



## AUSTRALIAN LAW REFORM COMMISSION

### Traditional Rights and Freedoms - Encroachments by Commonwealth Laws

#### Submission by the Department of the Environment

#### 1. INTRODUCTION

The Department of the Environment welcomes the opportunity to comment on *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws (ALRC Interim Report 127)*. This submission is intended to provide ALRC further information which may be relevant to Chapter 8 of the Interim Report - particularly paragraphs 8.52 to 8.67 which focus on the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)*.

#### 2. LEGISLATIVE BACKGROUND

##### The scope of Commonwealth power

The Constitution does not expressly confer power on the Commonwealth Parliament to make laws with respect to the environment.

Until the 1970s, regulation of most environmental matters was left to the States and Territories. The trade and commerce power was the Commonwealth's prime basis for protecting the environment – most notably, when it came to stopping the export of mineral sands from Fraser Island, upheld by the High Court in *Murphyores Inc Pty Ltd v Commonwealth*.<sup>1</sup>

In the 1980s, further High Court judgments laid the foundation for the Commonwealth's role in environmental matters – these cases clarified the scope of the external affairs power in s.51(xxix) of the Constitution by confirming that, under this provision, the Commonwealth has jurisdiction to make laws for the purposes of implementing Australia's international obligations. The *Tasmanian Dam case* also found that the corporations power could be a basis for Commonwealth involvement in environmental matters.<sup>2</sup>

##### Commonwealth laws concerning environmental regulation

The 1992 Council of Australian Governments' [Intergovernmental Agreement on the Environment](#) (IGAE) established a framework for intergovernmental action on environmental issues. Under the IGAE, the Australian Government and all State and Territory governments agreed to integrate environmental considerations into their decision-making and pursue the principles of ecologically sustainable development set out in the IGAE.

In 1999, the Commonwealth Parliament passed the *Environment Protection and Biodiversity Conservation Act 1999 (Cth)* (EPBC Act) which merged a number of laws into a single overarching framework for national environmental regulation. The need to deliver Australia's international obligations is at the heart of the EPBC Act, with the relevant Conventions it implements being the:

- *Antarctic Treaty*;
- *Convention on the Conservation of Migratory Species of Wild Animals* (Bonn Convention);

<sup>1</sup> *Murphyores Inc Pty Ltd v Commonwealth* [1976] HCA 20.

<sup>2</sup> *Commonwealth v Tasmania* (1983) 158 CLR 1.

- *Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES);*
- *Convention on Biological Diversity (CBD);*
- *Convention on Wetlands of International Importance especially as Waterfowl Habitat (Ramsar Convention);*
- *International Convention for the Regulation of Whaling (International Whaling Convention);*
- Migratory Bird Agreements –
  - *Japan-Australia Migratory Bird Agreement (JAMBA),*
  - *China-Australia Migratory Bird Agreement (CAMBA), and*
  - *Republic of Korea-Australia Migratory Bird Agreement (ROKAMBA);*
- *Rio Declaration on Environment and Development; and*
- *Convention Concerning the Protection of the World Cultural and Natural Heritage (World Heritage Convention).*

### **3. ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999**

#### **EPBC Act Assessments**

As noted in ALRC’s interim report, the EPBC Act gives the Commonwealth Environment Minister a role in assessing and approving actions that will have a significant impact on nine matters of national environmental significance. Under the EPBC Act, the Minister also regulates the environmental impacts of actions affecting Commonwealth land, and the impacts of actions taken by the Commonwealth on the environment.

There are a variety of assessment processes available under the EPBC Act, depending on the nature and complexity of the action under assessment. At the end of the assessment process, the Minister may choose to reject any action that would have unacceptable impacts and may also attach approval conditions, to avoid, mitigate or offset impacts. Statistics on EPBC Act assessments and approvals are published in the Department of the Environment’s Annual Reports.

In the context of ALRC’s focus on property rights, several relevant features of the EPBC Act assessment and approval process are discussed in greater detail below.

#### *Prior authorisation (s.43A)*

Under the prior authorisation exemption, assessment and approval under the EPBC Act is not required if:

- before 16 July 2000, the action was authorised by a *specific environmental authorisation* under a law of the Commonwealth, state or a self-governing territory; and
- as at 15 July 2000, no further *environmental authorisation* was necessary to allow the action to be taken lawfully; and
- the specific environmental authorisation remains in force at the time the action is taken (in limited circumstances a renewal may satisfy this requirement).

‘Environmental authorisation’ means an authorisation under a law of the Commonwealth, a state or a self-governing territory that is intended to protect the environment and/or promote the conservation and ecologically sustainable use of natural resources.

‘Specific environmental authorisation’ means an environmental authorisation that is issued specifically in relation to the relevant action, i.e. it identifies the particular action by reference to acts and matters uniquely associated with that action, or was issued or granted following a consideration of the particular action by reference to acts and matters uniquely associated with the action.

An example of an activity that could be exempted under the prior authorisation provision is cattle grazing in accordance with a crown land licence issued under the Victorian *Land Act 1958*.

#### *Continuing use (s.43B)*

Under the continuing use exemption, assessment and approval under the EPBC Act is not required if:

- the action commenced before 16 July 2000; and
- the use of land, sea or seabed was lawful; and
- the action has continued without enlargement, expansion or intensification; and
- the action has continued in the same location with the same activities (or with different activities and in a different location if there is no substantial increase in impacts).

Examples of activities that may be exempted under the continuing use provision are:

- routine grazing activities, including cyclical activities such as periodic grazing;
- continuing cropping and crop rotation;
- slashing to maintain existing firebreaks;
- maintenance of existing dams, roads, fences etc; and
- continuing an existing weed control program.

The continuing use exemption does not cover actions which are covered by the prior authorisation exemption.

#### **Environmental Offsets**

Environmental offsets are measures that provide compensation for the residual adverse impacts of an action on the environment, once all reasonable avoidance and mitigation measures have been applied. For example, where the habitat of a threatened species is to be cleared as a result of a proposed action, an appropriate offset could include protecting an equivalent piece of habitat elsewhere, or alternative measures such as revegetation, weed management or feral animal control.

The principles underpinning environmental offsets under the EPBC Act are set out in the [EPBC Act environmental offsets policy](#). Using the policy, offsets are negotiated with project proponents and then built into the conditions of approval. This gives landowners, developers and government a degree of flexibility in managing impacts identified during the assessment process.

The *EPBC Act environmental offsets policy* also encourages offsets that deliver social and economic co-benefits. These include offsets that enable rural land owners to diversify their income for the management of biodiversity. For example, the policy enables farmers to receive funding from

developers in order to undertake conservation activities on their land. These activities can often coexist with existing land uses, such as managing native shelterbelts or remnant stands of vegetation as to improve their quality while still enabling farming to occur on productive paddocks.

### **EPBC Act Review**

Finally, it should be noted that the EPBC Act also provides for regular reviews of the operation of the Act and the extent to which the objectives of the Act are being achieved. Section 522A(2) of the EPBC Act states: *'The first review must be undertaken within 10 years of the commencement of this Act. Later reviews must be undertaken at intervals of not more than 10 years'*.

The first review of the EPBC Act was tabled in the Australian Parliament on 21 December 2009. The second review may provide a suitable opportunity for more detailed consideration of the EPBC Act's interaction with property rights.