



RESEARCH NOTE

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Farming and Commonwealth Environmental Law

A fundamental revision of Commonwealth environmental law was recently achieved by the *Environment Protection and Biodiversity Conservation Act 1999* (EPBCA). This extensive Act replaces five previous environmental laws. It commenced in July 2000.

The EPBCA provides scope for improved environmental protection, by providing the Commonwealth government with more direct means for involvement in environmental matters, as opposed to the previous system of ad hoc and indirect 'triggers'. It provides for a clearer delineation of Commonwealth and State roles and responsibilities for the environment. Critics of the EPBCA argued that it reduced protection for World Heritage properties and forests, and allowed abandonment of responsibility to States under bilateral agreements. Nevertheless the EPBCA has potentially wide ranging application. One area includes activities on privately owned land—farming, irrigation, and land development.

Land Clearing Controls

Land clearing has long been a matter of considerable political controversy in Australia. Primary producer interests often resent the intrusion of regulatory controls over private land. Meanwhile, environmental groups point to the impacts of native vegetation clearing in terms of biodiversity decline, salinity, water quality and greenhouse gas emissions.

Land clearing is a matter of considerable environmental importance. In 1996, the *State of the Environment* report produced for the Commonwealth concluded that habitat destruction was the major cause of biodiversity decline in Australia.¹

Some attempt has been made to restrict vegetation clearing in the States under partnership agreements

made with the Commonwealth in return for Natural Heritage Trust monies. These agreements required that there be 'no net loss' of native vegetation. However late in 1999 CSIRO research concluded that the ratio of vegetation clearing to planting stood at 30:1.²

Land clearing rates remain particularly high in Queensland, especially on freehold land. The Queensland Government has been reluctant to apply controls under the *Vegetation Management Act 1999* to so-called 'of concern' ecological communities in the absence of a Commonwealth contribution to a 'compensation' fund to landholders potentially affected. This is in spite of other states applying similar controls in previous years without Commonwealth financial assistance.

Matters of Significance

The EPBCA applies wherever 'an action' (a project, development, undertaking or activity) has, or is likely to have a significant impact on a 'matter of national environmental significance' (MNES). At present seven such matters are specified in the Act. The most important to primary producers are listed threatened species and ecological communities and World Heritage properties.

The Commonwealth has not added land clearance as MNES. However, in April 2001, it listed land clearance as a 'key threatening process'.³ This decision meant that instead of providing a direct route for regulation of clearing, all that was immediately required was a decision as to whether to produce a 'threat abatement plan' (TAP). Upon advice from the Threatened Species Scientific Committee, the Minister decided not to produce a TAP.

Ecological Communities

However the main aspect of the EPBCA at present with the capacity to affect primary producers is the listing of endangered ecological communities. So far, a total of 27 endangered ecological communities have been listed as MNES under the EPBCA.

Of particular relevance to farmers is the fact that in April 2001, four ecological communities located in NSW and Queensland covering over one million hectares were listed. Among these, the Commonwealth listed the *Bluegrass Dominant Grasslands of the Brigalow Belt Bioregions* as an endangered ecological community. This Queensland vegetation community was eligible because over 90 per cent of its original extent has been destroyed or severely degraded. The key point is that 'actions' such as clearing—where these have a significant impact on the Bluegrass or other listed ecological communities—will require both assessment and approval from the Environment Minister.

Existing Land Uses

However, an 'action' such as clearing does not require approval if it is covered by one of the exemptions contained in the Act, such as for 'existing uses'. This refers to a lawful continuation of a use of land that was occurring prior to the Act commencing in July 2000. The exemption however does not permit an enlargement, expansion or intensification of a land use.⁴ Nor does a contemplated or intended future use of land amount to an existing use.⁵

On this basis, for example it appears that grazing on a property may continue without assessment. However if it is expanded by vegetation clearing, intensified by

pasture improvement, or altered by ploughing for conversion to cropping, these actions would be unlikely to be exempt.

Assessment Thresholds

If the 'existing use' exemption is not available, it is necessary to ask if the action is subject to approval requirements. These apply if the action is 'likely to have a significant impact on a listed threatened ecological community'. Which actions will have such an impact?

Administrative guidelines published in July 2000 state that a 'significant impact' on an endangered ecological community is likely if the action will reduce its extent, or fragment an occurrence of the community, or adversely affect habitat critical to the survival of the community. In relation to the Bluegrass ecological community, Environment Australia has advised (in a supplement to the guidelines) that the clearing of less than 20 hectares or less than 5 per cent of the patch (whichever is the smaller) will, in its opinion, not be significant.

Triggering the Act

The EPBCA comes into operation when a proposed 'action' (e.g. clearing) is 'referred' to the Commonwealth Environment Minister for a decision as to whether approval is required. Without referral the approval process of the Act will not come into play. A referral can be made by the land owner, a State or Territory Parliament or a Commonwealth agency. The Minister may also request that a matter be referred.

If a landowner fails to refer an action which on an objective basis should

have been referred, the landowner is running the risk of prosecution for breach of the legislation. It is an offence to take an action that is likely to have a significant impact on a listed threatened ecological community where a person 'is reckless as to that fact'. The maximum penalty for the offence is \$5.5 million (corporations) or \$550 000 (individuals). To date there have been nine referrals of land clearing proposals for assessment (but only one which involved agricultural clearing), and no prosecutions for breaches of the EPBCA.

However, there is scope for 'third party' civil enforcement where the Commonwealth is reluctant to enforce the Act. This scope was demonstrated by the Federal Court's decision in *Booth v Bosworth*, involving an application by a conservationist for an injunction under the EPBCA to restrain culling of flying foxes by a lychee grower in North Queensland.⁶

Property Rights

The National Farmer's Federation (NFF) has been critical of aspects of the EPBCA. It recently stated its belief that 'the biggest threat to the economic fundamentals of Australia's agricultural sector is the increasing encroachment of federal and state environmental legislation and regulation on farm management'.⁷ In reply, the Australian Conservation Foundation has called for the introduction of land clearing as a MNES but also called for 'incentives and structural adjustment payments to help landholders adopt more sustainable land management'.⁸

At the heart of the controversy over land clearing is the question of the scope of private property rights. It has never been the case that the law

'normally' permits private landholders to deal with their property as they wish, unfettered by any controls. Laws applicable to private property include planning laws, particularly subdivision and zoning controls (e.g. on intensive feedlot farming), agvet chemical regulation, pollution law, etc. Even the common law restricts the capacity of land owners to deal with their property as they wish, e.g. through the law of nuisance and riparian rights.

Another aspect is the difficulty in identifying the dividing line between actions which are the social obligations of all land-holders, and those actions which involve 'going beyond the call of duty'—ie. actions which provide a public benefit, the cost of which is borne by the land holder.⁹ The difficulty in defining this point—a matter which depends on value judgements and scientific uncertainty—will ensure the continuation of controversy when governments seek to regulate activities on privately held land.

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1. Commonwealth *State of the Environment Report* (1996).
2. CSIRO (1999) *Mid Term Review of the NHT Bushcare Program*, Ch.4.
3. EPBCA, s. 188 (3).
4. EPBCA, s. 523(2).
5. *Parramatta City Council v. Brickworks Ltd* (1972) 128 CLR 1 at 21–2.
6. *Booth v Bosworth*, [2000] FCA 1878; [2001]FCA 1453, 17 October 2001.
7. NFF, *Media Release*, 3.10.01.
8. ACF, *Media Release*, 1.7.01.
9. Bates, G (2001), *A Duty of Care for the Protection of Biodiversity on Land*, Consultancy Report for Productivity Commission.