

Chapter 4

Compliance and Enforcement

Introduction

4.1 The *Environment Protection and Biodiversity Conservation Act 1999* (the Act) provides a range of enforcement mechanisms, including civil and criminal penalties, environmental audits, conservation orders, injunctions, infringement notices, the power to publicise contraventions and the power to take action to remedy environmental damage and to recover the costs of these actions from perpetrators.¹

4.2 In the second reading speech the Parliamentary Secretary to the Minister for the Environment and Heritage said that changes were needed to continue to strengthen compliance with the Act and to establish new enforcement options. The Parliamentary Secretary said:

While there have been a number of successes in ensuring compliance with the act during the first six years, practice has shown that the current provisions are often difficult to use. The proposed amendments will strengthen environmental protection by fixing these problems and making it easier and quicker to bring compliance action against people and organisations that breach the act.²

4.3 The explanatory memorandum states that one of the overarching objectives of the proposed amendments is to 'increase the effectiveness of the compliance regime'.³

4.4 Of the witnesses and submitters that addressed the issue, many were broadly supportive of measures aimed at strengthening the compliance and enforcement regime under the Act. Many still expressed strong opposition to individual amendments, particularly the amendment dealing with third party enforcement.⁴

Changes proposed by the bill

4.5 According to the Department of the Environment and Heritage, the proposed amendments are designed to address compliance difficulties that have been identified

1 *Environment Protection and Biodiversity Conservation Act 1999*, Chapter 6, Part 17.

2 The Hon. Mr Gregory Hunt MP, Parliamentary Secretary to the Minister for the Environment and Heritage, *House of Representatives Hansard*, 12 October 2006, p. 4.

3 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 8.

4 Australian Conservation Foundation, *Submission 27*, p. 6; Australian Network of Environmental Defenders' Offices, *Submission 17*, p. 32; The Environment Association, *Submission 58*, p. 1.

in relation to the Act and will strengthen environmental protection by making it easier to take action against people who breach the Act's protected area provisions.⁵

4.6 The explanatory memorandum said that the bill will introduce 'more effective and more flexible compliance and enforcement provisions', including:

- addressing the lack of appropriate and effective alternatives to litigation in varying circumstances;
- ensuring that employers, principals and landowners are accountable for actions by their employees, agents and land managers respectively;
- offence formulations which address evidentiary difficulties (that is, the introduction of strict liability to certain elements of some offences);
- the provision for criminal penalties for serious contraventions of the Act in Commonwealth reserves, in addition to civil penalties;
- scope of the court's power to grant rehabilitation orders and ability to grant a rehabilitation order in the absence of an injunction;
- powers under warrant and powers of seizure;
- provision for civil penalties and liability of executive officers of corporations for non-compliance with provisions of approved wildlife trade operations and management plans;
- provision of enforcement of conditions relating to future sale, management, manner of keeping and reproduction of certain imported and exported wildlife specimens;
- ability to prosecute non-citizens who are suspected of contravening the Act; and
- powers of investigation, specifically the ability to introduce a 'notice to produce and attend' and increased powers for the detention, searching and screening of alleged offenders.⁶

4.7 The bill is expected to bring in the following benefits:

- simplified, flexible and cost-effective compliance and enforcement arrangements;
- strengthened enforcement procedures including powers under warrants and power of seizure;
- broadened capacity for a court to grant rehabilitation orders; and

5 Department of the Environment and Heritage, *2006 Amendments to the EPBC Act*, <http://www.deh.gov.au/epbc/2006-amendments/index.html> (accessed on 19 October 2006).

6 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 6.

- efficient and effective administration and greater certainty through resolution of definitional and technical uncertainty and problems.⁷

4.8 A range of witnesses and submitters expressed support for measures in the bill that seek to clarify and strengthen compliance and enforcement provisions.⁸ Australian Network of Environmental Defender's Offices (ANEDO) argued that there needed to be 'a commitment of resources and political will to use the provisions effectively.'⁹

Enforcement issues

Lack of enforcement

4.9 In discussing compliance with the Act, ANEDO and The Australia Institute both drew attention to the 'lack of compliance action' taken by the Commonwealth Department of the Environment and Heritage (the Department).¹⁰ The Australia Institute said that 'to date, only two enforcement actions have been taken by the Commonwealth' in relation to the environmental assessment and approval regime.¹¹ These are known as the *Greentree Case*¹² and *Booth v Bosworth*¹³.

4.10 The Australia Institute questioned the extent to which the Act has been able to achieve the purpose of deterring wrongdoing given 'there has been a marked lack of political will to prosecute people' who fail to comply with the Act's requirements.¹⁴ The Institute argued that compliance was often a function of the risk of prosecution and the penalties that are likely to be incurred following prosecution.

4.11 ANEDO and The Australia Institute put forward a number of possible reasons as to the reluctance to prosecute people who fail to comply with the provisions including:

- a lack of political will;
- difficulty in proving that a person has breached the 'likely to have a significant impact test';
- the costs of undertaking legal proceedings; and

7 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 14.

8 ANEDO, *Submission 17*, p. 5.

9 *Submission 17*, p. 5.

10 ANEDO, *Submission 17*, p. 32; The Australia Institute, *Submission 60 (Attachment 1)*, p. 167.

11 *Submission 60 (Attachment 1)*, p. 159.

12 See *Minister for the Environment and Heritage v Greentree (No 2)* [2004] FCA 741.

13 [2001] FCA 1453.

14 *Submission 60 (Attachment 1)*, p. 167.

- a lack of resources needed to gather evidence and monitor compliance.¹⁵

4.12 However, as the Department notes, in its Compliance and Enforcement Policy, criminal prosecutions are the last step in a hierarchy of measures designed to achieve the objectives of environmental legislation:

The Department employs a range of responses that escalate according to the severity of the contravention or if non-compliant activities continue. Generally, education and/or warnings are used in response to first and less serious contraventions; this ensures that suspected offenders become aware of legislative requirements. For serious or continuing contraventions, deterrent sanctions are used that may include suspension or cancellation of permits or approvals, injunctions, remediation orders, pecuniary penalties, and criminal prosecution.¹⁶

4.13 A small number of prosecutions may indicate the success of this 'enforcement pyramid',¹⁷ not any limitation on the commitment or capacity of the Department to ensure compliance with Australian environmental laws.

Third party enforcement

4.14 Third parties can participate in enforcement of the Act in a number of ways:

- by notifying the Department of actions that should be referred to the Minister under the Act or by providing other information about suspected breaches;
- by taking legal action (see sections 475 and 487); and
- ensuring that administrative decisions are made in accordance with the law.

4.15 The bill proposes to repeal section 478 of the Act (at Item 763) which currently prevents the Federal Court from requiring undertakings for damages from an applicant as a condition of granting an interim injunction.

4.16 The explanatory memorandum states that the repeal of section 478 brings the Act into line with other Commonwealth legislation that gives the Federal Court discretion whether or not to require an applicant for an injunction to give an undertaking as to damages.¹⁸

4.17 A number of submissions expressed concern about the bill's proposed removal of 'no undertakings as to damages' protections for civil society actors seeking to

15 *Submission 60 (Attachment 1)*, p. 168; *Submission 17*, p. 32.

16 Department of the Environment and Heritage Compliance and Enforcement Policy, August 2004, <http://www.deh.gov.au/about/publications/compliancepolicy.html>, accessed November 2006.

17 I. Ayres and J. Braithwaite, *Responsive Regulation: Transcending the Deregulation Debate*, Oxford University Press, New York, 1992.

18 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 88.

enforce the Act by way of injunctions.¹⁹ The Committee heard that section 478 in effect facilitates effective enforcement of the Act by environmental groups.²⁰

4.18 Associate Professor Lee Godden and Ms Jacqueline Peel from the Faculty of Law at The University of Melbourne argued:

An important enforcement tool currently provided by the EPBC Act is the capacity for any ‘interested person’, including environmental civil society groups, to seek an injunction to prevent breaches of the Act (s 475). Such applications supplement the enforcement activity carried out by the Department of the Environment and Heritage, and play an important role in ensuring the accountability of developers for the environmental consequences of their actions on MNES.²¹

4.19 Associate Professor Godden and Ms Peel said that the changes were ‘likely to affect, adversely, the enforcement strength of the legislation’ because environmental groups and other community members rarely have the necessary resources to meet demands for an undertaking as to damages.²² The National Trust of Australia (Western Australia) agreed and commented that the change would ‘effectively prevent many heritage and environment groups from seeking judicial redress where they believe there has been a breach of the EPBC Act’.²³

4.20 Humane Society International (HSI), the Tasmanian Conservation Trust (TCT) and WWF-Australia argued against the repeal of section 478 and said:

It is instructive to note that third parties have used the court system very judiciously, and given the Australian Government has such poor surveillance arrangements in place to ensure compliance, enabling individuals and organisations to ensure the objects of the Act are achieved should be encouraged not dissuaded.²⁴

4.21 The Australian Conservation Foundation (ACF) highlighted that ‘important gains’ had been made through public interest enforcement of environmental laws, but noted that there were many barriers to third party enforcement of the Act. The ACF argued that the following steps would assist in overcoming those barriers:

- Provision for public interest costs orders in legal proceedings under the Act, following the recommendations of the ALRC (Report 75);

19 Associate Professor Lee Godden and Ms Jacqueline Peel, *Submission 15*, p. 1; National Trust of Australia (Western Australia), *Submission 22*, p. 7; Ms Diarne Wiercinski, *Submission 32*, p. 1; ASH, *Submission 24*, pp 2–3; HSI, TCT and WWF–Australia, *Submission 66*, p. 24.

20 ACF, *Submission 27*, p. 6.

21 *Submission 15*, p. 5.

22 *Submission 15*, p. 5.

23 *Submission 22*, p. 7.

24 *Submission 66*, p. 24.

- Establishment of administrative review of decisions by the Minister not to request referral of a proposed action under section 70(1), where a third party has requested that the Minister seek such a referral;
- Establishment of merits review of controlled action decisions under Chapter 4, Part 7; and
- Broadening further the standing rules in section 475 and 487 so as to allow “any person” to seek injunctive relief for a breach of the Act and/or to seek review of administrative decisions.²⁵

4.22 The committee is concerned that there may be some misunderstanding of the effect of this change. It will not mean that environmental groups will always be required to give undertakings for damages if they initiate action under section 475 or 487. As the Law Council of Australia noted in its support for the proposed repeal of section 478, the Federal Court will have the discretionary power whether to require, or not require such an undertaking.²⁶ The Department argued that 'It is appropriate for the Federal Court to be making such a decision on its merits rather than for the decision to be prescribed in legislation'.²⁷

Strict liability

4.23 The bill applies strict liability to certain elements of some offences. The changes proposed by the bill mean that it will not be an excuse to not know that a matter is protected by the Act.

What is strict liability?

4.24 Strict liability offences are those which do not require guilty intent for their commission, but for which there is a defence if the wrongful action was based on a reasonable mistake of fact.²⁸

4.25 At common law there is a presumption that fault must be proven for each element of an offence.²⁹ However, this presumption may be displaced by an express legislative provision that an offence or element of an offence carries strict liability.³⁰ In its *Sixth Report of 2002*, the Senate Standing Committee for the Scrutiny of Bills

25 *Submission 27*, p. 6.

26 *Submission 37*, p. 4.

27 Department of the Environment and Heritage, answer to question on notice, 10 November 2006.

28 Section 6.1 of *The Criminal Code* (Commonwealth); see Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2002 – Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, 26 June 2002, p. 258.

29 *The Criminal Code* (Commonwealth), s. 5.6.

30 *The Criminal Code* (Commonwealth), s. 6.1.

said that fault liability is one of the most fundamental protections of criminal law and 'to exclude this protection is a serious matter'.³¹

The provisions of the bill

4.26 The intent of the amendments is to make it clear that the prosecution does not have to show a person knew or was reckless as to the following facts:

- that the property was a World Heritage property (section 15A);
- that the heritage value was a National Heritage value (section 15C);
- that the place was a National Heritage place (section 15C);
- that the wetland was a declared Ramsar wetland (section 17B);
- that the threatened species or threatened ecological community is a listed threatened species or threatened ecological community (section 18A and sections 196(1)(c), 196B(1)(b) and 196D(1)(b));
- that the species is a listed migratory species (section 20A and sections 211(1)(c), 211B(1)(b) and 211D(1)(b));
- that the area is a Commonwealth marine area (section 24A);
- that the area is Commonwealth land (section 27A);
- that the place is a Commonwealth Heritage place (section 27C);
- that the cetacean is in the Australian Whale Sanctuary or waters beyond the outer limits of the Australian Whale Sanctuary (section 229(1)); and
- that the species is a member of a listed marine species (sections 254, 254B and 254D).

Strict liability offences

4.27 In its *Sixth Report of 2002*, the Senate Standing Committee for the Scrutiny of Bills referred to the Commonwealth Attorney-General's Department's guidelines that stated that strict liability has been applied in the following cases:

- to ensure the integrity of a regulatory regime, particularly those which relate to the environment or public health;
- where it is difficult for the prosecution to prove a fault element because a matter is peculiarly within the knowledge of the defendant; or
- to overcome the 'knowledge of law' problem, where an element of the offence expressly incorporates a reference to a legislative provision.³²

31 Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2002 – Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, 26 June 2002, p. 283.

32 Senate Standing Committee for the Scrutiny of Bills, *Sixth Report of 2002 – Application of Absolute and Strict Liability Offences in Commonwealth Legislation*, 26 June 2002, p. 259.

4.28 The Law Council of Australia stated that in relation to strict liability:

...it is usual to have offences of strict liability in relation to environmental offences....There is no argument that stands that says that strict liability offences cannot attract jail sentences as well as a fine – and those fines can be very high. However, a jail sentence should only be for a very serious crime.³³

4.29 The Law Council also argued that where an offence of strict liability exists, the Department of the Environment and Heritage should focus attention on educating the public so that people are aware that, for example, a particular species is a listed migratory species.³⁴ The Nature Conservation Council of NSW was supportive of strict liability being applied to offences:

There are a number of amending provisions that make it clear that offences are strict liability offences. NCC strongly supports these amendments. NCC is supportive of greater enforcement of the Act. Adequate resources must be dedicated on the ground for this effort.³⁵

4.30 The Scrutiny of Bills committee recently reiterated, in the context of the Environment and Heritage Amendment Bill, the principles outlined in its *Alert Digest (No. 12 of 2006)* and from the its *Sixth Report of 2002* on the use of strict liability in legislation:

- 'strict liability should be introduced only after careful consideration on a case-by-case basis of all available options; it would not be proper to base strict liability on mere administrative convenience or on a rigid formula'; and
- 'strict liability should be applied only where the penalty does not include imprisonment and where there is a cap on monetary penalties; the general Commonwealth criteria of 60 penalty units...appears to be a reasonable maximum'.³⁶

4.31 The committee notes the concerns raised by the Scrutiny of Bills committee in its *Alert Digest No. 12 of 2006*, and hopes that the Minister's responses to the questions raised will address these concerns.

Collecting evidence

4.32 The bill proposes a number of other changes to the Act in relation to the collection of evidence and dealing with offenders.

33 Law Council of Australia, additional information, 14 November 2006.

34 *Submission 37*, p. 5.

35 *Submission 21*, p. 5-6.

36 Senate Standing Committee for the Scrutiny of Bills, *Alert Digest (No. 12 of 2006)*, 18 October 2006, p. 10.

4.33 The bill would insert a new schedule 1 into the Act which provides for the detention of 'suspected non-citizen offenders'.³⁷ According to the explanatory memorandum, the Government is limited in its ability to:

- enforce the Act in Australia's maritime jurisdiction and non self-governing external Territories; and
- protect Commonwealth reserves, such as Ashmore Reef National Nature Reserve and listed species.

4.34 Currently under the Act authorised officers are prevented by the *Migration Act 1958* from bringing non-citizens suspected of committing offences against the Act into the migration zone as such persons are not authorised to travel to Australia.

4.35 The main objects of the new schedule 1 provide for:

- the detention of non-citizens reasonably suspected of committing an offence against the Act;
- the searching and screening of persons in environment detention and the carrying out of identification tests; and
- transition between environment detention and subsequent detention and repatriation under the *Migration Act 1958*.³⁸

4.36 Schedule 1 mirrors the provisions contained in the *Migration Act 1958* for dealing with the detention of unauthorised non-citizens and the provisions of the *Fisheries Management Act 1991* providing for detention of foreign fishers suspected of offences against that Act. For example, current legislation only makes it possible to confiscate illegal fishing catches of species protected under the Act, but does not endow the relevant officers with the authority to detain, search and screen offenders or suspected offenders. The proposed changes intend to make it easier to prosecute foreign offenders and bring environmental enforcement in line with similar provisions in the *Migration Act 1958* and the *Fisheries Management Act 1991*.

4.37 Items 854 to 869 would make related amendments to the enforcement visa provisions of the *Migration Act 1958* that currently apply to suspected illegal foreign fishers so that they apply also to suspected offenders against the EPBC Act.³⁹

4.38 Item 633 of the bill would allow an approved officer to conduct, without warrant, a search of a detainee and a detainee's clothing and any property under the

37 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 95.

38 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 95.

39 Explanatory Memorandum, Environment and Heritage Legislation Amendment Bill (No. 1) 2006, p. 105.

detainee's immediate control to find out whether evidence of a crime is concealed about the person of the detainee.

4.39 The bill also provides that a person cannot refuse to provide information on the grounds of self-incrimination (but the uses of that information are then limited). Item 767 of schedule 1 would insert a new section 486J into the Act which would abrogate the privilege against self-incrimination for a person required to answer a question or produce a document under new division 15A of the Act. Proposed subsection 486J(2) would limit the circumstances in which information so provided is admissible in evidence in proceedings against the affected person.

4.40 There was support for improving enforcement provisions such as these.

Ms Walmsley—You will see on page 34 of our submission, the strict liability amendments in this bill are predominantly going to essentially help DEH with enforcement. There are things like: ‘that a property is a World Heritage property’, ‘that a place is a heritage place’. They are things that would put an onerous burden on DEH to prove and have been a bit of a barrier to DEH action. We are supportive of the provisions in this bill that will help DEH do more enforcement work, because up until now in the last six years they have not actually done much enforcement action. So, these minor aspects, that are now strict liability under the bill, are actually a part of the bill that we do support, because they should make enforcement of the legislation better.⁴⁰

Mr McLoughlin—The fisheries officers of AFMA work extensively in Northern Australia on illegal foreign fishing and the like, and those powers have already been made available to AFMA Commonwealth officers. There is an issue that, where fisheries officers, for example, in a hypothetical situation, find a fishing vessel that has turtles and dolphin onboard but no fish, the AFMA fisheries officers are without the powers to deal with that effectively. For example, they might be hiding or concealing dugong tusks on their body. They are very valuable. If the AFMA fisheries officers were at sea, they could search those people and charge them as appropriate under the fisheries act; but without those powers in the EPBC Act, they could not effectively undertake the same sort of work they might otherwise do because they are on the scene. The powers are consistent with the Fisheries Management Act. I am not really in a position to say whether or not they are appropriate, but they would seem to be effective in an operational sense to enable officers in the field to deal with a wider range of offences as they see them.⁴¹

40 Ms Rachel Walmsley, Australian Network of Environmental Defender's Offices Inc, *Committee Hansard*, 3 November 2006, p 33.

41 Mr Richard McLoughlin, Australian Fisheries Management Authority, *Committee Hansard*, 6 November 2006, p. 28.

Committee view

4.41 The committee's view is that the powers of search and seizure given to departmental officers, and the establishment of strict liability provisions with strong penalties, are necessary for better enforcement of the Act. The committee understands that these provisions have come from those that currently exist in the *Fisheries Management Act 1991*, and therefore supports their inclusion in the bill.

4.42 The committee notes some concerns raised by the Scrutiny of Bills committee in its Alert Digest No. 12 of 2006 in regard to the provisions above, and hopes that the Minister's responses to the questions raised by that committee will allay any fears regarding these reforms.

