

Development Approvals under Commonwealth Legislation

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*Speaker: Stephen Keim SC
Barrister-at-Law
Higgins Chambers
29/239 George Street
Brisbane Queensland
Telephone: (07) 3229 0381
s.keim@higginschambers.com.au*

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Scope and Purpose of this Paper

1. On 12 December 2006, the *Environment and Heritage Legislation Amendment Act (no.1) 2006* (“the Amending Act”) received royal assent. The part of the Amending Act directed to amending the *Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth) (“the EPBC Act”) runs to 367 pages. The three sections of the Amending Act commenced on the day of royal assent. However, the amending provisions are contained in schedules to the Amending Act.¹ Section 2 of the Amending Act provided for the vast majority of the amending provisions² to commence on 12 June 2007 unless proclaimed earlier.³ Proclamations in recent weeks have provided for most of the amendments to commence earlier, most of them to do so on 19 February 2007⁴.
2. The purpose of this paper is to provide a basic explanation of the usual process or regime for development assessment and approvals contained in the EPBC Act while, at the same time, pointing out and highlighting the principal amendments provided for by the Amending Act and the manner in which those amendments have changed, significantly, that assessment and approvals regime. The paper will touch lightly on other mechanisms for development assessment and approvals provided for by the EPBC Act. A full consideration of those alternative mechanisms is outside the scope of this paper.

¹ Schedule 1 sets out amendments to the EPBC Act. Schedule 2 sets out amendments to other legislation.

² Described as “items” in the schedules.

³ A number of amendments: items 607, 808, 836, 838 and 841-845, relate to changes accommodating the new regime for National heritage Listing and are provided (by s.2 Amending Act) to commence 5 years after item 550 has commenced. Item 550 effected the principal changes to the regime by which places are to be included in the National Heritage List. Item 550 commenced on 19 February 2007.

⁴ See, in particular, proclamation dated 15 February 2007 (federal register of legislative instruments F2007L00411 which provided for the commencement on 19 February 2007 of items 1-604, 606, 608-762, 764-780, 783-807, 809-835, 840, 846-851 and 854-869 of schedule 1 to the Amending Act.

3. The paper will draw upon relevant case law where that is helpful to the elucidation of the statutory provisions. The EPBC Act is a large and extensive piece of legislation dealing with much more than the development approvals regime. For that reason, this paper does not purport to be a comprehensive guide to the EPBC Act as a whole.

The Structure of the EIA Regime under the EPBC Act

Controlled Actions

4. The EIA regime in the EPBC Act operates through “controlled actions”.⁵ A “controlled action”, prior to the Amending Act, was an action the taking of which was prohibited by one or more of the sections of the Act found in part 3.⁶ Each of those sections imposing the prohibition is known as a “controlling provision”. The effect of the prohibition is subject, subsequent to the amendments to the EPBC Act, to special provision in ss.25AA and 28AB EPBC Act which excuse certain actions which would, otherwise, be prohibited by the controlling provisions if the impact on matters protected by the controlling provisions is indirect and operates through the actions of third parties.
5. An understanding of “controlled action” is best obtained by reference to the structure of a “controlling provision”. Section 12 EPBC Act, which prohibits certain conduct which would impact on the world heritage values of a declared World Heritage property, provides as follows:

“12 Requirement for approval of activities with a significant impact on a declared World Heritage property

(1)A person must not take an action that:

- (a) has or will have a significant impact on the world heritage values of a declared World Heritage property; or
- (b) is likely to have a significant impact on the world heritage values of a declared World Heritage property.

Civil penalty:

⁵ “Controlled actions” are defined in s.67 EPBC Act. Section 67 has been amended by item 172 of schedule 1 of the Amending Act.

⁶ The amended text of s.67 contains the excepting words: “or would, but for ss.25AA and 28AB, be prohibited”.

- (a) for an individual—5,000 penalty units;
- (b) for a body corporate—50,000 penalty units.

(2) Subsection (1) does not apply to an action if:

- (a) an approval of the taking of the action by the person is in operation under Part 9 for the purposes of this section; or
- (b) Part 4 lets the person take the action without an approval under Part 9 for the purposes of this section; or
- (c) there is in force a decision of the Minister under Division 2 of Part 7 that this section is not a controlling provision for the action and, if the decision was made because the Minister believed the action would be taken in a manner specified in the notice of the decision under section 77, the action is taken in that manner; or
- (d) the action is an action described in subsection 160(2) (which describes actions whose authorisation is subject to a special environmental assessment process).

(3) A property has **world heritage values** only if it contains natural heritage or cultural heritage. The **world heritage values** of the property are the natural heritage and cultural heritage contained in the property.

(4) In this section:

cultural heritage has the meaning given by the World Heritage Convention.

natural heritage has the meaning given by the World Heritage Convention.”

6. For present purposes, it is enough to notice only the structure of the provision. First, it imposes civil penalties (varying in size as between individuals and corporations).⁷ The prohibition is against “taking an action”. To qualify as an offence, the action must have, immediately (“has”); or in the future (“will have”) or create a certain likelihood of (“is likely to have”) a significant impact (insignificant impacts are insufficient)⁸⁹ on the world heritage values¹⁰ of a declared World Heritage property.¹¹

⁷ Section 15A creates certain offences analogous to this civil prohibition. The model of having corresponding civil and criminal sections is applied broadly within part 3.

⁸ The meaning of “significant” was discussed in the context of previous authority in *Booth v Bosworth* [2001] FCA 1453 by Justice Branson at paragraph 99 where her honour said: “The parties were in broad agreement that in the context of s 12 of the Act a “significant impact” is, as expressed in the applicant’s written submissions, an “*impact that is important, notable or of consequence having regard to its context or intensity.*” Reliance was placed on a number of Australian authorities including *Oshlack v Richmond River Shire Council and Iron*

7. However, what is important in terms of structure is the effect of subs.12(2) which provides that the prohibition does not apply if any one of the matters listed in sub-section (2) operates. The most obvious of these is existence of an approval under Part 9 of the EPBC Act, which is an approval by the minister after an environmental impact assessment (“EIA”) process has been carried out.¹² The approval by the minister under Part 9 EPBC Act is the culmination of the assessment process which is the subject of this paper. Paragraphs 12(2)(b), (c) and (d) involve decisions made which avoid the necessity of the EIA process proceeding all the way to assessment and approval. Paragraph 12(2)(d) involves a different set of actions which are not treated as controlled actions and undergo a different assessment and approvals process. they include the provision of foreign aid and certain activities associated with aircraft.¹³ Each of the paragraphs of subs.12(2), however, relates to some provision of or decision taken under the EPBC Act. Section 12 is structured, therefore, to create a civil prohibition with strong consequences which may then be lifted by the coming into effect or existence of the EIA processes which other sections and parts of the EPBC Act put in place. In this way, the prohibition facilitates the EIA processes and creates a

Gates Developments Pty Ltd (1993) 82 LGERA 222 per Stein J at 233; *Concord, North Sydney, Woollahra and Manly Councils v Optus Networks Pty Ltd* (1996) 90 LGERA 232 per Dunford J at 264; *McVeigh v Willarra Pty Ltd* (1984) 6 FCR 587 per Toohey, Wilcox and Spender JJ at 596; *Tasmanian Conservation Trust Inc v Minister for Resources* (1995) 55 FCR 516 per Sackville J at 541; *Drummoyne Municipal Council v Roads and Traffic Authority of New South Wales* (1989) 67 LGRA 155 per Stein J at 163.”

⁹ The concept of “significant impact” was elaborated upon, briefly, by Justice Dowsett of the Federal Court in *Wildlife Preservation Society of Queensland Proserpine/Whitsunday Branch Inc. v The Minister for the Environment and Heritage and others* [2006] FCA 736 (“Wildlife”) when his honour said, at paragraph 40:

“The likely significance of the impact of any action will vary, depending upon which protected matter is being considered. In other words, it will usually be erroneous to speak of a “significant impact” for the purposes of Part 3 as if a particular action and its consequences might affect all protected matters in the same way and to the same extent.”

¹⁰ The “world heritage values” of the property are defined in subs.12(3) as the natural heritage and cultural heritage contained in the property.

¹¹ Sections 13 and 14 define what a World Heritage property is. This includes a property nominated but not yet listed under the Convention for the Protection of the World Cultural and Natural Heritage done at Paris on 23 November 1972. See s.528 EPBC Act, the definition section.

¹² I have used the concept of environmental impact assessment in its generic sense. Later in the paper, I discuss the specific level or method of assessment, more involved than public environmental report and less intensive than inquiry, called environmental impact statement. The two should not be confused. Assessment by EIS is provided for in the amended version of the EPBC Act by sections 101-105.

¹³ See s.160 EPBC Act.

strong incentive to avoid taking actions which have not, in some way, been approved or permitted by the EIA processes.¹⁴

8. The Amending Act inserts a definition of “impact” by inserting a new s.527E EPBC Act¹⁵ which provides as follows:

“527E Meaning of *impact*

(1) For the purposes of this Act, an event or circumstance is an ***impact*** of an action taken by a person if:

(a) the event or circumstance is a direct consequence of the action; or
(b) for an event or circumstance that is an indirect consequence of the action—subject to subsection (2), the action is a substantial cause of that event or circumstance.

(2) For the purposes of paragraph (1)(b), if:

(a) a person (the ***primary person***) takes an action (the ***primary action***); and

(b) as a consequence of the primary action, another person (the ***secondary person***) takes another action (the ***secondary action***); and

(c) the secondary action is not taken at the direction or request of the primary person; and

(d) an event or circumstance is a consequence of the secondary action; then that event or circumstance is an ***impact*** of the primary action only if:

(e) the primary action facilitates, to a major extent, the secondary action; and

(f) the secondary action is:

(i) within the contemplation of the primary person; or

(ii) a reasonably foreseeable consequence of the primary action; and

(g) the event or circumstance is:

(i) within the contemplation of the primary person; or

¹⁴ Justice Dowsett summarized the operation of controlling provisions very concisely in *Wildlife* at paragraph 2 when he said:

“Division 1 is divided into subdivisions A to I. Subdivision A deals with World Heritage properties. Section 12 prohibits actions which have, will have, or are likely to have a significant impact on the World Heritage values of a declared World Heritage property. However, if the Minister has, pursuant to Part 9 of the EPBC Act, approved the relevant action, the prohibition will not apply. The EPBC Act provides a mechanism for determining, in advance, whether a proposed action will be “controlled” by any provision of Part 3. If the Minister has decided, pursuant to Part 7, that a proposed action is not so controlled, then such action is not prohibited. Similar provisions in other sub-divisions deal with National Heritage places, wetlands, threatened species and communities, listed migratory species and other matters.”

¹⁵ See item 783 to schedule 1 Amending Act.

(ii) a reasonably foreseeable consequence of the secondary action.”

9. The new definition appears to be a response to the decision of the Federal Court in *Queensland Conservation Council Inc v Minister for the Environment and Heritage* [2003] FCA 1463 (Kiefel J.) and *Minister for the Environment and Heritage v Queensland Conservation Council Inc* [2004] FCAFC 190 (30 July 2004) (Black CJ and Ryan and Finn JJ.) (“the Nathan Dam Case”). I have always thought that the decisions in the Nathan Dam case, both at first instance and on appeal, were a straightforward statement and application of basic concepts of causation and, in no way, calculated to cause consternation or concern.¹⁶ The definition in the new s.527E appears to be a restatement of those principles, albeit, done with greater complexity and with some attempts to draw fine distinctions. It remains to be seen whether that greater complexity gives rise to future ambiguities and complication. The definition of action also facilitates the exception from prohibition created by ss.25AA and 28AB and the language used in those sections to describe certain indirect impacts is similar to the language ins.527E.

¹⁶ The significant passage from the decision on appeal (from paragraph 53) goes as follows: “It is unhelpful, we consider, to attempt to paraphrase the expression “all adverse impacts” in s 75(2)(a) of the EPBC by recourse to phrases like “inextricably involved” or “natural consequence”. “Impact” in the relevant sense means the influence or effect of an action: *Oxford English Dictionary*, 2nd ed, vol VII, 694-695. As the respondents submitted, the word “impact” is often used with regard to ideas, concepts and ideologies: “impact” in its ordinary meaning can readily include the “indirect” consequences of an action and may include the results of acts done by persons other than the principal actor. Expressions such as “the impact of science on society” or “the impact of drought on the economy” serve to illustrate the point. Accordingly, we take s 75(2) to require the Minister to consider each way in which a proposed action will, or is likely to, adversely influence or affect the world heritage values of a declared World Heritage property or listed migratory species. As a matter of ordinary usage that influence or effect may be direct or indirect. “Impact” in this sense is not confined to direct physical effects of the action on the matter protected by the relevant provision of Pt 3 of Ch 2 of the EPBC Act. It includes effects which are sufficiently close to the action to allow it to be said, without straining the language, that they are, or would be, the consequences of the action on the protected matter. Provided that the concept is understood and applied correctly in this way, it is a question of fact for the Environment Minister whether a particular adverse effect is an “impact” of a proposed action. However, we do not consider that the Minister did apply the correct test in answering the question of fact which had arisen in the present case.” (Emphasis added.)

10. Section 15A EPBC Act creates criminal offences for actions corresponding to those the subject of civil prohibition in s.12. Section 7 EPBC Act provides that chapter 2 of the *Criminal Code* (Commonwealth) applies to all offences against the EPBC Act. Chapter 2 *Criminal Code* sets out the principles of criminal responsibility as they apply to offences under Commonwealth legislation and makes provision for particular statutes to define the particular state of mind necessary for particular offences and particular elements of offences.
11. The amendments provided for by the Amending Act amend s.15A (and other provisions of Part 3 EPBC Act which create criminal offences) to make certain elements of the offences created matters of strict liability. In the case of s.15A, for example, that a property (impacted upon by an action) is a World Heritage Property is made a matter of strict liability.¹⁷ Accordingly, in proving that offence, the prosecution would not need to prove any particular state of knowledge or belief or other state of mind of the defendant in respect of that fact.
12. The amendments also provide a regime for the criminal liability of landholders for the actions of others upon their land¹⁸ and for the liability of bodies corporate and non-bodies corporate for the actions of their actions of directors, employees and agents.¹⁹

Defining an “action”

13. To fully understand the structure of the controlling provisions in Part 3 EPBC Act, one needs to draw upon some of the definitions used in our example section, s.12. For example, “action” is discussed in some detail in ss. 523-524A of the EPBC Act which sections provide as follows:

¹⁷ See items 4-7, schedule 1, Amending Act.

¹⁸ Item 796 of schedule 1 to the Amending Act (new Division 18A, ss.496A-D).

¹⁹ Item 774 of schedule 1 to the Amending Act (new division 22, s.498B).

“523 Actions

- (1) Subject to this Subdivision, **action** includes:
 - (a) a project; and
 - (b) a development; and
 - (c) an undertaking; and
 - (d) an activity or series of activities; and
 - (e) an alteration of any of the things mentioned in paragraph (a), (b), (c) or (d).

524 Things that are not actions

- (1) This section applies to a decision by each of the following kinds of person (**government body**):
 - (a) the Commonwealth;
 - (b) a Commonwealth agency;
 - (c) a State;
 - (d) a self-governing Territory;
 - (e) an agency of a State or self-governing Territory;
 - (f) an authority established by a law applying in a Territory that is not a self-governing Territory.
- (2) A decision by a government body to grant a governmental authorisation (however described) for another person to take an action is not an **action**.
- (3) To avoid doubt, a decision by the Commonwealth or a Commonwealth agency to grant a governmental authorisation under one of the following Acts is not an **action**:
 - (a) the *Customs Act 1901*;
 - (b) the *Export Control Act 1982*;
 - (c) the *Export Finance and Insurance Corporation Act 1991*;
 - (d) the *Fisheries Management Act 1991*;
 - (e) the *Foreign Acquisitions and Takeovers Act 1975*;
 - (f) the *Petroleum (Submerged Lands) Act 1967*;
 - (g) the *Quarantine Act 1908*;
 - (h) the *Trade Practices Act 1974*.

This subsection does not limit this section.

524A Provision of grant funding is not an action

Provision of funding by way of a grant by one of the following is not an **action**:

- (a) the Commonwealth;
- (b) a Commonwealth agency;

- (c) a State;
- (d) a self-governing Territory;
- (e) an agency of a State or self-governing Territory;
- (f) an authority established by a law applying in a Territory that is not a self-governing Territory.”

14. The first thing to note about the provisions is the broad meaning given to action by the definition in s.524 which starts by being inclusive in nature (“includes”) and then picks up the ordinary meanings of “project”, “development”, “undertaking” and “activity”. Most development projects would be picked by these concepts. The reference to “series of activities” and “alteration” of the other concepts is designed to make it difficult for a potential proponent to avoid the effects of the EPBC Act by breaking up a development into smaller components in the hope that the impact of any one component on matters dealt with by the controlling provisions will be something less than a significant impact. This objective is strengthened by s.74 EPBC Act which gives the Minister a discretion to refuse to accept a referral of an action where the Minister is satisfied that “the action that is the subject of the referral is a component of a larger action the person proposes to take”. The proponent, in those circumstances, has little option other than to refer the whole of the larger action to the Minister and to allow the processes of the Act to operate upon that larger action.

15. The other thing to note about ss.523-524A EPBC Act is that the EPBC Act departs from the approach of previous Commonwealth environment legislation,²⁰ in directing itself to actual activity on the ground and not to the decisions of government to approve such activity or provide government finance for that activity to take place. For a proponent and its advisers, the EPBC Act focuses on the impact of a development proposal in relation to the matters which constitute the subject of the controlling provisions and not on whether and what Commonwealth Act or Regulation allows one to carry out the activity. If one takes as an example, sand mining on Fraser Island (the

²⁰ In particular, the *Environment Protection (Impact of Proposals) Act 1974* (“the Impact of Proposals Act”), the predecessor of the EPBC Act, in respect of the EIA of projects.

subject of *Murphyores Inc. v Commonwealth* (1976) 136 CLR 1), under the *Impact of Proposals Act*, the Commonwealth involvement was triggered by the fact that the proponent miner in that case required a permit to export the product of the sand mining process. Under the EPBC Act, the involvement of the Commonwealth EIA process would be triggered by the actual or likely impacts on, *inter alia*, the world heritage values of the World Heritage property of which Fraser Island forms part. This change of focus of the legislation is integral to the way in which the EPBC Act operates.

A Full List of the Controlling Provisions

16. Because the EPBC Act's reach is dependant upon significant impact upon a matter the subject of a controlling provision, knowledge of the controlling provisions is a key to knowing whether a particular proposal of a particular proponent is likely to come within the provisions of the EPBC Act. The controlling provisions cover the following subject areas.

World Heritage

17. Sections 12-15A EPBC Act deal with the world heritage values of World Heritage properties.

National Heritage

18. Sections 15B-15C²¹ relate to significant impacts on National Heritage values of a National Heritage place.²² A National Heritage place is a place on a List

²¹ The drafting of ss.15B (civil prohibition) and 15C (criminal prohibition) each draw on a number of Constitutional heads of power for their effectiveness. As a result, the subsections of the two sections, respectively, restate the prohibitions by reference to constitutional corporations, Commonwealth places, trade and commerce, both interstate and international, indigenous heritage values and so on, drawing upon as many heads of power as possible. This is not necessary, for example, in the case of impacts on World Heritage values of World Heritage places in that obligations to protect World Heritage places arise from the Convention which gives rise to listing of World Heritage places and the prohibitions can comfortably rely upon the Foreign Affairs head of power.

²² The Amending Act provides for repeal of parts of ss.15B and 15C which prohibit actions taken outside Australia impacting of National Heritage places outside Australia. See items 9 and 33, schedule 1 to the Amending Act, repealing, respectively subss.15B(7) and 15C(11) and (12). The repeal of s.324B EPBC Act by item 546 removes the concept of National Heritage places existing outside the Australian jurisdiction for the purposes of the EPBC Act.

maintained by the Minister pursuant to s.324C EPBC Act. National Heritage values are defined by s.324D EPBC Act by reference to regulations made under the EPBC Act. The section sets out the inter-relationship between the criteria which must be met to be placed on the National Heritage List and the values which are also included in the list and comprise the National Heritage values for the purpose of the controlling provisions ss.15B-15C. Section 324D provides in part:

324D Meaning of *National Heritage values*

(1)A place has a ***National Heritage value*** if and only if the place meets one of the criteria (the ***National Heritage criteria***) prescribed by the regulations for the purposes of this section. The ***National Heritage value*** of the place is the place’s heritage value that causes the place to meet the criterion.

(2)The ***National Heritage values*** of a National Heritage place are the National Heritage values of the place included in the National Heritage List for the place.

...”

19. Regulations 10.03A-10.03G of the *Environment Protection and Biodiversity Conservation Regulations 2000* (“the regulations”) provide in detail for the criteria for listing as a National Heritage place and the procedures which must be followed as part of the listing process. Regulation 10.03A commences the setting out of the criteria in the following terms:

“10.03A Commonwealth Heritage criteria (Act s 341D)

(1) For section 341D of the Act, sub-regulation (2) prescribes the Commonwealth Heritage criteria for the following:

- (a) natural heritage values of places;
- (b) indigenous heritage values of places;
- (c) historic heritage values of places.

...”

20. The procedure by which places are included in the National Heritage List has been extensively rewritten by the Amending Act to provide for annual cycles of nomination and assessment and for a process of prioritisation of nominations for assessment by the Australian Heritage Council. The final decision on inclusion is made by the Minister.²³
21. A new regulation, 10.03AB provides for the machinery aspects of the new nomination regime, including a requirement that a nomination be in writing or electronic form.²⁴ Regulation 10.03AB provides as follows:

“10.03AB Nominations of places for inclusion in the Commonwealth Heritage List

For paragraphs 341H (3) (b) and (c) of the Act, a nomination of a place for inclusion in the Commonwealth Heritage List must:

- (a) be in writing or electronic form; and
- (b) be made on a form approved by the Minister; and
- (c) include the full name, signature, address, telephone number and e-mail address (if any) of the person making the nomination; and
- (d) include the following:
 - (i) the name of the place, and any alternative name;
 - (ii) a description of the location of the place;
 - (iii) a map or plan showing the location and boundaries of the place;
 - (iv) a statement of the heritage significance of the place;
 - (v) a statement identifying 1 or more Commonwealth Heritage criteria that the place satisfies;
 - (vi) evidence showing how the place satisfies the criterion or criteria.”

Wetlands of International Importance

22. Sections 16-17B EPBC Act relate to wetlands of international importance.

The prohibitions²⁵ concern, specifically, significant impact on “the ecological character of a declared Ramsar wetland”. Section 17 defines “declared Ramsar wetland” by reference to actions taken pursuant to article 2 of the Ramsar Convention. Section 528 EPBC Act identified the Ramsar Convention as “the Convention on Wetlands of International Importance especially as

²³ Item 550 of schedule 1 to the Amending Act two new subdivisions containing sections 324E-324JS.

²⁴ The new regulation was inserted by State Legislative Instrument no.9 of 2007, s.

²⁵ Contained in ss. 16 (civil) and 17B (criminal).

Waterfowl Habitat done at Ramsar, Iran, on 2 February 1971, as in force for Australia immediately before the commencement of this Act”. Item 827 to schedule 1 to the Amending Act changed the definition in s.528 so that it now refers to the Convention “as amended and in force for Australia from time to time”.

Listed threatened species and communities

23. Sections 18-19 EPBC Act relate to listed threatened species and listed threatened communities. The prohibitions set out in ss.18 (civil) and 18A (criminal) deal with a number of different categories of threatened species, namely, extinct in the wild, critically endangered, and vulnerable. The prohibitions on significant impact on threatened ecological communities are restricted to the critically endangered and endangered categories.²⁶

24. The process of listing and the criteria which must apply are set out in division 1 of part 13 of chapter 5 of the EPBC Act. Section 178 creates an obligation on the Minister to create a list of threatened species by publication in the *Gazette*. Section 179 sets out the criteria for the different categories of threatened species.²⁷ Section 180 creates an obligation on the Minister to create a list of threatened ecological communities and s.181 sets out the criteria for the different categories.

Listed migratory species

²⁶ Item 48 to schedule 1 Amending Act adds a new subs.19(4) providing an exemption from both ss.18 and 18A for actions taken pursuant to a new subs.517A EPBC Act. Section 517A provides a regime for the reintroduction into the wild of members of a species for conservation purposes and provides for the granting of exemptions from various controlling provisions for certain incidental impacts of the reintroduction process.

²⁷ Item 353 to schedule 1 to Amending Act extends the definition of “conservation dependant” for fish, presumably, because one cannot, for absence of data, be as definitive about the impacts of the cessation of a plan of management for marine species as one can for land based species.

25. Sections 20-20A EPBC Act impose prohibitions, civil (s.20) and criminal (s.20A), concerning actions impacting significantly upon “a listed migratory species”. Section 209 EPBC Act (appearing in division 2 of part 13 of chapter 5 of the Act) imposes the obligation on the Minister to establish the list of migratory species by notice published in the *Gazette*. The nature of the list and its dependence on Australia’s treaty obligations may be gained from subs.209(3) which provided, prior to amendment, as follows:

- “(3) The list must include:
- (a) all species from time to time included in appendices to the Bonn Convention²⁸ and for which Australia is a Range State under the Convention; and
 - (b) all species from time to time included in lists established under JAMBA²⁹ and CAMBA³⁰; and
 - (c) all native species from time to time identified in a list established under, or an instrument made under, an international agreement approved by the Minister under subsection (4).

The list must not include any other species.”

26. Sub-section 209(3) is amended, apparently, to improve terminology, so that paragraphs(a) and (b) read as follows:³¹

²⁸ Section 528 EPBC Act, before amendment, defined the Bonn Convention as follows:
“**Bonn Convention** means the Convention on the Conservation of Migratory Species of Wild Animals done at Bonn on 23 June 1979, as in force for Australia immediately before the commencement of this Act.
Note: The English text of the Convention is set out in Australian Treaty Series 1991 No. 32.”
Item 798 to schedule 1 Amending Act changes the definition so that it refers to the Convention “as amended and in force in Australia from time to time”.

²⁹ The definition in s.528 EPBC Act defines “JAMBA” as follows:
“**JAMBA** means the Agreement between the Government of Japan and the Government of Australia for the Protection of Migratory Birds and Birds in Danger of Extinction and their Environment done at Tokyo on 6 February 1974, as in force for Australia immediately before the commencement of this Act.” This definition is also amended to refer to “as amended and in force in Australia from time to time” (item 817).

³⁰ Similarly, s.528 EPBC Act defines CAMBA as:
“**CAMBA** means the Agreement between the Government of Australia and the Government of the People’s Republic of China for the protection of Migratory Birds and their Environment done at Canberra on 20 October 1986, as in force for Australia immediately before the commencement of this Act.
Note: The English text of the Agreement is set out in Australian Treaty Series 1988 No. 22.”
This definition is also amended to refer to “as amended and in force in Australia from time to time” (item 817).

“(a) all migratory species that are:
(i) native species; and
(ii) from time to time included in the appendices to the Bonn Convention;
and
(b) all migratory species from time to time included in annexes
established under JAMBA and CAMBA; ...”

Other Categories of Prohibited Actions

27. A number of other controlling provisions appear in part 3 EPBC Act but will not be considered in any detail because they are not likely to figure in the considerations of the run of the mill private developer and her advisers. The categories of action of this kind are: nuclear actions (ss.21-22A); actions in a Commonwealth marine area³²; actions taken outside a Commonwealth marine area that impacts on a Commonwealth marine area, and fishing in Commonwealth managed fisheries (ss.23-24A); additional matters of national environmental significance prescribed by regulation (no such regulations exist) (ss.25-25A); actions involving Commonwealth land (ss.26-27A); actions impacting on Commonwealth Heritage places overseas (27B-27C); and activities of Commonwealth agencies (s.28).
28. No significant amendments occur to ss.21-22A although items 532-537 to schedule 1 to the Amending Act make changes to sections 305 and following EPBC Act with the result that conservation agreements made pursuant to part 2 of chapter 5 EPBC Act can be made, *inter alia*, for the protection and conservation of “the environment, in respect of the impact of a nuclear action in the Australian jurisdiction”. Nuclear actions and nuclear installations are defined in s.22. The amendment to s.305(2) EPBC Act provides that an agreement of that kind may not relate to the construction or operation of any of a nuclear fuel fabrication plant; a nuclear power plant; an enrichment plant; or a re-processing facility. Although it is not clear why these amendments have been made, it is important to note new s.306A (item 544) and new s.37M (item 122) which, *inter alia*, have the effect that conservation

³¹ Item 393.

³² The definition in s.24 EPBC Act is complex but it excludes waters which have been vested in a State or the Northern Territory by legislation passed in 1980, namely, the *Coastal Waters (State Title) Act* and the *Coastal Waters (Northern Territory Title) Act* which, in broad terms are waters out to the 3 nautical mile limit from the coast.

agreements may declare that actions taken in accord with them do not require approval pursuant to part 9 of the EPBC Act (the approvals process considered by this paper) and that such actions do not, indeed, require approval.

Exceptions³³

29. Sections 38-43 EPBC Act provide for two alternative approvals regimes to persist and prevail over the approvals regime instated by the EPBC Act. One excepted area of activity from the regime comprises forestry operations in defined areas which are intended to be dealt with by an approvals regime under regional forestry agreement (“RFA”) processes pursuant to the *Regional Forest Agreements Act 2002*.
30. If you advise loggers on a regular basis, it is important to note that the forestry operations exempted by s.38(1) are those which, as a matter of fact, are indeed conducted in accord with the Regional Forestry Agreement. In *Brown v Forestry Tasmania (No 4)* [2006] FCA 1729, the Federal Court (Marshall J.) concluded, on the evidence before the Court, that the requirements of the RFA in that case were not being complied with. The threatened species which were not being sufficiently protected by the forestry actions were the broad-toothed stag beetle; the Tasmanian wedge-tailed eagle and the swift parrot.

³³ Apart from the exceptions discussed in the text, part 4 of the Act provides for approval regimes that do not involve EIA of individual “actions”. These include actions declared by bilateral agreements not to require approval under part 9 (ss.29-31). The matters covered by bilateral agreements have been expanded slightly in that what were “bilaterally accredited management plans” can now be, for the purpose of such agreements, a “bilaterally accredited management arrangement or bilaterally accredited authorization process”. See items 86-91. They also include matters declared by the minister not to need approval (pursuant to an accredited management plan) (ss.32-35). These sections have also been expanded to provide for and utilize the expanded concept of “accredited management plan” being replaced by “accredited management arrangement” and “accredited authorization process”. See items 96-113.

31. Section 43 excepts from the operations of the EPBC Act actions which derive authorization from processes under the *Great Barrier Reef Marine Park Act* 1975.

32. Section 43A and 43B make provision for matters authorized under previous legislation or constituting lawful continuation of land uses which were occurring immediately prior to the commencement of the EPBC Act.

How the Approvals System Works

Returning to s.67

33. It was noted earlier that s.67 EPBC Act (which defines a “controlled action”) has been amended. It used to provide that a “controlled action” is an action that would be prohibited by a provision in Part 3 without an approval under part 9, in each case, of the EPBC Act. A “controlled action” is now an action that would (but for the effect of s. 25AA or s.28AB) be prohibited. A new s.67A is inserted³⁴ that, in addition to and separately from, the controlling provisions in part 3, prohibits the taking of an action without a part 9 approval. A note to s.67A specifically states that this prohibition can be enforced by injunction pursuant to 475 EPBC Act.

34. Sections 25AA and 28AB provide that impacts of an action by one person (which are the result of a subsequent action by another person, not at the behest of the first person) are not prohibited by the various listed provisions in part 3 which otherwise impose criminal and civil prohibitions. So the controlling provisions in part 3, no longer, purport to prohibit actions where the significant impacts occur (only) through the subsequent actions of third parties. The sections deal with Nathan Dam impacts, the type of indirect impacts now the subject of the expanded definition in s.527E EPBC Act.

³⁴ Item 173.

35. What the framers of the Amending Act appear to have done is to exclude these indirect impacts from being the basis of the civil and criminal prohibitions of the controlling provisions in part 3 while, at the same time, seeking to have these indirect impacts create a need to be subject to an EIA process under the EPBC Act and, accordingly, a need for assessment and approval under part 9. To achieve this, a new prohibition is introduced via s.67A, which has no civil or criminal penalty but may be enforced by injunction.

Referrals

36. The starting point for the assessment and approval process is a referral to the Minister. A referral to the Minister does not automatically result in some form of EIA process occurring. A referral triggers a form of “gatekeeper” process by which the Minister decides whether, under the EPBC Act, an EIA process needs to occur.

37. Section 68 EPBC Act provides for referral by “a person proposing to take an action”.³⁵ The new s.68A³⁶ is a complex provision to ensure that the requirement in s.68 only applies to the real proponent of an action and not contractors and sub-contractors who may be physically carrying out actions or parts of actions but only in their contracting role.

38. There are other means by which a proposed action may be referred. A relevant State or Territory or State or Territory agency (s.69) or a Commonwealth agency aware of the proposal by a person to take an action (s.71) may refer the proposal to the Minister. Alternatively, the Minister may request that the person proposing to take the action, or the relevant State or

³⁵ Regulations 4.01-4.03 and schedule 2 to the regulations prescribe how a referral is made and the information that it must contain.

³⁶ Item 175.

Territory or State, or Territory agency, to refer the proposal (s.70). Section 71 EPBC Act has a deeming effect that, if a request to refer is not complied with within the requisite time period, the EPBC Act is to apply as if it had been referred to the Minister.³⁷

39. The full text of s.68 EPBC Act is as follows:

“68 Referral by person proposing to take action

(1) A person proposing to take an action that the person thinks may be or is a controlled action must refer the proposal to the Minister for the Minister’s decision whether or not the action is a controlled action.

(2) A person proposing to take an action that the person thinks is not a controlled action may refer the proposal to the Minister for the Minister’s decision whether or not the action is a controlled action.

(3) In a referral under this section, the person must state whether or not the person thinks the action the person proposes to take is a controlled action.

³⁷

The Minister should be wary of providing too much guidance to potential proponents as to whether they should regard their proposed action as likely to have a significant impact on matters protected by a controlling provision. In *Humane Society International v Minister for the Environment and Heritage* [2003] FCA 64, the Minister had published guidelines which stated: “If you are complying with a current State permit or licence to shoot a specific number of Grey-headed Flying-foxes you do not need to make a referral under the EPBC Act for this activity. This will be in effect until June 2003 when the policy will be reviewed ...” When challenged that was no legal basis for the Minister’s claim that proponents in the circumstances contemplated by the guideline had no obligation to refer their action pursuant to s.68, the Minister responded by saying that it did not matter since the guidelines and the advice contained within were not meant to have any legal effect. Notwithstanding, Justice Kiefel of the Federal Court was prepared to make a declaration that the guidelines were not authorised by law. At paragraph 59, her honour stated as follows:

“In my view there should be a declaration that the exemption purported to be authorised by the Minister, of persons’ obligations under s 68(1), namely to consider the effect of actions proposed by them and if they think it amounts to a “*controlled action*” within the meaning of the Act, to refer the matter to the Minister, is not authorised by the Act. Another, and perhaps a preferable course, would be for the Minister to publish a retraction of that part of the Guidelines, with a suitable explanation. If this were proposed to be undertaken I would be minded to vacate the order made.”

(4) If the person states that the person thinks the action is a controlled action, the person must identify in the statement each provision that the person thinks is a controlling provision.

(5) Subsections (1) and (2) do not apply in relation to a person proposing to take an action if the person has been informed by the Minister under section 73 that the proposal has been referred to the Minister.

(6) This section is affected by s.68A.”³⁸

40. Section 72 EPBC Act is a short section specifying the form of the referral document (providing for prescription by the regulations).³⁹ Item 178 has inserted a new subs.72(3) which allows the inclusion in a referral of certain alternative proposals. This is a useful flexibility added to the process.

The Upside of Referring

41. It is important to note that referral must occur if the proponent thinks the action is a controlled action and may occur even if the proponent believes the action is not a controlled action. That is, an action may be referred whether or not the proponent believes the action is likely to have a significant impact on those matters protected by the controlling provisions in part 3 of the EPBC Act.⁴⁰

42. The reason why the proponent would refer matters which the proponent believes are not controlled actions is because of the protection against future

³⁸ Subsection 68(6) is inserted by item 174.

³⁹ The regulations provide for referral in regs.4.01-4.03. Note that the regulations have been amended in a number of respects to provide for new procedures created by the amendments to the EPBC Act. For example, the new reg.5.03A provides for assessment on referral documentation, a new method of EIA, introduced by the Amending Act and discussed below. Just as the Government has moved to cause most of the provisions of the Amending Act in schedule 1 to commence, it has moved, also, to make new regulations for the new processes created by the amendments to the EPBC Act.

⁴⁰ Section 67 EPBC Act defines “controlled action”.

liability provided by a determination by the Minister under s.75. Section 75 EPBC Act, prior to the amendments, provided as follows:

“75 Does the proposed action need approval?

Is the action a controlled action?

- (1) The Minister must decide:
 - (a) whether the action that is the subject of a proposal referred to the Minister is a controlled action; and
 - (b) which provisions of Part 3 (if any) are controlling provisions for the action.
- (1AA) To avoid doubt, the Minister is not permitted to make a decision under subsection (1) in relation to an action that was the subject of a referral that was not accepted under subsection 74A(1).

Minister must consider public comment

- (1A) In making a decision under subsection (1) about the action, the Minister must consider the comments (if any) received:
 - (a) in response to the invitation (if any) under subsection 74(3) for anyone to give the Minister comments on whether the action is a controlled action; and
 - (b) within the period specified in the invitation.

Considerations in decision

- (2) If, when the Minister makes a decision under subsection (1), it is relevant for the Minister to consider the impacts of an action:
 - (a) the Minister must consider all adverse impacts (if any) the action:
 - (i) has or will have; or
 - (ii) is likely to have;on the matter protected by each provision of Part 3; and
 - (b) must not consider any beneficial impacts the action:
 - (i) has or will have; or
 - (ii) is likely to have;on the matter protected by each provision of Part 3.

Designating a proponent of the action

- (3) If the Minister decides that the action is a controlled action, the Minister must designate a person as a proponent of the action.

Consent to designation

- (4) The Minister may designate a person who does not propose to take the action only if:
- (a) the person agrees to being designated; and
 - (b) the person proposing to take the action agrees to the designation.

Timing of decision and designation

- (5) The Minister must make the decisions and designation:
- (a) within 20 business days of the referral; or
 - (b) if the person proposing to take the action referred the proposal and stated in the referral that the person thought the action was a controlled action—within 10 business days of the referral.

Note: Section 156 sets out rules about time limits.

Time does not run while further information is being sought

- (6) If the Minister has requested more information under section 76 for the purposes of making a decision, a day is not to be counted as a business day for the purposes of subsection (5) if it is:
- (a) on or after the day the Minister requested the information; and
 - (b) on or before the day on which the Minister receives the last of the information requested.

Running of time may be suspended by agreement

- (7) The Minister and the person proposing to take the action may agree in writing that days within a period worked out in accordance with the agreement are not to be counted as business days for the purposes of subsection (5). If the agreement is made, those days are not to be counted for the purposes of that subsection.”

43. Some relatively minor, mainly clarifying amendments were inserted by items 186-191.

44. Before considering the intricacies of s.75, one should note that paragraph 75(1)(a) EPBC Act requires the Minister to decide whether the action that is the subject of a proposal referred to the Minister is a controlled action.

Paragraph 75(1)(b) also requires the Minister to decide which provisions of part 3 are controlling provisions for the action.

45. One can appreciate the relevance of such determinations by the Minister by going back to s.12 EPBC Act. Paragraph 12(2)(c) provides:

“(2) Subsection (1)⁴¹ does not apply to an action if:

...

(c) there is in force a decision of the Minister under Division 2 of Part 7 that this section is not a controlling provision for the action and, if the decision was made because the Minister believed the action would be taken in a manner specified in the notice of the decision under section 77⁴², the action is taken in that manner; or

...”

46. Even if it turns out later that the action when carried out has a devastating impact on the World Heritage values of one or more World Heritage properties, the proponent (and other persons taking the same action) may rest assured that the Minister’s determination that s.12 was not a controlling provision for the action provides an impregnable buffer against the prohibition and civil penalties that s.12 would otherwise impose. Because the other controlling provisions are structured similarly, the Minister’s s.75 decision has the same potential to shield the proponent of a proposal from the prohibitions contained within those other controlling provisions.

⁴¹ Subsection 12(1) creates the prohibition.

⁴² Section 77A makes provision for a s.77 notice to specify that the Minister’s decision that particular controlling provisions did not apply to a proposed action to be based on the Minister’s belief that the action would be carried out in a particular manner. A failure to carry out the action in the appropriate manner forfeits the protection of the Minister’s decision. Section 77 does allow a proponent, as it were, to propose its own conditions of carrying out an action to avoid the necessity of going through an EIA process. Note that there is now a guideline introduced by the minister on the subject of proposals that actions will be taken in a particular manner. It can be found at <http://www.deh.gov.au/epbc/publications/pubs/particularmanner.pdf>. An example of a project not required to be referred because it was intended to be carried out in a manner specified in the notice may be found at http://www.deh.gov.au/cgi-bin/epbc/epbc_ap.pl?name=show_document&document_id=20515&proposal_id=2114. The proposed action was to provide pipeline to the Tungamah Water District in Northern Victoria. Section 77A has been amended to make reference to the possibility that a belief that an action is to be carried out in a certain way is pursuant to an accredited management process; accredited authorisation process; bioregional plan; or bilaterally accredited management arrangement or authorisation process, all other forms of Commonwealth authorisation provided for elsewhere in the EPBC Act as alternatives to part 9 approval. See item 194.

Section 75 EPBC Act (the gatekeeper) under the microscope

47. The choice for the Minister pursuant to s.75(1) EPBC Act is, in one respect, simple. The Minister either decides that the action that is the subject of the proposal is a controlled action (and which sections of part 3 of the EPBC provisions are controlling provisions) or decides that it is not a controlled action. If the answer is wholly in the negative, as discussed, the person taking the action has the benefit that the controlling provisions, no longer, apply to the action. If the answer is yes, the person taking the action still has the benefit that those controlling provisions not identified as controlling provisions for the action do not apply to the action. However, if the Minister decides that the action is a controlled action, then, in respect of the action and those provisions identified as controlling provisions for the action, the gate has opened and a process of EIA follows.

48. Section 75 EPBC Act (together with other sections of the Act) regulates the way in which the Minister must approach the decision pursuant to subs.75(1). Subsection 75(1A) requires the consideration of certain comments made in a timely manner. The provision for receiving comments is contained in s.74. Important amendments have occurred to s.74 as a result of the Amending Act. Subsection 74(1) provides for obtaining comments from relevant Commonwealth ministers. New subss. 74(1A) and (1B) allow for obtaining input from the Australian Heritage Council on heritage values of a National Heritage Place.⁴³ Subsection 74(2), which provides for input from appropriate State ministers, has been fine tuned with an added focus on receiving input on the appropriate approach to the assessment process.⁴⁴

49. Subsection 74(3) provides as follows:

⁴³ Item 181.

⁴⁴ Item 180.

“Inviting public comment

- (3) As soon as practicable after receiving a referral of a proposal to take an action, the Environment Minister must cause to be published on the Internet:
- (a) the referral; and
 - (b) an invitation for anyone to give the Minister comments within 10 business days (measured in Canberra) on whether the action is a controlled action.”

50. Although one has to be attuned to knowing to look on the internet (and the time for responding is only 10 business days), notice by internet has very significant advantages. Relevant documents may be made the subject of a link and, therefore, be instantly able to be downloaded or printed. A potential maker of comments does not have to spend hours at the Council Office or a Public Library taking notes of a large document. The giver of notice does not have to put up unwieldy signs and lick numerous envelopes.⁴⁵ The giving of public notice by internet has been well exercised and tested in response to subs.74(3) EPBC Act. It is these comments, received within the 10 business day limit pursuant to subs.74(3), that the Minister must consider pursuant to subs.75(1A). A note has been added to subs.74(3) to facilitate the consultation for the EIA process currently being considered being carried out contemporaneously with other permits applied for under other parts of the EPBC Act. The note refers to ss.200, 215, 237 and 257.⁴⁶ New subss.74(3A) and (3B) have been inserted allowing for commercial in confidence information to be excluded from the public notification process.⁴⁷

51. Subsection 74(4) has been removed.⁴⁸ This removes a fault in the earlier system in that the deleted sub-section removed any obligation to seek

⁴⁵ The particular link is http://www.deh.gov.au/cgi-bin/epbc/epbc_ap.pl?name=invitation_to_comment&limit=999999&text_search=. The pathway is described as DEH Home > EPBC Act > Public Notices. At time of writing (9 October 2006) the last entry was no.3091 of 2006, a 7.7 hectare harbour proposal in Albany, Western Australia. The referral documents (and subsequent documents containing decisions about the referral pursuant to the Act) are able to be accessed as PDF files.

⁴⁶ Item 181. By way of example, s.200 provides for permits to take or do other actions with respect to listed threatened species or communities.

⁴⁷ Item 182.

⁴⁸ Item 183.

comment if the proponent indicated that it thought that the action was a controlled action. The extent of impact on protected environmental values and the steps that should be taken in that respect were always matters that would benefit from wide consultation and input.

52. A new s.74AA has been inserted which strengthens the assessment process by prohibiting the taking of action where actions have been referred or requested for referral. This has the effect of preventing developers from putting pressure on the EIA process by doing preliminary clearing processes for a referred development. It strengthens the hand of the minister by creating the separate prohibition in that it is not necessary to establish the offence to prove that the work carried out had any impact on the values protected by the controlling provisions in part 3.

53. The gatekeeper nature of s. 75 EPBC Act is emphasized by the process mandated by subs.75(2). The Minister is directed to consider all adverse impacts of a proposed action on the relevant matter protected by each of the controlling provisions in part 3. At the same time, the Minister is directed not to consider any beneficial impacts. That is, in deciding the action is a controlled action, the Minister is not looking at carrying out a balancing exercise. The exercise of balancing beneficial impacts against adverse impacts is something which can occur later in the process at the approvals stage.

54. The Minister is not stuck with the information provided by the person proposing to take the action and may request further information (s.76 EPBC Act). Section 76 has been expanded to allow the Minister to seek information specifically directed to whether the action is part of a larger action and, also, to seek information directed to deciding the best method of assessing the impacts of the action including what assessment has or is being carried out at a State or Territory level.⁴⁹ The Minister is, generally, required to make a

⁴⁹ Item 189.

decision within 20 days of the referral (subs.75(5) EPBC Act) which will also be close to 10 days after the time for receiving comments has ceased. The time ceases to run in the case of a request for further information by the Minister (subs.75(6) EPBC Act) and may cease to run by agreement (subs.75(7) EPBC Act).⁵⁰

55. Once a Minister has decided that the action is a controlled action, the Minister must designate a person to be the proponent of the action. This will normally be the person who proposes to take the action (subss.75(3) and (4) EPBC Act).

56. A streamlining provision introduced by item 185 of the schedule to the Amending Act provides for summary dismissal of hopeless applications for development approval. Sections 74B - 74D allows the Minister to avoid the usual processes of notification and consideration under s.75 if he or she considers “that it is clear that the action would have unacceptable impacts on a matter protected by a controlling provision”. A regime is prescribed by which the proponent can ask for reconsideration which leads to a notification process and a further decision from the Minister as to whether the application should be dismissed or go through the normal s.75 consideration and subsequent assessment. This innovation has the potential to save many resources that would otherwise be spent on the assessment of an action that will ultimately be refused. Apart from saving public resources, the provisions allow a developer to go back to the drawing board, immediately, without spending her resources on the hopeless case.

⁵⁰ The amount of assistance provided by the courts to the minister and others interested in the application of the EPBC Act in the relatively limited period since its commencement has been contributed to by relatively generous standing provisions contained in subss.475(6) and (7), in respect of applications for injunctive relief, and ss.487-8 in respect of judicial review under the *Administrative Decisions (Judicial Review) Act 1977*. The approach is to give standing to individuals and organizations (including unincorporated associations) who, over a two year period prior to the relevant cause of action arising, have engaged in activities directed to “protection or conservation of, or research into, the environment”. The standing provisions are relevant for proponents of “actions” because they raise a greater likelihood that any arguable failure to comply with the EPBC Act will be tested by litigation. The provisions are discussed in more detail below in the text.

57. Section 78 EPBC Act, previously, contained a provision for reconsideration of decisions made pursuant to s.75(1) in the event of certain changed circumstances. This has been considerably expanded to create a regime by which proponents and others (not just State or Territory ministers) can seek reconsideration and allowing for time limits to be suspended while reconsideration is being carried out.⁵¹ The sections dealing with reconsiderations now are ss.78, 78A-78C and 79.⁵² One of the objectives underlying the expanded regime is to allow proponents to amend proposals prior to the completion of the assessment process in the light of further information coming to hand.⁵³

When the Gate to an EIA has been opened – the Assessment Process

58. Section 77 EPBC Act requires the Minister to publish his decision in accordance with the regulations.⁵⁴ The proponent (and the person proposing to take the action (if different) are to receive written notice (subs.77(1) EPBC Act). The notice of the decision must, if it is that the action is a controlled action, identify each of the controlling provisions (subs.77(2) EPBC Act). The persons given the notice must also get reasons for the decision if a request is made within 28 days of the giving of the notice (subs.77(4) EPBC Act).

59. The decision by the Minister that an action is a controlled action leads the proponent directly to part 8 of the EPBC Act: “*Assessing impacts of controlled actions*”. Section 80 provides a “simplified outline of the part” which read (prior to the amendments) as follows:

“The following is a simplified outline of this Part:

⁵¹ See items 195-199.

⁵² Regulation 4A.01 provides for notice of outcome of reconsideration.

⁵³ Regulations 5.07-5.09 provide for the procedural requirements of variation of proposals.

⁵⁴ In practice, the decision as to whether an action which has been referred appears on the same page on the web site as the referral and the invitation to make comments. The most recent referrals appear at the top and the earlier ones move down the page with the PDF file of the referral document being replaced by the PDF file of the Minister’s decision. By clicking on the link for the particular referred action, one may descend the ladder of hyper-text to access all relevant documents for the referral such as the referral document, the decision that the action was a controlling action and a decision whether or not the action was approved, with or without conditions.

This Part provides for the assessment of impacts of controlled actions, to provide information for decisions whether or not to approve the taking of the actions. However, this Part does not apply to actions that a bilateral agreement or Ministerial declaration says are to be assessed in another way.

For actions that are to be assessed under this Part, the Minister must choose one of the following methods of assessment:

- (a) an accredited assessment process;
- (b) an assessment on preliminary documentation (see Division 4);
- (c) a public environment report (see Division 5);
- (d) an environmental impact statement (see Division 6);
- (e) a public inquiry (see Division 7).”

60. The part 8 process is directed towards assessing the relevant impacts of the action, namely, those impacts of the action on the matters protected by the controlling provisions which, by the s.75 decision of the Minister, were decided to be controlling provisions for the action (ss.81 and 82 EPBC Act).

61. The amendments provide for one extra method of assessment, namely, assessment on referral documentation.⁵⁵

62. Matters may be excluded from the part 8 process. These matters include matters covered by a bilateral agreement under the EPBC Act⁵⁶ (s.83 EPBC

⁵⁵ See item 200 (inserting a new paragraph (aa) in the box in s.80) and, *inter alia*, item 210 which adds a new subs.87(4A)).

⁵⁶ Bilateral agreements, a means of avoiding duplication of EIA processes between the Commonwealth and States and territories are provided for by ss.r44-65A EPBC Act and regulations 3.05-3.06 and schedule 1 to the regulations. Bilateral agreements dealing with environmental assessment have been concluded between the Commonwealth on the one hand and the Northern Territory and the States of Queensland, Western Australia and Tasmania on the other. A signed bilateral agreement exists between New South Wales and the Commonwealth relating to the Sydney Opera House. A draft agreement exists between Victoria and the Commonwealth dated July 2000. It purports to provide for assessments pursuant to the *Environmental Effects Act 1978* (Victoria) to substitute for assessment pursuant to part 8 of the EPBC Act. The agreement contemplates a report going from the Victorian minister to the Commonwealth minister for the Commonwealth minister to make the final approvals decision under the EPBC Act. The text of the draft agreement may be found at

Act) or declared by the Minister to be part of a class of matters not requiring assessment (s.84 EPBC Act).⁵⁷ The legislative requirements for the declaration process have been greatly expanded (see item 122 which inserted ss.36-37L). (It is interesting to note that the new s.37J prohibits a declaration dealing with those same nuclear installations which were excluded from conservation agreements by s.305(2). (It appears to be the case that there is a policy imperative that certain nuclear installations in future might be dealt with by declarations or conservation agreements and not by the EIA process provided for by parts 3-9 EPBC Act.) The purpose of the bilateral agreement is for the agreed State EIA process to address the matters and produce the information which the Commonwealth Minister can then use to make decisions about approval of the action or otherwise.

63. Section 87 EPBC Act requires the Minister to choose one of 5 different types of assessment process. Section 87 provided (prior to the amendments) as follows:

“87 Minister must decide on approach for assessment

Minister must choose one assessment approach

- (1) The Minister must decide which one of the following approaches must be used for assessment of the relevant impacts of the action:
 - (a) assessment by an accredited assessment process;
 - (b) assessment on preliminary documentation under Division 4;
 - (c) assessment by public environment report under Division 5;
 - (d) assessment by environmental impact statement under Division 6;
 - (e) assessment by inquiry under Division 7.

<http://www.deh.gov.au/epbc/assessmentsapprovals/bilateral/victoria/vicdraft.html> . A search of the website of the Victorian minister for the environment finds precious little mention of anything to do with the EPBC Act. One presumes that the draft agreement is not going to be signed by the Victorian minister any time soon. An article on the draft agreement written soon after it was published is Dr. Murray Raff, *Environment Protection and Biodiversity Conservation Act and the Draft Bilateral Agreement with the State of Victoria*, (2000) Vol. 17.5 EPLJ 369.

⁵⁷ The detailed provision with regard to declarations is found at ss.34A-36 EPBC Act and regulation 2A.01 which relates only to fisheries. Declarations are directed to a form of EIA which is more strategic than application based EIA. It appears that the declaration option has not as yet been utilised.

Minister must consult before making decision

- (2) If:
- (a) the action is to be taken in a State or self-governing Territory and
 - (b) a controlling provision for the action is in Division 1 of Part 3 (about matters of national environmental significance);
- the Minister must invite the appropriate Minister of the State or Territory to provide information relevant to deciding which approach is appropriate, before deciding on the approach to be used for assessment of the relevant impacts of the action.

Note: Subsection (2) also applies to actions to be taken in an area offshore from a State or the Northern Territory. See section 157.

Considerations in making choice

- (3) In making the decision, the Minister must consider:
- (a) information relating to the action given to the Minister in the referral of the proposal to take the action or under section 86; and
 - (b) any other information available to the Minister about the relevant impacts of the action that the Minister considers relevant (including information in a report on the impacts of actions under a policy, plan or program under which the action is to be taken that was given to the Minister under an agreement under Part 10 (about strategic assessments)); and
 - (c) any relevant information received in response to an invitation under subsection (2); and
 - (d) the matters (if any) prescribed by the regulations; and
 - (e) the guidelines (if any) published under subsection (6).

Accredited assessment process

- (4) The Minister may decide on an assessment by an accredited assessment process only if the Minister is satisfied that:
- (a) the process is to be carried out under a law of the Commonwealth, a State or a self-governing Territory; and
 - (b) the process and the law meet the standards (if any) prescribed by the regulations; and
 - (c) the process will ensure that the relevant impacts of the action are adequately assessed; and
 - (d) he or she will receive a report of the outcome of the process that will provide enough information on the relevant impacts of the action to let him or her make an informed decision

whether or not to approve under Part 9 (for the purposes of each controlling provision) the taking of the action.

Assessment on preliminary documentation

- (5) The Minister may decide on an assessment on preliminary documentation under Division 4 only if the Minister is satisfied (after considering the matters in subsection (3)) that that approach will allow the Minister to make an informed decision whether or not to approve under Part 9 (for the purposes of each controlling provision) the taking of the action.

Guidelines for choosing assessment approach

- (6) The Minister may publish in the *Gazette* guidelines setting out criteria for deciding which approach must be used for assessing the relevant impacts of an action.”

64. As foreshadowed earlier, item 210 inserts a new subs.87(4A) which provides:

- “(4A) The minister may decide on an assessment on referral information under Division 3A only if the minister is satisfied (after considering the matters in subsection (3)) that the action meets the criteria prescribed in the regulations for the purposes of this subsection.”

65. Subsection 87(6) permits the Minister to publish guidelines in the *Gazette* setting out criteria for deciding which form of assessment is to be used. The Department’s web site, prior to recent changes, provided information of some assistance on this point and about the different forms of assessment. It read as follows:⁵⁸

“Assessment by preliminary documentation, PER or EIS, involves the following steps.

1. The person proposing to take the action prepares and publishes draft assessment documentation, in accordance with regulations and published guidelines.
2. There is a public comment period.
3. The person proposing to take the action finalises the assessment documentation, taking public comments into account.

⁵⁸ The web page reference was <http://www.deh.gov.au/epbc/publications/assessment.html> . The data was downloaded during 2006.

4. The Secretary of the Department of the Environment and Heritage prepares an assessment report for the Commonwealth Environment Minister.

Assessment on Preliminary Documentation is likely to be appropriate when:

- the number and complexity of relative impacts is low and locally confined; or
- the relevant impacts of the controlled action can be predicted with a high degree of confidence; or
- the relevant impacts have been or are being adequately assessed under Commonwealth or State or Territory legislation.

Assessment by Public Environment Report is likely to be appropriate when:

- an assessment of the relevant impacts is expected to focus on a relatively small number of key issues; and
- an adequate assessment of these issues will require the collection of new information and/or further analysis of existing information.

Assessment by Environmental Impact Statement is likely to be appropriate when:

- an assessment of the relevant impacts is expected to raise complex issues, or a large number of issues; and
- an adequate assessment of these issues will require the collection of new information and/or further analysis of existing information.

Assessment by Public Inquiry is likely to be appropriate when:

- the relevant impacts are likely to be relatively high; or
- the relevant impacts, or the management of those impacts, are outside the control of a single proponent; or
- a public inquiry is necessary or desirable to ensure effective and efficient public involvement in the assessment process.

Assessment by Accredited Process⁵⁹ is where a State or Territory will manage the assessment, or the Commonwealth will do so under other

⁵⁹ An example of accreditation of a State assessment process is discussed by way of case study in Michael Jewell, *Major Projects – An Overview of the Federal, State and Local Government EIS Assessment and Approval Process*, in Queensland Environmental Law Association, 2006 Conference Proceedings, *Making It Better*. The project was the construction of the Dent Island Golf Course in the Whitsunday Islands. The assessment process that was accredited was assessment under the *State Development and Public Works Organisation* 1971. An *ad hoc* accreditation of the process was necessary in that the assessment process pre-dated the bilateral agreement of 13 October 2004.

legislation. This assessment approach allows appropriate case-by-case accreditation of State, Territory or Commonwealth assessment processes in situations where bilateral agreements and declarations do not apply. The Commonwealth Environment Minister must be satisfied that certain standards will be met, that the process will ensure the relevant impacts of the action will be fully addressed and that he or she will receive an adequate report on those impacts.

There are significant penalties for providing information that is false or misleading in assessment documentation.” (Footnote added.)

66. A more complex but, in some respects, more useful graphical representation appears on the website at this address:

<http://www.environment.gov.au/epbc/assessmentsapprovals/pubs/flow-chart.pdf> .

It is rather too lengthy to be incorporated in this paper.

67. One of the most significant attempts to speed up the assessment process is the time limit now applying to the minister’s decision as to what approach will be used for the assessment of the relevant impacts of the action. Previously, s.88 EPBC Act set a time limit for the Minister’s decision, to decide which form of assessment, of 20 business days after either the Minister’s s.75 decision or the receipt of information from the proponent pursuant to s.86. The new version of s.87 requires that the decision be made on the same day as the decision (pursuant to s.75(1)) that the action is a controlled action unless further information for deciding the approach to be taken is requested pursuant either to s.76(3) or s.89 EPBC Act.⁶⁰ Section 89 EPBC Act, which allows the Minister to request more information to make the s.87 decision, has been expanded to allow the minister to request information about the assessment processes which have occurred at State or Territory level⁶¹ (similar to the changes to s.76). Section 91 EPBC Act requires written notice of the s.87 decision to the designated proponent and publication of the notice of decision.

⁶⁰ Items 211 and 212.

⁶¹ Item 215.

68. The Amending Act has greatly expanded the way in which the EPBC Act sets out the different approaches to the assessment of impacts of an action. The expanded provisions present a clearer indication of the way in which approach is to operate. Assessment on referral information is now dealt with by ss.92-3⁶² and has some provision for public input. Sections 94-95C provide for assessment on preliminary documentation also with provision for public input.⁶³ The provision for assessment by public environment report (“PER”) has been significantly expanded including by providing for both standard guidelines and tailored guidelines. The relevant sections for PERs are ss.96-100⁶⁴ Similar changes have occurred in respect of assessment by Environmental Impact Statement (“EIS”). The relevant sections now are ss.101-105.⁶⁵ The 24 sections on assessment by public inquiry are unchanged. Perhaps Australia will never see, again, the likes of the Ranger Inquiry.⁶⁶ The sections dealing with the different approaches to impact assessment suggest that the processes involve a rising complexity of the assessment process (from referral documentation at the lower end to inquiry at the upper end) in line with the likely significance of the impacts and the complexities associated with controlling and ameliorating those impacts.

69. A form of assessment that is of importance is assessment by accredited process. Footnote 59 provides an example of assessment under a Queensland Act providing for projects of State significance.

Decision Time

70. The whole purpose of referral of an action; the decision of the Minister that an action is a controlled action; and the intervening assessment process is in order that a Minister can make a decision whether or not to approve the taking of the action. Section 130 EPBC Act prescribes a complicated set of

⁶² Inserted by item 217.

⁶³ Also inserted by item 217.

⁶⁴ For the amendments, see items 218-230.

⁶⁵ For changes, see items 231-243.

⁶⁶ The Ranger Uranium Environmental Inquiry (1977) conducted by Justice Fox.

time periods within which the Minister must make a decision whether or not to approve.⁶⁷ The starting point is some 30 or 40 days after receiving an assessment report. Sections 131 and 132 EPBC Act allow the Minister to consult further (other Ministers) and to seek yet further information from a proponent. The comments of another Minister consulted pursuant to s.131 may go to economic and social matters relating to the action considered consistent with the principles of ecologically sustainable development.

71. The Amending Act inserts further natural justice provisions allowing further input from the proponent (new s.131AA)⁶⁸, in the event that the minister is proposing to approve, about conditions and, also, in the event that the minister is intending to refuse. The new s.131A provides for internet notification of an intention to approve (including proposed conditions) and an invitation for public comment within 10 days.⁶⁹ Rather more provision is made for the provision of information to the proponent by s.131AA than is made in s.131A for information to be provided to the public.

72. Section 133 EPBC Act provided for the Minister's decision to approve. In part, it provided as follows:

“133 Grant of approval

Approval

(1)After receiving an assessment report relating to a controlled action, or the report of a commission that has conducted an inquiry relating to a controlled action, the Minister may approve for the purposes of a controlling provision the taking of the action by a person.

Content of approval

(2)An approval must:

- (a) be in writing; and
- (b) specify the action that may be taken; and
- (c) name the person who may take the action; and

⁶⁷ The time limits, still complicated, are now in subs.130(1B). See item 244.

⁶⁸ Inserted by item 251.

⁶⁹ Inserted by item 251.

- (d) specify each provision of Part 3 for which the approval has effect; and
- (e) specify the period for which the approval has effect; and
- (f) set out any conditions attached to the approval.

Notice of approval

- (3)The Minister must:
- (a) give a copy of the approval to the person; and
 - (b) provide a copy of the approval to a person who asks for it (either free or for a reasonable charge determined by the Minister).
- ...”

73. The two significant changes wrought by the Amending Act recognise the possibility of alternative proposals submitted by the proponent⁷⁰ and a provision that an approval extends to permit the holder of the approval and persons acting with the holder’s ultimate authority.⁷¹ The minister may approve one or more of the alternative proposals.

74. Section 134 EPBC Act allows the Minister to attach conditions to an approval. The key purpose of the conditions is to protect or ameliorate damage to the matters protected by the controlling provisions. However, a large number of machinery conditions to ensure the effectiveness of the approval in achieving its environmental protection aims are also permissible. Section 134 provided (prior to the amendments) as follows:

“134 Attaching conditions to approval

Generally

- (1)The Minister may attach a condition to the approval of the action if he or she is satisfied that the condition is necessary or convenient for:
- (a) protecting a matter protected by a provision of Part 3 for which the approval has effect; or
 - (b) repairing or mitigating damage to a matter protected by a provision of Part 3 for which the approval has effect (whether or not the damage has been, will be or is likely to be caused by the action).

⁷⁰ See, particularly, the new subs.133(1A) inserted by item 255.

⁷¹ See the new subs.133(2A) inserted by item 260.

Conditions to protect matters from the approved action

(2) The Minister may attach a condition to the approval of the action if he or she is satisfied that the condition is necessary or convenient for:

- (a) protecting from the action any matter protected by a provision of Part 3 for which the approval has effect; or
- (b) repairing or mitigating damage that may or will be, or has been, caused by the action to any matter protected by a provision of Part 3 for which the approval has effect.

This subsection does not limit subsection (1).

Other conditions that may be attached to approval

(3) The conditions that may be attached to an approval include:

- (a) conditions relating to any security to be given by the person by bond, guarantee or cash deposit:
 - (i) to comply with this Act and the regulations; and
 - (ii) not to contravene a condition attached to the approval; and
 - (iii) to meet any liability of the person whose taking of the action is approved to the Commonwealth for measures taken by the Commonwealth under section 499 (which lets the Commonwealth repair and mitigate damage caused by a contravention of this Act) in relation to the action; and
- (b) conditions requiring the person to insure against any specified liability of the person to the Commonwealth for measures taken by the Commonwealth under section 499 in relation to the approved action; and
- (c) conditions requiring the person taking the action to comply with conditions specified in an instrument (including any kind of authorisation) made or granted under a law of a State or self-governing Territory or another law of the Commonwealth; and
- (d) conditions requiring an environmental audit of the action to be carried out periodically by a person who can be regarded as being independent from the person whose taking of the action is approved; and
- (e) conditions requiring the preparation, submission for approval by the Minister, and implementation of a plan for managing the impacts of the approved action on a matter protected by a provision of Part 3 for which the approval has effect such as a plan for conserving habitat of a species or ecological community; and
- (f) conditions requiring specified environmental monitoring or testing to be carried out; and

- (g) conditions requiring compliance with a specified industry standard or code of practice.

This subsection does not limit the kinds of conditions that may be attached to an approval.

Considerations in deciding on condition

(4) In deciding whether to attach a condition to an approval, the Minister must consider:

- (a) any relevant conditions that have been imposed under a law of a State or self-governing Territory or another law of the Commonwealth on the taking of the action; and
- (aa) information provided by the person proposing to take the action or by the designated proponent of the action; and
- (b) the desirability of ensuring as far as practicable that the condition is a cost-effective means for the Commonwealth and the person taking the action to achieve the object of the condition.

Validity of decision

(5) A failure to consider information as required by paragraph (4)(aa) does not invalidate a decision about attaching a condition to the approval.”

75. The major changes include a standard condition that, if one authorises someone else to act pursuant to an approval, the authoriser must inform the other person of any condition relevant to the work being authorised. See the new subs.134(1A) inserted by item 264. The second major change is an express provision for conditions to be inserted by consent which protect, repair or ameliorate matters protected by controlling provisions but which are not caused by the action.⁷² This allows (without fear of illegality for lack of relevance) for conditions to provide for environmental trade-offs. Thus a proponent could agree to be bound to plant trees in a completely different location to compensate for trees which will be removed as a result of the development.

⁷² See subss.134(3)(aa) and (ab) inserted by item 266.

76. The decision of the Minister is guided by both mandatory considerations (which are value laden)⁷³; factors to be taken into account (which tend to go to the facts of the action) and others matters in all decisions whether or not to approve. There are also requirements to take into account particular matters depending on the particular controlling provision (and its protected matter) being considered. These matters which must be considered are set out in ss.136-140. Only relatively minor changes are made in respect of these sections by the Amending Act.

Third Party Rights to Litigate

77. Sections 475-480 EPBC Act provide for the Federal Court to grant injunctions, including mandatory injunctions, where a person is committing an offence or other contravention under the EPBC Act. As a result of the political climate in which the Act was passed (a Coalition government requiring Democrats support for the GST), liberal standing provisions were negotiated for third parties seeking such injunctive relief. Researchers, environmental activists and environmental conservation groups are favoured by these provisions contained in subss.475(6) and (7). These provisions have led to a considerable amount of litigation which has assisted in understanding the full implications of the EPBC Act's provisions. The standing provisions are retained. However, one amendment which impacts on the likelihood of actions for injunctive relief being effective to prevent deleterious impacts on the environment is the deletion of s.478 EPBC Act which prevented the Federal Court from requiring an undertaking as to damages as a condition of granting interim injunctive relief.⁷⁴

⁷³ One may note that, in contrast to the gate keeper provision, s.75, s.136 EPBC Act provides for social and economic matters to be taken into account. The policy implication is that, only when one has properly assessed all of the impacts on the matters protected by the relevant controlling provisions, can one engage in the process of balancing negative impacts on protected matters against social and economic (benefits) likely to flow from an action.

⁷⁴ See item 763.

78. Liberal standing provisions assisting researchers and activists to protect the environment are provided in respect of the more general right to obtain reasons and seek an order of review of a decision under an enactment pursuant to the *Judicial Review Act 1977* (“the JRA”) so far as the JRA applies to decisions under the EPBC Act. These are contained in ss.487 and 488 EPBC Act. These provisions have contributed to the ability of third parties to ensure that the decisions of the minister in particular have been in accord with the EPBC Act and based on an accurate understanding of the EPBC Act’s provisions. A significant amount of the litigation under the EPBC Act, including the Nathan Dam case, has involved judicial review of the Minister’s decisions and might not have been possible (or, at least, would have been made more difficult and expensive) if the liberal standing provisions did not apply. The Amending Act has not affected these standing provisions.

79. The presence of these standing provisions in the EPBC Act is important if you are advising proponents for actions which require approval under the EPBC Act. It places an extra discipline upon one’s work to ensure that both the proponent and the bureaucracy are applying the law correctly. This is because interested third parties can access the Courts, more readily, to test the legality and correctness of the steps being taken and the decisions being made.

Concluding Thoughts

80. The EPBC Act has a potentially very wide impact on proposals to develop areas of land for new land uses. Statistics published by the department⁷⁵ show that 1,687 referrals had been received as at 30 September 2005, in just over 5 years from when the EPBC Act commenced.⁷⁶

⁷⁵ <http://www.deh.gov.au/epbc/statistics/sep05-overview.pdf> .

⁷⁶ The larger statistics are as follows:
Environment Protection and Biodiversity Conservation Act 1999
Activity Report – Statistical Overview
Updated to 30 September 2005
REFERRALS

81. It is in the nature of the Australian continent and its wildlife that threatened species; threatened ecological communities; Ramsar wetlands; and migratory species of birds, in particular, occur in very many areas and are frequently located close to or upon land that may, potentially, be turned to socially and financially more profitable land uses.
82. It follows, therefore, that no proposal for new uses of land can, without consideration and investigation, be said to be unaffected by the provisions of the EPBC Act. It follows also that those who would seek to turn land to more profitable uses (and those who advise them) would be well advised to have at least a working knowledge of the provisions of the EPBC Act touched upon in this paper. The civil and criminal penalties made available by the controlling provisions of the EPBC Act extend to 50,000 penalty units and 7 years imprisonment, respectively. The amendments occurring as a result of the Amending Act have, in some respects, extended the degree of regulation. In that context, ignorance is neither bliss nor good policy.

APPENDIX 1: Further Reading

Total referrals received 1687
Referrals withdrawn or lapsed before decision 29
Referrals decisions made (incl. Reconsiderations) 1623
Approval required - controlled actions 379
Approval not required - action to be taken in particular manner 230
Approval not required - no conditions on action 1014
Still being processed at end of September 2005 35
CONTROLLED ACTIONS
Assessment Reports Completed 153
Commonwealth assessment 122
Preliminary Documentation 107
Public Environment Report 5
Environmental Impact Statement 10
Public Inquiry 0
Accredited Assessments 27
Assessment under Bilateral Agreements 4
Approval Decisions 120
Approved without conditions 10
Approved with conditions 108
Approval not granted 2

- (a) For a critical review of the EPBC Act's operations after 6 years by Humane Society International workers, see Nicola Beynon, Michael Kennedy and Alistair Graham, *Grumpy Old Greenies – lament waiting lists, wasted opportunities and wayward pork barreling in Australia's biodiversity programs* at <http://www.edo.org.au/edonsw/site/pdf/2005conf/beynon.pdf>.
- (b) Dean Ellwood and William Dixon, *EPBC Bilateral – How Will it Work?*, QELA Conference 2005, Acts, Facts and Impacts.
- (c) Michael Jewell, *Major Projects – An Overview of the Federal, State and Local Government EIS Assessment and Approval Process*, QELA Conference 2006 "Making it Better".
- (d) Chris McGrath, *Swirls in the Stream of Australian environmental law: Debate on the EPBC Act*, (2006) 23 EPLJ 165 (June 2006).
- (e) Chris McGrath, *Applying the EPBC Act 1999: A Case Study of the Naturelink Cableway*, (2002) 7 QEPR⁷⁷ 123.
- (f) Chris McGrath, *The Nathan Dam Case*, (2003/4) 43 QEPR 123.
- (g) Chris McGrath, *The Flying Fox Case*, http://www.wwf.org.au/About_WWF_Australia/How_we_work/Science_and_policy/Biodiversity/EPBC_unit/articles/BoothvBosworthCM.pdf.
- (h) Chris McGrath, *Bilateral Agreements: Are They Enforceable?*, http://nccnsw.org.au/member/cbn/projects/upload/Bilateral_agreements.pdf.
- (i) Peter Wulf, *Diffuse land based pollution and the Great Barrier Reef World Heritage area: the Commonwealth's responsibilities and implications for the Queensland sugar industry*, (2004) 21 EPLJ 424.