

The Adventures of the *Environmental Protection and Biodiversity Conservation Act 1999*

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Introduction

1. In one sense, this paper is intended to be a beginner's guide to the *Environment Protection and Biodiversity Conservation Act 1999* (Commonwealth) ("the EPBC Act"). However, since the EPBC Act seeks to regulate a broad swathe of human interaction with the environment, the paper will, largely, concentrate on those parts of the Act concerned with the approval of proposed developments.
2. The paper also seeks to look at the main events which have occurred in respect of the legislation including cases elucidating its content.¹ The Act came into existence after a long gestation period and as a result of a complicated and controversial political negotiation. There have been at least 16 major pieces of litigation in the life of the EPBC Act, a number of which have elucidated the Act's provisions. In 2006, a 410 page amending Act was passed, responding, at least in part, to the results of some of that litigation. There has been at least one episode of extremely poor conduct in administering the Act on the part of the Commonwealth Minister responsible for that task. All in all, a rather turbulent history.
3. That is why this paper is called *The Adventures of the EPBC Act*.

A Little History

4. The idea of Commonwealth legislation imposing a process of environmental impact assessment ("EIA") for certain development proposals goes back at least to 1974 when the government led by the then Prime Minister, Gough Whitlam,² passed the *Environment Protection (Impact of Proposals) Act 1974* ("the Impact of Proposals Act"). This Act followed a worldwide trend at that time for improved EIA catalysed by the *National Impact of Proposals Act of 1969* (US) ('NIPA'). The *Impact of Proposals Act* was directed to ensure that impact on the environment was fully considered in Commonwealth decision

¹ Space does not allow discussion of all the cases decided concerning the Act. However, I am indebted to colleague and friend, Chris McGrath of the Brisbane bar, for appendix 1 which sets out what we think is an exhaustive list of the decided cases on the EPBC Act.

² Mr. Whitlam celebrated his 91st birthday on 11 July 2007.

making in respect of actions by the Commonwealth, itself, or actions dependant on Commonwealth finance or approvals.³ The legislation led to considerable litigation including the unsuccessful⁴ *Australian Conservation Foundation v Commonwealth* (1980) 146 CLR 493.⁵ Bipartisan values accepted the role of the Commonwealth in EIA⁶ but controversy existed as to whether the *Impact of Proposals Act* struck the right note as to when Commonwealth assessment should occur in preference to or along with State and Territory EIAs. Concern also developed as to a plethora of Commonwealth legislation addressing environmental matters involving different procedures.⁷

5. The *Impact of Proposals Act* gave the Commonwealth a foothold into EIA but the watershed for Commonwealth environmental laws was, of course, the celebrated Tasmanian Dams Case in 1983 to stop the damming of the Franklin River. That case, *Commonwealth v Tasmania* (1983) 158 CLR 1, opened the Constitutional doorway for the Commonwealth to make laws on any subject for which Australia had international relations. This is an enormous arena for Commonwealth law-making. In the environmental field alone, Australia has international obligations in relation to many issues including World Heritage, biodiversity, atmospheric protection, marine pollution, uranium use, and Antarctica.⁸

³ See s.5 of the *Impact of Proposals Act*. See, also, the discussion in GM Bates, *Environmental Law in Australia*, 4th edition, Butterworths, 1995, pages 146-154.

⁴ *Inter alia*, on grounds of lack of standing of the applicant.

⁵ The case involved an alleged failure to comply with procedures under the *Impact of Proposals Act* in respect of a Reserve Bank decision approving foreign investment to establish the Iwasaki Resort outside Rockhampton, in central Queensland.

⁶ *Murphyores Inc. v Commonwealth* (1976) 136 CLR 1 involved the use of an EIA process which, ultimately, led to the refusal to issue export permits for the export of minerals from Fraser Island. Other litigation seeking to enforce the carrying out of procedures under the *Impact of Proposals Act* include *Australian Postal Corporation v Botany Municipal Council* (1989) 69 LGRA 86; and *North Coast Environment Council v Inc. v Minister for Resources* (1994) 127 ALR 617 and *Tasmanian Conservation Trust v Minister for Resources* (1995) 55 FCR 516 (both wood chipping cases). The *Ranger Uranium Inquiry* was carried out pursuant to the *Impact of Proposals Act*. See *Ranger Uranium Environmental Inquiry First Report* (AGPS, 1976) and *Second Report* (AGPS 1977).

⁷ See, for example, *Australian Heritage Commission Act 1975*; *World Heritage Properties Conservation Act 1983*; and *Endangered Species Protection Act 1992*.

⁸ In more recent times (3 December 2007), Australia ratified the Kyoto Protocol to the United Nations Framework Convention on Climate Change. See

6. The opening for Commonwealth law-making on environmental issues created a degree of conflict with State governments. Some of this conflict was resolved through the Inter-Governmental Agreement on the Environment (“the IGAE”), an agreement arrived at by the Commonwealth, States, Territories and local government in 1992. This agreement was directed at integrating environmental considerations into government decision making at all levels and the pursuit of ecologically sustainable development.⁹ However, an important element of the IGAE, in schedule 3, clause 1, comprised the “desire to establish certainty about the application, procedures and function of the EIA process, to avoid duplication of process where more than one Government or level of Government is involved and interested in the subject matter of the assessment and to avoid delays in the process”.
7. The IGAE was followed by a number of reviews and a further agreement in late 1997 known as the Heads of Agreement on Commonwealth/State Roles and Responsibilities for the Environment¹⁰. This then fed into a review of Australian Government environmental legislation.
8. Following completion of this review, the *Environment Protection and Biodiversity Conservation Bill* 1998 (“the EPBC Bill”) was introduced into the Senate of the Australian Parliament in July 1998. The passage of the Bill and its eventual content was a product of particular circumstances involving the Liberal-National coalition government needing support of other parties to pass legislation through the Senate and the particular juncture that government had reached with regard to a reform agenda concerned with taxation law as opposed to matters concerning the environment.

<http://www.greenhouse.gov.au/international/kyoto/index.html> and
http://unfccc.int/kyoto_protocol/items/2830.php.

⁹ The objects of the EPBC Act, expressly, include the promotion of ecologically sustainable development through the conservation and ecologically sustainable use of natural resources. See subs. 3(1)(b) EPBC Act.

¹⁰ Council of Australian Governments, Meeting Communiqué, Canberra, 7 November 1997 (1997).

9. Whilst the Australian Labor Party and the Greens were opposed outright to both suites of legislation, the Australian Democrats were prepared to negotiate with the government in respect of both.¹¹ The negotiations in respect of the EPBC Bill were intense and led to some 500 amendments (most of which, it seems fair to say, would not have occurred if the government did not, at that time, have a pressing need for legislation to introduce the goods and services tax and other reforms in that field) to the legislation before its passage. The legislation, the EPBC Act, remains controversial. A number of conservation groups had worked with the Democrats to draft amendments to the EPBC Bill. Others were opposed to anything short of withdrawal of the Bill and its complete redrafting. Many of those differences of approach remain in discussions of the EPBC Act over half a decade since it commenced operation on 16 July 2000.¹²

The Structure of the EIA Regime under the EPBC Act

Controlled Actions

10. The EIA regime in the EPBC Act operates through “controlled actions”.¹³ A “controlled action”, prior to the commencement of *Environment and Heritage Legislation Amendment Act (No. 1) 2006* (“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 3.¹⁴ 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 provisions in ss.25AA and 28AB EPBC Act which excuse certain actions which would, otherwise, be

¹¹ Many observers would consider that decision to be the reason why, a decade later, the Australian Democrats will, after 1 July 2008, be reduced to just one representative in the Senate after its most disastrous election result yet, at the 2007 general election. See <http://www.news.com.au/story/0,23599,23250227-421,00.html>.

¹² The writer is indebted to Gerard Early, Head of the Approvals and Wildlife Division, Australian Government Department of the Environment and Heritage for the discussion of the circumstances concerning the passage through the Senate of the EPBC Act. The writer has drawn heavily upon his soon to be published paper, Early G, Australia’s National Environmental Legislation and Human/Wildlife Interactions, (2006) *Journal of International Wildlife Law and Policy*.

¹³ “Controlled actions” are defined in s.67 EPBC Act. Section 67 has been amended by item 172 of schedule 1 of the Amending item 167 of schedule 1 of the Amending Act.

¹⁴ The amended text of s.67 contains the excepting words: “or would, but for ss.25AA and 28AB, be prohibited”.

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.

11. 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:

- (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.”

12. 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).¹⁵ 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)¹⁶¹⁷ on the world heritage values¹⁸ of a declared World Heritage property.¹⁹

13. 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.²⁰ 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

¹⁵ 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.

¹⁶ 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 s12 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 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; *Drummoine Municipal Council v Roads and Traffic Authority of New South Wales* (1989) 67 LGRA 155 per Stein J at 163.”

¹⁷ 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.”

¹⁸ The “world heritage values” of the property are defined in subs.12(3) as the natural heritage and cultural heritage contained in the property.

¹⁹ 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.

²⁰ 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 by sections 101-105 EPBC Act.

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.²¹ 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 strong incentive to avoid taking actions which have not, in some way, been approved or permitted by the EIA processes.²²

14. An early test of the EPBC Act came in December 2002 when Dr. Carol Booth sought an interlocutory injunction preventing Rohan Bosworth, a lychee farmer of Dallachy Creek, Kennedy in North Queensland from continuing to use electric grids to kill Spectacled Flying Foxes who were emerging from the nearby Wet Tropics World Heritage Area to attack his crops.²³ Justice Spender found that Dr. Booth had standing to bring the application pursuant to s.475(6) EPBC Act^{24,25} but declined to grant the injunction “having regard to

²¹ See s.160 EPBC Act.

²² 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.”

²³ *Booth v Bosworth* [2000] FCA 1878.

²⁴ *Booth v Bosworth* [2000] FCA 1878, paragraph 5.

²⁵ Section 475(6) EPBC Act provides:

“... an individual is an interested person if ...

- (b) the individual engaged in a series of activities for protection or conservation of, or research into, the environment at any time in the 2 years immediately before:
 - (i) the conduct; or

the lack of commonality as to the factual position, the number of evenings likely to be left in the harvesting season, and ... [that Mr. Bosworth] would suffer loss which he would be unable to recover should he succeed at the final trial".²⁶

15. Dr. Booth was successful in the trial of the action when it came on before Justice Branson.²⁷ Justice Branson found:

"104 In my view the finding that the operation of the Grid during the 2000-2001 lychee season had the consequence that approximately 20% of the population of adult female Spectacled Flying Foxes were killed leads inevitably to the conclusion that the operation of the Grid had a significant impact on the population of Spectacled Flying Foxes. ... the probable impact of the operation of the Grid, if allowed to continue in the manner mentioned, will be to render the Spectacled Flying Fox an endangered species in the Wet Tropics World Heritage Area and in Australia in less than five years.

105 Is this impact on the population of Spectacled Flying Foxes to be equated in the context of the Act with a significant impact on the world heritage values of the Wet Tropics World Heritage Area? This is an issue on which virtually no authoritative guidance appears to be available. ... I reject the submission of the respondents that before this conclusion can properly be reached it would have to be established that the Spectacled Flying Fox is itself, when compared with other species, a species of outstanding universal value."

16. Also in 2001, cases were brought to try to prevent a planned cull of the dingo population on Fraser Island in the wake of a fatal attack on a nine year old boy.²⁸ Justice Dowsett concluded that the evidence called fell short of establishing that the proposed cull of 30 dingos would have a significant impact on the world heritage values of Fraser Island as a World heritage property.²⁹ That was an important factor in deciding that the balance of convenience lay against granting an interlocutory injunction.³⁰

(ii) in the case of proposed conduct-making the application for the injunction."

²⁶ *Booth v Bosworth* [2000] FCA 1878, paragraph 30.

²⁷ *Booth v Bosworth* [2001] FCA 1453 and [2001] FCA 1718.

²⁸ *Schneiders v State of Queensland; Jones v State of Queensland* [2001] FCA 553.

²⁹ *Schneiders v State of Queensland; Jones v State of Queensland* [2001] FCA 553, paragraph 7.

³⁰ *Schneiders v State of Queensland; Jones v State of Queensland* [2001] FCA 553, paragraphs 9-11.

17. The Amending Act inserted a complex definition of “impact” by a new s.527E EPBC Act³¹ 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
 - (ii) a reasonably foreseeable consequence of the secondary action.”

18. 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.) (at first instance) 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., on appeal) (“the Nathan Dam Case”). The Nathan Dam case concerned a proposed dam near Taroom on the Dawson River in Central Queensland. The Minister had excluded from his consideration in assessing the likely impact of the dam on world heritage values the likely impact on the Great Barrier Reef of cotton growing made possible from the water from the dam. The Court at first instance and on appeal held that such indirect effects were capable of being part of the impact of an “action”.

19. 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 s75(2)(a) of the EPBC by recourse to phrases like “inextricably involved” or “natural consequence”. “Impact” in the relevant sense means the

³¹ See item 783 to schedule 1 Amending Act.

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 Ch2 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.)

20. The definition in s.527E refines the notion of impact in the light of the decision in Nathan Dam albeit with added complexity. Impacts of an action are divided into two with those impacts which are downstream impacts of the subsequent action of another person carrying added requirements, namely that the secondary action was contemplated by the first person and effects of the secondary action were reasonably foreseeable. Therefore, certain downstream impacts are excluded from operation of the EPBC Act because they are considered to be too remote. Sections 25AA and 28AB EPBC Act deal with those downstream impacts which survive the definition in s.527E. Actions, so far as they cause such downstream impacts do not give rise to civil or criminal penalties through the controlling provisions but are separately prohibited, enforceable by injunction.³² The Government, in the wake of the Nathan Dam decisions, was concerned to limit the liability arising from impacts which result from subsequent activity by other people but which are caused or facilitated by the original action.

21. 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

³² See the discussion of ss.67 and 67A EPBC Act below.

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.

22. The EPBC Act provides a regime for the criminal liability of landholders for the actions of others upon their land³³ and for the liability of bodies corporate and non-bodies corporate for the actions of their actions of directors, employees and agents.³⁴

Defining an “action”

23. 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:

“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.

³³ See new Division 18A, ss.496A-D inserted by the Amending Act.

³⁴ See new division 22, s.498B inserted by the Amending Act.

- (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."

24. 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 forms of actions 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.

A Full List of the Controlling Provisions

25. 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

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

National Heritage

Sections 15B-15C³⁵ relate to significant impacts on National Heritage values of a National Heritage place.³⁶ A National Heritage place is a place on a List 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.

Wetlands of International Importance

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

The prohibitions³⁷ concern, specifically, significant impact on "the ecological character of a declared Ramsar wetland". Section 17 defines "declared

³⁵ 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 "external affairs" head of power in s.51(xxix) of the Constitution of the Commonwealth of Australia.

³⁶ The Amending Act provided for repeal of parts of ss.15B and 15C which prohibited actions taken outside Australia, impacting on National Heritage places outside Australia. The repeal of s.324B EPBC Act removed the concept of National Heritage places existing outside the Australian jurisdiction for the purposes of the EPBC Act.

³⁷ Contained in ss. 16 (civil) and 17B (criminal).

Ramsar wetland” by reference to actions taken pursuant to article 2 of the Ramsar Convention. Section 528 EPBC Act identifies the Ramsar Convention as “the Convention on Wetlands of International Importance especially as Waterfowl Habitat done at Ramsar, Iran, on 2 February 1971, as amended and in force for Australia from time to time”.

28. The Ramsar wetlands provisions of the EPBC Act have been the focus of the one example of enforcement action taken by the Commonwealth for breach of the Act evident from the cases. The Greentree litigation³⁸ of 2004 - 2005 involved penalties imposed for the clearing, ploughing and sowing³⁹ of part of the Ramsar listed Gwydir wetlands located in the grazing property of Windella in north west New South Wales, west of Moree.⁴⁰ The penalties, imposed at first instance and sustained on appeal, involved restraining orders; orders requiring the carrying out of certain remedial orders requiring tree planting; and pecuniary penalties of \$150,000 for the natural person respondent and \$300,000 for the corporate respondent.⁴¹
29. The decisions provide informative discussion of the Ramsar convention itself and elucidate the principles concerning the construction of international treaties and legislation implementing such treaties.⁴²

Listed threatened species and communities

30. 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

³⁸ See *Minister for Environment and Heritage v Greentree* [2004] FCA 741; [2004] FCA 1317; and *Greentree v Minister for the Environment* [2005] FCAFC 128.

³⁹ *Greentree v Minister for the Environment* [2005] FCAFC 128, paragraph 45.

⁴⁰ *Greentree v Minister for the Environment* [2005] FCAFC 128, paragraph 3.

⁴¹ *Greentree v Minister for the Environment* [2005] FCAFC 128, paragraph 1.

⁴² *Greentree v Minister for the Environment* [2005] FCAFC 128, paragraphs 25-33 and 37-39.

prohibitions on significant impact on threatened ecological communities are restricted to the critically endangered and endangered categories.⁴³

31. 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.⁴⁴ 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

32. 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 provides as follows:

“(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

⁴³ Subsection 19(4) EPBC Act provides an exemption from both ss.18 and 18A for actions taken pursuant to a new s.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.

⁴⁴ The Amending Act extended 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.

33. A number of other controlling provisions appear in part 3 EPBC Act but will not be considered in any detail. The categories of action of this kind are: nuclear actions (ss.21-22A); actions in a Commonwealth marine area⁴⁵; 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).

34. One of the less heralded aspects of the 2006 amendments was provision for easier Commonwealth approval of certain nuclear actions. One example of this involves the amendments to sections 305 and following EPBC Act which caused a 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 did not extend to providing for the construction or operation of any of a nuclear fuel fabrication plant; a nuclear power plant; an enrichment plant; or a re-processing facility. The amendments have the effect that actions taken in accord with conservation agreements, in this example, avoid any need for approval pursuant to part 9 of the EPBC Act.

⁴⁵ 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.

Exceptions⁴⁶

35. 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*.
36. The exemption in s.38 EPBC Act was explored in litigation commenced by Tasmanian Greens Senator, Bob Brown.⁴⁷ The litigation commenced and was successful at first instance based on two propositions, namely, that s.38 EPBC Act when it talks of “forestry operations taken in accordance with a regional forest agreement” means that the operations must comply with the agreement and that clause 68 of the Tasmanian RFA, when it spoke of Tasmania “agreeing to protect” certain specified species through a system of reserves meant that Tasmania promised by that method to protect the species.⁴⁸ The threatened species which were found not to be sufficiently protected by the forestry actions were the broad-toothed stag beetle; the Tasmanian wedge-tailed eagle and the swift parrot.⁴⁹ The forestry operations were in the Wielangta forest in south east Tasmania.⁵⁰

⁴⁶ 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 were expanded by the Amending Act slightly in that what were “bilaterally accredited management plans” became, for the purpose of such agreements, either a “bilaterally accredited management arrangement or bilaterally accredited authorization process”. They also include matters declared by the minister not to need approval (pursuant to an accredited management plan) (ss.32-35). These sections were also expanded to provide for and utilize the expanded concept of “accredited management plan” being replaced by “accredited management arrangement” and “accredited authorization process”.

⁴⁷ *Brown v Forestry Tasmania* [2005] FCA 1210; [2006] FCA 468; [2006] FCA 469; [2006] FCA 1729; *Forestry Tasmania v Brown* [2007] FCAFC 186.

⁴⁸ *Forestry Tasmania v Brown* [2007] FCAFC 186, paragraphs 16-21.

⁴⁹ *Forestry Tasmania v Brown* [2007] FCAFC 186, paragraph 1.

⁵⁰ *Forestry Tasmania v Brown* [2007] FCAFC 186, paragraph 1.

37. However, on appeal, the Full Federal Court held that, properly construed, the Tasmanian RFA and s.38 EPBC Act only required that the procedures provided for in the RFA be gone through and that whether or not the species were actually protected was not a relevant question outside the political area of Commonwealth State interaction.⁵¹

38. 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.

39. 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

Section 67 EPBC Act

40. Section.67 EPBC Act (which defines a “controlled action”), before the 2006 Amending Act 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 inserted 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.

41. 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, purp ort to prohibit actions where the

⁵¹ *Forestry Tasmania v Brown* [2007] FCAFC 186, paragraphs 60-68.

significant impacts occur (only) through the subsequent actions of third parties.

42. Sections 67 and 67A, therefore, 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, creating a need for the actions which give rise to them to be subject, nevertheless, to the need for assessment and approval under part 9.

Referrals

43. 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.

44. Section 68 EPBC Act provides for referral by “a person proposing to take an action”.⁵² Section 68A is a complex provision seeking 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.

45. 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.

⁵² Regulations 4.01-4.03 and schedule 2 to the regulations prescribe how a referral is made and the information that it must contain.

(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.

(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.”⁵³

46. In November 2002, the cousin of the Spectacled Flying-Fox, the Grey-headed Flying-Fox became the subject of certain administrative guidelines issued by the Commonwealth Minister advising land owners about their duties to refer under s.68 EPBC Act. The guidelines stated that, if a person had certain State permits to kill Grey-headed Flying-Foxes, the killing of those animals did not have to be referred pursuant s.68 EPBC Act.

47. The guidelines were challenged in *Humane Society International v Minister for the Environment & Heritage* [2003] FCA 64. The logic and science behind the guidelines were questionable. The Minister did not try to defend his guidelines on the merits but sought to avoid successful legal action by saying that were not made pursuant to any section of the EPBC Act and were not of any legal effect.

48. This tactic was successful in avoiding orders pursuant to the *Administrative Decisions (Judicial Review) Act 1977* and an order for mandamus. However, Justice Kiefel granted a declaration that the exemption purported to be given by the administrative guidelines was not authorised by law. Again, the Minister had been provided with some assistance in construing the legislation which he administered.

⁵³ Subsection 68(6) is inserted by item 174.

49. Subsection 72(3) EPBC Act allows the inclusion in a referral form of certain alternative proposals. This is a useful flexibility added to the process by the 2006 Amending Act.

The Upside of Referring

50. 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.⁵⁴

51. The reason why a proponent would refer matters which that proponent believes are not controlled actions is because of the protection against future liability provided by a determination by the Minister under s.75. Section 75 EPBC Act provides 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.

Note: The Minister may revoke a decision made under subsection (1) about an action and substitute a new decision. See section 78.

(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 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;

⁵⁴ Section 67 EPBC Act defines “controlled action”.

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.

Note: **Impact** is defined in section 527E.

(2A) For the purposes of subsection (2), if the provision of Part 3 is subsection 15B(3), 15C(5), 15C(6), 23(1), 24A(1), 26(1) or 27A(1), then the impacts of the action on the matter protected by that provision are only those impacts that the part of the action that is taken in or on a Commonwealth area, a Territory, a Commonwealth marine area or Commonwealth land:

- (a) has or will have; or
- (b) is likely to have;

on the matter.

(2B) Without otherwise limiting any adverse impacts that the Minister must consider under paragraph (2)(a), the Minister must not consider any adverse impacts of:

- (a) any RFA forestry operation to which, under Division 4 of Part 4, Part 3 does not apply; or
- (b) any forestry operations in an RFA region that may, under Division 4 of Part 4, be undertaken without approval under Part 9.

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 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 under subsection (1) and, if applicable, the designation under subsection (3), within 20 business days after the Minister receives the referral of the proposal to take the action.

Note: If the Minister decides, under subsection 75(1), that the action is a controlled action, the Minister must, unless the Minister has requested more information under subsection 76(3) or section 89, decide on the approach to be used for assessment of the relevant impacts of the

action on the same day as the Minister makes the decision under subsection 75(1)—see subsection 88(2).

Time does not run while further information being sought

(6) If the Minister has requested more information under subsection 76(1) or (2) 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. ”

52. 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.

53. 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)⁵⁵ 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 77, the action is taken in that manner; or

...”

54. Even if it turns out later that the action when carried out has had a devastating impact on the World Heritage values of one or more World Heritage properties, the proponent 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.

Section 75 EPBC Act (the gatekeeper) under the microscope

55. 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

⁵⁵ Subsection 12(1) creates the prohibition.

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.

56. 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).

57. Subsection 74(3) provides as follows:

“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.”

58. 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.⁵⁶ The giving of public notice by internet has been well exercised and tested in response to subs.74(3) EPBC Act.

⁵⁶ 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 (26 February 2008) the last entry was no.4048 of 2008, a proposal for a residential development at Horseshoe Bay on Magnetic Island off Townsville, the proponent for which is David Haintz. The referral documents (and subsequent documents containing decisions about the referral pursuant to the Act) are able to be accessed as PDF files.

59. Section 74AA 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 so 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.

60. 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 expected to carry 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. Section 75(2) is the provision which was considered in the Nathan Dam litigation. Its operation is affected by the restrictions on the ordinary meaning of "impact" found in s.572E EPBC Act.

61. 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).

62. A streamlining provision introduced by the 2006 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”. 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.

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

63. Section 77 EPBC Act requires the Minister to publish his decision in accordance with the regulations.⁵⁷

64. 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 reads as follows:

“80 Simplified outline of this Part

The following is a simplified outline of this Part:

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;
- (aa) an assessment on referral information (see Division 3A);
- (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).”

65. Matters may be excluded from the part 8 process. These matters include matters covered by a bilateral agreement under the EPBC Act⁵⁸ (s.83 EPBC

⁵⁷ 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.

Act) or declared by the Minister to be part of a class of matters not requiring assessment (s.84 EPBC Act).⁵⁹ (It is interesting to note that s.37J prohibits a declaration dealing with those same nuclear installations which were excluded from conservation agreements by s.305(2).)

66. Section 87 EPBC Act requires the Minister to choose one of the 6 different types of assessment process. 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.
67. Section 87 EPBC Act requires that the decision as to the form of assessment 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. Section 91 EPBC Act requires written notice of the s.87 decision to the designated proponent and publication of the notice of decision.
68. The EPBC Act sets out the different approaches to the assessment of impacts of an action. Assessment on referral information is dealt with by ss.92-3 and

⁵⁸ Bilateral agreements, a means of avoiding duplication of EIA processes between the Commonwealth and States and Territories are provided for by ss.44-65A 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 <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.

⁵⁹ 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.

has some provision for public input. Sections 94-95C provide for assessment on preliminary documentation also with provision for public input. The provision for assessment by public environment report (“PER”) provides for both standard guidelines and tailored guidelines. The relevant sections for PERs are ss.96-100. Assessment by Environmental Impact Statement (“EIS”) is provided for by ss.101-105. Sections 109– 129 provide for assessment by public inquiry are unchanged. It remains to be seen whether Australia will see, again, the likes of the Ranger Inquiry.⁶⁰ 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.

Decision Time

69. 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 133 EPBC Act provides for the Minister’s decision to approve. In part, it provides as follows:

“133 Grant of approval

Approval

(1) After receiving the assessment documentation 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.

(1A) If the referral of the proposal to take the action included alternative proposals relating to any of the matters referred to in subsection 72(3), the Minister may approve, for the purposes of subsection (1), one or more of the alternative proposals in relation to the taking of the action.

Content of approval

(2) An approval must:

- (a) be in writing; and
- (b) specify the action (including any alternative proposals approved under subsection (1A)) that may be taken; and
- (c) name the person to whom the approval is granted; and
- (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 the conditions attached to the approval.

Note: The period for which the approval has effect may be extended. See Division 5.

⁶⁰ The Ranger Uranium Environmental Inquiry (1977) conducted by Justice Fox. See *Ranger Uranium Environmental Inquiry First Report* (AGPS, 1976) and *Second Report* (AGPS 1977).

Persons who may take action covered by approval

(2A) An approval granted under this section is an approval of the taking of the action specified in the approval by any of the following persons:

- (a) the holder of the approval;
- (b) a person who is authorised, permitted or requested by the holder of the approval, or by another person with the consent or agreement of the holder of the approval, to take the action.

Notice of approval

(3) The Minister must:

- (a) give a copy of the approval to the person named in the approval under paragraph 133(2)(c); 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).

...

70. 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.

71. Subsection 134A provides for 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. There is also 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.⁶¹ This allows (without fear of illegality for lack of relevance) for conditions to provide for environmental trade-offs or offsets. 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. Sections 136 – 140 seek to specify the matters which the minister must consider as part of his decision making process.

73. The most dramatic decision making by a minister pursuant to the EPBC Act is not graphically reported in Austlii or in the law reports and is too lengthy to be

⁶¹ See subss.134(3)(aa) and (ab).

told here. (It makes, however, for interesting and dramatic reading.) Of two pieces of litigation which were commenced, one became redundant (a long delayed decision was made) and the other was settled (the Minister backed down and approved the proposal for a wind farm). All we have in terms of case reports is the costs decision concerning the action to require a decision to be made.⁶²

74. One may access, however, a detailed narrative of these events involving extreme political opportunism by a Commonwealth Minister for the Environment using the orange-bellied parrot, a species declared “critically endangered” under the EPBC Act, to attack and inhibit the development of alternative low carbon forms of energy generation.⁶³ These actions of the Commonwealth Minister occurred in the face of extremely careful environmental assessment under accredited Victorian schemes of assessment and further reports ordered by the Minister, himself, which suggested a likely mortality rate from the proposed wind farm of one bird every 1,000 years. Eventually, on 4 August 2006, facing certain defeat in an application for judicial review based on Wednesbury unreasonableness and breach of procedural fairness, the Minister consented to Justice Weinberg’s setting aside his refusal of the application for reconsideration according to law. Just before Christmas of the same year, the Minister approved a fresh application for the wind farm. Despite the story’s happy ending, it provides a depressing example of the extent to which ministers of the Crown will misuse for political purposes discretions bestowed by carefully drafted legislation and meant to be exercised on the merits in almost a judicial manner.

Third Party Rights to Litigate

⁶² *Bald Hills Wind Farm Pty Ltd v Honourable Ian Campbell, Minister for Environment and Heritage* [2006] FCA 848

⁶³ A carefully documented and entertainingly told history of this sorry tale may be found in Prest, James, *The Bald Hills wind farm debacle* in Bonyhady, Tim and Christoff, Peter, *Climate Law in Australia*, The Federation Press, 2007 at pages 261.

75. 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. The sections provide liberal standing provisions 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).

76. Liberal standing provisions assisting researchers into, 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. A significant amount of the litigation under the EPBC Act, including the Nathan Dam case, might not have possible (or, at least, would have been made more difficult and expensive) if the liberal standing provisions did not apply.

Concluding Thoughts

77. The EPBC Act has a potentially very wide impact on proposals to develop areas of land for new land uses. Statistics published by the department⁶⁴ show that 1,932 referrals had been received as at 30 June 2006, in approximately 6 years from when the EPBC Act commenced. The rate of referrals was fairly steady lying in the range of 300-350 per year during most of that time. In that time, only four outright refusals occurred.

78. The processes of the EPBC Act have produced a considerable amount of litigation during that period only some of which has been discussed in this paper. At least some of that litigation has clarified the Act’s operations and meaning. The Act has seen a considerable revamp through the 2006 Amending Act. The correctly labelled Bald Hills wind farm debacle has seen a

⁶⁴ <http://www.environment.gov.au/epbc/statistics/>.

very low point in the conduct of the principal person responsible for administering the Act. Many proposals with considerable impact on the environment have received increased scrutiny and have been subjected to additional conditions directed to mitigating environmental impact.

79. With a change of government in November 2007 and increased emphasis on actions to mitigate climate change, the EPBC Act may well be facing more legislative change and more adventures.

Stephen Keim SC

Chambers

27 February 2008

Appendix 1

EPBC Act cases at 27 February 2008⁶⁵

A. Cases for injunctive relief

1. *Booth v Bosworth* [2000] FCA 1878; [2001] FCA 1453 (Flying Fox Case);
2. *Schneiders v State of Queensland* [2001] FCA 553; *Jones v State of Queensland* [2001] FCA 756 (Fraser Island Dingo Case);
3. *Mees v Roads Corporation* [2003] FCA 306; [2003] FCA 410 (Paul Mees' Scoresby Freeway false or misleading information case);
4. *Minister for Environment and Heritage v Greentree* [2004] FCA 741; [2004] FCA 1317; *Greentree v Minister for Environment and Heritage* [2005] FCAFC 128 (Greentree Case – clearing of a Ramsar wetland);
5. *Brown v Forestry Tasmania* [2005] FCA 1210; [2006] FCA 468; [2006] FCA 469; [2006] FCA 1729; *Forestry Tasmania v Brown* [2007] FCAFC 186 (Bob Brown's Wielangta Forest Case);
6. *Humane Society International Inc v Kyodo Senpaku Kaisha Ltd* [2004] FCA 1510; [2005] FCA 664; [2006] FCAFC 116; [2007] FCA 124; [2008] FCA 3; [2008] FCA 36 (Japanese Whaling Case).

B. Judicial review cases

1. *Humane Society International v Minister for the Environment & Heritage* [2003] FCA 64 (HSI flying fox administrative guidelines case);
2. *Queensland Conservation Council Inc v Minister for Environment & Heritage* [2003] FCA 1463; *Minister for the Environment and Heritage v Queensland Conservation Council Inc* [2004] FCAFC 190 (Nathan Dam Case).
3. *Mees v Kemp* [2004] FCA 366; [2005] FCAFC 5 (Paul Mees' second highway case);
4. *Tasmanian Conservation Trust v Minister for Environment and Heritage* [2004] FCA 883 (Meander Dam Case);
5. *Save the Ridge Inc v Commonwealth of Australia* [2004] FCA 996; [2004] FCAFC 209; [2004] FCA 1167; [2004] FCA 1289; [2005] FCA 17; [2005] FCA 157; [2005] FCA 355; [2005] FCAFC 203; [2006] FCAFC 51 (Canberra Gungahlin Drive Extension freeway case);
6. *Paterson v Minister for the Environment and Heritage & Anor* [2004] FMCA 924 (Powerlink transmission line – applicant's lack of standing);

⁶⁵ I am indebted to Chris McGrath, barrister at the Queensland Bar, for this (we think) exhaustive list of cases on the Act.

7. *Wilderness Preservation Society of Queensland Proserpine/Whitsunday Branch Inc v Minister for the Environment and Heritage* [2006] FCA 736 (Bowen Basin Coal Mines Case);
8. *The Wilderness Society Inc v Turnbull, Minister for the Environment and Water Resources* [2007] FCA 1178; [2007] FCA 1863; [2007] FCAFC 175 (Gunns Pulp Mill Case);
9. *Investors for the Future of Tasmania Inc v Minister for the Environment and Water Resources* [2007] FCA 1179; [2007] FCA 1864 (Second Gunns Pulp Mill Case);
10. *Anvil Hill Project Watch Association Inc v Minister for the Environment and Water Resources* [2007] FCA 1480; [2008] FCAFC 5 (Anvil Hill Coal Mine Case);
11. *Blue Wedges Inc v Minister for the Environment, Heritage and the Arts* [2008] FCA 8 (Dredging of Port Phillip Bay) ;
12. *Bald Hills Wind Farm Pty Ltd v Honourable Ian Campbell, Minister for Environment and Heritage* [2006] FCA 848 (costs argument only, wind farm case).

C. Merits review cases in the AAT

1. *International Fund for Animal Welfare (Australia) Pty Ltd and Minister for Environment and Heritage, Re* (2005) 41 AAR 508; [2005] AATA 1210; [2006] AATA 94 (importation of Asian Elephants to a zoo);
2. *Wildlife Protection Assoc of Australia Inc and Minister for the Environment and Heritage, Re* (2003) 73 ALD 446; [2003] AATA 236; [2006] AATA 29 (NSW Kangaroo Management Plan);
3. *Humane Society International and Minister for the Environment and Heritage* [2006] AATA 298 (Southern Bluefin Tuna Fishery); and
4. *Nature Conservation Council of NSW Inc and Minister for Environment and Water Resources, Re* (2007) 98 ALD 334; [2007] AATA 1876 (Grey Nurse Shark conservation).