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No. 173 2000–01

Environment Protection and Biodiversity
Conservation Amendment (Wildlife Protection) Bill
2001

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I N F O R M A T I O N A N D R E S E A R C H S E R V I C E S

Bills Digest
No. 173 2000–01

Environment Protection and Biodiversity Conservation
Amendment (Wildlife Protection) Bill 2001

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26 June 2001

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Environment Protection and Biodiversity Conservation Amendment (Wildlife Protection) Bill 2001

Date Introduced: 24 May 2001

House: Senate

Portfolio: Environment and Heritage

Commencement: Sections 1-3 of the Act and Part 3 of Schedule 1 commence on Royal Assent. The remaining provisions commence on a day to be fixed by proclamation or failing that, six months after Royal Assent.

Purpose

To incorporate an amended version of the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* into *Environmental Protection and Biodiversity Conservation Act 1999*.

Background

The CITES Convention

The Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES) entered into international force on 1 July 1975. CITES established a world-wide system of controls on international trade in threatened wildlife and wildlife products by stipulating that government permits are required for such trade.

Species covered by CITES are categorised into three groups, contained in CITES Appendices I-III respectively.

Appendix I covers all species threatened with extinction which are, or may be, affected by trade in the species. Under CITES, trade in these species can only occur after the proper permits have been obtained, and these permits should only be authorised in exceptional circumstances. Permits are needed both to export and import specimens listed under Appendix I.

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Appendix II covers species not currently threatened with extinction but may become so unless trade is subject to strict regulation. An export permit is required to export Appendix II specimens.

Appendix III covers those species identified by contracting parties as 'being subject to regulation within its jurisdiction for the purpose of preventing or restricting exploitation, and as needing the cooperation of other parties in the control of trade.' Again, export permits are required.

Australian regulation of wildlife imports and exports

Australia ratified CITES in 1976. At that time, legislative implementation of CITES obligations was through regulations under the *Customs Act 1901* plus various Acts and ordinances relating to Australia's external territories. In 1982, the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* (the WPA) was passed.¹ The WPA consolidated CITES wildlife controls into a single piece of legislation. It was (and still is) structured around several schedules of species in which trade is prohibited or regulated. A permit system was introduced under the WPA to impose conditions appropriate to the status of the species being traded. It also provided for substantial fines plus forfeiture of goods and equipment, and five years' imprisonment for some offences.

In 1991 the Director of the Australian Parks and Wildlife Service commissioned John Ley to conduct a public review of the WPA.² The terms of reference of review included:

- to examine the efficiency and effectiveness of the existing arrangements for the administration of the Act and Regulations made under the Act, and
- assess the impact of the Act on commercial activity including international trade.

Probably the major weakness of the WPA highlighted by the Ley report was in the area of compliance and enforcement. Other issues of concern included an inequitable fee structure, complexity of the legislative provisions and some of the administrative procedures.

Substantial changes were made to the WPA through the *Wildlife Protection (Regulation of Exports and Imports) Amendment Act 1995*.³ In introducing the changes, the Government commented that they:⁴

... have largely arisen from recommendations of the Ley Report which reviewed the act, having particular regard to Australia's obligations under CITES. The proposed amendments will implement Appendix III of CITES, relating to species identified by a Party as under regulation to prevent or restrict exploitation, and needing the co-operation of others in the control of trade. They will also enable a more flexible approach to controlling private non-commercial trade in species identified under Appendix II of CITES, species identified as although not endangered, requiring trade regulation....The proposals include improved enforcement powers of inspectors

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appointed under the act by strengthening powers of seizure, improving powers of search of premises and conveyances, providing powers to conduct frisk searches of suspect persons, enabling seizure of specimens.

Other provisions included a new offence of cruelty to animals in the course of illegally importing or exporting live animals and the introduction of a national exotic bird registration scheme. The latter measure was intended to boost Australia's level of protection against imported disease potentially carried by exotic birds.

In 1996, the Senate referred the issue of commercial utilisation of Australian native wildlife to the Rural and Regional Affairs and Transport Committee. The terms of reference for this inquiry included:

- the potential impact which commercial utilisation of native wildlife might have on the Australian environment;
- the current and future economic viability of these commercial activities;
- and the adequacy of existing Federal Government regulations and controls to ensure biodiversity of any native species commercially utilised.

The Committee reported in June 1998. Key findings and recommendations included:

6.77 ...industry groups provided strong evidence that because commercial utilisation of wildlife had evolved in an *ad hoc* way, many statutory requirements were unnecessarily restrictive to their businesses. Three types of problems were encountered: inflexibility in statutory arrangements in the Federal *Wildlife Protection (Regulation of Exports and Imports) Act 1982* which prevented export of live animals and caused difficulties in the export of products; an overall excess of administrative procedures, compliance with which was costly and time-consuming; and inconsistencies between state arrangements, and between state and Federal arrangements leading to a call for a national approach to commercial utilisation of wildlife. The Committee is concerned that duplicated and onerous administrative procedures are unnecessarily hindering legitimate industries in Australia. **The Committee recommends that State and Federal Governments together review all administrative procedures relating to commercial utilisation of wildlife in Australia with a view to increasing their efficiency so as to ensure that there are no unnecessary hindrances to industry.**

7.49 TRAFFIC Oceania believes that enforcement of wildlife crime in Australia is 'at an all-time low' because the Australian Customs Service had reduced its activities in the area of investigation and other Federal or state agencies had not moved to fill the gap. TRAFFIC Oceania noted that the wildlife protection section of Environment Australia had almost no investigative capacity and was 'seriously understaffed'. According to TRAFFIC Oceania, 'little has been done to improve enforcement of the [*Wildlife Protection (Regulation of Exports and Imports) Act 1982*], and in fact enforcement has gone backwards'. While the activities of the ACS have been curtailed, resources provided to the Wildlife Protection Section of Environment

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Australia have not been increased and no attempt has been made to 'harmonise the disparate activities of the various state agencies'....7.73 **The Committee believes that these factors point strongly to the conclusion that the current prohibitionist policy does not work to protect wildlife from illegal activities, although the extent to which it does not work is difficult to ascertain. The Committee notes that the Federal Government is currently undertaking a review of all environmental legislation. The Committee recommends that the Government include in that review consideration of other policy options for wildlife protection.**

All the recommendations of the report were accepted, although some were accepted 'in principle'.⁵

In his February 1998 Consultation Paper, *Reform of Commonwealth Environment Legislation*, Senator Hill foreshadowed the Government's intention to incorporate the WPA, with some amendments, into what was to become the *Environmental Protection and Biodiversity Conservation Act 1999*. According to the consultation paper, this move was intended to:

- simply existing provisions;
- increase the emphasis on biodiversity and animal welfare issues;
- provide a clearer structure for accreditation of management plans prepared under State legislation, with a view to encouraging greater reliance on the provisions dealing with approved management plans rather than controlled specimen declarations;
- ensure appropriate criteria are applied before decisions are made in relation to trade in, or the use of, wildlife
- strengthen the link between environmental assessment provisions and decisions in relation to trade, or the use of wildlife; and
- strengthen the provisions creating an offence of possession of illegally imported CITES species.

How the Bill is structured

The key provisions of the Bill insert new sections into the *Environmental Protection and Biodiversity Conservation Act 1999* (EPBCA). Most of these are contained in a new *Part 13A - International movement of wildlife specimens*. There are three main categories of plants and animals covered by Part 13A: CITES specimens,⁶ regulated (Australian) native specimens and regulated live specimens. For each of these categories, there are requirements for importing and exporting as relevant, criteria for the issuing of permits, offence provisions and so forth. Other elements of Part 13A deal with technical concepts and definitions, special types of permits, anti-cruelty and welfare provisions, and evidential issues.

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The remainder of the Act mainly deals with enforcement issues, general definitional issues, transitional matters and makes some technical amendments to the EPBCA not directly related to wildlife matters.

Senate Amendments

The Bill was brought on to debate relatively quickly after its introduction to the Senate. Almost one hundred amendments were tabled by the Australian Democrats at the committee stage on June 19 and 20. Most of these were passed by the Senate. This Digest notes most of the more significant amendments made by the Senate.

Main Provisions

Schedule 1

Item 4 inserts new sections 232A and 232B. These sections create new offences of export or importing a cetacean, a part of a cetacean or a product derived from a cetacean.⁷ The penalty is up to ten years imprisonment or a fine up to 1000 penalty units,⁸ or both. However, no offence occurs if the action falls under the provisions of existing section 235. In particular, section 235 exemptions apply if the action is authorised under a permit issued by the Commonwealth Environment Minister (the Minister), taken in accordance with an EPBCA wildlife conservation plan or recovery plan or occurs as a result of an unavoidable accident.

Items 6 and 7 increase the gaol term for possessing or processing unlawfully imported cetaceans from a maximum of 2 years to a maximum of 5 years.

Item 10 inserts **new paragraphs 238(3)(d)-(e)** which will allow the Minister to issue a permit for the non-commercial export or import of a part of a cetacean where it is a personal item and will not be detrimental to the conservation of cetaceans. The Explanatory Memorandum to the Bill comments that 'it is intended that the regulations prescribing what is taken to be a personal item will be tightly constrained (for example, a dolphin tooth necklace that was bestowed on a person as part of a traditional ceremony). It is not intended that curios will be prescribed as personal items that can be imported.'⁹ This provision was amended in the Senate, mainly to ban whale products from being defined as personal items.

Item 11 inserts **new Part 13A - International movement of wildlife specimens.** This new Part contains the majority of the key amendments made by the Bill. Part 13A is divided into 6 Divisions.

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Division 1 - introductory matters and definitions

New section 303BA sets out the objects of Part 13A. These include 'to ensure that Australian complies with its obligations under CITES...[and]...to ensure that any commercial utilisation of Australian native wildlife is managed in an ecologically sustainable way'. This provision was amended in the Senate, mainly to add objects of ethical research conduct, humane treatment of animals and the wider application of the precautionary principle. The Senate added also **new section 303BAA**:

303BAA Certain Indigenous rights not affected

To avoid doubt, nothing in this Part affects the existence and operation of the inherent traditional rights of indigenous peoples with respect to the ownership of native plants and knowledge of their uses.

Division 2 - CITES species

New section 303CA requires that the Minister must establish a list in the Gazette of CITES species for the purposes of the Act. The list is to include all species that are listed in CITES Appendices I-III but no others. The list replaces the three separate CITES lists currently found in Schedules 1, 2 and 2A of the WPA. The list must also be placed on the Internet.

New section 303CB allows the Minister to declare that a particular species or specimen will be regulated more strictly than required by its corresponding CITES classification. This implements Article XIV of CITES which allows Parties to adopt stricter national measures to restrict or prohibit the trade, taking, possession, or transport of any wildlife species. The Minister's declaration will be disallowable by either House of Parliament (note that this last provision was deleted by the Senate). Any new section 303CB declarations must be made available on the Internet.

New section 303CC creates an offence, subject to certain exceptions, of exporting a CITES listed specimen unless it is in accordance with an export permit issued under new sections 303CG, 303GB or 303GC. The exceptions include

- exporting as part of a registered exchange of scientific specimens between scientific organisations. Note that the Senate amended this provision to require exchanges to be non-commercial
- where the export is an export that, under the regulations, is taken to be an export of a personal or household effect. Note that the Senate amended this provision to the effect that bear or cat products, or animal trophies cannot be taken to a personal or household effect
- if the Minister is satisfied that the specimen was obtained before the provisions of CITES applied to the specimen.

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The exceptions in the Government Bill implement the exemptions to CITES regulation as set out in CITES Article VII. The penalty for breaching **new section 303CC** is up to ten years imprisonment or a fine up to 1000 penalty units, or both.

New section 303CD creates an offence, subject to certain exceptions, of importing a CITES listed specimen unless in accordance with an export permit issued under new sections 303CG, 303GB or 303GC. The exceptions mentioned above in new 303CC are mirrored for new section 303CD. New section 303CD also allows for the importation of dead CITES Appendix II specimens for non-commercial purposes in a personal luggage, providing permission has been granted from the CITES authority country of export. The Explanatory Memorandum comments that 'the Government will [regulate to] ensure this exemption does not operate to allow, for example, the import of leopard or lion skins, trophies or other Appendix II specimens for which the Government has specific concerns'.¹⁰

New sections 303CG-CH set out the circumstances in which the Minister may issue an import or export permit for CITES specimens. Key provisions such as the obtaining of the specimen in compliance with State and Territory law and requiring that the Minister be satisfied that the actions specified in the permit will not be detrimental to the survival of the relevant species are carried over from the WPA. However extra requirements such as that it will not be detrimental to the recovery in nature of the species, or to any relevant ecosystem have been added: **new subparagraphs 303CG(3)(a)(ii)-(iii)**. Senate amendments effectively prevent an import permit being issued by the Minister under new section 303CG for cat and bear products or trophies.

New section 303CN provides that the Minister may have regard to a relevant resolution of the Conference of the Parties under Article XI of CITES in making a decision under Part 13A.

New section 303CK provides that the Minister must establish a register that contains 'prescribed particulars' of applications for CITES export and import permits under clause 303CE and prescribed particulars of decisions by the Minister under new section 303CG. The register must be made available on the Internet.

Division 3 - export of regulated native specimens

New sections 303DA-DC deal with regulated native specimens. These are specimens that are, or derived from, native animals or plants, and are not on the section 303DB exemption list. The exemption list is to initially be the same as the equivalent list currently existing under the WPA. The list can be amended once the Bill is in force, but there are various restrictions and consultation requirements. Senate amendments tighten restrictions applying to some migratory birds and also require the Minister to take into account recovery plans and wildlife conservation plans in amending the list. Consultation requirements for non-government organisations and individuals are also very much expanded by Senate amendments. Any amendment of the list, other than to correct technical inaccuracies, is disallowable by either House of Parliament.

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New section 303DD creates an offence, subject to certain exceptions, of exporting a regulated native specimen unless in accordance with an export permit issued under new sections 303CG, 303DG, 303GB or 303GC. The exceptions include

- the export is in accordance with an accredited wildlife trade management plan under new section 303FP, providing the specimen is not an eligible listed threatened species, is not a CITES specimen and is not a live native mammal, reptile, amphibian or bird¹¹
- registered exchanges of scientific specimens between scientific organisations. Note that the Senate amended this provision to require exchanges to be non-commercial.

The penalty for breaching **new section 303DD** is up to ten years imprisonment or a fine up to 1000 penalty units, or both.

New section 303DG sets out the circumstance in which the Minister may issue a regulative native specimen export permit. As for other Part 13A permits, the Minister must be satisfied that it not be detrimental to the survival of the taxon to which the species belongs or to any relevant ecosystem. Senate amendments impose a tougher requirement: the Minister must be satisfied that a permit would not be detrimental to the species' 'conservation status' rather just its survival. The Minister cannot issue a permit authorising the export of a live native mammal, live native reptile, live native amphibian or live native bird unless satisfied that the export is an eligible non-commercial purpose. Senate amendments expand this restriction to live terrestrial invertebrates and live freshwater fish as prescribed by regulations. The Bill also provides for special requirements for eligible listed threatened species.

New section 303DJ provides that the Minister must establish a register similar to that described under new section 303CK above.

Division 4 - import of regulated live specimens.

Regulated live specimens are live animals or plants not in Part 1 of the **new section 303EB** 'list of specimens suitable for live import'. The new section 303EB list is divided into two parts:

- Part 1 is to be a list of unregulated specimens, and
- Part 2 is to be a list of allowable regulated specimens.

The combined Part 1 and 2 list is to initially be made up of the equivalent lists currently in operation under the WPA. The list can be amended once the Bill is in force, but there are various restrictions and consultation requirements. Any amendment of the list, other than to correct technical inaccuracies, is disallowable by either House of Parliament. Before the Minister can amend the list, an environmental assessment must be done. In terms of process and content, an assessment must, amongst other things, provide for:

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- the publication of the draft terms of reference for public comment for a period of at least 10 business days
- the publication of the draft assessment report for public comment for a period of at least 20 business days, and
- the finalisation of the report must take into account the comments (if any) received after publication of the draft report.

New section 303EJ allows the Minister a five year period to 'review' his or her decision on amending or refusing to amend the list of specimens suitable for live import without commissioning a new environment assessment. This situation would seem to apply even if there was a material change of circumstances in the time since the original Ministerial decision was made.

New section 303EK creates an offence of importing a regulated live specimen unless in accordance with the appropriate permit. The penalty for breaching **new section 303EK** is up to ten years imprisonment or a fine up to 1000 penalty units, or both.

New section 303EN sets out the circumstance in which the Minister may issue a permit for a regulative live specimen that comes under the Part 2 **new section 303EB** list. The key new requirement over that currently in the WPA is that the Minister must be satisfied the import would not be likely to threaten biodiversity in the Australian jurisdiction. The Bill's Explanatory Memorandum comments that 'this is a major advance that will boost the capacity of the Federal Government to protect Australia's unique environment from potentially invasive species'.¹² The Senate has added a requirement that the Minister be satisfied that the proposed import would not be detrimental to the conservation status of a species or ecological community.

Other **new section 303EN** requirements include that welfare conditions and any other restrictions or conditions noted for that species on the Part 2 list under new section 303EB have been, or are likely to be complied with.

New section 303EQ provides that the Minister must establish a register that contains 'prescribed particulars' of applications for import permits under new section 303EL and prescribed particulars of decisions by the Minister under new section 303EN. The register must be made available on the Internet.

New sections 303ER-EW cover the marking of regulated live specimens for the purpose of identification.

New section 303ES defines what specimens may be marked subject to **section 303EU**.

New section 303EU provides that the Secretary may make a determination in writing about the marking of specified kinds of specimens for the purposes of identification, which specimens are to be marked, how and when it is to be done etc. It also provides that in the case of a live animal, a determination must not require marking that involves undue

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pain or distress to, or risk of death of, the animal and that in the case of a live plant, a determination must not require marking that involves undue risk of death of the plant. The Secretary's determinations are disallowable by either House of Parliament.

New section 303EV creates an offence where:

- an owner fails to comply with a determination made under new section 303EU, or
- a person engages in conduct that causes the removal of the mark, or interferes with the mark or renders the mark unusable, except where such conduct is in accordance with a determination under new section 303EU.

Any new section 303EV offence is punishable by a fine of up to 120 penalty units.

Division 5 - Concepts relating to permit criteria

New section 303FA provides that an export of a specimen can be counted as an 'eligible non-commercial purpose export' only if the purpose of the export is

- research in accordance with new section 303FC. Note that Senate amendments remove research on the maintenance and / or improvement of human health from the categories of eligible new section 303FC research. Another Senate amendment reduces the allowable commercial component of any research in order for to be counted as having an eligible non-commercial purpose. This reduction in the allowable commercial element is repeated for new sections 303FD-FI
- education in accordance with new section 303FD
- an exhibition in accordance with new section 303FE. Note that Senate amendments incorporate a more restrictive definition of exhibition
- conservation breeding or propagation in accordance with new section 303FF
- for household pets in accordance with new section 303FG
- for personal items in accordance with new section 303FH
- a travelling exhibition in accordance with new section 303FI.

New section 303FB provides that an import of a specimen can only counted as an 'eligible non-commercial purpose import' if the import was done for same purposes outlined in **section 303FA** above.

New section 303FF, which relates to export or import for conservation breeding or propagation makes a change on the current WPA provisions in relating to non-commercial activities of zoos. The change is that zoos will no longer be required to be approved zoological organisations in order to export and import specimens for exhibition, conservation breeding or propagation. The Explanatory Memorandum comments that the

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change incorporates ' a more appropriate focus on the purpose of export or import and the conservation program itself. However, it is a fundamental requirement that, for both categories (exhibition and conservation breeding), the export or import must not be primarily for commercial purposes. Accordingly, a permit may not be granted for a transaction that is motivated by commercial interest rather than the legitimate objectives of exhibition or conservation breeding.'¹³

New section 303FJ provides that an export of a specimen can counted as an 'eligible commercial purpose export' only if the purpose of the export is an

- approved captive breeding program in accordance with new section 303FK
- approved artificial propagation program in accordance with new section 303FL
- approved aquaculture program in accordance with new section 303FM
- approved wildlife trade operation in accordance with new section 303FN, and
- approved wildlife trade management plan in accordance with new section 303FO.

New section 303FN deals with approved wildlife trade operations. It effectively replaces the controlled specimen provisions in the WPA. It provides that a specimen is an export from an approved wildlife trade operation if the specimen is, or is derived from, a specimen that was taken in accordance with an operation that has been declared by the Minister to be an approved wildlife trade operation.

New subsection 303FN(3) provides that the Minister may only make such a declaration if he or she is satisfied that the operation is consistent with the objects of Part 13A, is not detrimental to the survival or conservation status of a taxon to which the operation relates, and meets any other conditions specified in the regulations. If the operation involves the taking of live specimens that belong to a taxon specified in regulations, the Minister must also be satisfied that the operation is likely to comply with the conditions that, under the regulations, are applicable to the welfare of the specimens. The Minister must 'have regard to' the significance of the impact on an ecosystem and the effectiveness of the management operations for the operation, including monitoring procedures. The Minister may have regard to relevant State and Territory legislation applying to the species, including its effectiveness. Senate amendments require the Minister to also have regard to the effectiveness of legislation in the receiving country relating to welfare, protection, or conservation of the specimens to which the operation relates.

Note that a wildlife trade operation must involve the taking of specimens and fall within one of the following categories

- a market-testing operation as defined under the regulations
- a small-scale operation as defined under the regulations

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- a developmental operation as defined under the regulations
- a commercial fishery as defined under the regulations
- a provisional operation as defined under the regulations, and
- another kind of operation specified in the regulations.

New section 303FO provides that the Minister may, by instrument published in the *Gazette* declare an operation to be an approved wildlife trade management plan for the purposes of this section. The approved wildlife trade management plan provisions effectively replace the WPA management program provisions.

Subsection 303FO(3) provides that the Minister must not make a declaration unless satisfied that:

- the plan is consistent with the objects of Part 13A; and
- there has been an assessment of the environmental impact of the activities;¹⁴ and
- the plan includes management controls directed towards ensuring that the impacts of the activities covered by the plan, on the taxon to which the plan relates or on any taxa that may be affected by the activities, or on any relevant ecosystem are ecologically sustainable; and
- the activities covered by the plan will not be detrimental to the survival or conservation status of the taxon to which the plan relates, or to any relevant ecosystem; and
- the plan includes measures to mitigate and/or minimise the environmental impact of the activities covered by the plan, and includes measures to monitor that impact and the ability to respond to changes in that impact; and
- if the plan involves the taking of live specimens that belong to a taxon specified in the regulations, the Minister must also be satisfied that the operation is likely to comply with the conditions that, under the regulations, are applicable to the welfare of the specimens; and
- meets any other conditions specified in the regulations.

The Minister must also have regard to the existence and effectiveness of any State or Territory legislation that relates to the protection, conservation or management of the specimens to which the operation relates.

New section 303FP deals with accredited approved wildlife trade management plans. Specimens taken in accordance with an accredited wildlife trade management plan may be

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exported without an export permit under this Part (referred to in new subsection 303DD(3)).

Subsection 303FP(3) provides that the Minister may only declare a plan an accredited wildlife trade management plan if he or she is satisfied that

- The plan is in force under a law of the Commonwealth or of a State or Territory; and
- meets the conditions for an approved wildlife trade management plan under new subsection 303FO(3); and
- imposes limits in relation to the taking of specimens; and
- includes compliance and enforcement measures that are likely to be effective in preventing the trade or export of specimens taken in breach of the plan; and
- provides for monitoring of the taking and the export of specimens under the plan; and
- provides for statistical reports about specimens taken under the plan to be given to the Minister on a regular basis. These reports are to be publicly available on the Internet unless the Minister decides this could substantially prejudice a person's commercial interests. Note that this commerciality exemption has been deleted by Senate amendments; and
- meets any other conditions specified in the regulations.

Senate amendments require that, before making a declaration under new section 303FP, the Minister must also be satisfied that the implementation of the plan would be 'beneficial to the conservation of the taxon to which the plan relates'. The Senate has also inserted a provision that such declarations are disallowable by either House of Parliament.

New section 303FQ requires the Minister to consult a relevant agency of each affected State and self-governing Territory before making a new section 303FO or FP declaration. The Explanatory Memorandum that comments that 'affected' jurisdictions may include more than just those actually covered by the trade management plan .

New section 303FR requires the Minister must seek public comment before making a new section 303FN, FO or FP declaration. The Minister must publish an Internet notice setting out the proposal and providing sufficient information to enable persons and organisations to consider adequately the merits of the proposal and invite comments for a period of no less than 20 business days. Senate amendments extend this period to 28 business days. The Minister must consider the public comments received in accordance with **new section 303FR** in reaching a decision about the declaration.

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Division 6 - Miscellaneous

New section 303GA covers situations where actions requiring certain Part 13A permits may also be an EPBCA controlled action or otherwise require an additional non-Part 13A permit or Ministerial approval. It also covers situations where the action is 'related' to a second action that itself is a controlled action or otherwise require an additional non-Part 13A permit or approval. For example, the taking, handling or processing of a specimen would be a related action to the import or export of that specimen.

The effect of **new section 303GA** is that the Minister cannot make a decision on the Part 13A permit until he or she also makes a decision on the controlled action / non Part 13A permit question. The Minister must also refuse to grant the Part 13A permit if he or she refuses permission to the related action.

New section 303GB allows the Minister to issue a permit to a person who has applied for an import and export permit under new sections 303CG, 303DG or 303EN *even if the Minister is not satisfied about a matter that is a normally a requirement for granting the permit*. In doing so, the Minister must be satisfied that the export or import of the specimen would not be contrary to the objects of Part 13A, it would not adversely affect biodiversity, and there are exceptional circumstances that justify the import/export. Such 'exceptional circumstances' permits only remain in force for a maximum of 6 months in relation to CITES specimens and 12 months for non-CITES specimens.

Before the Minister can issue a new section 303GB permit, he or she must publish an Internet notice setting out the proposal to issue the permit and inviting comments within a period of no less than 5 business days. The notice must include sufficient information to enable the merits of the proposal to be adequately considered. The Minister must consider any comments received before deciding whether or not to issue the permit. Note that this public consultation requirement has been replaced by Senate amendment **new section 303GEA** which introduces extensive consultations requirements for all Part 13A permits, although regulations may exclude some types of permits from these requirements.

New section 303GC allows the Environment Secretary to apply to the Minister for a permit to take the action or actions specified in the permit without breaching new sections 303CC, 303CD, 303DD or 303EK. The permit can only be issued in relatively limited circumstances, and in most cases only where the specimen will be used for identification purposes, education or training and the foreign authority importing or exporting the specimen is the CITES authority of the relevant country.

Section 303GD provides that the Minister may issue a permit to bring a non CITES specimen into the Australia for the purposes of conducting tests. **New subsection 303GD(7)** provides that the Minister may only issue such a permit if he or she is satisfied that

- the person has applied to the Minister for the list of specimens suitable for live import (see new section 303EB) to be amended by adding an item; and

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- an assessment is to be made under new section 303EE and the terms of reference for a report on that assessment have been finalised; and
- the action proposed involves conducting tests on the specimen in order to obtain information that is required for the assessment; and
- it is not practicable for the person to obtain the information necessary for the assessment without conducting the tests in Australia; and
- the tests will be conducted in a controlled environment.

The permit is also subject to conditions about holding the specimen in quarantine.

New sections 303GE-GI deal with various aspects of Part 13A permits. Breaches of permit conditions attract a penalty of 300 penalty units, or 600 units where the breach relates to the sale, disposal, release or escape of the specimen.

New section 303GJ list the decisions made under Part 13A that are potentially reviewable by the Administrative Appeals Tribunal, or its proposed successor, the Administrative Review Tribunal.

New section 303GN creates offences for the possession of CITES or regulated live specimens, unless they, or the specimens of which they are progeny, were lawfully imported into Australia. It is sufficient if the person charged was reckless¹⁵ in relation to the fact that the specimen was a CITES or regulated live specimen. A person also has an evidential burden to show that the specimen, or the specimens of which they are progeny, were lawfully imported. The penalty for contravening **new section 303GN** is imprisonment for 5 years or 1,000 penalty units, or both.

New section 303GO provides that regulations made for the purposes of new paragraphs 303CG(3)(c), 303DG(4)(b), 303EN(3)(e), 303FN(3)(c) or 303FO(3)(f) may provide for a range of matters relating to the welfare of live animals or live plants.

New section 303GP creates a makes it an offence for a person to export or import a live animal in a manner that subjects the animal to cruel treatment. The offence applies when the animal is:

- a CITES specimen and the person contravenes new sections 303CC or 303CD; or
- a regulated native specimen and the person contravenes new section 303DD; or
- a regulated live specimen and the person contravenes new section 303EK.

Again the mental fault element is recklessness. The offence is punishable by up to two years imprisonment. Although there is no explicit provision for a fine under new section 303GP, section 4B of the *Crimes Act 1914* would allow a court to impose a fine of up to 120 penalty units instead of, or addition to, two years gaol.

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New section 303GQ makes it an offence to intentionally import a specimen that has been illegally exported from a foreign country. A prosecution under this clause can only proceed if the relevant CITES authority of the country from which the specimen has been exported requests assistance or an investigation of the offence. The penalty for contravening **new section 303GQ** is imprisonment for five years.

New section 303GT provides that a witness for the prosecution is not to be compelled to disclose the fact that he or she received any information, the nature of the information received or the name of the person who gave them the information.

New section 303GV provides that the requirements of Part 13A apply in addition to all laws of the Commonwealth or of an external Territory, including the *Customs Act 1901* and the *Quarantine Act 1908*.

New section 303GW provides that a specimen that is brought into Australia or an Australian external territory for the purpose of transshipment to another country or as part of a ship's or aircraft's stores is not deemed to have been imported for the purposes of Part 13A. Likewise it is not deemed to have been exported once the stores or transshipment leaves again. **New subsection 303GW(5)** provides that a specimen is not deemed to have been imported / exported if the Minister or certain officials consider that a specimen is required to be sent in or out of Australia or an Australian external Territory for an emergency treatment of a human or animal.

New section 303GX provides that certain actions by a 'traditional inhabitant' in the Torres Strait protected zone are not deemed to be an export or import for the purposes of Part 13A. These circumstances include where the specimen is owned or under the control of a traditional inhabitant and has been, is being or will be used in connection with the performance of traditional activities. This section replicates existing section 8A of the WPA and is consistent with Torres Strait Treaty between Australia and Papua New Guinea.

Item 12 amends existing subsection 391(3) of the EPBCA which lists those decisions in which the Minister must take account of the precautionary principle.¹⁶ **Item 12** adds a number of provisions of Part 13A to this list.

Items 13-25 relate to the role of Customs officers performing wildlife import / export compliance duties such as inspections and seizures.

Item 26 inserts a **new Division 8A** to Part 17 of the EPBCA. It empowers an authorised officer to question a person suspected to have been involved in committing a Part 13A offence. Failure to answer, or knowingly giving a false or misleading answer to such a question is punishable by a penalty of up to ten penalty points. However, it is not an offence if a person refuses to answer on the grounds of self-incrimination.

Item 28 inserts several new sections relating to the seizure of specimens on the grounds of a Part 13A offence. **New section 444A** allows an authorised officer to seize a specimen on

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the grounds of reasonable suspicion that the specimen has been involved in a Part 13A offence. A written notice must be given to the person from whom the specimen was seized giving reasons for the seizure and setting out the process for applying for the return of the specimen: **new section 444B**. Return of specimens can be done either through application to the Environment Secretary or through court action.

Item 37 inserts new definitional provisions covering various concepts, including 'specimen', 'bred in captivity', and 'artificially propagated'.

Items 38-67 insert more new definitional provisions.

Items 70-81 contain various transition items. Notably, **item 70** provides that with some limited exceptions, if an application for a WPA permit or authority has been made but not decided at commencement of item 70, the application will be considered as if made under the equivalent new provisions under Part 13A. Similarly, **item 71** provides that a valid WPA permit or authority that is in force immediately prior to the commencement of this item will continue to be valid.

Item 82 provides that regulations may be made for matters relating to transitional arrangements.

Items 83-86 make some technical amendments to the EPBCA not directly related to wildlife matters.

New section 25A allows regulations to be made identifying actions or classes of actions that are taken to have a significant impact on matters of national environmental significance. This will mean that actions in a class specified in such a regulation will be a controlled action for the purposes of the EPBCA. According to the Explanatory Memorandum, this is to allow the Minister to 'provide greater certainty for stakeholders in relation to the actions that will be covered by the provisions in Division 1 of Part 3'.¹⁷

New sections 25B -25F relate to evidentiary certificates. In particular, **new section 25B** allows the Minister to issue an evidentiary certificate that states, for example, if a person proceeds with a specified action without obtaining Ministerial approval under the EPBCA controlled action provisions, the person will be contravening Part 3 of the EPBCA. Under **new section 25D**, the certificate provides prima facie evidence to a Court in proceedings involving the seeking of an injunction under section 475 of the EPBCA or civil penalty under section 481.

Item 84 amends **existing section 70**. Where a person fails to refer an action as requested by the Minister for consideration as to whether it is a controlled action, item 84 allows the Minister to make a decision as to whether it is a controlled action.

Items 85-86 repeal existing section 524B which deals with the making of regulations to provide guidance on whether an action is likely to have a significant impact for the purposes of the

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EPBCA. These repeals are consequential to the insertion of **new section 25A** under **item 83**.

Schedule 2

Item 1 repeals the Wildlife Protection Act.

Items 2-3 are transitional items relating to existing court proceedings and witness protection issues.

Item 4 provides that regulations may be made for matters of a transitional nature relating to the repeal of the Wildlife Protection Act.

Schedule 3

Item 1 amends paragraph 5(2)(b) of the *Biological Control Act 1984* by replacing the existing reference to the Wildlife Protection Act with a reference to Part 13A of the EPBCA.

Concluding Comments

The Bill contains a number of improvements over the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* particularly in relation to assessment of wildlife utilisation and trade and also the strengthening various offence and enforcement provisions. However, given the relatively large and complex nature of the Bill, a Parliamentary committee for inquiry would enhance public scrutiny and understanding of its provisions.

Endnotes

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- 1 Although the Act itself did not come into effect under May 1984.
 - 2 John Ley, *Australia's Protection and Conservation of Wildlife* Report on the Review of the *Wildlife Protection (Regulation of Exports and Imports) Act 1982* and Regulations April 1992
 - 3 Analysis Bills Digest 107 of 1995 at <http://search.aph.gov.au/search/ParlInfo.ASP?action=view&item=140&from=browse&path=Legislation/Bills+Digests/1995&items=141>
 - 4 Senate *Debates* 9 May 1995 p. 43.
 - 5 Response tabled by Senator Minchin, 8 December 1999, p 11459 accompanied by statement by Senator Hill.

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- 6 What constitutes a specimen is more fully defined in item 37 of the Bill, but essentially it includes an animal or plant, any part of an animal or plant (including skin, feathers etc), or any animal or plant reproductive material, or any article wholly produced or derived from a single animal or plant.
- 7 Cetaceans include whales, dolphins and porpoises.
- 8 One penalty unit equals \$110.
- 9 Explanatory Memorandum, p. 18.
- 10 p. 21.
- 11 The Bill maintains the WPA ban on the commercial trade of live native mammals, reptiles, amphibians and birds.
- 12 p. 30.
- 13 p. 33.
- 14 Senate amendments require this assessment to cover certain defined issues.
- 15 Recklessness in relation to a circumstance is defined in subsection 5.4 of the Criminal Code as being 'aware of a substantial risk that the circumstance exists or will exist; and having regard to the circumstances known to him or her, it is unjustifiable to take the risk'.
- 16 The precautionary principle is defined in the EPBCA as the 'lack of full scientific certainty should not be used as a reason for postponing a measure to prevent degradation of the environment where there are threats of serious or irreversible damage'.
- 17 p. 52.

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