

Australian Network of Environmental Defender's Offices



Australian Network of Environmental
Defender's Offices Inc

Submission to the Freedoms Inquiry on *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws* (Issues Paper 46)

27 February 2015

The Australian Network of Environmental Defender's Offices (**ANEDO**) consists of eight independently constituted and managed community environmental law centres located across the States and Territories.

Each EDO is dedicated to protecting the environment in the public interest. EDOs provide legal representation and advice, take an active role in environmental law reform and policy formulation, and offer a significant education program designed to facilitate public participation in environmental decision making.

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Executive Summary

The Australian Network of Environmental Defender's Offices Inc (**ANEDO**) welcomes the opportunity to comment on the *Traditional Rights and Freedoms—Encroachments by Commonwealth Laws (IP 46) (Issues Paper)*,¹ as part of the Freedoms Inquiry referred to the Australian Law Reform Commission (**ALRC**).²

ANEDO is a network of community legal centres across Australia that specialise in public interest environmental law. We help people to use the law to protect the environment. We provide legal advice and representation, legal education and policy and law reform advice.

We note that the Commonwealth Attorney-General, Senator the Hon George Brandis QC, has asked the ALRC to review Commonwealth legislation to identify provisions that unreasonably encroach upon traditional rights, freedoms and privileges. We understand that the ALRC will draft proposals for reform partly based on submissions and will then release a further discussion paper in mid-2015. A final report is due by December 2015.

The Terms of reference for the Inquiry identify environmental regulation as an area of law that potentially interferes with vested property rights.³

For the purpose of the inquiry 'laws that encroach upon traditional rights, freedoms and privileges' are to be understood as laws that:

...

- *interfere with vested property rights;...*
- *restrict access to the courts;*

Scope of the reference

In undertaking this reference, the ALRC should include consideration of Commonwealth laws in the areas of, but not limited to:

- *commercial and corporate regulation;*
- ***environmental regulation;*** and
- *workplace relations.*

At the outset, we submit that the attempted use of a human rights argument to demonise environmental law is nonsensical. Environmental laws exist to protect the environment and conserve natural resources in the public interest, for the benefit of all Australians, including property owners. We welcome the Issues Paper's brief acknowledgement of the public interest benefits of environmental laws. We suggest that in the interests of weighing the evidence, the Discussion Paper should go further in articulating these benefits.

Strong environmental laws are critical to addressing the major environmental, social and economic challenges that Australia faces. ANEDO is concerned that over the last few years, the unprecedented focus on 'cutting green tape' (as environmental laws are pejoratively labelled) has distracted lawmakers, policymakers and environmental managers from working together to address these challenges and answer important questions. For example, how can environmental laws best conserve Australia's environment and opportunities for present and future generations? In our view, the answer to conserving Australians' freedoms, livelihoods and wellbeing requires more

¹ <https://www.alrc.gov.au/publications/traditional-rights-freedoms-ip46>

² <http://www.alrc.gov.au/inquiries/freedoms>

³ <http://www.alrc.gov.au/inquiries/freedoms/terms-reference>

than a narrow focus on ‘traditional rights, freedoms and privileges’. It requires policies consistent with the concept and principles of *ecologically sustainable development*.

This submission focusses on Issues Paper *Chapter 6 – Property Rights* and *Chapter 18 – Judicial Review*, with specific reference environmental law. We address:

1. **The public interest purpose of environmental regulation**
2. **Public interest and ecologically sustainable development**
3. **Existing protections for individual property rights achieve an appropriate balance**
4. **The right to a healthy environment**
5. **Access to environmental justice**

In relation to property rights, the Issues Paper asks two questions:

- *Question 6–1 What general principles or criteria should be applied to help determine whether a law that interferes with vested property rights is justified?*
- *Question 6–2 Which Commonwealth laws unjustifiably interfere with vested property rights, and why are these laws unjustified?*

We respond to these questions specifically in relation to environmental regulation.

In relation to **Question 6–1**, it is not clear to us that there is a need for additional principles to test the specific effects of regulation on private property rights (i.e. beyond the usual processes of identifying policy problems, potential solutions and their impacts). However, consideration of such principles may be considered desirable, at least for the purposes of the present inquiry. If so, *we recommend applying a public interest test that includes the well-established principles of ecologically sustainable development (ESD)*, to help determine whether an environmental law that interferes with vested property rights is justified (see 2 below).

Equally, such a test could be used to determine whether the exercise of private property rights prejudices the rights and freedoms of others to enjoy a healthy environment – for example, actions that pollute neighbouring land or water. Indeed, this is often how environmental laws develop. Accordingly, instead of focusing solely on property rights, *the ALRC should consider the right of all Australians to a healthy environment* (see 4 below). This emerging area of human rights law would assist the Commission in weighing the evidence of how best to protect both private property and the public good in a long-term, sustainable way.

In relation to **Question 6–2**, in our expert opinion as public interest environmental lawyers, there are currently *no* Commonwealth environmental laws that unjustifiably interfere with vested property rights.

We note that the *Freedom's Inquiry Wiki - Catalogue of Australian Commonwealth laws that limit or encroach upon traditional rights, freedoms and privileges* (a webpage set up as part of this inquiry to identify offending laws), currently does not list *any* environmental laws as unreasonably encroaching on freedoms.⁴ However, the catalogue overview specifically suggests the *Environment Protection & Biodiversity Conservation Act (EPBC Act)*, Australia's main Commonwealth environmental law, as an example of a potential 'encroachment'.⁵ As discussed below (at 1), environmental laws and regulations deliver

⁴See: <https://drive.google.com/folderview?id=0B5G2pUIPqDxKcjR0cWpPeG84eHM&usp=sharing>, accessed at 3/3/15.

⁵ See: <http://www.alrc.gov.au/news-media/freedoms-wiki>, accessed 3/3/15.

important benefits and therefore environmental laws do not belong on this list The EPBC Act example should be removed.

We hope this submission assists the ALRC in its inquiry. We would be happy to meet with the Commission to discuss this submission, or provide further evidence of the public purpose and benefits of environmental laws, based on our extensive experience across Australia.

1. The public interest purpose and benefit of environmental regulation

The Issues Paper sets out the historical legal evolution of individual property rights with an emphasis on the sanctity of such rights. What is missing from Chapter 6 is a balanced discussion of the public purpose and benefits of laws such as environmental regulations. We recommend this be addressed at the Discussion Paper stage and in the Final Report, taking into account the following comments.

a) Property rights are not absolute

As Dr Nicole Graham notes:⁶

[T]he fact is that private property rights are not absolute, and never have been in Australian law. Property rights exist necessarily in relation to competing rights and interests...

Environmental laws indicate the government's prerogative, indeed responsibility, to balance private rights against the public's interest in health and environmental protection...

Those who think the sanctity of property rights supersedes the need to comply with environmental laws have a view of land ownership that is based on individual entitlement. But environmental laws are designed to deliver benefits at a scale far larger than the individual.

The Issues Paper (6.31) recognises that laws need to regulate behaviour on private property in order to secure social benefits, or the 'public interest'. However, the inquiry terms of reference that specifically identify environmental law imply that such restrictions may not be warranted.

Planning and environmental laws evolved in part to address land use conflict arising from incompatible uses of private property (for example, industrial and urban uses), and competing use of natural resources. To assert that the government has unduly whittled away traditional protections for private property rights would be to misunderstand the role and development of planning and environmental laws. The premise also ignores evidence that the wider community values the environment and feels that regulation across a wide range of sectors is 'about right'.⁷

b) Public purpose versus private compensation

The common law has long accepted that government regulation of activities that can occur on private property (for example, restricting water use, land-clearing or requiring

⁶ Senior Lecturer of Law at University of Technology, Sydney. "Land Clearing Laws Bring Out Worrying Libertarian Streak". *The Conversation*, 4 August 2014. <http://theconversation.com/land-clearing-laws-bring-out-worrying-libertarian-streak-29978>

⁷ See NSW Office of Environment & Heritage, *Who Cares About the Environment in 2012?* (2013), pp 41-42.

development consents) is not an acquisition of property, and therefore does not trigger a right to compensation.⁸

Planning law is an example of this. A particular 'zoning' may limit the development activities on a parcel of land in order to achieve a public purpose (such as environment protection or natural hazard management). Although this may affect land prices, it is not an acquisition of land, as the zoning does not affect the property rights in the land itself. As Professor Kevin Gray puts it, 'a mere regulatory interference with land use or management does not constitute a deprivation of property for which compensation must be paid'.⁹

Therefore, a government implementing native vegetation laws to control or prohibit land clearing to maintain a healthy and productive landscape, or laws to minimise development impacts on sensitive coastal land, is clearly not acquiring land for which compensation is payable. There is no general proprietary right to clear vegetation or to undertake development under the common law or legislation in Australia. These 'privileges' are contingent on the landholder obtaining a relevant approval or permit under legislation (or being explicitly exempted from the need to do so).

Where no consent is obtained, there is no right to clear land or develop the land. This has been settled by the High Court of Australia. The Court held in *ICM Agriculture Pty Ltd v The Commonwealth of Australia & Ors* [2009] HCA 51, in the context of groundwater licences, that the ability to take groundwater is not a private right as it is a natural resource and therefore the State always had the power to limit the volume of water to be taken. We also note that legislation makes clear that minerals are not private property.

Imposing native vegetation laws or land use zoning does not mean that the landholder cannot use their land for another purpose, such as farming or other types of development. It only means that the government has prevented a certain activity proposed in a certain manner. Furthermore, determining whether preventing an activity causes economic loss is often arbitrary and unduly complex, as US litigation shows (below).

As one planning expert notes, even though property is defined as a private commodity, government intervention (through zoning controls etc) is actually *necessary* to ensure that the value and benefits of owning that property can be realised.¹⁰ Government control over or 'interference' with property rights is actually what gives those rights value. For similar reasons, the same sort of 'interference' protects the value of natural resources. Consequently, consideration of *sustainability* (ie, applying an ESD framework) is needed as a means of resolving the inherent conflicts involved, including to maintain the value of property rights into the future. (This is discussed further below).

c) Economic, social and environmental rights are interconnected and multi-dimensional

A healthy atmosphere, rivers, forests, soils and oceans are vital to sustaining earth's species – including our own. Relying on 'traditional rights, freedoms and privileges' alone to protect these elements would unwind decades of progress in environmental

⁸ *ICM Agriculture Pty Ltd v The Commonwealth of Australia & Ors* (2009) HCA 51, *Commonwealth v Tasmania* (1983) 158 CLR 1 at 145-6.

⁹ Kevin Gray, 'Can environmental regulation constitute a taking of property at common law?' (2007) 24(3) *EPLJ* pp 161-182 at 1688.

¹⁰ Scott Campbell, 'Green Cities, Growing Cities, Just Cities? Urban Planning and the Contradictions of Sustainable Development' (1996) 62(3) *Journal of the American Planning Association* 296, 298.

protection, including at the Commonwealth level. In fact, we are still dealing with the fallout of the *absence* of environmental laws in the past. As the most recent Australian *State of the Environment Report* (2011) found: 'Pressures of past human activities and recent droughts are affecting our inland water systems.' This is evidenced by the decline in the Murray-Darling river system resulting from water over-allocation, land-clearing and salinity.¹¹

There is a growing recognition that these environmental challenges are social and economic challenges too. As the National Sustainability Council argued in its inaugural report:

Without well-functioning ecosystems, the security of food and water supplies would be threatened; our ability to produce medicinal products would be reduced; the buffer capacity of the Australian landscape and seascape against climate change would be undermined; and the supply of essential materials and fibres for construction and clothing would be constrained.

*Running down our natural capital risks serious economic and social implications and would undercut the wellbeing of future generations of Australians. A healthy natural environment with functioning ecosystem processes is therefore an economic and social imperative.*¹²

d) The public benefit of current national environmental laws

This is a useful point to reflect on the public purpose and benefits of having strong environmental laws at the Commonwealth level. As the *State of the Environment Report 2011* notes:

*Our environment is a national issue requiring national leadership and action at all levels... The prognosis for the environment at a national level is highly dependent on how seriously the Australian Government takes its leadership role.*¹³

Despite this, the last few years have seen an unprecedented focus on 'cutting green tape' (as environmental laws are pejoratively labelled).¹⁴ This agenda has distracted lawmakers, policymakers and environmental managers from working together to address the growing environmental challenges Australia faces. These challenges include climate change and increased severity of drought, fire, floods and heatwaves; loss of biodiversity and ecosystem services; salinity and water quality; as well as waste, resource efficiency and overconsumption.

As noted, the EPBC Act is the main federal environmental law, setting out 10 matters of national environmental significance (**NES**) for federal protection, such as threatened and migratory species and world heritage areas. The Act represents the agreed division of responsibilities between the Commonwealth and the States and Territories (**States**). It also aims to fulfil a range of Australia's international environmental obligations. It does this by requiring federal approval of actions that have a significant impact on matters of

¹¹ 21 of 23 valleys are in poor or very poor health (*Sustainable Australia Report 2013* pp185-187).

¹² Australian Government National Sustainability Council, *Sustainable Australia Report 2013*, p 81, at <http://www.environment.gov.au/resource/sustainable-australia-report-2013-conversations-future>.

¹³ Australian Government expert committee, *State of the Environment 2011*, 'In brief', at 9.

¹⁴ For example, since 2012 ANEDO has participated in the following inquiries and consultations: COAG agreement on streamlining of environmental laws (2012); Senate Inquiry into Retaining Federal Approval Powers (2012); House of Representatives inquiry into 'green tape' (2013); Senate Inquiry into attacks on environmental laws (2014); reviews of the Renewable Energy Target (2012, 2014); Productivity Commission referrals and inquiries into major projects assessment (2013), and barriers to mineral exploration (2013); and at least 10 submissions on draft agreements to hand over federal environmental assessment and project approval powers to the states and territories (2013-15).

NES. Recently though, the so-called 'One-stop shop' policy proposes to hand over federal EPBC Act environmental assessment and approval powers to the States.¹⁵

ANEDO has extensively analysed the public purpose of Commonwealth environmental laws. Compelling reasons to retain strong Commonwealth oversight include:

- Only the Commonwealth Government can provide national leadership on national environmental issues (ie, in the national public interest);
- The Commonwealth must ensure that we meet our international obligations (ie, in the international public interest);
- State and Territory environmental laws and enforcement are not up to standard to ensure biodiversity (and the related ecosystem services) are protected for the benefit of all;¹⁶
- States are not mandated to act (and do not act) in the national interest; and,
- States often have conflicting interests, as they benefit directly from the projects they are assessing.¹⁷

Furthermore, there is an expectation from the community that the Australian Government should safeguard our environment for present and future generations. For example, in one 2012 survey 85% of Australians surveyed agreed that the federal government should be able to block or require changes to major projects that could damage the environment.¹⁸

Finally, arguments about the financial burden of environmental laws on private developers being unreasonable have also been called into question. A 2012 Senate Inquiry found very little evidence to demonstrate this claim, and warned of a 'race to the bottom' on environmental standards.¹⁹ A recent OECD report on environmental policies found that more technologically advanced industries can benefit from more stringent environmental policies and that environmental policies have no longer-term effects on productivity growth.²⁰

e) Implications of changes to strengthen private property rights

There is evidence from other jurisdictions that a legislative focus on stronger private property rights will undermine environmental protection and public good planning.²¹ For example, in the United States, there has been an increase in 'takings' (ie, compensation) and property rights legislation proposed at both federal and state levels.²² The proposals are based on the US Constitution's Fifth Amendment, which requires 'just compensation' where the government takes private property for public use. These

¹⁵ <http://www.environment.gov.au/epbc/one-stop-shop>

¹⁶ See: *Audit of threatened species and planning laws in all Australian Jurisdictions Updated 2014*, Places You Love Alliance.

¹⁷ See ANEDO, 'Submission to the Senate Standing Committee on Environment and Communications regarding the *Environment Protection and Biodiversity Conservation Amendment (Retaining Federal Approval Powers) Bill 2012*'. Available at: <http://www.edo.org.au/policy/ANEDO-Submission-EPBC-Retaining-Federal-Approval-Powers-Bill-2012.pdf>.

¹⁸ See: Lonergan Research on behalf of the Places You Love Alliance of environmental NGOs, Oct. 2012.

¹⁹ Senate Environment and Communications Committee, *Report on the EPBC Amendment (Retaining Federal Powers) Bill 2013*.

²⁰ Silvia Albrizio, Enrico Botta, Tomasz Koźluk, Vera Zipperer *Do Environmental Policies Matter for Productivity Growth? Insights from New Cross-Country Measures of Environmental Policies*, 1: OECD, France, No.: 1176.

²¹ Eminent Domain, Exactions, and Rail Banking: Can Recreational Trails Survive the Court's Fifth Amendment Takings Jurisprudence (Danaya Wright (2001), 26 Columbia Journal of Environmental Law 399), pg 401.

²² *Ibid* 404.

'takings bills' have not been successful at a federal level, but many have been passed at a state level. A small number of large landowners are the major beneficiaries of the compensation paid out under these laws. This means that the wider majority of land owners end up paying for the compensation through their taxes.²³ Unsurprisingly, this legislation has a chilling effect on government agency regulatory activity.²⁴ (This is discussed further below).

f) Conclusion

The very intention of environment and planning law is to regulate activities of individuals in the public interest. As noted, planning law in particular arose as a result of competing and incompatible private property uses. Environmental law emerged with the realisation that common resources deserved special protection and conservation for the public good. Yet its origins go far back in the European legal tradition to the Roman law property concept of *res communis*; and much further in the Indigenous Australian tradition of custodianship of the land.²⁵

In summary, environmental laws matter because they:

- protect the public's right to be informed of, and participate in, decision-making processes that affect the environment and communities;
- can ensure the rigorous, science-based assessment of environmental impacts;
- promote decisions that integrate environmental, social and economic factors in accordance with the principles of ecologically sustainable development (**ESD**);
- provide enforcement mechanisms where someone causes damage to the environment or a risk to public health; and
- provide community assurances of government accountability and 'access to justice'.²⁶

ANEDO submits that elevating the sanctity of private property rights is not a wise or viable policy option in Australia today. As a network of community legal centres, we do not see public demand for such an individualistic approach – with the possible exception of widespread rural anger over corporate rights to mine on private land. Rather, we see that private property rights and laws that facilitate development are already strongly protected. As these rights often conflict, effective regulation and opportunities for consultation are required to resolve the tensions that emerge. These issues form the majority of queries that EDOs receive from members of the public across Australia. In our view, public participation and transparency in decision-making, court review mechanisms and other procedural fairness are more important 'access to justice' measures than expanded protection of private property rights. As noted below in 5, these measures are an important safety valve, and form the backbone of EDO services.

²³ Ibid 405.

²⁴ Ibid 404.

²⁵ Speech by the Hon. Justice Brian J Preston SC, 'Protected Areas in the Courts: An Overview', IUCN World Parks Congress, 13 November 2014, Sydney, p.29.

²⁶ See: ANEDO (2012) *In defence of environmental laws* Briefing Note.

2. Public interest and ecologically sustainable development

Issues Paper **Question 6-1** asks for suggested principles or criteria to determine whether a law that interferes with private property is justified. The ALRC could clarify the scope and context for this question. For example, are such principles limited to informing the ALRC in undertaking its inquiry, or is the question implicitly suggesting that new principles are necessary for public policy-making in general? In our view, the latter conclusion would be premature.

Noting this initial reservation, in terms of criteria to be applied when determining whether an interference with private property rights is justified in the public interest, a useful starting point when considering environmental law is to apply the principles of ecologically sustainable development (**ESD**) as a guide to decision-making.

a) ESD in law and policy

The concept of ESD emerged out of growing concern that human activities were eroding earth's natural values and life support systems by ignoring environmental factors in decision-making. Internationally, this was marked by the *Our Common Future* report (1987) and the *Rio Declaration on Environment and Development* (1992). In Australia, the Council of Australian Governments agreed on a *National Strategy for Ecologically Sustainable Development* (1992). This Strategy defines ESD as:²⁷

using, conserving and enhancing the community's resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased.

The inclusion of ESD as an aim, and its principles as a guiding framework, has been an important development in environmental law and policy across Australia. In brief, its principles relate to *integration*, the *precautionary principle*, *intergenerational equity*, *conservation of biodiversity*, and *improved valuation*.

As the main Commonwealth environmental law, the EPBC Act explains:²⁸

*The following principles are **principles of ecologically sustainable development** :*

- (a) decision-making processes should effectively integrate both long-term and short-term economic, environmental, social and equitable considerations;*
- (b) if there are threats of serious or irreversible environmental damage, lack of full scientific certainty should not be used as a reason for postponing measures to prevent environmental degradation;*
- (c) the principle of inter-generational equity--that the present generation should ensure that the health, diversity and productivity of the environment is maintained or enhanced for the benefit of future generations;*
- (d) the conservation of biological diversity and ecological integrity should be a fundamental consideration in decision-making;*
- (e) improved valuation, pricing and incentive mechanisms should be promoted.*

In the decades since ESD was 'mainstreamed', governments have been criticised for not doing more to implement ESD in decision-making (including by ANEDO). Nevertheless, a body of case law has developed around the interpretation and application of these principles in Australian jurisdictions.²⁹ A wide body of international, national and state

²⁷ See <http://www.environment.gov.au/about/esd/index.html>.

²⁸ Section 3A, EPBC Act 1999.

²⁹ See, for example, *Leach v National Parks and Wildlife Service* (1993) 81 LGERA 270, *Friends of Hinchinbrook Society Inc v Minister for Environment* (1997) 93 LGERA 249, *Carstens v Pittwater Council*

policy and principles also support decision makers to act in accordance with ESD.³⁰ There is also a growing number of established tools to effectively integrate environmental, economic and social considerations in decision making.³¹

b) Recognising that rights and freedoms operate in an ecological context

The claim that environmental laws are an undue 'encroachment' fails to acknowledge that human expansion over the last century (including population, resource use and pollution) is now encroaching on planetary life support systems in ways that were not envisaged in centuries past.³²

Clearly, the challenge of integrating environmental factors in decision-making is an ongoing one.³³ Much more needs to be done to ensure that Australian and global society is ecologically sustainable. This is relevant to the ALRC's inquiry in determining the legitimacy of interferences with individual rights, particularly laws to conserve resources and protect the environment. This public interest is far more prominent today than it was, for example, in Blackstone's 18th century England. Put simply, it means that 'Australians can no longer afford to see themselves as separate from the environment.'³⁴

Chief Justice Preston of the NSW Land & Environment Court has argued that recognition of the reality that everything in an ecological system (including humans) is connected to everything else is likely to lead to regulatory authorities imposing greater affirmative duties on land owners.³⁵ Preston points out that this is because the increasing strain on these systems means that the *public benefit demands* from these resources will increasingly have to be met first, before the resources are available for *private benefits*.³⁶ This supports the need to apply ESD principles in determining where the balance of public and private interests lies. If a policy of deregulation allows private owners free reign to use resources, as before the advent of environmental laws, the cumulative result would be the erosion of natural systems and resources to an extent detrimental to everyone.³⁷

c) Benefits of applying ESD criteria

Our previous submissions have consistently and extensively outlined the rationale for adopting ESD as the overarching object for all environmental and planning laws.³⁸ In particular, ESD and its principles:

(1999) 111 LGERA 1, *BGP Properties Pty Ltd v Lake Macquarie City Council* (2004) 138 LGERA 237; *Telstra Corporation Limited v Hornsby Shire Council* [2006] NSWLEC 133; *Minister for Planning v Walker* [2008] NSWCA 224.

³⁰ See, for example, *Rio Declaration on Environment and Development* (1992), Australia's *National Strategy for Ecologically Sustainable Development* (1992); Local Government and Shires Association, *Integrating Natural Resource Management into Local Government Operations*, Vol. 2 Land Use Planning (2009).

³¹ For a recent example, see The Economics of Ecosystems and Biodiversity (TEEB) Project, *TEEB for Local and Regional Policy Makers Report*, at <http://www.teebweb.org/ForLocalandRegionalPolicy/tabid/1020/Default.aspx>.

³² See for example, F. Pearce, 'From ocean to ozone: Earth's nine life-support systems', *New Scientist*, at <http://www.newscientist.com/special/ocean-to-ozone-earths-nine-life-support-systems>.

³³ See UN Conference on Sustainable Development, *Rio+20* (2012) at <http://www.uncsd2012.org/>

³⁴ See Report to Australian Government, *State of the Environment 2011 'Headlines'*.

³⁵ The Hon Justice Preston, 'The Environment and its influence on the law' (2008) 82 ALJ 180, pg 180

³⁶ *Ibid.*

³⁷ We note that Preston also supports the revival of the traditional doctrine of public trust (*ibid* at 184). This is based on the idea that certain resources including air and waterways are held in trust by the government for the benefit and use of the general public.

³⁸ For example, in NSW see EDO NSW, Submission to Planning Review Stage 1 (November 2011); NCC NSW, EDO NSW and TEC (March 2012), pp 5-7.

- provide a sound framework to integrate environmental, economic and social considerations in decision making;
- have been adopted as part of our international, national and state legal systems and jurisprudence, including in the NSW Land and Environment Court;³⁹
- have clear present and long-term environmental, economic and social benefits; and
- have been recognised as best practice by Australian experts, who have noted that ‘there is no other credible candidate for an integrative policy framework’.⁴⁰

d) Conclusion

ANEDO is not convinced that there is a need, in the general practice of public policy-making, for specific and additional principles that consider the impacts of regulation on private property rights. However, for the purpose of the inquiry, we submit that the principles of ESD should be an integral part of any public interest test.

In response to Issues Paper **Question 6-1**, effective and integrated decision-making must appropriately balance economic concerns of private property owners with public interest benefits of different regulatory options. Effective decision-making recognises that environmental, social and economic factors are inherently intertwined. This means short-term private economic gains can lead to long-term or cumulative losses for the economy, environment and society (for example, salinity, biodiversity loss, climate change).

ESD and its principles provide a framework to navigate these competing interests. It emerged to address the impact of individual private and public decisions holistically, particularly by increasing the visibility of environmental impacts. This recognises that social progress and human quality of life relies on healthy ecological systems and processes. As such, ESD is “not a factor to be balanced against other considerations; ESD is the balance between development and environmental imperatives.”⁴¹

³⁹ See, for example, *Rio Declaration on Environment and Development 1992*, available at <http://www.unep.org/>; *National Strategy for Ecologically Sustainable Development (1992)*, which defines ESD as ‘using, conserving and enhancing the community’s resources so that ecological processes, on which life depends, are maintained, and the total quality of life, now and in the future, can be increased’, see <http://www.environment.gov.au/about/esd/index.html>; *Environment Protection and Biodiversity Conservation Act 1999* (Cth), ss 3-3A; *Protection of the Environment Administration Act 1991* (NSW), s 6(2); The Hon Brian Preston, Chief Judge of the Land and Environment Court (speaking extra-judicially), *Judicial Implementation of the Principles of Ecologically Sustainable Development in Australia and Asia* (2006), available via www.lawlink.nsw.gov.au.

⁴⁰ See Hawke, A. (2009), “Report of the Independent Review of the Environment Protection and Biodiversity Conservation Act 1999”, October 2009. See also Dovers, S. (2008) ‘Policy and Institutional Reforms’, in D. Lindenmayer, S. Dovers, M. Harriss Olson & S. Morton (Eds.), *Ten Commitments: Reshaping the Lucky Country’s Environment*, p 216.

⁴¹ Bates, G. *Environmental Law in Australia* (5th ed. LexisNexis. 2002), para [5.19]-[5.20], cited by Farrier D, et al (2007) *Biodiversity offsets and native vegetation clearance in New South Wales; The rural/urban divide in the pursuit of ecological sustainable development* 24 EPLJ 427

3. Existing protections for individual property rights achieve the appropriate balance

The Issues Paper clearly sets out the firmly established common law right to property and the existing protections from statutory encroachment in Chapter 6. This part of the submission briefly summarises the position in Australia regarding property rights and compensation. Noting the inquiry is limited to Commonwealth laws, we refer to the State situation below because most environmental and natural resource management regulation falls within State jurisdictions.

a) The Commonwealth Constitutional position

Section 51(xxxi) of the Commonwealth Constitution gives the Commonwealth the power to acquire property from any State or person for any purpose for which Parliament has the power to make laws. Such acquisition must be on just terms. “Acquisition” has been found in two circumstances. First, where there has been a formal *acquisition* of some interest in the land. Second, where there has been an indirect (or *de facto*) acquisition – that is, where the land has been “sterilised”. Mere regulation does not entitle a person to compensation.

b) The State Constitutional position

It has long been established that s.51(xxxi) does not affect acquisitions made under State legislation, even in the event that the State legislation is designed to give effect to a Commonwealth policy.⁴²

The Constitutions of NSW, Queensland and South Australia do not contain any provisions requiring compensation for acquisition of property or any lesser modification of any property right. Other than the Northern Territory, no State constitutions contain provisions requiring compensation for the acquisition of property or any lesser modification of any property right.⁴³ Therefore, State legislation may modify the common law position without requiring the payment of compensation.⁴⁴ Unless States have legislation in place to the contrary,⁴⁵ these jurisdictions can acquire on any terms they choose.⁴⁶

Native vegetation (land-clearing) laws and land use planning laws are State-based legislation.⁴⁷ There is therefore no acquisition of property involved in imposing such development controls. Nevertheless, even if there was an acquisition, there is no right to compensation under State constitutions.

⁴² *Alcock v The Commonwealth* (2013) 210 FCR 454 at 475 (particularly [82])

⁴³ *Northern Territory (Self-Government) Act 1978*, s.50: *Acquisition of property to be on just terms*. We also note that Victoria’s *Charter of Human Rights and Responsibilities Act 2006* provides that: ‘A person must not be deprived of his or her property other than in accordance with law’ (s.20).

⁴⁴ We note that, in 1988, the Federal Labor Government sought to make acquisitions of property by State Governments’ subject to a provision similar to the Commonwealth’s obligations under s 51(xxxi). The proposed constitutional amendment was rejected by every State.

⁴⁵ See for example, *Land Acquisition (Just Terms Compensation) Act 1991* (NSW)

⁴⁶ *PJ Magennis Pty Ltd v Commonwealth* (1949) 80 CLR 382; *Commonwealth v NSW*. See also *Durham Holdings Pty Ltd v NSW* (2001) 205 CLR 399.

⁴⁷ Unless the vegetation or development is prohibited under the *Environment Protection and Biodiversity Conservation Act 1999*

c) Compensation under legislation

A distinction has long been made, dating back to the Magna Carta, between compensation for acquisition of land, and no compensation where mere restrictions were imposed. In modern times, legislation protecting the environment or amenity imposes limits on landholders without requiring compensation.

For instance, limits on land-clearing have been introduced in the last 20 years to curb the loss of native vegetation, and to improve or maintain what is left.⁴⁸ While governments may employ transitional measures and incentives, the legislative regimes in NSW, Queensland and South Australia do not provide for general compensation rights where land clearing is merely regulated. Put another way, there is no right to compensation where an application to clear land is refused.

Where a permit *is already granted*, limited rights to compensation exist where the permit is revoked. Such compensation are only for “sunk costs” and do not extend to future losses.

d) Implications of any changes to compensation laws

There would be a number of negative drawbacks if law reform recommendations were made to wind back environmental laws enacted for the public good, or to increase compensation payable to private property owners for complying with environmental laws. Compensation for regulation would potentially:

- create precedents for other sectors (such as rent-seeking by industries against the regulation of pollution, or the imposition of zoning or development controls);
- result in inefficient use of the limited resources devoted to environmental protection (as compared to, say, financial assistance or incentives to perform certain duties);
- contradict the ESD principle that those who cause pollution, waste or environmental damage should bear its costs (the *polluter pays principle*);⁴⁹
- create a ‘chilling effect’ whereby governments are hesitant to regulate properly and effectively, for fear of the financial repercussions;
- involve Australia in complex and costly litigation over what regulations require compensation (as in the US); and
- create practical and legal difficulties in distinguishing between the public and private elements of any regulation (as a basis for compensation).

As noted, law reform in the US in this area has been problematic. Those in favour of ‘takings’ legislation argue that:⁵⁰

- It is not fair that individual landowners bear the burden of regulations designed to protect society generally;
- It assists the courts to provide prompt and fair compensation; and
- It makes regulators think twice before making rules that regulate economic activity.

⁴⁸ According to the *State of the Environment 2011* (at 2.3): ‘Less than 50% of the original native vegetation remains in most of Australia’s major primary production regions, and in many settled coastal regions.’ Native vegetation *condition* is declining in and outside intensive use areas.

⁴⁹ For example, see: *Protection of Environment Administration Act 1991* (NSW) s.6(d); *EPBC Act 1999* (Cth) s.3A(e).

⁵⁰ Richard Loe, ‘Takings: balancing Public Interest and Private Property Rights’ (1998) *Wisconsin Briefs from the Legislative References Bureau*, p.8.

However, the arguments against such legislation include:⁵¹

- Taxpayers are exposed to billions of dollars of new taxes for reimbursement;
- Takings laws related to environmental protection measures pay people to pollute;
- Compensation costs are prohibitively high, meaning governments will struggle to afford to enforce *current* environmental laws, let alone deal with future threats;
- Cases are best dealt with by courts on a case by case basis, rather than forcing them to apply rigid rules; and
- The laws just add to government red tape, are relatively arbitrary, and the basis for deciding losses to property value loss are problematic.

Research on the early application of these laws in the US indicates that the laws have increased litigation, come at a great cost to taxpayers, increased red tape significantly and appear to have a chilling effect on development of law, rules and regulation.⁵² In our view, the risks of stronger legislative protection for property rights far outweigh the benefits.

g) Conclusion

Based on our extensive legal experience, we believe there are adequate safeguards against unreasonable interference with private property rights where laws, regulations and decisions are made to serve the public interest in environmental protection.

This conclusion is supported by experts in the judiciary. Chief Justice Robert French notes that planning decisions all involve the exercise of public power provided by law and are subject to the rule of law.⁵³ This means that decisions that affect property rights must be exercised consistently with the scope, subject matter and purpose of the law under which the discretion is exercised.

Furthermore, the Chief Justice notes that the Australian concept of administrative justice already provides a conceptual and normative framework for making planning decisions that affect property rights.⁵⁴ This framework provides minimum standards to ensure that those decisions, and the processes by which they are made, are just: 'striking a balance between the public interest and the legitimate interests of individuals, communities and corporations in the use and enjoyment of their property.'⁵⁵ Decisions in planning law and practice are 'exercised within the framework of constitutional and statutory constraints and the great traditions of the common law...'. This includes the Australian and State Constitutions, representative democracy, the rule of law, the separation of powers and other common law rights and freedoms.

⁵¹ Ibid.

⁵² Ibid 9.

⁵³ Property, Planning and Human Rights (CJ Robert French, 2013, Planning Institute of Australia, National Congress), pg 7.

⁵⁴ Ibid 8.

⁵⁵ Ibid 13.

4. The right to a healthy environment

Although sometimes misappropriated, the right to own property is found in article 17 of the *Universal Declaration of Human Rights*, as follows:

- (1) *Everyone has the right to own property alone as well as in association with others.*
- (2) *No one shall be arbitrarily deprived of his property.*

As the Issues Paper notes (at 6.30), both domestic and international laws 'commonly provide exceptions to the right not to be deprived of property', subject to safeguards such as reasonableness, lawfulness or compensation.

In comparison to these rights and safeguards for property ownership, the human right to a healthy environment currently has an uncertain status in international law, and has not been formally recognised in any binding global international agreement.⁵⁶ Nevertheless, the 1992 *Rio Declaration* set out general principles aimed at bringing together the goals of environmental protection and human development. Australia and other signatories have agreed that 'People are entitled to a healthy and productive life in harmony with nature'; and that 'Nations shall enact effective environmental laws,'⁵⁷ such as the EPBC Act. The concept and principles of ESD are also clearly embedded in the Declaration.

a) Recognition of a right to a healthy environment in other jurisdictions

Despite lacking formal recognition, there are existing civil and political rights which could provide a basis for an individual to argue that they have a right to a healthy or sound environment.⁵⁸ Consequently, there is an increasing push for its formal recognition.⁵⁹ Emeritus Professor Bernhard Boer has written extensively on this subject and has advocated for increased recognition of a human right to a healthy environment. He has identified many countries that have recognised environmental rights in recent years.⁶⁰

Other commentators have also examined the potential for development of a substantive human right for the protection of the environment, and noted progress to date.⁶¹ Turner notes that 147 of the 193 nations recognized by the United Nations have a provision or provisions in their constitutions containing an environmental duty or right in some form,

⁵⁶ Good, M, 'Implementing the Human Right to Water in Australia' (2011) 30(2) *University of Tasmania Law Review* 107, 117; Boer, B and Boyle, A 'Human Rights and the Environment 13th Informal ASEM Seminar on Human Rights: background Paper' (2013) *Sydney Law School Research Paper No. 14/14*, 13.

⁵⁷ See for example: <https://www.iisd.org/rio+5/agenda/declaration.htm>. See further <http://www.un.org/esa/documents/ecosoc/cn17/1997/ecn171997-8.htm>, which notes (at 6): 'The legal status of each of the principles varies considerably.'

⁵⁸ Boer, B and Boyle, A 'Human Rights and the Environment 13th Informal ASEM Seminar on Human Rights: background Paper' (2013) *Sydney Law School Research Paper No. 14/14*.

⁵⁹ Donald K Anton and Dinah L Shelton, *Environmental Protection and Human Rights*, Cambridge University Press, 2011, 519–43.

⁶⁰ Ben Boer, 'Environmental Law and Human Rights in the Asia-Pacific' (Legal Studies Research Paper No. 14/62, July 2014, Sydney Law School), pg 2. Examples of more robust provisions can be found in the Constitutions of the Philippines, South Korea, Indonesia, Nepal, the Maldives, Mongolia, Timor Leste and Fiji. For example Article 61 of the Constitution of Timor Leste states that everyone has the right to a humane, healthy, and ecologically balanced environment and the duty to protect it and improve it for the benefit of the future generations. Bangladesh, India and Pakistan use the right to life as a basis for the right to a healthy environment. The courts have interpreted the right to life in these countries to include the right to a healthy environment.

⁶¹ S.J. Turner, 'Factors in the Development of a Global Substantive Environmental Right' (2013) *Onati Socio-Legal Series*, v 3 (5), 893-907, p.893. There have been significant developments at a regional and national level which show that creating such a right is plausible. For example, that at a regional level Article 24 of the African Charter of Human and People's Rights and Article 11 of the Protocol of San Salvador to the American Convention on Human Rights provide such substantive rights.

such as the right of nature to exist in Ecuador's Constitution.⁶² Lord Carnwath summarises how far environmental law has progressed in a few decades and notes that nearly all constitutions of countries adopted since the 1990s have in some form explicitly recognised a right to a clean and healthy environment.⁶³ However, commentators have also identified some of the theoretical and practical challenges for human rights law of an emerging right to a healthy environment.⁶⁴

b) Conclusion

We submit that if the ALRC is concerned about the protection of human rights with respect to property, this concern should be redirected towards considering the human right to a healthy environment, as an emerging area of human rights law.

5. Access to environmental justice

This submission focuses on the issue of the public interest benefits of environmental laws compared with private property rights. However, we would also like to note the relevance of Issues Paper **Chapter 18 - Judicial Review**, which is fundamental to ensuring access to justice for both property owners and the broader community.

a) Role of EDOs

With respect to property rights, a critical aspect of both property law and environmental law is access to justice. EDOs across Australia are regularly contacted by people with property rights (either freehold or leasehold) who are having the quiet enjoyment of their property disturbed or risk having their property value and/or amenity diminished due to proposed development in their vicinity. Impacts can range from increased noise and dust intrusions to reduced water quality or soil contamination, subsidence, salinity or erosion as a result of vegetation clearance. In particular EDOs in NSW and Queensland have been contacted by landholders concerned that they in fact have no property rights over their own farms compared to the rights of mining companies with exploration licences.⁶⁵

Since 2013, all EDOs around the country have had all federal funding withdrawn. As the only community legal centres advising on environmental and planning issues, we provide an invaluable service to people unable to afford to seek advice in relation to adverse impacts on their property and their health. The removal of federal funding from EDOs will significantly reduce the community's capacity to access the advice they need to take action to uphold their rights.

EDOs are crucial to ensure that the most disadvantaged in society have access to justice when it comes to their property rights, and their right to access environmental justice. The Productivity Commission recently found that "there are strong grounds for the legal assistance sector to receive funding to undertake strategic advocacy, law reform and public interest litigation, including in relation to environmental matters".⁶⁶

⁶² Ibid.

⁶³ Environmental Law in a Global Society (Lord Carnwath, (2015) 3 Journal of Planning and Environment Law 2015) pg 278.

⁶⁴ Environmental Rights or a Right to the Environment? Exploring the Nexus Between Human Rights and Environmental Protection (Bridget Lewis (2012), Macquarie Journal International and Comparative Environmental Law 36.)

⁶⁵ See: *Mining Law in NSW*, EDO NSW, available at www.edonsw.org.au.

⁶⁶ *Access to Justice Arrangements* Productivity Commission Inquiry Report, No. 72, 5 September 2014, Volume 2, pages 711 – 713, available at: <http://www.pc.gov.au/projects/inquiry/access-justice/report>

The rationales for government support for environmental matters are well recognised. The impact of activities or actions that cause environmental harm typically extend beyond a single individual to the broader community. For example, inappropriate developments by governments or the private sector that reduce air quality, water quality or the amenity of an area can impose costs on all residents in that area. Costs might include poor health outcomes or decreased land values.

As a result of negative environmental externalities, the social benefits for a community in raising environmental matters are more likely to exceed the private benefits for a single individual. If the costs of litigation are high and/or there are substantial costs to coordinating community interests, this can lead to situations where there may be environmental matters that are justiciable by the courts but individuals or communities are unwilling or unable to raise them.

b) Excluding judicial review – privative clauses

Issues Paper **Question 18-1** asks **What general principles or criteria should be applied to help determine whether a law that restricts access to judicial review is justified?** We strongly submit that in relation to environmental regulation, there is no justification for excluding judicial review.

Often there is no right to merits review for third parties wishing to bring an action in the public interest, so judicial review is the only option. Furthermore, there are significant barriers to bringing an action and it is not done lightly by clients of the EDOs. For example, even where access to the courts is possible, there can be significant upfront costs and costs risks involved.

There are several current examples and many attempts to insert privative clauses into legislation to prevent third party challenges to decisions.⁶⁷ By preventing judicial oversight of the legality of decisions, these provisions erode accountability and public trust, often in the case of the most powerful government decision-makers. Examples include South Australia's *Development Act 1993*, s.48E; Queensland's *State Development and Public Works Organisation Act 1971*, and the NSW Planning Bill 2013 (not yet enacted). Attempts are also being made, under the EPBC Amendment (Bilateral Agreement Implementation) Bill 2014, to retrospectively 'accredit' past State decisions to approve major projects that significantly impact on matters of NES, in place of federal assessment, public consultation and approval. ANEDO strongly opposes any attempts by any government to curtail the already limited rights for public interest environmental law challenges.

c) Conclusion

A more appropriate focus for law reform would be to establish open standing and public interest cost rules in environmental legislation in all jurisdictions. This would be consistent with international human rights recognition of the importance of access to environmental justice.

Professor Boer has noted that the 1998 *Aarhus Convention on Access to Information, Public Participation and Access to Justice in Environmental Matters* has great potential for enabling recognition of individual environmental rights and duties. It does this by

⁶⁷ For example, see the NSW Planning Bill, as introduced to NSW Parliament 2012. An example of a privative clause in Queensland is Section 27AD *State Development and Public Works Organisation Act 1971* (Qld) that provides: "The *Judicial Review Act 1991*, parts 3 and 5, other than section 41(1), do not apply to a decision, action or conduct of the Coordinator-General under this part [being Environmental Coordination] relating to the project." Furthermore, new provisions under the *Mineral and Energy Resources (Common Provisions) Act 2014* (Qld) also seek to limit rights to merits review of decisions in the state Land Court.

recognizing that everyone has a right to live in an adequately healthy environment and the duty to protect and improve the environment for future generations. It is primarily a European instrument, but other countries can and are being encouraged to become parties to it.⁶⁸ Similarly, Carnwath notes that implementation of the right to public participation has been pervasive and highly effective to ensuring environmental democracy is protected.⁶⁹ This encompasses the right of the public to relevant information held by public authorities, the right to participate in decision-making processes and the right to access to judicial and administrative proceedings to enforce those rights.

We refer the ALRC to numerous submissions we have prepared on how laws could be reformed in Australia to improve access to justice.⁷⁰

Conclusion

The identification by the Inquiry terms of reference of environmental law as an area that potentially unreasonably impinges upon personal freedoms evidences a misunderstanding of human rights principles as they relate to property rights. There is a significant lack of detailed examination and recognition of the public interest purpose and benefit of environmental laws in the Issues Paper. We hope this gap is comprehensively addressed in the mid-year Discussion Paper and the Final Report. It should in fact be recognised that in the context of the emerging human right to a healthy environment it may become necessary to impose greater restrictions on traditional property rights in order to protect broader public interests.

⁶⁸ Ben Boer, Environmental Law and Human Rights in the Asia-Pacific (Legal Studies Research Paper No. 14/62, July 2104, Sydney Law School), pg 47.

⁶⁹ Environmental Law in a Global Society (Lord Carnwath, (2015) 3 Journal of Planning and Environment Law 2015) pg 271.

⁷⁰ For extensive submissions on access to justice see: http://www.edonsw.org.au/environmental_law_policy.