



# Animal Defenders Office

*Using the law to protect animals*

ABN: 12837355070 | Member: CLCNSW Inc. | GPO Box 2259 Canberra ACT 2601 | [www.ado.org.au](http://www.ado.org.au) | [contact@ado.org.au](mailto:contact@ado.org.au)  
The Animal Defenders Office Inc. is accredited by the National Association of Community Legal Centres.

---

Committee Secretary  
Parliamentary Joint Committee on Law Enforcement  
PO Box 6100  
Parliament House  
Canberra ACT 2600

**By email:** [le.committee@aph.gov.au](mailto:le.committee@aph.gov.au)

Dear Sir/Madam

## **Submission—Trade in elephant ivory and rhino horn inquiry**

Thank you for the opportunity to provide a submission to the Parliamentary Joint Committee on Law Enforcement’s inquiry into the trade in elephant ivory and rhinoceros horn (“the inquiry”).

### About the Animal Defenders Office

The Animal Defenders Office (“ADO”) is a nationally accredited community legal centre that specialises in animal law. The ADO offers information and representation for individuals and groups wishing to take action on behalf of animals. The ADO also produces information to raise community awareness about animal protection issues, and works to advance animal interests through law reform.

The ADO is a member of the National Association of Community Legal Centres.

Our submission to the inquiry, based on the inquiry’s Terms of Reference, are set out below.

### Submission Summary

The ADO supports any move ‘to strengthen existing legislation and administrative arrangements, including through agreements with the states and territories, to reduce the

domestic trade in elephant ivory and rhinoceros horn products' and 'to close domestic markets for elephant ivory and rhinoceros horn products'.<sup>1</sup>

The ADO submits that the current regulatory framework is insufficient to prevent the sale of elephant ivory and rhinoceros horn in Australia, and that a national agreement is required to bring about a comprehensive, Australia-wide ban.

The Commonwealth government does not, on its own, have the power to implement an Australia-wide ban on the sale of elephant ivory and rhinoceros horn. While the Commonwealth government has the constitutional authority to prevent elephant ivory and rhinoceros horn from entering (and leaving) Australia and from travelling across state borders, it has no such power to prevent it from being sold within state borders.

The ADO submits that a coordinated effort by the Commonwealth government and all state and territory governments is required. In our view the most effective means of achieving this coordinated effort is through a national agreement (ideally led by the Commonwealth government) to ban the sale of elephant ivory and rhinoceros horn within Australia. It is our view that in the absence of a national agreement, it would be virtually impossible to give effect to a full ban, given the limitations imposed by the *Intergovernmental Agreement on Mutual Recognition*.

A useful precedent of a national agreement is the 1996 National Firearms Agreement, where the Howard government took the initiative to ban and confiscate certain firearms within Australia. On its own the Commonwealth government did not have the power to do anything more than ban the import and export of certain guns into and out of Australia (as per the trade and commerce power under s 51(i) of the Australian Constitution). This is because trade and commerce within state borders falls within the powers of the states and territories. To ban certain firearms within Australia, the Commonwealth government had to coordinate with the state and territory governments to reach a national agreement, which it achieved. Under the auspices of this national agreement, the Commonwealth government, and state and territory governments, passed complementary legislation to implement a national approach to the control of firearms within Australia.

---

<sup>1</sup> Parliamentary Joint Committee on Law Enforcement's inquiry into the trade in elephant ivory and rhino horn, Terms of Reference, paragraphs (h) and (i).

The ADO therefore calls on the Commonwealth government to lead the way in producing a national agreement to bring an end to the sale of elephant ivory and rhinoceros horn in Australia.<sup>2</sup>

#### Constitutional Basis for a National Agreement—Summary

1. The federal parliament has the legislative power under section 51(i) of the *Constitution of Australia* to ban the import and export of elephant ivory and rhinoceros horn to prevent ivory and rhinoceros horn products from entering and leaving Australia.
2. The federal parliament also has the legislative power under section 51(i) of the *Constitution of Australia* to ban the sale of elephant ivory and rhinoceros horn across state borders.
3. However, the federal parliament does not have the legislative power under section 51(i) or any other provision of the *Constitution of Australia* to ban the sale of elephant ivory and rhinoceros horn *within* state borders.
4. Furthermore, section E(c) of the *Intergovernmental Agreement on Mutual Recognition* and section 9 of the *Mutual Recognition Act 1992* (Cth) would prevent the federal parliament, or any state or territory parliament, from unilaterally banning the sale of elephant ivory and rhinoceros horn without first securing an exemption to the mutual recognition principle. Such an exemption, however, would need to be unanimously approved by the federal government and all state and territory governments.
5. It is the view of the ADO, therefore, that any legislative solution to the sale of elephant ivory and rhinoceros horn within Australia would have to be driven by a national agreement to ban the trade of elephant ivory and rhinoceros horn within Australia.

---

<sup>2</sup> Such an agreement could perhaps be called the “National Agreement to Ban the Domestic Trade of Elephant Ivory and Rhinoceros Horn”.

## Constitutional Basis for a National Agreement—Details

### *Legislative Powers of the Federal Parliament*

6. Section 51 of the *Constitution of Australia* sets out the legislative powers of the federal parliament.
7. Section 51(i) empowers the federal parliament to make laws with respect to ‘trade and commerce with other countries, and among the states’.
8. The phrase “trade and commerce” ought to be interpreted in accordance with its common or ordinary meaning: *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530.
9. Trade and commerce here includes, but is not limited to, ‘the mutual communings, the negotiations, verbal and by correspondence, the bargain, [and] the transport and delivery’: *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530, 547.

### *International Trade of Elephant ivory and Rhinoceros Horn*

10. The first limb of section 51(i) empowers the federal parliament to make laws with respect to ‘trade and commerce with other countries’.
11. This power enables the federal parliament to ‘prohibit, regulate and control the importation and exportation of goods’: *Murphyores Incorporated Pty Ltd v Commonwealth* (1976) 136 CLR 1.
12. The federal parliament, therefore, has the legislative power to ban the import and export of elephant ivory and rhinoceros horn, to prevent elephant ivory and rhinoceros horn products from entering Australia.

### *Interstate Trade of Elephant ivory and Rhinoceros Horn*

13. The second limb of section 51(i) empowers the federal parliament to make laws with respect to ‘trade and commerce ... among the states’.
14. This power enables the federal parliament to make laws with respect to ‘intangibles as well as the movement of goods and persons’ across state borders: *Bank of New South Wales v Commonwealth* (1948) 76 CLR 1, 381.

15. A contract which expressly, or by necessary implication, requires goods to be sent across state borders would satisfy the requirement of "interstate": *W & A McArthur Ltd v Queensland* (1920) 28 CLR 530, 567-8.
16. The federal parliament, therefore, has the legislative power to ban the sale of elephant ivory and rhinoceros horn across state borders.

#### *Intrastate Trade of Elephant ivory and Rhinoceros Horn*

17. Section 51(i) does not empower the federal parliament to make laws with respect to trade and commerce *within* states.
18. The federal parliament does not, therefore, generally have the power to regulate intrastate trade and commerce: *R v Burgess; Ex parte Henry* (1936) 55 CLR 608, 628.
19. The legislative power to make laws with respect to intrastate trade and commerce is, therefore, vested in the state governments.
20. The federal parliament does, however, have the power to regulate intrastate trade and commerce where it is 'inseparably connected with inter-State trade and commerce': *Redfern v Dunlop Rubber Australia Pty Ltd* (1964) 110 CLR 194, 221.
21. The High Court of Australia has determined that the federal parliament may regulate intrastate trade and commerce in those special cases where intrastate trade and commerce is 'inseparably connected with inter-State trade and commerce': *Redfern v Dunlop Rubber Australia Pty Ltd* (1964) 110 CLR 194, 221.
22. In general, however, the court has held that the distinction between interstate trade and commerce and intrastate trade and commerce 'must be maintained however much inter-dependence may now exist between those two divisions of trade and however artificial the distinction may be thought to be': *Attorney-General (WA) v Australian National Airlines Commission* (1976) 138 CLR 492, 502.
23. The federal parliament does not, therefore, have the legislative power to ban the sale of elephant ivory and rhinoceros horn within state borders.

### *Intra-Territory and Inter-Territory Trade of Elephant ivory and Rhinoceros Horn*

24. Section 122 of the *Constitution of Australia* empowers the federal parliament to 'make laws for the government of any territory'.
25. This enables the federal parliament to regulate trade and commerce within and, presumably, between territories.
26. However, this power was modified when the federal government and all state and territory governments came together and agreed to create the *Mutual Recognition Act 1992* (Cth).
27. The *Mutual Recognition Act 1992* (Cth) was enacted 'for the purpose of promoting the goal of freedom of movement of goods and service providers in a national market in Australia': section 3 of the *Mutual Recognition Act 1992* (Cth).
28. The mutual recognition principle requires that goods which are lawfully sold in one state or territory, may also be lawfully sold in any other state or territory: section 9 of the *Mutual Recognition Act 1992* (Cth).
29. The federal parliament, therefore, would be unable to ban the sale of elephant ivory and rhinoceros horn within and between territories unless it secured an exemption to the mutual recognition principle. Such an exemption would have to be unanimously approved by all state and territory governments: section E(c) of the *Intergovernmental Agreement on Mutual Recognition*.
30. It would be very challenging, therefore, for the federal parliament unilaterally to ban the sale of elephant ivory and rhinoceros horn within and between territories.

### *National Agreement to Ban the Trade of Elephant Ivory and Rhinoceros Horn*

31. The *Mutual Recognition Act 1992* (Cth) would similarly prevent any state or territory government from banning the sale of goods within its borders unless that state or territory secured an exemption to the mutual recognition principle. Such an exemption would have to be unanimously approved by the federal government and all other state and territory governments: section 9 of the *Mutual Recognition Act*

1992 (Cth); section E(c) of the *Intergovernmental Agreement on Mutual Recognition*.

32. It would be difficult, therefore, for any single parliament—federal, state, or territory—to “lead the way” by unilaterally banning the sale of elephant ivory and rhinoceros horn within its borders.

33. It is our view, therefore, that any legislative solution to the sale of elephant ivory and rhinoceros horn within Australia would have to be driven by a national agreement – presumably led and facilitated by the federal government – to ban the sale of elephant ivory and rhinoceros horn.

#### Domestic ban—international perspective

The ADO notes that there is considerable international support for closing domestic ivory and rhinoceros horn markets regardless of the size of either the markets in question or the conservation impact.<sup>3</sup>

We also note that a number of countries has already implemented domestic bans on trading ivory, including the USA<sup>4</sup> and China<sup>5</sup>. It would be appropriate, therefore, if Australia were to follow the lead of these other nations and work towards a complete and comprehensive domestic ban on the domestic trade in elephant ivory and rhinoceros horn products.

Yours faithfully

Scott Dempsey and Tara Ward

**Animal Defenders Office Inc.**

GPO Box 2259, Canberra ACT 2601

[www.ado.org.au](http://www.ado.org.au)

7 June 2018

---

<sup>3</sup> These include the 2016 IUCN World Conservation Congress’s motion calling for the closure of domestic markets in elephant ivory ([WCC-2016-Res-011](#), September 2016), the UN General Assembly’s resolution to close legal domestic ivory markets ([A/RES/71/326](#), cl.21, September 2017), the Conference of the Parties to CITES’ recommendation for the closure of domestic ivory markets ([Resolution Conf. 10.10 \(Rev. CoP17\)](#), September-October 2016), and the CITES Secretariat’s notification re the closure of domestic ivory markets ([2017/077](#), 19 December 2017).

<sup>4</sup> <https://news.nationalgeographic.com/2016/06/us-ivory-ban-regulations/>.

<sup>5</sup> <https://news.nationalgeographic.com/2017/12/wildlife-watch-china-ivory-ban-goes-into-effect/>.