EPBC ACT – THE CASE FOR REFORM

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ABSTRACT: This article examines whether the environmental assessment and approval (‘EAA’) regime of the Environment Protection and Biodiversity Conservation Act 1999 (Cth) (‘EPBC Act’) has been effective and explores how it could be improved. It is argued that the EAA regime has failed to achieve any substantial environmental outcomes. This failure is due to a combination of the Federal Government’s reluctance to enforce the Act, the lack of appropriate administrative infrastructure, structural flaws in the process, and possible constitutional limitations. Two areas of the EAA regime that require reform are discussed: the listing processes that relate to threatened species, threatened ecological communities and national and Commonwealth heritage places; and the provisions that apply to actions taken in the states and territories that could affect the matters of national environmental significance. It is argued that responsibility for the listing processes should be transferred from the relevant Minister to an independent statutory authority. In relation to the provisions that apply to actions taken in the states and territories, three possible options for reform are put forward: replacing the significant impact provisions with a zoning process; replacing the significant impact provisions with a call-in power; and adding a zoning process and call-in power to the existing provisions. All three offer advantages over the existing regime, but also suffer from a number of weaknesses. It is concluded that there is an urgent need for the EAA regime to be amended, but that this should only occur after these, and other options for reform, are appropriately debated.

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I INTRODUCTION

In June 1999, the Howard Liberal-National Coalition Government\(^1\) successfully steered the *Environment Protection and Biodiversity Conservation Act 1999* (Cth) (‘*EPBC Act*’) through Federal Parliament. In doing so, it further dismantled the legislative legacy of the Whitlam Labor Government,\(^2\) fundamentally reforming federal environmental law.\(^3\) At the time, members of the Government described the Act as ‘landmark legislative reform’,\(^4\) ‘the most significant legislation dealing with environmental issues that has ever been presented to the Commonwealth Parliament’,\(^5\) and ‘a gigantic step forward for Australia’.\(^6\) The Government was not alone in lavishing praise on the new legislation. Several environment groups that were involved in brokering the deal that led to the Bill’s passage through the Senate were quick to promote the virtues of the new regime. The World Wide Fund for Nature Australia, for example, ran an advertisement in *The Weekend Australian* that described it as ‘the biggest win for the environment in 25 years’.\(^7\) However, after six years, it has become clear that the enthusiasm displayed towards the Act was misplaced.

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\(^1\) For readers unfamiliar with Australian politics, the Liberal Party – National Party coalition, a longstanding alliance and one generally characterised as conservative, was led to election victory in 1996 by the Liberal Party leader and subsequent Prime Minister, John Howard. The Coalition also formed the government between 1947–72. It remains in power at time of print with the next election not expected until 2007.

\(^2\) The Australian Labor Party has fluctuated between the centre-left and centre-right over the past 40 years. Under former Prime Minister Gough Whitlam (1972–75), the party introduced many liberal or centre-left reforms, including the first federal environmental and heritage laws. The Labor Party was also in government between 1983–96.


Most of the EPBC Act is a consolidation of a number of pre-existing statutes, including the National Parks and Wildlife Conservation Act 1975 (Cth), Whale Protection Act 1980 (Cth) and Endangered Species Protection Act 1992 (Cth). However, the legislation does contain a number of novel elements, the most significant of these being the environmental assessment and approval (‘EAA’) provisions, which are found in chapters 2, 3 and 4 of the Act. These provisions are intended to protect the matters of national environmental significance and promote the conservation of biodiversity.

Regulatory regimes have a number of functions. In most cases, their primary purpose is to deal with market failure by preventing certain activities or changing the way in which those activities are carried out. Regulatory regimes can also be used to provide an incentive for developers and producers to engage in voluntary environmental programs or to change community attitudes. To date, it appears unlikely that the EAA provisions have performed any of these fundamental tasks. Most importantly, the EAA regime has failed to bring about any significant improvements in environmental outcomes and it is costing the Australian taxpayer between AUD 15 million and AUD 30 million a year. 

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11 Cass R Sunstein, Free Markets and Social Justice (1997). Arguably, the degree of opposition to the EPBC Act from the agricultural sector may suggest it is failing to perform this function. See National Farmers’ Federation (‘NFF’), Property Rights Position Paper (NFF, 2002); and Productivity Commission, Impacts of Native Vegetation and Biodiversity Regulations, Report No 29 (2004). However, there is insufficient evidence to draw definite conclusions on this issue. Consequently, this issue is not considered further in this article.

12 The annual reports of the Department of the Environment and Heritage (‘Department’) and the budget statements issued by the Minister for the Environment and Heritage suggest the annual cost of administering the EAA regime has varied between approximately AUD 5 million and AUD 15 million: Department, Annual Report 2001-02 (2002) (AR 2002); Department, Annual Report 02-03 (2003) (AR 2003); and Department, Annual Report 03-04 (2004) (AR 2004);
This article analyses how effective the EAA regime has been since it commenced in July 2000 and argues that significant changes are needed to ensure environmental outcomes are achieved in a more cost-effective manner. Section II provides a brief outline of the EAA provisions. Section III analyses what the EAA process has achieved since it commenced in July 2000. Section IV discusses the reasons for the failure of these provisions to realise substantial environmental outcomes. Section V evaluates the EAA regime as an environmental policy instrument. Section VI suggests some possible changes to the structure of the EAA regime to improve outcomes and cost-effectiveness and Section VII draws a conclusion.

II THE ENVIRONMENTAL ASSESSMENT PROCESS

The EAA process is divided into three parts: referral, assessment and approval.\(^{13}\)

A Referral

If a person is proposing to take an action that may have a significant impact on a matter protected under Part 3 of the *EPBC Act*, they are required, unless the action is exempt,\(^{14}\) to refer details of the action to the Commonwealth Minister for the Environment and Heritage (‘the Minister’).\(^{15}\) The matters protected under Part 3 are:

- the ‘matters of national environmental significance’,\(^{16}\)
- the environment on Commonwealth land in the Australian jurisdiction;\(^ {17}\)

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\(^{14}\) There are a number of exemptions from the general referral requirement. See Section IV below for more details.

\(^{15}\) *Environment Protection and Biodiversity Conservation Act 1999* (Cth) s 68. The Minister can deem an action to have been referred under the Act in certain circumstances (s 70).

\(^{16}\) *Environment Protection and Biodiversity Conservation Act 1999* (Cth) pt 3, div 1.
• the environment in Commonwealth Heritage places outside the Australian jurisdiction;\textsuperscript{18} and
• the environment generally where the relevant action is carried out on Commonwealth land in the Australian jurisdiction\textsuperscript{19} or the action is undertaken by the Commonwealth or a Commonwealth agency (inside or outside the Australian jurisdiction).\textsuperscript{20}

There are currently seven ‘matters of national environmental significance’: world heritage areas,\textsuperscript{21} Ramsar wetlands,\textsuperscript{22} listed threatened species and ecological communities,\textsuperscript{23} listed migratory species,\textsuperscript{24} nuclear actions,\textsuperscript{25} the Commonwealth marine area and Commonwealth managed fisheries,\textsuperscript{26} and national heritage places.\textsuperscript{27} Regulations can also be made that specify that certain actions are subject to the EAA requirements in Division 1 or 2 of Part 3 of the Act.\textsuperscript{28}

When a referral is made, the Minister must decide whether the action requires approval under the Act.\textsuperscript{29} This involves the Minister determining whether the action is likely to have a significant impact on a matter protected under Part 3 of the Act. The Minister’s decision on whether an action requires

\textsuperscript{17} Environment Protection and Biodiversity Conservation Act 1999 (Cth) pt 3, div 2, ss 26(2), 27A(3) and 27A(4).
\textsuperscript{18} Environment Protection and Biodiversity Conservation Act 1999 (Cth) pt 3, div 2, ss 27B and 27C.
\textsuperscript{19} Environment Protection and Biodiversity Conservation Act 1999 (Cth) pt 3, div 2, ss 26(1), 27A(1) and 27A(2).
\textsuperscript{20} Environment Protection and Biodiversity Conservation Act 1999 (Cth) pt 3, div 2, ss 28.
\textsuperscript{21} Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 12 and 15A (the matter protected is the world heritage values of declared world heritage properties).
\textsuperscript{22} Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 16 and 17B (the matter protected is the ecological character of declared Ramsar wetlands).
\textsuperscript{23} Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 18 and 18A (the matters protected are listed threatened species (other than conservation dependent species) and ecological communities (other than vulnerable communities)).
\textsuperscript{24} Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 20 and 20A (the matter protected is listed migratory species).
\textsuperscript{25} Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 21 and 22A (the matter protected is the environment generally where a nuclear action is taken or proposed).
\textsuperscript{26} Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 23 and 24A (the matters protected are the environment in Commonwealth marine areas, the environment in Commonwealth managed fisheries in the coastal waters of a state or the Northern Territory where a person fishes or proposes to fish, and the environment generally where an action is taken in a Commonwealth marine area).
\textsuperscript{27} Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 15B and 15C (the matter protected is the national heritage values of national heritage places).
\textsuperscript{28} Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 25, 25A and 28AA.
\textsuperscript{29} Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 75.
approval is commonly known as the ‘controlled action’ decision and, if the action requires approval, it is called a ‘controlled action’.30

In making a controlled action decision, the Minister has three options: the action requires approval, the action does not require approval, or the action does not require approval if it is undertaken in a manner specified.31 The ‘manner specified’ process is intended to enable the Minister to set conditions on how an action can be taken so it does not have a significant impact on a matter protected under Part 3.32 Until 1 January 2004, the manner specified conditions were not directly enforceable. This was changed by the Heritage Bills.33

**B Assessment**

If an action is declared to be a controlled action, the Minister must decide whether it must be assessed under the EAA regime and, if so, how it will be assessed.34 Certain actions may be exempt from assessment under the EAA process if they are assessed under another Commonwealth process or under a state or territory process that is designated in an ‘assessment bilateral agreement’.35 If an action must be assessed, the Minister has a choice of five methods of assessment: public inquiry, environmental impact assessment, public environmental report, preliminary documentation and accredited assessment process.36 After the method has been selected, the proponent of the action is usually responsible for the preparation of all relevant assessment documentation.

**C Approval**

At the completion of the assessment, the Minister must decide whether to approve the action.37 When making this decision, the Minister is required to have regard to a broad range of issues, including economic and social matters related to the action.38 If the action is approved, the Minister can attach enforceable

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32 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 77A.
33 See, Environment and Heritage Legislation Amendment Act (No.1) 2003 (Cth) sch 4, Item 1E.
34 Environment Protection and Biodiversity Conservation Act 1999 (Cth) ch 4, pt 8.
35 Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 83 and 84.
36 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 87. An ‘accredited assessment process’ is a federal, state or territory assessment procedure that is accredited by the Minister for the purpose of assessing a particular action (see s 87(4)).
38 Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 136–140A.
conditions to the approval to protect, repair or mitigate damage to the matter that triggered the approval requirement.\textsuperscript{39}

\section*{D Bilateral Agreements}

The \textit{EPBC Act} contains provisions that enable the Commonwealth to enter into agreements (called ‘bilateral agreements’)\textsuperscript{40} with the states and territories to accredit their environmental assessment and approval processes. An action that is assessed or approved under a process that is accredited under a bilateral agreement is exempt from the equivalent process in the EAA regime.\textsuperscript{41}

Although the Act allows the Commonwealth to devolve responsibility for approving actions to the states and territories, it appears that the Federal Government’s focus in relation to bilateral agreements was on reducing duplication in assessment processes. This is alluded to in the Explanatory Memorandum, which states:

Features of the Bill are ... [a] transparent legislative mechanism for accreditation of State assessment processes and, in some cases, State decisions will be adopted. The goal will be to maximise reliance on State processes which meet appropriate standards. Bilateral agreements will provide for Commonwealth accreditation of State processes and, in appropriate cases, State decisions (for example, decisions under agreed management plans).\textsuperscript{42}

The emphasis on devolving assessment responsibilities in the Explanatory Memorandum has been replicated in practice. Since the EAA regime commenced, four bilateral agreements have been made, all of which relate to the transfer of responsibility for assessments.\textsuperscript{43} To date, no bilateral agreements have been made that devolve responsibility for approving actions for the purposes of the EAA regime to a state or territory.

\section*{III The Achievements}

The objects of the \textit{EPBC Act} suggest that the EAA regime is intended to provide protection for the matters of national environmental significance and the environment in Commonwealth areas, as well as promoting the conservation of

\begin{thebibliography}{99}
\bibitem{39} \textit{Environment Protection and Biodiversity Conservation Act 1999} (Cth) s 134.
\bibitem{40} \textit{Environment Protection and Biodiversity Conservation Act 1999} (Cth) ch 3, pt 5.
\bibitem{41} \textit{Environment Protection and Biodiversity Conservation Act 1999} (Cth) ss 29 and 83.
\bibitem{43} Assessment bilateral agreements have been made with Queensland, Tasmania, Western Australia and the Northern Territory.
\end{thebibliography}
Australia’s biodiversity and heritage. The EAA regime was never intended to provide absolute protection for these matters, nor was it intended to be the only policy mechanism used by the Commonwealth to promote biodiversity and heritage conservation. However, it was intended to play a constructive role in improving environmental and conservation outcomes. Indeed, it would be surprising if a regulatory regime that costs up to AUD 30 million a year was not intended to control or regulate a substantial number of activities so as to ensure improved protection for the environment.

Evidence to support the conclusion that the EAA regime is performing its environmental functions would include:

- a relatively large number of referrals and controlled actions, particularly from the industries that are having the greatest detrimental impact on the matters protected under Part 3 (namely, agriculture, fisheries and forestry);\(^4\)
- a reasonable number of refusals;
- a reasonable number of cases where effective and enforceable conditions have been placed on actions;
- where non-compliance has been identified as a problem, a reasonable number of enforcement actions and the initiation of programs to raise awareness of the EAA requirements; and
- a marked decline in the number of activities that are threatening the matters protected under Part 3.

The following sections seek to determine whether any of this evidence is accumulating. Section IIIA considers the statistics on the administration of the EAA provisions. Section IIIB discusses the enforcement of the regime and Section IIIC provides a brief overview on the trends in relation to the activities that are threatening the matters protected under Part 3.


A  

**EAA Administration Statistics**

Table 1 contains the latest available statistics on the administration of the EAA regime.

**Table 1: Referrals, controlled action decisions and approval decisions (July 2000 – December 2004)**

<table>
<thead>
<tr>
<th>Referrals</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Total number of referrals</td>
<td>1420</td>
</tr>
<tr>
<td>Referrals withdrawn or lapsed before a controlled action decision was made</td>
<td>23</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Controlled Action Decisions</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Controlled action decisions made*</td>
<td>1360</td>
</tr>
<tr>
<td>Approval required</td>
<td>324</td>
</tr>
<tr>
<td>Approval not required – manner specified</td>
<td>184</td>
</tr>
<tr>
<td>Approval not required</td>
<td>852</td>
</tr>
<tr>
<td>Still being processed at the end of December 2004</td>
<td>37</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Approval Decisions</th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Approval decisions made</td>
<td>101</td>
</tr>
<tr>
<td>Approved without conditions</td>
<td>9</td>
</tr>
<tr>
<td>Approved with conditions</td>
<td>90</td>
</tr>
<tr>
<td>Approval refused</td>
<td>2</td>
</tr>
</tbody>
</table>

*This includes decisions that have been remade.

1 Referrals

Between July 2000 and the end of December 2004, the Minister received 1420 referrals under the EAA regime. There is insufficient evidence to draw definitive conclusions on the adequacy of the total number of referrals that have been made. In particular, there is no data on how many actions have been undertaken that have had a significant adverse impact on the matters protected under Part 3. However, the available evidence suggests that the number of referrals should be significantly higher.

The number of referrals received under the Environment Protection (Impact of Proposals) Act 1974 (Cth) (‘EPIP Act’) provides an interesting comparison to those received under the EAA regime. Between July 1995 and the end of June 2000, 1583 referrals were made to the Department of Environment and Heritage (‘the Department’) under the EPIP Act (314 in 1999–2000, 240 in 1998–99, 235 in 1997–98, 329 in 1996–97 and 465 in 1995–96). On this basis, it appears likely that the number of referrals made to the Minister under the EAA regime in its first five years will be about the same as the number made to the Department in the last five years of the EPIP Act.

It is important to emphasise that there are significant differences between the EAA regime and the assessment process that operated under the EPIP Act. Like the EAA regime, the EPIP Act was restricted to ‘matters affecting the environment to a significant extent’. Yet, it only applied to activities involving the Commonwealth (and there were no sanctions for non-compliance with its requirements). The EAA regime therefore is capable of regulating a wider variety of activities than its predecessor (and of utilising the threat of sanctions to encourage compliance). Given the nature of the differences between the assessment regimes, the similarity in the number of referrals made under the EAA regime and those made under the EPIP Act suggests there is widespread non-compliance with the EAA referral requirements.

Further support for this conclusion is provided by the lack of referrals from the agricultural, fisheries and forestry sectors. The Department allocates all

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referrals to one of 18 categories based on the nature of the action.\(^{52}\) These categories include ‘agriculture and forestry’ and ‘water management and use’, which account for almost all referrals received from the agricultural, fisheries and forestry sectors.

At the end of December 2004, no referrals had been received from the fisheries sector (excluding aquaculture)\(^{53}\) and around 34 actions had been received and allocated to the ‘agriculture and forestry’ category.\(^{54}\) Approximately three of the ‘agriculture and forestry’ referrals related to forestry activities and 31 concerned agricultural developments. By 1 July 2005, the number of agricultural referrals in the ‘agriculture and forestry’ category had grown to 38, but there had been no change in the number of referrals from the commercial fisheries or forestry sectors. Given the environmental damage caused by these industries, these figures are extremely low and provide further support for the conclusion that there is wide-spread non-compliance with the EAA requirements.\(^{55}\)

Similarly, between 16 July 2000 and 1 July 2005, approximately 93 referrals were received and allocated to the ‘water management and use’ category. The overwhelming majority of these concerned the construction or modification of water infrastructure (for example, dams, weirs, stormwater drains and pipelines). Approximately four concerned the construction of new farm dams\(^{56}\) and only a


\(^{53}\) Approximately 45 referrals were made in relation to aquaculture activities between July 2000 and December 2004: Department, *Referrals, Assessments and Approvals Statistics - Overview Since Commencement of EPBC Act on 16 July 2000* (2005) above n 52. The lack of referrals from the wild fisheries sector may be a result of the fact that when the strategic assessment of fisheries management plans are complete under Part 10 of the Act, it is likely that the majority of commercial fishing activities in Commonwealth managed fisheries will be exempt from the operation of relevant EAA provisions. The Department has also given an assurance that it would not support the prosecution of fishers for contraventions of certain provisions of the Act until the strategic assessment process has been completed: Australian Fisheries Management Authority, *Australian Fisheries Management Authority – News* (December 2000) 4(8), 2.

\(^{54}\) There are a relatively small number of agricultural referrals that are not allocated to the ‘agriculture and forestry’ category. The vast majority of these concern water-related developments (see, eg, EPBC 2003/1069, EPBC 2004/1365, EPBC 2005/2060 and EPBC 2169). At least one agricultural related referral was also marked as having been allocated to a non-existent category known as ‘vegetation clearance’ (EPBC 2001/482). This and other related information: Department, ‘Public notifications relating to referrals’ <http://www.deh.gov.au/epbc/publicnotices/index.html> at 1 July 2005. Due to problems associated with the website, there is a possibility of slight statistical errors.

\(^{55}\) Section 38 of the *EPBC Act* provides that the EAA provisions do not apply to an ‘RFA forestry operation’ that is undertaken in accordance with a Regional Forestry Agreement. This exemption has ensured that a significant proportion of forestry activities are excluded from the EAA requirements.

very small number related solely to water extraction and the use of existing water infrastructure.\footnote{See, eg, EPBC 2002/885, 2004/1573 and EPBC 2005/2134.} On this basis, it appears the EAA regime may be capturing a reasonable proportion of new water infrastructure developments (with the exception of farm dams), but is failing to regulate unsustainable water use practices. This may be partly attributable to the operation of the ‘prior authorisation’ and ‘existing use’ exemptions.\footnote{Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 43A and 43B.}

In summary, it seems likely that there is a significant problem with non-compliance with the EAA referral requirements. This problem appears to be greatest in relation to the agriculture and fisheries sectors, where the number of referrals to date has been extremely low. Given the impact of these sectors on the matters protected under Part 3, the lack of referrals from these sectors is a strong indicator that the EAA regime is not performing its environmental purpose.

2 Controlled Actions

At the end of December 2004, 1 360 controlled action decisions had been made and 324 actions had been declared to be controlled actions (that is, 24 per cent of actions referred were declared to be controlled actions). Similar to the case faced in relation to referrals, it is difficult to draw definitive conclusions on the adequacy of the total number of controlled actions without more data on the total number of activities that have adversely affected the matters protected under Part 3. However, the small number of referrals and controlled actions, and the relatively low ratio of referrals to controlled actions suggest the EAA regime is failing to achieve its environmental objectives.\footnote{The low ratio of referrals to controlled actions may partly be due to the fact that many of the actions that have been referred are unlikely to have a major detrimental impact on the matters protected under Part 3. However, it is arguable that there have been a significant number of instances where actions that were likely to have a significant adverse affect on matters protected under Part 3 have not been declared to be controlled actions (see, eg, EPBC 2004/1904, EPBC 2003/1069, EPBC 2003/975, EPBC 2002/849, EPBC 2003/962, EPBC 2003/924, EPBC 2003/1156, EPBC 2003/1149, EPBC 2003/1262, EPBC 2003/1082, EPBC 2004/1863, EPBC 2003/966 and 2002/652). Irrespective of the cause of the low referral to controlled action ratio, the most important fact from an environmental perspective is that there have been a relatively small number of controlled actions, particularly from the agriculture, fisheries and forestry sectors.} The most telling data in relation to controlled actions concerns the agriculture, fisheries and forestry sectors.

As discussed, no referrals have been made in relation to commercial fishing operations (excluding aquaculture). Consequently, no commercial fishing activities have been declared to be controlled actions. This is a remarkable statistic given the impact the commercial fishing sector has on migratory species
and the environment in the Commonwealth marine area and Commonwealth managed fisheries.\(^60\)

Between 20 July 2000 and 1 July 2005, the Minister made approximately 34 controlled action decisions in relation to referrals that were allocated to the ‘agriculture and forestry’ category.\(^61\) Ten of these referrals were declared to be controlled actions (29 per cent), two of which were subsequently withdrawn (although one was later re-submitted in a slightly altered form\(^62\)). Despite land clearing arguably being the most problematic activity currently associated with agriculture in terms of biodiversity conservation,\(^63\) only two of the remaining eight ‘agriculture and forestry’ controlled actions involved any significant vegetation removal. One of these actions involved clearing approximately 100 trees in western Victoria while the other concerns a proposal to clear approximately 4.5 hectares of land for horticultural purposes near Kurrimine Beach in Queensland.\(^64\)

The small number of controlled actions involving land clearing for agricultural purposes is primarily due to the lack of relevant referrals, but there also appears to be a reluctance to declare clearing proposals to be controlled actions.\(^65\) This is illustrated in the treatment of clearing proposals from the Brigalow Belt Bioregions (North and South) in Queensland.

The Brigalow Belt Bioregions contain a number of threatened species and at least two endangered ecological communities: Bluegrass (\textit{Dichanthium} spp.) dominant grasslands of the Brigalow Belt Bioregions (North and South); and Brigalow (\textit{Acacia harpophylla} dominant and co-dominant). At least six clearing proposals that could affect these ecological communities have been referred to the Minister since the EAA regime commenced,\(^66\) but not one was declared to be a controlled action.\(^67\)

Nineteen out of 89 referrals allocated to the ‘water management and use’ category were declared to be controlled actions (21 per cent). Twelve of these involved the construction or modification of a dam or weir, although three were

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\(^{62}\) See EPBC 2001/480 and EPBC 2002/571.

\(^{63}\) Williams et al (2001), above n 45.

\(^{64}\) See EPBC 2002/766 and EPBC 2005/2152.


\(^{67}\) Three were declared not to be controlled actions if they were carried out in a specified manner (EPBC 2004/1473, EPBC 2003/962 and EPBC 2003/924).
subsequently withdrawn and re-submitted in a modified form.\textsuperscript{68} The other eight controlled actions in this category related to pipeline and drain construction,\textsuperscript{69} waste treatment,\textsuperscript{70} water extraction\textsuperscript{71} and the modification of a wetland.\textsuperscript{72}

On the basis of the referral and controlled action statistics, it seems relatively clear that the EAA regime is not fulfilling its environmental objectives. The most damning evidence is the low number of referrals from the agricultural, fisheries and forestry sectors. Adding further weight to this argument is the fact that only a very small number of actions in the ‘agriculture and forestry’ and ‘water management and use’ categories have been declared to be controlled actions.

3 Approvals and Refusals

Between July 2000 and December 2004, 99 actions were approved (nine without conditions) and only two were refused. The first action to be refused involved a proposal to kill 5,500 spectacled flying-foxes between November and December 2002 on a property near the Wet Tropics World Heritage Area in northern Queensland. The second was a proposal to construct a residential home on a property adjacent to the Kingston Arthurs Vale Heritage Area on Norfolk Island.

A refusal rate of less than 0.2 per cent is extremely low for any regulatory system. This low refusal rate is arguably attributable to three factors. Firstly, it appears that many of the activities that have been approved are unlikely to have a major detrimental impact on the matters protected under Part 3. It seems that a large proportion of the activities that are having the greatest impact on these matters are not being referred to the Minister. Secondly, the Commonwealth seems willing to put economic and political interests above natural and cultural heritage concerns.\textsuperscript{73} Thirdly, the Commonwealth may be hesitant to refuse activities due to possible constitutional problems, which are discussed below.

Although the reasons for the low refusal rate are debatable, the lack of refusals, when considered in conjunction with the statistics on the number of referrals and controlled actions, suggests that the EAA process is failing to achieve its environmental objectives. This is particularly evident in relation to

\textsuperscript{68} See EPBC 2001/188 (resubmitted as EPBC 2001/420), EPBC 2001/189 (resubmitted as 2001/422) and EPBC 2001/190 (resubmitted as EPBC 2001/385, EPBC 2001/388 and EPBC 2001/389).

\textsuperscript{69} EPBC 2001/184, EPBC 2004/1319 and EPBC 2004/1588.

\textsuperscript{70} EPBC 2005/2028.

\textsuperscript{71} EPBC 2005/2134 and EPBC 2004/1573.

\textsuperscript{72} EPBC 2000/14.

the agricultural, fisheries and forestry sector. As the Productivity Commission has stated in relation to the agricultural sector:

In terms of preventing activities, or of requiring activities to undergo the assessment and approval process, the EPBC Act to date has had little direct impact on the agricultural sector.\(^{74}\)

4 Conditions

By the end of December 2004, the Minister had approved 90 actions with conditions and decided 184 actions did not require approval on the basis they will be undertaken in a ‘manner specified’. Therefore, it is arguable that the EAA regime has resulted in 274 actions being subject to conditions of some description. However, this figure is misleading.

Only 27 of the 184 ‘manner specified’ actions are subject to conditions that are directly enforceable.\(^{75}\) Consequently, 117 actions (27 under the manner specified process and 90 under approval decisions) have been subject to legally enforceable conditions under the EAA regime.

This is a relatively small number of actions. Further, it is arguable that many of the conditions that have been imposed on actions under the EAA regime will not result in any substantial improvements in environmental outcomes.\(^{76}\) This is attributable to a number of factors, including the following.

- A significant proportion of the conditions have been exceedingly vague and ambiguous.\(^{77}\) For example, one agricultural land clearing proposal was declared not to be a controlled action if the developer undertakes a survey of the relevant land for an endangered skink and provides the survey results to the Department ‘with the objective of ensuring that areas, if any, found to comprise important habitat (as indicated by the presence or likely presence of the species) will not be developed’ (our emphasis).\(^{78}\)

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\(^{74}\) Productivity Commission (2004), above n 11, LI.

\(^{75}\) Conditions imposed under the manner specified process only became directly enforceable in January 2004. Between 1 January 2004 and 31 December 2004, 27 manner specified decisions were made: Department, ‘Public notifications relating to referrals’ (update 15 April 2005) <http://www.deh.gov.au/epbc/publicnotices/index.html> at 11 May 2005. Interestingly, prior to these conditions becoming directly enforceable, the average number of manner specified decisions was approximately 45 per year.

\(^{76}\) The conditions that have been imposed under the approval process generally follow a standard formula that requires the proponent to carry out the action in accordance with a management plan. These management plans are not public documents. As a result, there is no means of evaluating the appropriateness of many of the approval conditions.


\(^{78}\) Decision notice in relation to EPBC 2004/1473.
problem with the fact that the condition arguably does not relate to the way in which the relevant action will be undertaken, it does not appear that the developer will be in breach of this condition if it proceeds to clear land that is found to contain appropriate habitat for the skink. There are numerous other manner specified conditions that contain similar flaws and, in many cases, there is a reasonable argument that the conditions would not be legally enforceable.

- Many of the conditions are the same or very similar to those imposed under state and territory planning and environmental laws.\(^79\)
- The Commonwealth does not have the necessary administrative systems and infrastructure to monitor compliance with, and enforce, the conditions that are imposed under the EAA regime.\(^80\) In its 2003 report on the administration of the EAA provisions, the Australian National Audit Office (‘ANAO’) was highly critical of the arrangements the Department had in place for monitoring compliance.\(^81\) In relation to the monitoring of approval decisions, the ANAO concluded that:

> [The Department] does not have information on the number of approved actions that have commenced or that have been completed. In addition, while proponents are asked to nominate timeframes for project commencement and completion in the referral form, currently this information is not effectively used. … The EPBC database does not currently support the monitoring and compliance function.\(^82\)

Its conclusions in relation to monitoring the conditions imposed under the manner specified process were even more damning.

During the course of the audit, particular manner actions were not subject to any formal monitoring or audit. … (T)he Department has no information on the number of activities that have commenced or have been completed. The Department is reliant on the proponent or the wider public to advise of changes or circumstances affecting the implementation of the particular manner conditions.\(^83\)

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80 Scanlon and Dyson, above n 13; Macintosh (2004), above n 8; and Australian National Audit Office (‘ANAO’), *Referrals, Assessments and Approvals under the Environment Protection and Biodiversity Conservation Act 1999*, Audit Report No. 38 (2003). See also Department AR (2004), above n 12, 471.

81 ANAO (2003), above n 80.

82 Ibid para 6.19.

83 Ibid para 6.30.
The problems associated with monitoring are not simply a result of administrative errors or poor planning. As discussed below, the Commonwealth lacks the administrative infrastructure to enable it to effectively monitor compliance. Consequently, as the ANAO has identified, it is highly reliant on the goodwill of proponents and state and territory environmental and planning agencies to perform this critical function.  

- The legal validity of a number of the conditions is questionable. An example of this concerns conditions that are based on ‘trade-offs’. This involves cases where a proposed action is allowed to proceed if the developer carries out specified measures to compensate for the likely detrimental impacts of the action. Although convenient for the Department and the developer, trade-off conditions may be illegal on potentially two grounds. Firstly, when making a controlled action decision, the Minister is not allowed to have regard to any beneficial impacts that the action may have on the matters protected under Part 3. Arguably, the compensatory aspects of a proposed action are ‘beneficial impacts’. Secondly, the Act requires that all manner specified conditions relate to the way in which the relevant action will be undertaken. With many ‘trade-off’ conditions, the required compensatory activities are not intimately related to the proposed action, but rather are tacked onto the action as a means of offsetting its adverse impacts.

- There is little scientific evidence to support the conclusion that many of the ‘trade-off’ and mitigation conditions will provide adequate protection for the relevant aspects of the environment.

When the evidence relating to conditions is added to that concerning referrals, controlled action decisions and refusals, it appears highly unlikely that the EAA regime has resulted in any substantial improvements in environmental outcomes. Clearly, the EAA regime is not appropriately regulating the activities that are having, or could have, a significant adverse impact on the matters

84 See ibid, paras 6.25–6.26; and Scanlon and Dyson, above n 13.
85 Macintosh (2004), above n 8; and Macintosh and Wilkinson, above n 65.
87 See Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 75; and Macintosh (2004), above n 8.
88 See Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 77; and Macintosh (2004), above n 8.
90 Macintosh and Wilkinson, above n 65.
supposedly protected under Part 3. This is particularly evident in relation to the agriculture, fisheries and forestry sectors.

B Compliance and Enforcement

An appropriate response to the apparent problems associated with non-compliance with the EAA requirements arguably should include a reasonable number of enforcement actions and the initiation of programs to raise awareness about the EPBC Act.

The Commonwealth has taken some initiatives to help raise awareness about the EAA regime. These include:

- the publication of materials, and holding public lectures on the EAA regime;\(^{91}\)
- placement of an officer from the Department on secondment with the National Farmers’ Federation;\(^{92}\) and
- funding the World Wide Fund for Nature Australia, in conjunction with several other environment and heritage groups, to help raise awareness about the EPBC Act.\(^{93}\)

The statistics on administration suggest these initiatives have failed to produce any noticeable improvements in compliance. However, there is insufficient evidence upon which to draw definitive conclusions as to their effectiveness. More importantly, awareness raising initiatives stand little chance of success if the Government does not provide a clear indication of its willingness to prosecute people who fail to comply with the EAA requirements.

The evidence concerning enforcement paints a bleak picture of the degree to which the Commonwealth is committed to improving the effectiveness of the EAA regime. To date, only two enforcement actions have been taken by the Commonwealth in relation to the EAA provisions.

The first concerned two Japanese citizens who were arrested for attempting to smuggle insects from Lord Howe Island.\(^{94}\) The Commonwealth tried to prosecute the defendants for threatening the world heritage values of the Lord Howe Island Group World Heritage Area. However, the case based on the EAA provisions was dismissed at the committal hearing.\(^{95}\)

The second case, which is the only successful enforcement action that has been undertaken since the EAA regime commenced, was a civil proceeding

\(^{91}\) Department, AR (2004), above n 12.
\(^{92}\) Department, AR (2003), above n 12.
\(^{93}\) Macintosh and Wilkinson, above n 65.
\(^{94}\) David Kemp, First Charges Laid for World Heritage Offences (Media Release, 11 February 2003).
\(^{95}\) Macintosh (2004), above n 8.
against a wheat farmer and an associated company who were found to be responsible for completely clearing all 100 hectares of an ephemeral Ramsar-listed wetland on a property known as ‘Windella’ near Moree in northern New South Wales (the ‘Greentree Case’).96

The Greentree Case was complicated by the fact that the Ramsar wetland on the property was infested with a herbaceous weed known as Lippia. Yet, it still contained a small quantity of native vegetation, including a number of *Eucalyptus coolabah* and *Casuarina cristate*. Under state environment laws, the defendants were required to obtain a development consent before clearing the native vegetation located on the property. Had they obtained this consent prior to the commencement of the *EPBC Act*, it is likely they would have been able to clear the wetland without referring the action to the Minister under the EAA provisions. However, the development consent was not obtained, which meant that the defendants contravened both the applicable state environment laws and the *EPBC Act* when they directed their agents to clear and plough the wetland. While the case resulted in the farmer and company being fined a total of AUD 450,000 and orders were granted requiring certain restoration work to be undertaken, the manner in which the proceedings were handled is a case study in regulatory failure.

In February 1999, four landholders in the Gwydir region in northern New South Wales signed a memorandum of understanding with a number of parties concerning the management of wetlands located on their properties. The then owners of Windella were signatories to this memorandum. The wetlands on the four properties total around 823 hectares, with Windella’s wetland comprising around 100 hectares. The wetlands are not adjacent to one another, but rather are four discrete wetland areas located within the larger Gwydir wetlands system. Soon after the memorandum was signed, the Minister designated the wetlands for inclusion on the List of Wetlands of International Importance under the Ramsar Convention.

The successful negotiation of the memorandum of understanding and the inclusion of the wetlands on the List of Wetlands of International Importance was trumpeted as an example of the type of success that can be achieved through consultative processes. For example, the Secretary to the Minister, Dr Sharman Stone, described the agreement and subsequent listing as: ‘a breakthrough for wetlands conservation in Australia’ and ‘an outstanding example of balance and cooperation that is a win for the environment and a win for local landholders’.97 However, in late 2001, Windella was sold to a number of those who were to become the defendants in the Greentree Case, at which time they were made

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96 See *Minister for the Environment & Heritage v Greentree (No 2) [2004] FCA 741* and *Minister for the Environment and Heritage v Greentree (No 3) [2004] FCA 1317.*

aware of the status of the wetland as a Ramsar wetland and provided with a copy of the memorandum. Less than a year later, an employee of The Wilderness Society, a non-government environment organisation, flew over Windella and noticed that vegetation had been cleared and dredging had occurred within the boundaries of the Ramsar listed wetland. She took photographs of the clearing and dredging and then provided them to the Department in early September 2002.

On 30 September 2002, the Department sent a letter to the defendants about the alleged clearing and indicated that it wanted to conduct a site visit of the property. The defendants refused, which resulted in the Department obtaining a warrant to inspect the property. At the site inspection that followed in October 2002, Departmental officers found ‘that approximately 20 per cent of the Windella Ramsar site in the north-eastern portion had been cleared of all ground cover’ and that dredging had occurred within the site.\(^{98}\) Despite finding clear evidence of a serious breach of the Act, the Minister failed to initiate legal proceedings immediately to prevent the defendants from causing further damage to the ecological character of the wetland. Rather, the Department attempted to negotiate an outcome with the defendants for more than six months. When Departmental officers returned to inspect the site in late July 2003, they found the entire site had been cleared of all ground cover and that the soil had been ploughed. Only then were legal proceedings initiated.

However you describe the outcome of the *Greentree Case*, it was hardly a victory for the environment. The vast majority of native flora in the wetland was destroyed and its ecological character has been fundamentally altered. Worse still, these events occurred in circumstances where the Minister and the Department must have known, or should have known, there was a significant risk they would occur.\(^{99}\) Although the orders of the court require the defendants to carry out restoration work, the damage done to the wetland was substantial and it could have been avoided if the Minister and the Department had acted decisively when the breach was first brought to their attention.

The mismanagement of the *Greentree Case* is a reflection of the broader failings in enforcement that have plagued the EAA regime since its commencement. Although the number of enforcement proceedings should not necessarily be used as a measure of success of a regulatory regime, the incentive to comply is greatly diminished if there is a perception that a government is reluctant to prosecute offenders. The lack of political will has undoubtedly hindered the ability of the EAA regime to achieve its environmental objectives. This is not to suggest that there have not been other causes, a number of which are discussed below. However, the Government’s unwillingness to pursue those

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\(^{99}\) Macintosh and Wilkinson, above n 65.
who chose to ignore the EAA requirements has ensured they have proven to be little more than a political exercise, rather than a bona fide attempt to establish an effective regime to protect and conserve important aspects of Australia’s natural and cultural heritage.

C Decline in the Number of Activities that are Threatening the Matters Protected under Part 3

It is beyond the scope of this article to analyse the condition of all of the matters protected under Part 3 or determine whether there has been decline in the total number of activities that are threatening their conservation status. In many cases, this information is not currently available. However, there is evidence that indicates that several important threatening processes have not been negated since the EAA regime commenced. One of the most significant of these is land clearing.

The EPBC Act lists land clearing as a key threatening process for biodiversity conservation. One area of particular concern is Queensland, where a vast amount of native vegetation has been cleared over the past decade.\(^\text{100}\) In the first three years after the EAA regime commenced, the rates of land clearing in Queensland actually increased, rising from approximately 380,000 hectares a year (ha/year) in 2000–01 to 554,000 ha/year in 2002–03.\(^\text{101}\) The majority of this clearing occurred in bioregions that contain a significant number of listed threatened species and ecological communities.

Some of the causes of the increase in the rates of land clearing in Queensland may include strong beef prices and export demand, and high returns to beef producers in recent years, which may have given rise to a demand for additional grazing areas for beef production.\(^\text{102}\) The introduction of the Vegetation Management Act 1999 (Qld) may also have played a part as it appears to have prompted a panic reaction amongst farmers in the lead up to the Act’s commencement in September 2000. This resulted in the rates of land clearing rising from an average of around 425,000 ha/year between 1997 and

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\(^{101}\) Ibid. At the time of writing, no data was available on the rates of land clearing in Queensland between July 2003 and July 2005.

1999 to 758,000 ha/year in 1999–2000.\textsuperscript{103} After the *Vegetation Management Act* commenced, clearing rates fell by approximately 50 per cent.\textsuperscript{104} The increase witnessed between 2000 and 2003 may be partly attributable to farmers merely returning to their pre-2000 clearing practices after adapting to the changes in the state laws and realising the new restrictions were not as tight as they first thought. Yet, irrespective of the cause, it is clear that the EAA regime has not triggered a decline in land clearing in Queensland.\textsuperscript{105}

There is also evidence that environmentally important areas have continued to be cleared in Victoria.\textsuperscript{106} Further, it appears that there has not been a substantial decline in the rates of land clearing in New South Wales since the EAA regime commenced and that clearing has continued in sensitive and threatened environments.\textsuperscript{107}

Another indicator that the activities that are threatening the matters protected under Part 3 have not substantially declined since the EAA regime commenced is the number of primary fish stocks or species classified as overfished in Commonwealth-managed fisheries. In 1999, seven stocks were classified as overfished in these fisheries.\textsuperscript{108} By 2004, this number had increased to 17.\textsuperscript{109} Although some of this increase is due to improved data availability, it suggests that the commercial fishing sector is still placing considerable pressure on the Commonwealth marine environment.

Similar trends have also been evident in relation to threatened species and ecological communities. The lists of threatened species and ecological communities have continued to expand since the EAA regime commenced. Between July 2000 and the end of June 2005, approximately 133 species were


\textsuperscript{104} Ibid.

\textsuperscript{105} Recent amendments to Queensland’s environment laws could potentially lead to a notable decrease in land clearing over the next five years. Time will tell whether this potential is realised.

\textsuperscript{106} Macintosh and Wilkinson, above n 65; and Department, *Productivity Commission Inquiry into the Impacts of Native Vegetation and Biodiversity Regulations – Submission by the Department of the Environment and Heritage* (2003).


\textsuperscript{109} Ibid.
added to the list of threatened species that is maintained under the EPBC Act.\textsuperscript{110} This brought the total to 1682. Similarly, ten more ecological communities were listed as threatened under the EPBC Act over that period, bringing the total at 1 July 2005 to 32. Although these figures are large, the number of species and ecological communities that are currently listed as threatened under the EPBC Act is only a small proportion of the total number that are likely to meet the listing criteria.\textsuperscript{111}

Comparable trends have been witnessed in relation to the lists of threatened species and ecological communities that are maintained by the states and territories. For example, in New South Wales, between December 2000 and December 2002, 94 additional terrestrial species were listed as either vulnerable or endangered and the number of listed threatened ecological communities rose from 28 to 60.\textsuperscript{112}

A significant proportion of the increase in number of listed threatened species and ecological communities is attributable to improvements in knowledge and assessment processes. Part of the decline in biodiversity is also likely to be attributable to natural factors. However, it is also a reflection of the impacts of human activities that endanger the long-term survival of Australia’s biodiversity.

Overall, there is insufficient information upon which to draw definitive conclusions on whether there has been a significant decline in the total number of activities that are threatening the matters protected under Part 3. However, there is ample evidence that a large number of actions have been carried out that have had a significant detrimental affect on the condition of these matters, particularly in relation to land clearing, water use and commercial fishing. Further, when the statistics on the administration of the EAA provisions are considered, it appears highly unlikely that the regime has been responsible for any significant improvements in environmental outcomes.\textsuperscript{113}

\textsuperscript{110} Macintosh and Wilkinson, above n 65.
\textsuperscript{111} Ibid.
\textsuperscript{112} Maganov et al, above n 107.
\textsuperscript{113} In 2001, Sophie Chapple published research on how the EAA regime performed in its first year of operation and concluded that the EPBC Act was, ‘proving to be a dramatic improvement on previous Federal environmental legislation in many ways … (although) effective implementation and enforcement of the legislation will be crucial if the Act’s significant potential is to be realized’: Sophie Chapple, ‘The EPBC Act: One Year Later’ (2001) 18 Environmental and Planning Law Journal 523. While agreeing that effective implementation and enforcement are necessary to realise the EPBC Act’s potential, the authors believe there was insufficient evidence to support the conclusion that the Act was ‘proving to be a dramatic improvement’ on previous federal laws. Given the magnitude of the current threats to Australia’s natural and cultural heritage and the amount of money spent on the EAA regime, the authors believe the regime’s achievements have largely been insignificant. The structure of the EAA regime may be an improvement on past legislation, but these improvements have not yet been converted into significant environmental outcomes.
IV WHY HAS IT FAILED?

As the above discussion demonstrates, the EPBC Act’s EAA regime has done very little to improve environmental outcomes. There are a number of reasons for this failure. They include the following.

A Lack of Administrative Infrastructure

The Federal Government lacks the infrastructure to properly administer the EAA process in the states and territories.114 The Department, which is responsible for the administration of the Act, is based in Canberra. The majority of its staff and resources are located in the Australian Capital Territory, particularly those involved in the administration of the EAA regime.115 As a result, there are few Departmental officers who are permanently located in relevant areas in the states and territories to monitor compliance, gather information on local conditions and areas of environmental significance, disseminate information, liaise with local communities and initiate enforcement actions where necessary. As a result, it is extremely difficult for the Commonwealth to effectively administer and enforce the EAA requirements.

B Statutory Uncertainty

The EAA provisions contain a number of areas of statutory uncertainty that impede enforcement and compliance.116 In particular, the regime hinges on the inherently ambiguous question of whether an action is ‘likely to have a significant impact’ on a matter protected under Part 3.

Broad statutory requirements are not necessarily fatal to a regulatory regime. The Trade Practices Act 1974 (Cth), for example, contains many vague statutory obligations that have been given meaning by the Courts and enforced reasonably effectively by the Australian Competition and Consumers Commission (‘ACCC’).117 The extent to which statutory uncertainty impedes the effective implementation of a regulatory regime is dependent on the nature of the uncertainty and the regime in question.

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114 Scanlon and Dyson, above n 13; and Macintosh and Wilkinson, above n 65.
115 At 30 June 2004, the Department employed approximately 1340 staff, 78 per cent of whom were located in the Australian Capital Territory: Department, AR (2004), above n 12, 410.
A combination of factors makes the uncertainty associated with the EAA provisions a significant impediment to their effective administration and enforcement. Of particular importance is the fact that the operation of many of the EAA provisions depends on the availability of sufficient information — on both specific aspects of the environment and the operation of relevant ecosystems — to assess the likely impacts of an action. It is often the case that the requisite degree of knowledge does not exist. For example, it is often extremely difficult to even identify or locate a threatened species or ecological community, let alone conclude with any degree of certainty whether a given action is likely to have a significant impact on it.\textsuperscript{118} The fact that the actions that are the target of the EAA provisions are dispersed over an extremely wide geographic area makes it hard for the Department to appropriately monitor compliance and gather the information that is necessary to overcome the statutory and scientific uncertainty that is inherent in the regime.

Magnifying these problems is the fact that the Federal Government lacks an administrative presence in the states and territories. In addition, compared to other federal regulatory regimes, such as the Trade Practices Act, relatively few resources are made available for the implementation of the EAA regime.\textsuperscript{119} These resource limitations and the political costs associated with the abrogation of property rights in primary industries may diminish the Government’s willingness to undertake enforcement proceedings where there is a risk they will not be successful. For these reasons, it is not merely the statutory uncertainty that blunts the effectiveness of the EAA regime, but rather the combination of the uncertainty with other scientific, political and resource issues.

C Cumulative Impacts

The EAA regime focuses solely on individual actions that meet the significant impact threshold. As a result, it lacks the framework to enable the Minister to appropriately regulate and manage the cumulative impact of actions that adversely affect the condition of the matters that are supposed to be protected. The strategic assessment process could partly address this issue, although the available anecdotal evidence suggests this process is being used sparingly and with limited success.

D Exemptions

\textsuperscript{118} For a vivid illustration of this problem, see Tasmanian Conservation Trust v Minister for Environment and Heritage [2004] FCA 883.

\textsuperscript{119} To provide some perspective, the ACCC, which is responsible for the implementation of the Trade Practices Act, has an annual budget of around AUD 75 million and approximately 450 full-time staff: ACCC, Annual Report 2003-04 (2004). By comparison, the annual cost of administering the EAA provisions is estimated to be between AUD 15 million and AUD 30 million (see, above n 12).
There are a number of exemptions from the EAA provisions. These ensure that many environmentally damaging activities do not fall within the scope of the Act. The most well-known of these is the forestry exemption, which provides that actions that are taken in accordance with a Regional Forestry Agreement are not required to comply with the EAA provisions.\textsuperscript{120} Other important exemptions include those relating to existing uses, national interest, bilateral agreements and strategic assessments.\textsuperscript{121}

E Listing of Threatened Species, Ecological Communities and Natural Heritage Places

The Minister has refused to include many threatened species and ecological communities on the lists that are maintained under the Act.\textsuperscript{122} Similarly, the Minister has only included a very small number of places on the National Heritage List, the majority of which are high profile places that are already adequately protected under state laws.\textsuperscript{123} The reluctance to list species, ecological communities and places of heritage significance on the various lists under the Act has greatly reduced the reach of the EAA provisions and their ability to assist in the conservation of biodiversity and heritage.

F Lack of Enforcement

As discussed above, there has been a marked lack of political will to prosecute people who fail to comply with the EAA requirements. This has greatly reduced the incentive to comply with these provisions and undermined the effectiveness of the EAA regime.

There are a number of possible reasons why the Government has been reluctant to prosecute people who fail to comply with the EAA provisions. One of the more obvious reasons is that enforcement proceedings could have significant political costs, particularly in rural electorates.\textsuperscript{124}

Around the time \textit{EPBC Act} commenced, farm lobby groups around the country began a campaign to provide greater protection for farmers’ property rights. Broadly, this campaign has sought to wind back federal, state and

\textsuperscript{120} Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 38.
\textsuperscript{121} Environment Protection and Biodiversity Conservation Act 1999 (Cth) ss 43A, 43B, 158, 29 and 33. See also Macintosh (2004), above n 8.
\textsuperscript{122} Macintosh (2004), above n 8; and Macintosh and Wilkinson, above n 65.
\textsuperscript{123} Macintosh and Wilkinson, above n 65.
territory environmental laws and ensure farmers are compensated for any restrictions that are placed on their ability to develop ‘their’ land and water resources.\textsuperscript{125} The Federal Government has generally been supportive of this campaign and it would no doubt want to avoid aggravating its rural constituency by taking enforcement proceedings against farmers who violate the very laws the farm lobby groups are seeking to remove.\textsuperscript{126}

Other factors that may have contributed to the Government’s failure to enforce the EAA requirements include the difficulty in proving that a person has breached the ‘likely to have a significant impact test’, a lack of resources, the exorbitant costs associated with undertaking successful enforcement proceedings, and the lack of appropriate on-ground infrastructure to gather evidence and monitor compliance. In addition, the Government’s willingness to turn a blind eye to contraventions of the EAA requirements may be due to the realisation that it may be forced to compensate property owners whose ability to use their land and water resources for commercial purposes is restricted by the operation of the Act.

The \textit{Australian Constitution} provides the Commonwealth with the power to make laws with respect to ‘the acquisition of property on just terms’.\textsuperscript{127} In recent years, the High Court has broadened the scope of this ‘constitutional guarantee’ and a number of members of the current High Court have indicated a willingness to extend it further.\textsuperscript{128} There is now uncertainty associated with the question of when laws that regulate the use of land and water resources will bring about an ‘acquisition of property’ for these purposes. At the very least, it is arguable that the \textit{EPBC Act} will affect an acquisition of property if it prevents a property owner from using their property for any commercial purpose. For example, if the Act prevents a farmer from clearing native vegetation on a parcel of land to enable it to be used for agricultural purposes, it is arguable the farmer’s property has been effectively acquired and that the Commonwealth must provide compensation.\textsuperscript{129}

\textsuperscript{125} NFF (2002), above n 11; Productivity Commission (2004), above n 11; and Andrew Macintosh and Richard Denniss, \textit{Property Rights and the Environment: Should farmers have a right to compensation?}, Discussion Paper No 74 (The Australia Institute, November 2004).


\textsuperscript{127} \textit{Australian Constitution} s 51(xxxi).


\textsuperscript{129} Farmers are well aware of the ‘regulatory takings’ issue, having canvassed it when state land clearing laws have been tightened: ABC Radio, ‘Land clearing ban prompts calls for compensation’, \textit{AM}, 23 December 1999 <www.abc.net.au/am/stories/s75157.htm> at 22
To address this issue, the *EPBC Act* provides that where its operation results in the acquisition of property, the Commonwealth must pay the affected property holders a ‘reasonable amount of compensation’.\(^{130}\) Hence, the Government’s reluctance to enforce the Act’s requirements may stem from an aversion to compensate affected property holders.

### V Evaluating the EAA Regime as an Environmental Policy Instrument

Numerous criteria can be used to measure the usefulness and success of an environmental policy instrument.\(^ {131}\) Arguably the most important of these are environmental effectiveness (that is, dependability in achieving the desired objectives), cost-effectiveness (that is, the objectives are achieved at least cost), and administrative feasibility and cost (that is, government administration is cost-effective and the instruments requirements are easily understood and applied).

When measured against these three criteria, it is difficult to describe the EAA regime as anything other than a failure. As discussed, the regime has done very little to improve environmental outcomes and, due to flaws in its design and the political, legal and administrative realities, it is unlikely this situation will improve dramatically in the foreseeable future. Importantly, even if the Federal Government wanted to utilise the Act to achieve widespread change in environmental practices, the lack of federal administrative infrastructure, its structural weaknesses and potential constitutional restrictions could severely impede its ability to do so. Hence, the EAA regime has not been, and is unlikely to be, an effective instrument to achieve its stated objectives.

Supporters may argue that the EAA process has achieved some modest outcomes and that, in time, its environmental accomplishments will grow.\(^ {132}\) Even if this argument is accepted, the regime is proving to be an extremely inefficient means of realising its environmental objectives. The best available data suggests that somewhere between AUD 55 million and AUD 150 million was spent on the EAA regime in its first five years and that the current annual

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\(^{130}\) Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 519.


\(^{132}\) McGrath (2005), above n 13.
cost of administering the regime is between AUD 15 million and AUD 30 million.\textsuperscript{133} This is a large amount of money for such humble achievements. To the costs of administration must be added the costs incurred by developers in complying with the regime. It is beyond the scope of this article to attempt to estimate the magnitude of these costs. However, there is little doubt they are substantial.

The situation with respect to administrative feasibility and cost is also damning. Young \textit{et al} (1996) suggest there are four parts to this criterion:

\begin{itemize}
  \item low administrative cost (that is, enforcement is cost-effective and self-enforcement is promoted);
  \item low information cost (that is, the costs associated with monitoring and gathering information are kept to a minimum);
  \item communicative simplicity (that is, the requirements are easily understood); and
  \item transparency (that is, the decision-making process is understood by all relevant parties).\textsuperscript{134}
\end{itemize}

The administrative costs associated with EAA process are moderately low when regard is had to the magnitude of the regimes objectives and the costs associated with other federal regulatory regimes. Yet, until the regime generates significant tangible results, it will remain an inefficient means of achieving the desired environmental objectives.

The reliance of the process on the ‘likely to have a significant impact’ test also ensures it has very high information costs. For the regime to be administered and enforced effectively, the Government would require a continual physical presence in the states and territories and a comprehensive database on the condition of relevant aspects of the environment. The creation of a nationwide federal environmental infrastructure would be extremely costly and would result in the duplication of existing state and territory environmental bureaucracies. The alternative is for the state and territory environment agencies to perform the monitoring and enforcement functions on behalf of the Commonwealth. This has been suggested by the ANAO and attempted by the Department in a number of instances.\textsuperscript{135} However, it appears the relevant state and territory agencies are reluctant to take on additional Commonwealth responsibilities when they are already struggling to perform their existing roles.

With regard to the development of an environmental database, over the past decade, Australian governments have invested large amounts in the expansion of our knowledge of the environment. The National Land and Water Resources

\textsuperscript{133} See references cited at above n 12.
\textsuperscript{134} Young \textit{et al} (1996), above n 131.
\textsuperscript{135} ANAO (2003), above n 80.
Audit is one example. The difficulty is that the information that is gathered in relation to these projects is often not specific enough to assist in the administration of the EAA regime. Further, it is unclear whether there is sufficient coordination between governments and government agencies to ensure the Minister and the Department have appropriate access to all available information that is relevant to the operation of the EAA provisions.

The EAA process is also complex and contains a number of areas of uncertainty. The combination of statutory and scientific uncertainty makes it hard for the Minister, developers, and interested members of the public to determine when the regime’s requirements apply. This increases compliance costs (for example, by requiring developers to seek professional advice to determine whether the EAA provisions apply), administrative costs, and social conflict.

The only one of these elements where the EAA regime performs reasonably is transparency. In most instances, the EAA provisions require members of the public to have the opportunity to submit comments on a proposed action and for the Minister to disclose the reasons for referral and approval decisions. However, transparency alone cannot salvage an otherwise ineffective and inefficient policy instrument.

Another possibility is that the Federal Government’s intention in introducing the *EPBC Act* and establishing the EAA regime was to provide an incentive for developers and producers to engage in voluntary environmental programs. If this were the case, the EAA regime would serve merely as a potential ‘stick’, which would be used to coax people engaged (or proposing to engage) in environmentally damaging activities to enter into voluntary agreements or to otherwise improve their environmental performance. The difficulty with this argument is that it is widely acknowledged that in order for this strategy to work,

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137 Where there is uncertainty associated with the operation of environment laws, it can often lead to environment groups and people concerned with the conservation of the environment commencing legal proceedings in an attempt to enforce the public rights created under the laws or feeling aggrieved when the laws are not applied in the manner they desire. This appears to have been the case in relation to the EAA provisions. To date, the majority of legal actions concerning the EAA provisions have been commenced by environment groups or aggrieved individuals. See, eg, *Save the Ridge Inc v Commonwealth of Australia* [2005] FCA 17; *Minister for the Environment and Heritage v Queensland Conservation Council Inc* [2004] FCAFC 190; *Tasmanian Conservation Trust v Minister for Environment and Heritage* [2004] FCA 883; *Mees v Kemp* [2004] FCA 366; *Mees v Roads Corporation* [2003] FCA 306; *Humane Society International Inc v Minister for the Environment & Heritage* [2003] FCA 64; *Booth v Bosworth* [2001] FCA 1453; *Jones v State of Queensland* [2001] FCA 756; *Schneiders v State of Queensland* [2001] FCA 553. While these legal proceedings have some public benefits, they are extremely costly and can divert government resources away from other potentially advantageous activities.
the relevant developers and producers must believe there is a significant risk the ‘stick’ (in this case the EAA provisions) will be used if they fail to make the necessary changes voluntarily. In this case, the statistics and other publicly available information illustrate that the Commonwealth currently has no intention of forcing wide-spread compliance with the EAA regime. Further, as discussed, there are a number of structural, constitutional and administrative problems that greatly diminish the Government’s ability to enforce the provisions rigorously. Therefore, any potential incentive value that may have been associated with the EAA regime has been lost or greatly diminished (at least in the short-term).

VI REFORMING THE PROCESS

Section 522A of the EPBC Act requires an independent review to be undertaken on the operation of the Act and the extent to which it has achieved its objectives within 10 years of the Act’s commencement. The Act also requires the Minister to ensure a report is prepared every five years on whether additional environmental matters should be protected under Part 3. At the time of writing, the review of the matters protected under Part 3 had commenced and rumours were circulating that the Government intended to use the review, and its control of the Senate, to make broad changes to the legislation. The ineffectiveness and inefficiency of the EAA regime may lead some to jump to the conclusion that an additional layer of federal environmental legislation is unnecessary and that the resources that are currently devoted to the process should be redirected to voluntary beneficiary pays mechanisms. Yet, as the Natural Heritage Trust, Greenhouse Gas Abatement Program and National Action Plan for Salinity and Water Quality have vividly illustrated, voluntary environmental programs are not immune from inefficiency or ineffectiveness. Further, the fact that there are flaws in the process does not mean that it should be entirely discarded or that the Commonwealth does not have a valid role to

138 Alberini and Segerson (2002), above n 10; and Segerson and Miceli (1998), above n 10.
139 Environment Protection and Biodiversity Conservation Act 1999 (Cth) s 28A.
play in relation to the regulation of environmentally harmful activities. The record of the states and territories on environmental issues suggests the Commonwealth must have some powers to intervene to conserve important aspects of our natural and cultural heritage. The challenge is to ensure that these powers are not tied to the creation of an unwieldy bureaucracy that consumes resources without realising tangible environmental outcomes.

As a preliminary issue, it is necessary to emphasise that if the EAA regime is amended, the provisions concerning Commonwealth areas and Commonwealth agencies should be retained (although they could be improved).\(^{141}\) In a number of instances, state and territory environment and planning laws will not apply to certain Commonwealth agencies and Commonwealth areas.\(^ {142}\) To plug this gap, there is a need to maintain a statutory process to ensure environmentally harmful actions taken in Commonwealth areas and actions undertaken by Commonwealth agencies are subject to a Commonwealth environmental assessment and approval process.\(^ {143}\)

The current provisions concerning Commonwealth agencies and Commonwealth areas could be improved to reduce uncertainty, either by adopting a zoning approach or eliminating the ‘significant impact’ threshold requirement. A zoning approach would involve the use of a plan or map of relevant Commonwealth areas that specifies the activities that can be carried out in these areas. As with most state and territory planning laws, the zoning plan would indicate whether a particular type of activity was prohibited, prohibited without approval, or permitted and include provisions for the imposition of conditions on certain types of activities. The benefit of this approach is that it would shift the focus of the regulatory process from the nature and magnitude of the impacts to the characteristics of the action. This would reduce the cumulative impact problems, decrease uncertainty and align the Commonwealth EAA regime with equivalent state and territory environmental assessment processes. Another alternative is to simply eliminate the ‘significant impact’ test, so as to make all actions that are likely to have an impact on the environment subject to the EAA process. Although this would reduce uncertainty and ensure all relevant


\(^{143}\) The retention of these provisions will result in certain actions being subject to a Commonwealth and a state or territory assessment and approval processes. The accredited assessment process and assessment bilateral agreement provisions can be used to minimise unnecessary duplication in assessments. However, the Commonwealth should ensure it is required to approve these actions. This is justifiable on the basis that the Federal Government has an interest in protecting the environment in Commonwealth areas and in acting as a model environmental manager.
actions are subject to the regulatory process, it would arguably cast the net too wide, thereby wasting resources without necessarily improving environmental outcomes.

The provisions concerning Commonwealth agencies and Commonwealth areas could also be improved by eliminating duplication between Commonwealth assessment and approval processes. For example, actions that are approved under the Petroleum (Submerged Lands) Act 1967 (Cth), Fisheries Management Act 1991 (Cth) or Australian Radiation Protection and Nuclear Safety Act 1998 (Cth) should not also be subjected to the EAA process. There are already provisions that enable the Minister to declare actions to be exempt from the EAA provisions if they have been assessed and approved under another Commonwealth process. These exemptions should be mandatory in all instances, rather than being dependent on the exercise of a statutory discretion. If the other assessment and approval processes lack sufficient regard for environmental issues, they should be amended accordingly.

There are two major aspects of the EAA regime that are in need of reform:

- the processes for the listing of threatened species, threatened ecological communities, national heritage places and Commonwealth heritage places; and
- the provisions concerning the regulation of activities that are undertaken in the states and territories that could affect the matters of national environmental significance.

The major flaw in the processes for the listing of threatened species, threatened ecological communities and national and Commonwealth heritage places is that the responsibility for listing decisions rests with the Minister. This ensures that the listing processes are complicated by political factors. To partially solve this problem, responsibility for listing decisions should be transferred to an independent statutory body, whose sole focus should be on whether the species, ecological community or place meets the requisite listing criteria. Problems will remain, as the Government will no doubt be tempted to ensure the statutory body is staffed by people who are sympathetic to its political interests. However, it is likely to result in listing processes that have more integrity than those currently in existence.

With regard to the regulation of activities that are undertaken in the states and territories, the key issue is to determine how the Commonwealth can establish a regulatory system that is capable of realising environmental outcomes in a cost-effective manner.

Three possible options for reforming this aspect of the EAA regime are:

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144 Environment Protection and Biodiversity Conservation Act 1999 (Cth) pt 4, div 2.
• narrowing its scope and reducing uncertainty by adopting a zoning process that only applies to a limited number of areas;
• establishing a reactive process that is primarily dependent on a ‘call-in’ power; and
• adding a zoning process and call-in power to the existing regime.

A Zoning Process

As discussed above, a zoning approach would involve the use of a series of plans of relevant areas that specify whether particular activities are prohibited, prohibited without approval, or permitted in the designated areas or zones. These plans and associated referral and approval processes would replace the existing ‘significant impact’ provisions. To reduce unnecessary duplication and administration costs, the assessment provisions could be amended to ensure that actions are only assessed under the EAA regime if they have not been subject to another appropriate environmental assessment.145

Given geographic, political, legal and administrative realities, a Commonwealth environmental zoning scheme could only work effectively if it was confined to a relatively limited number of areas. These areas could include world heritage properties, national heritage places, Ramsar wetlands and their catchments, and sites containing a high concentration of listed threatened species or critical habitat of one or more listed threatened species or ecological communities.

The main advantage of a zoning structure is that it would reduce legal uncertainty by focusing regulatory attention on the nature of the action (rather than the nature and magnitude of the effects) and enable the Commonwealth to focus its attention on clearly identifiable areas. The reduction in legal uncertainty and concentration on specified areas could reduce administration and compliance costs, allowing environmental outcomes to be achieved in a more cost-effective manner. A zoning structure would also be consistent with existing state and territory environmental assessment processes. This would lower information costs and ensure greater comprehension of the details of the EAA process. In addition, Commonwealth zoning plans could potentially be linked with relevant state and territory planning schemes, which would further reduce compliance costs for developers.

Another advantage of a zoning structure is that it would reduce the Commonwealth’s ability to deflect responsibility for the protection of places of environmental significance. Under the existing EAA process, the

145 For example, the provisions concerning nuclear actions could be folded into the Australian Radiation Protection and Nuclear Safety Act 1998 (Cth), so as to create a more streamlined federal process for the approval of nuclear actions.
Commonwealth is able to hide behind claims that it is unclear whether the ‘significant impact’ test has been satisfied as an excuse for not stopping unsustainable and destructive actions. A zoning structure would reduce the scope for these excuses, thereby placing greater political pressure on the Commonwealth to intervene when actions are being taken that threaten the environmental integrity of the designated areas.

While a zoning structure has a number of advantages over the current ‘significant impact’ provisions, its greatest weakness lies in the difficulties associated with the selection of the areas that should be protected and the nature of the zoning plans that should be used in the designated areas. As the processes for the listing of threatened species, threatened ecological communities, critical habitat, and national heritage places has demonstrated, politicians are hesitant to include places on a list that has regulatory consequences if there is a risk of an electoral backlash. This can lead to the creation of regulatory lists that only contain things that are already protected or that are in no danger of being damaged by unsustainable activities. Similarly, the various management and recovery plans that have been prepared under the EPBC Act demonstrate that the Federal Government is a deft hand at preparing plans that give rise to few, if any, legally enforceable obligations. If the EAA regime was dependent on a zoning structure, its potential environmental benefits will prove illusory if the areas that are chosen for protection, and the plans that are developed for this purpose, are determined on the basis of short-term political priorities, rather than on legitimate social, scientific and economic grounds. The risks of the zoning process being unduly politicised could be reduced if responsibility for listing places and preparing zoning plans is assigned to an independent statutory body.

Another problem associated with the zoning approach is that its efficacy may be limited by a constitutional requirement to pay compensation where restrictions are imposed on landholders’ property rights under zoning plans. The question of ‘if and when’ federal land use regulations will trigger a requirement to pay compensation casts a shadow over the EAA provisions and all possible options for their reform. Whether the Australian Constitution is a major restriction on the Commonwealth’s role in environmental regulation still awaits resolution by the High Court.

B Call-In Power

Another alternative to the current EAA process is to replace the existing significant impact provisions that govern actions taken in the states and territories with a ‘call-in’ power.\footnote{As noted above, actions taken in the states and territories that could affect the environment in a Commonwealth area (including Commonwealth waters) should still be subject to a Commonwealth environment approval process.} The broad significant impact provisions
would be repealed and in their place, the Minister would be provided with a power to issue orders that would prohibit certain actions from being undertaken or require certain actions to be carried out in a certain ways on environmental grounds. The Minister’s powers would have to be crafted and exercised in such a way as to ensure there was the necessary nexus with a relevant constitutional head of power.\footnote{147} The exercise of the powers should also be subject to procedural restrictions to ensure the proponents of the relevant actions are afforded natural justice.\footnote{148}

This system would be similar to that which currently operates under the Australian and Torres Strait Islander Heritage Protection Act 1984 (Cth) (‘ATSITIP Act’). In that case, the Minister has the power to issue declarations for the protection of significant Aboriginal sites and objects where an application has been made by an Aboriginal or on behalf of an Aboriginal group.\footnote{149}

The primary advantages associated with a call-in power approach are its simplicity and low administration costs. Yet, it suffers from a number of flaws. It is arguable that formal assessment and approval processes (like the current EAA provisions) provide a degree of legitimacy to decision-making processes, which increase the likelihood that regulators will use their powers to improve environmental outcomes. In the absence of these procedural requirements, the Government may be reluctant to use the call-in power. The ATSITIP Act could be offered as proof of this, as it has been roundly criticised for failing to result in any noticeable improvements in the conservation of Indigenous heritage.\footnote{150} However, the history of federal environmental and heritage laws indicates the choice is not between an ineffective, informal protection process and an effective formal protection process. Rather, it has largely been between an ineffective, expensive process and a cheaper but still ineffective process. While the Federal Government lacks the political will to take the necessary steps to provide appropriate levels of protection for important aspects of the Australian environment, it is arguable that a cheaper, less formal structure could be a more efficient use of scarce resources.

\footnote{147}{This would include a statutory requirement to provide compensation on ‘just terms’ if property is acquired under the legislation.}

\footnote{148}{It may also be appropriate to provide the Minister with the power to force proponents to disclose relevant information to ensure the Minister is in a position to make informed decisions.}

\footnote{149}{An ‘Aboriginal’ is defined for these purposes as ‘a member of the Aboriginal race of Australia, and includes a descendant of the indigenous inhabitants of the Torres Strait Islands’: Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (Cth) s 3.}

\footnote{150}{Elizabeth Evatt, Review of the Aboriginal and Torres Strait Islander Heritage Protection Act 1984 (1996). Only 22 declarations have been issued since the Act commenced (many of which relate to the same place) and only one has been issued since the Howard Government came to power in 1996. See Commonwealth, Parliamentary Debates, Senate, 13137, 11 August 2003.}
Another argument against an ad hoc regime of this nature is that formal assessment and approval processes provide levers that can be used by interested members of the public and environment groups to prevent destructive developments and activities. While this argument has some merit, the contrary argument is that the periodic strategic use of litigation by members of the public does not constitute an efficient use of scarce public resources.

It is also arguable that a call-in power approach could give rise to excessive uncertainty, which could reduce investment and economic growth. The experience with the ATSIHP Act suggests this is unlikely. Further, the constitutional right to ‘just terms’ would provide a measure of protection for developers who suffer losses as a result of the operation of the regime. Additional safeguards could also be included to ensure people are compensated in appropriate circumstances for out-of-pocket expenses incurred before an order is granted.

C Combination of Significant Impact Test, Zoning Process and Call-In Power

Another possible option for reforming the EAA regime is to simply add a zoning process and call-in power to the existing significant impact provisions that apply in the states and territories. To some extent, the foundations for these additions already exist. For example, sections 25, 25A and 28AA of the EPBC Act provide the Minister with the power to make regulations to declare an activity to be an action to which a specific provision of Part 3 applies. This power resembles a call-in power, only it is subject to the procedural requirements (including disallowance process) in the Legislative Instruments Act 2003 (Cth). The provisions for the inclusion of habitat on the register of critical habitat and for the preparation of management and recovery plans also resemble the foundations of a zoning structure. It would not be a quantum leap for these existing provisions to be moulded into a form that contains the advantages of the envisaged zoning structure and call-in power.

The main difficulty with this option is that it would fail to address the problems caused by the uncertainty associated with the ‘significant impact’ provisions. Public and private resources could continue to be squandered on a costly process without there being any guarantee of improved environmental outcomes. The use of the zoning provisions could potentially reduce information and compliance costs for certain developers and interested members of the public. However, the Department, developers and others would have to continue to cope with the ‘significant impact’ test in areas that are not subject to a zoning plan.

151 The so-called ‘Flying-Fox Case’ is a good example of this (see Booth v Bosworth [2001] FCA 1453 and Chris McGrath, ‘The Flying-Fox Case’ (2001) 18 Environmental and Planning Law Journal 540).
VII CONCLUSION

After almost six years, it has become patently clear that the EAA process has not lived up to the sometimes grand expectations held for it. Most importantly, the EAA regime has failed to prevent the continuing degradation of Australia’s natural and cultural heritage. It is also highly unlikely that it has provided an effective incentive for developers and producers to engage in voluntary environmental programs. Hence, it is hard to avoid the conclusion that the EAA regime has wasted an enormous amount of public and private resources, without realising any significant environmental outcomes.

All regulatory systems suffer from some weaknesses. There is no perfect regulatory regime and no amount of regulation will solve all environmental problems, particularly those concerned with biodiversity and heritage conservation. However, the current EAA regime contains a number of flaws and it should be amended to ensure environmental outcomes are achieved in a more cost-effective manner. Most importantly:

- responsibility for listing decisions regarding threatened species, threatened ecological communities and national and Commonwealth heritage places should be transferred from the Minister to an independent statutory body; and
- the significant impact provisions that relate to activities carried out in the states and territories should be amended to ensure more effective Commonwealth involvement in environmental regulation.

Three possible options for improving the EAA regime that applies to the states and territories have been outlined in this article: replacing the significant impact provisions with a zoning process; replacing the significant impact provisions with a call-in power; and adding a zoning process and call-in power to the existing provisions. All three offer advantages over the existing regime, but also suffer from a number of weaknesses. It is hoped that the Commonwealth will use the current review process to consider these and other options for reform and, after an appropriate debate, amend the EAA regime so as to provide better protection for Australia’s natural and cultural heritage.