, including clearing vegetation for activities constituting "routine rural management" on land subject to an agricultural or grazing lease. Routine rural management includes clearing regrowth vegetation that has emerged after clearing under a permit issued after 31 December 1989.

Applications for tree clearing permits are determined by the Minister for Natural Resources and Mines against the code contained in the *Broadscale Tree Clearing Policy for State Lands*.

The codes contained in the *State Policy for Vegetation Management on Freehold Land* and *Broadscale Tree Clearing Policy for State Lands* currently contain the following standards.

(a) Clearing of remnant "endangered" regional ecosystems is not permitted on freehold land.

(b) Clearing of remnant "endangered" or "of concern" regional ecosystems is not permitted on leasehold land.

(c) Vegetation should be managed so that regional ecosystems do not move to a lower conservation status.

(d) Vegetation should be managed so that the total extent of remnant vegetation in a bioregion does not fall below 30% of the pre-clearing extent.

3.2.2 Impact of Queensland native vegetation laws

Background

Over the past decade, land clearing in Queensland has accounted for over 85% of the total land clearing in Australia. Table 7 below contains the Australian Greenhouse Office's estimates of the annual land clearing rates for all States and Territories between 1991 and 1999.

Table 7: Estimated annual land clearing rates between 1991 and 1999

State/Territory	**1991 – 1995 ha**	**1996 – 1999 ha**
New South Wales	19120	30000
Victoria	2450	2450
Queensland	289000	382500*
South Australia	1370	2088
Western Australia	21150	3145
Tasmania	940	940
Northern Territory	3320	3320
Australian Capital Territory	N/A	N/A
Australia	337350	424444

Source: *Australian Bureau of Statistics, Australia's Environment: Issues and Trends 2003*, Commonwealth of Australia, 2003.
* This estimate appears to be relatively conservative. The Queensland Department of Natural Resources and Mines has estimated the rate of clearing of woody vegetation between 1997-1999 was 425,000 ha/year (Department of Natural Resources and Mines, *Land Cover Change in Queensland 1999-2001: A Statewide Landcover and Trees Study Report (SLATS)*, Queensland Government, January 2003).

The extent of land clearing in Queensland is staggering and is well beyond that which is sustainable. Already the loss of native vegetation in Queensland has jeopardised our natural resource base, degraded our natural heritage, and resulted in the loss of a considerable amount of biodiversity.

Unfortunately, the VM Act has failed to make significant inroads to resolving this problem. This is evidenced by the statistics set out below concerning the rates of clearing on different land tenures before and after the commencement of the Act.

Table 8: Land clearing rates in Queensland: 1995 - 2001

Tenure	1995-1997 ha/year		1997-1999 ha/year		1999-2000 ha/year		2000-2001 ha/year	
	Remnant	**Non-remnant**	**Remnant**	**Non-remnant**	**Remnant**	**Non-remnant**	**Remnant**	**Non-remnant**
Freehold	125000	72800	168200	86100	330700	167300	84000	84000
Leasehold	95900	38100	113600	47800	180600	71500	137200	64700
Other tenures	2600	500	2600	400	1700	500	1000	200
Other reserves	3500	1700	1900	4600	1900	3700	3000	3800
State total	227200	113100	286300	138900	514900	243000	225200	152700

Source: Department of Natural Resources and Mines, *Land Cover Change in Queensland 1999-2001: A Statewide Landcover and Trees Study Report (SLATS)*, Queensland Government, January 2003.

As the above figures demonstrate, there was a significant increase in the rate of clearing of both remnant and non-remnant vegetation on freehold land in the lead up to the commencement of the VM Act in September 2000. After the commencement of the Act, there has been a considerable drop in the rates of clearing (particularly of remnant vegetation) on freehold land. However, the rates of clearing in 2000-2001 are not radically different to the rates that existed between 1995-1997. In 2000-2001, 84,000 ha of remnant vegetation was still cleared on freehold land and a further 137,200 ha of remnant vegetation was cleared on leasehold land.

These figures do suggest the VM Act has had some success in reducing clearing of remnant vegetation. This is evidence of the utility of regulatory regimes as a means of reducing land clearing, although I acknowledge that the reductions in the rate of clearing may be partly attributable to changes in market and production conditions.

Impacts on Landholders

As with the EPBC Act and NSW native vegetation laws, the impacts of the Queensland native vegetation laws on the economic interests of rural landholders appears to have been relatively limited. As discussed above, the rates of land clearing remain extremely high on both freehold and leasehold land. Although there have been reductions in the rates of clearing since the commencement on the VM Act, the rates appear to have returned to a level that is not exceedingly below that which existed in 1995-1997.

The failure of the VM Act and the *Land Act* appears to be primarily due to:

(a) the manner in which the relevant legislation is currently being administered;

(b) the scope of the restrictions and exemptions; and

(c) non-compliance.

The conclusion that the impacts of Queensland's native vegetation laws on the economic interests of rural landholders is supported by the available statistics on the financial performance of three of Queensland's largest agricultural industries that are most likely to be affected by native vegetation laws: the beef, grains and cotton industries.

Between 1996-1997 and 2000-2001, the real Gross Value of Production ("**GVP**") of Queensland cattle and calf slaughterings in Queensland increased by over 110% from

$1355m to $2873m[90]. The GVP in 2000-2001 was an all time record high and it was attributed primarily to persistently high prices.

The GVP of the Queensland cotton industry has increased considerably over the past decade. Between 1990-1991 and 2000-2001, the GVP of the Queensland cotton industry increased from $291m to $515m (a 77% increase). The 2000-2001 result was a little down on the record high reached in 1999-2000, which was around $550m.

The GVP of the Queensland grain industry and the total area sown with grain crops decreased in 2000-2001 to levels similar to those experienced in 1997-1998[91]. However, this decrease can be attributed to commodity price changes, climate variation and the transfer of gain lands to cotton.

In conclusion, there is no available data to support the claim that Queensland's native vegetation laws have had a significant adverse impact on the financial interests of Queensland's landholders. Again, there is likely to be particular landholders that are likely to have been adversely affected. However, on the whole, the impacts appear to have been negligible.

3.2.3 Efficiency and effectiveness

The Queensland native vegetation laws have been relatively ineffective in reducing the costs of resource degradation. As noted above, this is a result of the structure of the regulatory regimes, the way in which the relevant Acts are being administered and non-compliance.

The recent proposal to tighten Queensland's native vegetation laws is long overdue and should be put in place immediately. While this proposal does not go far enough, it will ensure greater protection for a significant amount of native vegetation.

There is a need for Queensland landholders to receive financial assistance to cope with significant changes to the regulatory regimes under which they operate. However, the compensation package must account for the extent of landholders' responsibility for environmental degradation issues and their capacity to make adjustments. Further, all financial assistance needs to be strategically applied so as to help rural communities move to more sustainable industries.

The proposed adjustment assistance package associated with the land-clearing proposal is very generous and, if appropriately administered, should provide adequate assistance for affected landholders.

3.2.4 Transparency and community consultation

As has been well documented, the VM Act was introduced after an expensive period of consultation with the agricultural sector. An unfortunate by-product of the involvement of rural stakeholders in the development of the legislation was that Queensland witnesses an extended period of "panic clearing".

The first phase of the recent land clearing proposal was developed with little public consultation. However, the Commonwealth and the Queensland Government's have now

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[90] Queensland Department of Primary Industries, *Queensland Beef Industry Profile: May 2002*, Queensland Government, 2002.
[91] Queensland Department of Primary Industries, *Queensland Grains Industry Profile: September 2002*, Queensland Government, 2002.

provided rural landholders and other interested parties with an opportunity to express their views about the proposed arrangements. Fortunately, the Queensland Government has instituted a moratorium on new clearing applications to prevent a repeat of the panic clearing that preceded the commencement of the VM Act. It will be interesting to gauge the success of these interim arrangements.

In my opinion, the Queensland Government has provided ample opportunities for public participation in the development of Queensland's native vegetation laws. What is now required is for the Commonwealth and the Queensland Government to put in place a regulatory regime that provides protection for all native vegetation and ensures the conservation of the natural heritage values of Queensland.

3.2.5 Consistency with State/Territory laws

There is no inconsistency between the EPBC Act and Queensland's native vegetation laws. The level of duplication between the EPBC Act and Queensland's laws could be improved if the Commonwealth and the Queensland Government could finalise an assessment bilateral agreement. This would reduce compliance and assessment costs associated with project applications.

4. CONCLUSION

In summary, Australia's native vegetation and biodiversity laws have not had a significant adverse impact on the financial interests of rural landholders or the agricultural sector. This is the result of the nature of the regulatory regimes, the way in which they are being administered and non-compliance.

However, in order to prevent further degradation of our natural resource base and the destruction of our natural heritage, there is an urgent need for the regulatory regimes to be tightened. In particular, it is essential that the rates of clearing of native vegetation are reduced to sustainable levels and that areas containing important biodiversity and natural heritage values be appropriately protected. The required changes will adversely affect the financial interests of certain rural landholders. However, the protection and conservation of native vegetation and biodiversity will ultimately yield substantial benefits for the entire community. Where these changes result in rural landholders suffering acute hardship, financial assistance should be provided to help these people make appropriate adjustments.