ENVIRONMENT PROTECTION AND BIODIVERSITY CONSERVATION ACT 1999: AN OVERVIEW OF THE FIRST TWO YEARS

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First published in 2002 by

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Environment Protection and Biodiversity Conservation Act 1999: An Overview of the First Two Years

SYNOPSIS

There has been considerable debate about the *Environment Protection Biodiversity Conservation Act 1999* (Cth) since its commencement on 16 July 2000. This article examines how key aspects of the Act have been administered and discusses important developments in the application of the Act in the first 2 years of its operation.

1. INTRODUCTION

The *Environment Protection and Biodiversity Conservation Act 1999* (Cth) ("**EPBC Act**") commenced on 16 July 2000 and brought about sweeping changes to Commonwealth environmental law. The Act established a new Commonwealth regime for the protection and conservation of biodiversity and is intended to ensure Australia is able to meet its obligations under several international environmental agreements. Probably of greatest significance is the fact that it has clarified the division of responsibility for natural resource management between the Commonwealth, States and Territories and established a new Commonwealth environmental assessment process for the protection of matters of national environmental significance and the environment in Commonwealth areas.

This article looks back over the first 2 years of the operation of the EPBC Act and identifies key issues that have arisen over this period[1]. Part 2 discusses how key stakeholder groups have reacted to the Act since commencement. Part 3 reviews the available data on the referral, assessment and approval process and identifies some important issues that have arisen in relation to its operation. Part 4 briefly discusses the Commonwealth's attempts to transfer responsibility for the Act's assessment processes to the States and Territories. Part 5 discusses how the biodiversity provisions of the Act have been administered, including the listing processes for threatened species and ecological communities. Part 6 examines the enforcement of the Act and Part 7 discusses the progress of the strategic assessment of Commonwealth managed fisheries. Part 8 provides an overview of important amendments that have been to the Act since commencement (including those concerning wildlife trade) and Part 9 discusses the progress on the development of new approval "triggers". Part 10 concludes the article and highlights a number of issues that need to be addressed in the future.

2. STAKEHOLDER REACTIONS TO THE APPLICATION OF THE ACT

The EPBC Act has sparked heated argument amongst many stakeholders about its impacts and ability to address key environmental issues[2]. A number of environmental organisations have been highly

[1] There has been a wealth of commentary about the development of the EPBC Act and its implementation during the first year of its operation. See, for example, *A New Green Agenda Conference Papers October 1999*, EDO Network Conference on the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (available at www.edo.org.au/alerts.htm); M Kennedy, N Beynon, A Graham, and J Pittock (2001) "Development and Implementation of Conservation Law in Australia", *Review of European Community and International Law* 10(3):296; S Chapple (2001) "The EPBC Act: One Year Later", *Lifelines* 7(3):3, available on the internet at: http://nccnsw.org.au/member/cbn/projects/Policy_and_Law/epbc1.html, 10 September 2002; C McGrath (2001) "The Fraser Island Dingo Case", EPLJ 18(3):269; C McGrath (2000) "An introduction to the Environment Protection and Biodiversity Conservation Act 1999 (Cth), Its Implications for State Environmental Legislation and Public Interest Litigation", QEPR 6 (28):102; L Ogle (2000) "The Environment Protection and Biodiversity Conservation Act 1999 (Cth): How Workable Is It?", EPLJ 17(5):468; L Hughes (1999) "Environmental Impact Assessment in the Environment Protection and Biodiversity Act 1999 (Cth)", EPLJ 16(5):441; J Scanlon and M Dyson (2001) "Will Practice Hinder Principle? – Implementing the EPBC Act", EPLJ 18(1):14.

[2] See, for example, L Ogle (2000) "The Environment Protection and Biodiversity Conservation Act 1999 (Cth): How Workable Is It?", EPLJ 17(5):468; L Hughes (1999) "Environmental Impact Assessment in the Environment Protection and Biodiversity Act 1999 (Cth)", EPLJ 16(5):441; The Wilderness Society, Australian Conservation Federation and Greenpeace, "New Commonwealth Environment Legislation: Environmental Demolition", Media Release, 23 June 1999; National Farmers Federation, "Coalition Commits to Fix Flawed EPBC Act", Media Release, 31 October 2001; J Scanlon and M Dyson (2001) "Will Practice Hinder Principle? – Implementing the EPBC Act", EPLJ 18(1):14.

supportive of the Act, primarily on the grounds that, while not perfect, it constitutes a major improvement on previous Commonwealth environmental legislation and that it is a starting point for further developments (including the creation of new approval "triggers")[3]. WWF Australia, Humane Society International, Tasmanian Conservation Trust and the Queensland Conservation Council have been among the more vocal of the environmental organisations that have praised the Act. Support for the EPBC Act has also been forthcoming from a number of independent commentators[4].

For every supporter of the Act, there has been an equally passionate opponent. Several environmental organisations (including The Wilderness Society, Australian Conservation Foundation and Greenpeace) have expressed concern about the ability of the Act to address key environmental issues. Their primary grievance has been that the Act limits the Commonwealth's responsibility for environmental regulation to the listed matters of national environmental significance, the actions of Commonwealth agencies and the environment on Commonwealth lands, and that the Act does not contain an approval "trigger" that specifically relates to key environmental issues such as land clearing and greenhouse gas emissions[5]. The past two years have not seen any change in the opposition of these groups to the EPBC Act. It would appear they remain committed to the view that the Act is unable to address important environmental issues and that it does not provide sufficient protection for the matters of national environmental significance[6].

Among the more significant developments concerning the EPBC Act over the past 2 years has been the increasing opposition to the Act from agricultural lobby groups and the Government's response to this opposition. In April 2001, the then Minister for the Environment and Heritage, Senator Robert Hill, listed Bluegrass (*Dichanthium* spp.) dominant grasslands of the Brigalow Belt Bioregions (North and South) and Brigalow (*Acacia harpophylla* dominant and co-dominant) as endangered ecological communities. On the same day, the Minister also included land clearance on the list of key threatening processes under the Act. These decisions were greeted warmly by environmental organisations[7]. However, they were fiercely opposed by several agricultural lobby groups, including the National Farmers Federation, Agforce and the Queensland Farmers Federation. These groups claimed there had been inadequate consultation prior to the making of the decisions and that the decisions imposed an intolerable burden upon rural landholders[8].

These listings have sparked ongoing opposition from agricultural lobby groups to the EPBC Act. They maintain the Act is adversely effecting agricultural productivity and land values and that it imposes "onerous regulations and costs on farmers" without adequate compensation[9]. Agricultural lobby groups have also claimed that the Act is flawed, owing to the uncertainty that is associated with the approval "triggers"[10]. These complaints are primarily associated with the fact that the approval triggers are based on the intensity of the impacts of an activity on certain aspects of the environment,

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[3] J Pittock (2000) "Improved Commonwealth Environmental Impact Assessment Due to the EPBC Act", *Environmental Defender's Office Journal – Impact*, December 2000; M Kennedy (1999), "Opportunities for Increased Conservation in New Commonwealth Biodiversity Act", Lifelines 5(3): 6 (available on the internet at: http://nccnsw.org.au/member/cbn/news/media/19991129_53epbcmk.html, accessed 10 September 2002); M Kennedy, N Beynon, A Graham, and J Pittock (2001) "Development and Implementation of Conservation Law in Australia", *Review of European Community and International Law*, 10(3):296.

[4] C McGrath (2001) "Enforcement, Politics and the EPBC Act", Community Biodiversity Network website (at: http://nccnsw.org.au/member/cbn/projects/Policy_and_Law/Enforce.html), accessed 10 September 2002.

[5] See, for example, The Wilderness Society, "New Commonwealth Environment Law - Concern Deepens", Media Release, 31 May 1999; and The Wilderness Society, Australian Conservation Federation and Greenpeace, "New Commonwealth Environment Legislation: Environmental Demolition", Media Release, 23 June 1999.

[6] See P Christoff (2002), *In Reverse – Australia's Environmental Performance 1992 to 2002*, unpublished (available at www.wilderness.org.au – accessed, 10 September 2002).

[7] See, for example, Humane Society International, "Senator Hill Ups the Ante on Land Clearing" , Media Release, 4 April 2001 and WWF Australia, "WWF Calls for Regulation of Land Clearing", Media Release, 4 April 2001.

[8] See Agforce, "Farmers want new listings under Commonwealth environment act withdrawn", Media Release, 10 May 2001; Agforce, "AgForce to meet with Prime Minister to discuss newly protected ecosystems", Media Release, 7 May 2001; Queensland Farmers Federation, *Weekly Bulletin*, 31 August 2001; and National Farmers Federation, "Coalition Commits to Fix Flawed EPBC Act", Media Release, 31 October 2001.

[9] National Farmers Federation, *Environmental Equity – Respect for property rights as a key to achieving better protection of the environment*, Election Policy, November 2001 (available at www.nff.org.au/pages/policies.html#en) (accessed 10 September 2002); and A Hodge, "Farmers push for green law rollback", *The Australian*, Tuesday, 13 August 2002.

[10] National Farmers Federation, *Environmental Equity – Respect for property rights as a key to achieving better protection of the environment*, Election Policy, November 2001 (available at www.nff.org.au/pages/policies.html#en) (accessed 10 September 2002); and National Farmers Federation, "NFF Welcomes Minister's EPBC Announcement", Media Release, 30 July 2002.

rather than the nature of the activity. National Farmers Federation have also expressed concern about the uncertainty and administrative burden created by differences between the EPBC Act and State/Territory environmental laws[11]. The opposition of agricultural lobby groups to the EPBC Act is consistent with their agenda to establish a system for the compensation of rural landholders whose activities are curtailed by environmental legislation[12].

As a result of the response of agricultural lobby groups to the inclusion of Bluegrass (*Dichanthium* spp.) dominant grasslands of the Brigalow Belt Bioregions (North and South) and Brigalow (*Acacia harpophylla* dominant and co-dominant) on the list of threatened species, the new Minister for the Environment and Heritage, Dr David Kemp, introduced a public consultation procedure for all proposed listing decisions. Now, before the Threatened Species Scientific Committee has submitted its advice to the Minister concerning the eligibility of a nominated species or ecological community for inclusion on the lists, the public is provided with an opportunity to make submissions on whether the species or ecological community satisfies the listing criteria and the likely social and economic impacts if the species or ecological community is listed. Social and economic considerations are not relevant to the Minister's decision on whether or not to include a species or ecological community on the lists. The Minister is only allowed to have regard to matters that "relate to the survival" of the relevant species or ecological community. However, the Minister has indicated that socio-economic information submitted during this consultation process will be retained for use when he/she is considering granting an approval under Part 9 in relation to a proposed action that may have an adverse impact on the relevant species or ecological community[13].

Environment Australia has also released guidelines concerning a number of species and ecological communities that have been listed to explain the impacts of the listings on relevant stakeholders[14]. These guidelines were developed in consultation with stakeholders (particularly rural landholders) to help them to adjust to the EPBC Act requirements[15]. More recently, the Minister announced that the Commonwealth would fund a National Farmers Federation EPBC Act project to provide information to rural landholders and other regional stakeholders about the Act[16].

3. THE REFERRAL, ASSESSMENT AND APPROVAL PROCESS – THE FIRST 2 YEARS

Broadly, the EPBC Act prohibits a person from taking an action (ie. a project, development, undertaking, activity or series of activities) that is likely to have a significant impact on a "matter of national environmental significance" without the approval of the Minister. There are currently six matters of national environmental significance: listed threatened species (other than those listed as "extinct" or "conservation dependent")[17]; listed ecological communities (other than those listed as "vulnerable")[18]; listed migratory species; the ecological character of wetlands listed under the Ramsar Convention; the world heritage values of listed World Heritage properties; nuclear actions; and the environment in Commonwealth marine areas.

The Act also requires approval to be obtained for:

- activities that are likely to have a significant impact on the environment on Commonwealth land;
- activities taken on Commonwealth land that are likely to have a significant impact on the environment; and

[11] National Farmers Federation, *Environmental Equity – Respect for property rights as a key to achieving better protection of the environment*, Election Policy, November 2001 (available at www.nff.org.au/pages/policies.html#en) (accessed 10 September 2002).
[12] National Farmers Federation, *Property Rights Position Paper - 2002*, National Farmers Federation, Canberra, May 2002.
[13] When considering whether or not to approve an action under Part 9, the Minister is specifically required to have regard to social and economic considerations (see s.136(1)).
[14] For example, supplementary guidelines on significance have been published in relation to Bluegrass ecological communities and the Spectacled Flying-fox and guidelines are currently being prepared in relation to the Greyheaded Flying-fox.
[15] The information gathered by Environment Australia on the socio-economic impacts of the listing of a species or ecological community is often used to design these guidelines and other information products.
[16] National Farmers Federation, "NFF Welcomes Minister's EPBC Announcement", Media Release, 30 July 2002.
[17] The list of threatened species contains 6 categories: extinct, extinct in the wild, critically endangered, endangered, vulnerable, and conservation dependent.
[18] The list of threatened ecological communities contains 3 categories: critically endangered, endangered and vulnerable.

- activities carried out by Commonwealth agencies that are likely to have a significant impact on the environment.

The assessment and approval process is usually initiated by proponents, who are required to refer details of an activity to the Minister if they believe it may require approval under the Act. The Minister may also "call-in" proposed activities if he/she considers they may require approval. Further, a Commonwealth agency, State, Territory or agency of a State or Territory can also referral a proposal by another person to take an action to the Minister if they have administrative responsibilities relating to the action. Upon receiving a referral, the Minister then decides whether approval is required. The Minister has three options when deciding whether a proposed activity requires approval under the Act: approval is required; approval is not required; or approval is not required if the action is carried out in a manner specified by the Minister.

If the Minister decides approval is required, the activity is usually required to be assessed under the Act and the Minister must choose the type of assessment that must be undertaken. The assessment options available to the Minister are: assessment on preliminary documentation; public environment report; environmental impact statement; public inquiry; and accredited assessment process[19]. After the assessment has been completed, the Minister decides whether or not to approve the action and, if it is approved, what conditions to attach to the approval.

The data concerning the number of referrals and referral decisions at 30 June 2002 is presented below[20].

Table 1: Number of referrals and referral decisions at 30 June 2002

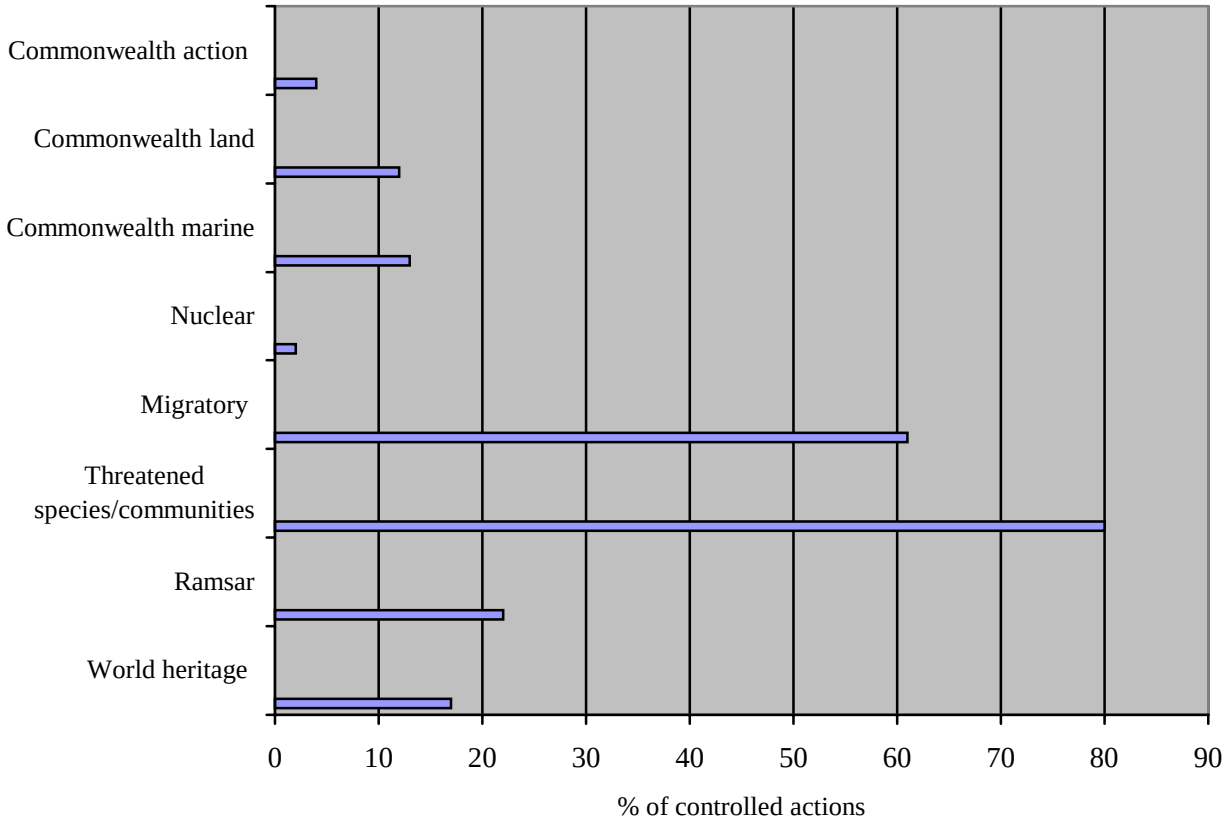
Total No. of Referrals	**603**
Total No. of referral Decisions	**571**
Approval Required	167 (29%)
Approval Not Required	357 (63%)
Approval Not Required – Manner Specified	47 (8%)

Figure 1 below shows the relative importance of the provisions in Part 3 (ie the provisions relating to matters of national environmental significance, Commonwealth agencies and Commonwealth land) in triggering assessments and approvals under the Act.

[19] Assessments under accredited assessment processes are described as assessments "under the Act". However, in reality, they involve the transfer of responsibility for administration of the assessment process from the Commonwealth Department of the Environment and Heritage (which is called "Environment Australia") to the States and Territories or an alternative Commonwealth agency. At the completion of the assessment process, a report is required to be submitted to Environment Australia on the impacts of the proposed activity on relevant matters protected under the EPBC Act. The Minister then uses this report as the basis for his/her decision on whether or not to approve the activity.

[20] The data provided here was compiled from Environment Australia's statistics website on 20 August 2002. The website can be found at www.ea.gov.au/epbc/statistics/statistics.html.

Figure 1: Relative Importance of Controlling Provisions

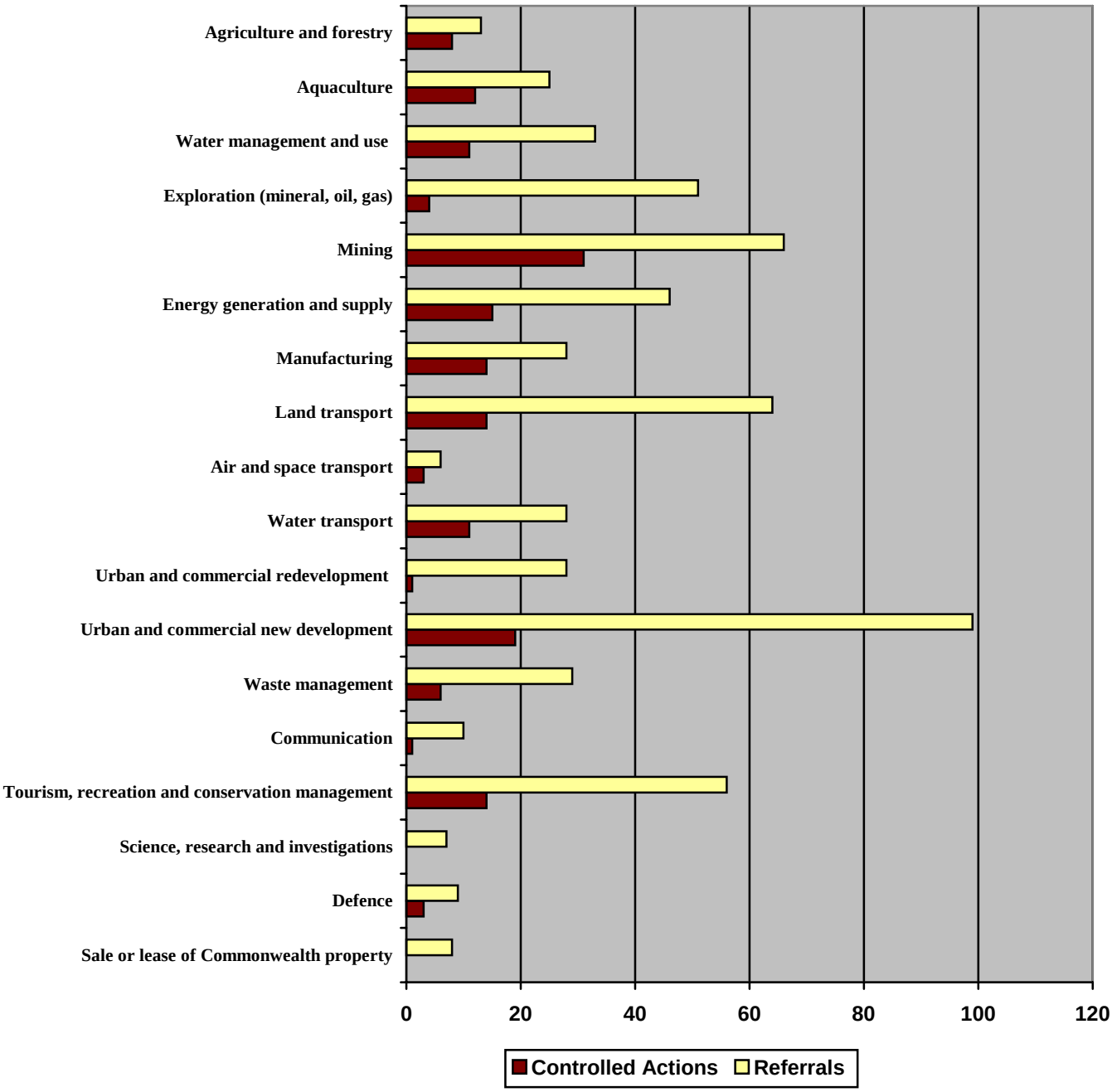


As the above graph illustrates, by far the most important trigger to date has been that relating to listed threatened species and ecological communities (ss.18 and 18A), which were relevant to approximately 80% of actions requiring approval under the Act. The provisions concerning listed migratory species (ss.20 and 20A) were relevant to a little over 60% of controlled actions. None of the remaining potential triggers applied to any more than 25% of actions requiring approval.

Figure 2 below shows the number of referrals received and number of actions requiring approval from industry categories as at the end of June 2002[21].

[21] Figure 2 was prepared by Environment Australia and is available on Environment Australia's statistics website (www.ea.gov.au/epbc/statistics/statistics.html). This graph was reproduced with the permission of Environment Australia.

Figure 2: Referrals Received and Actions Requiring Approval by Industry Category



An area of concern that is illustrated in Figure 2 is the relatively small number of referrals received from the agricultural sector over the past 2 years. At 30 June 2002, a mere 8 referrals had been received in relation to agricultural activities, one of which was subsequently withdrawn. Details of these 8 proposals and the outcome of the referral process are provided in Table 2 below.

Table 2: Agricultural Referrals and Controlled Action Decisions to 30 June 2002

No	Referral No.	Nature of proposed action	Location	State/ Territory	Approval required/not required
1.	2002/571	Electrocution of Spectacled Flying-foxes	Kennedy	QLD	Required
2.	2002/655	Cattle feedlot development	Condobolin	NSW	Not required
3.	2002/564	Mill and timberyard	Smithton	TAS	Not required
4.	2001/480	Electrocution of Spectacled Flying-foxes	Kennedy	QLD	Required (subsequently withdrawn)
5.	2001/452	Cattle feedlot development	Rangers Valley	NSW	Not required
6.	2001/200	Dairy facility	Gannawarra	VIC	Required
7.	2001/381	Cattle feedlot development	Milang	SA	Required
8.	2000/91	Irrigated cotton development	Macquarie Marshes	NSW	Required

The available data on the administration of the assessment process illustrates that the Minister has had a tendency to prefer assessments to be carried by way of preliminary documentation or under an accredited assessment process. Information on the assessment approach decisions and assessments completed at 30 June 2002 is presented in Table 3 below.

Table 3: Number of assessment approach decisions and assessments completed at 30 June 2002

Total No. of Assessment Approach Decisions	**104**
Preliminary Documentation	50 (48%)
Accredited Assessment Approach	31 (30%)
Environmental Impact Statement	14 (13.5%)
Public Environment Report	7 (6.5%)
Public Inquiries	0
Tasmanian Bilateral Agreement	2 (2%)
Total No. of Assessments Completed	**49**
Preliminary Documentation	44
Accredited Assessment Approach	3
Environmental Impact Statement	0
Public Environment Report	0
Public Inquiries	0
Tasmanian Bilateral Agreement	2

At 30 June 2002, 34 approvals had been granted, and none had been refused. Of the 34 approvals granted, 28 had been issued with conditions and 6 without. The conditions that are attached to approvals are generally designed to minimise the relevant environmental impacts of the actions and ensure the impacts are adequately monitored. This information is presented in Table 4 below.

Table 4: Number of approval decisions at 30 June 2002

Total No. of Approvals Granted	**34**
Approvals with conditions	28
Approvals without conditions	6
Total No. of Approvals Refused	**0**

Finally, at 30 June 2002, 3 exemption notices had been issued under s.158 granting proponents exemptions from the referral, assessment and approval process on the grounds of "national interest". The details of these notices are outlined below.

Table 5: Part 3 Exemption Notices

No	Title	Date of Notice	Person(s) exempt	Scope of exemption	Specified action
1	Christmas Island - Immigration Reception and Processing Centre and associated infrastructure	3 April 2002	Commonwealth, all Commonwealth agencies, all persons acting on behalf of the Commonwealth, all persons providing services or carrying out activities for the purposes of the specified action	All of Part 3	Establishment and ongoing operation of the Christmas Island Immigration Reception and Processing Centre and associated infrastructure
2	South Australia – Spring/Summer 2000-2001 locust control program	21 October 2000	South Australian Minister for Primary Industries and Resources and persons acting on behalf of the Minister in relation to the specified action	All of Part 3	Actions associated with the South Australian Spring/Summer 2000-2001 Australian plague locust control program
3	Australian Maritime Safety Authority - National Plan to Combat Pollution of the Sea by Oil and Other Noxious and Hazardous Substances	28 August 2000	All persons acting in accordance with the National Plan to Combat Pollution of the Sea by Oil and Other Noxious and Hazardous Substances	All of Part 3	Actions taken in accordance with the National Plan to Combat Pollution of the Sea by Oil and Other Noxious and Hazardous Substances

The most controversial of these was the Minister's decision to exempt the Commonwealth, Commonwealth agencies and agents of the Commonwealth or Commonwealth agencies from the referral, assessment and approval process in relation to the construction and operation of a new refugee detention centre on Christmas Island. This decision was criticised by a number of environmental organisations, who claimed the proposed development would threaten the recovery of threatened species and diminish the heritage values of the project area[22].

It is too early to be drawing conclusions on the effectiveness of the referral, assessment and approval process in providing protection for matters of national environmental significance. Further, any evaluation of the Commonwealth's attempts to address threats to matters of national environmental significance will have to have regard to its non-regulatory programs, including the Natural Heritage Trust and National Action Plan for Salinity and Water Quality. However, the available information suggest there is room for improvement, particularly in increasing awareness of, and compliance with, the referral, assessment and approval requirements in the agricultural sector[23].

4. TRANSFERRING RESPONSIBILITY TO THE STATES AND TERRITORIES

The EPBC Act contains two mechanisms that enable Environment Australia to transfer assessment and/or approval responsibilities under the Act to the States and Territories. The most widely discussed is the bilateral agreement process, which enables the Minister to enter into agreements with the States and Territories. These agreements can accredit State and Territory assessment and/or approval processes for the purposes of actions or a class of actions described in the agreement, provided the State and Territory processes meet the standards prescribed in the Act and Regulations.

At 30 June 2002, only two bilateral agreements had been made. These relate to Tasmania and the Northern Territory. The bilateral agreement between the Commonwealth and Tasmania was made in

[22] The Wilderness Society, *Detention Centres on Christmas Island*, published on The Wilderness Society website on 19 August 2002 (see: www.wilderness.org.au/projects/Christmas_Island/detain_ci.html) (accessed 24 August 2002).

[23] For further discussion on Environment Australia's administration of the referral, assessment and approval provisions of the EPBC Act, see WWF Australia's, Humane Society International's and Tasmanian Conservation Trust's combined submission to the Commonwealth Auditor-General's in relation to its performance audit of Environment Australia's administration of the referral, assessment and approval provisions of the EPBC Act, available at www.wwf.org.au/epbc. The Commonwealth Auditor-General's final report is expected be released later this year.

December 2000 and it provides that actions that are assessed under the *State Policies and Projects Act 1993* (Tas) or the *Environmental Management and Pollution Control Act 1994* (Tas) in accordance with the terms of the agreement are exempt from the assessment requirements under Part 8 of the Act. Similarly, the bilateral agreement between the Northern Territory and the Commonwealth, which was made on 31 May 2002, declares that actions that are assessed under the *Environmental Assessment Act* (NT) or the *Inquiries Act* in accordance with the terms of the agreement are exempt from the assessment requirements under Part 8 of the Act.

The practical effect of these agreements is that they transfer the responsibility for carrying out assessments for the purpose of the EPBC Act from Environment Australia to the relevant State and Territory agencies that are responsible for the administration of the accredited assessment processes[24]. At the completion of the assessment processes, these State and Territory agencies are required to provide a report to Environment Australia on the potential impacts of the proposed action on relevant matters of national environmental significance or the environment on Commonwealth land. The Federal Minister is then responsible for deciding whether or not to approve the project under the EPBC Act.

On 19 August 2002, a similar assessment bilateral agreement was made between the Commonwealth and Western Australia. The agreement provides an exemption from the assessment requirements under Part 8 of the EPBC Act for actions that are assessed under the *Environment Protection Act 1986* (WA) in accordance with the terms of the agreement. Again, the Minister will still be responsible for approving actions that are assessed under this Western Australian process.

Similar assessment bilateral agreements are currently being negotiated with the remaining States and Territories. The majority of these (the exception being South Australia) are expected to be finalised in the near future. At present, there does not appear to be any plans to begin negotiations on bilateral agreements that will enable the transfer of responsibility for granting approvals for the purposes of the EPBC Act to the States and Territories.

The Act also enables the Minister to accredit State and Territory processes on a case-by-case basis. The affect of this arrangement is largely the same as that under the Tasmanian and Western Australian bilateral agreements. That is, the relevant State or Territory agency that is responsible for the administration of the accredited process must ensure the assessment accounts for relevant matters of national environmental significance (and the environment on Commonwealth land, where appropriate). At the completion of the assessment, the State and Territory is required to provide a report to Environment Australia on the impacts of the action on these matters and the Minister then uses this report as the basis of his/her decision on whether or not to approve the action. As noted in Part 3 above, the Minister has chosen an accredited assessment approach for approximately 30% of actions that require approval under the Act.

5. THREATENED SPECIES AND ECOLOGICAL COMMUNITIES

Why listing is important?

As discussed, the EPBC Act contains a list of threatened species and a list of threatened ecological communities. The inclusion of a species or ecological community on these lists results in the species or ecological community attracting important statutory protection under the Act. The referral, assessment and approval requirements discussed above are the most important of these statutory protections. Other protections provided for listed threatened species and ecological communities under the EPBC Act include the following.

- Part 13, Division 1 of the Act requires a permit to be obtained to take or injure a member of a threatened species (except "conservation dependent" species) or ecological community in a

[24] Many actions taken in Tasmania and the Northern Territory will still be required to be assessed under the EPBC Act by Environment Australia. For example, the agreement does not cover actions taken on Commonwealth land or actions taken by the Commonwealth or a Commonwealth agency. Similarly, the agreement only has effect if the actions are assessed under the identified legislation in the specified manner.

Commonwealth area and prohibits the damaging of habitat in Commonwealth areas that is listed on the Register of Critical Habitat under s.207A of the Act[25].

- Part 13, Division 5 of the Act requires recovery plans to be prepared for listed threatened species (except conservation dependent species) and ecological communities and allows wildlife conservation plans to be prepared for conservation dependent species. These plans are intended to identify the threats facing the species or ecological community and to set out the steps to ensure the recovery and ongoing management of the species or ecological community.
- Part 13A imposes stringent controls on the exportation of listed threatened species and specimens derived from these species.

Potentially of equal importance however, is the impact listing has on the distribution of government funding for conservation activities, particularly under the Natural Heritage Trust. Between 1 July 2000 and 30 June 2001, the Endangered Species Program of the Natural Heritage Trust spent almost $11 million, the majority of which was directed toward the conservation of listed threatened species and ecological communities. Although the Endangered Species Program has recently been amalgamated into a broader program under the new Natural Heritage Trust II structure, nationally listed species and ecological communities are still a significant priority in respect of funding that is available under the Trust for biodiversity conservation. For example, under the Threatened Species Network Community Grants Program, priority is given to projects involving listed threatened species and ecological communities in respect of which a recovery plan has been prepared[26].

How have the lists of threatened species and ecological communities been administered?

At the commencement of the EPBC Act, the lists of threatened species and ecological communities consisted of 1566 species (1236 plants and 332 animals) and 22 ecological communities, which were transferred from the lists under the *Endangered Species Protection Act 1992* (Cth). Between July 2000 and 30 June 2002, a further 32 species and 5 ecological communities were listed, 33 species were transferred to different categories on the lists (32 to higher conservation categories, 1 to a lower category), and 3 species and 1 ecological community were removed from the list[27]. This brought the total number of listed species at 1 July 2002 to 1595, which is comprised of 1241 plants and 354 animals[28]. The total number of listed ecological communities at 1 July 2002 was 27, all of which were listed as endangered.

Concern has been expressed by a number of groups about the slow rate of listings for threatened species under the EPBC Act. Under the *Endangered Species Protection Act 1992*, species were being listed at an average rate of in excess of 200 a year. That rate has fallen to below 20 under the EPBC Act. The decline in the rate of listings is obviously partly attributable to the fact that there is a decreasing pool of threatened species that have not already been listed under the Act. However, there are several gaps in the coverage of the current list. The relatively small number of listed aquatic and invertebrate species is an area of particular concern.

Environment Australia has also been criticised for the small number of ecological communities that have been listed over the past 2 years. In this regard, no ecological communities have been listed since the controversial listing of Bluegrass (*Dichanthium* spp.) dominant grasslands of the Brigalow Belt Bioregions (North and South) and Brigalow (*Acacia harpophylla* dominant and co-dominant) as endangered ecological communities in April 2001.

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[25] Note, there are a number of exemptions from these permit requirements. See p.10 for further discussion on the Register of Critical Habitat.

[26] The Threatened Species Network Community Grants Program is a devolved grants program of the Natural Heritage Trust that is administered by WWF Australia that provides funding to local projects that are associated with the conservation of threatened species and ecological communities. Between 30 June 2000 and 30 June 2002, the Network provided approximately $1million for on-ground conservation work.

[27] Semi-evergreen Vine Thickets of the Brigalow Belt South Bioregion in New South Wales was removed from the list. However, it was effectively redefined as part of a larger ecological community that was subsequently included on the list of threatened ecological communities, being the Semi-evergreen vine thickets of the Brigalow Belt (North and South) and Nandewar Bioregions.

[28] Between 1 July 2002 and 30 August 2002, a further 9 species were listed (7 animals and 2 plants), bringing the total number of listed threatened species at 30 August 2002 to 1604.

It is understood that the Threatened Species Scientific Committee is currently undertaking a review of the lists of threatened ecological communities that are maintained by the States and Territories to assess the eligibility of communities on these lists for inclusion on the list maintained under the EPBC Act[29]. In this regard, the Minister has issued declarations in relation to 5 lists of ecological communities under s.185(2), which effectively nominates all communities on these lists for inclusion on the list of threatened ecological communities. Environment Australia is apparently also reviewing other State and Territory lists. In all, the review is looking at in excess of 580 ecological communities included on State and Territory lists.

As part of this review, the Threatened Species Scientific Committee is seeking to establish a national approach to defining ecological communities using the framework under the National Vegetation Inventory System ("**NVIS**"). NVIS, which was developed by the National Land and Water Resources Audit, identifies 42 Major Vegetation Sub-groups. Ecological communities included on lists maintained by the States and Territories will be allocated to one of the Major Vegetation Sub-groups. The similarities of the ecological communities allocated to each sub-group will then be assessed to determine whether communities should be amalgamated into so-called "nationally-described" ecological communities. After "nationally-described" ecological communities have been identified, their eligibility for inclusion on the list of threatened ecological communities will be assessed.

The application of this policy has been illustrated in recent decisions to refuse to list a number of nominated ecological communities on the grounds the communities formed part of larger national ecological communities and did not fit within the NVIS framework[30]. It was also demonstrated in the decision to include the Semi-evergreen Vine Thickets of the Brigalow Belt South Bioregion in New South Wales in the larger Semi-evergreen vine thickets of the Brigalow Belt (North and South) and Nandewar Bioregions.

The amalgamation of recognised ecological communities into larger "nationally-described" communities may offer advantages. For example, it may facilitate a more strategic approach to recovery planning. However, it can have adverse impacts on the effectiveness of the approval process. For example, if an ecological community displaying a unique combination of biotic and abiotic characteristics only covers an area of 1000 hectares, a proposal to clear 100 hectares is likely to have a significant impact on the ecological community and thereby trigger the approval requirement. However, if this ecological community is included as a component of a larger "nationally-described" ecological community that covers 10,000 hectares, the proposal to clear 100 hectares of the sub-community is less likely to require approval.

Whether this policy is consistent with the EPBC Act is a moot point. The definition of "ecological community" in the Act is extremely broad and would appear to support a more inclusive approach to defining and listing ecological communities. Only time will tell whether this policy stands up to legal challenge and, if it does, what its net effect will be on the conservation of ecological communities.

The Register of Critical Habitat

The Act requires the Minister to maintain a register of habitats (called the "**Register of Critical Habitat**") that are regarded as critical to the survival of listed threatened species and ecological communities. The Minister is not obliged to list any habitat on the Register. However, recovery plans must identify habitat that is critical to the survival of the relevant listed species and ecological communities and the Minister is required to consider whether to include these areas on the Register.

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[29] Lists of threatened ecological communities are maintained by New South Wales, Victoria, Western Australia, Queensland, Tasmania and the Australian Capital Territory. Apparently, neither Northern Territory nor South Australia maintain lists of threatened ecological communities. See, Environment Australia, *Process for assessing vegetation-based State and Territory listed ecological communities under the Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act)*, available on the internet at: www.ea.gov.au/biodiversity/threatened/communities/nvisprocess.html (accessed 10 September 2002).

[30] For example, the Minister refused to list Coolabah (Eucalyptus coolabah)/Black Box (Eucalyptus largiflorens) Woodlands of the Northern NSW wheatbelt and Queensland Brigalow Belt Bioregion as a threatened ecological community on the grounds the nominated community should be considered as part of a larger woodland ecological community.

The Act prohibits any person from intentionally significantly damaging a habitat located in a Commonwealth area that is listed on the Register as being critical to the survival of a listed threatened species (except a "conservation dependent" species) or ecological community. In addition, s.207C requires Commonwealth agencies to ensure all contracts for the sale or lease of Commonwealth land that includes habitats listed on the Register to contain a covenant for the protection of the habitats. Commonwealth agencies must take reasonable steps to ensure the covenant in the contract binds successors in title of the buyer or lessee. The inclusion of habitat on the Register of Critical Habitat also has the potential to diminish the uncertainties associated with the Act by providing proponents with a clearer picture of when the approval "triggers" for threatened species and ecological communities will apply.

At 30 June 2002, no habitat had been included on the register of critical habitat. However, on 1 July 2002, the Minister listed the entirety of Macquarie Island (which was listed as habitat critical to the survival of the Grey-headed Albatross (*Thalassarche chrysostoma*) and the Wandering Albatross (*Diomedea exulans*)) and Albatross Island, The Mewstone and Pedra Branca (which was listed as habitat critical to the survival of the Shy Albatross (*Thalassarche cauta*)) on the register. Admittedly, these listings are relatively uncontroversial, in that these areas not facing development pressures and there are few (if any) competing interests. However, it was encouraging to see these areas listed and the Minister was congratulated by conservation organisations (including Humane Society International) for making these first entries on the Register[31]. As Humane Society International has expressed, efforts now need to be made to increase the habitats on the Register and to raise awareness about the consequences of listing[32].

Recovery plans and wildlife conservation plans

As discussed above, recovery plans are only binding on the Commonwealth. However, they are important as they identify habitats that are critical to the survival and recovery of the species or ecological community, identify threats to the species or ecological community and set out a process to ensure the recovery of the species or ecological community in the wild. Further, they can also have important impacts on the allocation of government assistance for the protection and conservation of the species or ecological community.

Wildlife conservation plans are similar to recovery plans, only they can cover conservation dependent species, listed migratory species, listed marine species and cetaceans and Commonwealth agencies are merely required to "take all reasonable steps" to comply with the plans. The plans are also required to identify the habitats of these species and the actions needed to protect these habitats, rather than the habitats critical to the survival of the relevant species.

At 30 June 2002, approximately 114 recovery plans covering 171 threatened species and 8 ecological communities had been adopted under the Act. This constitutes approximately 11% of the total number of species on the list of threatened species and approximately 30% of the listed threatened ecological communities. 27 of these recovery plans (covering 44 species) were previously prepared under the *Endangered Species Protection Act 1992* and were transferred over at the commencement of the EPBC Act. No wildlife conservation plan had been prepared at 30 June 2002.

Given the significance of these plans for the success of non-regulatory programs, more resources must be made available to increase the rate at which recovery plans are being prepared and to ensure they are implemented effectively.

[31] Humane Society International, "Commonwealth Lists First Critical Habitat for Threatened Albatross Species" , Media Release, 1 July 2002.
[32] Humane Society International, "Commonwealth Lists First Critical Habitat for Threatened Albatross Species" , Media Release, 1 July 2002.

6. ENFORCEMENT OF THE EPBC ACT

Environment Australia's compliance policy

Penalties are included in legislation to influence community behaviour or, put more simply, to deter wrongdoing. The degree to which legislation is able to achieve this purpose is often a function of the risk of prosecution and the penalties that are likely to be incurred following prosecution. The EPBC Act contains serious penalties for non-compliance, including goal terms of up to 7 years and fines of up to $5.5 million. Further, the Act provides Environment Australia with a range of enforcement mechanisms, including civil and criminal penalties, environmental audits, conservation orders, injunctions, infringement notices, the power to publicise contraventions, and the power to take action to remedy environmental damage and to recover the costs of these actions from perpetrators.

Despite the range of formal enforcement mechanisms that are available under the Act, it appears Environment Australia has adopted a more cooperative approach to enforcement at this stage. This has been done without a clear and public expression of intention in relation to enforcement.

At 30 June 2002, the only formal action that Environment Australia had taken under the Act that could possibly be interpreted as a punitive action was the issuance of a lapsed proposal declaration under s.155 on 13 June 2002, in relation to a proposed development in Queensland (Reference Number 2001/250). The declaration appears to have been issued as a result of the proponents failure to provide information required by Environment Australia to assist it to determine how the proposed action would be assessed.

The Flying-fox case: Booth v Bosworth

A Queensland bat researcher, Dr Carol Booth, demonstrated the ability of the Act to contribute to conservation outcomes when she commenced proceedings in the Federal Court in late 2000 to stop a Queensland lychee farmer, Rohan Bosworth, from electrocuting Spectacled Flying-foxes.

Mr Bosworth's property is located near Kennedy in northern Queensland, adjacent to the Wet Tropics World Heritage area. He was operating a large electric grid that was designed to protect his lychee crop from a number of species of flying-foxes, which included Spectacled Flying-foxes. Dr Booth alleged that the operation of the electric grid was illegal as the large numbers of Spectacled Flying-foxes killed by the grid was likely to have a significant impact on the world heritage values of the Wet Tropics World Heritage Area.

The Federal Court found that the Spectacled Flying-fox contributes to the world heritage values of the Wet Tropics World Heritage Area on three grounds:

- it forms part of the record of the mixing of the faunas of the Australian and Asian continental plates;
- it contributes to the character of the Wet Tropics World Heritage Area as a "superlative natural phenomena" by reason of its being "one of the most significant regional ecosystems in the world"; and
- it constitutes part of the biodiversity for which the Wet Tropics World Heritage Area is a most important and significant natural habitat for in-situ conservation.

The Court also found it was probable the operation of the electric grid killed in the order of 18,000 Spectacled Flying-foxes in the 2000/2001 lychee season and that the continued operation of the grid would halve the Australian population of Spectacled Flying-foxes in less than five years. On the basis of these findings, the Court held that the operation of the electric fences was likely to have a significant impact on the world heritage values of the Wet Tropics World Heritage Area and issued an injunction prohibiting the continued operation of the electric fences until such time as all relevant approvals had been obtained under the EPBC Act[33]. However, Branson J refused to issue an order

[33] Since the decision was handed down in October 2001, the Spectacled Flying-fox has been listed as vulnerable under the Act. Mr Bosworth has also applied for approval to recommence operating the grid. The listing of the Spectacled Flying-fox as vulnerable is largely irrelevant for the purposes of Mr Bosworth's approval application as the application was made before the species was listed.

under s.475(3) requiring the respondent to dismantle the electric grid due to the fact the operation of the grid could be made legal by the issuance of an approval by the Minister.

The case was important for several reasons. Firstly, it demonstrated the ability of the Act to be used to prevent unsustainable and harmful practices. Secondly, when the Act was introduced, there was concern that the Act only protected the "world heritage values" of World Heritage properties, rather than the properties themselves. This case demonstrated the potency of the protection of "values" as it enables activities outside the boundaries of the place to fall within the scope of the Act.

Thirdly, it illustrated the usefulness of the provisions in the Act that broaden the rules of standing[34]. Courts have traditionally been reluctant to allow persons who do not have a proprietary or financial interest in the subject matter of an action to enforce public environmental rights[35]. At common law, applicants are generally required to demonstrate a "special interest in the subject matter of the action"[36]. Similarly, a number of statutes allow courts to grant remedies to enforce public rights if the applicant is able to demonstrate they are a "person aggrieved" by the relevant action[37]. This requirement has been interpreted in a manner similar to the "special interest" test, in the sense the applicant must demonstrate they have suffered a wrong beyond that suffered by an ordinary member of the public[38]. Over the past 15 years, courts have demonstrated a greater willingness to interpret these requirements broadly so as to enable certain non-government organisations to enforce public environmental rights[39]. However, these statutory rules of standing still pose a significant hurdle for those seeking to enforce these rights.

The EPBC Act partially addresses this issue by explicitly providing that persons and organisations involved in the conservation of, or research into, the environment are taken to have standing to seek injunctions to prevent a contravention of the Act and to seek judicial review of a decision made under the Act via the *Administrative Decisions (Judicial Review) Act 1977*. In *Booth v Bosworth*, these provisions effectively eliminated the complications associated with the traditional rules of standing. The issue was briefly raised in Spender J's decision concerning Dr Booth's application for an interim injunction. However, the respondent did not dispute Dr Booth's standing to seek the relief sought in the trial before Branson J.

Fourthly, Branson J provided some guidance on the meaning of "significant impact" in the context of the provisions relating to the protection of matters of national environmental significance. In this regard, Branson J suggested that a "significant impact" is one that is "important, notable or of consequence" having regard to its context. When viewed in the light of existing authority on how similar terminology was interpreted under the *Environment Protection (Impact of Proposals) Act 1974* (Cth) and has been interpreted in State environmental legislation, this finding was hardly startling[40]. Yet, it was reassuring to obtain confirmation that this phrase would be interpreted in a manner that is consistent with existing authority concerning similar statutory requirements.

Fifthly, while Branson J did not reach a concluded view on the matter, she suggested the term "likely", when used in the context of "likely to have a significant impact on" a matter of national environmental importance, is likely to mean "prone, with a propensity or liable", or "real or not

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Both the Queensland and Federal Governments are currently investigating alternative methods of preventing flying-foxes from damaging fruit crops in northern Queensland and research is being conducted on the numbers of Spectacled Flying-foxes located in the Wet Tropics World Heritage Area.

[34] See s.475 and 485.

[35] See, for example, *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493.

[36] See *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493; *Onus v Alcoa of Australia Ltd* (1981) 149 CLR 27; *Australian Conservation Foundation Inc v South Australia* (1989) 52 SASR 288; and *Ex parte Helena Valley/Boya Assn (Inc); State Planning Commission and Beggs* (1989) 2 WAR 422.

[37] See, s.5 of the *Administrative Decisions (Judicial Review) Act 1977* (Cth).

[38] See *Tooheys Ltd v Minister for Business and Consumer Affairs* (1981) 36 ALR 64; *Telecasters North Queensland Ltd v Australian Broadcasting Tribunal* (1988) 82 ALR 90; and *Australian Conservation Foundation v Forestry Commission* (1988) 19 FCR 127.

[39] See *North Coast Environment Council Incorporated Inc v Minister for Resources* (1994) 55 FCR 492; *Australian Conservation Foundation v Minister for Resources* (1989) 19 ALD 70; and *Tasmanian Conservation Trust Inc v Minister for Resources* (1994) 127 ALR 580.

[40] *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516; *Drummoyne Municipal Council v Roads and Traffic Authority of NSW* (1989) 67 LGRA 155; *Oshlack v Richmond River Shire Council and Iron Gates Developments Pty Ltd* (1993) 82 LGERA 222; and *Concord, North Sydney, Woollahra and Manly Councils v Optus Networks Pty Ltd* (1996) 90 LGERA 232.

remote chance or possibility regardless of whether it is less or more than fifty per cent". Again, this is consistent with how similar phrases have been interpreted in State environmental legislation[41]. However, if this interpretation is adopted, it will enable the "triggers" for approval to be more sensitive to potential threats to matters of national environmental significance and the environment on Commonwealth land.

Sixthly, Branson J clarified that in seeking to define the meaning of "natural heritage" for the purposes of the relevant provisions in Part 3 of the Act, the Court would be willing to have regard to resolutions made by the World Heritage Committee concerning the meaning of this phrase under the Convention. s.12(3) of the Act defines "world heritage values" as "the natural heritage and cultural heritage contained in the property". "Natural heritage" and "cultural heritage" are then defined as having the same meaning as under the World Heritage Convention[42]. Article 2 of the World Heritage Convention defines "natural heritage" as:

"*…natural features consisting of physical and biological formations or groups of such formations, which are of outstanding universal value from the aesthetic or scientific point of view;*

geological and physiographical formations and precisely delineated areas which constitute the habitat of threatened species of animals and plants of outstanding universal value from the point of view of science of conservation;

natural sites or precisely delineated natural areas of outstanding universal value from the point of view of science, conservation or natural beauty."

Article 11, paragraph 5 of the Convention requires the World Heritage Committee to define the criteria for the inclusion of places on the World Heritage List. In accordance with this requirement, the World Heritage Committee has published guidelines containing the criteria against which nominations are assessed. Branson J held that these guidelines could be considered when seeking to interpret Article 2 of the Convention. Indeed, her judgement focuses almost entirely on the criteria in the guidelines as the basis for her decision that the operation of the gridlines was likely to have a significant impact on the world heritage values of the Wet Tropics World Heritage Area.

This approach is important, as it provides stakeholders with a better idea of how to determine the world heritage values of Australia's World Heritage Areas. Branson J's decision and reasoning also have important implications for how other phrases in the Act will be interpreted, in particular, the "ecological character" of wetlands listed under the Ramsar Convention. In this regard, the Act defines "ecological character" as having the same meaning as in the Ramsar Convention. The Convention does not define this phrase. However, it was defined in Resolution VII.10 of the 7th Meeting of the Conference of the Contracting Parties to the Convention as[43]:

"*…the sum of the biological, physical, and chemical components of the wetland ecosystem, and their interactions, which maintain the wetland and its products, functions, and attributes.*"

Given Branson J's decision and reasoning in *Booth v Bosworth,* it would seem highly reasonable to presume this definition will be applied in relevant provisions of the Act.

Finally, Branson J also provided interesting remarks on how the court would approach the exercise of its discretion concerning the issuance of injunctions where it had been established that an action has had, would have, or was likely to have, a significant impact on the world heritage values of a property listed under the World Heritage Convention. In this regard, Branson J stated:

"*In weighing the factors which support an exercise of the Court's discretion in favour of the grant of an injunction under subs 475(2) of the Act against those factors which tell against the grant of such*

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[41] 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.
[42] s.12(4).
[43] Resolution VII.10 on Wetland Risk Assessment, 7th Meeting of the Conference of the Contracting Parties to the Convention on Wetlands (Ramsar, Iran, 1971), San José, Costa Rica, 10-18 May 1999.

an injunction, it seems to me that it would be a rare case in which a Court could be satisfied that the financial interests of private individuals, or even the interests of a local community, should prevail over interests recognised by the international community and the Parliament of Australia as being of international importance."

This principle would appear to have equal application to the provisions in Part 3 of the Act that relate to the protection of listed threatened species and ecological communities[44], listed migratory species[45], the ecological character of wetlands listed under the Ramsar Convention[46], and the environment in Commonwealth marine areas[47].

The Fraser Island Dingo case

The only other legal proceedings concerning the EPBC Act that were heard prior to 1 July 2002, were two applications for an interim injunction to prevent the continuation of a dingo culling program on Fraser Island (*Schneiders v State of Queensland* (2001) and *Jones v State of Queensland* (2001)). The culling program was undertaken by the Queensland Department of Parks and Wildlife Management following the tragic death of a nine year old boy who was mauled by a dingo. The applicants alleged that the culling program was likely to have a significant adverse impact on the world heritage values of the Fraser Island World Heritage Area as the reduction of the dingo population would detract from the natural heritage values of the Island.

The first application (*Schneiders v State of Queensland* (2001)) was rejected on the grounds the balance of convenience favoured the Queensland Government owing to the intent of the program being to protect the public interest and the weakness of the evidence presented at the hearing concerning the potential impact of the culling on the world heritage values of Fraser Island. The second application (*Jones v State of Queensland* (2001)) was refused on the grounds there was insufficient evidence of a change of circumstances to warrant the overturning of the decision in *Schneiders v State of Queensland* (2001).

7. STRATEGIC ASSESSMENT OF COMMONWEALTH FISHERIES

Prior to the commencement of the EPBC Act, management plans and policies for Commonwealth managed fisheries were not always subject to a formal environmental impact assessment process[48]. Part 10 of the EPBC Act addresses this issue, by requiring all management plans and policies for Commonwealth managed fisheries to undergo a strategic assessment to evaluate the impact of actions taken under these plans and policies on relevant matters of national environmental significance. Obviously, these assessments usually concentrate on the impact of fishing activities in Commonwealth marine areas or in coastal waters managed by the Commonwealth on the marine environment.

At 30 June 2002, strategic assessments had been commenced in relation to 7 of the 18 Commonwealth managed fisheries. None of these assessments have been completed. However, draft assessment reports had been released for public comment in relation to the Heard Island and McDonald Islands Fishery and the Bass Strait Central Zone Scallop Fishery. In late July, a draft strategic assessment report for the Southern and Eastern Scalefish and Shark Fishery was released and it is expected that a draft strategic assessment report for the Northern Prawn Fishery will be released in the near future.

[44] ss.18 and 18A.
[45] ss.20 and 20A.
[46] ss.16 and 17B.
[47] ss.23 and 24A.
[48] It should be noted that fisheries management plans for Commonwealth managed fisheries were occasionally subject to environmental impact assessment under the *Environment Protection (Impact of Proposals) Act 1974* (Cth). Further, fisheries from which fish and fish products were exported could previously be subject to environmental assessment under the *Wildlife Protection (Regulation of Imports and Exports) Act 1982* (Cth) (and can now be assessed under Part 13A of the EPBC Act – see Part 8 below).

8. AMENDMENTS SINCE COMMENCEMENT

Wildlife Trade Amendments

A number of amendments have been made to the Act since commencement. Undoubtedly the most significant were the amendments made as a result of the *Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Act 2001*, which commenced on 11 January 2002. The amendments resulted in the insertion of Part 13A, which contains a complex system for the regulation of the importation and exportation of wildlife and specimens derived from wildlife. The regime under the Act replaces that which applied under the *Wildlife Protection (Regulation of Imports and Exports) Act 1982* (Cth).

The new wildlife trade regime is very similar to that which applied under the *Wildlife Protection (Regulation of Imports and Exports) Act 1982*. In this regard, Part 13A regulates:

- imports and exports of CITES-listed specimens;
- exports of certain native specimens (called "**regulated native specimens**"); and
- imports of certain live specimens (called "**regulated live specimens**").

Broadly, a permit is required to import or export a CITES-listed specimen, to export regulated native specimens, and to import regulated live specimens. However, the new regime includes a number of advances on the old regime, including:

- Part 13A requires the impacts of the importation of certain specimens on the environment to be assessed before an permit is issued;
- under Part 13A, the defendant bears the evidential burden of proof in relation to establishing that a CITES-listed specimen, regulated native specimen, or regulated live specimen they are found importing or exporting (as appropriate), was imported or exported in accordance with the statutory requirements; and
- where native species are being harvested for export, Part 13A allows the impacts of these activities on the ecosystem as a whole to be assessed, rather than the assessment being confined to the impacts on relevant species.

The new regime also includes provisions to ensure the welfare of species is protected. In this regard, the objects of Part 13A include "to promote the humane treatment of wildlife". However, the regulations that have been made in relation to animal welfare issues have been criticised as being "weak and vague"[49].

Supplementary Amendments

Two other important amendments have been made to the Act since commencement. Firstly, s.70 was amended to enable the Minister to "call-in" a proposed action where he/she considers it may have a significant impact on a matter protected under Part 3. Previously, s.70 only enabled the Minister to ask a person to refer a proposed action.

Secondly, s.25A has been inserted, which enables regulations to be made that specify that certain actions are taken to be actions to which a specified provision in Part 3 applies. This amendment is particularly important, as it has created a means by which to minimise uncertainty associated with the "significant impact" test. For example, regulations could be made that specify that the clearing of X hectares of Y vegetation will be taken to be an action to which the threatened species provisions in Part 3 apply (ie. ss.18 and 18A). At the date of publication, no regulations had been made under this section.

[49] Humane Society International, "Bitter disappointment following fruitless negotiations to improve impact assessment and animal welfare regulations for wildlife trade", Media Release, 18 September 2002.

9. PROGRESS ON NEW APPROVAL TRIGGERS

The blueprint for the EPBC Act was first developed in 1992, when the Federal, State and Territory Governments and the Australian Local Government Association signed the Intergovernmental Agreement on the Environment. The details of the structure of the Act were further developed in the November 1997 meeting of the Council of Australian Governments, which led to the signing of the Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment. These agreements clarified the scope of the Commonwealth's responsibility for natural resource management and provided the structure that would later evolve into the EPBC Act and cooperative programs such as the National Environment Protection Measures and the National Action Plan for Salinity and Water Quality.

The Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment identifies seven matters of national environmental significance that should trigger the Commonwealth's environmental assessment and approval processes[50]. The only one of these matters that is not currently in the EPBC Act relates to places of national heritage significance.

Proposed Heritage Triggers

On 27 June 2002, the Federal Government tabled three Bills (collectively known as the "**Heritage Amendment Bills**") in Parliament, which are intended to give effect to the Commonwealth's commitment to provide protection for places of national heritage significance and places in Commonwealth areas that have important heritage values[51].

The Heritage Amendment Bills are comprised of the *Environment and Heritage Legislation Amendment Bill (No. 1) 2002*, *Australian Heritage Council Bill 2002* and the *Australian Heritage Council (Consequential and Transitional Provisions) Bill 2002*. These Bills will repeal the *Australian Heritage Commission Act 1975* (Cth) and replace the Australian Heritage Commission with the Australian Heritage Council. Most importantly, the Heritage Amendment Bills will establish two new lists under the EPBC Act: the National Heritage List and the Commonwealth Heritage List.

The National Heritage List is intended only to include places that are of *national* heritage significance. It is designed to fill the gap between the World Heritage Convention, which records places of world heritage significance, and State and Territory heritage laws, which record places of State, Territory, regional and local heritage significance. Places will be eligible for inclusion on the National Heritage List if they are found to have one or more National Heritage values, which will be prescribed under the regulations. Similar to the situation with World Heritage properties, Part 3 of the EPBC Act will generally require actions that are likely to have a significant impact on the National Heritage values of a place that is on the National Heritage List to be assessed and approved under the Act.

The Commonwealth Heritage List will only included places in Commonwealth areas or that are located outside the Australian jurisdiction and are owned or occupied by the Commonwealth or a Commonwealth agency. Unlike the National Heritage List, it may include places that are of national, State, Territory, regional or local heritage significance. The Commonwealth Heritage List is necessary to overcome complications created by the Commonwealth's immunity from certain State and Territory laws and is intended to ensure there is a comprehensive regime for the protection, conservation and presentation of places of heritage significance in Commonwealth areas.

Places will be eligible for inclusion on the Commonwealth Heritage List if they are found to have one or more Commonwealth Heritage values. Again, these values will be prescribed under the regulations. Unlike the National Heritage values of National Heritage places, Part 3 of the EPBC Act will not include separate sections for the protection of the Commonwealth Heritage values of places on the Commonwealth Heritage List. The main protection for Commonwealth Heritage values in

[50] Clause 4, Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment, Council of Australian Governments ("COAG"), November 1997.

[51] An earlier version of the Bills was introduced into Parliament in December 2000. However, the Bills lapsed while awaiting debate in the Senate when the 2001 Federal Election was called.

Part 3 of the EPBC Act will be provided by ss.23 and 24A (which relate to the environment in Commonwealth marine areas and Commonwealth managed fisheries), ss.26 and 27A (which relate to the environment on Commonwealth land), and s.28 (which relates to the actions of the Commonwealth and Commonwealth agencies which are likely to have a significant impact on the environment). In this regard, the definition of "environment" in s.528 of the EPBC Act will be amended to include explicit reference to the "heritage values of places"[52]. As a result, actions will generally require approval under the EPBC Act if they are likely to have a significant impact on the heritage values of a Commonwealth area (where the heritage values may include Commonwealth Heritage values).

The new regime will establish a system for the preparation and implementation of management plans for places included on the National Heritage List and Commonwealth Heritage List. The Heritage Amendment Bills will also impose a number of additional obligations on Commonwealth agencies. In this regard, all Commonwealth agencies will be required to prepare heritage strategies for the places they own or control. In addition, when taking an action that relates to a place on the National Heritage List or Commonwealth Heritage List, Commonwealth agencies will be required to "minimise the impact" of their actions on the heritage values of the place. Further, Commonwealth agencies will also be required to ask the Minister for advice if they proposed to take an action that is likely to have a significant impact on a place on the Commonwealth Heritage List.

Probably the most controversial aspect of the proposed new heritage regime concerns the procedure for the inclusion of places on the National and Commonwealth Heritage Lists. Unlike the listing procedure for threatened species and ecological communities, the Minister will be permitted to have regard to socio-economic and political matters when deciding whether to include a place and values on these lists.

Greenhouse Gas Trigger

In December 1999, the Federal Government released a discussion paper for public comment on the possibility of a greenhouse trigger being included in the EPBC Act. A model trigger and draft regulations were released in 2000, which proposed the inclusion of requirement that all developments that would involve the release of 500,000 tonnes of carbon dioxide equivalent over a 12 month period to be assessed and approved under the Act. In accordance with clause 4 of the Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment, the Minister invited comments on the proposal from the States and Territories. However, since inviting comments from the States and Territories, the proposal appears to have lost momentum. No doubt, this is a result of the Federal Government's ongoing deliberations about Australia's greenhouse strategy and response to the Kyoto Protocol.

Land Clearing Trigger

Another important development since the commencement of the EPBC Act has related to the discussion of the possibility of the inclusion of a land clearing trigger in the Act. As part of its 2001 election campaign, the Australian Labor Party announced that, if elected, it would amend the EPBC Act so as to require approval to be obtained under the EPBC Act to clear in excess of 1000 ha over any 24 month period[53]. The Democrats and Greens also expressed support for the inclusion of a land clearing trigger in the Act. Obviously, with the re-election of the Coalition, these election promises never came to fruition. However, this proposal has featured in the ongoing debate about the most appropriate means of controlling broadscale land clearing in Australia.

An associated issue is the ability of the provisions of the Act which relate to listed threatened ecological communities to act as a surrogate land clearing trigger. At present, it would appear there are not enough ecological communities listed under the Act to impose a significant restriction on land clearing activities. However, as more ecological communities are listed, these provisions could become a potent tool to address broadscale land clearing issues. Further, several environmental

[52] The term "heritage value" is defined in the EHLA Bill as including the relevant place's "*natural and cultural environment having aesthetic, historic, scientific or social significance, or other significance, for current and future generations of Australians*".
[53] K Beazley and N Bolkus; "Labor To Take Action on Land Clearing" Joint Media Statement, 7 March 2001.

organisations have recommended the Act be amended so as to make vulnerable ecological communities matters of national environmental significance. Such an amendment would bolster the ability of the listed threatened ecological community provisions to regulate broadscale land clearing.

10. CONCLUSION

It is too early to be drawing definitive conclusions on the effectiveness of the EPBC Act in ensuring Australia meets its international environmental obligations. There is also insufficient data to enable an accurate evaluation of the Act's contribution to the Commonwealth's attempts to protect and conserve biodiversity. However, the Act contains a number of attributes that have the potential to make a significant contribution to addressing key environmental issues. Whether this potential is realised will largely depend upon how the Act is administered and enforced.

There is evidence that improvements can be made in the way in which the Act is currently being administered. In particular, greater efforts must be made to raise the level of compliance with the Act. This will require more resources to be made available to increase awareness about the Act and the matters of national environmental significance. In this regard, the Minister's decision to provide funding to the National Farmers Federation for a community outreach project will hopefully assist in raising awareness of, and increasing compliance with, the requirements of the Act within the agricultural sector. Raising the level of compliance may also require a greater preparedness to take formal enforcement actions where appropriate.

The EPBC Unit is a joint project of WWF Australia, Humane Society International and the Tasmanian Conservation Trust and receives funding support from Environment Australia.

Its primary objectives are to increase community awareness and understanding of the Commonwealth Environment Protection and Biodiversity Conservation Act 1999 (EPBC Act) and to assist groups to use the Act to bring about desirable environmental outcomes.

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